RESOLUTION OF COMMERCIAL DISPUTES IN INDIA: A REVIEW OF THE COMMERCIAL COURTS, 2015

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Abstract: *In the 188th Report on Proposals for Constitution of Hi-Tech Fast – Track Commercial Divisions in High Courts, the Law Commission had expressed concerns over the generalisations made by the courts in the United Kingdom ('U.K.') and the United States ('U.S.') with respect to litigation delays in India. The Commission felt that adequate structural changes needed to be brought to civil courts of the country in a way that they themselves are equipped to solve all high value commercial matters in a timely manner. This led to the very first wave of establishing 'commercial courts' or 'commercial divisions' in 2003, for disposing high value commercial matters on a fast-track basis. It focused on two major notions – definition of 'commercial dispute' and 'specified value' of a commercial dispute – as two prerequisites to developing an appropriate dispute resolution framework. After 2003, almost a decade later the Commercial Courts Act, 2015 ('CCA 2015') was enacted where Commercial Courts exclusively equipped to handle complex 'commercial disputes' were created by the government. This was done to tackle the problem of judicial delays in commercial dispute resolution and further to improve India's position on the World Bank's 'enforcement of contracts' indicator. It has been close to seven years since then and in this short span of time, these Commercial Courts have generated and kindled the interest of the Bar and Bench. The volume of cases that we have seen in these last years is a testament to the same. In the aforesaid context, the objective of the paper is to re-evaluate the utility of these commercial courts and commercial divisions and analyse the CCA, 2015. The paper aims to explore whether the 2015 Act has lived up to the intent of the legislation and its stakeholders or has just turned out to be an 'old wine in a new bottle'.*

I. INTRODUCTION

In any modern democracy, establishment of a strong justice mechanism that provides transparent and objective recourse to all is a core value that is held all over the world. Therefore, legal and judicial reforms have been a consistent priority on the agendas of most countries regardless of their state of development. For a developing country like India,

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especially, having a strong justice system makes it look like an attractive destination for foreign investors who would be willing to access the Indian courts to resolve their disputes.[1]

Since the 1950s, the Law Commission of India has suggested various reforms in the machinery of justice, with a view to removing defects that engulf our justice system.[2] Till date, they have produced more than 256 reports (an average of just over four per year).These reforms were primarily suggested in three spheres – firstly, statutory legal reforms that aimed at doing away with the dysfunctional elements of legislation and bringing state intervention to a minimum; secondly, administrative law reforms for eliminating constraints to effective decision making and finally, judicial reforms for faster dispute resolution and easier enforcement of contracts.[3]

In 1991, the economic policy of liberalisation, globalisation and privatisation turned out to be a complete game changer for the Indian economy and by an extension, for the justice system in the country.[4] The new economic policy opened the Indian market to international trade and investment and largely initiated privatization.[5]Unfortunately, even after the adoption of the new economic policy, investors in the Indian market, particularly foreign investors faced problems due to the poor state of the country's judicial infrastructure.[6] Our courts were overburdened with cases, lacked adequate number of judges, took a very long time to dispose of cases, and most importantly, judges lacked the expertise required to resolve a complex

[1] United Nations Office on Drugs and Crime, *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011) <www.unodc.org/documents/treaties/UNCAC/Publications/ResourceGuideonStrengtheningJudicialIntegrityandCapacity/11-85709_ebook.pdf> accessed 9 March 2022.

[2] Expert Committee on Legal Aid, *Processual Justice to the People* (Ministry of Law and Justice, Government of India 1973) <http://reports.mca.gov.in/Reports/15-Iyer%20committee%20report%20of%20the%20expert%20committee%20in%20legal%20aid,%201973.pdf> accessed 22 April 2022.

[3] Manoj Mate, 'Globalization, Rights, and Judicial Review in the Supreme Court of India' (2016) 25(3) Washington International Law Journal 643.

[4] Bibek Debroy, 'Justice Delivery in India – A Snapshot of Problems and Reforms' (2008) ISAS Working Paper 47 <www.isas.nus.edu.sg/papers/47-justice-delivery-in-india-oco-a-snapshot-of-problems-and-reforms/> accessed 15 April 2022.

[5] R Nagaraj, 'What Has Happened since 1991? Assessment of India's Economic Reforms' (1997) 32(44/45) Economic and Political Weekly 2869.

[6] Puja Mehra, 'Looking back on the 1991 reforms in 2021' (*Observer Research Foundation*, 24 July 2021) <www.orfonline.org/expert-speak/looking-back-on-the-1991-reforms-in-2021/> accessed 15 April 2022.

commercial dispute.[7] Thus, the Indian legal infrastructure needed reforms even before 1991; however, the cycle of reforms that started post 1991 gave it an additional trigger.[8]

About a decade later in 2003, the Law Commission in its 188th Report noted, for the very first time, that the number of disputes arising out of business and commerce have vastly increased post 1991.[9] It stated that these disputes which were mostly 'commercial' in nature needed to be specifically dealt by fast-track courts that are technologically equipped and have professionally competent and trained judges who can hear these commercial matters within designated timelines. In fact, the Law Commission specifically noted that one of the biggest reasons to create commercial courts was to prioritize these high value litigations over other pending matters. Having an effective commercial dispute resolution framework would not only make the Indian litigation environment look good to the world but also cater to the needs of domestic businesses that are caught up in litigation for years.[10]If the commercial justice system is one that is fast and efficient, it would automatically create a welcoming business environment and boost the country's international economic relations; which essentially was one of the most important objectives of the 1991 policy.

Following the above line of thought, in the same report, the Law Commission put forward the Commercial Division of High Courts Bill, 2009 ('**the 2009 Bill**')[11]. The Bill required State Governments to establish Commercial Divisions in High Courts of their respective states. This was the first legislative attempt to separately identify and categorise 'commercial disputes' and suggest that the country needed specialized courts dedicated to resolve these disputes. Although the 2009 Bill initially received opposition in the Rajya Sabha, a lot of deliberations and discussions led to the final enactment of CCA, 2015. The author has discussed the historical evolution of the same in Part III.

II. CONCEPT OF 'COMMERCIAL DISPUTES'

I. Theoretical Framework

[7] Pratik Chaudhari and Anay Amin, 'India commercial courts: Saviour of the system' (*World Intellectual Property Review*, 24 September 2019) <www.worldipreview.com/contributed-article/india-commercial-courts-saviour-of-the-system> accessed 6 September 2022.
[8] Uday Shankar and Saurabh Bindal, 'Policy Initiatives and the Role of Indian Judiciary' (*SCC Online Blog*, 19 May 2016) <www.scconline.com/blog/post/2016/05/19/policy-initiatives-and-the-role-of-indian-judiciary-initiatives-and-the-role-of-indian-judiciary/> accessed 6 September 2022.
[9] ibid.
[10] 'New law minister Ashwani Kumar backs new benches for high-value *cases' The Economic Times* (New Delhi, 30 October 2012) <https://economictimes.indiatimes.com/news/politics-and-nation/new-law-minister-ashwani-kumar-backs-new-benches-for-high-value-cases/articleshow/17012614.cms?from=mdr> accessed 9 March 2022.
[11] The Commercial Division of High Courts Bill 2009.

The legislative debate on the scope of 'commercial disputes' is often anticipated by the academic debate on the scope of 'commercial law'. Jeremy Bentham had stated that property and state-made law are born and must die together.[12] Once we eliminate law from society, all property and the interests therein cease.[13] Back in those days, there must have been some form of a market system, where the property rights and the rules of exchange (contracts) were protected and enforced.[14] Commerce, as we all know, is an evolving process of interaction and reciprocity which is simultaneously facilitated by and leads to an evolving system of commercial law.[15] Several economists like Adam Smith and Carl Menger argue that commercial law as a sector developed largely due to the efforts of the merchant community that is entirely capable of creating and enforcing its own law.[16] They were of the view that the market systems have developed through a trial-and-error process, where institutional arrangements that performed more effectively prevailed over ones that were less effective.[17] Thus, customs and practices and traditions in the merchant community always played an important role in developing a legal order.[18] Just like the price system in a market economy, commercial law developed as a product of a deliberate design without the aid and interference of major coercive power of nation states.[19] Economists were of the belief that commercial law itself was analogous to the price system in that it facilitates interaction and makes exchange more efficient.[20]

Much before that, John Locke (1632 – 1704), while explaining the role of Rule of Law in development and nation building stated that any modern state requires Rule of Law institutions – effective courts and commercial codes that can secure property rights and enforcement of contracts.[21]

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[12] Dean Alfange Jr, 'Jeremy Bentham and the Codification of Law' (1969) 55(1) Cornell Law Review 58.
[13] HLA Hart, 'Bentham and the Demystification of the Law' (1973) 36 Modern Law Review 2.
[14] Jurgen Basedow, 'The State's Private Law and the Economy: Commercial Law as an Amalgam of Public and Private Rule-Making' (2008) 56(3) American Journal of Comparative Law 703.
[15] Bruce L Benson, 'The Spontaneous Evolution of Commercial Law' (1989) 55(3) Southern Economic Journal 644.
[16] Bryan Druzin, 'Law Without the State: The Theory of High Engagement and the Emergence of Spontaneous Legal Order within Commercial Systems' (2010) 41(3) Georgetown Journal of International Law 559.
[17] United Nations Commission on International Trade Law ('UNCITRAL'), 'Uniform Commercial Law in the 21st Century: Proceedings of the Congress of the United Nations Commission on International Trade Law' (22 May 1992) A/CN.9/SER.D/1 <https://digitallibrary.un.org/record/207822> accessed 6 September 2022.
[18] Emily Kadens, 'The Myth of the Customary Law Merchant' (2012) 90(5) Texas Law Review 1153.
[19] Achim Hurrelmann and others, 'The Golden-Age Nation State and its Transformation: A Framework for Analysis' in Achim Hurrelmann and others (eds), *Transforming the Golden-Age Nation State* (Palgrave Macmillan 2007).
[20] Silvia Fazio, *The Harmonization of International Commercial Law* (Wolters Kluwer 2007).
[21] Lee Ward, 'Locke on Executive Power and Liberal Constitutionalism' (2005) 38(3) Canadian Journal of Political Science 719.

Historically, we are used to looking at the division of law into two major branches – civil and criminal. But towards the nineteenth century, when we look at some of the western countries like Great Britain, Italy and even some Scandinavian countries, we find that a part of civil law separated themselves to grow up independently and form a distinct body of 'commercial law'.[22]In England 'commercial law' was more popularly called 'lex moratoria' or the 'law of merchants. It was perceived as an independent system of legal doctrine, akin in status to civil law and a form of immemorial custom which went on to be judicially noticed as a body of rules akin to mercantile practice.[23]. Early modern Italian scholars like Benvenuto Stracca (1509–1578), Sigismundo Scaccia (1564–1634); Tractatus de commerciis et cambio, 1618) and Casaregis (1670–1737) for the first time, presented the body of commercial law and called it the 'law merchant'. Their theories were based on Romanist traditions and legal norms pertaining to commercial relations originating in the Middle Ages and profound knowledge of commercial and court practice. They argued that the subject of autonomy of commercial law is positioned between two extremes – commercial law can either be a 'special law' or 'exceptional law' in contrast to civil law. They chose to position it between these two extremes because 'commercial law' as a discipline did not have any separate jurisprudential foundation; at the same time, it was largely guided by unique practices and rules of the mercantile community that made it distinguishable from 'civil law'. If commercial law is an 'exceptional law' then it must possess an independent system of norms, rules and endowed with principles that are contrary to or at least different from that of civil law. But, if we look at commercial law as a 'special law', then it means it encompasses within its ambit, provisions that are different from those of civil law but at the same time, integrated into it, the two being bound in their genesis and development to the doctrinal tradition and to the order of principles and norms normally associated with the latter.[24]Commercial law as a discipline did not have a very specific source in jurisprudence, rather it developed as a result of mercantile practice or commercial transactions. Norms and rules followed to swiftly dispose of such mercantile disputes, that suited the mercantile community or litigants slowly gave rise to the body of commercial law. Apart from efficient and timely resolution, commercial law did not possess any special system or principles which were different from those followed in ordinary civil courts at the time. Thus, commercial law

[22] Dennis Patterson, 'Taking Commercial Law Seriously: From Jurisprudence to Pedagogy' (1999) 74(2) Chicago-Kent Law Review 625.
[23] Enrique Lalaguna Dominguez, 'The Interaction of Civil Law and Commercial Law' (1982) 42(5) Louisiana Law Review 1629.
[24] Murray Raff, 'The importance of reforming civil law in formerly socialist legal systems' (2015) 1(1) International Comparative Jurisprudence 24.

can be at best called a special private law that is based on civil law principles and norms and linked to the civil law doctrine.[25]

For example, in the sixteenth century, in England, special courts called the borough and piepowder courts were established that dealt with disputes arising out of mercantile transactions.[26] Blackstone termed these as *"the lowest and at the same time the most expeditious court of justice known to the law of England"*.[27] These courts dealt with mercantile cases that largely involved mercantile customs, which were questions of fact. In order to introduce rule of law into these mercantile courts, Lord Chief Justice, Lord Mansfield stated, *"In all mercantile transactions, the great object should be certainty: and therefore, it is of more consequence that a rule be certain…"*.[28] He also added that commercial usage needs to essentially be introduced into the main body of English Law without sacrificing its elasticity. Although these specialized courts were popular a little later till 1600s, the procedures followed in these courts weren't that much different from the procedure in other courts.[29] Sir John Baker in his article titled 'Law Merchant and the Common Law before 1700' stated*, "The medieval law merchant was not so much of a corpus of mercantile practice for commercial law as an expeditious procedure especially adapted for the needs of men who could not tarry for the common law".*[30]

Roy Goode in his treatise on commercial law, examined whether commercial law should be distinguished as a separate discipline from general civil law. He observed that *"in those legal systems that treat commercial law separately from civil law, the character of the transaction may be determined subjectively by the status of the parties as carrying on a business…or objectively by reference to the type of transaction or activity…or by a combination of the two. Whatever the legal system involved, it is clear that commercial law and commercial transactions cannot be isolated as self-contained compartments of contract or of commercial law"*.[31]Goode further observed that historically, it has been very difficult if not impossible, to draft a code that applies exclusively to a civil or commercial transaction, and hence, the hair

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[25] ibid.
[26] Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law: Text, Cases, and Materials* (2nd edn, OUP 2015).
[27] 1 Bl Comm 287.
[28] Rex Ahdar, 'Contract Doctrine, Predictability and the Nebulous Exception' (2014) 73(1) Cambridge Law Journal 39.
[29] Patterson (n 30).
[30] Stephen E Sachs, 'From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'' (2006) 21 American University International Law Review 686.
[31] Roy Goode, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (2005) 54(3) International and Comparatie Law Quarterly 539.

splitting is best avoided.[32] Even though 'commercial law' cannot be completely isolated from 'civil law', it is self-evident that the former comprises of rules and norms regulating 'commerce', which is why it was ideally called the law of merchants.[33]

Thus, if one wants to understand the scope of 'commercial law' it becomes imperative to define the term 'commerce'. In economics, man's efforts towards the production of wealth are divided into the extractive (which take raw materials from nature), manufacturing (which convert raw materials into objects of use) and distributive industries (which finally sells the product to the consumer).[34]The legal significance of the word 'commerce' is the comprehension of the last two industries – manufacturing and distributive. It is essentially the approximation of raw material to the consumer for a profit. The principles of law governing individuals engaged in manufacturing and distribution industries and their transactions is what comprises 'commercial law'. The disputes that arise in the sphere of 'commercial law' are 'commercial disputes.[35]

II. 'Commercial Disputes' in India

India, traditionally recognized two types of justice delivery systems – civil courts and criminal courts. The Civil Procedure Code, 1908[36] and the Criminal Procedure Code, 1973[37] clearly lay down the operation and hierarchy of these courts in our judicial system and usher light on the very specific distinction between 'civil' and 'criminal' disputes that our judicial system was designed to resolve. Before the 1991 economic policy that flooded the Indian market with a vast volume of commercial transactions, the need to have a separate forum as part of the country's court system, for handling commercial matters was never felt. Thus prior to 1991, 'commercial disputes' were treated at par with 'civil disputes' and handled by ordinary civil courts that exercised both territorial and pecuniary jurisdiction over them.

In India, the three Chartered High Courts of Bombay, Calcutta, and Madras enjoyed power akin to that of King's Bench in England. Each of these High Courts introduced a 'commercial cause list' under their original side rules, that provided for an expedited resolution procedure for commercial cases. The Delhi High Court Original Side Rules 1967 added a Chapter titled

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[32] ibid.
[33] Goode, Kronke, and McKendrick (n 34) 7-8.
[34] Chris Williams, 'The Search for Bases of Decision in Commercial Law: Llewellyn Redux' (1984) 97(6) Harvard Law Review 1495.
[35] Layton Register, 'The Dual System of Civil and Commercial Law' (1913) 61(4) University of Pennsylvania Law Review 240.
[36] The Code of Civil Procedure 1908.
[37] The Code of Criminal Procedure 1973.

"Appeals from decrees in commercial matters". The Rules defined 'Commercial Causes' as "*causes arising out of ordinary transactions of merchants, bankers arising out of the ordinarytransactions of merchants,bankers and traders, such as those relating to theconstruction of mercantile documents, export or import of merchandize, affreightment, carriage of goods by land, insurance, banking and mercantile documents, mercantile agency,mercantile usage and infringements of trademarks and passing off actions. and traders, such as those relating to the construction of mercantile documents, export or import of merchandize,affreightment, carriage of goods by land, insurance, banking and mercantile documents, mercantile agency, mercantile usage and infringements of trademarks and passing off action"*.[38] Similarly, Calcutta High Court, Bombay High Court and Madras High Court added the definition of a 'commercial cause' to their respective Original Side Rules. [39]These Rules further stated that all cases arising out Companies Act, 1956 as well as cases affecting the responsibility of a Railway Administration as carriers, will be treated as "Commercial causes".[40]

Section 34 of CPC also states that a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.[41]

Apart from the above rules, some matters which were 'commercial' in nature went to specialized tribunals like Debt Recovery Tribunal (DRT), National Company Law Tribunal (NCLT), the erstwhile Company Law Board, etc.

The Commercial Courts Act, 2015 defines a 'commercial dispute' under Section 2(c) by providing an expansive list of 22 categories of disputes. Out of that list, joint venture agreements and shareholders agreements mentioned in (xi) and (xii) require compliances under the Companies Act, 2013.[42] The adjudicating authority under Companies Act, 2013 is NCLT. Section 241 and 244 gives right to shareholders to go to NCLT if they face any oppression or mismanagement.[43] NCLT also handles matters relating to corporate insolvency under the Insolvency and Bankrupcy Code, 2016 (IBC).[44] However, we need to note that in both cases, NCLT resolves disputes arising out of statutory rights. Even though Companies Act, 2013 and IBC, 2016 are essentially commercial statutes, NCLT only adjudicates upon

[38] The Delhi High Court (Original Side) Rules 1967, r 1.
[39] The Rules of the High Court at Calcutta (Original Side) 1914, rr 3-4.
[40] The Rules of the High Court at Calcutta (Original Side) 1914, Rule 2.
[41] The Code of Civil Procedure 1908, s 34.
[42] The Commercial Courts Act 2015.
[43] The Companies Act 2013.
[44] The Insolvency and Bankruptcy Code 2016.

disputes that violates right in rem and aren't contractual in nature. One exception to that was the case of *Tata Consultancy Services v Vishal Ghisulal Jain, Resolution Professional SK Wheels Pvt. Ltd*.[45]where the Supreme Court held that NCLT has the right to adjudicate contractual disputes that are essential to the success of CIRP. This comes from its residuary jurisdiction under section 60(5)(c) of the IBC, 2016.

With respect to intellectual property (IP) disputes (dealing with registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits as mentioned in xvii), those that arose from decisions of Controller of Patents, Registrars of Trademark, Design, Copyright Board in relation to registration and revocation of any intellectual property, rectification of register, compulsory licenses etc. went to the Intellectual Property Appellate Board (IPAB). The Tribunals Act, 2021 dissolved the IPAB and declared that all appeals will now directly lie to High Courts. With respect to disputes relating to infringement of any IP, an IP holders could pursue a civil action in ordinary civil courts which would grant the plaintiff a range of relief ranging from injunction orders, search and seizure orders, to accounts of profits, damages and costs.[46] After the CCA, 2015 IP disputes have been classified as 'commercial disputes' that go to respective commercial courts.

Of the disputes arising out of ordinary transactions of merchants, bankers, financiers and traders etc. mentioned in (i), with respect to recovery of a trade debt, a creditor (a bank or financial institution) could approach the Debt Recovery Tribunal the Recovery of Debt Due to Banks and Financial Institutions Act, 1993. The RDDBFI Act strictly barred the jurisdiction of ordinary civil courts (except High Courts and Supreme Court) over matters which went to DRT. Other categories of creditors could approach the ordinary civil court to recover their debts. After the enactment of the CCA 2015, creditors can go to a competent Commercial Court, since disputes relating to recover of debts have been classified as a 'commercial dispute'.[47]

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[45] *Tata Consultancy Services Ltd v Vishal Ghisulal Jain, Resolution Professional, SK Wheels Pvt Ltd* (2020) Civil Appeal No 3045 of 2020 (Supreme Court of India). *Also see, Gujarat Urja Vikas v Amit Gupta* (2021) 7 SCC 209 (Supreme Court of India).

[46] Mirandah Asia, 'India – The IPAB signs off, as the President signs on the Tribunals Reforms Bill, 2021' (*Lexology*, 10 September 2021) <www.lexology.com/library/detail.aspx?g=2e4286b6-99c4-4dc0-8dbe-6fa9a08e8781> accessed 6 September 2022.

[47] Kunaal Shah, Anirudh Kapoor, and Kartik Adlakha, 'Complex Commercial Litigation in India' (*Lexology*, 12 November 2018) <www.lexology.com/library/detail.aspx?g=4449b31a-ff8d-4dd8-a9bc-a9eadd092b24#:~:text=While%20commercial%20litigation%20involves%20an,dealing%20with%20immoveable%20property%3B%20and> accessed 6 September 2022.

Again, under (iv), disputes arising out of aircrafts, aircraft engines etc. have been classified as 'commercial disputes'; however, no mention has been made of disputes arising out of shipbuilding, ships and related transportation contracts. Similarly, disputes arising out of 'subscription and investment' agreements under (xiii) have been classified as commercial disputes however, disputes arising out of private equity and venture capital unless they fall within a specific category would fall out of the definition.

Interestingly, if we look at the plenary clause, (xxii), the definition includes all prescribed commercial disputes that essentially includes the entire gamut of commercial litigation and leaves out very little; like disputes in public law, writ petitions, family law etc.

CCA, 2015 for the first time attempted to categorise 'commercial disputes' into 22 distinctive categories so that judges of commercial courts can give specific and dedicated attention to each dispute as and when it comes to them. We can give due credit to CCA, 2015 not only if the Commercial Courts deliver fast justice, but also if they produce a rich body of precedents in commercial law. India is a common law country; thus, our legal regime heavily draws from judicial law making. It is believed that through categorizing commercial disputes, these courts will be better able to the literature of commercial disputes through its decisions, in order to take this regime forward.[48]

Further, if we closely look at the list of disputes under Section 2(c), they are mostly ones arising out of commercial contracts A notable feature of any commercial contract is its well drafted dispute resolution clause. Most parties to commercial disputes prefer alternative dispute resolution (ADR) mechanisms like arbitration and mediation governed by the Arbitration and Conciliation Act, 1996.[49]

This preference towards ADR is primarily because commercial disputes get clogged up in the civil justice system in our country and take an exhausting amount of time to get resolved by civil courts. The intention of the CCA, 2015 was to solve this very problem. Creating commercial courts as part of the civil justice system in the country would give confidence to litigants to resolve their disputes through litigation as well.

III. HISTORICAL EVOLUTION OF THE COMMERCIAL COURTS ACT, 2015

A. Legislative Attempt to Recognise 'Commercial Disputes'

[48] Sebastian Lewis, 'Precedent and the Rule of Law' (2021) 41(4) Oxford Journal of Legal Studies 873.
[49] Manoj Singh and Nilava Bandhopadhyay, 'The changing paradigm of commercial disputes in India' (*Legal Business*, 27 March 2020) <www.legalbusiness.co.uk/analysis/disputes-yearbook-2020/sponsored-briefing-the-changing-paradigm-of-commercial-disputes-in-india/> accessed 6 September 2022.

In 2003, Justice M. Jagannadha Rao, the then Chairman of the Law Commission of India wrote to Mr. Arun Jaitley, the Minister of Law and Justice, expressing concerns over resolution of high value commercial disputes in the country. He expressly mentioned that in order to maintain and accelerate the economic growth of the country that got sparked by the 1991 policy, both domestic and foreign investors must be given a clear assurance that they will have access to faster, efficacious forums to resolve any commercial dispute, that they are parties to. He was also of the opinion that our judicial system urgently needed fast track courts equipped with technological facilities that could resolve high value complex commercial disputes in an expeditious manner and accordingly, the judges of these courts too needed adequate training to address the same.[50]

In the 188th Report titled "Proposals for Constitution of Hi-tech Fast-Track Commercial Divisions in High Courts", the Law Commission studied the establishment and operation of USA, UK, France, Ireland, Singapore, Philippines, Russia etc. – a total of 12 other countries and finally came to the conclusion that High Courts should have a separate bench or 'Commercial Division' dedicated to disposing of high value commercial cases and enforcing decrees relating to the same. The Law Commission seemed convinced that setting up these Benches in High Courts would not only relieve the parties to such disputes from inordinate delays that they face in lower courts, but it would additionally reduce the burden of these lower courts that already have their hands full with other cases.[51] Further, the Law Commission Report mentioned that the overall benefits of setting up these courts that may accrue by way of increased investment in India, both from domestic and foreign investors, will be in hundreds of millions of dollars and the expense in constituting these will only be a very small fraction of it. It was for the first time that the Commission had come up with the term 'commercial disputes' since these disputes were previously heard by ordinary civil courts. In the final chapter of its report, the Law Commission suggested that the very reason of acknowledging 'commercial disputes' as a sub-category of civil disputes is that the former is usually of high pecuniary value involving litigants that are mostly looking for resolving their disputes on a fast-track basis. The Report further goes on to elaborate that giving special

[50] Sudhir Krishnaswamy, Sindhu Sivakumar, and Shishir Bail, 'Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches' (2014) 2(1) Journal of National Law University Delhi 1.

[51] Sumeda, 'Explained | The clogged state of the Indian judiciary' *The Hindu* (10 May 2022) <www.thehindu.com/news/national/indian-judiciary-pendency-data-courts-statistics-explain-judges-ramana-chief-justiceundertrials/article65378182.ece> accessed 6 September 2022.

attention to this category of disputes will enhance India's global reputation as a country that has expeditious justice delivery systems and improve its image in the 'commercial circles'.[52]

If one reads the Law Commission's recommendations carefully, it can be seen as an undisputed fact that the former has stressed upon updating the exposure of our courts to the fast-growing changes in commerce occurring globally and increasing their overall capacity to handle cases involving new branches of commercial law. The emphasis on 'fast-track' dispute resolution was also mentioned in an earlier Report of the Law Commission on Amendments to the Indian Arbitration and Conciliation Act, 1996.[53] In spite of such clearly spelled out intention to improve the efficacy of the then judicial system, the recommendations of this Report failed to bring forth any positive development.

The 2009 Bill that established commercial divisions in the High Courts was strongly opposed in the Rajya Sabha. It was specifically pointed that the 2009 Bill solely reflected 'elitist' concerns by 'reserving' a Bench for high value commercial cases and catering to the interests of the corporate sector at the cost of the ordinary litigant. It was further contended that High Courts in our country were already overburdened with pending cases and dealing with absence of adequate judges, creating special commercial divisions would further reduce the number of judges hearing other disputes.[54] Thus, the 2009 Bill did not get the Parliament's assent at this stage. Although it was not rejected in *toto*, substantial amendments were suggested in order to reform the alleged 'poorly drafted and misconceived' provisions of the Bill, which led to the revised Commercial Division of High Courts Bill, 2010. Meanwhile, deliberations continued amongst judges and expert legal professionals on the scope and definition of 'commercial disputes' and since there was no real implementation of the suggestions provided by the Commission and the provisions of the Bill did not get a nod from both houses of the Parliament, commercial disputes continued to get handled by the civil courts on the basis of territorial and pecuniary jurisdiction.[55]

B. Ease of Doing Business in India: A Priority

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[52] Abhinav Chandrachud, 'Commercial Courts and the Ease of Deciding Cases' (*BQ Prime*, 17 July 2018) <www.bqprime.com/opinion/commercial-courts-and-the-ease-of-deciding-cases> accessed 6 September 2022.

[53] Law Commission, *Amendments to the Arbitration and Conciliation Act 1996* (Law Comm No 246, 2014) <https://lawcommissionofindia.nic.in/report_twentieth/> accessed 6 September 2022.

[54] 'Report of the Select Committee on the Commercial Division of High Courts Bill, 2009' (Lok Sabha, 29 July 2010).

[55] Debashree Dutta, 'A Critical Analysis of the Commercial Division of High Courts Bill, 2009' (*AIR Online*, 2010) <www.aironline.in/legal-articles/A+Critical+Analysis+of++the+Commercial+Division+of+High+Courts+Bill%2C+2009> accessed 6 September 2022.

In 2014, for the first time after the election of the new government, India participated in the World Bank's Ease of Doing Business (EODB) Ranking. The World Bank's Doing Business project aims at providing objective comparison of business regulations and their implementation in 190 economies across the globe. The parameter for ranking economies on ease of doing business include[56]-

a) Starting a business;
b) Dealing with construction permits;
c) Getting electricity;
d) Registering property;
e) Access to credit;
f) Protecting minority shareholders;
g) Paying tax;
h) Trading across borders;
i) Enforcing Contracts;
j) Resolving Insolvency;

Since the start of the project in November 2001, over 3000 scientific articles have used one or more indicators of the Doing Business Report to arrive at logical conclusions. The study has become one of the World Bank's leading private sector information products and is said to basis of planning and implementing several legislative reforms in developing countries. It is highly influential in business regulations worldwide and it is also the most used set of indicators which is widely analyzed in the academic literature. As noted in the World Bank Independent Evaluation Group study, for national authorities, this report provides a strong and general light on regulatory aspect of business environment. From the point of view of businesses, this report helps promote discussion and dialogue and for World Bank group, this report demonstrates ability to create and utilize world data and freelance resources with an objective to create handy reference material for gauging a country's business environment.[57] The methodology used in World Bank's Doing Business Study clearly specifies that for easy comparability of data collected from all 190 economies, the study is based on standardized case scenarios with specific assumptions. One such assumption is that is the location of a

[56] World Bank, 'Doing Business 2014' <www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB14-Full-Report.pdf> accessed 9 March 2022.
[57] 'Ease of doing business indicators, methodology designed on hard data: WB' *Business Standard* (New Delhi, 15 January 2018) <www.business-standard.com/article/economy-policy/ease-of-doing-business-indicators-methodology-designed-on-hard-data-wb-118011400440_1.html> accessed 6 September 2022.

standardized business—the subject of the Doing Business case study—in the two largest business cities of the economy. Thus, although the Doing Business study report clearly admits that the biggest limitation of this methodology is that business regulations and their enforcement may differ within a country, particularly in federal states and large economies, the study limits itself to two cities only.[58] Hence, for the purpose of studying India's ease of doing business reforms, only Delhi and Mumbai were selected for collection and examination of data.[59]

One of the most important indicators of the World Bank's EODB rankings is 'Enforcement of Contracts'. This indicator measures the time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficiency in the court system. In other words, it is a direct reflection of the effectiveness of a country's judiciary in handling of and settlement of commercial disputes. To assess the 'Enforcement of Contracts' indicator, the World Bank prepares a questionnaire to assess the quality of judicial processes which focused on four primary areas – Court structure and proceedings, case management, court automation, alternative dispute resolution.[60]

In 2014, the Indian Government had set up a vision of breaking into top 50 countries from the rank of 142 in that year. It was ranked 142nd when the NDA Government took the charge in 2014, this was followed by 130th in 2017[61], 100th in 2018[62], 77th in 2019[63] and 63rd in 2020[64]. In its EODB Report, 2020, World Bank complemented the reforms undertaken by the Indian government, given the size and politically diverse nature of its economy. India too made a place for itself in top 10 improvers for the third time in a row. This data clearly shows a forward-looking reform in our business regulations and resultant progress in ease of doing

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[58] 'Word Bank Ease of Doing Business report limited study in two Indian cities: Chidambaram' *The New Indian Express* (New Delhi, 2 November 2018) <www.newindianexpress.com/business/2018/nov/02/world-bank-ease-of-doing-business-report-limited-study-in-two-indian-cities-chidambaram-1893220.html> accessed 6 September 2022.

[59] Department of Promotion of Industry and Internal Trade, Ministry of Commerce, 'Ease of Doing Business' <https://dpiit.gov.in/sites/default/files/Ease_of_doing_business_Booklet_20210710_08Oct2021.pdf> accessed 9 March 2022.

[60] ibid.

[61] World Bank, 'Doing Business 2017' <www.doingbusiness.org/en/reports/global-reports/doing-business-2017> accessed 9 March 2022.

[62] World Bank, 'Doing Business 2018' <www.doingbusiness.org/en/reports/global-reports/doing-business-2018> accessed 9 March 2022.

[63] World Bank, 'Doing Business 2019' <www.doingbusiness.org/en/reports/global-reports/doing-business-2019> accessed 9 March 2022.

[64] World Bank, 'Doing Business 2020' <www.doingbusiness.org/en/reports/global-reports/doing-business-2020> accessed 9 March, 2022.

business. It also depicts seriousness which the top leadership of the country attaches to our EODB rank for a better global image. Thus, it can be said that a lot of regulatory developments that have taken place post 2014, have been triggered by the ambition to do well in the said ranking.

In 2015, the 253rd Law Commission Report presented the final Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill. After incorporating various suggestions from the Select Committee and Expert Committee, it specifically suggested that establishment of commercial courts exclusively for the efficient resolution of complex business disputes was the key policy measure that needed to be introduced by the government to improve India's position on the enforcement of contracts indicator.[65]

C. Enactment of the Commercial Courts Act, 2015

Accordingly, the Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Act, 2015 was enacted by both the Houses of Parliament on January 1, 2016 and made effective from October 23, 2015.

Even though it was considered as one of the most significant reforms to better the civil justice system in India, the utility of commercial courts to reach the expectations of solving commercial matters was questioned by the Economic Surveys of India in 2017-2018. The survey highlighted that even though India has made exceptional progress on other indicators of EODB Report like taxation and insolvency reforms, protection of minority investors, ease of obtaining credit etc., it needs to put special emphasis on developing an efficient, effective and expeditious contract enforcement regime.[66] An attractive contract enforcement regime can only be established if commercial disputes are resolved in India on fast-track basis. Following the same line of thought, the Economic Survey of India, 2018-2019 states that India's inability to enforce contracts and resolve legal disputes is the single biggest constraint to ease of doing business in India.[67]

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[65] ''Investment', 'ease of doing business' rank high in Jaitleyspeak'' *The Hindu* (New Delhi, 28 February 2015) <www.thehindu.com/business/budget/'Investment'-'ease-of-doing-business'-rank-in-high-Jaitleyspeak/article60516752.ece> accessed 9 March 2022.

[66] Sudipto Dey, 'Ease of doing business: Why India is faltering in enforcing contracts' *Business Standard* (New Delhi, 9 January 2020) <www.business-standard.com/article/economy-policy/hamstrung-judiciary-the-reason-why-india-falters-on-enforcing-contracts-119103101234_1.html> accessed 9 March 2022.

[67] Economic Survey 2018-19.

The 2015 Act (before the 2018 Amendment) established Commercial Divisions in High Courts where the later had original civil jurisdictions and Commercial Courts at the district level where High Courts do not have original civil jurisdiction. Appeals from Commercial Courts and Commercial Divisions in High Courts would go to Commercial Appellate Divisions in High Courts. Thus, in Delhi, Bombay, Calcutta, Madras and Himachal Pradesh, Commercial Divisions and Commercial Appellate Divisions in their High Courts were established while in 19 other High Courts, along with Commercial Appellate Divisions, Commercial Courts were established at the district level. The 2015 Act, while defining a 'commercial dispute' set the pecuniary value of the same at 1 crore.

If we look at the recommendations of the Law Commission's 253rd Report, it recognised that it was equally urgent and essential to reform civil litigation in totality, and not just for commercial cases. The Commission stated that in spite of wider changes brought to improve the litigation culture in India through several amendments brought to the Civil Procedure Code in 1976, 2002, amendments made to the Arbitration and Conciliation Act, 1996, the changes in the manner of conducting civil litigation have been minimal and largely cosmetic. The Indian judiciary as a whole will never be able to get rid of inordinate delays and pendency unless these courts start functioning effectively and a distinguished regime of commercial dispute resolution is implemented in spirit in the country.

Unfortunately, for the purposes of World Bank's Doing Business Report, they only reviewed the two largest business cities in the country – Delhi and Mumbai. Their methodology required collection of data for a specific court in each of these cities, that has jurisdiction over disputes worth 200% of income per capita or $5,000; accordingly, only City Civil Courts of Bombay and Delhi came within the purview of the same. The Commercial Courts at the district level in other cities and Commercial Divisions in High Courts of Delhi and Bombay set up by the 2015 Act, did not contribute to any data that the World Bank collected since there were no Commercial Courts in Delhi and Bombay and the Commercial Divisions in High Courts of Delhi and Bombay dealt with disputes of value one crore and above; thus, clearly not coming within the scope of the study. Therefore, India's ranking in the 'enforcement of contracts' parameter continued to be poor till 2018.[68]

[68] Vaidehi Misra and Ameen Jauhar, 'Commercial Courts Act, 2015: An Empirical Impact Evaluation' (*Vidhi Centre for Legal Policy*, 5 July 2019) <https://vidhilegalpolicy.in/research/commercial-courts-act-2015-an-empirical-impact-evaluation/> accessed 6 September 2022.

When the Bhartiya Janata Party came to power in 2014, one of their key electoral promises was the reinvigoration of the Indian economy and stimulate India's credibility as a lucrative destination for foreign investment. Right from its election manifesto, to its first full-fledged budget in 2015, the new government touted its agenda of improving India's standing in the annually published 'Doing Business' reports of the World Bank. Creating a place for new commercial courts in the Indian judicial system was one such step in that direction.

In the backdrop of this rationale of policy makers, the 2018 Amendment to the Commercial Courts Act, 2015 got triggered. The said Amendment introduced changes to the existing structure of commercial courts in the country – it stated that Commercial Courts shall be established at the district level along with Commercial Divisions of High Courts where the later enjoyed original civil jurisdiction. Appeals from both would lie to Commercial Appellate Divisions of High Courts. However, where the High Courts did not enjoy original civil jurisdictions, Commercial Courts would be set up below the district judge level and appeals from the same would lie to Commercial Appellate Courts; Commercial Courts shall also be set up at the district level. From Commercial Courts at the district level and Commercial Appellate Courts, appeal would lie to Commercial Appellate Division of High Courts. The State government would decide the pecuniary limits of each of these Commercial Courts at the district level and below, which will not exceed pecuniary jurisdiction exercisable by the ordinary District Courts. Another significant change brought by the 2018 Amendment was reduction in the pecuniary value of a commercial dispute.[69] The new Amendment successfully brought the Commercial Courts of Delhi and Mumbai within the scope of World Bank's study; hence we see India's EODB ranking of 186th in the 'enforcement of contracts' indicator in 2015 improve 23 positions to 163rd in 2020.[70]

Aside, from reducing the pecuniary value of a 'commercial dispute', the Amendment Act of 2018 introduced the concept of 'Pre-Institution Mediation' under Section 12A. The provision mandates parties to a commercial dispute to compulsorily go for mediation (except in cases of urgent relief) before they become eligible to be heard by the commercial court. Accordingly, the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (PIMS Rules) authorize the District and State Legal Services Authorities to conduct these

[69] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act 2018.

[70] Prashant Reddy Thikkavarapu, 'How the Government used a Flawed Ordinance to Expedite Cases Dealing with Rs 1 Crore or More While Other Cases Remain Pending' (*The Caravan*, 6 November 2015) <https://caravanmagazine.in/vantage/government-flawed-ordinance-expedite-cases-1-crore> accessed 6 September 2022.

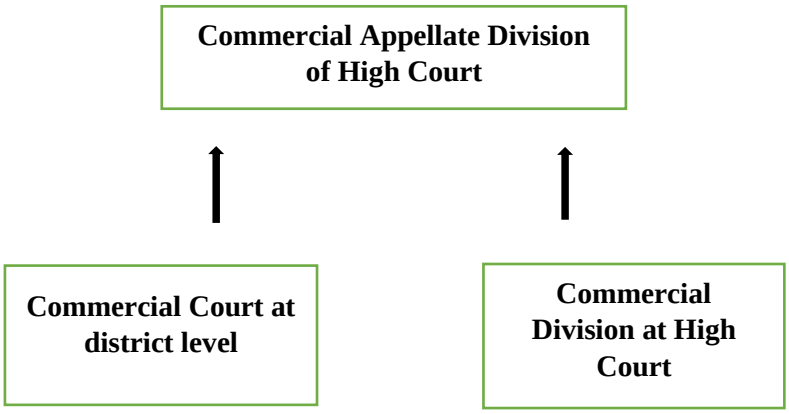
mediations.[71] Commercial Courts were established primarily to solve disputes in a fast and efficient basis. The idea was to promote mediation as a desirable method of resolving commercial disputes; additionally, the Government assumed that even if a small percentage of disputes get solved at this stage, it would somehow reduce the overall litigation burden of these Commercial Courts and Commercial Divisions.

IV. SALIENT FEATURES OF THE COMMERCIAL COURTS ACT, 2015

A. Model of Commercial Courts

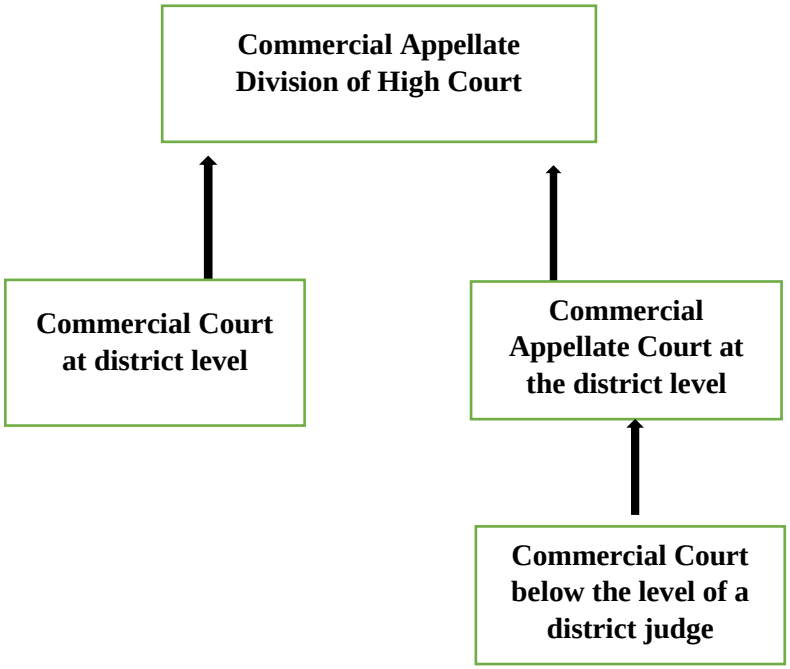
The Act established Commercial Courts at the district level, Commercial Divisions and Commercial Appellate Divisions in High Courts in places where the High Court enjoys original jurisdiction (for example, Delhi, Mumbai, Kolkata, Madras, Himachal Pradesh). In other districts where the High Court does not enjoy original jurisdiction, Commercial Courts are established below the level of a district judge and Commercial Appellate Courts are established at the district level. Other than that, Commercial Courts are also established at the district level. Appeals from the Commercial Courts at the district level as well as Commercial Appellate Courts lie to the Commercial Appellate Divisions of High Courts. The pecuniary jurisdiction of all these Commercial Courts and Commercial Divisions and Appellate Divisions are decided by the state government, with the minimum value of a 'commercial dispute' being three lakhs.

B. High Courts and Original Civil Jurisdiction



[71] The Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018, r 3.

Where High Courts do not enjoy original civil jurisdiction (19 other High Courts) – fig. ii)



C. Definition of 'Commercial Disputes'

Section 2(1)(c) of the CCA, 2015 defines 'commercial disputes' as disputes arising out of ordinary transactions of merchants, bankers, financiers, and traders etc. It provides an exhaustive list of 22 categories of disputes which can be broadly categorized under three heads –

i) trade/mercantile disputes - those relating to mercantile usage, agency, partnerships, sale, export or import of merchandise or services

ii) infrastructure and construction disputes – including carriage of goods, construction and infrastructure contracts including tenders, agreements relating to immovable property used exclusively in trade or commerce, relating to aircrafts, oil and natural gas,

(iii) business and financial disputes – arrangements including franchising, distribution and licensing, management and consultancy agreements, joint ventures, investment agreements, information technology, financial services, insurance, intellectual property rights etc.

Kindly refer to Part II(B) for a detailed discussion on each of the above categories.

Aside from the above, if the subject matter of an arbitration is a 'commercial dispute', then any application (Section 9, 16, 34) or appeals (Section 37) arising out of Arbitration and Conciliation Act, 1996 would be heard by a Commercial Court (in case of domestic arbitration) or Commercial Division of a High Court (in case of international commercial arbitration).[72]

D. Case Management Hearings

The Law Commission Reports clearly specified that Commercial Courts were meant to adopt a fast-track procedure in the resolution of commercial disputes. This fast-track procedure would be similar to fast-track arbitration referred to in the 176th Report on 'Arbitration and Conciliation (Amendment) Bill, 2002', subject to suitable modifications for the purpose of fast-track procedure in a civil court.[73] The CCA, 2015 adopted this suggestion and designated strict timelines with respect to filing of pleadings, framing issues and dealing with discovery or document production requests. These courts can further hold case management hearings where at a preliminary stage itself, the court would fix specific dates for the filing of evidence, and date of hearing arguments.[74] Additionally, under Order 57 of the Civil Procedure Code (hereinafter referred to as CPC), Commercial Courts can also order summary judgement at any stage in the litigation process prior to framing of issues.[75]

E. Costs

The Law Commission Reports state that if costs are imposed infrequently any commercial suit that have no actual bearing with the expenses of the case, then litigants may get encouraged to engage in frivolous litigation and delaying tactics.[76]Thus, to fundamentally alter the exhausting litigating culture in India, the CCA, 2015 gives wide powers to Commercial Courts to impose costs on parties who have no reasonable claim, make no reasonable efforts to reach a settlement and delay disposal of matters. The Act further incorporates amendments to the CPC to determine liability to pay costs and sets out the quantum and period by when costs should be paid.[77]

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[72] The Commercial Courts Act 2015, s 10.
[73] Law Commission, *Report on the Arbitration and Conciliation (Amendment) Bill 2002* (Law Comm No 176, 2002).
[74] The Commercial Courts Act 2015, ss 13-14.
[75] The Commercial Courts Act 2015, Schedule.
[76] Law Commission, *Costs in Civil Litigation* (Law Comm No 240, 2012).
[77] The Commercial Courts Act 2015, s 16 read with Schedule; *See also*, Akrati Modi and Harshul Bangia, 'Provision of Cost under Civil Procedure Code: A Need for Change in Today's Time' (*Manupatra*, 4 August

F. Appeals

The CCA, 2015 after the amendment in 2018 provides for two types of appellate mechanisms – in places where High Courts do not enjoy original jurisdiction, appeals from the Commercial Court established below the level of a district judge lies to the Commercial Appellate Court at the district level and from the later to the Commercial Appellate Division in High Courts. In other places where the High Courts enjoy original jurisdiction, appeals from both Commercial Courts at district level and Commercial Divisions of High Courts lie to Commercial Appellate Division in High Courts. These courts would hear appeal under Order 43, CPC, which enumerates a list of orders of the CPC against which appeals can lie. The interesting feature of the CCA, 2015 is that alongside prescribing a period of 6 months for disposal appeals, it also limits the right to appeal for a litigant. Section 8 states that no civil revision application or petition will be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction.[78]

G. Pre-institution Mediation

Section 12A of CCA, 2015 makes it mandatory for parties to a commercial dispute to get their dispute resolved through pre-institution mediation. Unless any commercial suit requires urgent relief, parties have to undergo mediation. Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018 (hereinafter referred to as the PIMS Rules)[79] authorizes the District and State Legal Services Authorities to conduct these mediations within three months of the date of application. The settlement arrived at by such mediation shall have the status and effect of an arbitral award under section 30(4) of the Arbitration and Conciliation Act, 1996.[80]

V. ANOMALIES IN THE COMMERCIAL COURTS ACT, 2015

A. Shift in Policy Change and Policy Decision

2021) <https://articles.manupatra.com/article-details/Provision-of-Cost-under-Civil-Procedure-Code-A-Need-for-Change-in-Todays-Time> accessed 6 September 2022.

[78] Ajit Warrier and Aditya Nayyar, 'India: Appeals Under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 – A Legal Quagmire' (*Mondaq*, 24 April 2018) <www.mondaq.com/india/contracts-and-commercial-law/694944/appeals-under-the-commercial-courts-commercial-division-and-commercial-appellate-division-of-high-courts-act-2015-a-legal-quagmire> accessed 9 March 2022.

[79] Commercial Courts (Pre-Institution Mediation and Settlement) Rules 2018, Notification No. G.S.R. 606(E); *See also*, the Commercial Courts Act 2015, s 12A.

[80] Aniruddha AS and Akshita Bohra, 'Pre-institution mediation and settlement: Messiah or Chimera?' (*Bar and Bench*, 25 July 2021) <www.barandbench.com/columns/pre-institution-mediation-and-settlement-messiah-or-chimera> accessed 9 September 2022.

In 2003, in the 188th Law Commission Report when the establishment of Commercial Divisions of High Courts was discussed for the first time, it related to the perception that Indian judicial system had collapsed due to inordinate delays. Quick disposal of high value commercial matters that go directly to a separate Division Bench of the High Court as opposed to an ordinary civil Court or Single Judge Bench, would not only inspire, and incite confidence in local and foreign investors but also promote India's global image as a desirable business destination. This was in line with numerous economic policies that India had adopted post 1991. Thus, the initial policy objective of setting up Commercial Divisions in High Courts was to develop a fast-track court system that will be equipped with new age technological facilities like online filing, video conferencing etc. This was an extension of the e-Courts Project conceptualized under the National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary, 2005.[81] The idea was to transform the judicial system of the country by ICT enablement of courts. Thus, if commercial courts were technologically equipped, it would help in the timely disposal of cases and since, a lot of these litigants were foreign entities/individuals, it would make the overall justice delivery system a lot more accessible and cost effective. It was also suggested that fast track courts would be able to solve high value complex commercial matters strictly within the prescribed time, not exceeding a couple of years.[82]

The 2009 Bill which the Law Commission had presented was thoroughly criticised by the Select Committee in Rajya Sabha on accounts of showing unjustifiable preference to commercial disputes over ordinary civil disputes. They also expressed their reservations about the Law Commission copying the entire idea of commercial courts from western countries without properly analysing the actual pendency of commercial matters in various district courts.[83] This idea of fast-track commercial courts, however, continued to morph in the 253rd Law Commission Report as well. Although it states that recommendations given by

[81] e-Committee, Supreme Court of India, 'Information and Communication Technology in Indian Judiciary' <https://ecommitteesci.gov.in/#:~:text=e%2DCourts%20is%20a%20pan,by%20ICT%20enablement%20of%20courts> accessed 9 March 2022.

[82] Faisal Sherwani and Shubham Saigal, 'Of flawed considerations and failed legislations: Observations from the implementation of the Commercial Courts Act, 2015' (*Bar and Bench*, 16 June 2020) <www.barandbench.com/columns/the-commercial-courts-act-2015-notes-on-considerations-and-observations-from-its-implementation> accessed 6 September 2022.

[83] Ibid.

the Select Committee were given due regard, we do not see any change in policy perspective behind the whole scheme of commercial courts.[84]

The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015 that got the final nod from both Houses of the Parliament simply changed the structure of Commercial Courts suggested by the 2009 Bill. According to the 2015 Act, both Commercial Courts and Commercial Divisions of High Courts were to be set up. If we look at rationale behind this enactment, it is clearly to set up commercial courts as a forum dedicated to creating a stable, certain and efficient dispute resolution mechanism, essential for India's economic development. The government believed if Commercial Courts can be set up as 'Model Courts' that would establish new norms of practice in commercial litigation and address 'complex facts and question of law', then gradually over time these reforms could be scaled up and extended to all civil litigation in India.[85]

Hence, we can safely say that reforming commercial litigation was essentially the first step to reform the overall civil litigation in the country. However, the 2018 Amendment to the 2015 Act drastically reduced the pecuniary value of a commercial dispute to a mere three lakh from 1 crore and came with the idea that fast commercial dispute resolution needs to happen even at the lowest level of commercial courts. Thus, post 2018, Commercial Courts were set up in every district even below the level of district judge and otherwise. The basic model of commercial courts that was initially introduced as a minor reform by setting up Commercial High Court Divisions transformed into a structural reform of the subordinate court structure on the civil side. Unfortunately, there was no corresponding budgetary allocation for such a radical cultural transformation of these new lower courts. In the absence of these initiatives, it's hard to say that introduction of commercial courts at all seemed to be transformative.[86]

B. Wide Definition of 'Commercial Disputes'

Secondly, it is important to note that the first time the definition of 'commercial disputes' was proposed in the 188th Law Commission Report, it envisaged all disputes arising out of banking and insurance transactions, contracts for the sale and supply of goods or services, disputes of building contracts, partnership agreements, business property etc. Therefore, a

[84] V Ramasubramanian, 'Commercial Litigation or Litigation Commercial: Specialised Commercial Courts in India' (2015) 1 NLS Business Law Review 79.
[85] Sudhir Krishnaswamy and Varsha Mahadeva Aithala, 'Commercial Courts in India: Three Puzzles for Legal System Reform' (2020) 11(1) Journal of Indian Law and Society 20.
[86] Prateek Sibal, 'India's Business Policy Needs to Look Beyond World Bank's Doing Business Report' (*The Wire*, 23 February 2017) <https://thewire.in/economy/india-business-policy-beyond-world-bank> accessed 6 September 2022.

residuary clause was also added to the definition, enabling High Courts to notify other disputes to be included in the definition. The Report further set out detailed explanations of matters which fall within the meaning of a commercial dispute. The 2009 Bill that followed attempted to provide an exhaustive list of commercial disputes in the definition clause and interestingly, suggested that the necessary determinant to vest the jurisdiction of a Commercial Division over a commercial dispute was the specified pecuniary value of the suit. The 253rd Report further expanded the scope of a 'commercial dispute' and included disputes arising out of 22 categories of documents. This continued in the 2015 Act, completely ignoring the warning given by the Select Committee in Rajya Sabha that a broad definition might lead to extensive litigation. The 2015 Act divided 'commercial disputes' into three broad categories – trade/mercantile disputes, infrastructure/construction disputes and business/financial disputes. The 2018 Amendment to the 2015 Act continued with the same broad definition and reduced the pecuniary value to broaden the scope of jurisdiction of a commercial court.[87]

The author has discussed the status of different categories of commercial disputes and the subsequent challenges in the previous Parts. In the backdrop of the same, we can say that in the event, additional judges are not appointed in these courts, the huge bulk of commercial litigation that were handled by district civil courts across the country are only going to come to a handful of judges sitting at these Commercial Courts and Commercial Divisions; and their pressure will be unbearable.

Thus, in effect, there is a possibility that 'commercial' disputes are being treated as ordinary civil disputes of high pecuniary value. There has not been any legislative debate on how 'commercial' disputes can be separated from civil disputes and the only rationale of drawing a distinction between both has been the pecuniary value, which also has changed over the years. Thus, it is important to note that any broad definition is not only superfluous but also can negate a subject matter assessment while determining whether a dispute is a 'commercial dispute'.[88]

C. Organisational Structure of Commercial Courts

[87] Essenese Obhan and Shubhangi Agarwal, 'India: Are Disputes Arising Out of Immovable Property Considered as Commercial Disputes?' (*Mondaq*, 7 November 2019) <www.mondaq.com/india/contracts-and-commercial-law/861690/are-disputes-arising-out-of-immovable-property-considered-as-commercial-disputes> accessed 9 March 2022.

[88] Sai Ramani Garimella and MZ Ashraful, 'The Emergence of International Commercial Courts in India: A Narrative for Ease of Doing Business?' (2019) 1 Erasmus Law Review 111.

Let us take the example of West Bengal. The High Court in Kolkata enjoys original civil jurisdiction. Previously under the 2015 Act, Commercial Divisions and Commercial Appellate Divisions were established in the Calcutta High Court. After 2018, Commercial Courts were established in 4 more districts – Asansol, Rajarhat (part of Kolkata), Siliguri and Alipore (part of Kolkata). On 20th March, 2020, the government of West Bengal published a gazette notification declaring the pecuniary jurisdiction of the four Commercial Courts.[89] According to the notification, in case of the Commercial Courts of Asansol, Rajarhat (part of Kolkata), Siliguri and Alipore (part of Kolkata), the pecuniary jurisdiction was 30 lakhs, however for the Commercial Court set in the City Civil Court of Kolkata, the pecuniary jurisdiction was of 3 lakhs to 10 lakhs exclusively and 10 lakhs to 1 crore concurrently with the Commercial Division of High Court. Further, Commercial Division of High Court of Kolkata enjoys a pecuniary jurisdiction of amount 10 lakhs exclusively. The Commercial Court within the territorial jurisdiction of the City Civil Court has still not been established 4 years after the 2018 amendment. Therefore, commercial disputes of value 3 lakhs to 10 lakhs still continue to be heard by and disposed of by the ordinary civil courts. The same needs to be reviewed for other states as well. Hence, it becomes pertinent for us that we do an objective study of the performance of the commercial courts set up under the Commercial Courts Act, 2015 and review their utility in serving effective justice to litigants.[90]

D. Infrastructure and Training of the Judges of 'Commercial Courts'

The Law Commission in their 188th and 253rd Reports stressed upon the requirement of sufficient number of judges with 'adequate' experience in civil and commercial laws in position to man the Commercial Courts. The Select Committee of Rajya Sabha while criticizing the 2009 Bill suggested that the existing vacancies in High Courts need to urgently filled up since these benches would face an increased workload due to the bulk transfer of commercial matters from district courts. The 253rd Report suggested that judges of the commercial court need to have 'demonstrable expertise and experience' in commercial litigation and would be appointed from amongst the higher judicial service. This new and separate cadre of judges would be selected through a well-defined recruitment process and entitled to a higher pay scale and better perquisites. They would also receive special training for six months at the National Judicial Academy or relevant State Judicial Academy with a

[89] 'Gazette Notification regarding the local limits of jurisdiction of Commercial Courts of West Bengal' <https://www.calcuttahighcourt.gov.in/Notice-Files/gazette-notification/2869> accessed 9 March 2022.
[90] Vaidehi Misra and Ameen Jauhar, 'Commercial Courts: A Failure in Implementation' (*BQ Prime*, 21 June 2019) <www.bqprime.com/opinion/commercial-courts-a-failure-in-implementation> accessed 9 March 2022.

view towards their continuous professional education.[91] In spite of such detailed attention, the CCA, 2015 addressed this issue superficially. Although Section 19 and Section 20 provides that it is the State government's responsibility to provide adequate infrastructure and training facilities to the judges of these courts, the lack of legislative mandates on infrastructure and judicial selection has meant that High Courts and the State Governments have essentially renamed existing courts as commercial courts.[92]

E. Concerns Relating to Pre-Institution Mediation

A pre institution mediation is essentially a time bound non adjudicatory process that needs to be completed within three months, post which the parties may or may not arrive at settlement that will have the status of an arbitral award under Section 30 of the Arbitration and Conciliation Act 1996.[93]Under Section 30(4), such an arbitral award has the same effect and status as any other arbitral award on the merits of the dispute. Therefore, whether parties amicably settle their dispute in a non-adjudicatory proceeding such as a pre-institution mediation or in an adjudicatory proceeding such as arbitration, the terms of the settlement in both the cases have the status of an arbitral award. This award qualifies for ground of challenge under Section 34.[94]Such a possibility of challenge detracts from the finality that parties usually desire when they decide to amicably settle their disputes. Any such challenge not only commits the parties to future litigation and uncertainties, but also makes parties skeptical of the efficacy of the mediation process. This is because if a challenge to such an arbitral award were to succeed, the whole pre-institution would be set at naught.[95]

The main idea behind mandating this mediation was so that parties can completely exhaust the possibility of reaching a cordial solution by themselves before coming to the court. The biggest drawback however, in this situation is where the mediation becomes a 'non-starter'.Under the PIMS Rules, if the opposite party does not participate in the mediation process, does not respond to the notice sent by the Authorities for initiation of mediation or

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[91] Report of the Annual National Seminar on Working of the First Level Commercial Courts <https://nja.gov.in/Concluded_Programmes/2016-17/P-992%20ER.pdf> accessed 9 March 2022.

[92] Kruthika Jerome, 'Ease of doing business? High Court of Delhi has no dedicated time for commercial disputes' (*Centre for Civil Society*) <https://ccs.in/ease-doing-business-high-court-delhi-has-no-dedicated-time-commercial-disputes> accessed 6 September 2022.

[93] The Arbitration and Conciliation Act 1996.

[94] The Arbitration and Conciliation Act 1996.

[95] Kritika Sethi, 'Is India ready for 'mandatory mediation'?' *Sunday Guardian* (11 September 2021) <www.sundayguardianlive.com/legally-speaking/india-ready-mandatory-mediation> accessed 9 March 2022.

fails to appear on the notified date, the mediation will be treated as a non-starter.[96] Thus, the mandate of pre institution mediation is extremely hard to implement and fails to push both sides to come together to a settlement, since it solely applies to the plaintiff. In effect, pre-institution mediation continues to remain a voluntary process. Only initiation of the process of mediation is mandatory before institution of a suit, and the choice is left with the opposite party to decide whether to participate in such proceedings.[97]

F. Ease of 'Doing Business' Concerns

As the author mentioned earlier, the World Bank's methodology collected data relating to disputes worth 200% of income per capita or $5,000, and did not include within its scope the Commercial Courts and Commercial Divisions established by the 2015 Act. The priority of doing well in the World Bank rankings however continued till 2018 when the first amendment to the 2015 Act was brought. In fact, it was this obsession to score well in the rankings that essentially drove the 2018 Amendment. More number of Commercial Courts were now established in the country after 2018, below the level of a district judge, at the district level, in High Courts (Already in place under the 2015 Act) and their corresponding Appellate Courts and Appellate Divisions. Their pecuniary jurisdiction was also reduced just so they could come within the purview of the World Bank study.[98] Unfortunately, on 16th September, 2021, the World Bank issued an official statement that Ease of Doing Business (or, Doing Business Reports) of 2018 and 2020 were reported to have major data irregularities. Accordingly, they initiated a series of reviews and audits of the reports and its methodology. After reviewing all the information available to date on Doing Business, including the findings of past reviews, audits, they decided to discontinue the Doing Business Report.[99]The action came after an external investigation's findings that the rankings could be manipulated. The investigation implicated the then World Bank chief executive Kristalina Georgieva, who is now managing director of the International Monetary Fund, the global lender of last resort, and former World Bank president Jim Yong Kim. However, 3 months after this, on December 16th, 2021, they issued another statement that said that the World

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[96] Avaneesh Satyang and Sohini Mandal, 'India: Mandatory Pre-Institution Mediation: Commercial Courts' (*Mondaq*, 13 August 2018) <www.mondaq.com/india/arbitration-dispute-resolution/727214/mandatory-pre-institution-mediation-commercial-courts> accessed 9 March 2022.

[97] Bhaven Shah, 'Mandatory pre-institution mediation – Purpose v. Procedure' (*SCC Online*, 24 March 2021).

[98] Aparna Gopalan, 'We've Got the Ease of Doing Business – but for whom?' (*The Wire*, 26 October 2019) <https://thewire.in/economy/weve-got-the-ease-of-doing-business-but-for-whom> accessed 9 September 2022.

[99] Ian Richards, 'The World Bank's 'Doing Business' report is out of business. Now what next?' (*UNCTAD*, 4 November 2021) <https://unctad.org/news/world-banks-doing-business-report-out-business-so-what-next> accessed 9 September 2022.

Bank has done a systematic review of all data irregularities previously reported and done an independent external verification of their methodology; taking from that, they will be publishing the Ease of Doing Business Rankings and Reports of 2021. These rankings have often set in motion far-reaching economic policies that focus on winding down red tape and easing regulations to facilitate quicker investments, setting off a global competition to reach the top of the rankings. It is also equally critical policymaking in many developing nations to push income-generating investment.[100] From the above instances of irregularities, we have to carefully note that any global index, no matter how it improves India's image to the world, cannot be a contributing factor to bring changes to the national legislation or policy.[101]Regulatory and legislative changes in any national civil law reform cannot be proposed, designed and enacted to satisfy an external ranking index targeting the real issue of litigation culture and systemic challenges within the Indian judiciary.

VI. CONCLUSION

As of February, 2022, the total number of cases pending before all the commercial courts in Delhi on the last day of the month is 26,559. Out of 2339 cases instituted that month, 1456 were disposed of. Thus, only 62% were resolved within that very month.[102] From November, 2021 to February 2022, the total number of cases pending have kept on increasing. The picture is quite similar with respect to the four dedicated Commercial Courts of West Bengal. For the Commercial Court at Rajarhat, Alipore, Asansol and Siliguri, the average number of cases that are disposed of every month is below 10, while pendency of cases is between 100-150.[103]Similarly, for the Commercial Courts in Mumbai, the total number of pending cases have increased from 2685 in December 2021 to 2807 in February.[104]For better implementation of CCA, 2015, particularly Section 17, the Commercial Courts (Statistical Data) Rules 2018[105] was enacted that required the Commercial Courts, Commercial Appellate Courts, Commercial Division or Commercial Appellate Division to release information

[100] Zia Haq, 'Why World Bank junked its ease of doing business rankings' *Hindustan Times* (New Delhi, 18 September 2021) <www.hindustantimes.com/business/why-world-bank-junked-its-ease-of-doing-business-rankings-101631863994289.html> accesse 9 September 2022.
[101] Sonalde Desai, 'Lessons from the death of the ease of doing business index' *The Indian Express* (6 October 2021) <https://indianexpress.com/article/opinion/columns/ease-of-doing-business-index-world-bank-7552199/> accessed 9 September 2022.
[102] 'Summary of Commercial Cases, Consolidated Report' <https://delhicourts.nic.in/commcourt.html#collapse24> accessed 9 March 2022.
[103] 'Statistical Data of 2022 for Commercial Courts of West Bengal' <www.calcuttahighcourt.gov.in/Commercial/> accessed 9 March 2022.
[104] 'Statistical Data of 2022 for Commercial Courts of Maharashtra' <https://bombayhighcourt.nic.in/commercialcourt.php> accessed 9 March 2022.
[105] The Commercial Courts (Statistical Data) Rules 2018, r 3.

regarding pendency and status of each commercial suit, time to dispose it etc. by the tenth of every month. In 2020, these rules were amended, these new rules require the courts to publish data on the use of several virtual facilities including the number of e-filed cases, e-payment transactions, and e-processing of summons. Further, details with respect to case management hearings, contested commercial cases also need to be recorded by the High Courts.[106]Of 24 High Courts, only High Courts of Mumbai, Delhi, Karnataka, Rajasthan, Uttarakhand etc. have maintained data up to February 2022, in accordance with the format prescribed by the 2020 Amendment Rules. Rest others have either not been publishing any data at all, or publishing it as per the 2018 rules (High Courts of Calcutta, Hyderabad, Madras, Patna etc.)

While these new rules should ideally create more nuanced data sets and maintain more efficient judicial statistics, these would better the implementation and monitoring of the CCA, 2015 only when the well-intended provisions under the Rules are brought forth in spirit. In United Kingdom, the Commercial Court is a sub-division of the Queen's Bench Division of the High Court of Justice. It comes up with an annual report that not only depicts the performance statistics of the Commercial Court but also provides detailed information about initiatives and projects undertaken to improve its service to the litigants, to make them more familiar with its use[107].If something as basic as maintaining data is not being implemented and undertaken by courts, a substantive task of depicting performance statistics along with detailed information about initiatives undertaken is probably a farfetched goal for now. However, if India does want to achieve evidence-based law and policy making, then it should be prepared to take similar steps, so that CCA Act, 2015 can be implemented in spirit and does not remain a reform on paper.

The primary aim of any civil law reform is speedy justice. Within that sphere, is the need to provide speedy justice of commercial disputes, those with high value litigation because commerce is the life plat of the economy. However, if we want to establish these Commercial Courts and Commercial Divisions as model courts, the government would need to provide additional infrastructure and appoint new judges for the same. The same judges of ordinary civil courts cannot be designated as judges of Commercial Courts and asked to hear matters

[106] The Commercial Courts (Statistical Data) Amendment Rules 2020, r 2.

[107] 'The Commercial Court Report 2020-2021 (Including the Admiralty Court Report)' <www.judiciary.uk/wpcontent/uploads/2022/02/14.50_Commercial_Court_Annual_Report_2020_21_WEB.pdf > accessed 9 March 2022.

from all over the district. It would be impossible for them to adhere to the timelines mentioned in the CCA, 2015 which is after all the main intent of the legislation.

Ideally, these commercial courts shall have some technical members to support the judicial members just like the National Company Law Tribunal. If we need to make these Commercial Courts adequately functional, then technology should be mandatorily used to prevent procedural delays. In 2005, the "National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary - 2005" conceptualized the E-Courts Project. Following that, on 7th August 2013, the Hon'ble the Chief Justice of India launched the e-Courts National portal (ecourts.gov.in). However, more concerted efforts need to be made to implement the judicial management information system. Commercial Courts' judges need to be given proper and regular training so that they build the expertise required to dispose of commercial disputes within prescribed timelines. To make these courts popular, we need to share the best practices that they follow in consonance with other jurisdictions that have established commercial courts. Additionally, the monitoring and supervision of these courts need to be an initiative of the High Courts, rather than the Ministry. Last but not the least, 'ease of doing business' can only be culturally accepted and implemented in India, provided these commercial courts weigh the economic impact of decisions, while deciding cases.

At the valedictory ceremony of the Constitution Day celebrations, Chief Justice of India, CV Ramana stated *"Another issue is that the legislature does not conduct studies or assess the impact of the laws that it passes. Re-branding the existing courts as commercial courts, without creating a special infrastructure, will not have any impact on the pendency".*[108]The CCA, 2015 was initially designed to handle high value commercial cases in the country, however it progressively enveloped almost all of civil litigation in its scope. A legal reform can only be meaningful if it is supported by huge investment in moulding legal culture - of judges, lawyers and clients - and a corresponding examination of the administrative systems and processes of handling disputes. For a successful legislative reform, there needs to systematic changes both in administrative as well as cultural parameters.[109] Otherwise, the scale and scope of such effort would be simply perceived as an 'old wine in a new bottle'.

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[108] 'Legislature does not assess impact of laws it passes, leading to big issues, says CJI Ramana' *The Print* (New Delhi, 27 November 2021) <https://theprint.in/judiciary/legislature-does-not-assess-impact-of-laws-it-passes-leading-to-big-issues-says-cji-ramana/772797/> accessed 6 September 2022.
[109] Krishnaswamy and others (n 58).