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Are Commercial Courts the answer to India's arbitration woes?

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The Indian Government recently promulgated two ordinances (i.e., the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance ("**Ordinance**") and the Arbitration and Conciliation (Amendment) Ordinance ("**Arbitration Ordinance**" – an analysis of the Arbitration Ordinance by the authors is available here), that will have a far-reaching impact on the practice of arbitration in the country.

The Ordinance extends to all commercial disputes and is not restricted to arbitration related litigation. It does not contemplate specialist arbitration judges, such as in Australia. While the Ordinance provides for appointment of judges with "*experience in dealing with commercial disputes*", it does not provide any objective criteria for determination of the expertise of a judge in commercial matters.

Both the Ordinance and the Arbitration Ordinance seem to ignore the principal underlying problem of litigation in India, i.e., the lack of infrastructure for faster disposal of cases. Until these problems are addressed, the changes introduced by the Ordinance (that are highlighted below) may remain cosmetic.

Setting up specialised courts for commercial disputes

Arbitration disputes end up with significant delays once they enter the clogged up judicial system—be it at the pre-arbitral stage or at the stage of challenge to arbitral awards. The Ordinance holds out the promise of a speedy disposal of disputes of a commercial nature, which include applications and appeals arising out of arbitration proceedings.

The definition of a "Commercial Dispute" (Section 2(1)(c)) is wide, and includes disputes such as those pertaining to JV agreements, SHAs, agreements for sale of goods and contracts for exploitation of oil and gas reserves.

The Ordinance envisages the setting up of specialized courts for all commercial disputes that exceed a "Specified Value" (currently INR 10 million, but subject to revision by the Central Government).

Based on the peculiarities of the judicial system in each State, the Ordinance envisages the setting up of either Commercial Courts or a Commercial Division, as the court of first instance for commercial disputes. Commercial Courts will be set up at the district level by the State

Governments in consultation with the High Court in States where the High Court does not enjoy original jurisdiction (i.e., is not the court of first instance). Where a State High Court enjoys original civil jurisdiction (i.e., High Courts at Delhi, Bombay, Madras, Calcutta and Himachal Pradesh), Commercial Divisions will be set up within each High Court by the Chief Justice of such High Court.

All High Courts are also required to set up a Commercial Appellate Division, comprising one or more division benches (a division bench comprises of two judges), to entertain appeals from the relevant Commercial Courts/Divisions.

Stumbling Blocks

While the Ordinance envisages a Commercial Court or Commercial Division as a court of first instance in general, it creates a limited exception from this principle for certain arbitration related appeals and applications. Where the High Court of a State does not enjoy original jurisdiction, the general principle under the Ordinance follows, i.e., applications/appeals would lie before a Commercial Court with territorial jurisdiction.

However, where the arbitration is an international commercial arbitration (that is, where one of the parties is, *inter alia*, a foreign company as defined under Section 2(1)(f) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**")) or where the High Court of a State has customarily been the Court of first instance for arbitration related litigation, Section 10 vests jurisdiction in the Commercial Appellate Division. The reason for this departure is, presumably, to reduce the time spent in appellate proceedings.

However, this has unwittingly created the very first stumbling blocks for the Ordinance: an internal contradiction within the Ordinance as well as confusion about which forum is to hear arbitration related proceedings.

Internal contradiction

There is an apparent inconsistency between section 15 and section 10 of the Ordinance, as to whether pending arbitration applications/appeals will be heard by single judges (i.e., Commercial Divisions) or division benches (i.e., Commercial Appellate Divisions). This has already led to significant confusion, with cases being transferred back and forth between single judges and division benches.

A division bench of the Delhi High Court referred to this inconsistency in its order dated 30 November 2015 in *Roger Shashoua v Mukesh Sharma* (O.M.P. (Comm) No. 1/2015), and held that a harmonious reading would entail that section 10 is restricted to applications filed after promulgation of the Ordinance and in terms of section 15, applications that were pending are placed before the Commercial Division.

Which forum is right?

On 10 December 2015, the same division bench appears to have recanted from its earlier position, in *Ascot Estates Pvt. Ltd.* v. *Bon Vivant Life Style Pvt. Ltd.* (O.M.P. (Comm) No. 16/2015). The Court held that the words "Commercial Appellate Division" in section 10(1) and (2) of the

Ordinance must be read down as "Commercial Division" in petitions filed after the promulgation of the Ordinance where an appeal lies under Section 37 of the Arbitration Act. The division bench reasoned that this was necessary to preserve the right of appeal provided for under Section 37 of the Arbitration Act.

The Government of India appears to have noted this defect in the Ordinance, and amended clause 10 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 ("**Bill**") on 16 December 2015 so the words "Commercial Appellate Division" are substituted by "Commercial Division".

Inconsistencies with the Arbitration Ordinance

Apart from contradictions within the Ordinance, there also appear to be inconsistencies between the Ordinance and the Arbitration Ordinance. The Arbitration Ordinance has not made changes to the definition of "Court" under section 2(1)(e) of the Arbitration Act in conformity with the Ordinance, and does not refer to the Commercial Division or the Commercial Appellate Division. The absence of parallel changes in the Arbitration Ordinance promulgated on the same day is unfortunate.

Case management hearings, specialist judges and other key changes

The Ordinance also introduces the concept of a case management hearing, in terms of which the Commercial Division or Commercial Court is empowered to prescribe new timelines or issue such directions as would be necessary for a speedy and efficacious disposal of the suit or application. These provisions are not applicable to the Commercial Appellate Division and appear to be directed at disposal of commercial disputes other than arbitration related litigation. In any case, the Arbitration Ordinance prescribes certain timelines for the disposal of specified applications. If the Commercial Division or the Commercial Court were to exercise its powers under Section 15(4) of the Ordinance, the timelines prescribed under the Arbitration Ordinance should prevail (being statutory timelines, as opposed to being contained in delegated legislation).

In relation to timelines, Section 14 of the Ordinance provides that the Commercial Appellate Division will endeavour to dispose of appeals within six months of the appeal being filed. Since it is only applicable to "*appeals*", it may not have any impact on arbitration related proceedings that lie before the Commercial Appellate Division, as a court of first instance.

The appointment of specialist judges is a move that has significant potential. However, the Delhi High Court has appointed six single judges (that constitute the entire original side) as the Commercial Division and four Division Benches as the Commercial Appellate Division, pursuant to the Ordinance. This means that the same single judges continue to hear the same disputes, albeit under a new title of Commercial Division, thereby defeating the objective of appointing specialist commercial judges. The wisdom of transferring applications and appeals to division benches from single judges (save the exception created for applications where an appeal under Section 37 of the Act is available per *Ascot Estates*) is questionable. The four division benches already have a significant workload and to expect them to now hear arbitration related litigation on an expedited basis does not comport to reality. The Government of India has made appropriate amendments in the Bill which was passed by the Lok Sabha on 16 December 2015.

In conclusion, it is unlikely that the Ordinance will serve as a magic pill to ensure more efficacious conduct and faster disposal of arbitration related litigation in India. Further, there is an urgent need

to clarify the inconsistencies and contradictions in the Ordinance, lest it become the battleground for prolonged litigation that defeat its very objective.

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