

Commercial courts need much more than legislative intent for their success

The success of Commercial Courts is contingent on setting up the necessary state-level infrastructure and improving the expertise of the judges.

Mannu Arora | ETCFO | Updated: June 13, 2018, 21:57 IST

The rejigged law for settlement of disputes through commercial disputes courts, as notified by the May 8, 2018 ordinance, looks good on paper.

The May Ordinance covered two primary amendments. First, it reduced the dispute value that can be settled in the Commercial Courts to Rs 3 lakhs from the earlier Rs 1 crore limit, and second, it introduced mandatory pre-institution mediation.

However, the absence of a broader arbitration mindset in India Inc along with the poor performance of the earlier law, are causing some misgivings about the future success of the so-called 'gamechanger'.

Decoding the Ordinance

The reduction in dispute value means that disputes in small and mid-sized companies can now be entertained by the Commercial Courts.

The mandatory pre-institution mediation, a concept has already existed at the High Court level, is seen as adding substance to the existing legal framework. "Mediation as an alternate dispute resolution tool is time and cost effective and also preserves relationships," states Ashish Kabra, Senior Expert, International Litigation & Dispute Resolution at Nishith Desai Associates.

"Earlier, small and medium businesses which wanted to file suits for claims didn't pursue that route due to the cost and time involved in litigation being more than the amount for which the suit was filed," shares Amit Maheshwari, Partner, at Delhi-based tax consultant firm, Ashok Maheshwari and Associates.

Commercial Courts, Maheshwari adds, will bring down the trial period to 1-2 years as "the detailed filing has to be done at the time of the suit." Earlier, such matters usually took 5-7 years.

Another Delhi-based commercial lawyer, Sarthak Malhotra agrees. He points out that in as many as 150 jurisdictions mediation in commercial disputes is recognized in different forms, sometimes indirectly mandatory.

"For instance, the Australian Civil Dispute Resolution Act 2011 indirectly mandates the parties explore alternative dispute resolution mechanisms (mediation being one of such mechanisms) before approaching the court," Malhotra says.

The Indian government, as of now hasn't prescribed any particular mechanism for mediation. Going forward, "it should provide through rules a basic framework such as for appointment of mediator, scheduling of meetings, provision of information, confidentiality of proceedings etc," says Nishith's Kabra.

Not everyone agrees with the need for a government-suggested prescription. "The whole concept of mediation is that you are not bound by any fixed rules because the moment you have strict rules, they will again get embroiled in questions of specifics," says Ameeta Verma Duggal, founder partner of the Delhi-based law firm DGS Associates.

Nishith Desai's Kabra points to the ambiguous language of the Ordinance which lacks clarity on overlapping jurisdictions of commercial divisions of (High Courts) and Commercial Courts. "The ordinance also allows government to unilaterally appoint judges of commercial courts. The constitutionality of this may also be tested," he points out.

Challenges in execution

Commercial dispute resolution in India is stymied by other factors too. An adequate number of commercial courts is the first challenge even after nearly two-two and a half years of the law for Commercial Courts coming into force, says Malhotra.

The law now called, Commercial Courts Act, 2015 puts the onus of providing an enabling framework on the executive through Section 19 and Section 20 of the Act.

Section 19 of the Act provides that the respective state governments shall provide necessary infrastructure to facilitate the workings of Commercial Courts, while Section 20 of the Act provides that the state government may establish necessary facilities providing for training of Commercial Courts Judges.

An equally significant challenge is the business expertise of the judges that preside over the commercial courts. Further, even though the Act provides for transparency and regular collection and disclosure of data on various aspects of commercial courts' functioning, such data is not being regularly disclosed.

"In the absence of this data, it is difficult to assess how the commercial courts are functioning across the country," Malhotra points out.

Perhaps a more relevant and pressing issue is the overall lack of arbitration mindset. "An Indian litigant may not be prepared for settling because it means immediate reduction in receipt; he is just not exposed to arbitration culture," worries Duggal. "To change the mindset, lawyers have to play an important role. Their advice has to be very holistic," she adds.

For the full benefits of the Ordinance to accrue, several other pieces need to fall into place, else the law might lose its sheen.
