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Commercial Litigation or Litigation Commercial:Specialised Commercial Courts in India

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*The Indian judiciary is plagued with heavy work load and inadequate number of judges. Consequently, several committees have been created with the objective of examining the problems of delay and arrears in the disposal of cases. It is in this context that the subject matter of specialised commercial courts in India, as propounded in the Law Commission of India's 188*th *Report titled* "Proposals for Constitution of Hi-tech Fast Track Commercial Divisions in High Courts," *is examined in this paper. The Commercial Courts, Commercial Division, and Commercial Appellate Division of High Courts Bill, 2015, which seeks to set up commercial divisions and commercial appellate divisions of High Courts was recently introduced in Parliament, after having been in flux for twelve years. The article conducts a critical examination of this Bill, primarily in the context of commercial court structures prevalent in the United States, United Kingdom, and Singapore.*

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Introduction

When the great historian Charles A. Beard was asked if he could summarise the lessons of history, he said he could do it with four simple observations: (*i*) whom the gods would destroy, they first make mad with power, (*ii*) the mills of the gods grind slowly, but they grind exceedingly fine, (*iii*) the bee fertilises the flower it robs, and (*iv*) when it is dark enough, you can see the stars.

A close look at the history of mankind shows that at different points of time, different things assumed power. What was once possible by the power of the sword later became possible with the power of the pen. After the fall of monarchies and the rise of democratic systems, a shift took place making the power of the ballot replace the power of the sword. But today, the power of currency has displaced everything else. The economic power, more than the military power, of a country, today decides the position of a country and its system. As a result, countries place importance more on economic empowerment than on anything else today. This is fortified by the fact that at the behest of several nations, the World Trade Organisation was formed in 1995 to protect the commercial interests of all nations.

Like individuals, nations seek prosperity. The prosperity of a nation is measured by several indices such as Gross Domestic Product, Human Development Index *inter alia*. These indicators depend upon the strength of the nation's economy, which in turn depends upon its ability to produce, to trade, to consume, and to market. This ability is directly dependent upon the efficacy of the system of administration of justice. Just as there can be no trade and commerce without disputes, there can be no contract without breach, and there can be no dispute without resolution. Therefore, the strength of the economy of a country is directly proportionate to the strength of its judicial system.

After adopting a socialistic pattern of economy in the first four decades after independence, the Indian economy was liberalised in 1991. The period of transition was critical and our problems were compounded by various factors that are peculiar to India.

In their paper *Law and Finance in Transition Economies*,[1] the authors contend that the most fundamental problems faced with respect to corporate governance in the transition from central planning to market econ-

[1] Katharina Pistor, Martin Raiser, and Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 Economics of Transition, 325-368 (2000), available at http://dx.doi.org/10.2139/ssrn.214648.

omy is that of external finance. In the central economy, the State managed most of the assets. Enterprises did not have to worry about raising external finance. As the role of the State reduces from being a direct co-ordinator of economic activities to that of an impartial arbiter,[2] the lack of external finance becomes a serious constraint on the enterprises after the transition.[3] Therefore, dealing with the issue of external finance is the crux of solving the puzzle of corporate governance problems. The State will have to ensure that the private rights will be recognised, enforced, and not be crippled by state intervention, in order to ensure a free flow of productive and efficient external private finance. This not only requires an extensive change in the statutory and administrative regime, but also a sea change in the way the institutions concerned with administration of justice function. The assessment of the legal environment in transition shows that the quality of law enforcement is at least as important as (if not more than) the extensiveness of the law.[4]

Unfortunately, our country has gained a bad reputation – albeit neither wholly justified nor unjustified – of being a jurisdiction where contracts can rarely be enforced through courts within a reasonable time frame. According to the World Bank,[5] contract enforcement in India takes 1420 days (viz. 150 days taken in Singapore, ranked as the most efficient country), costs 39.6% of the value of the claim (viz. 9% in Iceland) and requires 46 procedures (viz. 21 in Singapore).[6] Globally, India ranks 186th among 189 economies in terms of ease of enforcing contracts.[7]

I. Historical Background to the Woes of the Judiciary

The workload that every officer of the Indian judiciary carries on his shoulders is phenomenal. In a statistical analysis carried out recently, it was found that despite India having a total population of about 127 crore, the total sanctioned strength of judges in the Supreme Court, all the High Courts, and the Subordinate courts put together is only about 20,533. Even if the

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2 *Ibid*, at 15.

3 G. Calvo and F. Coricelli. *Stagflationary Effects of Stabilisation Programmes in Reforming Socialist Economies: Enterprise-side versus Household-side Factors*, 6(1) World Development Review 71-90 (1992).

4 *Supra* note 2, at 3; *see* European Bank for Reconstruction and Development, *Transition Report 1998: Financial Sector in Transition*, EBRD Ann. Rep. (1998) available at http://www.ebrd.com/downloads/research/transition/TR98.pdf.

5 World Bank, *Doing Business 2015: Going Beyond Efficiency*, DOI: 10.1596/978-1-4648-0351-2 (2014).

6 *Ibid*, at 104.

7 *Supra* note 5.

working strength of judges in all courts in India is equal to the sanctioned strength (*i.e.* without leaving any vacancy) the judge-population ratio would be 1:61,865. But today, the working strength of judges in all the 24 High Courts put together is only about 630 as against the sanctioned strength of 984. Thus, one-third of the number of posts in the High Courts is lying vacant. In so far as the subordinate judiciary is concerned, the working strength as on December 31, 2014 was 15,115 as against the sanctioned strength of 19,518. Thus, nearly 25% of the posts are lying vacant in the subordinate judiciary. If the judge-population ratio is worked out on the basis of the average working strength of judges, it will be somewhere near 1:80,000.

Yet, it is not as though the courts have crumbled because of such a heavy workload. A look at the inflow-outflow ratio of cases would show that the current strength of the judiciary is sufficient to man the inflow. In fact, it is actually the accumulated arrears that has made things extremely difficult. An analysis of the data relating to the institution of cases in High Courts every year, the arrears brought forward from the previous year, and the disposals made during the year, reveals that the disposals very closely match the institution.

Unfortunately, the Indian judiciary carries the legacy of the British Raj, and even the Englishmen were unable to tackle the problem of arrears. Numerous committees were constituted for over a hundred years to tackle the problem of arrears, but social conditions have made the implementation of any ideal solution impossible.

The first committee to examine the problem of delay was set up in 1924 under Justice Rankin. Since then, several Committees have put forth recommendations but little progress has been made on the implementation front. These include the Justice S.R. Das High Court Arrears Committee (1949), the Trevor Harris Committee in West Bengal (1949), the Wanchoo Committee in Uttar Pradesh (1950), Justice J.C. Shah Committee (1972), Satish Chandra Committee (1986) and the first Malimath Committee (1990). In addition, the Law Commission of India has addressed this issue in several reports since 1955 – namely the 14th, 79th, 80th, 120th, 121st and 124th reports. More recently, other reports on this issue such as the 221st, 222nd and 229threports, have touched upon the issues of delay, pendency, and arrears.

Though several steps were taken to improve the overall performance of the judiciary in terms of clearance of backlog and speedy disposal of cases, particular focus was placed by the 17th Law Commission on commercial litigation of high value, pending particularly in High Courts exercising Ordinary Original Civil Jurisdiction.

The 17th Law Commission of India *suo moto* took up the issue of speedy disposal of high value cases so as to provide assurance to the investors in view of the transition of the Indian economy in 1991. The Law Commission, in its 188th Report titled "*Proposals for Constitution of Hi-tech Fast Track Commercial Divisions in High Courts*" submitted in 2003, recommended the setting up of Commercial Divisions in the High Courts. This Bill was considered and accepted in the Conference of Chief Ministers of the States and Chief Justices of the High Courts in 2009. After it was passed in the Lok Sabha, the Bill was referred to the Select Committee on the Commercial Division of High Courts Bill, 2009 by the Rajya Sabha. As more time was sought for incorporating the amendments suggested by the Select Committee of the Rajya Sabha, the Bill was referred to the 20th Law Commission of India.

The 20th Law Commission collected data from several courts, to enable it to comprehend the magnitude of the problem before making any suggestions. The statistics collected from the Madras High Court presented a dismal picture, as can be seen from the following:

1. Status of pendency of main Cases (all types) as on 01.01.2014

Sr. No.	Case Type	Less than 2 years	2 – 5 years	5 – 10 years	More than 10 years	Total
1	Civil Suits	1536	1451	2196	1143	6326
2	Company Petitions	360	128	194	63	745
3.	Original Petitions	1233	712	468	166	2579

2. Details of Cases involved in Commercial Disputes Pending as on 01.01.2014

Sr. No.	Case Type	Less than 2 years	2 – 5 years	5 – 10 years	More than 10 years	Total
1	CS	1325	1250	2190	1100	5865
2	Arbitration OP	572	354	176	60	1162
3	CP	360	128	194	63	745

3. Value of Pending Commercial Disputes Cases

Less than Rs 1 crore	Rs 1 crore – Rs 2 crore	Rs 2 crore – Rs 5 crore	More than Rs 5 crore
6020	463	274	221

After a critical analysis of the data collected from various courts, the Law Commission submitted its 253rd Report titled "*Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015*." It is seen from newspaper reports that appeared on April 22, 2015 that the Government has approved the bill to set up commercial benches in select High Courts to deal with high value business disputes. Accordingly, the 2015 Bill was introduced in the Rajya Sabha on April 29, 2015.

The Bill seeks to set up commercial divisions in High Courts such as Delhi, Bombay, Calcutta, Madras and Himachal Pradesh, which already exercise ordinary original civil jurisdiction. The Bill has travelled far from the stage of its incubation, and it has travelled back and forth for the past twelve years. Hence, it maybe useful to take note of similar legislative attempts in other jurisdictions before taking a critical look at the Bill.

II. Specialised Commercial Courts in Other Jurisdictions

A. United Kingdom

The history of the establishment of Commercial Courts in England can be traced to the late nineteenth century. In response to the criticism recorded by Sir Sidney Water low in the Report of the Judicature Commission in 1874 about the delay in judicial administration affecting the confidence of the traders, the Judges of the Queen's Bench Division resolved to set up a "*Commercial List*" in 1895. The first "*commercial cause*" was argued before Mr. Justice Mathew as the Commercial Judge in March 1895 concerning the claim of an account by Flemish cloth manufacturers against their London agent.[8] The Commercial Court in the United Kingdom which was designated by a resolution of the judges in 1895 still continues to be a part of the Queen's Bench Division in the High Court.[9] However, it was statutorily recognised as a division of the High Court in 1970 by the Administration of Justice Act, 1970 (replaced by Administration of Justice Act, 1981). This Court was called the Commercial Court (England and Wales) and was given legislative backing under Sections 6(1)(b) and 62(3) of the Senior Courts Act, 1981. Schedule I of the said Act lists the matters of business of Chancery and Queen's Bench Divisions. The Commercial Court deals with complex

[8] V. Veeder, *Mr. Justice Lawrence: The "True Begetter" of the English Commercial Court*, 110 Law Quarterly Review 292 (1994).

[9] K. Malleson and R. Moules, The Legal System (4th edn, 2010).

cases arising out of national and international business disputes, particularly international trade, banking, commodity trade, and arbitration disputes.[10]

Although the commercial court in the United Kingdom has many competitors overseas, a research survey has shown that in 80% of cases in the Commercial Court, one of the parties carried on business outside its jurisdiction, and in 52% of cases, both parties did.[11] Thus, a great many of the disputes handled by the Commercial Court in England involve overseas parties, who have chosen the Commercial Court in London as their forum.[12] More than 60% of litigants in English commercial courts now come from overseas, according to a study by communication agency Portland.[13]

The other Commercial Courts in England under the Queen's Bench Division are (*i*) the Admiralty Court dealing with shipping and maritime disputes, such as collision, salvage, carriage of cargo, limitation, mortgage disputes,[14] (*ii*) the Mercantile Court dealing with business disputes, national and international, of lesser value,[15] and (*iii*) the Technology and Construction Court dealing primarily with engineering disputes, claims relating to design, supply and installation of computers, computer software and related network systems.[16] Other Commercial Courts in England under the Chancery Division are (*i*) the Bankruptcy and Companies Court dealing with cases under the Insolvency Act, 1986, the Company Directors Disqualification Act, 1986, the Companies Act, 1985, and the Financial Services and Markets Act, 2000,[17] (*ii*) the Patents Court,[18] and (*iii*) Intellectual Property Enterprise Court.[19]

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[10] Roger E. Meiners, Al H. Ringleb and Frances L. Edwards, The Legal Environment of Business 37 (11th edn, 2015).

[11] The Stationery Office, Review of Civil Litigation Costs: Final Report (2009) (UK).

[12] *Ibid*.

[13] IdilOyman, *Who Uses the Commercial Courts,* Portland Communications (2014), http://www.portland-communications.com/wp-content/uploads/2014/05/Portland_Who_Uses_the_Commercial_Court.pdf.

[14] Admiralty, Commercial and London Mercantile Courts, H.M Courts & Tribunals Service, http://www.justice.gov.uk/courts/rcj-rolls-building/admiralty-commercial-mercantile-courts (Last visited Jul. 1, 2015).

[15] Mercantile Court, H.M Courts & Tribunals Service, http://www.justice.gov.uk/courts/rcj-rolls-building/mercantile-court (Last visited Jul. 1, 2015).

[16] Technology and Construction Court, H.M Courts & Tribunals Service, https://www.justice.gov.uk/courts/rcj-rolls-building/technology-and-construction-court (Last visited Jul. 1, 2015).

[17] Bankruptcy and Company Court, H.M Courts & Tribunals Service,https://www.justice.gov.uk/courts/rcj-rolls-building/bankruptcy-and-companies-court (Last visited Jul. 1, 2015).

[18] Patents Court, H.M Courts & Tribunals Service,https://www.justice.gov.uk/courts/rcj-rolls-building/patents-court (Last visited Jul. 1, 2015).

[19] IntellectualProperty Enterprise Court, H.M Courts & Tribunals Service,https://www.justice.gov.uk/courts/rcj-rolls-building/intellectual-property-enterprise-court (Last visited

The efficient functioning of the Commercial Courts in England is demonstrated by the fact that Dubai and Qatar set up commercial courts that are modeled on the same lines as the Commercial Courts in England, which have former appellate judges of England on the benches. In fact, the enhancement of court fees by the English Commercial Courts has resulted in loss of business to other courts, although preference for English law prevails in international contracts. In March 2015, the court announced a 576% hike in court fees (making the arbitration regime lucrative and the arbitration lobby happier).[20]

B. United States

The Commercial Division of the Supreme Court of the State of New York was established pursuant to an administrative decision of the Chief Justice of the Supreme Court of the State of New York, in November 1995, at Monroe County (Rochester) and in New York County.[21]

In 1993, four Commercial Courts were established on an experimental basis under the management of the then Administrative Judge Stanley S. Ostrau.[22] The Commercial Courts Task Force then proposed the expansion of the Commercial Division and suggested recommendations for case management, technology, and other issues to promote the efficient resolution of commercial cases.[23] The Commercial Division is strictly a commercial court that presides over all types of business disputes ranging from breach of contract, business torts, partnership disputes, and unfair competition claims to corporate governance issues, commercial insurance coverage disputes, shareholder derivative actions, commercial financing disputes, and so on.[24] The efficient functioning and the success of the Court is evidenced by the reduction in the number of days taken from filing to disposition of breach of contract cases from 648 days in 1992 to 412 days in 1998. By 2006, 80% of contract cases in the Commercial Division were resolved in 340 days or

Jul. 1, 2015).

[20] Parish Matthew, *London's Commercial Court sinks under its own weight*, Global Arbitration Review (Feb. 6, 2015), available at https://www.linkedin.com/pulse/londons-commercial-court-sinks-under-its-own-weight-matthew-parish?trk=seokp_posts_primary_cluster_res_title.

[21] Commercial Division – NY Supreme Court, New York State Unified Court System, available at http://www.nycourts.gov/courts/comdiv/ (Last visited Jul. 1, 2015).

[22] History – Commercial Division – NY Supreme Court, New York State Unified Court System, available at https://www.nycourts.gov/courts/comdiv/history.shtml (Last visited Jul. 1, 2015).

[23] *Ibid.*

[24] *The Court That's All Business*, 25 (Smith, Gambrell & Russell LLP, Winter 2009/2010), http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl25/1416/.

less, and the ADR program continues to result in settlement for a majority of cases referred to the program.[25]

The New York courts have adopted new age technology to improve the efficiency of their courts with the help of case management software and electronic filing of court documents. Owing to the success of the Filing by Electronic Means (FBEM)[26] pilot program launched in 1999 to test the efficacy of electronic filing in cases (where the parties had agreed to the same), the Chief Administrative judge issued an order expanding electronic filing through the New York State Courts Electronic Filing (NYSCEF) system. Thus, e-filing became mandatory in all Commercial Division cases initiated on and after February 2013.[27]

Presently, there are 28 Commercial Division justices state-wide and the Commercial Division spans ten different jurisdictions namely, Albany, Kings, Nassau, New York, Onondaga, Queens, Suffolk and Westchester Counties as well as the entire Seventh and Eighth Judicial Districts.[28]

C. Singapore

The establishment of the Singapore International Commercial Court (SICC) was in pursuance of a proposal by way of the report of the Singapore International Commercial Court (SICC)[29] Committee released on November 2013. This suggested framework was adopted by way of Parliamentary amendments to the Singapore Supreme Court of Judicature Act (Chapter 332), the Legal Profession Act (Chapter 161) and the Singapore Rules of Court. The SICC was formally established on January 5, 2015 with the aim of boosting Singapore as a leading forum for dispute resolution in Asia. The SICC is to be a part of the Supreme Court of Singapore[30] and has been constituted as "*a statutory division of the High Court under the Supreme Court of Judicature Act (SCJA)*."[31] Thus, the SICC resembles the Qatar International

[25] *Ibid*.
[26] Jonathan Lippman C.A.J., *Report on the Unified Court System's Filing By Electronic Means Pilot Program 1999-2004*', New York Unified Courts System 5 (Jun. 6, 2005), https://www.nycourts.gov/reports/FBEM.pdf.
[27] Clara Flebus, *Electronic Filing: A Paperless Future in New York State Courts*, 8(26) New York County Lawyer (Dec. 2014).
[28] *Supra* note 21.
[29] Report of the Singapore International Commercial Court Committee (Ministry of Law, Nov. 2013) (Singapore), available at http://www.sicc.gov.sg/documents/docs/Annex%20A%20-%20SICC%20Committee%20Report.pdf.
[30] *Ibid*, at 17.
[31] *Ibid*, at 15.

Court and Dispute Resolution Centre and the Dubai International Financial Centre Courts in some respects.[32]

The SICC has jurisdiction to try an action or claim that is: (*a*) international and commercial in nature, and (*b*) one that the High Court may hear and try in its original civil jurisdiction.[33]

There has been a shift in preference from London to Singapore among Indian companies, who have filed as many as 49 cases in the Singapore International Arbitration Center in 2012 – double the number since 2009.[34] In fact, India is just behind China (52 cases) and above Indonesia (28 cases). The other specialised commercial courts in Singapore are the Admiralty Court, Intellectual Property Court, and Arbitration Court.

III. The 2015 Bill: A Critical Analysis

Keeping in mind the developments that have taken place in England, United States, and Singapore, let us now have a look at the present Bill.

A review of the preamble and the objects of the Bill would show that it seeks to provide (*a*) for the constitution of Commercial Divisions and Commercial Appellate Divisions in the High Courts, and (*b*) for the creation of Commercial Courts in other parts of the country. However, only those commercial disputes which are of high value are sought to be brought within the purview of these Divisions and Courts.

The Bill provides for a very comprehensive definition of the expression "*commercial dispute*" in Section 2(1)(a), to include all kinds of commercial transactions, maritime matters, joint venture agreements, construction contracts, shareholders agreement, partnership disputes, disputes relating to intellectual properties, insurance, and technology development agreements *inter alia*. By virtue of two explanations incorporated under Section 2(1)(a), disputes that relate to the recovery of immovable property, and disputes to

[32] Beth Cubitt, Ian Roberts, Rupert Coldwell and Yicheng Chen, *Recent legislative bills passed paving the way for the Singapore International Commercial Court* (Clyde & Co., Nov. 27, 2014), http://www.clydeco.com/insight/updates/view/recent-legislative-bills-passed-paving-the-way-for-the-singapore-internatio.

[33] *New Singapore International Commercial Court* (Gard A.S., Jan. 16, 2015), http://www.gard.no/ikbViewer/web/updates/content/20810563/new-singapore-international-commercial-court.

[34] *Singapore's Planned International Commercial Court to Take Business Away from London and Hong Kong,* South China Morning Post (Feb. 12, 2014), http://www.scmp.com/business/companies/article/1426528/singapores-planned-international-commercial-court-take-legal.

which the State or an instrumentality of the State is a party are also brought within the definition, if they are fundamentally commercial disputes.

Section 3 of the Bill empowers the Central Government (*a*) to constitute a Commercial Division in every High Court having ordinary original civil jurisdiction, and (*b*) to constitute a Commercial Court, in places where the High Court does not have ordinary original civil jurisdiction. Section 3 also empowers the States and the Union Territories to create Commercial Courts in areas over which the High Court does not exercise ordinary original civil jurisdiction.

Section 4 empowers the Chief Justice of the High Court to nominate judges to the Commercial as well as Commercial Appellate Division, for a period of two years, while Section 5 prescribes the procedure for appointment of Judges of Commercial Courts (not to be confused with the Commercial and Commercial Appellate Division of the High Courts). The latter provision makes the High Court itself the appointing authority.

The jurisdiction of the Commercial Divisions of High Courts, the jurisdiction of the Commercial Courts, and the jurisdiction of the Commercial Appellate Divisions of the High Courts are defined in Sections 6 to 8 of the Bill. Further, Section 9 imposes a bar against the filing of any revision against any interlocutory order of a Commercial Court, including an order relating to the question of its jurisdiction.

Section 10 provides for the transfer of any suit to the Commercial Division or Commercial Court, even if the subject matter of the suit does not fall within the definition of the expression "*commercial disputes*" provided that the counter claim relates to a commercial dispute of a specified value. Section 11 is devoted entirely to the question of jurisdiction in respect of arbitration matters.

Interestingly, Section 12 bars the Commercial Division or the Commercial Court from entertaining any suit, application, or other proceeding relating to a commercial dispute, if the jurisdiction of the civil court is expressly or impliedly barred under any other law, in respect of such dispute.

Section 13 provides the definition of the expression "*specified value*" and the procedure for determination of the same. Sections 14 and 15 provide for appeals from orders of Commercial Divisions and Commercial Courts.

Section 16 goes a step further by providing that any appeal or writ petition filed in a High Court against the orders of certain Tribunals, such as (*i*) Competition Appellate Tribunal, (*ii*) Debts Recovery Appellate Tribunal,

(*iii*) Intellectual Property Appellate Board, (*iv*) Company Law Board or National Company Law Tribunal, (*v*) Securities Appellate Tribunal, and (*vi*) Telecom Disputes Settlement and Appellate Tribunal, shall be heard and disposed of only by a Commercial Appellate Division, if the subject matter of the appeal or writ petition relates to a commercial dispute.

Section 18 lists out, with reference to the Schedule to the Act, the provisions of the Code of Civil Procedure that would stand amended in cases heard by these specialised courts. Section 19 provides for transfer of pending cases. Section 20 mandates the provision of infrastructural facilities and Section 21 mandates training and continuous education for judges.

A very innovative provision is incorporated in Section 22 to provide for the uploading of statistical data relating to the suits, applications, and appeals filed before these Courts, the status of each one of them, and other information on the website of the High Court every month. The Act is also given an overriding effect in respect of other enactments, under Section 24.

Though the Act appears to be novel and comprehensive, there are some shortcomings:

First, though the Bill mandates an increase in the number of judges of the High Courts, it provides only for the nomination of existing judges to the Commercial Divisions and the Commercial Appellate Divisions. Therefore, it is not known as to how effective such a creation would be, especially considering that one-third of the posts in the High Courts are presently lying vacant.

Second, in so far as the provision for the creation of an independent Commercial Court is concerned, it is not known as to how the provisions contained in the Bill could be harmoniously construed with Article 233 and 234 of the Constitution of India. Article 233 vests the power of appointment of District Judges in any State, with the Governor of the State, to be made in consultation with the High Court of the State. Similarly, Article 234 vests with the Governor of the State the power of appointment of Subordinate Judges (other than District Judges) in accordance with the Rules made by him, after consultation with the State Public Service Commission and with the High Court concerned. Therefore, Commercial Courts at the level of District Judges and Subordinate Judges cannot be created except with the concurrence of the State Governments and the creation of a separate cadre and sanction of posts by the State Government.

Third, under Article 217(2)(a) of the Constitution, a person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen

of India and has for at least ten years held a judicial office in the territory of India. In *Kumar Padma Prasad* v. *Union of India*[35], the Supreme Court interpreted the expression "*judicial office*" to mean judicial office as defined in Article 236(b). Article 236(a) defines the expression "*district judge*" to include Judge of a City Civil Court, Additional District Judge, Joint District Judge, Assistant District Judge, Chief Judge of a Court of Small Causes, Chief Residency Magistrate, Additional Chief Residency Magistrate, Sessions Judge, Additional Sessions Judge, and Assistant Sessions Judge. Article 236(b) defines the expression "*judicial service*" to mean a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge. Therefore, it is not known whether the posts occupied by judges appointed to man these Commercial Courts (other than in the High Courts) would fall within the definition of the expression "*judicial office*" in Article 217(2)(a).

Fourth, the above question assumes significance in the light of the judgment of the Supreme Court in *S.D. Joshi* v. *High Court of Bombay*[36], where the Supreme Court was concerned with the question of whether the Family Court Judges are eligible and entitled to be considered for elevation as Judges of the High Court in terms of Article 217 of the Constitution or not. The Court finally held that the Principal and other Judges of the Family Court may be Judges presiding over such courts in the generic sense, but *stricto sensu* they are not members or an integral part of the judicial service of the State of Maharashtra as defined in Article 236, and hence, they do not hold a judicial office as contemplated under Article 217 of the Constitution. Therefore, this is one area which has not been addressed by the Bill.

Fifth, Section 16 of the Bill mandates that an appeal or a writ petition filed in a High Court against the orders of certain Tribunals, such as the Competition Appellate Tribunal, Debt Recovery Appellate Tribunal, Intellectual Property Appellate Board, Company Law Board or National Company Law Tribunal, Securities Appellate Tribunal, and Telecom Disputes Settlement and Appellate Tribunal shall be heard and disposed of by the Commercial Appellate Division of such High Court, if the subject matter of such appeal or writ petition relates to a commercial dispute. However, it is not clear whether Section 16 would apply notwithstanding anything contained in the respective enactments under which the tribunals indicated in Section 16 are constituted. Take for instance, the Competition Appellate Tribunal constituted under the Competition Act, 2002. Any order of the Competition Appellate Tribunal can be challenged only before the

[35] *Kumar Padma Prasad* v. *Union of India*, (1992) 2 SCC 428.
[36] *S.D. Joshi* v. *High Court of Bombay*, (2011) 1 SCC 252.

Supreme Court under Section 53-T of the Competition Act, 2002. Despite the decision of the Constitution Bench of the Supreme Court in *L. Chandra Kumar*[37], today the question remains at large as to whether the Tribunals, whose orders are appealable only to the Supreme Court, are also amenable to the jurisdiction of the High Court. Some of the Acts under which the Tribunals indicated in Section 16 of the Bill are constituted, contain two type of provisions: (*a*) a provision relating to the overriding effect of the Act, and (*b*) a provision barring the application of other laws. This is an area which does not appear to have been addressed in the Bill in question.

Finally, the very question as to whether a case filed in the Commercial Division of the High Court or the Commercial Court relates to a commercial dispute or not is likely to be fought by cantankerous litigants and consenting lawyers. This is due to the fact that though the definition of the expression "*commercial dispute*" is very exhaustive, it is impossible to bring everything within the written code. Take for instance a petition for oppression and mismanagement, filed under Sections 397 and 398 of the Companies Act, 1956 before the Company Law Board in relation to a closely held family company. All issues arising for such consideration in such a petition need not necessarily be commercial disputes, even if they are of high value. The role of the Company Court or for that matter, the role of the National Company Law Tribunal is well defined in such cases, since they are not concerned about the commercial or non-commercial nature of such disputes.

Conclusion

I am conscious of the difficulties that the draftsmen face while drafting legislation. As part of the Rules Committee of the High Court, I have realised the difficulties of drafting legislation (including subordinate legislation). Therefore, the shortcomings that I have pointed out herein are not aimed at belittling the efforts of the lawmakers, but only to highlight that these problems may have to be addressed before it takes final shape.

[37] *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 : AIR 1997 SC 1125.