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Intellectual Property

What India's New Commercial Courts Mean For IP Owners

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The creation of India's new commercial courts are a step toward improving India's IP regime.

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("the Act") which took effect on October 23, 2015, is also a significant piece of a larger move at improving the business environment in India.

India's economy is expanding briskly at 7% despite global headwinds. Foreign inflows are at a record high and there is a marked effort to stimulate domestic manufacturing and services. The "Make in India" and "Start Up India" campaigns to promote manufacturing and entrepreneurship in the country are notable examples of this.

But running a business in India has its challenges. Though the World Bank's recent *Doing Business* report shows an improved business environment, with India ranking 130 out of 189 countries, performance on a key metric - enforcing contracts - remains unchanged. As in 2015, the 2016 report ranks us 178 out of 189 countries. This must change, for, speedy and effica-

cious contract enforcement is imperative for healthy bottom lines of companies.

On this count, the Act is a significant legislative initiative. Let's look at key provisions on the strength of which it seeks to improve the quality of judicial processes.

What's in the New Law.

The Act calls for dedicated courts for adjudicating 'commercial disputes' where the value of the subject matter is more than Rs. 10 million (\$ 150,000). Under this new law, state governments are empowered to set up separate commercial courts equivalent to district courts. For territories where the High Court itself is vested with original jurisdiction (High Courts of Delhi, Bombay, Calcutta, Madras and Himachal Pradesh), commercial divisions are to be constituted within these High Courts by appointing one or more benches of single judges. Appeals from both commercial courts and commercial divisions will be heard by newly formed commercial appellate divisions, also comprising High Court judges.

Further, the law brings changes to the Civil Procedure Code, 1908 ("CPC")—to the extent it is applicable to commercial disputes within the scope of the new law—that may help speed up litigation before the new dedicated commercial courts, an important issue in India. The CPC is the general Indian law governing civil suit procedures. Currently, courts more often than not condone litigants missing filing deadlines, resulting in de-

lays and making frequent adjournments and protracted trials commonplace. A significant change introduces global practices such as ‘case management hearings’ entailing a six-month window from the date of the first hearing to close arguments. Other notable provisions include:

- If no written statement is filed by a defendant within 120 days from the date of having been served with the summons, the right to file a written statement stands abdicated;
- Evidence is to be recorded on a day to day basis;
- Judgment is to be pronounced within 90 days of the conclusion of arguments;
- The Act also prohibits review or revision of an interlocutory order passed by a commercial court. An aggrieved party can challenge an interlocutory order only in appeal to the final decree made in the case. This is important because there is currently a lot of unnecessary review and revision petitions clogging the judicial system at present; and
- All appeals are to be disposed of within 6 months.

Legal costs too are covered quite elaborately including heavy penalties for those indulging in frivolous litigation or wrongful withholding of documents. Provisions to award costs have always existed under the CPC, however, there are many qualifiers, and this has meant that awards of substantial costs are rare. The Act seeks a shift in trend where the unsuccessful party pays the costs of the successful party, including its legal costs, more as a norm than exception.

The Intellectual Property Perspective.

“Commercial disputes” have been defined broadly in the Act and specifically include disputes related to intellectual property. Further, in a significant ruling in February, the Delhi High Court interpreted the provisions of the new Act to mean that *all* intellectual property disputes under the trade marks, patent, copyright, design and geographical indications statutes that were pending before it on October 23, 2015 (the date the Act took effect) will be heard and decided by its commercial divisions irrespective of whether or not the suits met the Rs. 10 million valuation criteria.

IP lifecycles, particularly in the case of patent and design rights, are short and from that perspective quick adjudication of disputes is vital for an IP owner to successfully commercialize products. So the stringent timelines under the new law will serve IP interests well.

Also, the technical elements in IP disputes can be quite complex and judges with specialist knowledge counts as a favorable factor. This idea finds resonance in the Draft National IPR Policy which lists within its objectives the designation of specialized patent benches in the High Courts of Madras, Calcutta, Bombay and Delhi. As matters stand, it is these four courts which hear most IP suits in the country and over time, commercial division judges will expectedly gain a stronger understanding of

IP issues. This should prove especially beneficial for areas in which IP litigation is still at a nascent stage, because concentration of matters before a few judges with more expertise should result in greater uniformity in statutory interpretation and implementation.

Ultimately, IP owners seek certainty of outcomes and mitigation of risks to ensure business success. India has been under attack for its lengthy adjudication processes and sometimes inconsistent rulings. The new commercial courts hold out the promise of remedying such ills and are thus a step in the right direction for an improved IP regime.

Yet, these fast track courts may not be the panacea for all that is not optimal. IP suits are but one component of commercial litigation and by some estimates, more than half of the more than 30,000 civil suits pending before the five High Courts with original jurisdiction are commercial disputes within the meaning of the Act. Sheer numbers are likely to slow down progress. Critics argue that one way to address this issue would be to raise the pecuniary jurisdiction under the new law – a Rs. 10 million threshold appears too low and ought to be raised 500% or more to bring down pendency rate of high value commercial disputes quickly.

It is equally important to keep in mind that commercial courts set up in other jurisdictions such as the UK and Singapore have proved successful on the back of procedural innovation and clarity on everything from the length of pleadings, the manner in which documents are to be submitted and the consequences of non-compliance with strictly enforced timelines. In a sense, the commercial courts framework must evolve to ensure there is a paradigm shift not just in the pace of litigation in India but the whole approach to it – adjudication ought to be viewed as a public service, which is supposed to enforce rights, and reach a correct decision *within* the constraints of time and cost and not regardless of them. In this regard, clear practice directions will be imperative to ensure that commercial court judges enforce the new Act in both letter and spirit and further, implement it uniformly across the country.

Concerns also exist around the fact that specialized commercial courts in other countries employ specialist judges to increase efficiencies. That is not so for India’s new commercial courts and divisions. The Act does make mention of facilities to train judges appointed to such courts but the government will do well to lay out more specific training schedules and courses for commercial court judges to assist them. Such concerns are particularly valid for IP disputes which have technical aspects.

A Game Changer?

First off the blocks, the High Court of Delhi already has six benches functioning as commercial divisions. Other courts are expected to follow soon.

In creating specialized commercial courts, a significant first step has been taken – it is often a parameter utilized to gauge the quality of judicial processes in a jurisdiction. But the proof of the pudding lies in its eating. It is

very early days yet and tangible outcomes will only be revealed in the months ahead- this is confirmed by the experiences of the lawyers at this firm so far. Given the strong intent underlying this attempt at judicial reform,

one hopes it will mark a transformative leap in the prevailing judicial system.

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