

COMMERCIAL COURTS IN INDIA: THREE PUZZLES FOR LEGAL SYSTEM REFORM

—PROF. (DR.) SUDHIR KRISHNASWAMY &
VARSHA MAHADEVA AITHALA*

Are commercial courts in India effective? This paper attempts to answer the question by reviewing the performance of the commercial courts set up under the Commercial Courts Act, 2015 using quantitative and qualitative methods, nearly four years after the 2015 Act was introduced. When we re-evaluate the utility of the commercial courts in terms of whether they have lived up to their expectations, using the Delhi High Court as a live example and through court observations of the commercial court in Bengaluru, we note with concern that the objective of speedy and effective justice for commercial matters has not been achieved. On the contrary, we show that justice delivery for commercial matters has slowed down since the 2015 Act came into force.

I. INTRODUCTION

“Delays and pendency of economic cases are high and mounting in the Supreme Court, High Courts, Economic Tribunals, and Tax Department, which is taking a severe toll on the economy in terms of stalled projects, mounting legal costs, contested tax revenues, and reduced investment...”

—Economic Survey of India 2017-18¹

In the last few years, much has been made of India’s improved ranking in the World Bank’s annual ‘Ease of Doing Business’ Report (“**EODB Report**”). The EODB Report 2020 has lauded India’s achievement of being one of top 10 economies in the world that improved the most on the ease of doing business front. India witnessed a jump from a ranking of 142 to 63 in the last four years,

* Prof. (Dr.) Sudhir Krishnaswamy is the Vice Chancellor of the National Law School of India University, Bengaluru; Varsha Aithala is a Research Fellow at Azim Premji University, Bengaluru.

Correspondence address: Varsha Aithala, Azim Premji University, PES Campus, Pixel Park, B Block Hosur Road Beside NICE Road, Electronic City, Bengaluru, Karnataka 560100. Email: varshaathala@gmail.com.

¹ Ministry of Finance, Department of Economic Affairs, *Economic Survey 2017-2018*, available at <http://mofapp.nic.in:8080/economicsurvey/> (Last visited on July 30, 2020).

after implementing regulatory reforms.² These rankings serve as proof of the exceptional reforms implemented by the Government. The previous Economic Survey (2017-2018) highlighted India's "striking progress" on taxation and insolvency reforms, protection of minority investors, ease of obtaining credit and the importance of an efficient, effective and expeditious contract enforcement regime for economic growth and development.³ However, the 2018-2019 Economic Survey bemoans India's inability to enforce contracts and resolve legal disputes as 'arguably the single biggest constraint to ease of doing business in India'.⁴

The establishment of commercial courts exclusively for the efficient resolution of complex business disputes was the key policy measure introduced by the Government to improve India's position on the enforcement of contracts indicator. It was touted as a major step towards reform of India's civil justice system to ensure quick enforcement of contracts, facilitate easy recovery of monetary claims and the award of just compensation for damages. This, it was argued, would encourage investors to establish and operate businesses in India and result in rapid economic growth.⁵

In this paper, we assess the contribution of commercial courts to more efficient enforcement of contracts. We begin by exploring the legislative history for the new law set out in the 188th and 253rd Reports of the Law Commission of India. Then, we assess whether these recommendations were incorporated into the Commercial Courts Act, 2015 and implemented in that spirit. This detailed exploration of the legislative history uncovers how the current reform policy was chosen and shaped. Finally, we analyse the data from the Delhi High Court and qualitative research in the Bengaluru commercial court to ascertain whether these reforms have resulted in quicker case disposals. We conclude by showing that commercial courts may unintentionally have resulted in further delays in the disposal of commercial disputes. Through this case study, we identify three distinct puzzles for legal system reform. Firstly, why do legal system reform initiatives designed to improve judicial outcomes have the opposite effect? Secondly, is the cause of failure built into the chosen reform strategy or the result of poor implementation? Finally, can legal system reform measures succeed without

² World Bank Group, International Bank for Reconstruction and Development, *Doing Business 2020*, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/97814648144402.pdf> (Last visited on July 30, 2020) accessed 14 November 2019.

³ Ministry of Finance, Department of Economic Affairs, *Economic Survey 2017-2018*, 131 (January, 2018), available at <http://mofapp.nic.in:8080/economicsurvey/> (Last visited on July 30, 2020).

⁴ Ministry of Finance, Department of Economic Affairs, *Economic Survey 2018-2019*, available at <https://www.indiabudget.gov.in/economicsurvey/> (Last visited on July 30, 2020).

⁵ The Financial Express, *Ease of Doing Business rankings 2018 highlights: India took giant leap of 53 positions under paying taxes category*, October 31, 2017, <https://www.financialexpress.com/economy/world-bank-ease-of-doing-business-report-2018-live-updates-india-ranking-index-arun-jaitley/914076/> (Last visited on July 30, 2020).

reshaping legal culture? This paper aims to explore the reform effort with commercial courts to develop partial responses to these puzzles.

II. COMMERCIAL COURTS ACT, 2015: POLICY CHOICE AND POLICY DESIGN.

In 2003, the 188th Report of the Law Commission of India (“**Law Commission**”) first recommended setting up of fast track courts in the High Courts.⁶ In 2009, the Commercial Division of High Courts Bill was approved by the Lok Sabha (“**2009 Bill**”). The Bill was then examined by a Select Committee of the Rajya Sabha (“**Select Committee**”), which presented its Report on July 29, 2010.⁷ A revised Commercial Division of the High Courts Bill, 2010 was presented before the Rajya Sabha. Owing to reservations expressed by several members of Parliament, the 2010 Bill was referred to the Law Commission for re-examination of its provisions. In particular, the Law Commission was tasked with scrutinizing the scope and definition of ‘commercial dispute’.⁸

The Law Commission, then engaged in several discussions with expert committees, and submitted a new report in 2015, namely, the 253rd Report. The 253rd Report recommended setting up commercial courts, and Commercial Divisions and Commercial Appellate Divisions in the High Courts.⁹ As a result, the Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Act, 2015 (the “**2015 Act**”) was enacted by both Houses of Parliament on January 1, 2016 and made effective from October 23, 2015. In August 2018, the Act was amended through the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (the “**Amended Act**”) (the 2015 Act and the Amended Act together referred to as the “**Act**”) to reduce the pecuniary limits to jurisdiction for commercial disputes, thereby increasing the workload of these courts.

Unlike recent Indian legislations which were enacted by Parliament without much debate, the 2015 Act has undergone several modifications across 15 years

⁶ Law Commission of India, *Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts*, Report No.188, (December 2003), available at <http://lawcommission-ofindia.nic.in/reports/188th%20report.pdf> (Last visited on July 30, 2020).

⁷ PROF. P.J. KURIEN COMMITTEE, *Report of the Select Committee on the Commercial Division of High Courts Bill, 2009 as passed by Lok Sabha*, (July 29, 2010), available at <http://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf> (Last visited on July 30, 2020).

⁸ Law Commission of India, *Report on Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*, Report No.253, 8, (January 2015), available at http://lawcommission-ofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and__Commercial_Courts_Bill._2015.pdf (Last visited on July 30, 2020).

⁹ *Id.*, 60.

before reaching its present iteration. In this Section, we review the evolution of the commercial court's policy across three main policy documents: the 188th and 253rd Reports, the 2015 Act, and the Amended Act. We focus on the changing objectives of the policy, the jurisdiction of the court, procedure to be followed and the costs rule.

A. MODEL OF COMMERCIAL COURTS

We begin with a brief discussion on the goals of commercial courts and examine if, and how, these goals have shifted over time.

In its 188th Report, the Law Commission *suo motu* took up the subject of setting up commercial courts. It was concerned with the perception that the Indian judicial system had 'collapsed'¹⁰ due to inordinate delays. Moreover, quick resolution of high value commercial matters by directly bringing it before a Division Bench of a High Court, as compared to a district Court or a Single Judge Bench, would inspire within local and foreign investors a new confidence. This confidence would be buttressed by the numerous economic policies India has adopted since 1991. It recommended that the 'new' and 'effective' commercial courts should be fast track courts, equipped with technological facilities for online filing and video conferencing for expeditious disposal of complex or high pecuniary value commercial suits within one or two years.¹¹

This High Court Division Bench approach continued in the 2009 Bill, which implemented the 188th Report. Commercial Divisions of High Courts were required to follow a fast track procedure, i.e. dispose cases and pronounce judgments within 30 days of the conclusion of arguments. When the Select Committee reviewed the 2009 Bill, some members of the Committee expressed reservations about "simply copying the concept of commercial courts from western countries without any analysis of the situation prevailing in India".¹² They felt that the 188th Report failed to consider statistical data on actual pendency numbers for commercial matters in various courts, and were worried by the lack of specialist commercial training for judges of these Divisions.¹³

¹⁰ *Id.*, 2.

¹¹ Law Commission of India, *Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts*, Report No. 188, (December 2003), available at <http://lawcommission-ofindia.nic.in/reports/188th%20report.pdf>. (Last visited on July 30, 2020).

¹² Prof. P.J. Kurien Committee, *Report of the Select Committee on the Commercial Division of High Courts Bill, 2009 as passed by Lok Sabha*, 23, (July 29, 2010), available at <<http://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf>> (Last visited on July 30, 2020).

¹³ Law Commission of India, *Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts*, Report No. 188, 18, (December 2003).

This idea of fast track courts morphed in the 253rd Report, which moved beyond High Court Divisions to see commercial courts as a forum dedicated to resolving complex commercial matters. These forums were not limited only to high value commercial disputes but would extend to all disputes over time. The rationale was that commercial courts created a stable, certain and efficient dispute resolution mechanism, essential for India's economic development. Commercial courts would function as model courts, establishing new norms of practice in commercial litigation that could over time be scaled up and extended to all civil litigation in India. The procedure followed by these courts could form the basis of a larger reform of the country's Civil Procedure Code.

Following a similar theme, the 2015 Act set up commercial courts as an independent mechanism for early resolution of 'high value' commercial disputes involving 'complex facts and question of law'.¹⁴ Early resolution of commercial disputes would 'create a positive image to the investor world about the independent and responsive Indian legal system',¹⁵ a measure towards improving ease of doing business in India. The objectives were to: "promote accelerated economic growth, improve the international image of India's justice delivery system and enhance investor communities' faith in our legal culture".¹⁶

The 2018 amendments to the 2015 Act reiterate the commitment of the 253rd Report to ensure 'speedy settlement of commercial disputes of even lesser value, widen scope of courts to deal with commercial disputes and facilitate ease of doing business'. This will create a 'positive image' about the 'strong and responsive Indian legal system', so India can *further* improve its ranking in the EODB Report.¹⁷

The basic model of these courts has also shifted over time. While the 188th Report focused on creating Commercial Divisions at the High Court level granting no jurisdiction to district courts, the Amended Act moves the entire burden of adjudication to commercial courts set up at the subordinate court level. In the next Section, we explore the choice of forum in greater detail.

¹⁴ The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015, 25 of 2015, Statement of Objects and Reasons, available at <https://www.prsindia.org/uploads/media/Commercial%20courts/Commercial%20courts%20bill,%202015.pdf> (Last visited on July 30, 2020).

¹⁵ *Id.*

¹⁶ Standing Committee on Personnel, Public Grievances, Law and Justice, The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015, *Seventy Eighth Report*, (December 2015), available at https://www.prsindia.org/sites/default/files/bill_files/SCR-Commercial_Courts_bill.pdf. (Last visited on July 30, 2020).

¹⁷ The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018, 123 of 2018, Statement of Objects and Reasons.

B. JURISDICTION OF COMMERCIAL COURTS

1. Which Court Exercises Jurisdiction?

The Law Commission in its 188th Report recommended that commercial disputes of high pecuniary value should go directly before a Commercial Division of the High Court, rather than to a District Court or a Single Judge Bench of the High Court. Decrees of commercial matters in original suits and for transferred matters would be executed by the Commercial Division of High Courts and not by subordinate courts. This approach continued till the 2009 Bill.

The Select Committee, which examined the 2009 Bill, felt that it would be necessary to create a Commercial Division in the Supreme Court in the future since the Bill provided for an appeal to lie to the Supreme Court against any decree, passed by the Commercial Divisions. It suggested that the issue of providing original jurisdiction to some High Courts, as the 2009 Bill envisaged, should be dealt with separately in a comprehensive law on judicial reforms, with a view to have uniformity in the judicial system.¹⁸

The 253rd Report recommended that (i) in High Courts with ordinary original civil jurisdiction, Commercial Divisions are set up in High Courts; (ii) commercial courts are set up in High Courts even in regions where the original jurisdiction of High Courts does not extend (like Pune or Madurai) and (iii) commercial courts are set up at the district court level in territories where the High Courts do not have ordinary original civil jurisdiction.¹⁹

The 2015 Act followed the 253rd Report and mandated setting up of Commercial Divisions in those High Courts exercising ordinary original civil jurisdiction, i.e. at Bombay, Calcutta, Chennai, Delhi and Himachal Pradesh. In these territories, no commercial courts are constituted at the district level. Commercial Divisions adjudicate commercial disputes filed on the original side of these High Courts and transferred to High Courts under other laws. For all other States and Union Territories whose High Courts do not have ordinary original civil jurisdiction, commercial courts are set up at the district court level. However, under the Amended Act, 2018 even where High Courts enjoy ordinary original civil jurisdiction, commercial courts are to be set up at the district court level. For other territories where High Courts do not exercise ordinary jurisdiction,

¹⁸ Prof. P.J. Kurien Committee, *Report of the Select Committee on the Commercial Division of High Courts Bill, 2009 as passed by Lok Sabha*, 08, (July 29, 2010), available at <http://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf> (Last visited on July 30, 2020).

¹⁹ Law Commission of India, *Report on Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*, Report No. 253, 53 (January 2015).

commercial courts are to be established at a court below the level of a district judge.²⁰

Hence, what began as a minor reform by the introduction of a new High Court Division has transformed into a structural reform of the subordinate court structure on the civil side. While the scale of reform was magnified, there was no corresponding budgetary allocation or programme for radical cultural transformation of these new lower courts. In the absence of these initiatives, it is unclear why the introduction of these new courts was assumed to be transformative.

C. SUBJECT MATTER JURISDICTION

The 188th Report proposed a broad definition of ‘commercial dispute cases’ to include any transaction or dispute of a *commercial* or *business* nature. The envisaged disputes include banking and insurance transactions, contracts for the sale and supply of goods or services (national or international) and commercial cases, disputes of building contracts, partnership agreements and business property. A residuary clause was added to the definition, enabling High Courts to notify other disputes to be included in the definition. The Report also set out detailed explanations of matters which fall within the meaning of a commercial dispute.

In the 2009 Bill that followed, an exhaustive definition of ‘commercial disputes’ was provided to mean “those disputes arising out of ordinary transactions between *merchants, bankers* and *traders such as* those relating to mercantile transactions, franchising, distribution and licensing agreements, maintenance and consultancy agreements, and agreements relating to hardware and software technology and internet and intellectual property.” Interestingly, the Bill suggested that the ‘specified value’ of a suit was the necessary determinant to vest jurisdiction over a matter in the Commercial Division.²¹

²⁰ The Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts (Amendment) Act, 2018(§3. “(1) The State Government, may after consultation with the concerned High Court, by notification, constitute such number of Commercial Courts at District level, as it may deem necessary for the purpose of exercising the jurisdiction and powers conferred on those Courts under this Act:

Provided that with respect to the High Courts having ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, constitute Commercial Courts at the District Judge level:

...

(3) The State Government may, with the concurrence of the Chief Justice of the High Court appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of a Commercial Court either at the level of District Judge or a court below the level of a District Judge.”)

²¹ *Id.*, 168-170.

The Select Committee reviewing the 2009 Bill observed that the exhaustive definition of commercial disputes needs to be made inclusive to provide as much clarity as possible.²² It recommended adding to the definition, ‘joint venture, shareholder, subscription and investment agreements; agreements relating to the services industry including outsourcing services, and financial services’. The Report warned that a very wide definition would lead to extensive litigation.

The 253rd Report however failed to pay heed to this warning and further expanded the scope of “commercial disputes”. The broadened definition covers all categories of disputes which arise out of ordinary transactions of *merchants, bankers, financiers and traders* relating to 22 categories of documents including mercantile documents, agreements relating to immoveable property, construction and infrastructure contracts, and transactions relating to intellectual property rights, insurance, air crafts and carriage of goods and export and import of goods and services among others.

This legislative debate on the definition of a commercial dispute is anticipated by the academic debate on the scope of commercial law. Goode (2015), in his treatise on commercial law,²³ examined whether commercial law should be distinguished 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”. Goode observed that historically, it has been very difficult if not impossible, to draft a code that applies exclusively to a civil or commercial transaction,²⁴ and hence, the hair splitting is best avoided.

A similar problem is encountered in the 2015 Act and the Amended Act. Following the recommendations of the 253rd Report, ‘commercial disputes’ has been defined very widely. ‘Commercial disputes’ includes disputes arising out of ordinary transactions of *merchants, bankers, financiers and traders*, which we categorise under three broad headings:

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

²² Prof. P.J. Kurien Committee, *Report of the Select Committee on the Commercial Division of High Courts Bill, 2009 as passed by Lok Sabha*, 11, (July 29, 2010), available at <http://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf> (Last visited on July 30, 2020).

²³ Roy Goode, Herbert Kronke&Ewan McKendrick, *Transnational Commercial Law: Texts, Cases and Materials*, 7-8 (2nd ed., 2015).

²⁴ *Id.*, 8.

- (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.

Such a broad definition is superfluous since it negates subject matter assessment while determining whether a dispute is a ‘commercial dispute’. In practice, commercial disputes are essentially civil disputes of higher pecuniary value. As we discussed earlier, the legislative history of the Act also seems to support this view, even though it effectively converts specialist commercial courts to ordinary civil courts.

D. PECUNIARY JURISDICTION

The 188th Report recommended that commercial cases of high pecuniary value (minimum of Rupees One Crore, but High Courts could fix this value to up to Rupees Five Crore), on the original side and those on appeal before Division Benches of High Courts, should be determined by the High Court Commercial Division straight way rather than be queued along with other civil appeals pending in High Courts.

The 2009 Bill set a similar high threshold of Rupees five crore (or such higher value as may be specified) for the Commercial Divisions of the High Courts to decide commercial disputes. The Select Committee was concerned that providing for a ‘specified value’ for commercial disputes creates two classes of litigants – those with disputes valued above Rupees five crore who would ‘straight away’ move the special division of High Courts and all others, who would have to approach the civil courts, was in violation of the equality guarantee enshrined in Article 14 of the Constitution. This concern was resolved in the 253rd Report as there were other enactments where, like the 2009 Bill in which special tribunals were created like the Debt Recovery Tribunal, which deals with loan recovery, matters of above Rupees Ten Lakhs. The Committee recommended reducing this value to Rupees one crore from Rupees five crore.

The 253rd Report moved away from the high pecuniary limits set out by the 188th Report and adopted the approach of the Select Committee, retaining a monetary threshold of Rupees one crore. It was suggested that this high threshold would serve as a measure to reduce the case burden on High Courts that were already facing difficulties in disposing pending matters. It recommended that all commercial disputes pending in High Courts and civil courts above this

monetary threshold be transferred to a Commercial Division or commercial court. Commercial courts were set to serve as a pilot project towards reforming India's civil justice system, by providing a dedicated Bench of the High Courts to dispose commercial matters expeditiously, fairly and at reasonable cost to litigants.²⁵

These limits on pecuniary jurisdiction were followed in the 2015 Act, which retained the threshold value at Rupees one crore. Convinced that faster resolution of commercial disputes of 'even lesser value' will 'create a positive image amongst investors about the strong and responsive Indian legal system', and to ensure that disputing parties can resolve commercial disputes at the lowest level of subordinate courts, the Amended Act reduces the pecuniary threshold further to Rupees Three Lakh.²⁶

The periodic and sustained reduction of the pecuniary threshold has removed the distinction originally intended between ordinary civil disputes and 'high value' commercial disputes. Contrary to its original purpose, this also effectively contributes to an increase in the workload of commercial courts – what started off as a minor subset of disputes, now growing to more than three quarters of all civil disputes being litigated in the country.

E. PROVISION OF INFRASTRUCTURE

Under the 188th Report, State Governments and High Courts were required to ensure that Commercial Divisions consisted of as many benches as necessary and there were sufficient judges with 'adequate' experience in civil and commercial laws in position to man these benches. Apart from regular appointments, retired judges of high courts with a proven record of efficiency and who have adequate experience in civil and commercial laws, would also be appointed for this purpose. It was believed that these judges and lawyers would benefit from a programme of continuing legal education on commercial laws.²⁷

There is no specific mention of providing better-trained judicial manpower to the commercial courts in the 2009 Bill. It gives maximum discretion to the Chief Justice of a High Court to determine the composition of the commercial courts.²⁸ The Select Committee reviewing the 2009 Bill recommended that

²⁵ *Id.*, 52.

²⁶ The Commercial Courts Act, 2015, (§2(1)(i); §2(1)(i) of the Act defines "Specified Value" as "in relation to a commercial dispute, shall mean the value of the subject-matter in respect of a suit as determined in accordance with Section 12 which shall not be less than three lakh rupees or such higher value, as may be notified by the Central Government.").

²⁷ Law Commission of India, *Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts*, Report No.188, 03 (December 2003).

²⁸ The Commercial Division Of High Courts Bill, 2009, 139 of 2009, Cl. 3(2), available at http://prsindia.org/sites/default/files/bill_files/The_Commercial_Division_of_High_Courts_Bill_2009.

a single judge decide commercial matters at each Commercial Division, and required expedited filling up of existing vacancies of judges in the high courts to deal with the increased workload due to the bulk transfer of commercial matters from district courts.²⁹

The 253rd Report was highly influenced by the model court guidelines of the Model Court Report and, along these lines, suggested that Commercial Divisions should have access to new technological infrastructure such as computerisation. The Report supported the Government's proposal to increase bench strength in high courts by 25%. Judges of the commercial court would be persons with 'demonstrable expertise and experience' in commercial litigation and were to 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 would be 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 view towards their continuous professional education.³⁰

Despite the detailed attention in the Reports, the 2015 Act and the Amended Act deal with the provision of infrastructure only cursorily. They provide that judges of commercial courts should be persons with experience in dealing with commercial disputes³¹ and impose obligations on State Governments to provide the necessary infrastructure and facilities for training these judges at all levels.³² The absence 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.³³

pdf(Last visited on July 30, 2020).

²⁹ Law Commission of India, *Report on Proposals for Constitution of Hi-Tech Fast-Track Commercial Divisions in High Courts*, Report No.188, 10,12 (December, 2003).

³⁰ Law Commission of India, *Report on Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*, Report No. 253, 41 (January, 2015),

³¹ The Commercial Courts Act, 2015, § 3(3). of the Act: "Constitution of Commercial Courts:... The State Government may, with the concurrence of the Chief Justice of the High Court appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of a Commercial Court either at the level of District Judge or a court below the level of a District Judge."

³² The Commercial Courts Act, 2015, §19, §20 (S. 20 of the Act: "20. Training and continuous education —The State Government may, in consultation with the High Court, establish necessary facilities providing for training of Judges who may be appointed to the Commercial Courts, Commercial Appellate Courts, Commercial Division or the Commercial Appellate Division in a High Court.")

³³ See also, Abhinav Chandrachud, *Commercial Courts and the Ease of Deciding Cases*, July 17, 2018, available at <https://www.bloomberquint.com/opinion/commercial-courts-and-the-ease-of-deciding-cases> (Last visited on July 31, 2020) (Last visited on August 05, 2020) ("The Commercial Courts Act has merely rebranded some of the existing courts in India, like parts of high courts and district courts, as 'commercial courts', without setting up any new infrastructure or appointing any fresh judicial personnel with specialised expertise")

F. COURT PROCEDURE

2. *Case Management*

The 188th Report set out broad guidelines to fast track procedures for filing pleadings, framing issues and dealing with discovery or document production requests. The fast track procedure would be similar to the 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.

The 2009 Bill set out the procedure that the Commercial Divisions would follow, suggesting minor improvements to the Code of Civil Procedure, 1908 (“CPC”) as it applied to commercial disputes. The single judge of the Commercial Division was empowered to hold case management conferences to fix time schedules for filing evidence and written submissions. Some members of the Select Committee pointed out that adopting the CPC *into to*, as the 2009 Bill recommended, was likely to lead to extensive delays “both at the time of trial and later at the time of execution”.³⁴

The 253rd Report dealt with this subject in greater detail. It recommended the introduction of targeted and specific modifications to civil procedural rules to ensure that commercial disputes moved easily through the court system, and judges are given power to ensure that trials are conducted fairly and efficiently.³⁵ For streamlined conduct of litigation, civil revision applications or petitions against interlocutory orders of the commercial court were barred. It suggested that frequent filings of revision applications and petitions against interim orders of the court should be discouraged, and that removing such unnecessary and cumbersome litigative processes would prevent derailing of timelines set out in a case.³⁶

The 2015 Act suggested further improvements in the application of civil procedure rules to commercial disputes. It set out procedures aimed at shifting control over the litigation process from the litigating parties to the judges or courts to ensure that only relevant issues are discussed. Parties were required to cut down length of pleadings and the manner of submission of documents to the court registry³⁷ was to be simple, effective and not cumbersome. This way, costs

³⁴ Prof. P.J. Kurien Committee, *Report of the Select Committee on the Commercial Division of High Courts Bill, 2009 as passed by Lok Sabha*, 14, (July 29, 2010), available at <<http://www.prsindia.org/uploads/media/Division%20High%20Courts/Select%20Committee%20Report.pdf>> (Last visited on July 30, 2020..

³⁵ Law Commission of India, *Report on Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*, Report No. 253, 43 (January, 2015).

³⁶ *Id.*, 48.

³⁷ The Commercial Courts Act, 2015, §16. (S. 16 of the 2015 Act provides for amendments to the provisions of the CPC in their application to any suit in respect of a commercial dispute,

and time spent in litigation would be kept under check and parties would be encouraged to settle disputes outside of the court system.

High courts were required to issue rules or practice directions for managing conduct of trial,³⁸ such as fixing timelines starting from pre-trial hearings for the first hearing, framing of issues, submission of documents, gathering evidence, summoning witnesses and up until completion of trial. Judges were encouraged to use internationally recognized litigation practices like case management hearings with tools such as pre-trial conferences and electronic filing of documents to ensure that litigation is conducted within the time frames scheduled at such hearings.³⁹ In the event of non-compliance with orders, commercial courts could foreclose the non-compliant party's right to carry on the trial or in extreme cases, dismiss their complaint.⁴⁰

The 2015 Act expanded the existing powers of the court to order summary relief under Order 37, CPC. Commercial courts could order summary judgment without regard to nature of relief claimed, and at any stage in the litigation process prior to framing of issues. Summary judgement could be given against a party if the court was convinced that the claim has no substance and there is no compelling reason for not disposing the matter before recording evidence. These were aimed at cutting down the time spent on, and expenses of conducting a regular trial.⁴¹

including those which *inter alia*:

- prescribe strict timelines for filing of pleadings (Order 5 Rule 1 and Order 8 Rule 1, CPC); provide for detailed and stringent procedures for production, discovery (including by interrogatories), disclosure, inspection of documents and impose exemplary costs against a defaulting party which negligently or willfully fails to disclose all documents necessary for its decision (Order 11, CPC);
- impose strict timelines for conduct of proceedings — written submissions to be filed mandatorily within four weeks prior to the commencement of oral arguments (Order 18 Rule 2, CPC), judgements to be pronounced and copies issued to parties, within ninety days from the conclusion of arguments (Order 20 Rule 1, CPC).

³⁸ The Commercial Courts Act, 2015, §18 S. 18 of the 2015 Act: "Power of High Court to issue directions: The High Court may, by notification, issue practice directions to supplement the provisions of Chapter II of this Act or the Code of Civil Procedure, 1908 (5 of 1908) insofar as such provisions apply to the hearing of commercial disputes of a Specified Value."

³⁹ The Commercial Courts Act, 2015, §16 read with the Schedule to the 2015 Act, Order Or. XV-A added to the CPC provides that the first case management hearing should be conducted not later than four weeks from the date of filing of affidavit of admission or denial of documents by all parties to the suit.

⁴⁰ *Id.*, 16 read with the Schedule to the 2015 Act, adding Order Or. XIII-A to the CPC which sets out the procedure for Summary Judgment. Rr. 6(c) and (d) (Orders that may be made by the Court).

⁴¹ Law Commission of India, Report on Commercial Division and Commercial Appellate Division of High Courts Bill, 2015, *Report No.253*, (Law Com No. 253, January 2015). In this Report, the Law Commission of India discusses the advantages of providing for summary judgments and reducing adjournments in the context of promoting a change in the manner of conducting litigation in India, p.25.

The Amended Act has retained the substantive changes made to the procedural laws under the 2015 Act. Without a clear supporting explanation, it imposes an additional requirement of conducting pre-institution mediation in cases where no urgent, interim relief is required.⁴² The Central Government is responsible for formulating the rules and procedures to govern this process.⁴³

As we observe in the next Section, these procedural changes to conducting commercial litigation have had limited impact. The international best practices of civil procedure recommended by the Act have not been used in practice. Instead, the commercial courts resemble ordinary civil courts applying the CPC, 1908.

G. COSTS RULE

The 188th Report and the 2009 Bill do not contain specific provisions for imposition of costs. In fact, the 2009 Bill contains only one reference to the commercial courts' discretion to extend time limits for parties to file written submissions after imposing costs, only in those cases where the court deems this necessary. We note a detailed reference to this only in the 253rd Report, as a measure to be used to 'fundamentally alter the litigation culture in India'.⁴⁴ The Report laments that with costs imposed infrequently and bearing no relation to the actual expenses in a case, litigants have 'little fear of punishment and frequently indulge in delaying tactics'. As a meaningful deterrent against frivolous litigation, it recommended the 'costs to follow the event' regime. Where costs are not awarded, commercial courts were mandated to give reasons for not awarding costs.⁴⁵

The 2015 Act and the Amended Act, 2018 maintain fidelity to the 253rd Report by incorporating majority of its recommendations, particularly those which provide commercial courts with wide powers of imposing costs under the "costs to follow the event" regime. It incorporates amendments to the CPC to determine liability to pay costs and sets out the quantum and period by when costs should be paid. The Act permits imposition of costs to discourage vexatious or frivolous matters. Costs can be ordered to be paid by a party that has no real

⁴² For a critique of this provision of the Act, see also, Anhad Miglani & Sagun Poudyal *Amending the Commercial Courts Act: Quantity over Quality*, August 26, 2018, available at <https://indiacorplaw.in/2018/08/amending-commercial-courts-act-quantity-quality.html> (Last visited on July 31, 2020).

⁴³ *Daramic Battery Separator India Pvt. Ltd. v. Union of India*, W.P. (C) No. 7857 of /2018, The requirement of undertaking pre-institution mediation process was challenged before the Delhi High Court in *Daramic Battery Separator India (P) Ltd. v. Union of India*, on the ground that since there is no mechanism provided in the Act for conducting the mediation, a section of the aggrieved parties is without effective remedy).

⁴⁴ Law Commission of India, *Report on Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*, Report No. 253, 25, (January 2015).

⁴⁵ *Id.*, 47.

claim or refuses to agree to reasonable offers of settlement and delays disposal of matters.⁴⁶ These wide-ranging costs rules have the potential to reshape the incentive structure of commercial litigation.

H. APPEALS

The Law Commission, in its 188th Report, suggested providing a statutory right of appeal to the Supreme Court against decrees in suits and orders passed by the Division Benches of Commercial Divisions of High Courts. The same requirement continued in the 2009 Bill. The 253rd Report replaced this with a new institutional mechanism for appeals - the Commercial Appellate Division at the High Court level. These would hear appeals against orders and decrees from the Commercial Divisions or commercial courts under Order 43, CPC, which enumerates a list of orders of the CPC against which appeals can lie,⁴⁷ and under Section 37 of the Arbitration and Conciliation Act, 1996, dealing with applications for appeals on arbitration matters.⁴⁸

The 2015 Act maintained the Commercial Appellate Division at High Courts as the single forum of appeal.⁴⁹ Civil revision application or petition against interlocutory orders of the commercial court are not allowed, including on the issue of jurisdiction. Furthermore, any challenge to orders of the commercial court should only be raised in appeal to the Commercial Appellate Division of that High Court. Appeals were required to be filed within sixty days from the date of the judgement/order⁵⁰ and disposed by the Commercial Appellate Division within six months from the date of filing such appeal.⁵¹

The Amended Act provides for two types of appellate courts - in High Courts which do *not* enjoy ordinary original jurisdiction, appeals on commercial disputes decided by commercial courts below the level of district court are to be

⁴⁶ The Commercial Courts Act, 2015, §16 (of the Act read with Schedule, substituting S. 35 (Costs) of the Civil Procedure Code, 1908).

⁴⁷ Law Commission of India, *Report on Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*, Report No.253, 40-41, 53-54, (January 2015).

⁴⁸ *Id.*, 53-54.

⁴⁹ The Commercial Courts Act, 2015, §5(1) (“After issuing notification under sub-section (1) of Section 3 or order under sub-section (1) of Section 4, the Chief Justice of the concerned High Court shall, by order, constitute Commercial Appellate Division having one or more Division Benches for the purpose of exercising the jurisdiction and powers conferred on it by the Act.”)

⁵⁰ *Id.*, §13(1) (“Appeals from Decrees of Commercial Courts and Commercial Divisions: Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be...”)

⁵¹ *Id.*, §14 (“Expedition Disposal of Appeals: The Commercial Appellate Division shall endeavour to dispose of appeals filed before it within a period of six months from the date of filing of such appeal.”)

made to the district court which functions as a Commercial Appellate Court;⁵² in High Courts with original civil jurisdiction, the Commercial Appellate Divisions set up under the Act continue to hear appeals from the district commercial courts or Commercial Division of a High Court.

From the earlier conception of reforming the civil justice system maintaining the existing institutional structure and improving it from within, the Act, as it currently operates, has introduced a complicated system of appeals at the subordinate court and High Court levels. However, the bar on interlocutory litigation should improve adjudication flow in commercial courts.

In this Section, we focused on exploring how the legislative and executive branches came to choose the current model of commercial courts. Unless we pay attention to these executive and legislative processes of policy choice and policy implementation, we cannot appreciate how initial good intentions may counter-intuitively result in poor outcomes. By reviewing the court model chosen, jurisdictional coverage, infrastructural provisioning and proposed procedural reforms, we gain insight into how these decisions are made and their likely impact. In the next Section, we see how these policy choices shape outcomes in the field.

III. COMMERCIAL COURTS ACT, 2015 IMPLEMENTATION AND IMPACT.

In this Section, we move from the evolution of commercial court's policy to its implementation. In particular, we ask if the existence of commercial courts have had a direct impact on the quicker resolution of commercial disputes. We use quantitative data on court performance to determine the outcome of reform, and engage in court observations and interviews with key practitioners to isolate plausible reasons for these outcomes.

The 2015 Act has been in implementation since October 2015. The High Courts of Delhi, Calcutta, Himachal Pradesh and Bombay operationalized the original side Commercial Divisions between late 2015 and mid-2017. The Chennai High Court notified the setting up of commercial courts as late as in December 2017. For all other States where High Courts do not possess original civil jurisdiction, commercial courts have been set up at the district court level and as Commercial Appellate Divisions in the High Courts for a majority, of which,

⁵² *Id.*, §3-A (“Designation of Commercial Appellate Courts.—Except the territories over which the High Courts have ordinary original civil jurisdiction, the State Government may, after consultation with the concerned High Court, by notification, designate such number of Commercial Appellate Courts at District Judge level, as it may deem necessary, for the purposes of exercising the jurisdiction and powers conferred on those Courts under this Act.”)

notifications providing for the setting up of these courts are accessible on court databases for 24 States and Union Territories.⁵³

However, detailed information on commercial matters, including litigants' names, case filing, and disposal status are available under the e-Court Mission Mode Project from the respective High Court websites for States and Union Territories in only 8 instances.⁵⁴

In order to assess the performance of the commercial courts, we have adopted a mixed methods model. First, we have identified the commercial courts notified early by High Courts on the original side and which had consistently made their data publicly available. The Delhi High Court has satisfied both criteria.⁵⁵ In this paper, we analyse the Delhi High Court data quantitatively to assess if the creation of commercial courts has hastened the resolution of commercial

⁵³ See, Government of Karnataka, Notification No. LAW 39 LCE 2016, (Notified on September 21, 2017), available at <https://karunadu.karnataka.gov.in/law/Notifications/LAW%2039%20LCE%202016.pdf> (Last visited on August 05, 2020) (notification designating five district courts as commercial courts under S. 3 of the Act); Government of Orissa, Notification No.1748, (Notified on October 28, 2017), available at <http://law.bih.nic.in/ORDER/COURT%20CREATION-17-1150.pdf> (Last visited on August 05, 2020) (notification designating three district courts as commercial courts); Government of Bihar, Notification, available at <http://law.bih.nic.in/ORDER/COURT%20CREATION-17-1150.pdf> (Last visited on August 05, 2020); Government of Rajasthan, Notification No. F.1(2)Nyay/2016, (Notified on August 08, 2018), available at http://law.rajasthan.gov.in/content/dam/law-justice/Law%20&%20Legal%20Affairs%20Department/PDF/Circulars/CommercialCourt_Notification0001.pdf (Last visited on August 05, 2020); Government of Punjab, Notification No. S.O.70/C.A.4/2016/S.3/2017, (Notified on October 27, 2017), available at https://highcourtchd.gov.in/special_commercial_court/index.php?action=about (Last visited on August 05, 2020) (designating commercial courts at the district level and the Government of Haryana designating a special commercial court at Gurugram for the State of Haryana and Union Territory of Chandigarh)

⁵⁴ High Courts, *Gujarat, Delhi, Rajasthan, Telangana, Goa (through High Court of Bombay at Goa), Bombay and Andhra Pradesh and for district courts in Telangana* available at http://courtnic.nic.in/hcs/content_v1.asp (Last visited on August 05, 2020); District Courts, *Telangana*, available at <http://law.telangana.gov.in/commCourts1.do>, (Last visited on August 05, 2020); High Courts, *Gujarat*, available at <http://gujarathighcourt.nic.in/>, Last visited on August 05, 2020; High Courts, *Jarkhand*, available at <https://jharkhandhighcourt.nic.in/data-related-commercial-courts> (Last visited on August 05, 2020); District court, *Madhya Pradesh*, available at <https://district.mphc.gov.in/>; High Court, *Punjab, Haryana and Chandigarh*, available at <https://www.phhc.gov.in> (Last visited on August 05, 2020)

⁵⁵ Madras High Court, Notification No. 48/2018, (Notified on January 31, 2018), available at <http://www.hcmadras.tn.nic.in/PRACTICENOTECCOURT.pdf> (Last visited on August 05, 2020) (Other High Courts with original ordinary civil jurisdiction, namely, the High Courts of Bombay, Madras, Calcutta and Himachal Pradesh notified commercial courts only in or after 2016) <https://bombayhighcourt.nic.in/writereaddata/notifications/PDF/noticebom20160507173037.pdf> and <http://www.hphighcourt.nic.in/pdf/commercialappellatebench02062017.pdf>, accessed 13 April 2020 (notification not available online); See also, Vidhi Centre for Legal Policy, Alok Prasanna Kumar, Ameen Jauhar, Kritika Vohra & and Ishana Tripathi, *Strengthening Mediation in India: A Report on Court-Connected Mediations*, 18, available at https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf (Last visited on August 05, 2020), Vidhi Centre for Legal Policy, Ameen Jauhar and Vaidehi Misra, *Commercial Courts Act, 2015: An Empirical Impact Evaluation*, 18, available at <https://>

disputes. Next, we identified the jurisdiction where a commercial court was notified at the district court level where we could carry out a qualitative study with extended court observation and unstructured interviews with legal practitioners. For this qualitative study, we chose Bengaluru. We anticipate that the qualitative analysis may help explain some of the outcomes of the implementation of the Act in the Delhi High Court.

A. DELHI HIGH COURT: SPEEDING UP OR SLOWING DOWN?

The High Court of Delhi was the first in the country to designate Commercial Division Benches. Moreover, the High Court displays case status data in a systematic manner on its official website⁵⁶. The status of a case can be found through multiple options such as entering details of case type and year, or petitioner/respondent name(s) and year, or advocate's name and year, or diary number of the case and year – followed by an auto generated unique captcha. For this study, we used the first option – case type – to identify the relevant cases.

We investigated whether the Act facilitated the fast track settlement of commercial disputes by pouring over the filing and disposal numbers for commercial matters at the Delhi High Court between 2014 and December 2018. We studied available data for a 2-year period (2014-15) before the Act was implemented in Delhi and compared this with data for a 3-year period (2016-18) after the Act was implemented. For the period 2014-2015, we included all types of commercial matters filed before the Delhi High Court under the Ordinary Matters category, which were subsequently classified as a commercial dispute in the directions of the Delhi High Court of November 17, 2015.⁵⁷ For the period 2016-2018, we confined our analysis to cases listed before the Commercial Division of the High Court. This provided us, a comparable set of cases for each case category across the two time periods. In each period we have the total number of cases filed and the status of each case – pending, disposed or transferred to another court. In this manner we developed a unique data set that allows us to compare the impact of the Act from 2016-2018 against the baseline performance of the Delhi High in the same matters between 2014-15.

vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf (Last visited on 5 February 2020).

⁵⁶ High Court, *Delhi*, available at <http://delhihighcourt.nic.in/case.asp>, ((Last visited on January 30, 2019).

⁵⁷ High Court of Delhi, *Directions Dated 17.11.2015 For Filing of Matters to be Heard and Decided by the Commercial Division and Commercial Appellate Division As Amended On 24.07.2016.*, (Notification on November 17, 2015), available at http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_JVEV2NFS.PDF (Last visited on January 30, 2019) (Practice Direction for Matters to be decided by the Commercial Division and the Commercial Appellate Division).

We began by setting out the cases filed, disposed and pending in the High Court for each year.⁵⁸ The High Court website provides the number of cases filed each year and indicates whether a case is pending or disposed. We have counted the cases listed on the website to arrive at the total disposed and pending cases each year. Using this data, we arrive at a disposal rate where the total number of commercial disputes disposed in each year is divided by the total number of commercial disputes filed in that year. The annual disposal rate for commercial matters for each of the five years is set out in **Table 1** below.

Table 1: Disposal Rate of Commercial Disputes in the Delhi High Court

Year	Commercial Disputes Filed	Commercial Disputes Disposed	Commercial Disputes Pending	Disposal Rate (in %)
2014	7,640	6,893	747	90.22
2015	6,462	5,706	756	88.30
2016	3,139	1,742	1,397	55.50
2017	2,446	1,090	1,356	44.56
2018	3,326	2,132	1,194	64.10

While litigators at the Commercial Division in the Delhi High Court were generally optimistic about the impact of the Act, litigators in Mumbai and Bengaluru were less enthusiastic about the results. Our analysis in **Table 1** suggests that the data doesn't support the litigators optimism about the Delhi High Court. First, we must note that there is a drop in the number of cases filed prior to and after the enactment of the Act. This maybe the result of the higher pecuniary limits set by the 2015 Act and hence we may be including a range of cases before 2015 that may not be put before the Commercial Division of the High Court after 2015. The Amendment Act, 2018 revised the pecuniary jurisdiction downward from Rupees One Crore to Rupees Three Lakh, which should result in a substantial increase in filings in 2019. Second, there is a dramatic fall in the number of disposed cases and a significant increase in the pending cases across the two periods. The disposal rate of commercial disputes after the Act is between half and two-thirds of the disposal rate prior to the Act.⁵⁹ This

⁵⁸ See also, (A detailed breakdown of the data tables and sub-categories of commercial disputes is available on file with the authors).

⁵⁹ Vidhi Centre for Legal Policy, Alok Prasanna Kumar, Ameen Jauhar, Kritika Vohra & and Ishana Tripathi, *Strengthening Mediation in India: A Report on Court-Connected Mediations*, 23, available at https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf (Last visited on accessed 5 February 2020); See also, Vidhi Centre for Legal Policy, Ameen Jauhar and Vaidehi Misra, *Commercial Courts Act, 2015: An Empirical Impact Evaluation*", *Vidhi Centre for Legal Policy*, 23, available at https://vidhilegalpolicy.in/wp-content/uploads/2019/07/CoC_Digital_10June_noon.pdf (Last visited on accessed 5 February 2020) (Vidhi's 2019 report which notes that Delhi's commercial court has an abysmal disposal rate of 9%).

is a curious and surprising result and deserves further investigation. However, a preliminary step would be to eliminate potential errors in this result.

First, it is important to not make too much of the difference in cases considered prior to and after the Act. Significantly, the number of cases listed as Ordinary Matters post 2015 is almost 10% of the aggregate cases filed in 2014 and 2015. So even if we add these cases to the commercial disputes filed post 2015, it will not change the figures reported in **Table 1**. There has undoubtedly been a dramatic reduction of almost 35% in the number of commercial cases filed irrespective of the pecuniary value of these cases.

Second, we must appreciate the limitations of the data. The Delhi High Court does not indicate the stock of commercial cases pending prior to 2015. However, it does clearly indicate the total number of filings each year. Hence, when we tabulate the disposal rate for 2015 or 2014, we are unable to categorically assert when this case was filed. Thus inevitably, the disposal rate for each year is inflated as it includes cases filed in that calendar year as well as cases filed prior to that calendar year. Though we are unable to correct for this error, we are certain that this error occurs through the five years studied in this paper and does not skew the result in any particular direction.

Third, the category of disposed cases includes cases disposed through a final order, cases transferred to another court and cases where a judgment has been reserved. Our analysis in this paper rests on this composite category of disposed cases. We have not assessed whether the disposal rate in any year is driven by higher transfers or reserved cases. It may be that the 2015 Act prevented the transfer of cases and hence depressed the overall disposal figures.

Finally, we must confront whether the findings in **Table 1** are caused by or simply correlated with the passage of the 2015 Act. It may be that the higher rate of disposal of matters observed in the Delhi High Court prior to the Act was for reasons beyond the impact of the Act. Several factors related to the Court or the cases at hand may be relevant. The Delhi High Court, like Presidency Courts, has historically enjoyed an original civil jurisdiction power over a wide range of subject matter and pecuniary value.⁶⁰ The court is recognized for its proactive judges, aware litigants, efficient lawyers and court administration.⁶¹ Hence, unless we are able to unpack the mechanisms that explain the surprising result in **Table 1**, we should be careful in ascribing a causal role to the Act.

⁶⁰ The Delhi High Court Act, 1966, §5 (read with the Delhi High Court (Original Side) Rules, 2018).

⁶¹ Vidhi Centre for Legal Policy, Nitika Khaitan, Shalini Seetharam & Sumathi Chandrashekar, *Inefficiency and Judicial Delay: New Insights from the Delhi High Court*, 2-3, available at https://vidhilegalpolicy.in/wp-content/uploads/2017/03/InefficiencyandJudicialDelay_Vidhi-1.pdf https://vidhilegalpolicy.in/wp-content/uploads/2017/03/InefficiencyandJudicialDelay_Vidhi-1.pdf (Last visited on February 4, 2020).

B. QUALITATIVE STUDY: COURT PRACTICE

In the previous Section, our analysis of the Delhi High Court data leads us to the conclusion that the Act has depressed filings and disposals of commercial disputes in the court. In order to explore why this may be the case, we should engage in a qualitative study of the court proceedings and engage with the various actors involved. As we did not have the budgets and resources to carry out an extensive qualitative study in Delhi, we engaged in a limited qualitative study in the commercial court in Bengaluru. We adopted two methods: court observations and interviews with key litigators. We observed court proceedings at Court Hall 39 of the City Civil Court, Bengaluru, the only designated commercial court in the city, for two days: November 13 and November 16, 2018. We also spoke with several litigators who regularly practice in commercial courts in Karnataka through personal meetings and phone interviews conducted between November 4 and November 24, 2018. In the brief analysis below, we rely on these court observations and the interviews with 6 (three senior and three junior) advocates.

3. *Court Infrastructure*

The Act specifies that specialist judges, namely judges having experience in dealing with commercial disputes, are to be appointed to adjudicate commercial disputes.⁶² State Governments are required to provide all necessary infrastructure to facilitate the working of commercial courts and Commercial Divisions of High Courts.⁶³ They *may*, in consultation with the High Courts, establish required facilities for providing training to the judges of commercial courts, Appellate Courts, Commercial Division and Commercial Appellate Divisions at High Courts⁶⁴.

In practice, several State Governments have not put in place the necessary infrastructure to operationalize this law, particularly at the subordinate court level. The overall implementation of the Act has been tardy and leaves much to

⁶² The Commercial Courts Act, §3(3) (“Constitution of Commercial Courts:...(3) The State Government may, with the concurrence of the Chief Justice of the High Court appoint one or more persons having experience in dealing with commercial disputes to be the Judge or Judges, of a Commercial Court either at the level of District Judge or a court below the level of a District Judge.”); The Commercial Courts Act, §5(2) (“Constitution of Commercial Appellate Division... (2) The Chief Justice of the High Court shall nominate such Judges of the High Court who have experience in dealing with commercial disputes to be Judges of the Commercial Appellate Division.”)

⁶³ *Id.*, §19 (“Infrastructure facilities —The State Government shall provide necessary infrastructure to facilitate the working of a Commercial Court or a Commercial Division of a High Court.”)

⁶⁴ *Id.*, §20 (“Training and continuous education —The State Government may, in consultation with the High Court, establish necessary facilities providing for training of Judges who may be appointed to the Commercial Courts, Commercial Appellate Courts, Commercial Division or the Commercial Appellate Division in a High Court.”)

be desired. The judge, an Additional City Civil & Sessions Judge, is overburdened with matters of all categories, not just commercial disputes.

At our court observations, we noted that on average in a typical working week, the judge hears about 76 matters daily. A quick perusal of the daily cause list for about a week revealed that majority of the matters before this court have been transferred from other courts on account of the suit value being greater than the ‘specified value’ under the Act, and hence within the jurisdiction of a commercial court.

Our interviews with the advocates revealed that few fresh matters have been filed since the Act was implemented, and the case documents for these matters have not been filed in accordance with the fast track procedure prescribed under the Act. “CCH-39 does not work as a fast track court”, observes A2. While she has noticed some change in the recent months in terms of better understanding by the commercial court judges of the changes that the Act brings about, she feels that a lot more is required to be done to ensure greater awareness of this among the judges and the court registry.

As such, the Act does not really bring about any real improvement in the infrastructure of commercial courts.⁶⁵

C. JUDICIAL PROCEDURE

The Act provides that commercial courts and Commercial Divisions should undertake case management hearings for speedy and expeditious disposal of pending matters which are transferred to them from other courts.⁶⁶ As we note in the Section above, High Courts are required to issue rules or practice directions for managing conduct of trial.⁶⁷ The Act also imposes strict time limits for expeditious disposal of matters on appeal – appeals should be made within 60

⁶⁵ See also, Arunav Kaul and Leah Verghese, *Commercial Courts: Serving Justice or Ease of Doing Biz*, available at https://www.deccanherald.com/opinion/panorama/commercial-courts-serving-justice-or-ease-of-doing-biz-734273.html?fbclid=IwAR2wnJcNcpGJTuu7cvXbImp7-J7YcOEY8_Zn_1J8VllZmaVSYgWL6O20OZs, (Last visited on 5 February 2020).

⁶⁶ The Commercial Courts Act, §15(4) (Transfer of pending cases —...“(4)The Commercial Division or Commercial Court, as the case may be, may hold case management hearings in respect of such transferred suit or application in order to prescribe new timelines or issue such further directions as may be necessary for a speedy and efficacious disposal of such suit or application in accordance with Order XV-A of the Code of Civil Procedure, 1908.”)

⁶⁷ The Commercial Courts Act, §18 (“Power of High Court to issue directions —The High Court may, by notification, issue practice directions to supplement the provisions of Chapter II of this Act or the Code of Civil Procedure, 1908 insofar as such provisions apply to the hearing of commercial disputes of a Specified Value.”)

days of judgment or order and should be disposed by the Commercial Appellate Courts/Divisions within 6 months from the filing of the appeal.⁶⁸

Beginning from as early as 2005,⁶⁹ more than 20 Indian States and Union Territories have initiated case flow management rules at the High Court and some also at the subordinate courts for suits and other civil proceedings, not limited to commercial matters. The 188th Report drew attention to the need to hold case management hearings to properly schedule time to complete litigation procedures and for organized filing of court documents. However, these rules have not been strictly followed and so, have been ineffective in improving matter disposal rates.

In our court observations, we could not determine authoritatively if case management practices were adopted at the City Civil Court in Bengaluru. During our interviews with the legal practitioners, the dominant impression was that the procedural hindrances of the ordinary civil litigation system have found their way into the commercial courts. “Judges seldom insist that parties stick to the time limits prescribed in the Act for submission of documents” remarked A1, a senior litigator with more than 10 years of litigation experience. In fact, “delays are easily condoned, and commercial courts are often shy to impose substantial costs on parties and hence no deterrence for lawyers who unnecessarily delay matters”, he remarked.

A2, a commercial litigator with about 7 years of experience, mentioned that the “use of case management techniques for efficient conduct of trials is neglected. The case management [practiced in the commercial court] is similar to ordinary civil matters”.

In the few courts where case management practice directions are applied to commercial disputes, like in the Delhi High Court, A1 mentioned that the “timelines imposed on disputing parties are not strictly implemented. Case management is left in the hands of lawyers, who will most likely adapt this to suit their clients’ convenience.” He recommended that, “disputing parties cannot be allowed to control the pace and intensity of litigation and all measures should be taken to prevent loss of precious court time through delay tactics used by them” and that “judges have to be instructed to order that case management techniques are used to ensure smooth conduct of trials and bring about certainty in timelines. Since the court’s directions issued in case management hearings are binding, they need to strictly punish all instances of default by any party.”

⁶⁸ The Commercial Courts Act, §14 (“Expeditious disposal of appeals —The Commercial Appellate Court and the Commercial Appellate Division shall endeavour to dispose of appeals filed before it within a period of six months from the date of filing of such appeal.”)

⁶⁹ Himachal Pradesh, *Case Flow Management (High Court) Rules, 2005*, 1-8, available at [http://hphighcourt.nic.in/rules/Part-C%20I\(5\).pdf](http://hphighcourt.nic.in/rules/Part-C%20I(5).pdf) (Last visited on 27 November 2017)(introduced case flow management practices as early as in 2005 through the High Court of Himachal Pradesh Case Flow Management (High Court) Rules.

A leading commercial litigator with active practice in Delhi and Karnataka, A3, made several useful suggestions on this aspect. He suggested that “there should be a specific case manager to organize matter schedules. There has to be a special register maintained for this, but the cases are maintained in the ‘A’ diary in terms of Civil Rules of Practice as is done for regular suits. A person at the magistrate level should have been mandated as case manager to maintain court diary. Matters listed on any particular day should be limited to 50 or 60 and [all efforts must be made to] finish them off”. However, none of these practices are currently adopted in the Bengaluru commercial court.

D. INTERLOCUTORY ORDERS

The Act specifically bars filing of civil revision application or petition against an interlocutory order of a commercial court.⁷⁰ Further, no appeal or revision application can be filed on an order of a commercial court on the issue of its jurisdiction to hear a commercial dispute.⁷¹

During our visit to Court Hall 39 for observations, we noticed that the majority of matters listed related to original suits at different stages of trial – summons, objections, issue of notice, hearing, framing of issues, evidence, arguments and judgment/orders. We were unable to determine how many of these matters included applications for stay and interim relief.

In our interviews with advocates, A1 pointed out that “injunctions and stays are common in disputes where interim relief is critical to parties. Once such relief is granted, for instance in intellectual property matters, the party who secures an interim injunction is uninterested to conclude the proceedings expeditiously.”⁷² Hence, it appears that the statutory reform to prevent over reliance on interim relief has not shaped practice in the commercial courts.

⁷⁰ The Commercial Courts Act, 2015, §8 (“Bar against revision application or petition against an interlocutory order.—Notwithstanding anything contained in any other law for the time being in force, no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such challenge, subject to the provisions of Section 13, shall be raised only in an appeal against the decree of the Commercial Court.”)

⁷¹ *Id.*, §12(3) (“Determination of Specified Value—...(3) No appeal or civil revision application under Section 115 of the Code of Civil Procedure, 1908 (5 of 1908), as the case may be, shall lie from an order of a Commercial Division or Commercial Court finding that it has jurisdiction to hear a commercial dispute under this Act.”)

⁷² Ministry of Finance, Department of Economic Affairs, Economic Survey 2017-2018, 136, available at <http://mofapp.nic.in:8080/economicsurvey/> (Last visited on July 30, 2020) (The Economic Survey 2017-18 mentions that in intellectual property rights (IPR) cases, injunctions have led to about 60% of cases being stayed, whose average pendency is 4.3 years. It laments that “lengthy interim orders, *ex parte* ad interim stays, increasing rate of pendency of cases at final arguments and few final judgments in IPR cases are common traits of IPR practice across different High Courts”)

E. ENFORCING COURT DISCIPLINE

The Act uses costs as primary tool for the judges to enforce court discipline and to weed out unnecessary litigation. Indian courts have always had this power even before the coming into effect of this Act, though they rarely use this power.⁷³ The Act amends Section 35 of the CPC and provides commercial courts with wide discretion to determine whether costs should be imposed which would be paid by an unsuccessful disputing party, the quantum of costs and the period by when they ought to be paid. It also lists out the broad set of circumstances that the court should consider in making an order for payment of costs.

Our interviews suggest that commercial courts rarely impose costs on litigating parties. However, we were unable to confirm these claims through our court observations. “Where costs are ordered, the amounts are not prohibitive enough to penalize errant parties. These costs bear no relation to the commercial value of the dispute, the complexity of issues, actual expenses incurred or the paying capacity of the party in the wrong”, remarked A1.

A5, an advocate with more than 10 years of practice experience, litigating mainly in Karnataka, agreed with this assessment and stated that “even if costs are imposed, it doesn’t help. In the long run, it hasn’t improved matters. [Judges may have the] unusual procedural powers of imposing costs, but costs, even if imposed, are very low, usually in the range of Rs. 100 to Rs. 1,500, and in exceptional cases, Rs. 10,000”. As a remnant of the existing civil justice system, this continues to lead to abuse of court time.

IV. CONCLUSION

The Economic Survey of India, 2017-18, refers to the Central Government Taskforce formed to discuss reform measures for ease of doing business, which noted that “...measures introduced to streamline commercial disputes under the Commercial Courts Act has had no impact on the [ease of doing business] indicator’s data...”.⁷⁴ The Economic Survey, however, does not provide any data to substantiate this observation. The 2018-19 Economic Survey also makes no mention of commercial courts at all and concentrates the discussion on measures

⁷³ The Code of Criminal Procedure, 1973, §35 (CPC provides: “(1) ... the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers. (2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.” This is substituted by a new Section S. 35 under Paragraph 2 of the Schedule to the Act.)

⁷⁴ Ministry of Finance, Department of Economic Affairs, Economic Survey 2017-2018, 141, available at <http://mofapp.nic.in:8080/economicsurvey/> (Last visited on July 30, 2020)

to improve the capacity and efficiency of the country's subordinate judiciary and High Courts and to reduce delays.

This paper makes a first attempt to review the performance of the Commercial Courts Act, 2015 using quantitative and qualitative methods. At the time of its introduction, the idea of separate commercial courts was hailed by law practitioners as a 'win-win situation for lawyers and litigators alike' because of its promise to streamline the conduct of cases, improve efficiency in the functioning of courts and reduce delays in litigation. These objectives stubbornly persist from the 188th Report, the 2009 Act to the 253rd Report and the Act. Now, after nearly four years, when we re-evaluate the utility of the commercial courts in terms of whether they have really lived up to their expectations, using the Delhi High Court as an example, we note that the purported speedy and effective justice for commercial matters has not been rendered. On the contrary, as we show in our analysis, justice delivery particularly for commercial matters has slowed down since the passage of the 2015 Act. Our study suggests that the Act has not contributed to speedy disposal of commercial disputes. It may unintentionally have resulted in greater delays in the resolution of these disputes.

This Act, in its original form and as amended recently, only tweaks existing rules of civil procedure and works within the existing judicial institutional framework. It does nothing to address matter pendency (including on the original side), inadequate specialist bench strength due to manpower issues, lack of technical training and skill development programmes for judges, overburdened courts due to the expanding jurisdictions and the excessive use by the courts of the powers of ordering injunctions and stays.

In 2010, members of the Rajya Sabha Select Committee reviewing the Commercial Courts Bill had worried that increasing the work allocation to Commercial Divisions without consequent improvement to bench strength would result in the Commercial Division 'eating away' resources available to other cases. The Law Commission, in its 253rd Report, which has shaped the 2015 Act, had similarly remarked that 'slow or over-burdened judicial systems hamper growth by fostering inefficient use of time and monetary resources and technology; increasing transaction costs such as enforcement costs or delays; and moving countries away from their best possible output'.⁷⁵ This Report warned that such half-hearted efforts without addressing the underlying ills of the Indian judiciary, would make the 2015 Act merely cosmetic and not lead to real systemic reform. At present, this seems to be true insofar as commercial courts in India are concerned.

⁷⁵ Law Commission of India, *Report on Commercial Division and Commercial Appellate Division of High Courts Bill, 2015*, Report No. 253, 35 (January, 2015).

The experience with commercial court reform requires us to address three key puzzles for policy practitioners and academics interested with this field.

First, why does a major legislative reform initiative directed to reduce court delays potentially end up increasing delays? Manifestly, 15 years of legislative deliberation prompted a big bang legislative change. However, a change in legal rules does not, standing alone, transform institutional practice. Substantive and sustainable legal system reform cannot begin and end with legislative change. The legal system is a complex and dynamic system with varied key actors – lawyers, judges and clients – who will respond differently to legislative change. Unless a strategic model that anticipates likely stakeholder responses is built into the legislative reform model, the results are unlikely to cohere with the goals of the lawmaker.

The second puzzle is whether the reform strategy adopted by the Act was mistaken? If so, what aspects of the reform strategy must be modified? In the last three decades of legal system reform in India only one strategy appears to have delivered significant results in reducing delay. This is the strategy of diverting disputes away from courts towards alternate dispute resolution mechanisms like mediation and arbitration. While no large scale study of the effects of arbitration on reducing delay are available due to its ad hoc and non-institutional character, useful studies have been carried out in the field of mediation.⁷⁶ Available research suggests that mediation may well increase the overall natural rate of settlement, at lower cost and within shorter time frames than comparable litigation.⁷⁷ Hence, diversion strategies appear to have some success in reducing delays but dispersion strategies like those adopted in the Act have less success. Should this lead us to the conclusion that if dispersion is unsuccessful, then the legal system needs to be reformed root and branch.

This brings us to the third puzzle for Indian legal system reform. We showed that the Act, which was initially designed as a narrow intervention to respond to high value commercial cases, progressively enveloped almost all of civil litigation in its scope. However, it is not sufficient for a legal reform strategy to rely too heavily on new legislative rules unsupported by a huge investment in moulding legal culture - of judges, lawyers and clients - and a corresponding overhaul of the administrative systems and processes of handling disputes. So systemic change must rely on sustained and clear communication, incentives for

⁷⁶ Sudhir Krishnaswamy, Sindhu K. Sivakumar & Shishir Bail, *Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches*, 2 J. Nlud 12 (2014); Vidhi Centre for Legal Policy, Alok Prasanna Kumar, Ameen Jauhar, Kritika Vohra & Ishana Tripathi, *Strengthening Mediation in India: A Report on Court-Connected Mediations*, 14-15, 35 (December 2016); Tara Ollapally, Annapurna Sreehari & Shruthi Ramakrishnan, *The Mediation Gap: Where India Stands and How Far It Must Go in Approaches to Justice in India*, (2018).

⁷⁷ Sudhir Krishnaswamy, Sindhu K. Sivakumar & Shishir Bail, *Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches*, 2 J. Nlud 12 (2014).

compliance and behaviour modification and a fundamental shift in the registry and back office administrative functions of the court system. Successful legislative reform will ride on the back of these cultural and administrative shifts. Future law reformers will benefit from recognising the scale and scope of effort required for sustainable and manifold change and the need to sequence administrative, cultural and legislative reform in step to achieve meaningful change.