



IMPROVING CONTRACT ENFORCEABILITY IN INDIA

Centre for Civil Society

ENFORCING CONTRACTS

I. Comments on the Business Reforms Action Plan 2015

The following are our comments on the 8 action points provided to the State Governments for enforcing contracts by Department of Industrial Policy and Promotion (DIPP):

| S.No | DIPP Recommendations for State | Comments |
|------|-------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | Provide standardized contract templates to reduce ambiguity | <ul style="list-style-type: none"> • Excellent initiative; • Shall aid new and existing litigants. |
| 2. | Set up specialized courts or commercial divisions in existing courts to resolve commercial disputes | Alternatively, mandate arbitration for all commercial cases irrespective of pecuniary value and have dedicated benches for Arbitral appeals/ reviews at the High Court level. |
| 3. | Implement case management systems in courts to reduce delays | Outsource it to a private IT company. Or, a pilot involving a private IT service provider to manage Tribunal Registry may be executed and then implemented in other Tribunals and lower courts. |
| 4. | Initiate process of e-filing of proceedings and e-services of court proceedings in district and High Courts | |
| 5. | Appoint more judges | This alone will not suffice. In addition, focus should be on disposal rate and work efficiency. ¹ This data should be available for each judge on the Court website. |
| 6. | Limit number of adjournments for cases to avoid long delay in judgments | The bench should (soon after admitting the matter), make a detailed time-table in discussion with the parties to the dispute – specific to the matter before it. Fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the Courts should strictly adhere to the said dates and the said time table as far as possible; <ul style="list-style-type: none"> • If any delay is because of interlocutory applications, conduct of parties, the judge can provide sanctions for such behavior, including, dismissing the |
| 7. | Fix time limits for disposing of the commercial cases | |

¹ http://articles.economictimes.indiatimes.com/2013-04-10/news/38435013_1_fast-track-courts-chief-justices-15-5-judges

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| | | <p>application, imposing costs, etc.;</p> <p>[Comments: whilst the above, it is relevant to mention that a seven judge bench of the Supreme Court of India in <i>Ramchandra Rao v. State of Karnataka</i>, (2002) 4 SCC 578, <u>had held that mandatory time limits could not be prescribed by the Court.</u>]</p> <p>Further, in order to limit repeated adjournments by the parties to a dispute and prevent long delays in litigation, an innovative measure is Rule 68 of the Federal Rules of Civil Procedure in the USA. This rule involves civil commercial cases/contractual disputes involving monetary claim. Before the trial starts, the defendant can make an offer to the plaintiff to settle the case. If the plaintiff accepts the offer, the dispute does not go to the court resulting in time and cost savings. If the plaintiff rejects the offer, the judge is informed about the rejection but not the terms of the offer that was rejected (this is kept in a sealed copy with the court). If the plaintiff wins and the sum awarded in the judgment is less favorable than the offer made by the defendant before the trial started, the plaintiff has to bear the costs incurred by the defendant from the date the offer was made by the defendant. Both parties therefore make their own assessment in terms of cost and time before taking the dispute to litigation. This rule thus creates incentives for reducing litigation in the system.</p> |
| 8. | Mandate mediation/arbitration for commercial cases less than INR 10 Lakhs | Mandate arbitration for all commercial cases irrespective of pecuniary value and have dedicated benches for Arbitral appeals/ reviews at the High Court level. |

II. Comments on the Business Reforms Action Plan 2016

The following are our comments on the 13 recommendations provided to the State Governments for better contract enforceability:

| S.No | Recommendations for States and UTs | Comments |
|----------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>10a. Commercial dispute Resolution enablers</i> | | |
| 328. | Establish a specialized division/bench under the High Court to hear commercial cases | Alternatively, mandate arbitration for all commercial cases irrespective of pecuniary value and have dedicated benches for Arbitral appeals/ reviews at the High Court level. It reduces the tiers of appeal/ review. |
| 329. | Establish specialized courts at the district court level to resolve commercial disputes | |
| 330. | Ensure at least 90% of the vacancies in District courts/Commercial courts been filled up | This alone will not suffice. In addition, focus should be on disposal rate and work efficiency. ² This data should be available for each judge on the Court website. |
| 331. | Mandate pre-trial discovery for cases in commercial matters | Excellent initiatives though Point # 331-333 may require training for judges to implement these reforms. |
| 332. | Set clear timelines for examining witnesses and a court-appointed independent expert in commercial cases | |
| 333. | Allow pre-trial conferences as part of case management techniques | |
| 334. | Merge payment of court fees and process fees into a single transaction/procedure | |
| 335. | Publish model contract templates and guidelines on department's website that may be used for commercial contracts | |
| <i>10b. Paperless Courts</i> | | |
| 336. | Design and implement a system to allow for e-filing for commercial disputes in | These changes may be best achieved with private participation. The government should run a pilot project of letting a private IT company run a Tribunal |

² http://articles.economictimes.indiatimes.com/2013-04-10/news/38435013_1_fast-track-courts-chief-justices-15-5-judges

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| | | <p>Registry; clerical administration should be outsourced. If successful, these models can be implemented in other Tribunals and lower courts as well.</p> <p>Alternatively, many clerical processes such as payment of court fee, website sending notice and judgment publishing can be outsourced to private parties.</p> |
| 337. | Design and implement a system to allow for e-summons for commercial disputes in District courts/Commercial courts | <p>These functions can be outsourced to a private IT service provider(s).</p> |
| 338. | Design and implement a system to allow for publishing e-cause lists for commercial disputes in District courts/Commercial courts | |
| 339. | Design and implement a system to allow for e-payments for court fees and process fees for commercial disputes in District courts/Commercial courts | |
| 340. | Design and implement a system to allow for issuing digitally signed court orders in District courts/Commercial courts | |

Criminalising Cheque Bounce Cases – An Effective Remedy?

Due to the mistrust engendered by bounced cheques, cash transactions were encouraged which led to problems of counterfeiting, costs of storing and moving cash, and the law enforcement problems of an underground economy. The Negotiable Instruments Act, 1881 was amended in 1988 to include the criminalisation of bouncing cheques, following the recommendations given in the report of the committee on banking laws, headed by Dr. Rajammanar.

The time prescribed in section 138 of the Negotiable Instruments Act, 1881 for fast disposal of cases is six months, but due to the sheer number of cases in court, the minimum time a cheque bounce case takes to end is two to three years. Cases under section 138 of the Act have been identified as one of the top bottlenecks clogging the judicial system of India.

Section 138 has only been partly successful in achieving its overall purpose in that it has failed to deter cases of dishonour of cheques due to the sheer size of litigation faced by the courts, and the subsequent backlog that has been created. Dealing with such huge arrears of cheque bounce cases requires radical reforms.

International best practices

In Singapore, there is no criminal liability, and a civil liability is imposed on the defaulting party. The damages are liquidated and include amount of the bill, interest from the time of presentment of payment or maturity of the bill and expenses of noting, and protest (if protest is necessary).

France imposes civil liability on the defaulting party, and places frequent offenders on a list, banning them from issuing cheques for five years. Banks are also free to charge fees for unpaid cheques, under certain limits.

In the USA, different states have different laws, and both civil and criminal liabilities are imposed. Civil liability ranges from double to treble the original amount, and criminal liability ranges from one to ten years of imprisonment.

Recommendations

- I. Mandatory alternative dispute resolution or Arbitration: An amendment to the Negotiable Instruments Act, 1881 is being considered which decriminalises the cheque bounce offence, and makes it compulsory for parties to resolve cheque bounce disputes

through alternative dispute redressal mechanisms (section 89 of the Code of Civil Procedure, 1908).

However, this can work only if: (a) the drawee bank has a dedicated time-bound arbitration service for this purpose; (b) the Arbitration Act is amended to limit grounds for review; (c) arbitrator should impose penal and deterrent costs for dishonour.

- II. Dejudicialisation: Without any adjudication of guilt, the bank should be authorised to take the following actions against cheque dishonour due to insufficient balance:
 - a. Higher penalties and/or banning repeat offenders from issuing cheques: The French system of banning repeat offenders from issuing cheques seems like an ideal option for India to implement. Currently, if a cheque for a value of INR 1 crore or more is drawn on an account on four occasions in one financial year, and there are insufficient funds in the account, the account holder will not be issued a cheque book. This banning should not be limited to large amounts. Adding an increased penalty for a subsequent default (similar to the law in Arkansas) might prove to be an effective deterrent, and would at least be more effective than the current penalty.
 - b. Deterrent penalties: Also, the penalty imposed by banks in India is too small an amount to serve as a deterrent. It should be in proportion to the amount of the cheque.
 - c. Freezing the bank account: Another option that can be considered is giving banks the power to freeze accounts of offenders until they have enough money to fulfil the debt of the cheque holder.

 - III. Replacing cheque system with online transfer: Cheques should be replaced by electronic transfer of funds. It is a more effective way of monetary transfer, and would resolve the cheque bounce issue by eliminating cheques altogether. It is possible to replace the cheque system in a phased manner beginning with metropolitan cities.
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