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| IMPROVING CONTRACT ENFORCEMENT RANK FOR INDIA |
| Centre for Civil Society* *By Prashant Narang, Manager, iJustice and Priyveer Singh, student, RGNUL Patiala*
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The World Bank’s Doing Business project ranks business regulatory frameworks across 189 economies. The project objectively measures the regulations applying to the domestic small and medium-size companies at entry, operational and exit stages.[[1]](#footnote-2)

The latest report on *Ease of Doing Business 2015* ranked India for doing business as 142 out of 189 countries, which is a two-step drop from the last year’s footing. Furthermore, being stagnant at its last year ranking, enforcing contracts in India is ranked as low as 186 out of 189 countries. There is an urgency to focus on improving the business environment and arrest the decline in relative performance against various determinants of investment attractiveness.[[2]](#footnote-3) Having such lower figures pose great challenge for India to show its credibility and suitability as a host country for the foreign investors and is detrimental to the interests of an economy growing so rapidly as India.

Table 1: A comparison with some other economies (best performer, BRICS and neighboring economies)

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Country/Economy | Overall Ranking | Ranking Enforcing Contracts | DTF | Time (days) | Cost (% of Claim) | Procedures (number) |
| Singapore | 1 | 1 | 89.54 | 150.0 | 25.8 | 21.0 |
| U.S.A. | 7 | 41 | 67.26 | 420.0 | 30.5 | 33.6 |
| United Kingdom | 8 | 36 | 68.08 | 437.0 | 39.9 | 29.0 |
| South Africa | 43 | 46 | 66.14 | 600.0 | 33.2 | 29.0 |
| Russia | 62 | 14 | 75.85 | 267.0 | 14.9 | 35.0 |
| China | 90 | 35 | 68.21 | 452.8 | 16.2 | 37.0 |
| Sri Lanka | 99 | 165 | 38.96 | 1,318.0 | 22.8 | 40.0 |
| Brazil | 120  | 118 | 53.60 | 731.0 | 16.5 | 43.6 |
| Pakistan | 128 | 161 | 41.53 | 993.1 | 23.0 | 46.0 |
| India | 142 | 186 | 25.81 | 1,420.0 | 39.6 | 46.0 |
| Bangladesh | 173 | 188 | 20.82 | 1,442.0 | 66.8 | 41.0 |

In Indian courts, civil suits generally and recovery suits particularly take a long time, i.e. 1420 days on an average, for disposal.[[3]](#footnote-4)

The number of Procedures to be followed in India is 46, which is 21 in Singapore and Ireland. Average Time taken for the enforcement of contracts is 1420 days against 150 in Singapore. The cost of enforcing the contract in India is 39.6 %, while it is 9% in Finland.[[4]](#footnote-5)

## What’s the Problem?

The various reasons for the delay in civil suits are as follows:-

1. The service of notice takes extraordinarily long time. Notices are served by the serving officer, with hardly any incentives or checks. There is bribery causing non-serving of notice.[[5]](#footnote-6) Also, the court follows a liberal approach regarding the service of notice to the defendants. Second Attempt of physical delivery to the defendant and using substituted service at a very later stage are the endemic features of Indian legal system. More than half of the cases in Delhi are delayed due to non-serving of notice.[[6]](#footnote-7) The process further gets lengthier if the defendant resides in the jurisdiction of another court, which means channelizing the notices through that court having jurisdiction over the defendant.[[7]](#footnote-8)
2. Further, delays in the filing of written statement and applications for rejoinder by plaintiff calling of witnesses, tendering of evidence and delivery of judgment makes the process of enforcing contract very lengthy, sometimes even a decade long.[[8]](#footnote-9)
3. Also, time gap between the two consecutive dates is very wide. A respondent is given a month to produce his defence but because next date of hearing given is after 6 months, the respondent automatically get 6 months instead of one month. After 6 months, the petitioner gets one month to produce a rejoinder but because the date given is after 6 months the time given to produce the rejoinder automatically becomes 6 months. In between, if there are a couple of adjournments- the case is already two year old.[[9]](#footnote-10) Such a huge time gap between the two dates is due to the poor Court Management and wastage of judicial time on non-judicial activities.[[10]](#footnote-11)
4. Also, the formality of depositing the process fees in the court is an unnecessary step. Under the rules, the Court may make order for dismissal of suit if the plaintiff does not duly deposit the process fees.[[11]](#footnote-12) The dismissal of suit for non-deposit of process fees leads to further delay as the party often applies for restoration of the suit and for deposit of process fees. Much time is spent on hearing of the issues relating to valuation, amount of court fee and jurisdiction of the Court.[[12]](#footnote-13)

# **MEASURES ALREADY PROPOSED/ UNDERTAKEN BY THE GOVERNMENT**

## Amendments in the Arbitration Act

To make the arbitration more effective and fast, the Law Commission of India came out with Report No. 246 in August 2014, recommending various amendments to the Arbitration & Conciliation Act, 1996. The amendment of 2014 in Arbitration and Conciliation Act (not available in public domain), 1996 is aimed at making it mandatory for commercial disputes to be settled within nine months and also putting a cap on arbitrator’s fee.[[13]](#footnote-14)

## ****Commercial dispute forum segregation****

Commercial disputes should be segregated from the mainstream. **Pursuant to the 188th Report of the Law Commission of India, 200, the Commercial Division of High Courts Bill, 2009 was passed by the Lok Sabha on December 18, 2009 and has been referred to a select committee for further discussions by the Rajya Sabha. But till date the bill is pending.** The Bill has derived further impetus from revolution in technology and has allowed the service of summons and issuance of copies of the judgments via email. Currently, under the CPC only foreigners without an agent in India could be served via email. However, for Commercial Disputes, the Bill has broadened the scope and has legalized service of summons through email on any defendant.[[14]](#footnote-15) The said bill should be enacted, as early as possible, with certain amendments and amount of claim not set too high.

Although time limits for filing of the documents has been set, but the same lingers due to overburdening on the courts and setting of dates with long intervals in between. Setting up of separate courts for commercial disputes will also help to reduce these problems. Lesser the burden of cases on the court, more frequent will be the hearing and lesser will be the number of days for disposal of cases.

Recently, the commission, headed by chairman Justice A P Shah, forwarded its 253rd report to Union Law Minister Sadananda Gowda while formulating a draft bill, ‘The Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015.’[[15]](#footnote-16) While commercial divisions should be set up by the central government in high courts that are already exercising ordinary original civil jurisdiction, commercial courts should be set up in states and union territories where the High Court lack such jurisdiction and district courts are deciding such matters.[[16]](#footnote-17)

The institution of such courts should be seen as a stepping-stone to reforming the civil justice system in India ensuring that cases are disposed of expeditiously, fairly and at reasonable cost to the litigant. It will benefit the litigants and other potential litigants by the reduction in backlog caused by the quick resolution of commercial disputes. In turn, this will further economic growth, increase foreign investment, and make India an attractive place to do business.[[17]](#footnote-18)

# **SOLUTIONS PROPOSED**

## Electronic Service of Notices

Although it is not a common practice in United States to follow electronic mail system for service of notice, but in many cases the courts of different states have upheld the serving of notice through e-mail.

In New York, the court allowed service of process by e-mail in *Jason Arthur Snyder* v *Alternate Energy Inc.*[[18]](#footnote-19) In this case, the plaintiffs told the court that they had sent notification by e-mail to the defendant’s commonly known company e-mail address requesting a physical address to serve papers, but the defendant never replied. The plaintiff sent multiple e-mails to the defendant’s e-mail address, which was deemed valid and legitimate, and the e-mails were not rejected by the system. The court said that in this case, their attempt at notification by e-mail was reasonably calculated to give the defendant proper notification as well as gave him the chance to be heard.[[19]](#footnote-20)

In the another New York case of *Fortunato v. Chase Bank*,[[20]](#footnote-21) the [judge reasoned](http://www.dmlp.org/sites/citmedialaw.org/files/2012-06-07-Facebook%20Service%20of%20Process%20denied.pdf) that in order to serve process by electronic alternative means, a party needs to show the court that the defendant would receive constructive notice by showing that he is familiar with the manner of service and uses it regularly or to an extent that he would receive the notice. For example, it would be relevant whether the defendant used the e-mail address or social networking site within a certain period of time.[[21]](#footnote-22)

In *Rio Properties, Inc. v. Rio International Interlink*,[[22]](#footnote-23) the service of notice through e-mail was upheld as the most suitable method that could have been affected to serve the notice. Similarly, in *Broadfoot v. Diaz (In re Int'l Telemedia Assoc.),*[[23]](#footnote-24) the court authorized the service of notice via e-mail.

The official website of the State of Utah in U.S.A. elaborated the requisites for serving a notice by non-conventional method. The alternative means chosen has to be the method most likely to give actual notice of the document being served. The courts are more frequently using electronic communications and social media to publish the complaint and summons or to notify the person being served that the documents have been published. The court might order that a third person serve the documents and file proof of service on your behalf. For alternative service, this might mean the third person would mail or email the documents on your behalf, post the documents to a Facebook account, arrange for publication, or notify the person by phone or text that the documents have been published.[[24]](#footnote-25)

In its May 10, 2011, order in Mpafe v. Mpafe,[[25]](#footnote-26) a Hennepin County judge stated that service upon a defendant in a divorce case, who presumably lived in West Africa’s Ivory Coast (which is not a signatory to any treaty governing international judicial assistance with the US), could possibly be made via e-mail, “Facebook, Myspace or any other social networking site.” The order further stated that while the court’s rules authorized service by publication in a legal newspaper, it was unlikely the defendant would see it. The court stated that “[t]he traditional way to get service by publication is antiquated and is prohibitively expensive,” and that “technology provides a cheaper and hopefully more effective way of finding” the defendant at issue.[[26]](#footnote-27)

CANADA, AUSTRALIA AND UK- SERVING THROUGH FACEBOOK AND OTHER SOCIAL MEDIA

In 2008, the Supreme Court of the Australian Capital Territory considered, and allowed, personal service via a message sent on Facebook.[[27]](#footnote-28) Australia was the first country to permit service by social media.[[28]](#footnote-29) Shortly thereafter, in 2009, in the case of *Axe Market Gardens v Craig Axe*,[[29]](#footnote-30) New Zealand followed suit, citing the Australian case and allowing service of process via Facebook in an intra-familial business dispute.[[30]](#footnote-31) New Zealand’s High Court in Wellington also approved this method.[[31]](#footnote-32) In a Canadian case, *Knott v. Sutherland*,[[32]](#footnote-33) the Court of Queen’s Bench of Alberta allowed for “substitutional service” through the Human Resources department of the defendant’s former employer and to the defendant’s Facebook page.[[33]](#footnote-34)

This international trend is not limited to Facebook. The United Kingdom’s High Court permitted an injunction against an anonymous blogger to be served via Twitter.[[34]](#footnote-35) Australia has also

permitted service through text message.[[35]](#footnote-36)

INDIAN SCENARIO

The Supreme Court of India, in the case of *Central Electricity Regulatory Commission v. National Hydroelectric Power Corpn. Ltd.*[[36]](#footnote-37), upheld the validity and necessity of service of notices by e-mail. The necessity was felt to avoid delay in process serving and consequent piling up of arrears. The electronic service of notice is to be effected in addition to normal mode of service by registered post. The practice, for the time being, is to be followed in commercial litigation and in cases where urgent interim relief is sought in Supreme Court. Advocate-on-Record filing appeal/petition is required to furnish e-mail address of respondent company/corporation along with soft copy of petition/appeal in portable document format (pdf) and soft copy is to be furnished to Supreme Court Registry in addition to hard copy. E-mail is to be sent only in those cases where Supreme Court issues notice to respondent company/corporation and the practice of sending e-mail notice also to be followed where caveat has been filed. For this purpose, Advocate-on-Record filing caveat required to furnish e-mail id where notice of appeal/petition desired to be received. In order to implement this practice in future in respect of government offices also, the Apex Court gave directions to Cabinet Secretariat for furnishing centralized e-mail addresses of all Ministries/Departments/Regulatory Authorities along with names of Nodal Officers where such officers have been appointed.[[37]](#footnote-38)

*E-SYSTEM – PROS AND CONS*

While conventional methods of personal service and registered mails consume a lot of time and funds, the electronic service of process is fast and inexpensive; electronic messages are sent and received within moments. A majority of corporations and companies use e-mail and certain services allow receipt of e-mail to be confirmed by the sender. At the very least, electronic service should be an option when all other attempts have failed.[[38]](#footnote-39)

*USING ELECTRONIC AND SOCIAL MEDIA – SAFEGUARDS*

In its opinion in Griffin v. Maryland,[[39]](#footnote-40) Maryland’s highest court recently discussed the need for authentication of social media evidence. The court held that just because a social media profile appears to be real and genuine does not necessarily make it so. An attorney must do proper due diligence to ensure that a social media account actually belongs to the person to be served. In other words, before a US judge allows for service via social media, the court must ensure that the person being served online is the same person offline. Authentication simply cannot be an afterthought, and the service method must always comport with due process protections afforded by the US Constitution and its state analogs.[[40]](#footnote-41)

Based upon previous judicial analysis of new methods of service, courts will consider particular factors in determining the appropriateness of email or social media for service of process. These factors include:

• Any evidence of a defendant’s use of email or social media for communication;

• The extent to which a defendant has availed him or herself of the use of technology (i.e. the primary, or exclusive, means of contact listed on a company’s website or an active Facebook page or Twitter account);

• Whether a defendant’s business is conducted primarily, or exclusively, through the Internet; and

• The ability to authenticate the identity of the actual user of a social media account through corroborating information gleaned from other sources.[[41]](#footnote-42)

The issue is, whether a court finds that a Facebook message is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Such determination would likely turn on how often the user checks the Facebook message center.[[42]](#footnote-43) The notice requirement can be satisfied by showing that the user checks Facebook frequently. This would not be difficult to ascertain, as Facebook displays when a user takes an action and other informational blurbs that would demonstrate a user’s frequency of activity.

*PROPOSED AMENDMENTS TO CODE OF CIVIL PROCEDURE, 1908*

1. *Order V - Service of Summons*

Insert Rule 10A for service of summons through electronic media

And

Add to Rule 19A simultaneous issue of summons through electronic media

1. *Order VII - Plaint*

Insert Rule 1A for the Plaint to contain e-mail address of the respondent(s)

1. *Order VIII - Written Statement*

Court permission for filing of written statement not to exceed 3 months in any case

ABOLISHING SECOND ATTEMPT FOR PHYSICAL DELIVERY

Second attempt of physical delivery is the peculiar feature of Indian legal system. The court follows a liberal approach regarding the service of notice to the defendants. Sending of notice again and again to the defendant and using substituted service at a very later stage. More than half of the cases in Delhi are delayed due to non-serving of notice.[[43]](#footnote-44) The practice of second attempt should be discarded and simultaneous service of process through registered post and electronic media should be undertaken within the first attempt only.

## Compulsory Mediation/Arbitration

To remedy their industrial weakness, unions in Australia turned to the state and the law for support, through the installation of systems of compulsory arbitration that would oblige employers to deal with them. It was the Liberal government in New Zealand that enacted the first effective measure. [[44]](#footnote-45)

As mentioned above the Indian government is considering separate commercial courts for commercial disputes. An alternative can be to have compulsory arbitration for commercial disputes coming straight to courts. ADR processes may require further streamlining and they should adhere to the specified timelines as far as possible. According to the proposed amendments, the presiding officer of a commercial dispute will have to clear the case within a nine-month time-frame. The arbitrator will be free to seek an extension from the High Court. But in case of further delays, the High Court will be free to debar the arbitrator from taking up fresh cases for a certain period.[[45]](#footnote-46)

## Court Management Apparatus

Setting up of a separate court apparatus means ruling out the necessity of appearance of lawyers before a judge for each and every step. For all the judicial formalities such as completion of pleadings, where application of judicial mind is not required, the same can be done before a registrar as done in the high courts or the Supreme Court. To reduce the pendency and to relieve Judges of unnecessary work it is proposed that once the plaint is accepted by the judge, then steps like- filing of written submission by the defendant and rejoinder by the plaintiff should be completed without appearing before the judge.[[46]](#footnote-47)

## Judgment Copy through E-Mail

In India, a judge may not pronounce the judgment on the day of conclusion of final arguments and may reserve it and pronounce it on another day. Within few days, the judgment may also be available online. The parties would then have to apply for a certified copy if they wish to file appeal or execution proceedings. Ideally, a judgment within a fixed period must be sent to all parties without applying. This would save time, cost and procedure. There should be no need for certified copy at all. This requirement should be done away with.

In *MKM Capital Property Limited* *v. Corbo and Poyser*,[[47]](#footnote-48) the Australian Capital Territory Court of Appeals found that a default judgment entered against two debtors could be served via Facebook. The court found Facebook “a valid method of bringing the matter to the attention of the defendant” where attorneys were able to match birth dates, friends, and email addresses on the debtors’ Facebook profiles to information in their loan applications. The court ordered service by private message to the debtors’ personal Facebook accounts with the legal documents attached and a description of their terms.[[48]](#footnote-49) Other common law jurisdictions followed suit. Setting the similar system in India of sending the Judgment copy through electronic or social media can help in reducing the number of days as there will be no requirement of parties coming to the court and also of fixation of a separate date to the delivery of judgment.

Also, it will simplify the procedural formalities in the civil suits and will help in reduction of cost for obtaining the copy of Judgment, if the copy of Judgment is delivered to the parties by way of electronic or social media.

## Process Fees

Process fee is the one which is required to be paid by the party requesting for service of any process, be it a notice or application. Although it is not a very huge amount required to be paid as the process fee, but the same adds on a further step or complication to the procedure for a recovery suit. Under the rules, the Court may make order for dismissal of suit if the plaintiff does not duly deposit the process fees.[[49]](#footnote-50) The dismissal of suit for non-deposit of process fees leads to unnecessary delay as the party often applies for restoration of the suit and for deposit of process fees. Very often the defendant’s lawyer raises objection as to the valuation of the disputed property and payment of court fees. Much time is spent on hearing of the issues relating to valuation, amount of court fee and jurisdiction of the Court.[[50]](#footnote-51) Pre-trial procedure should be simple. Therefore, in order to avoid delay in issuing of process and for earlier disposal of the suit, the provision of deposit of process fees for summoning to the defendant and witnesses should be deleted. Process fees should be either to be included in the Court fees at the time of filing the suit or provided by the government.[[51]](#footnote-52)

It is proposed to amend the process fee clause and instead of requiring its payment at every process, it should be taken as an aggregate amount with the submission of complaint by the plaintiff and with the appearance in the court by the defendant.

# **CONCLUSION**

With these proposed changes in the procedures, India can cut down the number of procedures by 10 digits. Also, the proposed technological changes such as online service of notice and pro-actively supplying a copy of the judgment online can cut down the number of days by at least 250 days. With the aggregate changes in the number of procedures and days, the total improvement can be expected to rank India at 164 for enforcement of contracts and 134 for doing business in India.[[52]](#footnote-53)

If the government can enforce compulsory arbitration along with 270-day deadline as proposed, it can bring Indian rank on contract enforcement to somewhat closer to 50 from 186.

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51. *Id. at 10.* [↑](#footnote-ref-52)
52. #  *Business Reform Simulators, http://www.doingbusiness.org/reforms/reform-simulator (last visitedJan. 24, 2015).*

 [↑](#footnote-ref-53)