

Legislative Brief

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018

The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018 was promulgated on May 3, 2018. It amends the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

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Highlights of the Ordinance

- ◆ The Commercial Courts Act, 2015 provides for commercial courts and commercial divisions of high courts to adjudicate commercial disputes with a value of at least one crore rupees. The Ordinance reduces this limit to three lakh rupees.
- ◆ The Ordinance allows state governments to establish commercial courts at the district level, even in territories where high courts have ordinary original civil jurisdiction.
- ◆ In areas where high courts do not have original jurisdiction, state governments may set up commercial appellate courts at the district level to consider appeals from commercial courts below the level of a district judge.

Key Issues and Analysis

- ◆ The Ordinance reduces the pecuniary jurisdiction of commercial courts from one crore rupees to three lakh rupees. It may be argued that the transfer of all commercial disputes above three lakh rupees may overburden the commercial courts and defeat the objective with which they were established.

PART A: HIGHLIGHTS OF THE ORDINANCE

Context

Enforcing commercial contracts requires the involvement of the judicial system. However, it takes nearly four years (1,420 days) in India to resolve commercial disputes.¹ This may be due to reasons such as high existing pendency of cases, and complex litigation procedures.¹ In 2013, there were 32,656 civil cases pending in various high courts, of which 52% were commercial disputes.²

Over the years, various expert bodies such as the Law Commission of India and the Standing Committee on Personnel, Public Grievances, Law and Justice have observed the need to fast track disposal of commercial disputes.^{2,3,4} They note that most commercial disputes, especially of high value have an impact on financial investments and larger economic activity in the country. In its 253rd Report, the Law Commission (2015) further noted that an independent mechanism for quick disposal of these commercial disputes is required with specialised expertise in dealing with commercial cases.²

In this context, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was enacted to fast track the disposal of high value commercial disputes (above rupees one crore), by establishing commercial courts at the district level, and commercial divisions and commercial appellate divisions in high courts.⁵

As of December 2017, state governments had constituted a total of 247 commercial courts in various districts across the country.⁶ To improve ease of doing business in India, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018 (Commercial Courts Ordinance, 2018) was promulgated in May 2018, to reduce the pecuniary jurisdiction of commercial courts and commercial divisions in high courts from one crore rupees to three lakh rupees.

Key Features

Table 1 compares provisions of the Commercial Courts (Amendment) Ordinance, 2018 with the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (2015 Act).

Table 1: Comparison of the 2015 Act with the Commercial Courts (Amendment) Ordinance, 2018

	Existing 2015 Act	The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018
Minimum value of commercial disputes	<ul style="list-style-type: none"> At least one crore rupees (amount to be notified by the central government). 	<ul style="list-style-type: none"> At least three lakh rupees (amount to be notified by the central government).
Commercial division in high courts	<ul style="list-style-type: none"> Establishes commercial divisions in 5 high courts which have ordinary original civil jurisdiction, i.e., the High Courts of Delhi, Bombay, Calcutta, Madras and Himachal Pradesh. 	<ul style="list-style-type: none"> No change.
Commercial courts at district level	<ul style="list-style-type: none"> State governments may set up commercial courts at the district level, in areas where high courts do not have original jurisdiction. 	<ul style="list-style-type: none"> Allows commercial courts at the district level to be set up, in areas where all 24 high courts have jurisdiction. In areas where high courts have original jurisdiction, state governments may specify the pecuniary jurisdiction of commercial courts which is not lower than three lakh rupees and more than the pecuniary jurisdiction of district courts in those areas. State governments may constitute commercial courts below the level of a district judge, in areas where high courts do not have original jurisdiction.
Commercial appellate division in all high courts	<ul style="list-style-type: none"> Establishes commercial appellate divisions in all 24 high courts to hear appeals against orders from: (i) commercial divisions of high courts, and (ii) commercial courts at the district level. 	<ul style="list-style-type: none"> No change.
Commercial appellate courts at district level	<ul style="list-style-type: none"> No provision. 	<ul style="list-style-type: none"> State governments may set up commercial appellate courts at the district level in areas where high courts do not have original jurisdiction. These courts will hear appeals against orders of commercial courts below the level of a district judge.
Appointment of judges of commercial courts	<ul style="list-style-type: none"> State governments, with the concurrence of the Chief Justice of the High Court will appoint judges of commercial courts from the higher judicial service of the state. 	<ul style="list-style-type: none"> State governments <i>may</i> with the concurrence of the Chief Justice of the High Court, appoint judges of commercial courts either at the level of a district judge or below the level of a district judge.
Pre institution mediation	<ul style="list-style-type: none"> No provision. 	<ul style="list-style-type: none"> Introduces mandatory mediation before the filing of a suit, in cases where no urgent relief is sought by the parties. To be completed within three months (extendable by two months).
Counterclaims	<ul style="list-style-type: none"> If a counterclaim was filed in a commercial dispute of at least one crore rupees in a civil court, the civil court could transfer the suit to a commercial court or commercial division of high court. 	<ul style="list-style-type: none"> Provision removed.

Note: Original ordinary civil jurisdiction refers to when a court has the power to hear a fresh case. In India, five High Courts (i.e., High Courts of Delhi, Bombay, Calcutta, Madras and Himachal Pradesh) have ordinary original civil jurisdiction. The 19 remaining High Courts only have appellate jurisdiction, i.e., they can hear appeals from the others of subordinate courts.

Sources: The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018; PRS.

PART B: KEY ISSUES AND ANALYSIS

Reduction in the pecuniary jurisdiction of commercial courts

The 2015 Act establishes commercial courts at the district level and commercial divisions in high courts to adjudicate commercial disputes with a value of at least one crore rupees. The Ordinance reduces this limit to three lakh rupees. This raises a question whether lowering the pecuniary jurisdiction of commercial courts is appropriate.

Over the years, the Law Commission and Parliamentary Standing Committees have observed that due to high pendency of cases the judicial system is unable to dispose of cases in a timely manner.^{2,3,4} The Law Commission in 2003 and 2015 recommended that a law be enacted to establish commercial courts to resolve commercial disputes of high value. They argued that adjudication of high value commercial disputes requires specialised expertise, and has a larger impact on foreign investments and economic growth of the country.⁷ As seen in Table 2 below, it has been recommended that the minimum value of cases being heard by commercial courts should be above rupees one crore.

Act:
Sections
2(i), 3, 4
Ordinance:
Clause
4(ii)

Reducing the minimum value to above rupees three lakh will increase the number of cases admitted in commercial courts and therefore slow down the priority given to relatively higher value cases. Note that while examining the 2015 Act, the Standing Committee on Law and Justice (2015) recommended increasing the minimum value of commercial disputes from one crore rupees to two crore rupees.⁴ It argued that setting a lower value may lead to the transfer of large number of cases which may overburden the commercial courts. Therefore, the purpose behind their establishment may be defeated.

Table 2: Recommendations of expert bodies on minimum value of commercial dispute

Year	Expert Body	Minimum value (in Rs)
2003	17 th Law Commission	One crore (or five crore)
2009	The Commercial High Courts Bill, 2009	Five crore
2010	Select Committee on the Commercial High Courts Bill, 2009	One crore
2015	20 th Law Commission	One crore
2015	The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015	One crore
2015	Standing Committee on Personnel, Public Grievances, Law and Justice	Two crore

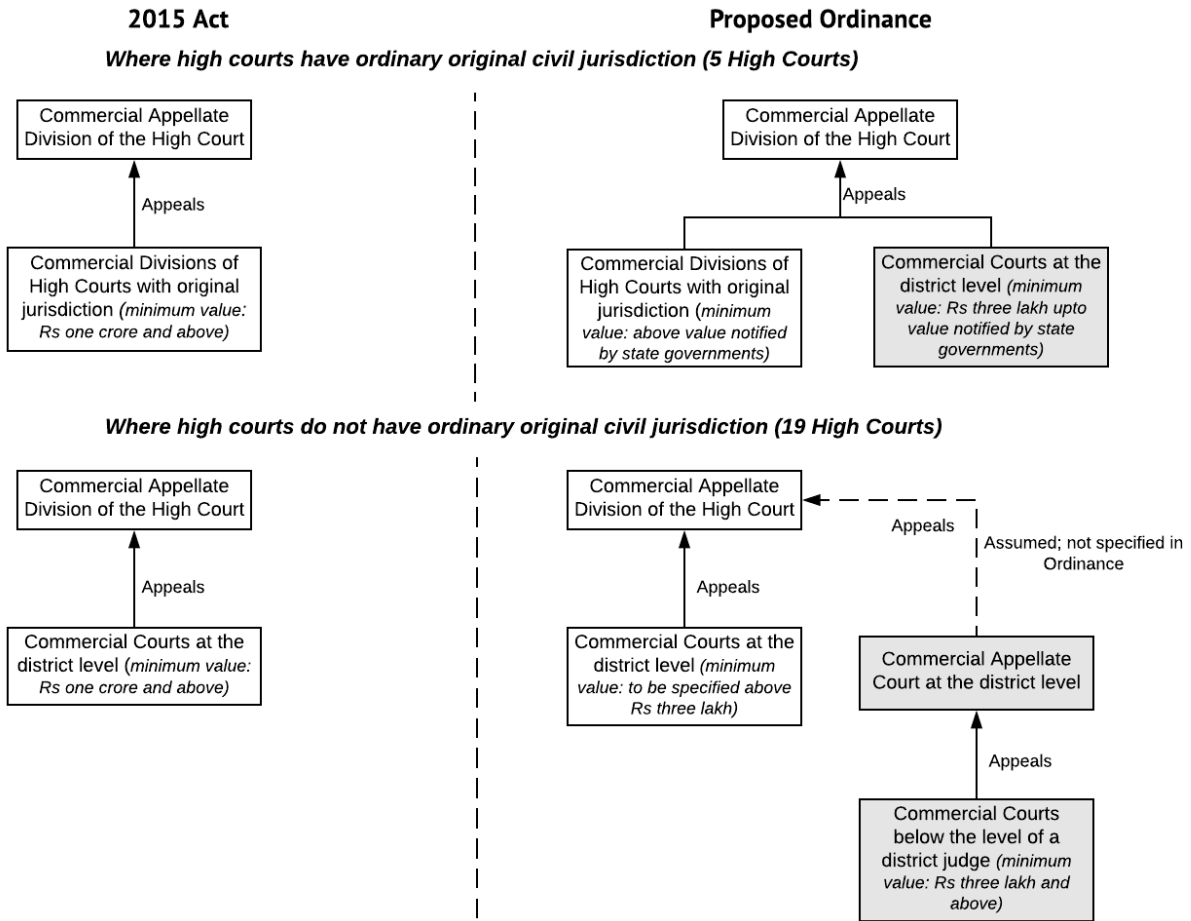
Other key issues affecting pendency of cases

Several expert bodies such as the Law Commission, National Commission to Review the Working of the Constitution, and Standing Committee on Law and Justice have recommended reforms to address the high pendency of cases. It may be argued that unless these are addressed, commercial courts may not be effective in speedy disposal of commercial disputes.

- **Vacancies and strength of judges:** Vacancy of judges across courts in India has affected the disposal of cases. As on March 2017, 41% of the approved strength of judges in high courts, and 23% in subordinate courts are vacant.⁸ The Standing Committee on Law and Justice (2015) noted that without filling up existing vacancies and increasing the strength of judges, commercial courts cannot function as specialised courts.⁴ Further, absence of judges with specialised expertise to decide commercial disputes will hinder the quick disposal of cases.⁴ Several suggestions have been proposed in relation to increasing judge strength as a means of addressing delays and arrears.^{7,9,10,11} These include:
 - *Fixing judge strength based on pendency:* The strength of judges in the high courts must be fixed on the basis of the level of pendency of cases. Further, in case of additional judges the rate of disposal of cases before them should be considered when appointing them in permanent positions.
 - *Doubling of judge strength:* The current strength of judges in subordinate courts and high courts may be doubled.
 - *Appointing retired judges for a year:* Retired judges and eminent lawyers may be appointed as ad hoc judges for a period of one year for dealing with arrears.
- **Litigation procedures:** The Law Commission (2015) recommended that mere establishment of commercial courts will not expedite adjudication of disputes.² It examined commercial courts in England and Singapore and recommended that litigation procedures in India need reform. For example, frequent adjournments sought by parties is the main cause of judicial delay and pendency in courts.² The Standing Committee on Law and Justice, while examining the 2015 Act, recommended that a cost be paid by the party seeking adjournments beyond a definite limit and such cost should progressively increase for subsequent adjournments.⁴ The Law Commission (2015) noted that the present culture of charging fees per hearing incentivises lawyers to delay cases. It recommended that court fees should be linked to the time consumed by the litigants in presenting their case.

Annexure

Figure 1: Hierarchy of commercial courts proposed by the Ordinance



1. “Ease of Doing Business”, 122nd Report of the Department Related Standing Committee on Commerce, December 21, 2015, <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Commerce/122.pdf>.
2. “Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015”, Law Commission, Report No. 253, January 2015, http://lawcommissionofindia.nic.in/reports/Report_No.253_Commercial_Division_and_Commercial_Appellate_Division_of_High_Courts_and_Commercial_Courts_Bill_2015.pdf.
3. “Proposals for Constitution Of Hi-Tech Fast – Track Commercial Divisions In High Courts”, Law Commission, Report No. 188, December 2003, <http://lawcommissionofindia.nic.in/reports/188th%20report.pdf>.
4. Report No.78, Standing Committee on Personnel, Public Grievances, Law and Justice: ‘The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015, Rajya Sabha, December 2015, <http://www.prsindia.org/uploads/media/Commercial%20courts/SCR-%20Commercial%20Courts%20bill.pdf>.
5. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, <https://indiacode.nic.in/bitstream/123456789/2156/1/201604.pdf>.
6. Rajya Sabha Starred Question No.14, Ministry of Law and Justice, December 15, 2017.
7. “Arrears and Backlog: Creating Additional Judicial (wo)man power”, Law Commission of India, Report No. 245, July 7, 2014, <http://lawcommissionofindia.nic.in/reports/Report245.pdf>.
8. Court News, Supreme Court of India, Volume 12, No.1, January to March 2017.
9. Vision Statement presented by the Law Minister to the Chief Justice of India at the National Consultation for Strengthening the Judiciary towards Reducing Pendency and Delays, October 2009.
10. Advisory Council of the National Mission for Justice Delivery and Legal Reforms, chaired by the Union Law Minister, on May 15, 2012; Conference of Chief Justices and Chief Ministers, 2012.
11. National Commission to Review the Working of the Constitution, Volume. 1, Chapter 7, <http://lawmin.nic.in/ncrcw/finalreport/v1ch7.htm>.

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