

Complex Commercial Litigation

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Quick reference guide enabling side-by-side comparison of local insights into the litigation market and legal framework; pre-action considerations (including alternative dispute resolution); bringing and defending a claim; procedural steps; funding; costs; appeals; cross-border enforcement; the advantages and disadvantages of litigating in this jurisdiction; and recent trends.

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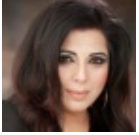
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BACKGROUND

Frequency of use

How common is commercial litigation as a method of resolving high-value, complex disputes?

Given the lackadaisical attitude and outdated procedural laws of the Indian courts, arbitration has been and continues to be a favoured mechanism for resolving complex and high-stake disputes. However, the enactment of the Commercial Courts Act 2015 (Commercial Courts Act), defining the timelines and streamlining the process, has imparted an impetus to commercial litigation alongside.

Law stated - 17 July 2023

Litigation market

Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

Although the culture and market for litigation in India is seen as unwieldy and a long-drawn-out process, it has been evolving with the positive changes brought in this regard. The courts in India are witnessing increased participation of international parties for dispute resolution.

Law stated - 17 July 2023

Legal framework

What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Commercial law is not codified in India and is dealt with under several statutes, such as the Indian Contract Act 1872, the Sale of Goods Act 1930, the Transfer of Property Act 1882 and the Insolvency and Bankruptcy Code 2016. Under the Commercial Courts Act, commercial disputes falling within the definition of 'commercial dispute' as provided therein, and of a specified value of Indian rupees (300,000 or above) are adjudicated by the specific courts designated thereunder. Essentially, the common law system governs Indian law.

Law stated - 17 July 2023

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

What key issues should a party consider before bringing a claim?

Bearing in mind the specific considerations of each case, the key elements to consider for a party intending to initiate a claim are the jurisdiction of the court, the limitation period for filing the claim, the nature of the relief sought in the context of duration of the proceedings, the presence of necessary evidence and the likelihood of a successful outcome. Further, the party may consider the possibility of an out-of-court settlement prior to submitting a claim to a court of law.

Law stated - 17 July 2023

Establishing jurisdiction

How is jurisdiction established?

Civil court jurisdiction is determined by the following primary factors:

- pecuniary jurisdiction, which refers to the value of the claim or dispute;
- territorial jurisdiction, which refers to the geographical nexus of the claim or dispute or the place of residence or business of the defendant(s); and
- the subject matter of the claim or dispute.

In India, parties cannot be vexed twice for the same cause of action, and if this is done, the aggrieved party has a right to seek rejection of the proceedings as being barred by law.

Law stated - 17 July 2023

Preclusion

Res judicata: is preclusion applicable, and if so how?

The doctrine of res judicata is applicable. It precludes the courts from trying any fresh suit or issue(s) that have been conclusively decided and adjudicated upon by a court, either when there has been no appeal preferred by the parties or when the appeal is dismissed or there could be no appeal therefrom. However, this is subject to certain exceptions, such as where the parties or cause of action or title of the suit are different.

Law stated - 17 July 2023

Applicability of foreign laws

In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

Indian courts recognise the applicability of a foreign law, in the event the governing law in the agreement between the parties to the dispute is such foreign law. However, this is subject to certain preconditions, such as bona fide intention of the parties for its applicability and such applicability must have a connection with the matter other than just being the stipulated governing law in the contract. The choice of foreign law cannot deviate from the mandatory and overriding provisions of Indian law or be in conflict with Indian public policy.

If a party wants to rely on foreign law, it should be pleaded like any other fact and be proved by evidence of experts in that law. The onus of proving the applicability of foreign law lies on the party relying on it. Hence, in such a case, the party may use it to its advantage to drag the proceedings, as these will involve an additional step of proving the applicability by leading evidence to that effect.

Law stated - 17 July 2023

Initial steps

**What initial steps should a claimant consider to ensure that any eventual judgment is satisfied?
Can a defendant take steps to make themselves 'judgment proof'?**

The underlying factors that a claimant should consider in order to ensure the satisfaction of an eventual judgment are to ascertain the financial position of the defendant and also, if required, seek an interim relief to prevent the defendant from disposing of its assets or creating third-party rights over them. Additionally, aspects such as whether there are any corporate guarantors that exist for the defendant or there exists a reciprocal arrangement between India and the country where the assets of the defendant exist, may also be taken into consideration.

It is usually difficult for judgment debtors to make themselves judgment proof and the only way that they may do so is by showing the court reasonable grounds that they do not have the wherewithal or capacity to pay the decretal amount. However, if the same can be proved by the judgment holder, the courts reject the stand of the judgment debtor, and either direct him or her to pay the amount decreed or face penal consequences of arrest and detention in a civil prison, subject to certain conditions.

Law stated - 17 July 2023

Freezing assets

When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

Freezing the defendant's assets is usually requested by a claimant when there is a genuine apprehension that the defendant may dissipate its assets or affect the execution of the judgment of the subject matter or when it is imperative to attach or freeze its assets to execute the judgment against it.

The courts in India usually grant interim reliefs, such as freezing of the assets of the defendant, when the plaintiff can demonstrate the following:

- a prima facie case exists;
- balance of convenience is in its favour; and
- irreparable injury or harm would be caused to it if the interim relief is denied to it by the court.

Law stated - 17 July 2023

Pre-action conduct requirements

Are there requirements for pre-action conduct and what are the consequences of non-compliance?

There are certain pre-action considerations and statutory requirements, such as mandatory mediation, prior to the institution of a commercial suit under Commercial Courts Act, where no urgent reliefs are sought. Also, in contracts where an attempt to amicably settle any dispute arising therefrom is a prerequisite, the parties must attempt this prior to initiating an action.

Under certain statutes, there are mandatory requirements in the form of notices and forms set out thereunder. Non-compliance with the requirements can be detrimental to the interest of the non-compliant party and the court may dismiss the claim on the basis of the same, with or without the imposition of costs.

Law stated - 17 July 2023

Other interim relief

What other forms of interim relief can be sought?

Apart from freezing of assets, other forms of interim measures include the following:

- attachment of property;
- depositing of a sum, security or bank guarantee with the court (equivalent to the amount claimed);
- appointment of local commissioners or receivers;
- interim custody or sale of goods; and
- stay on auction of property or goods.

Law stated - 17 July 2023

Alternative dispute resolution

Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

The Commercial Courts Act requires a party to mandatorily exhaust the remedy of mediation before filing a suit unless urgent relief is sought therein. The court may also direct the parties to engage in the same if the parties have an express agreement to that effect or otherwise. During the pendency of the suit, either the court or the parties may refer to or request the alternative dispute resolution (ADR) mechanism. In the case of a failure to arrive at a conclusion or settlement through any ADR mechanism, the matter would continue to be adjudicated upon in the court concerned.

Law stated - 17 July 2023

Claims against natural persons versus corporations

Are there different considerations for claims against natural persons as opposed to corporations?

A corporate entity is a distinct legal entity, separate from its shareholders. The liability of shareholders in the case of corporations is generally limited in proportion to their respective share capital, and the personal assets of the shareholders cannot be attached towards satisfaction of a claim against the corporation. In the case of a claim against an individual, their personal assets may also be attached if the assets of their business concern are insufficient to satisfy a claim against it, as the individual's liability is unlimited.

Law stated - 17 July 2023

Class actions

Are any of the considerations different for class actions, multiparty or group litigations?

Although the principles applicable to a suit for personal injury instituted by a person are the same for class action suits filed by persons with a common interest or grievance, the same differ in the context of the liability to prove the wrong caused to the claiming party. In class action suits, parties need not individually prove their claims, and the courts tend to adopt an overarching approach and grant damages that they consider reasonable and just, with no set formula, depending on the facts and circumstances of each case.

There are various statutes that recognise the concept of class action suits in India with different considerations, such

as the representative suits under the Code of Civil Procedure 1908 , 'public interest litigation' under writ jurisdiction, suits by shareholders and depositors in the company under the Companies Act 2013 for oppression and mismanagement, actions by consumers or associations under the Competition Act 2002 for anti-competitive practices, actions by consumers under the Consumer Protection Act 2019 , and by homebuyers under the Insolvency and Bankruptcy Code (Amendment) Act 2020.

Law stated - 17 July 2023

Third-party funding

What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

The concept of third-party funding is at a nascent stage in India. At present, there is no specific legislation that regulates litigation funding. However, it is pertinent to note that third-party funding has been recognised in the context of civil suits by a few states (Karnataka, Gujarat, Maharashtra, Madhya Pradesh and Orissa) by way of an amendment to Order XXV of the Code of Civil Procedure 1908, specifically acknowledging the permissibility and role of a financier of the plaintiff's costs, and providing for the impleadment of the said party to the court proceedings. The Supreme Court of India, in the case of Bar Council of India v AK Balaji (AIR 2018 SC 1382) , clarified the permissibility of third-party litigation funding and observed that '[t]here appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation'.

Law stated - 17 July 2023

Contingency fee arrangements

Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

As per the Bar Council of India Rules 1975 (Part VI, Chapter II, Section II, Rule 20) , lawyers in India are expressly barred from entering into contingency fee contracts with their clients. Additionally, the concept of pactum de quota litis (ie, arrangements to pay a percentage of the claim amount to a counsel) is prohibited under Indian law.

Law stated - 17 July 2023

THE CLAIM

Launching claims

How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Claims are launched by filing a suit in the form of a 'plaint' before a competent court of first instance. The plaint encapsulates the facts of the matter, the claim and the relief sought, and these are accompanied by an affidavit along with all relevant documents substantiating the claim. Upon issuance of the summons by the court, the defendant files its defence in the form of a 'written statement' within such time limit as prescribed under the Code of Civil Procedure 1908.

Written pleadings are usually long and detailed, depending upon the intricacy of the matter, and contain a concise form of the material facts on which the party pleading relies for the claim or defence, the amount of relief sought and the supporting documents. All documents relevant to corroborating the claims and contentions need to be appended to the

pleadings.

Law stated - 17 July 2023

Serving claims on foreign parties

How are claims served on foreign parties?

Order V, Rule 25 of the Code of Civil Procedure 1908 deals with service on defendants who reside or carry out their business outside India, and lays out the procedure of service in a foreign territory through the 'political agent' or court of that territory. Generally, service of judicial documents on foreign parties is governed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), to which India is a signatory, and claims are served on a foreign party in a signatory country to the Convention as per the procedure specified thereunder.

Law stated - 17 July 2023

Key causes of action

What are the key causes of action that typically arise in commercial litigation?

The key causes of action that arise in commercial litigation almost always pertain to breach of contract, especially relating to performance, payment and compliance with other contractual obligations between parties.

Law stated - 17 July 2023

Claim amendments

Under what circumstances can amendments to claims be made?

Indian courts enjoy wide discretion in deciding matters of amendment of pleadings. As a general rule, parties would be allowed to amend their pleadings when such amendments are necessary for the purposes of determining the real questions in controversy raised between the parties at dispute, and such amendments would occasion no harm or prejudice to the opposite party. However, the party seeking such amendments must ensure that it does not alter the cause of action on the basis of which the original suit was filed or the defence taken, or substitute a new cause of action. Further, such amendments will not be allowed after the commencement of trial, unless the party seeking the amendments satisfies the court that, in spite of due diligence, the amendments could not have been sought earlier.

Law stated - 17 July 2023

Remedies

What remedies are available to a claimant in your jurisdiction?

Under Indian law, the claimant may seek remedies including but not limited to the following:

- damages, namely pecuniary compensation in the form of compensatory damages, nominal damages and exemplary damages;
- mandatory and prohibitory injunctions;
- specific performance of obligations;
- declarations;

- restoration of status-quo ante; and
- attachment of property equivalent to the value of dispute and to appoint a receiver.

Law stated - 17 July 2023

Recoverable damages

What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

Under Indian law, damages that arise naturally in the usual course of things from a breach and are close enough in the chain of causation for a wrong that is either a tort or a breach of contract, are recoverable by parties. However, damages that are remote or suffered due to indirect loss sustained by reason of a breach may not be recoverable. The Indian courts only award such damages that are compensatory and not punitive in nature.

There is no specific rule on damages that makes the Indian jurisdiction more favourable than others.

Law stated - 17 July 2023

RESPONDING TO THE CLAIM

Early steps available

What steps are open to a defendant in the early part of a case?

Upon receiving the summons by the court, the defendant – in addition to filing its written statement – may file counterclaims against the plaintiff with respect to the cause of action that the defendant has against the plaintiff or raise an objection that the suit is bad for misjoinder or non-joinder of necessary parties, who are also liable in whole, or in part, for the claim and without whom no effective decree in the suit can be passed.

If the defendant considers that the court before which the plaintiff has filed the suit does not have jurisdiction to decide it, then the defendant should, at the first instance, raise its objection to that effect. Also, the defendant can make an application to the court for a summary judgment if it considers that the plaintiff has no real prospect of succeeding in the claim and there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.

Law stated - 17 July 2023

Defence structure

How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

The defence should be structured such that the facts challenging the maintainability of the suit should be detailed therein and should contain material facts on which the defendant relies for its defence. The defendant must specifically address each allegation of the plaintiff by way of either admission or denial.

The defence in a commercial suit under the Commercial Courts Act must be filed within 120 days of the date of service of summons upon the defendant, whereas in a commercial dispute not falling under the said Commercial Courts Act, the defendant is statutorily required to file the defence within 30 days (which is extendable to 90 days, with the permission of the court) of the date of service of summons upon the defendant. Furthermore, the defendant is duty-bound to produce documents upon which it relies in support of its defence.

Changing defence

Under what circumstances may a defendant change a defence at a later stage in the proceedings?

The defendant is permitted to amend its defence to bring out the true and correct facts necessary for determining the real question in controversy, and, generally, courts have adopted a liberal approach in allowing defendants to do so, to ensure that no material fact is left out while determining the matter in issue.

However, such amendments are not allowed after the commencement of trial, unless the party seeking the amendments satisfies the court that, despite due diligence, such a fact or amendments could not have been pursued earlier.

Law stated - 17 July 2023

Sharing liability

How can a defendant establish the passing on or sharing of liability?

The defendant may, at any stage of the proceedings, request the court to direct a person who is liable and necessary to answer the claims of the claimant and without which no effective decree in the suit can be passed, to join the proceedings.

Law stated - 17 July 2023

Avoiding trial

How can a defendant avoid trial?

The defendant can avoid trial by various methods, including filing an application before the court for rejection of the plaint based on, inter alia, the court's lack of jurisdiction, the suit being barred by any law or not disclosing a valid cause of action.

The defendant may also file an application seeking the deletion of its name from the array of parties. The defendant may also apply to the court to refer the matter to mediation for an amicable settlement of disputes. Further, the parties to the suit may also enter into an out-of-court settlement and approach the court to dispose of the suit on the basis of that settlement.

Law stated - 17 July 2023

Case of no defence

What happens in the case of a no-show or if no defence is offered?

If the defendant fails to file its defence or does not appear before the court despite proper service of the summons on the defendant and reasonable time given to it to do so, the court may hear the matter ex parte and adjudicate upon the same. In case the defendant, at a later stage during the pendency of the suit, assigns good cause for its non-appearance to the satisfaction of the court, the court may, subject to certain terms and conditions as it deems fit, allow the defendant to answer the claim of the plaintiff and take part in the proceedings.

Law stated - 17 July 2023

Claiming security

Can a defendant claim security for costs? If so, what form of security can be provided?

A defendant has a right to claim from the court security for costs incurred and likely to be incurred by it. The court shall, however, grant the same only in cases where the plaintiffs are based outside India and do not possess any sufficient immovable property within India other than the property in suit. The forms of security for costs usually include deposits in courts, bank bonds or bank guarantees.

Law stated - 17 July 2023

PROGRESSING THE CASE

Typical procedural steps

What is the typical sequence of procedural steps in commercial litigation in this country?

The procedural steps for adjudication of a commercial suit under the Commercial Courts Act are as follows:

- filing of the suit/plaint;
- filing of the written statement/defence by the defendant;
- inspection of the documents filed by the parties;
- admission and denial of the documents filed by the parties;
- case management hearing;
- trial and arguments by the parties; and
- pronouncement of the judgment.

Law stated - 17 July 2023

Bringing in additional parties

Can additional parties be brought into a case after commencement?

The court may, either upon an application by either party or suo moto, pass an order for adding any person as the plaintiff or the defendant in the suit, to enable itself to effectually and completely adjudicate upon and settle all the issues involved in the suit. Further, it is open for any third party to apply to the court for its impleadment as one of the parties to the suit.

Law stated - 17 July 2023

Consolidating proceedings

Can proceedings be consolidated or split?

Proceedings can be consolidated either by the court on its own motion or upon an application made by any of the parties to the proceedings requesting consolidation. This can happen where the right to relief arises out of the same act or transactions and where the common question of law arises relating to the same parties. The court may also split the suit by ordering separate trials for the reliefs sought by the plaintiff against the defendants.

Court decision making

How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The courts in a civil trial apply a standard of proof governed by the preponderance of probabilities. The burden of proof is a requirement for the party to demonstrate that a claim is valid or invalid based on facts and evidence presented, and this need not be proved beyond reasonable doubt, unlike in criminal proceedings.

Law stated - 17 July 2023

How does a court decide what judgments, remedies and orders it will issue?

The court passes judgments based on paradigms and parameters of law by applying judicial precedents and statutory provisions applicable to the facts of the case, cause of action, nature of the case, issues involved and the submissions and evidence led by the parties during the trial stage.

Law stated - 17 July 2023

Evidence

How is witness, documentary and expert evidence dealt with?

The two main kinds of evidence that are usually adduced in civil proceedings are oral and documentary evidence. The former includes direct, substantive and corroborative evidence, whereas the latter includes only substantive and corroborative evidence. Further, the opinion of an expert witness is required on points relating to, for example, foreign law, science, art, identity of handwriting and finger impressions. This form of evidence is only called for where specialised knowledge is required, and is to be led by a person who has acquired knowledge on the subject professionally.

Oral evidence has lesser value than documentary evidence adduced for the same. To achieve tactical advantage in a case, the parties should give documentary primary evidence to prove a fact, and bring a witness who has direct knowledge of the fact on which the party calling them requires proof. Further, when evidence relating to certain matters is reduced in the form of a document, no evidence is required to be given for proof of those matters except the document itself. Hence, oral proof cannot be substituted for a document, when a document exists.

Law stated - 17 July 2023

How does the court deal with large volumes of commercial or technical evidence?

The court may deal with large volumes of commercial or technical evidence by taking the necessary time to assess and evaluate the relevance of commercial or technical evidence. However, in certain cases, courts appoint commissioners to perform the task of preparing a report to be dealt with by the court for the said purpose.

Law stated - 17 July 2023

Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Evidence in a foreign country can be obtained either by way of a letter of request addressed to a foreign court as per the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970, to which India is a signatory, or by appointing a commissioner as an officer of the court to record the evidence or statement of a witness in a foreign country. The commissioner, though, cannot compel the attendance of a witness. However, if an Indian court requests the competent authority of a foreign country that is a signatory to the Convention, by means of a letter of request, to obtain evidence or record the statement of a witness, the latter can, if necessary, exercise its power of compulsion.

Law stated - 17 July 2023

How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

The duly summoned witnesses are tested on the credibility of their statements made on oath before the court. The witnesses may give all material facts within their knowledge related to the case, and the statements are analysed by the court, taking into consideration the facts presented in the case. Further, the courts allow for cross-examination of such witnesses who provide their testimony.

Documentary evidence is considered superior to oral evidence and is tested on various factors such as genuineness, the supposition of its existence, including ascertaining whether it is forged or not, and the intention of the parties behind the execution of the documents. If the authenticity of a document is challenged, then the courts allow the party challenging such authenticity to cross-examine the person adducing the document.

Law stated - 17 July 2023

Time frame

How long do the proceedings typically last, and in what circumstances can they be expedited?

In commercial suits, rigid timelines are provided under the Commercial Courts Act so that such proceedings are concluded in a timely manner. Despite this, the courts are usually unable to conclude the commercial proceedings within these timelines due to the voluminous pendency of cases, antiquated procedural laws, various stages before the judgment pronouncement and numerous adjournments sought by the parties to the proceedings to delay the procedure. The Commercial Courts Act provides for a case management hearing, allowing the court to set a timeline for the case and fix dates for the proceedings of the matter that would expedite the disposal of cases. Typically, the proceedings last for three to five years.

A variety of other legislation provides for timelines to expeditiously conclude the proceedings, and in light of this, the courts are making their systems robust to accommodate the changes. Further, the superior courts also issue advisory guidelines, directing the lower courts to adjudicate matters without any inordinate delay.

Law stated - 17 July 2023

Gaining an advantage

What other steps can a party take during proceedings to achieve tactical advantage in a case?

In cases where trial is unnecessary, the grant of summary judgment would exponentially expedite the court proceedings. An application by either party can be made, requesting that the suit be disposed of, without recording oral evidence. The court may exercise its discretion, in the event the facts and circumstances reveal that there is a compelling reason why the suit should not be summarily disposed of. Also, the parties may, on the basis of the admission of the opposite party, request for judgment on the basis of the admission without conducting trial.

Further, various other tools – such as application for rejection of plaint whereby the defendant can plead before the court that the suit filed by the plaintiff is devoid of any cause of action or lacks jurisdiction – can be an effective measure for dismissing the opponent's suit without going through the tedious process of trial.

Additionally, the defendant may opt for an application seeking relief for deletion of its name from the array of parties on the ground that no relief has been sought from the said defendant in the suit and the suit can be effectively decided without the said defendant. Such applications are an effective tool to adjudicate a matter qua such defendant without getting into the merits of the matter.

Law stated - 17 July 2023

Impact of third-party funding

If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

Although third-party funding would allow the party being funded to pursue the case with minimal risk of being under financial pressure, which the party's financial situation could otherwise not allow them, some of the potential drawbacks of this are that the litigation is likely to be controlled by the funding party, and the counsel may compromise on the independence to operate qua their client alone due to the directions of the funding party. In such cases, the funding party is likely to be pro-litigation in order to reap more benefit for themselves from the outcome thereof, thereby discouraging settlement between the parties to the dispute.

Further, in the absence of any clear agreement between the funder and the claimant, there is also risk of withdrawal of funding at any stage of the proceedings that may leave the claimant with an additional burden of facing the consequences thereof.

Law stated - 17 July 2023

Impact of technology

What impact is technology having on complex commercial litigation in your jurisdiction?

The witness and accused testimony could be provided through video conferencing if requested and allowed by the Indian courts. Also, in many civil proceedings, especially arbitration proceedings, the parties opt for Artificial Intelligence Transcription for recording the proceedings.

Further, the information related to a case – such as status, orders and judgments – is available online and certain courts have also adopted e-filing procedures. However, the documents filed electronically by the parties cannot be accessed by them and courts have not completely shifted online. Therefore, paperless trials are uncommon in India; however, parties are witnessing the shift of proceedings from offline to online, which is a step in the right direction.

Parallel proceedings

How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

Depending on the type of the proceeding initiated, there could be significant tactical advantages for a party to pursue parallel proceedings, simultaneously or at a later stage. Both civil and criminal proceedings can be pursued in parallel, as the burden of proof under each of the proceedings differs indisputably. It is common practice that parties invoke both civil and criminal proceedings, and the other party defends such proceedings by taking the defence of forum shopping and multiplicity of proceedings as pressure tactics to force the party to settle the dispute.

A private prosecution can be initiated by filing a private complaint directly before the magistrate. Private complaints do not require investigation by the police and the complaint is dealt with by the magistrate concerned based on the documentary evidence presented by the complainant.

Law stated - 17 July 2023

TRIAL**Trial conduct**

How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

Typically, trial in a commercial suit involves parties establishing their case by adducing evidence, examination and cross-examination of the parties' witnesses and presenting arguments, both oral and written, along with supporting law. The type of proceedings initiated by the claimant also decides the trajectory and length of the trial.

For commercial suits under the Commercial Courts Act, the courts are mandated to conduct case management hearings to fix the overall timelines for the conduct of the case, and the trial should be concluded within six months from the first case management hearing. However, this is not strictly implemented. Also, often the courts, to expedite the case, ask the parties to provide a written summary of the arguments instead of advancing the arguments orally.

Summary trial may also be applicable in certain cases, where the case may be adjudicated solely based on documentary evidence.

Law stated - 17 July 2023

Use of juries

Are jury trials the norm, and can they be denied?

Jury trials are no longer a norm in India. They were abolished in 1973 upon the introduction of the Code of Criminal Procedure 1973.

Law stated - 17 July 2023

Confidentiality

How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

Usually, unless specific direction is given to the contrary, court proceedings are not confidential and are held in an open court.

The documents filed by the parties that are taken on record by the court are not accessible publicly and permission has to be sought from the court for accessing them. The parties can also consider filing an application seeking that certain information be kept confidential (usually a redacted version is kept on record and the original of the document in a sealed cover) or for proceedings to be held in camera (hearings not held in public). Such confidential documents are also not allowed to be accessed by the opposite party. The procedure for in-camera proceedings is not a practice in commercial suits and is usually adopted in family disputes, trials of rape or child-related offences.

Law stated - 17 July 2023

Media interest

How is media interest dealt with? Is the media ever ordered not to report on certain information?

As court proceedings are accessible to the public, the media may publish regarding them. However, the exception provided under section 7 of the Contempt of Courts Act 1971 acts as a measure to curb the freedom of media to publish case-related information unfettered. In recent times, the courts, in certain cases, have passed sweeping orders restraining named (or unnamed) entities from publishing case-related information until an order to the contrary is passed. The courts have also passed strictures against reporting about case developments; however, such media gagging orders are uncommon in commercial disputes and are passed only in high-profile cases, where public policy may be impacted due to the publication of case details.

Law stated - 17 July 2023

Proving claims

How are monetary claims valued and proved?

Monetary claims are made by parties in their claims and are usually valued on the basis of the loss suffered by the parties resulting from a breach. Damages awarded by the court are compensatory in nature and are awarded to the tune of actual damage suffered and proved by the party.

In commercial disputes, the contracts usually contain a provision stipulating liquidated damages that are a genuine pre-estimate of the loss. Therefore, under those circumstances, the courts can award the stipulated amount in the event parties prove that loss was caused to them. In the absence of the stipulation of liquidated damages, the courts evaluate and calculate the losses suffered by one party based on the actual proof presented by that party. Pursuant to the assessment of the merits of the case, the courts adjudicate on the quantum of the damages to be awarded.

Law stated - 17 July 2023

POST-TRIAL

Costs

How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

Costs imposed by the courts are dependent on the facts and circumstances of each case. Generally, Indian courts are not known to award or impose a high cost towards legal fees, administrative costs, among others. However, in certain cases, where there is compelling evidence that the case filed was false and vexatious, the courts may impose substantial costs to curb or deter parties from filing such frivolous litigation.

Typically, the final judgments or decrees are detailed and deal with, for example, the facts leading to the disputes, each issue involved in the matter, arguments advanced by the parties, judicial precedents and the legal principles relied upon. The judgments rendered by the court are available on the website of the court concerned.

Law stated - 17 July 2023

Appeals

When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

All judgments rendered are appealable at the first instance. In commercial cases filed under the Commercial Courts Act 2015, appeal from the final decree or judgment lies with the commercial appellate court or commercial appellate division of the High Court, as applicable. The appeal to the commercial appellate court or commercial appellate division of the High Court, as the case may be, can be made within a period of 60 days. An appeal can be filed on the basis that the court erred in appreciating the facts and law involved in the case. For the first appeal made by the parties, no permission is required to be sought from the court.

Further, under article 136 of the Constitution of India, the Supreme Court may also grant special leave to appeal against any order, decree or judgment of a subordinate court. However, a petition under article 136 can only be made for cases involving a substantial question of law, and not fact. Appeals to the Supreme Court under special leave can be made within a period of 90 days, from the pronouncement of judgment.

Delay in filing the appeal can be condoned based on the reasons cited by the party. The courts endeavour to dispose of appeals within six months to one year.

Law stated - 17 July 2023

Enforceability

How enforceable internationally are judgments from the courts in your jurisdiction?

Enforcement of judgments passed by Indian courts would depend on the bilateral treaty, if any, or the law of the foreign country. India has signed bilateral treaties with certain countries whereby reciprocity in relation to the enforcement of judicial decrees passed by Indian courts has been established. The foreign courts of the reciprocating territory enforce decrees passed by Indian (superior) courts, as if they were pronounced by competent courts of the said reciprocating territory.

Law stated - 17 July 2023

How do the courts in your jurisdiction support the process of enforcing foreign judgments?

The recognition and enforcement of foreign judgments and decrees in India are governed by section 44-A, read with section 13, of the Code of Civil Procedure 1908. A conclusive foreign judgment or decree passed by the superior court of the reciprocating nation can be enforced by instituting execution proceedings as per the procedure prescribed in the Code. Further, a judgment passed by a court of a non-reciprocating nation can be enforced by instituting a fresh civil suit in India on the issues involved therein, and the foreign decree would have a persuasive value.

Law stated - 17 July 2023

OTHER CONSIDERATIONS

Interesting features

Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

The courts in India, especially the high courts and the Supreme Court, are extremely proficient in adjudicating complex commercial litigation. Further, the shift from physical to online dispute resolution would also provide tactical advantage to parties litigating in India.

In addition to the regular courts, there are special tribunals that have been set up for the adjudication of commercial disputes, such as the National Company Law Tribunal and the Debts Recovery Tribunal.

Law stated - 17 July 2023

Jurisdictional disadvantages

Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

The prolonged adjudication of disputes is a glaring disadvantage, prevalent in Indian litigation for multiple reasons, which include a large number of pending cases, archaic procedural laws, lack of judicial infrastructure, numerous adjournments by parties and understaffing of the judiciary. However, recent legislation changes are a conscious effort to address the issue at hand.

Law stated - 17 July 2023

Special considerations

Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

Not applicable.

Law stated - 17 July 2023

UPDATE AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?





















Indian courts and tribunals are under immense strain from the massive backlog of pending cases. This situation also hampers the ease of doing business in India as foreign companies fear that in case of a dispute, the resolution before Indian courts and tribunals would take a long time resulting in high legal costs, loss of management time, and uncertainty in doing business.

Many disputes are against the government and public sector undertakings. Therefore, through the Union Budget 2023–24, the Government of India announced a one-time voluntary settlement programme called the Vivad se Vishwas II (Contractual Dispute) Scheme (Scheme) to resolve contractual issues involving the government of India or its undertakings. The Scheme would also be applicable to disputes that have resulted in arbitral awards or court decrees or court orders upholding arbitral awards.

The government released the final draft of the Scheme, vide its office memorandum dated 29 May 2023 issued by the Department of Expenditure of the Ministry of Finance. The date of commencement of the Scheme was 15 July 2023 and the last date for submission of claims is 31 October 2023. The government's initiative to establish a framework for resolving contractual disputes in order to reduce the strain on the judiciary and shorten the time is a step in the right direction. However, the success of the Scheme would depend on the prompt acceptance of settlement terms submitted under the Scheme by the parties.

Law stated - 17 July 2023

Jurisdictions

	Australia	Holding Redlich
	Bermuda	MJM Barristers & Attorneys
	Brazil	Arruda Alvim, Aragão, Lins & Sato Advogados
	Bulgaria	Kinkin & Partners
	China	Jincheng Tongda & Neal
	Cyprus	Karamanolis & Karamanolis LLC
	Denmark	Lund Elmer Sandager
	Ghana	Ferociter
	Gibraltar	Signature Litigation
	India	Chadha & Co
	Indonesia	SSEK Law Firm
	Japan	Miura & Partners
	Lithuania	Triniti Jurex
	Luxembourg	Brucher Thieltgen & Partners
	Mexico	OLIVARES
	Nigeria	ÁLEX
	Switzerland	Bär & Karrer
	Thailand	Duensing Kippen
	United Arab Emirates	Horizons & Co Law Firm
	United Kingdom - England & Wales	Seladore Legal
	USA	Vinson & Elkins LLP