

Translucent barriers that foreign award holders encounter when seeking to enforce the awards in India: navigating the Indian Judiciary

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Abstract: The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards should enable prevailing parties in international arbitrations to enforce awards in a timely manner in any of its 172 signatory countries. Nevertheless, when it comes to India there are considerable differences in the time and cost entailed by enforcement compared to the rest of Asia. This paper examines the different legal obstacles and reasons behind this situation and proposes some alternatives to try to improve the situation, which is not only harmful for interested parties but also damages India's reputation.

Keywords: Arbitration India New York Convention Enforcement Foreign awards Legal obstacles.

(A) INTRODUCTION

We are living in a globalised age in which cross-border trade and investment are increasing rapidly in every country, leading to a growth in the number of disputes between parties based in different countries.¹ It is well-known that if both parties fulfil a contract,² it is concluded to their satisfaction. However, if either party breaches the obligations set out in the contract a dispute may arise³ and the non-defaulting party may have to overcome many problems to protect its rights;⁴ in such cases the non-defaulting party's top priority is having the adequate means to do so.⁵ Assuming that the contract stipulates that any controversy should be resolved by arbitration, international practice shows that obtaining an arbitral award may not immediately end disputes between the

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¹ See H. Pathak, "International standardization of arbitration as an alternate dispute resolution forum and its acceptance in India", 6 (Special) *Juridical Tribune* (2016) 99-107, at 103.

² See J. Chitty and H.G. Beale, *Chitty on contracts* (30th ed., Sweet & Maxwell, London, 2008) Vol. 2, at 43-266.

³ See J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) 1-1, at 1.

⁴ See Lew, *supra* n.3, 1-3, at 2.

⁵ See Hill Dickinson Lawyers, "Dealing with and Resolving problems", *Continuing Professional Development Programme* (2012) at 71. See also P.W. Becker, *The recognition and enforcement of international commercial arbitration awards in a South African context* (Doctoral dissertation at North-West University, South Africa, 2005) at 26, accessed 27 May 2023.

parties⁶ because the prevailing party expects the award to be enforced without delay. Even if it is the exception rather than the rule, there are instances in which the losing party refuses to comply promptly and voluntarily with the award,⁷ frustrating the prevailing party's expectations.⁸

In an international context it is therefore in each country's best interests to have the means to be able to execute foreign awards properly, promptly, successfully and without undue delay in the country in which the defaulting party is based or holds assets. The most influential treaty for achieving this goal is probably the New York Convention,⁹ also known as the "New York Arbitration Convention" or the "New York Convention" (NYC from now on).¹⁰ As UNICITRAL Secretary Mr Reanid Sorieul has stated, the NYC's main aim is "to oblige State Parties to ensure non-discrimination of foreign and non-domestic arbitral awards, such that these awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards".¹¹ As of August 2023 the New York Convention has 172 state parties including India, which signed it on 10 June 1958 and ratified it on 13 July 1960.

However, the application of the NYC in India has not been problem-free, and this may lead the international legal community to feel that India is not a pro-enforcement of foreign arbitral awards forum. The biggest barrier is the time that Indian courts take to enforce awards – and the associated costs.

This article examines whether the Indian judiciary system properly and effectively protects foreign award holders' rights against Indian parties under the NYC umbrella. Part II compares the length and cost of enforcement proceedings for foreign awards in some Asian countries which are also signatories to the NYC, while Part III considers the main practical hurdles that foreign award holders may face in enforcing their awards in India within a reasonable time period. Part IV contains the conclusions and suggests a wide range of potential solutions, ranging from increasing the number of current judges to establishing an enforcement procedure based on the blockchain technique.

⁶ See P. Comsa, "Enforcing arbitral awards in Romania – always a challenge", 5(1) *Challenges of the Knowledge Society* (2015) 182–195, at 182, accessed 27 May 2023.

⁷ See Comsa, *supra* n. 6, at 182.

⁸ See Becker, *supra* n. 5, at 2. See also R. N. Yao, "L'Exécution d'une sentence arbitrale nationale ou internationale en Côte d'Ivoire, cadre légal – enjeux et obstacles" 4(3) *KAS African Law Study Library*, (2017) at 382–393, at 383, accessed 27 May 2023 [doi: 10.5771/2363-6262-2017-3-38].

⁹ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

¹⁰ See K. Fach Gómez and A.M. López Rodríguez, *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International, Alphen aan den Rijn, 2019). See also F. Ferrari, F. Rosenfeld and C. Kotuby, *Recognition and Enforcement of Foreign Arbitral Awards: A Concise Guide to the New York Convention's Uniform Regime* (Edward Elgar Publishing, Cheltenham, 2023) [doi: 10.4337/9781035302079]. See also E. Gaillard and B. Siino, "Enforcement under the New York Convention", in J.W. Rowley QC, E. Gaillard and G.E. Kaiser (eds.), *The Guide to Challenging and Enforcing Arbitration Awards* (Law Business Research, London, 2021), 86–99, at 87.

¹¹ See R. Sorieul, *Message from Secretary of UNCITRAL*, on the 1958 New York Convention Guide website (2013), accessed 27 May 2023.

(B) COMPARATIVE ANALYSIS OF THE LENGTH AND COST
OF ENFORCEMENT PROCEEDINGS FOR FOREIGN AWARDS
IN THE TWO SIGNATORY COUNTRIES TO THE NEW YORK CONVENTION
IN SOUTHERN ASIA WHICH HAVE ALSO SIGNED FREE TRADE
AGREEMENTS WITH THE EUROPEAN UNION

India is an emerging economy¹² and a commodity import and export market. Between 2021 and 2022 the country imported goods to the value of USD613,052.05 million and exported goods to the value of USD291,808.48 million. From April 2022 to November 2022 these amounts increased to USD493,456.31 million (imports) and USD298,285.79 million (exports).¹³ Such transactions are normally supported by written sales and purchase contracts between the contracting parties,¹⁴ which in the scenario discussed here would be an India-based company and an international company based in another country. Contracts of this kind usually contain provisions such that any dispute will be solved by arbitration in one of the NYC's signatory countries and the analysis here is based on this premise. In some cases, the non-prevailing party in an arbitration is the one based in India, which may decide not to honour the award. This situation generates a chain of legal problems which will be analysed in Part III of this paper.

On the basis of these premises any contracting party to the NYC which has obtained an unambiguous award against an Indian-based company in an NYC country signatory (except India) is considered the holder of a foreign-based award.¹⁵ The regulation of the enforcement of these awards, which is laid down in Chapter I, Part II of the 1996 Indian Arbitration and Conciliation Act, plays a key yet controversial role. Foreign award holders are required to file an execution petition if the defaulting party does not honour its obligations under the award. The security and protection of foreign parties' rights rely on and lie in India's proper, efficient and effective execution of foreign awards.

The possibility that enforcing foreign arbitral awards in any country may lead to unpredictable outcomes (mainly with respect to the length and cost of the procedure) can be a significant barrier to entry for international trade, commercial agreements and foreign investment¹⁶ and detracts from the reputation, trustability and reliability of the country.¹⁷

¹² See S. Bhattacheryay, "Multinational enterprises motivational factors in capitalizing emerging market opportunities and preparedness of India", 12(4) *Journal of Financial Economic Policy* (2020) 609-640, at 610 [doi: 10.1108/JFEP-01-2019-0010]. See also Pathak, *supra* n. 1. See also J. Sankalp, "Enforcement of Foreign Arbitral Awards: International Conventions and Legal Regime in India", *SSRN*, posted 11 May 2016, accessed 10 June 2023 [doi: 10.2139/ssrn.2778548].

¹³ See Government of India Ministry of Commerce and Industry, "Export Import Data Bank – Import: Commodity-wise", *Department of Commerce*, accessed 27 December 2022.

¹⁴ See Hill Dickinson, *supra* n. 5, at 15.

¹⁵ Article 44 The Arbitration and Conciliation Act, 1996, 16 August 1996 (Gazette of India Extraordinary, Part II, sec. 3(i), 22 August 1996).

¹⁶ See Z. Safi, Z. Omarzai, "Overview of Arbitration in Afghanistan: A Practical Approach", *Legalico*, published on 19 March 2019, accessed 25 March 2023.

¹⁷ See M.R. Dahlan, "Dispute regulation in the institutional development of the Asian infrastructure investment bank: Establishing the normative legal implications of the belt and road initiative", 2(9) *International Organizations and the promotion of effective dispute resolution: AIB Yearbook of International Law 2019* (2019) 121-144 [doi: 10.1163/9789004407411]. See also L. Kerin and A. Cullen, "Enforcement of foreign awards:

For a country to provide legal certainty when it comes to enforcing foreign awards its legal and judiciary systems must have implemented the means to do so in a timely and cost-efficient manner; the only exceptions being cases which fall under the refusible case umbrella as specified in Article V of the NYC.¹⁸ With this in mind, the following comparative analysis of the time needed to enforce foreign awards in Vietnam, Singapore and India¹⁹ shows that the results differ greatly from one country to another.

According to the sources of legal information consulted, in Singapore from 1 to 3 months would be needed to register and enforce a foreign award if unopposed and from 3 to 6 months if opposed.²⁰ In Vietnam it would be from 6 to 8 months if unopposed and 12 months or more if opposed.²¹ In India the process can be significantly longer and may take years, as shown by the following examples:

- (i) *Centrotrade Minerals and Metals Inc. v. Hindustan Copper*, an award approved in 2001, was enforced after 19 years.²²
- (ii) In *National Agricultural Cooperative Marketing Federation of India (NAFED) v. Alimenta S.A.* the Supreme Court of India (SCI) ruled against enforcing a foreign award after 31 years:²³ Alimenta, a Swiss-based company, commenced arbitration in London before FOSFA²⁴ alleging breach of a commercial contract by NAFED, an India-based company and in 1989 the arbitral tribunal determined that NAFED should pay Alimenta over USD 4 million. As NAFED failed to honour its obligations under the award Alimenta filed an execution petition in India in 1993; however, NAFED objected, claiming the exception that the award was

a London perspective”, 3(4) *International Journal of Diplomacy and Economy* (2017) 388–398, at 388 [doi: 10.1504/IJDIPE.2017.088845].

¹⁸ Incapacity of the signatories of the arbitration agreement; invalid arbitration agreement; the notice of the arbitrator’s appointment was not given properly or one party was unable to present his or her case; the award refers to a matter beyond the scope of the arbitration; the arbitral tribunal was not composed in accordance with what the parties agreed or according to the law of the country where the arbitration took place, the award is not binding or has been set aside or suspended by a competent authority. Article V United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

¹⁹ This comparative analysis only takes Vietnam and Singapore into consideration because these are the only Southeast Asian countries which have already signed Free Trade Agreements with the European Union: a) Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, signed on 30 June 2019 and entered into force on 1 August 2020; b) Free Trade Agreement between the EU and the Republic of Singapore, signed on 19 October 2018 and entered into force on 21 November 2019. On 17 June 2022, the European Union restarted negotiations with India for a Free Trade Agreement.

²⁰ The cost is between USD10,000–50,000 if unopposed and over USD100,000 if opposed. See Baker McKenzie, “Singapore”, *Cross-Border Enforcement Center* (2020) 225–232, at 226–227. See also R. Khoo *et al.*, “Singapore”, in J. Herring and A. Goddard (eds.), *Enforcement of Judgments 2023*, (Chambers and Partners, London, 2023) 559–579, at 573–574.

²¹ The cost is between USD10,000–20,000 if unopposed and USD35,000–50,000 if opposed. See Baker McKenzie, “Vietnam”, *Cross-Border Enforcement Center* (2020), 324–330, at 325. See also J. Frangos *et al.*, “Enforcement of Foreign Arbitral Awards: Thailand and Vietnam”, *Tilleke & Gibbins*, published on 3 September 2021, accessed 7 February 2023. See also N.N. Minh, N. T. T. Trang and N. Mai Anh, “Vietnam”, *Global Arbitration Review*, published on 24 May 2019, accessed 7 February 2023.

²² *Centrotrade Minerals and Metals Inc. v. Hindustan Copper*, SCI, 2 June 2020 (Civil Appeal No. 2562 of 2006 and No. 2564 of 2006).

²³ *National Agricultural Cooperative Marketing Federation of India v Alimenta S.A.*, SCI, 22 April 2020 (case No. 667/2012).

²⁴ The Federation of Oils, Seeds and Fats Associations.

contrary to public policy. In 2000 the appropriate Superior Court ruled in favour of Alimenta; NAFED then filed a request for review and an appeal before the High Court (HC), both of which were dismissed. NAFED finally filed an appeal under the SCI, which in 2020 ruled that the foreign arbitration award should not be enforced as it was contrary to public order. It took the Indian courts 31 years to dismiss a case based on this exception.

- (iii) *Shri Lal Mahal Ltd (Shri Lal) v. Progetto Grano Spa (Progetto)*:²⁵ a dispute between an Indian supplier and an Italian buyer over a supply contract concluded in 1994. In 1997 the dispute was resolved by a GAFTA arbitral tribunal in London (UK) in favour of Progetto, who sought to enforce it before the Delhi HC with Shri Lal's opposition. The Delhi HC ruled in favour of Progetto in 2012 and Shri Lal filed an appeal under the SCI, which again ruled in favour of Progetto after dismissing Shri Lal's appeal, which was filed on the ground that the award was contrary to Indian public policy. It took the Indian courts 15 years to dismiss the enforcement.
- (iv) *Nagarjuna Fertilizers & Chemicals Limited v. Keytrade AG*:²⁶ Keytrade AG (Keytrade), a Swiss-based commodity trading company, commenced arbitration in London in 2014 against India-based company Nagarjuna Fertilizers & Chemicals Limited (Nagarjuna), claiming that the latter had breached two commercial contracts. The arbitral tribunal determined that Nagarjuna's legal defence was baseless and awarded in favour of Keytrade for an amount of over USD 2 million. As Nagarjuna decided not to honour their obligations under the Award, in 2017 Keytrade filed an execution petition in the competent court in India²⁷ under the NYC umbrella. Despite the fact that both Hyderabad HC²⁸ and the SCI²⁹ ruled in favour of Keytrade the case remains open more than 7 years later.
- (v) *Trammo Ag (Trammo) v. MMTC Limited (MMTC)*:³⁰ execution proceedings were instituted in respect of an award dated 25/27 November 2014 approved by an arbitral tribunal in favour of Trammo (a Swiss company) against MMTC, a company based in India. MMTC's challenge of the award was dismissed by the Delhi HC³¹ and reaffirmed by a Division Bench judgment.³² By an order dated 14 November 2018³³ the SCI again declined MMTC's request for special leave to appeal and also dismissed its review petition³⁴ on 12 February 2019. The award attained finality but Trammo had to seek the help of the Delhi HC (execution

²⁵ *Shri Lal Mahal Ltd v Progetto Grano Spa*, SCI, 3 July 2013 (Civil Appeal No. 5085/2013).

²⁶ *Nagarjuna Fertilizers & Chemicals Limited v. Keytrade AG*, execution petition No. 3/2017, 2 December 2016, under Hyderabad HC.

²⁷ See *supra* n. 25.

²⁸ Hyderabad HC judgment, 27 November 2018 (in execution petition No. 3/2017, 2 December 2016).

²⁹ SCI judgment 3 January 2019, (in petition(s) for Special Leave to Appeal, No(s). 32553/2018, arising out of impugned final judgement and order dated 27 November 2018 in execution petition No. 3/2017 passed by the HC Hyderabad).

³⁰ *Trammo Ag v MMTC Limited*, Delhi HC, 17 August 2022 (in execution petition 164/2015 and execution application 3058/2022).

³¹ Delhi HC Judgement, 11 March 2015 (in O.M.P. No. 212/2015, 11 March 2015).

³² Delhi HC Division Bench Judgment, 22 January 2016 (in FAO(OS) 256/2015, 22 January 2016).

³³ In SLP (Civil) No. 7810/2016.

³⁴ Review Petition (Civil) No. 124/2019, on 12 February 2019.

court) again in 2022 due to MMTTC's unwillingness to voluntarily honour the award. The case is still pending.

The cost of the proceedings is linked to their length and the longer the process takes, the more expensive it turns out to be. The time and cost entailed in enforcing foreign awards in India are far greater than in Singapore and Vietnam and the next section looks at the reasons for the delays.

(C) THE MAIN PRACTICAL HURDLES TO ENFORCING FOREIGN AWARDS IN INDIA

India has a single integrated judicial organisation which follows the common law system. The SCI is the highest court, below which are the High Courts (with appellate jurisdiction and original jurisdiction for certain matters) in each state or group of states³⁵ followed by a hierarchy of subordinate courts.³⁶ While the subordinate court judges are appointed by the state governor in consultation with the HC exercising jurisdiction over the state, the High Courts and SCI judges are appointed directly by the president of India following the recommendation of a collegium led by the Chief Justice and four other senior judges of the court.³⁷

Applications for the enforcement of foreign awards in India are made to the HC with jurisdiction.³⁸ It is possible to file an appeal against an HC judgment with the SCI after the HC has certified that it involves questions of substantive law as to the interpretation of the Constitution. It is also possible to appeal to the SCI against this court's judgments.³⁹

The Ease of Doing Business Ranking⁴⁰ published by the World Bank Group in May 2019 lists India as one of that year's ten top improvers, holding 77th position⁴¹ (of 190 countries). In the 2018 ranking India was in 100th position⁴² and in the 2016 ranking it was in 130th position.⁴³ In 2019 India implemented a series of reforms making it easier to do business there (compared to previous years) in the fields of starting a business, dealing with construction permits, obtaining electricity, obtaining credit, tax payment

³⁵ India is made up 28 states and 8 union territories.

³⁶ See S.N. Jain and V.Vahini, "Judicial system and legal remedies", *Indian Legal System* (2006) 139-153, at 140.

³⁷ See Articles 124(2), 217 and 233 Constitution of India, 1950 (adopted 26 November 1949, entered into force 26 January 1950). See also B.N. Kirpal *et al.*, *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, New Delhi, 2004) at 48-56.

³⁸ Article 47 The Arbitration and Conciliation Act, 1996. See also, HC Bombay judgement, 9 October 2017, *Trammo DMCC v Nagarjuna Fertilizers and Chemicals Limited* (Commercial arbitration petition (Lodge) No. 359 of 2017).

³⁹ Articles 132(1), 133(1) and 134 Constitution of India, 1950.

⁴⁰ "The Ease of Doing Business Ranking is an indication of an economy's position relative to that of other economies." World Bank, *Doing Business 2019: Training for Reform* (World Bank, Washington D.C., 2019), at 10 [doi: 10.1596/978-1-4648-1326-9].

⁴¹ "Economies are selected on the basis of the number of reforms and ranked on how much their ease of doing business score improved." World Bank, *supra* n. 39, at 11.

⁴² See World Bank, *Doing Business 2018: Reforming to create jobs* (World Bank, Washington D.C., 2017), at 4 [doi: 10.1596/978-1-4648-1146-3].

⁴³ See World Bank, *Doing Business 2016: Measuring Regulatory Quality and Efficiency* (World Bank, Washington D.C., 2016) at 5 [doi: 10.1596/978-1-4648-0667-4].

and cross-border trading. However, according to the report there are three fields in which such reforms were not (sufficiently) implemented, which are registering property, enforcing contracts and resolving insolvency.⁴⁴

The enforcing contracts indicator is highly significant because it measures the time and cost needed to resolve a standard commercial dispute and the quality of the judicial processes involved, and India's results in the 2019 ranking⁴⁵ clearly showed the country's improvement. Thus, in 2016 India held 178th position out of 190 in the enforcing contracts ranking, Singapore held 1st position and Vietnam 74th position. In 2018 India was ranked 164th, Singapore 2nd and Vietnam 66th and in 2019 India held 163rd position, Singapore 1st position again and Vietnam 62nd position. A considerable difference between Singapore and Vietnam and India can be observed and although the trend for India is positive (178-164-163), the country still ranks very low overall. In practice this means that while in Singapore the average time needed to solve a court case is 164 days at a cost of 25.8% of the value of the claim and in Vietnam it is 400 days at a cost of 29% of the value of the claim, in India it is 1,445 days (almost 4 years) at a cost of 31% of the value of the claim. This is the reason why India's enforcement score was 41.19⁴⁶ in 2019 (compared to 62.07 in Vietnam and 84.53 in Singapore) and the quality of the judicial processes index was 10.5⁴⁷ in India (compared to 15.5 in Singapore and 7.5 in Vietnam). In short, the data provided by the World Bank Group in this report shows that executing any contract in Indian courts is a very lengthy and expensive process. This data can be extrapolated to the enforcing of foreign awards and is the tip of the iceberg, which suggests that there is a serious case management problem in procedural law in India.⁴⁸

The long duration and high cost of enforcement proceedings entails a negative reputational cost for India as a place for the due and timely protection of party rights, including award holders' rights. The problems plaguing the enforcement of foreign awards can mainly but not solely be correlated with the current state of the judiciary system. The main issues are the following:

- a) A huge backlog of court cases (court pendency):⁴⁹ in India, which has a population of over a billion,⁵⁰ there are currently about 44 million pending cases in all

⁴⁴ See World Bank, *supra* n. 39, at 11.

⁴⁵ See World Bank, *supra* n. 39, at 1 and 98.

⁴⁶ This rank scores from 0 to 100. The higher, the better.

⁴⁷ This rank scores from 0 to 18. The higher, the better. See World Bank, *supra* n. 39, at 177.

⁴⁸ See H. Narasappa and S. Vidyasagar, *State of the Indian Judiciary: A report by Daksh* (Eastern Book Company, Bengaluru, 2016), at XXIX.

⁴⁹ See Government of India Ministry of Law & Justice Department of Justice, "Unstarred question no. 2116 to be answered on Friday, the 29th July, 2022: Sanctioned posts in courts", *Lok Sabha*, at 2-3, accessed on 31 March 2023. See also Government of India Ministry of Law & Justice Department of Justice, "Unstarred question no. 953 to be answered on Friday, the 22th July 2022: Analysis of pendency of cases in courts", *Lok Sabha*, at 2-3, accessed on 31 March 2023. IANS, "Singh urges judiciary to clear huge backlog of pending cases", *Gulf News India*, published on 16 August 2009, accessed 28 March 2023. See also S. Krishnaswamy, S. K. Sivakumar and S. Bail, "Legal and Judicial Reform in India: A call for systemic and empirical approaches", 2(1) *Journal of National Law University New Delhi* (2014) 1-25, at 8 [doi: 10.1177/2277401720140101]. See also Y. Ghosh, "Indian Judiciary: An analysis of the cyclic syndrome of delay, arrears and pendency", 5(1) *Asian Journal of Legal Education* (2017) 21-39, at 22 [doi: 10.1177/2322005817733566].

⁵⁰ 1,425,775,850 people in April 2023. United Nations Department of Economic and Social Affairs, "India overtakes China as the world's most populous country", policy brief no. 153 *Future of the World* (June 2023) [doi: 10.18356/27081990-153].

courts,⁵¹ 25% of which are civil cases.⁵² Among these 74% are more than a year old,⁵³ 6.29% are around 10 to 20 years old⁵⁴ and 1.26% are between 20 and 30 years old.⁵⁵ There are even 34,646 cases that have been in civil courts for more than 30 years.⁵⁶

According to the Indian judiciary its main concern is to reduce the pendency rate,⁵⁷ but the strenuous efforts made in the past to tackle this problem have proved fruitless⁵⁸ and India still has a huge number of pending court cases. The number of pending civil cases is currently 10,963,357⁵⁹ and the annual percentage increase in pendency is 6.40% in the High Courts and 22.76% in the district and subordinate courts.⁶⁰ While pendency in district courts was 2 crore 65 lakhs⁶¹ in 2016, it increased to 4 crore 11 lakhs in 2022, a rise of 54.64%.⁶²

The more complex the case is, the longer it takes to be resolved in court.⁶³ The courts are overloaded⁶⁴ and the number of cases scheduled on a specific day may differ greatly from one court to another. For example, on 28 April 2023 Hyderabad HC Court 15 listed 1917 cases, while Court 21 listed 1552 cases and Court 26 only 42.⁶⁵ It is clear that while certain courts only schedule a few cases

⁵¹ 43,207,597 on 31 March 2023. “National Judicial Data Grid (NJDG) is a database of orders, judgments and case details of 18,735 District & Subordinate Courts and High Courts”. Government of India Ministry of Law and Justice, “The National Judicial Data Grid (NJDG)”, *Department of Justice*, accessed on 31 March 2023.

⁵² 10,963,357 (16 March 2023). See NJDG, *supra* n. 50.

⁵³ 8,119,440 (16 March 2023). See NJDG, *supra* n. 50.

⁵⁴ 684,167 (16 March 2023). See NJDG, *supra* n. 50.

⁵⁵ 114,793 (16 March 2023). See NJDG, *supra* n. 50.

⁵⁶ See Sir Dorabji Tata Trust, *India Justice Report: Ranking states on police, judiciary, prisons and legal aid* (Tata Trusts, New Delhi, 2023), at 58, accessed 15 May 2023.

⁵⁷ See Supreme Court of India, *Indian Judiciary: Annual Report 2021-2022* (The Supreme Court of India, New Delhi, 2022), at 7.

⁵⁸ See S.P. Sharma, *Indian Legal System* (Mittal Publications, New Delhi, 1999), at 13.

⁵⁹ Data on 16 March 2023. Government of India Ministry of Law and Justice, “The National Judicial Data Grid: Pending Dashboard”, *Department of Justice*, accessed 16 March 2023.

⁶⁰ See Supreme Court of India, *Court News*, XIV (2) (April-June 2019), at 8-9.

⁶¹ The Indian currency is the Indian Rupee (INR): 1 lakh equals INR one hundred thousand and 1 crore equals INR ten million.

⁶² Joint Conference of Chief Ministers of States and Chief Justices of High Courts, which took place on 30 April 2022 and was conducted by the Chief Justice of India, N. V. Ramana. See Government of India Department of Justice, *Full text of the speech delivered by Hon'ble the Chief Justice of India Shri Justice NV Ramana at the inauguration of 11th Joint Conference of the Chief Ministers and Chief Justices*, published on 30 April 2022, accessed 20 May 2023.

⁶³ See F.S. Nariman, “Application of the New York Convention in India”, 25(6) *Journal of International Arbitration* (2008) 893-898 [doi: 10.54648/joia2008069].

⁶⁴ See Government of India Department of Justice, *supra* n. 61.

⁶⁵ Under the Hyderabad HC on 28 April 2023 the DCL showed: 83 cases in Court 1; 434 in Court 2; 186 in Court 3; 397 in Court 4; 40 in Court 6; 291 in Court 7; 87 in Court 8; 158 in Court 9; 65 in Court 10; 96 in Court 11; 46 in Court 12; 64 in Court 13; 146 in Court 14; 1917 in Court 15; 34 in Court 17; 67 in Court 19; 162 in Court 20; 1552 in Court 21; 67 in Court 22; 118 in Court 23; 36 in Court 25; 42 in Court 26; 92 in Court 27; 50 in Court 28; 94 in Court 29; 115 in Court 31; 52 in Court 32; 51 in Court 33; 115 in Court 35 and 62 in Court 46. High Court for the State of Telangana, *Daily cause list*, (cause list dated 28 April 2023), accessed 28 April 2023.

for a specific date, others can schedule 1,917 cases for a single court session,⁶⁶ which seems unrealistic.

- b) Covid-19: as in many other countries the lockdowns during the pandemic obliged the Indian courts to slow down. On 13 March 2020 the SCI ordered that only urgent matters were to be listed in courts and while the SCI itself continued working at very reduced capacity, lower courts suffered temporary shutdowns.

The number of new cases fell by 32% during the pandemic but case disposal also fell by 42.33%, negatively affecting the execution petition disposal rate, which fell by between 69.9 and 33.65%.⁶⁷

- c) The high number of vacancies: the courts in India do not work at full capacity due to a shortage of judges. In January 2023 the total number of vacancies amounted to 5,780.⁶⁸ The judge-population ratio is very low.⁶⁹ Vacancies might occur for several reasons, the main ones being holidays, retirement, resignation, death and promotion.

Court holiday periods are regulated: summer holidays cannot exceed seven weeks and the total length of the summer holidays and other holidays for the court and court offices cannot exceed 103 days (excluding Sundays that do not fall during the summer holidays or on public holidays).⁷⁰ In 2022 the SCI worked for 222 days⁷¹ and High Courts an average of 210 days,⁷² but no data on the number of working days in the lower courts is kept centrally.⁷³ Given the

⁶⁶ See HC for the State of Telangana, Daily cause list, *supra* n. 64, Court 15.

⁶⁷ The number of new cases fell from 46,447,870 (2018-2019) to 31,559,309 (2020-2021). The number of disposed cases fell from 38,896,865 (2018-2019) to 22,428,561 (2020-2021). See S. Tripathy *et al.*, *Data Speak: A look at the District Court's performance during the pandemic*, (Vidhi Centre for Legal Policy, India, 2022), at 24.

⁶⁸ See Department of Justice Government of India, *Dashboard for analytical review of projects across nation: CSS for Judicial Infrastructure – Total Number of Vacancies*, accessed on 29 March 2023. On 30 January 2023 there were 7 vacancies in the SCI and in the High Courts: 64 in Allahabad, 5 in Andhra Pradesh, 30 in Bombay, 18 in Calcutta, 8 in Chhattisgarh, 15 in Delhi, 1 in Gauhati, 26 in Gujarat, 8 in Himachal Pradesh, 3 in Jammu and Kashmir and Ladakh, 5 in Jharkhand, 11 in Karnataka, 10 in Kerala, 22 in Madhya Pradesh, 23 in Madras, 2 in Manipur, 1 in Meghalaya, 11 in Orissa, 19 in Patna, 19 in Punjab & Haryana, 15 in Rajasthan, 10 in Telangana, 3 in Tripura and 5 in Uttarakhand. See Open Government Data (OGD) Platform India, "Court-wise Statement Showing Sanctioned Strength, Working Strength and Vacancies of Judges in the Supreme Court and the High Courts of the India as on 30-01-2023", session 259 *Answers data of Rajya Sabha questions*, published on 30 June 2013, accessed 1 July 2023.

⁶⁹ The ratio of judges per million population is: 9.7 in Andhra Pradesh, 11.1 in Bihar, 15.2 in Chhattisgarh, 17 in Gujarat, 16.9 in Haryana, 15.5 in Jharkhand, 16.6 in Karnataka, 14.5 in Kerala, 18.4 in Madhya Pradesh, 16.0 in Maharashtra, 18.0 in Odisha, 20.7 in Punjab, 16.1 in Rajasthan, 14.7 in Tamil Nadu, 11.7 in Telangana, 11.2 in Uttar Pradesh, 24.1 in Uttarakhand, 9.9 in West Bengal, 23.2 in Arunachal Pradesh, 26.0 in Goa, 23.1 in Himachal Pradesh, 16.3 in Meghalaya, 34.0 in Mizoram, 35.1 in Sikkim, 27.3 in Tripura, 12.7 in Assam, 14.1 in Manipur, 11.4 in Nagaland, 32.9 in Andaman & Nicobar Islands, 25.7 in Chandigarh, 7.5 in D&N Haveli and Daman & Diu, 34.7 in Delhi, 18.6 in Jammu & Kashmir, 31.2 Ladakh, 30.4 in Lakshadweep and 7.5 in Puducherry. The recommended ratio is 50 judges per million people. See Sir Dorabji Tata Trust, *supra* n. 55, at 19.

⁷⁰ Articles 4(2) and 4(3), Supreme Court Rules 2013, 27 May 2014 (Gazette of India Extraordinary, Part II, Section 3 (i), 29 May 2014).

⁷¹ Supreme Court of India, *Calendar 2022*, accessed on 30 March 2023.

⁷² See Government of India Ministry of Law & Justice, "Working days in courts", *Press Information Bureau*, published on 11 March 2011, accessed 29 March 2023.

⁷³ See Government of India Ministry of Law & Justice, *supra* n. 71.

huge number of pending cases at all levels in the judicial hierarchy the 230th Law Commission report on reforms in the judiciary has considered the need to increase the number of working days⁷⁴ but the regulation has not yet been amended.

While retirement age for trial court judges is 60, it is 62 for High Court judges and 65 for SCI judges.⁷⁵ This reduces judges' working lifetimes and creates still more vacancies.

- d) The low judge-population ratio: according to SCI Judge Abhay S. Oka 50 judges are required for every million people in India, but there are currently only 21 judges per million.⁷⁶ The Chief Justice of India, Mr N.V. Ramana, has stated that this figure is alarmingly low.⁷⁷ The low judge-population ratio contributes to large-scale case pendency in different courts.
- e) Delays in releasing daily cause lists:⁷⁸ the Indian judiciary system uses an Automatic Cause List Generation Module to automatically assign cases to the appropriate benches according to the roster.⁷⁹ Courts usually publish advanced weekly and/or monthly cause lists (which are incomplete) and (consolidated) daily cause lists⁸⁰ on their websites and this information is available to the public. The consolidated daily list is final and binding and is used by lawyers to prepare their court appearances. The key point here is exactly when the consolidated daily lists (which are followed in court sessions) are released. An analysis has been carried out as to how many high courts have released their (consolidated) daily court lists on a given Saturday⁸¹ for the session to take place on the following Monday and only 8 out of 25 high courts had such information available.⁸²

⁷⁴ Government of India, Law Commission of India Report No. 230 Reforms in the Judiciary Some suggestions, published in August 2009, accessed 10 July 2023.

⁷⁵ Articles 124(2), 224(3) and 227 Constitution of India, 1950.

⁷⁶ See India News Press Trust of India, "50 Judges per 10 Lakh Needed to Reduce Case Pendency in India: Supreme Court Judge", *NDTV*, published on 3 January 2023, accessed 3 July 2023.

⁷⁷ See LegalWorld.com, "20 judges per 10 lakh population is alarmingly low: Chief Justice", *The Economic Times*, published on 30 April 2022, accessed 3 July 2023.

⁷⁸ Order III, Rule 7(2), Supreme Court Rules, 2013.

⁷⁹ See e-Committee Supreme Court of India, "Automatic Causelist Generation", *Information and Communication Technology in Indian Judiciary*, accessed on 19 May 2023.

⁸⁰ A cause list is a list of all cases to be heard on a working day.

⁸¹ 20 May 2023 between 09:58 am and 11:28 am Spanish time (13:28 pm and 14:58 pm Indian time).

⁸² On 20 May 2023: (i) Allahabad HC showed the daily cause list (DCL) 8-19 May 2023; (ii) Andhra Pradesh HC showed the DCL 8-19 May 2023; (iii) Bombay HC showed the DCL 2-22 May 2023; (iv) Calcutta HC did not show the DCL for Monday 22 May 2023 onwards; (v) Chhattisgarh HC showed the DCL for Monday, 22 May 2023, for 3 court rooms (10, 13 and 99); (vi) Delhi HC showed an incomplete DCL for Monday 20 May 2023 (with only 10 entries in total for all its court rooms); (vii) Gauhati HC showed the DCL for 2 May-2 June 2023; (viii) Gujarat HC showed an incomplete DCL for Monday 20 May 2023; (ix) Himachal Pradesh HC showed the DCL for Monday 22 May 2023; (x) Manipur HC only showed the DCL for the same day, 20 May 2023 (xi) Jammu & Kashmir HC and Ladakh showed the DCL for 15-19 May 2023; (xii) Jharkhand HC only showed the DCL for 15-19 May 2023; (xiii) Karnataka HC showed the DCL for Monday 22 May 2023; (xiv) Kerala HC did not respond when the author tried to retrieve the cause list; (xv) Madhya Pradesh HC showed the DCL for only some of the court rooms; (xvi) Madras HC showed DCL from 21 April to 19 May 2023; (xvii) Meghalaya HC showed the DCL for Monday 22 May 2023; (xviii) Orissa HC did not show the DCL for Monday 22 May 2023; (xix) Patna HC showed the DCL for 26 April-19 May 2023; (xx) Punjab and Haryana Chandigarh HC showed the DCL for Monday, 22 May 2023; (xxi) In the Rajasthan HC Principal

This short notice of the coming hearings only increases the costs incurred by prevailing parties instead of minimizing them because their lawyers need to check the lists on a daily basis to verify whether the case has been listed in court for the following day. Each case usually requires many hearings before a judgment is rendered.⁸³ Furthermore, if a party urgently needs assistance they have the option of making a spontaneous appearance in court through a process called “oral mentioning” in which they mention the case to the judge and request an early hearing date. This system allows parties with urgent needs to appear in court with the judge’s prior permission and without being listed in the cause list but increases foreign award holders’ execution costs.

- f) Lack of or poor physical infrastructure: an adequate judicial infrastructure is a pre-requisite for reducing pendency and case backlog in courts⁸⁴ and enhances efficiency.⁸⁵ Physical infrastructure includes courtrooms, lawyers’ rooms and units for judicial officers.

India suffers from a shortage of courtrooms.⁸⁶ On 31 March 2021 the sanctioned strength of the judiciary⁸⁷ was 24,291 but only 20,115 courts were available, while 2,423 were under construction.⁸⁸ If these are added together there was still a shortfall of 7.22%.

A study conducted by the Vidhi Centre for Legal Policy shows that the quality of the existing infrastructure is poor: (i) only 20% of the district courts have floor plans and only 45% have help desks; (ii) while 88% of court complexes have washing and toilet facilities, only 40% are fully functioning and around 100 district court complexes do not have facilities for women; (iii) only 54% of district court complexes have designated waiting areas; (iv) only 27% of court complexes are accessible via ramps and/or lifts, whereas only 11% of court complexes have designated washing and toilet facilities for persons with disabilities and only 2% of court complexes have built-in visual aid features.⁸⁹

The shortcomings in court infrastructure create problems not only for litigants and their lawyers, but also for judges and court staff, slowing down case resolution.

Seat Jodhpur the system advised that the DCL for 22 May 2023 was not yet ready; (xx) At the Rajasthan HC bench Jaipur the system advised that the DCL for 22 May 2023 was not yet ready; (xxi) Sikkim HC only showed the DCL until 19 May 2023; (xxii) Tripura HC, Agartala, only showed the DCL until 18 May 2023; (xxiii) Uttarakhand at Nainital HC showed the DCL for Monday 22 May 2023, informing that it was uploaded on 20 May 2023 at 12.55:33 pm (Indian time); (xxiv) Telangana HC only showed the daily court list for 28 April 18 May 2023.

⁸³ In *Nordscot Rig Management Pvt. Ltd. v. Essar Oilfields Services Limited Mauritius* (Execution Petition 2/2017, 25 May 2017, Hyderabad High Court) the court system in Hyderabad High Court records that there have been at least 28 hearings between 2017 and 2018.

⁸⁴ See Government of India Ministry of Law, “Judicial Infrastructure”, *Department of Justice*, accessed on 20 May 2023.

⁸⁵ See N. Sahoo and J. A. Khan, “Improving India’s Justice delivery system: Why infrastructure matters”, issue brief no. 562 *Observer Research Foundation*. (July 2022), accessed 21 May 2023.

⁸⁶ See Sir Dorabji Tata Trust, *supra* n. 55, at 87 and 92.

⁸⁷ The sanctioned strength means the authorized judges in the Indian judiciary system.

⁸⁸ See Government of India Ministry of Law, *supra* n. 83.

⁸⁹ See S. Chandrasekaran, S. Sanyal and R. Sekhar, *Building Better Courts. Surveying the Infrastructure of India’s District Courts* (Vidhi Centre for Legal Policy, New Delhi, 2019), at 30.

According to former Chief Justice of India, the Honourable Mr Justice Dipak Misra,⁹⁰ “The infrastructure gaps should not be allowed to multiply and should be addressed at the earliest opportunity before it leaves a deep scar on the administration of justice, and it becomes too late to act wisely. Fiscal constraints is no excuse. The need to strengthen the judiciary because of which the justice delivery system becomes fast, qualitative responsive and serve the purpose of justice.”⁹¹

- g) Lack of digital infrastructure: an electronic case display board provides information about court numbers, presiding judges and on-going case numbers, which helps to expedite judges’ work as it enables them to reduce the time between one case and the next. However, only 26% of court complexes have electronic case display boards at the entrance and in the waiting areas.⁹² Court celerity depends on many factors and having appropriate digital infrastructure is one of them, because it will serve to achieve the judiciary’s objectives.⁹³
- h) Roster changes: as a matter of routine and procedure Indian courts have implemented a roster system, which is a mechanism through which court cases are allocated to specific benches to be heard on a merit base. In practice roster changes result in changes in the judges hearing cases until they are marked part-heard and can stay with the same judges. The roster changes every 6 months, and the Chief Justice is the Master of the Roster.⁹⁴

This constant shifting of cases between judges increases resolution time because all judges need time to understand the cases on their rosters and this ultimately increases overall case length.

- i) Rising number of pending cases: due to economic expansion and population growth the caseload is rising alarmingly.⁹⁵ Between 2010 and 2020 pendency across all courts grew by 2.8% annually. However, between 2019 and 2020 it increased by 20% in High Courts and 13% in subordinate courts.⁹⁶ The higher the

⁹⁰ The Honourable Mr. Justice Dipak Misra was the 45th Chief Justice of India from 28 August 2017 to 2 October 2018. See National Legal Services Authority, *Patron-in-Chief: Hon’ble Mr. Justice Dipak Misra*, accessed 1 July 2023.

⁹¹ See The Times of India, “Infrastructure gaps in judicial system need to be addressed early: CJI”, *India News*, published on 1 September 2018, accessed 1 July 2023. See also The Times of India, “To make justice accessible, infrastructure is necessary: CJI Dipak Misra”, published on 25 August 2018, accessed 1 July 2023.

⁹² See S. Chandrashekar, S. Sanyal and R. Sekhar, *supra* n. 88, at 7-8.

⁹³ See DAKSH, “Paper 2: Transition and Implementation”, *Whitepaper Series on Next Generation Justice Platform* (2020) [doi: 10.2139/ssrn.3562166].

⁹⁴ *State of Rajasthan v. Prakash Chand* (1998) 1 SCC 1. See P. Iyengar, *Copyright Enforcement and Privacy in India, SSRV*, at 11, published on 14 June 2011, accessed 2 July 2023.

⁹⁵ At the Joint Conference of Chief Ministers of States and Chief Justices of High Courts, which took place on 30 April 2022, the Chief Justice of India, N. V. Ramana, stated that “The rising number of frivolous litigations is an area of concern.” See Government of India Department of Justice, *supra* n. 61. See also K. Vivek, “Why pending court cases have been going up”, *LiveMint*, published on 11 February 2019, accessed 3 December 2022.

⁹⁶ See PRS Legislative Research, “Vital Stats: Pendency and Vacancies in the Judiciary”, *Institute for Policy Research Studies*, published on 11 October 2021, accessed 2 July 2023.

number of pending cases in court, the greater the pendency and the more time needed to dispose of them.

- j) Inadequate funding: the average state budget for the judiciary for each pending case is INR 8,071, that is, USD97.75 per case.⁹⁷ Inadequate funding has a direct negative influence on the lack of adequate infrastructure (physical and digital), vacancies, the low judge-population ratio and court pendency.
- k) Dilatory tactics (guerrilla tactics) used by certain parties in court: if courts do not use their powers to control litigants and their conduct the negative impact of any dilatory tactics employed by defendants cannot be mitigated.⁹⁸

The most common dilatory tactic is to request an adjournment⁹⁹ of the hearing on the same date. Rule 1 of the Indian Code of Civil Procedure (CPC)¹⁰⁰ allows courts to grant time to all the parties or any one of them and adjourn a hearing, provided that no such adjournment is granted more than three times to a party during the hearing unless this is due to circumstances beyond the party's control.

Courts would traditionally adjourn a case if a lawyer presented a sick note because lawyers are human beings and can fall ill. However, the SCI has reported that the facility of adjournment available to lawyers on this ground has frequently been abused.¹⁰¹

It is also quite common for parties seeking to delay the proceedings to use the excuse of their counsels' non-appearance and requesting adjournments, although in 2010 the judiciary stated that a "counsel being out of station" is not a ground for conceding an adjournment.¹⁰²

It is also quite common for defendants to fail to file the documents ordered by the judge to delay proceedings and seek extensions for filing them, which are mainly granted. Parties who repeatedly abuse the system are given pecuniary fines only in exceptional cases.¹⁰³

⁹⁷ See Centre for Budget and Governance Accountability and DAKSH, *Memorandum to the Fifteenth Finance Commission on Budgeting for the Judiciary in India*, at 4, published in December 2018, accessed 2 July 2023.

⁹⁸ See V. P. Singh, A. Jha, and A. Vidyarthi, "The More Things Change, the More They Stay the Same: Guerrilla Tactics in Arbitration in India", 24(2) *Asian Dispute Review*, (2022) 58-65. See also E. Sussman and S. Eber, "All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration", 22(4) *The American Review of International Arbitration* (2011) 611–623, at 613 and 622.

⁹⁹ See Government of India Ministry of Law & Justice Department of Justice, "Unstarred question no. 595 to be answered on Thursday, the 21st July 2022: Pendency of cases in courts", *Rajya Sabha*, accessed on 2 July 2023.

¹⁰⁰ The Code of Civil Procedure, 1908, 21 March 1908 (Gazette of India, Central Act 5 of 1908)

¹⁰¹ Supreme Court of India *Rais Ahmad v. State of U.P. & Ors* on 13 August 1999.

¹⁰² Supreme Court of India *Ram Siromani Tripathi and Ors. v. Territory of U.P and Ors.*, Civil Appeal Nos. 9142-9144 of 2010.

¹⁰³ The court imposed a payment of INR 50,000. National Company Law Appellate Tribunal at Chennai (appellate jurisdiction). Company Appeal (AT) (CH) (Insolvency) No. 433 of 2022. [(Arising from the Impugned Order dated 05.12.2022 in CP (IB) No. 348/7/HDB/2020 passed by the "Adjudicating Authority" (National Company Law Tribunal, Bench-II; Hyderabad)]. Case of *Nagarjuna Fertilizers & Chemicals Ltd. v. IDBI Bank Limited and National Company Law Tribunal*.

- l) Corruption: as in any other country, corruption is a complex phenomenon in India.¹⁰⁴ The 2022 Corruption Perception Index published by global anti-corruption coalition Transparency International ranks India in 85th place (of 180) with a CPI score of 40 (out of 100).¹⁰⁵ Singapore and Vietnam are ranked 5th and 77th respectively.

Between 2017 and 2021 the Centralised Public Grievance Redress and Monitoring System (CPGRAMS)¹⁰⁶ received 1,631 complaints regarding the judiciary's functioning, including judicial corruption.¹⁰⁷

The huge court pendency is at the root of this issue, as some parties may be desperate and willing to use illegal means to try to expedite their cases in court or obtain positive resolutions.

- m) Cultural and legal clashes between foreign claimants and the Indian judiciary system: legal cultures differ radically from one jurisdiction to another.¹⁰⁸ Each jurisdiction is a different world with its own set of written and unwritten rules about behaviour, appearance and strategy in court. Written rules are easier to understand and follow but grasping unwritten rules requires more time. Foreign claimants need to set aside their understanding of how cases are conducted in courts in their home country and learn how the Indian judiciary works. This takes time but is essential for success.

The 1961 Advocates Act¹⁰⁹ defines two classes of advocate, senior advocates and others. There are over 1.4 million advocates in India,¹¹⁰ of which only 488 are senior advocates;¹¹¹ that is, less than 0.035% of practicing advocates. Senior advocates' "face value" in court is consequently higher than that of other advocates and is directly related to the fees that they charge per appearance, which, according to the 2013 SCI Rules, should not exceed INR 8,000 (approximately USD100)

¹⁰⁴ See N. Charron, "The Correlates of Corruption in India: Analysis and Evidence from the States", 18(2) *Asian Journal of Political Science* (2010) 177-194 [doi: 10.1080/02185377.2010.492986]. See also S. Sondhi, "Combating corruption in India: The Role of Civil Society", *XVIII World Congress of International Political Science Association*, at 2-3, published in July 2000, accessed 4 July 2023.

¹⁰⁵ CPI refers to the Corruption Perception Index. It runs from 0 to 100; the higher score, the better. See D. Eriksson, "Corruption Perception Index", published in 2022, accessed 17 May 2023.

¹⁰⁶ "CPGRAMS is an online platform available to citizens 24/7 to lodge their grievances with the public authorities on any subject related to service delivery." See Government of India Ministry of Personnel, Public Grievances & Pensions, Centralized Public Grievance Redress and Monitoring System, *Department of Administrative Reforms & Public Grievances*, (2023), accessed on 17 May 2023.

¹⁰⁷ See Government of India Ministry of Law and Justice, "Corruption in Judiciary", *Press Information Bureau*, published on 1 April 2022, accessed 18 May 2023.

¹⁰⁸ See S. I. Strong, K. Fach Gomez and L.C. Piñeiro, *Comparative Law for Spanish-English Speaking Lawyers: Legal Cultures, Legal Terms and Legal Practices* (Edward Elgar Publishing, xxx, 2016), at 17-19, 222, 449, 494-498. [doi: 10.4337/9781849807876]

¹⁰⁹ Article 16 The Advocates Act, 1961, 16 August 1961 (Gazette of India Extraordinary, Part II, sec 3(ii), 7 September 1961).

¹¹⁰ See A. K. Ganguli, "The Legal Profession Worldwide: Overview of the Legal Profession in India", *International Association of Lawyers* accessed 1 July 2023.

¹¹¹ See Supreme Court of India, List of Senior Advocates designated by the Supreme Court (as on 07.07.2022), Registrar, published on 7 July 2022, accessed 2 July 2023.

per hearing,¹¹² but in practice may vary between INR 5 lakh and INR 25 lakh (approximately between USD6,000 and USD30,000) per hearing under the SCI, and between INR 3 lakhs to INR 6 lakhs per hearing (approximately between USD3,600 and USD7,200) before an HC. In fact, as advocates charge according to their clients' ability to pay¹¹³ legal fees vary from client to client and are applied when a hearing finally takes place on the day listed – and also if it does not.

Furthermore, because senior advocates' practice is restricted and they can neither receive instructions directly from clients nor file documents in court,¹¹⁴ the financial effort to employ a senior advocate to have a higher "face value" in court is not the only expense. The award holder will also need to hire a leading or junior counsel who will communicate directly with clients and file all the necessary documentation in court. The financial investment that award holders need to make to try to protect their rights in court is very high and, depending on the value of the award, it might not be worthwhile. Costs should be calculated before commencing the enforcement of foreign awards in India, but this is extremely difficult because some of the variables in the equation cannot be known beforehand (how many hearings will be required, court pendency, roster changes, guerrilla tactics, etc.).

Another factor with a relatively similar weight to the "face value" of a senior advocate is the impact that foreigners have in Indian courtrooms, especially if they are European or American. In such situations there might be a feeling that the international community is watching the Indian judiciary, which could increase their willingness to do things properly and in a timely manner.

These reasons, whether taken separately or jointly, entail negative consequences for the enforcing of foreign awards in India. The legal costs to prevailing parties are very high and as a general rule only recoverable at the court's discretion.¹¹⁵ If the case is listed on a specific date lawyers charge the parties for every appearance regardless of whether the case is heard by the court or not, even if the other party only appears to request an adjournment, which is granted, and the hearing lasts five minutes or even less.¹¹⁶ Furthermore, lawyers not only charge for every appearance but there is also a list of miscellaneous costs which they may deem to be associated with their appearance,¹¹⁷ which increase the invoice. As noted previously, court cases can be listed more than forty times before a judgment is rendered, creating a huge burden for the claimant.

¹¹² Part IX – Second Schedule, Supreme Court Rules, 2013.

¹¹³ See Aapka Consultant, "Law on advocates fees", *Hamesha Aapke Saath*, published on 20 September 2022, accessed 2 July 2023.

¹¹⁴ Senior Advocates shall not file a vakalatnama, appear without an Advocate on Record or accept instruction to appear in court directly from a client. Part VI, Chapter I Bar Council of India Rules 6 September 1975 (under The Advocates Act, 1961) (Gazette of India, Part III, section 4, 6 September 1975).

¹¹⁵ Section 35(1) The Code of Civil Procedure, 1908.

¹¹⁶ K.V. Viswanathan Senior Advocate, *Memo No. 132/20-21. PAN No. (AAPV4233G) in SLP(C) No. 9252/2020 Keytrade AG v. Nagarjuna Fertilizers Chemicals Limited and Anr.*, (17 August 2020).

¹¹⁷ K. R. Reddi, *Appearance, Conference, Clerkage and Miscellaneous.*, *S.C. Memo of Fees. Ref: Bill No. 32/2018* (4 September 2018).

The parties to a conflict who resort to arbitration to resolve it do so because of the efficiency and effectiveness attributed to this method of conflict resolution. When the non-prevailing party in the conflict decides not to voluntarily comply with the award, the country in which the award is to be executed must use the full power of “*ius imperium*” to render the decision effective in a timely matter, and for this purpose an obstacle-free path must be available.

(D) CONCLUSIONS

The aim of the 1996 Indian Arbitration and Conciliation Act is to make the enforcing of a foreign award cost effective and expeditious. However, as has been seen, court case pendency is extremely high and foreign award enforcement does not have priority in the courts, which are completely overloaded with other civil cases. The length of the enforcement process is worrying and negatively affects the goal of a quick and affordable solution to disputes, which could save time and money for the parties involved as well as third parties (including India), protect prevailing parties’ rights and India’s reputation as a reliable and investor-friendly country.

The Indian judiciary seems very much aware of the problem discussed here; that is the delays that foreign award holders have to withstand in order to enforce them there and the importance of meeting (international) award holders’ expectations.¹¹⁸ In 2021 the SCI therefore laid down a direction (2021 SC Direction) for lower courts indicating that any “execution petition must be disposed within 6 months from the date of filing, which can be extended only by recording reasons in writing for such delay”.¹¹⁹

India’s efforts in the commercial sphere are not negligible, as is evident from the 2015 Commercial Courts Act, which provides for a separate court process for commercial matters. Moreover, the frequent amendments to the 1996 Indian Arbitration and Conciliation Act are aimed at making the country an international arbitration hub and the steps taken in this regard are considerable and extremely positive. However, if Indian courts are unable to ensure the realization of foreign awards, any progress made otherwise will be futile because it is the ultimate enforcement of foreign awards that is important to the international community.

India is trying to reverse this situation which is damaging both its reputation and hopes of attracting international investors:

“Disposal of cases pending in courts is within the domain of Judiciary. Though Government has no role in disposal of cases in courts, the Central Government is committed to speedy disposal of cases and reduction in pendency. The Government

¹¹⁸ See J. Sindhu, “Public policy and Indian Arbitration: Can the judiciary and the legislature rein in the “unruly horse”?”, 58(4) *Journal of the Indian Law Institute* (2016) 421–446, at 423.

¹¹⁹ *Rahul S. Shah v. Jinendra Kumar Gandhi* (2021) 6 SCC 418. According to the NJDG, at the District and Taluka Courts of India 26.67% of pending execution petitions were filed a year ago (in 2022); 26.18% between 1 and 3 years ago; 20.46% between 3 and 5 years ago; 18.83% between 5 and 10 years ago, 6.46% between 10 and 20 years ago and 0.33% more than 30 years ago, totalling more than 11 million cases (11,040,497). 52.92% of the execution petitions were disposed between 0 and 3 years, 26.66% between 3 and 5 years, 17.96% between 5 and 10 years, and 2.46% above 10 years. See National Judicial Data Grid, *supra* n. 50, accessed 31 December 2022.

has adopted a co-ordinated approach to assist judiciary for phased liquidation of arrears and pendency in judicial systems, through various strategic initiatives like improving the infrastructure for courts including computerisation, increase in strength of judicial officers/judges and filling up of vacant positions in High Courts/SCI, policy and legislative measures in areas prone to excessive litigation, repeal of outdated and archaic laws, initiatives to fast track special type of cases and emphasis on Alternate Dispute Resolution etc.”¹²⁰

However, the question which arises here is: which additional system could be implemented to help India to effectively enforce foreign arbitration awards within the SCI timeframe of six months?

The enforcement of all foreign awards could be expedited if just one or a combination of the following measures were taken: increasing the number of judges; reducing the number of vacancies for judges (by raising the retirement age or shortening the holiday period); improving infrastructure (physical and digital); reducing/eliminating corruption, banning guerrilla tactics in court and punishing them with higher fines and creating specialized courts, or establishing an enforcement procedure based on the blockchain technique, among others.

When court delays are long and award holders believe that they have been denied justice in Indian courts because the delays in enforcing them surpass all reasonable limits, one way of moving a case forward could be to begin an arbitration suit against the Government of India if the foreign award holder’s country has signed a Bilateral Investment Treaty (BIT) with India which is still in force. The request to the Government of India would be based on India’s treaty obligations for Fair and Equitable Treatment (FET) under the BIT. FET has been held to encompass refusals to entertain suits, undue delay, seriously inadequate administration of justice and the clear and malicious misapplication of the law¹²¹ because this denial of justice occurs in cases of unwarranted delays.¹²² Although such action could certainly open a new door for foreign award holders, it is no less certain that the time and costs would undoubtedly increase were the result unpredictable.

¹²⁰ See Government of India Ministry of Law and Justice, “Unstarred question no. 2023 to be answered on Thursday, the 5th August 2023: Holidays in Judiciary”, *Rajya Sabha*, published on 5 August 2021, accessed on 1 July 2023.

¹²¹ *Robert Azinian v. United Mexican State ICSID*, ARB (AF)/97/2, (1 November 1999).

¹²² *Belgium v. Spain* (Barcelona Traction, Light and Power Co. Ltd. (1970) (Judge Tanaka Separate Opinion).

