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# Specific Relief (Amendment) Act, 2018: Its Effect on Contract Enforcement

## Background of events that led to this change

### **World Bank Doing Business 2018 and Economic Survey 2018 Report**

World Bank in its Doing Business 2018 report ranked India at 100 (out of 190 countries). This was an improvement from earlier rank of 130 in 2017. India was lagging behind in Enforcement of Contracts and associated Legal systems, time lines and procedures. Such issues are of vital importance for international investors in order to obtain comfort in our dispute resolution process resulting in speedy justice.

Subsequently our Economic Survey 2018 report highlighted in its chapter "Ease of Doing Business' Next Frontier: Timely Justice" that India has only marginally improved its position on Enforcing Contracts (from 172 in 2017 to 164 in 2018 as per World Bank Doing Business indicators) which is still behind Pakistan, Congo and Sudan. That in itself speaks volumes.

### **Pending Cases in India and its growing numbers**

National Judicial Data Grid as of 2<sup>nd</sup> April 2018 estimated that there are 26.5 million pending cases in India. This when viewed along with the average time required to enforce a contract through court being 1445 days (approx.4 years) vs. 164 days in Singapore (the best performer as per DB 2018 report) – becomes self-explanatory for an investor's country risk perception.

### **Commercial Cases – Delays leading to costs and time overruns**

The Economic Survey 2018 also notes the count and value of stayed infrastructure projects belonging to 6 ministries as 52 nos. and Rs.52,081 Crores. Apart from general work overload in Courts, the Survey also mentions "Recourse to Injunctions and Stays" also as one of the main reasons for project delays on account of judicial procedures.

Therefore, it is a fair indicator that judicial delays have a great impact on uncertainty in commercial contracts, especially capital-intensive and long-duration projects, leading to project time and cost overruns resulting in unviable costs and uncertain project environment. The Legislative Department of Ministry of Law and Justice vide Office Order dated the 28<sup>th</sup> January, 2016 had constituted an Expert committee led by Mr. Anand Desai to examine the Specific Relief Act, 1963 (47 of 1963) and to make suggestions for amendments therein. Committee submitted its recommendations and on July 23, 2018, the Parliament passed the Specific Relief (Amendment) Bill, 2018 ("Bill"). The Bill considerably strengthens the law on specific performance by making the provisions for relief more efficacious. The Bill received the presidential assent on 1<sup>st</sup> August 2018.



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Under the Parent Act, specific performance was a limited right, which enforced by the court at its discretion, in the following circumstances:

1. when monetary compensation is inadequate; or
2. when monetary compensation cannot be easily ascertained.

The Bill has now amended 54-year-old law by removing above conditions and provide specific performance by courts as a general rule, as part of the government's ease of doing business policy.

With the introduction of the Specific Relief (Amendment) Act, 2018 Indian Legislators propose to usher in a paradigm shift in the existing law governing Contracts and their contractual enforcement in India. With the proposed amendment the proposed amendments now intends to shift the spotlight from the previous default remedy of award of damages for breach of contract to enforcing specific performance of contracts.

Acknowledging the need for greater clarity in enforcement of contractual obligations and strict timeline for its adjudication and protecting the rights of the contesting parties, the Specific Relief (Amendment) Act, 2018 (Amendment Act), amending the Specific Relief Act, 1963 (Principal Act), recently receive the concurrence of both the Houses of Parliament. It received Presidential assent on 1 August 2018.

The Amendment Act seeks to curtail the ample discretion previously vested with the courts to grant specific performance. It also introduces a new remedy of 'substituted performance' for breach of a contract, recognizing the right of a non-defaulting party to have the contract performed either through himself or a third party, at the cost of the defaulting party. The amendments are aimed at realigning the existing provisions to enable ease of doing business in India, while continuing to provide stronger contractual enforcement and strengthen the concept of investor protection. The amendments are in line with the UNDRUIT Principles of International Commercial Contracts and attempt to make India a business-savvy jurisdiction by improving its position on the enforceability of contracts. The key highlights of the Bill are discussed below:

### **Key Insights On The Amendments Introduced**

#### **The proposed amendment makes it a rule rather than discretion for enforcement of specific performance**

The relief of specific performance evolved as a discretionary remedy granted by English courts of equity in cases where either the common law courts could not provide a remedy, or the remedy was inadequate. Prior to the amendment, the Principal Act gave courts a discretionary power to grant specific performance of a contract under two circumstances i.e., where (a) monetary compensation for breach of contract was inadequate; or (b) the



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extent of damage caused by the breach could not be ascertained. Consequently, grant of specific relief for breach of contract was more of an exception, with courts granting damages as a general rule.

Section 10 of the Bill substitutes the words “*may, in the discretion of the court*” with “*shall be enforced by the court*”. This amendment makes the relief for specific performance a statutory remedy instead of an equitable discretionary remedy.

Vide the amendments as ushered in, Courts can no more act in discretion but are under obligation to grant specific performance unless expressly barred by the provisions stated in the Specific Relief Act, 1963 (“Act”) i.e. Sections 11(2), 14 and 16. The Amendment now mandates courts to enforce specific performance of contracts, except for certain types of contracts where performance is not specifically enforceable. This shift has been made in order to provide greater protection of contractual expectations by ensuring that a non-defaulting party can obtain the performance that he had contracted for. With specific performance as the new rule, the likelihood of a judicial order mandating specific performance may well act as a deterrent for defaulting parties. The previous condition requiring a party to specifically aver in the pleadings ‘readiness and willingness’ to perform the contract, which often lead to a pedantic reading by courts, has also been done away with. A party is now only required to prove ‘readiness and willingness’ to perform the contract.

The primacy given to the relief for damages over specific performances has been removed. The Bill has dispensed with the settled grounds that specific performance can only be granted when either the damage cannot be ascertained or when monetary compensation is not adequate.

The amended Section 14 now recognizes only 4 categories of contracts that cannot be specifically enforced, i.e., (i) contract where a party has obtained ‘substituted performance’ under Section 20; (ii) contract involving performance of a continuous duty which cannot be supervised by courts; (iii) contract so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of material terms; and (iv) contract of a determinable nature. Notably, (i) contracts where non-performance could be monetarily compensated; (ii) contracts running into minute details or dependent on the volition of the parties; and (iii) contracts which from their nature are such that the court cannot enforce specific performance of material terms, have been deleted.

### **Engagements of experts**

Post the amendments, Section 14A now empowers the Court to engage experts to assist and report on issues arising out of a suit for specific performance. The opinions of such experts shall form a part of the record of the proceeding and parties may, subject to Court’s permission, examine such



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experts in open Court on any matter referred to him or mentioned in his report. The said growth is essentially to regulate and institutionalize the manner in which experts can testify on important issues arising out of a conflict.

### The inclusion of Limited Liability Partnerships (“LLP”)

The newly inserted Sections 15(fa) and 19(ca) provide that an LLP which is created out of one LLP amalgamating with another can sue or be sued in a suit for a specific performance.

By way of this amendment, the Bill has introduced a new category of entities who are entitled to claim specific performance of contract i.e. amalgamated LLPs.

### Putting ‘substance’ over ‘form’

The amendment to Section 16© dispenses with the plaintiff’s requirement to make a specific averment reflecting his readiness and willingness to perform the contract. It would suffice if the averment in substance and spirit indicate a willingness on the part of the plaintiff to perform its part of the contract.

### Introduction of the concept of “Substituted Performance”

Section 20 of the Bill entitles a party that is affected due to the non-performance of another party, to get the contract performed by a third party or its own agency.

This is subject to the affected party issuing a written notice, of not less than thirty (30) days, calling upon the party in breach to perform the contract within such time as specified in the notice. The party suffering the breach is entitled to recover the cost and the expenses for the substituted performance by the third party or through its own agency from the party committing the breach.

The proposed amendment is likely to deter the occurrence of the breach in a contract. Further, the notice period of 30 days may result in parties choosing to perform or renegotiate the contract thereby not only restoring relationships but also reducing litigation.

By introducing the remedy of ‘substituted performance’, the Amendment Act has given statutory recognition to the concept of ‘Right to Cover’ in contracts (usually an agreed contractual term between parties), which allows an aggrieved party in case of non-performance of a contract, to obtain performance from a third party and at the same time recover the consequent costs or loss for such substituted performance from the breaching party.



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Though a remedy akin to substituted performance is provided under the Indian Contract Act, 1872 under Section 73 where, a non-defaulting party can buy the goods or services elsewhere at an additional cost and such cost be considered for calculating damages to be awarded, the award of damages is circumscribed by tests of foresee ability and mitigation of losses. Also, generally any indirect loss/cost incurred by a non-defaulting party does not fall within the ambit of damages recoverable under Indian contractual law. By providing the remedy of 'substituted performance', the Amendment Act seeks to restore a non-defaulting party to the position it would have otherwise occupied, but for the breach of contract.

The newly substituted Section 20 of the Principal Act provides an aggrieved party the option of 'substituted performance' through a third party or by its own agency. Further, while availing the remedy of 'substituted performance' disentitles an aggrieved party from claiming specific performance, it does not disentitle the aggrieved party from claiming damages for the breach of contract.

However, Section 20 lays down that the costs recovered from the defaulting party must be those *actually incurred, spent or suffered* by the non-defaulting party. Therefore, where the costs claimed from the defaulting party for 'substituted performance' exceed the contract price leading to a dispute, the non-defaulting party would need to prove in court (a) performance of the contract by a third party or own agency; and (b) the quantum of actual costs incurred by such 'substituted performance'.

### Infrastructure Contracts

Given the significance of infrastructure projects in India, the amendments grant special treatment to infrastructure projects. '*Infrastructure project*' has been defined to include scheduled categories of projects such as transport, energy, water and sanitation, communication, social and commercial infrastructure.

The Amendment Act introduces Section 20A which debars Courts from granting an injunction in a suit relating to an infrastructure project contract, where such injunction could cause delay in the completion of such project. The amendments also provide for the designation of Special Courts to try matters relating to infrastructure project related contracts.

The special recognition accorded to infrastructure projects stems from the sentiment that public infrastructure work should continue without interruption or delay and therefore seeks to abolish the indiscriminate practice of granting injunctions on public utility projects.

### Special Civil Courts and Timelines

Section 20B of the Bill mandates that the State government(s) in consultation



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with the Chief Justice of the concerned High court to establish Special Civil Courts to try cases under this Act. Further, Section 20C stipulates a maximum period of twelve (12) months to dispose off suits filed under the Act. This can be further extended by a maximum period of six (6) months and that too after recording reasons for doing so.

The establishment of Special Civil Court would come as a much-needed respite to the existing civil courts that are already choked with pendency. As regards the timeline of twelve (12) months is concerned, the potential conflict with the timelines prescribed under the Commercial Courts Act, 2015 may have to be clarified. The Amendment Act signals a welcome departure from granting specific performance as an exceptional equitable remedy to statutorily mandating that contracts must now be specifically enforced. The amendments are designed to protect contractual rights while lending greater certainty in enforcement of contracts by reducing the element of court discretion.

Historically, public utility projects in India have been plagued with delays on account of court mandated injunctions, interminable court processes and restrictions on use of third party agencies for completing projects. The special treatment given to public utility projects under the Amendment Act will therefore not only help promote growth benefiting the public but also protect investor sentiment.

### **Effect of the amendment on the Industry**

The above mentioned changes implemented into the Specific Relief Act, is expected to have the following positive impact –

1. Reduction in uncertainty of contract disputes with respect to judicial timelines by way of “no injunctions” on projects of public interest.
2. Critical contracts can be secured of equity remedy wherein the performance of the contract required for the project as envisaged in the terms and conditions would become the norm avoiding any monetary compensatory replacement.
3. The substitution clause would enable immediate remedy for the petitioner party against the contracted party who has breached terms even prior judicial process as the project work can continue to get executed.

Special courts and expert opinions ecosystem would ensure speeding up the dispute resolution timelines, thereby ensuring for India and its investors faster justice, reduced uncertainty in contracts environment, stable and secure judicial process perception and better rankings in international standings.

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## Conclusion

That said, as with any significant legislative overhauling, the impact of the Amendment Act is largely predicated on its successful implementation, keeping in mind the renewed objectives of the Principal Act.

De hors its minor glitches that are subject to clarification, the amendments to the Specific Relief Act, 1963 have finally given some meaningful purport to the relief of specific performance, which was, for the longest time subject to the whims of the judicial discretion.

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