

**National Judicial Academy | Workshop for High Court
Justices for Commercial Division and Commercial Appellate
Division on Commercial Disputes**

**Session I: Commercial Courts: Architecture & Challenges in
the Area of E-Commerce**

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Understanding “Commercial Disputes”

- Legislative history of the Act reveals that the definition of “*commercial dispute*” underwent some incremental changes
- Largely followed recommendations in the 253rd Report of the Law Commission through an exhaustive list of 22 standard commercial transaction
- Given the underlying object of the Act viz. to ensure speedy disposal of high value disputes, the SC has favoured a strict construction of the definition of “*commercial disputes*” [Ambalal Sarabhai Enterprises v. K.S. Infraspace LLP (2020) 15 SCC 585]
- 2(1)(c) defines “*commercial dispute*” as under:
 - “*commercial dispute*” means a dispute arising out of
 - (i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;
 - (ii) *export or import of merchandise or services;*
 - (iii) *issues relating to admiralty and maritime law;*

- (iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;*
- (v) carriage of goods;*
- (vi) construction and infrastructure contracts, including tenders;*
- (vii) agreements relating to immovable property used exclusively in trade or commerce;*
- (viii) franchising agreements;*
- (ix) distribution and licensing agreements;*
- (x) management and consultancy agreements;*
- (xi) joint venture agreements;*
- (xii) shareholders agreements*
- (xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;*
- (xiv) mercantile agency and mercantile usage;*
- (xv) partnership agreements;*
- (xvi) technology development agreements;*

- (xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;*
- (xviii) agreements for sale of goods or provision of services;*
- (xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;*
- (xx) insurance and re-insurance;*
- (xxi) contracts of agency relating to any of the above; and*
- (xxii) such other commercial disputes as may be notified by the Central Government*

Explanation – A commercial dispute shall not cease to be a commercial dispute merely because –

- (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;*
- (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;”*

Select Jurisprudence: Chapeau

2(1)(c) “Commercial dispute” means a dispute arising out of -”

A number of decisions have recognised the exhaustive scope of the definition of “*commercial disputes*”.

- The Delhi HC has noted that legislature did not intend to cover all disputes arising out of commercial transactions but only opted to specify 22 transactions, as transactions, disputes arising wherefrom will constitute commercial disputes. Accordingly, every dispute arising from a commercial transaction, unless falling within the 22 transactions identified, cannot be a commercial dispute. [*Qatar Airways Q.C.S.C. v. Airports Authority of India, 2017 SCC Online Del. 8088*]
- The Delhi HC noted that the use of the words “means” in Section 2(1)(c) of the Act shows that the categories provided in the definition are exhaustive and not inclusive [*Havells India Ltd. v. Advertising Standards Council of India, (2016) 227 DLT 719.*]
- The Calcutta HC has also reiterated that the categories of agreements specified in Section 2(1)(c)(i) –(xxii) of the Act are exhaustive. As per the Court the requirement of fixing the transaction within the ambit of the named category of agreements, can be construed as being in aid of what the Act aims to cut down viz. unnecessary wastage of time in determining whether the dispute is a commercial dispute [*Ladymoon Towers Pvt Ltd. v. Mahendra Investment Advisors Pvt. Ltd. MANU/WB/0547/2021*]

Select Jurisprudence: Sub-clause (i) of Section 2(1)(c) of the Act

(i) ***“Ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;”***

- Broadly speaking sub-clause (i) of Section 2(1)(c) of the Act pertains to the ordinary transactions of four identified classes of persons including (use of “such as”) such ordinary transactions which have been formalised in mercantile documents.
- In understanding the various component elements, Courts have frequently made reference to dictionaries and legal lexicons. It may therefore be apposite to understand the terms used from their ordinary meaning.
 - A merchant is defined as ‘one who buys and trades in anything and as merchandise includes all goods and wares exposed to sale in fairs or markets’.
 - A banker has been defined as ‘one involved in the business of receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer

- A financier has been defined as ‘an administrator, collector or farmer of taxes or one who is skilled in levying and managing public money or as a capitalist concerned in financial operations.
 - A trader is defined as one who sells goods substantially in the form in which they are brought or as a member of a stock exchange, buys and sells securities on the exchange floor or one who buys and sells commodities and commodity futures for others or for his/her own account in anticipation of speculative profit.
 - A mercantile document has been understood to be a document used in a transaction or in relation a transaction between merchants, bankers, financiers and traders.
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- The Delhi HC has held that the plaintiff’s plea that the defendant’s circulation of notices constituted “*tortuous interference*” with his contractual relations, entitling him to a decree of permanent injunction and damages, would not be a dispute arising out of an ‘*ordinary transaction*’ of a merchant or trader within the meaning of Section 2(1)(c)(i) of the Act and therefore not a “*commercial dispute*”. [*Perpetuuiti Technosoft Services Pvt. Ltd. v. Sanovi Technologies (India) Pvt. Ltd., 2016 SCC Online Del 6714*]

- A simpliciter summary suit filed on the basis of admissions in the balance sheet of the defendant is not a commercial suit. All suits relating to recovery of monies cannot *ipso facto* fall within the meaning of Section 2(1)(c)(i) Suit not based on any transaction relating to mercantile documents cannot be filed as a “*commercial dispute*”. [***Kailash Devi Khanna v. DD Global Capital Ltd. & Ors. 2019 SCC Online Del 9954***]
- The Calcutta HC has held that a suit arising out of a loan given on the basis of personal relation of familiarity is not a commercial dispute. The Bombay HC has also adopted a similar position that a dispute arising out of a friendly loan will not fall within the scope and ambit of a “*commercial dispute*” [***Ladymoon Towers Pvt Ltd. v. Mahendra Investment Advisors Pvt. Ltd. 2021 SCC Online Cal 2082; Glasswood Realty Pvt. Ltd. v. Chandravilas Kothari 2021 SCC Online Bom. 5032***]

Select Jurisprudence: Sub-clause (iv) and (vi) of Section 2(1)(c) of the Act

(iv) arising out of transaction relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same”

–Recovery for loss due to damage caused by the defendant to the plaintiff’s aircraft cannot be said to “*arise out of transactions relating to aircrafts*” and therefore not a commercial dispute within the meaning of the Act. [*Qatar Airways Q.C.S.C. v. Airports Authority of India, 2017 SCC Online Del. 8088*]

“(vi) construction and infrastructure contracts, including tenders”

–A suit filed by the plaintiff for recovery of extra amounts paid to the defendants for the construction of a residential villa, held that a dispute in relation to construction of a residential building (villa), would given the scope and objective of the Act (i.e. to encompass all types of commercial transactions which meet the specified value), fall within the category of “construction and infrastructure contracts” under clause (vi) of Section 2(1)(c) of the Act and would be a “commercial dispute”. However, it is respectfully submitted that the expansive reading of the definition of “commercial dispute” is not consistent with prior jurisprudence [*Blue Nile Developers Pvt. Ltd. v. Movva Chandra Sekhar & Ors. 2021 SCC Online AP 3964*]

Select Jurisprudence: Sub-clause (vii) of Section 2(1)(c) of the Act

(vii) “agreements relating to immovable property used exclusively in trade or commerce”

- The Gujarat HC hearing a suit for specific performance of an agreement for development of a plot of land as a biotech park noted that the expression “*used*” exclusively in trade or commerce in the said sub-clause must mean “actually used” or “being used”. As per the Court the word “used” denoted “*actually used*” and it cannot be said to be either “*ready for use*” or “*likely to be used*”. Accordingly the said suit would not be a “*commercial dispute*” within the meaning of the Act. [***Vasu Healthcare Pvt. Ltd. v. Gujarat Akruti TCG Biotech Ltd. AIR 2017 Guj. 153***]
- Hearing a suit for recovery of *mense profit* the Delhi HC held that sub-section (vii) has to be read together with explanation (a) to the Section 2(1)(c). As per the Court the words “*arising out of*” and “*in relation to immovable property*” in Section 2(1)(c) and sub-section (vii) of the Act have to read expansively. Clause (vii) would include “*all matters relating to all agreements in connection with immovable properties*”, provided that “*the immovable property forms the dominant purpose of the agreement out of which the dispute arises*”. SC has distinguished this decision of the Delhi HC noting that the observations made in that case were reached in a circumstance where the immovable property in question was undoubtedly being used for trade or commerce. [***Jagmohan Behl v. State Bank of Indore, 2017 SCC Online Del 10706***]

- SC has expressed agreement with the view taken by the Gujarat HC and held that the suit seeking specific performance of an agreement to execute a deed of mortgage of a plot of land would not be a dispute arising out of agreements relating to immovable property used exclusively in trade and commerce under the Act. The object of the Act i.e. so as to provide speedy disposal of high value commercial disputes so as to create positive image about the Indian legal system, an expansive interpretation would defeat the objective of the Act. Accordingly the SC endorsed a strict interpretation of the provisions of the Act. [*Ambalal Sarabhai Enterprises v. KS Infraspace LLP & Anr. 2019 SCC Online SC 1311*]
- Immoveable property must be legally and not illegally or unauthorisedly used in trade and commerce. Hence, a dispute arising out of an agreement in relation to premises used for commercial purposes in an area designated for residential use is not considered a commercial dispute within the meaning of the Act. [*Soni Dave v. Trans Asian Industries Expositions Pvt. Ltd, AIR 2016 Del 186*]

- The plaintiff must plead that the transaction from which the dispute arises relates to immovable property that is used exclusively in trade or commerce and in the absence therefore cannot maintain the action as a commercial suit in terms of sub-clause (vii) of Section 2(1)(c) of the Act. [*Soni Dave v. Trans Asian Industries Expositions Pvt. Ltd*, AIR 2016 Del 186]
- A suit seeking cancellation of powers of attorney and sale deeds and for recovery of possession of immovable property is not a dispute arising out of an agreement relating to immovable property, let alone immovable property used exclusively in trade or commerce. [*Hindpal Singh Jabbal v. Jasbir Singh*, 2016 SCCOnline Del 4901; *Sumer Singh v. Om Prakash Gupta*, 2017 SCCOnline Del 6675]
- Suit seeking quashing of a sale deed on the basis of a succession certificate issued in favour of the plaintiff is not a “commercial dispute” within the meaning of the Act. [*Ujwala Raje Gaekwar v. Hemaben Achyut Shah*, 2017 SCC Online Guj 583]

- A suit for specific performance of an agreement to sell property to be used for commercial purposes in an area notified as a commercial area is a dispute pertaining to an agreement relating to immovable property to be used exclusively in trade and commerce. [*Monika Arora v. Neeraj Kohli, 2016 SCCOnline Del 5259*]
- The Delhi HC has held that a dispute arising out of an agreement concerning the provision of consultancy and brokerage services in relation to the lease of premises for commercial purposes, is a commercial dispute in terms of Section 2(1)(c)(vii) of the Act, or alternatively, is so under Section 2(1)(c)(x) of the Act. [*Realistic Realtors Pvt. Ltd. v. Karanpreet Singh Walia 2021 SCC Online Del 5333*]

Select Jurisprudence: Sub-clause (xvii) of Section 2(1)(c) of the Act

(xvii) “intellectual property rights relating to registered and unregistered trademark, copyright, patent, design, domain names, geographical indication ...”

- Sub-section (xvii) of Section 2(1)(c) of the Act refers to rights relating to “*registered and unregistered trademarks*”. Hence, it would include common law actions for passing off. On the other hand, it does not mention actions in relation to trade secrets or confidential information, which would continue to be tried as ordinary suits outside the purview of the Act (unless arising out of any agreement which is otherwise covered under Section 2(1)(c) of the Act viz. licensing or distribution agreement, etc).
- Proceedings against the Advertising Standards Council of India challenging the direction to withdraw an advertisement on the ground that a particular advertising slogan or tagline is deceptive and/or misleading by exaggeration is not a dispute arising out of intellectual property rights within the meaning of the Act, even if the slogan or tagline is regarded as a trademark or subject matter of copyright. [*Havells India Ltd. v. Advertising Standards Council of India, (2016) 227 DLT 719.*]

Select Jurisprudence: Sub-clause (xviii) of Section 2(1)(c) of the Act

(xviii) “agreements for sale of goods or provision of services...”

- It is well known that e-commerce involves the regular buying and selling of goods and services over the internet. In e-commerce transactions, the agreement in question is executed over an electronic medium rather than in a physical space as with ordinary purchase/sale transactions. The definition under the Act is technology/medium neutral and encompasses electronic agreements as well. Accordingly, “e-commerce” transactions would normally qualify as “commercial disputes“ under the aforesaid provision of the Act.
- A suit filed by the Plaintiff for the enforcement of a compromise/consent decree, entered into between the parties in proceedings filed for realisation of monies arising from an agreement for sale of goods, has been held by the Calcutta High Court to not be a “commercial dispute” within the meaning of Section 2(1)(c)(xviii) of the Act. [*Indian Media Services Pvt. Ltd. v. Indian Express Newspapers [Bombay] Ltd. & Ors. 2022 SCC Online Cal. 273.*]