The Specific Relief (Amendment) Act, 2018 introduces a paradigm shift in the prevalent law regarding contractual enforcement in India, shifting the focus from the previous default remedy of award of damages for breach of contract to enforcing specific performance of contracts.

Acknowledging the need for greater certainty in contractual enforcement and timebound adjudication of rights of contesting parties, the Specific Relief (Amendment) Act, 2018 (Amendment Act), amending the Specific Relief Act, 1963 (Principal Act), was recently passed by both Houses of Parliament. It received Presidential assent on 1 August 2018, but its provisions are yet to be brought into effect.

The Amendment Act reduces the wide discretion previously conferred on courts to grant specific performance. It also introduces a new remedy of ‘substituted performance’ for breach of a contract, recognising 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 investor protection.

Key Amendments Introduced

(a) Specific Performance no longer discretionary

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. In India, the Principal Act was enacted embodying this same outlook towards specific performance. 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 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.

A major change introduced by the Amendment Act, is that it now makes it mandatory for courts to enforce specific performance of contracts, except for certain types of contracts where performance is not specifically enforceable. The discretion granted to courts previously while granting the remedy of specific performance including the two circumstances under which specific performance could be granted (as discussed above) have been removed.
This change is aimed at providing greater protection of contractual expectations by ensuring that a non-defaulting party can obtain the performance he bargained 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. This amendment may also discourage errant parties who may deem it more viable to breach a contract than perform it, as the cost of damages may still be less than the cost of the performance.

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.

(b) Reduction in category of contracts not specifically enforceable

In line with the shift to a pro-performance regime, the newly substituted Section 14 has reduced the categories of contracts that are not specifically enforceable. 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.

The amended Section 14 now recognises 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.

(c) Additional remedy of Substituted Performance

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.

Though a remedy akin to substituted performance is provided under the Indian Contract Act, 1872 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 foreseeability 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'.

(d) Power to engage experts

The Amendment Act now specifically empowers courts to engage technical experts to assist on technical issues that may arise in a suit for specific performance. This amendment will enhance the ability of courts to try suits where technical issues of construction, public utility services, developments/ re-development etc., arise for consideration.
(e) 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.

(f) Timebound adjudication

The Amendment Act provides an ambitious timeline of 12 months from the date of service of summons on the defendant for the disposal of a suit for specific performance. This period can be further extended by 6 months by the court.

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.

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.