Navigating the Disputes Environment in India

A Cyril Amarchand Mangaldas Thought Leadership Initiative
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The World Bank in its Doing Business ("DB") Review for 2015-16 has placed India at 178 for Enforcing Contracts, substantially lower than smaller economies such as Swaziland (175) and Pakistan (151). India's ranking in time and cost for resolving a commercial dispute through a local first-instance court is at a significant distance from its peer group of Brazil (45), Russia (5), China (16) and South Africa (119). In the backdrop of consistent efforts to make India an attractive investment destination, this is a parameter that appreciably discounts India's competitiveness in the overall DB rankings (130). The contours of strategy around investing or operating in India require understanding of the system's nerves. Thus understanding the dispute resolution system in India could be the delta (or the beta) that makes or breaks your investment.

The lay of the law is vast and the regulations, complex. The Supreme Court functions as the legislature (for instance laying down the law on sexual harassment and passive euthanasia), the executive (including tracking the environment clean up and the investigations in the 2G scam) and the judiciary (with over 500 matters routinely listed before the court on a daily basis). The roadblocks to routine functioning of the overstressed judiciary range from the strike at the Bar or vacant positions on the Bench to varied quality of legal service professionals at all levels of judicial hierarchies.

Internationally, the delays and tardy Court procedures have become synonymous with dispute resolution in India. Five years ago in the US, a class action securities claim against Satyam Computer Services was part-settled for USD 125million basis opinion of former Chief Justice of India that the shareholder-plaintiffs would “effectively (have) no recovery” or recourse in India due to judicial delays and absence of securities fraud class actions under Indian law. Later that year in November, an arbitral tribunal found India guilty of violating the India-Australia bilateral investment
treaty ("BIT") on the grounds of the inordinate delay (of over nine years) by Indian Courts in enforcing an arbitral award against a State Instrumentality in favour of *White Industries* (an Australian Company). Not only did it cost India AUD 4 million, the award, an indictment of India's sovereign function, had ramifications both for the executive and the judiciary. The ruling clearly reflected how sovereign functions of the Indian judiciary could amount to violation of India's BITs. Both these claims were focused on ruptured Rule of Law in India on account of delays.

Rule of Law and Justice, however, is foundational and truly the basic structure of Indian society and permeates to the corporate world. The dwindling international reputation triggered a critical review of India's commercial law landscape and the BIT program. The idea that *justice delayed is justice denied* has made its way to mainstream conversation and become key focus not only for the Judiciary but also the Legislature and the Executive. A review of our laws was imperative in light of India's deepening integration with the global economy and increasing number of new trade and investment agreements.

The recent developments in India’s companies law, fiscal law and commercial courts law present a fresh legal landscape which is arguably reliable, sturdy and competent. The revised model BIT comes to the fore with holistic assessment of India's position in the new commercial world order. This has effectively contributed to building investor confidence and spiralled the 'Ease of Doing Business' ranking of India. While the core dispute resolution principles are the same, the laws have infused fresh air into the tardy settings and are yet to be tested. In our collective experience, we have seen that every matter is different and a thoughtful approach to an application, pleading or prayer could be a game changer. The complexity of the system allows for smart and strategic navigation of a dispute to actually translate into real commercial upside for clients. With a little planning in advance and quick feet on the ground, I have seen disputes make 180 degree turns.

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Like everything else, the judicial framework in India is fast evolving with the focus being on speed and efficacy. Specialised courts and tribunals have become the order of the day, the law on arbitration has been overhauled, commercial courts have been established and radical changes in some key laws which affect business and commerce have been implemented or have been proposed. Consequently, the environment in which businesses pursue and resolve adversarial matters has become far more complex. The recent changes pose both a challenge as well as opportunity. Businesses nowadays conduct litigation more as a strategic compulsion and to derive the best of the recent changes requires a nuanced and tactical approach to every commercial dispute. We at Cyril Amarchand Mangaldas are well placed to provide strategic litigation solutions to our clients. In this book, we showcase our insights through summary essays on the new disputes environment, written from a practitioner’s standpoint.

With over 15 partners and 90 litigating lawyers across the country, we, at Cyril Amarchand Mangaldas, have a team of some of the most experienced and highly qualified lawyers to advocate commercial disputes pan India. We have appeared in the Supreme Court, across 17 High Courts and in every forum of relevance to corporations including the National Company Law Tribunal, the National Green Tribunal, the CBI courts, the Commercial Courts and regulatory tribunals such as the SAT, TDSAT and APTEL. We typically use a cross pollination approach by hand picking client service teams by including industry experts with the litigation team so as to ensure that our clients benefit from the fact that they are represented by a full service law firm with across the board expertise.

In this book, you will find essays which are both descriptive and prescriptive. We lay out a checklist of safeguards underlying regulatory action and what to bear in mind at each stage of the enquiry/adjudication by a regulatory authority. We take a critical look at the ever expanding powers of the National Green Tribunal, its expediency in disposal of cases and its unbridled powers to award relief and compensation to victims. We provide you a quick reference guide on some recent trends of the Supreme Court of India. We analyse the quickly evolving jurisprudence on the question of mens rea of a corporation and the distinctions that underlie the principles of corporate attribution (or alter ego) and that of vicarious liability in criminal matters. Given that clients can find themselves on either side of an award or judgment, we set out some practical hacks to enforcing or challenging arbitral awards and judgments - since this stage often proves to be the most critical aspect of adversarial matters which have run their course. We give you a step by step guide to managing white collar investigations within the complex regulatory
framework that spans the breadth of corporate activities. We detail the draconian arm of the money laundering laws and the powers of the investigating authorities. We put forward a 'need to know' on the new class action suit regime that has just been made effective in the country, including what the law specifies and what remains open to judicial determination. We debate the projected efficacy of the Commercial Courts, bearing in mind both procedure and infrastructure considerations. We review the impact of legislative certainty sought to have been introduced by the Arbitration (Amendment) Act of 2015. And finally, we look at some of the more nebulous aspects of the dispute resolution mechanism available under Bilateral Investment Treaties.

This is a part of our series on Thought Leadership Initiatives. We hope you find it informative and useful.

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*Disclaimer: These articles are not intended to serve as legal advice and the position of law expressed in these articles are only valid as on the date of publication of such article.*
The draftsmen of the Constitution of India could not perceive the intensity at which natural resources will be mercilessly exploited by human kind, and putting a question mark on its own survival. Therefore, the original text of the Constitution of India, 1950 did not have dedicated provisions for the protection of environment as a whole. With the growing awareness across the Globe on the concern and need for environmental protection, environmental discourse in India gained momentum and saw the constitutional amendments inserting Article 48A and Article 51A(g) in the Constitution. The mere amendments were not adequate. The ineffectiveness on the part of the executive authorities in implementing the environmental regulations and multi layered corruption in administrative enforcement, collectively prompted the judiciary to develop the environmental jurisprudence in India and recognize the 'right to wholesome environment' under Article 21 of the Constitution.¹

How the National Green Tribunal Came About

Despite a large development of jurisprudence by the Indian Judiciary, the implementation of any measures with regard to protection and preservation of environment remained on paper. The need for establishment of specialized environmental courts in India was emphasized by the Supreme Court for the first time in 1986². Subsequently, Government of India established the National Environmental Tribunal and National Environment Appellate Authority under the National Environmental Tribunal Act, 1995 and under the National Environment Appellate Authority Act, 1997 respectively. However, as recorded by the 186th Law Commission Report dated September 2003, these tribunals were not functional and remain only on paper.

The 186th Law Commission Report strongly advocated establishment of environmental courts in India, consisting of expert members in order to ensure sustainable development and to ensure a balance between the right to development and the right to environment. Consequently, the National Green Tribunal (“NGT” or “Tribunal”) came to be established under the National Green Tribunal Act, 2010 (“NGT Act”).

The NGT has been established for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and granting

² M.C. Mehta v Union of India AIR 1987 SC 965.
relief and compensation for damages to persons and property and for matters
connected therewith.

One of the most distinguishing features of NGT is that it comprises of both judicial as
well as expert members on the bench. To ensure access to all concerned in the interest
of protecting our environment, the NGT not only has a Principal Bench in Delhi but
also 4 Zonal Benches in Kolkata (Eastern bench), Pune (Western Zone), Bhopal
(Central Zone) and Chennai (Southern Zone) and circuit benches. The NGT has adjudicated approximately 808 cases, ensuring much faster disposal rate than most High Courts and Supreme Court.

What Can NGT Decide On

NGT has been granted both original as well as appellate jurisdiction under the NGT
Act. NGT has been granted exclusive jurisdiction with respect to environmental cases
and Section 29 of the NGT Act bars jurisdiction of all civil courts. NGT's jurisdiction
extends to cases where substantial question relating to environment including
enforcement of any legal right relating to environment is involved. The jurisdiction of
NGT is however, limited to the legislations specified in Schedule-I. The term
“substantial question relating to environment” has been defined in the NGT Act to mean and
include the instances where there is a direct violation of a specific statutory
environmental obligation. The outcome of such instance must either (i) affect or is likely
to affect the community at large or (ii) the gravity of damage to environment or property
is substantial (iii) the damage to public health is broadly measurable.

The term “substantial question relating to environment” has been interpreted by the NGT in Goa Foundation and Peaceful Society v. Union of India & Ors to mean question which is
debatable and not previously settled and must have a material bearing on the case and
its issues relating to environment.

The jurisdiction of NGT is confined only to civil cases and does not include within its
purview any criminal matters that may be initiated. The appeal from its decision lies to
the Supreme Court. It is noteworthy that a Division Bench of Madras High Court, has
held that a writ petition under Article 226/227 can be filed before the High Court
against the order of the NGT and there have been instances where High Courts have
entertained writ petitions filed against NGT orders.

Recently, NGT widened its jurisdiction by bringing within its purview the power of
judicial review. The tribunal took the view that the tribunal is a judicial tribunal having
the trappings of a court, and is vested with the power of judicial review to a limited
extent which it would exercise only as supplementing and not supplanting to the
jurisdiction of the higher courts. Through the power of judicial review, NGT can now

3 Rule 4 & 6, The National Green Tribunal (Practice and Procedure) Rules, 2011
4 Bhopal Gas Health Mahila Udyog Sangathan and Ors. v. Union of India & Ors; MANU/SC/0642/2012
6 Section 2(m)
7 Decision dated 18 July 2013; Application No.26 of 2012
8 Section 23 of the NGT Act provides that any person aggrieved by the order passed by NGT, may file an appeal to the Supreme Court within ninety days.
9 Kalpavriksh v. Union of India, Application No. 116 (THC) of 2013, decided on 17th July 2014
examine the validity, vires, legality and reasonableness of the rules, provisions or notifications, made or issued in exercise of the powers vested in the concerned government or authority by way of subordinate or delegated legislations, but it is restricted only in relation to Acts enumerated in Schedule-I of the NGT Act.

The Tribunal also enjoys appellate jurisdiction in terms of Section 16 of the NGT Act, wherein any person aggrieved by the order passed by the concerned authorities under the legislation specified in Schedule-I may file an appeal before NGT within a period of thirty days.

**Who Can Approach NGT**

Any person who has sustained injury, or owner of the property to which damage has been caused, or duly authorized agents; or the Central or the State Government or any state agency authorized in that behalf; any person aggrieved including any representative body or organization can approach the NGT for redressal. Keeping in mind the purpose of NGT, for the effective and expeditious disposal of cases relating to environmental protection along with conservation of forests and other natural resources, the rules with respect to *locus standi* before NGT have been sufficiently relaxed by NGT itself to secure its objectives and meet the ends of justice. The NGT in *Vimal Bhai v. Ministry of Environment & Forests* clearly held that the term “person” mentioned in the Act cannot be placed above “every citizen” as appearing in Article 51A of the Constitution of India. Therefore, every citizen of India is free to approach NGT complaining environmental threat.

Though the Act does not explicitly grant jurisdiction to NGT to take *suo moto* cognizance of matters, however, the NGT in few cases has taken *suo moto* cognizance based on newspaper reports etc and given direction to Ministry of Environment & Forest and Climate Change (“MoEF & CC”) accordingly.

**Burden of Proof on the Violator**

The Supreme Court in *Vellore Citizens Welfare Forum v Union of India & Ors* explicitly stated that the onus of proof in case of environmental matters lies on the actor or the developer/industrialist to show that his action is environmentally benign. NGT has also followed the same principle and accordingly held in *M/s. Sterlite Industries (India) Limited v. Tamil Nadu Pollution Control Board*, that the onus is on the person carrying out the activity complained of to establish by cogent and reliable evidence that it has not caused pollution or health hazards by carrying out its activities.

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10 Section 18, National Green Tribunal Act, 2010
11 Appeal No.5 of 2011
12 The Tribunal has based its power under Section 19 of the NGT Act which allows the Tribunal to decide its own procedure.
13 AIR 1996 SC 2715
14 2013 ALL (I) NGT Reporter (Del) 368
When to Approach NGT

In order to ensure expeditious disposal of cases, NGT has been given the mandate of disposing of the cases within a period of six months from the date of the cause of action. The NGT Act further provides limitation periods for filing of the applications and appeals before it. The tribunal cannot entertain an application which has been filed beyond the period of six months from the date on which the cause of action for such dispute first arose. An application for grant of any compensation or relief or restitution of property or environment shall not be entertained by the tribunal if it is not made within a period of five years from the date on which the cause for such compensational relief first arose.

The Tribunal may however, condone the delay if the applicant/appellant is able to show sufficient cause for not filing within the specified period and may allow a further period not exceeding sixty days. NGT has so far been quite lenient and flexible with respect to condonation of delay.

An Application or appeal may be filed before the Tribunal in the requisite form along with fee prescribed under the rules framed under the NGT Act. Section 19 of the NGT Act empowers NGT to regulate its own procedure and it is not bound by the procedure laid down under the Code of Civil Procedure, 1908 or by the rules of evidence contained in the Indian Evidence Act, 1872.

Relief and Compensation

NGT has also been empowered to impose penalty for violation of its orders and can order imprisonment for a term which may extend to three years or a fine which may extend to ten crore rupees or both in case of failure to comply with any order or award of decision of the tribunal. In case of failure to comply or if contravention continues, NGT has the power to impose additional fine which may extend to twenty-five thousand rupees for every day during which the failure or contravention continues after conviction for the first such failure or contravention. In case of non compliance by a company, the company can be punishable with fine which may extend to twenty-five crore rupees and in case the failure or contravention continues, with additional fine which may extend to one lakh rupees for every day during which such failure or contravention continues after conviction for the first such failure or contravention. Directors, managers, secretaries and other officers of companies can also be held personally responsible for violations by the company.

Infact the Act empowers the Tribunal to even fine government department and its officers for any offence under the Act.
NGT also has the powers to impose costs in case the claim is not maintainable, or is false or vexatious. In *B. Prajapathi v. Ministry of Environment & Forests* NGT imposed a cost of fifty thousand rupees against the appellant for engaging in frivolous litigation and for abuse of the tribunal process.

NGT has the power to award relief and compensation to the victims of pollution; for the restitution of property damaged and; for restitution of the environment for each area or areas. The tribunal may divide the compensation under different heads specified in Schedule II of the NGT Act.

The Tribunal has unbridled discretion in awarding compensation or relief. There is no method or maximum limit prescribed for calculation of such compensation or relief and thus the tribunal has awarded compensation ranging from a Lakh to 50 Crores. At times, the compensation is awarded in terms of a particular percentage of the project under consideration.

As per the mandate stated in the NGT Act, the tribunal is required to follow the settled principles of environmental jurisprudence viz. principles of sustainable development, the precautionary principle and the polluter pays principle.

### An Independent Institution

Though its nodal ministry is MoEF & CC, NGT has been functioning as an independent statutory institution. It has on multiple occasions rejected the views of MoEF & CC. In *Jeet Singh Kanwar v. Union of India*, the applicant had challenged environmental clearance given to the Respondent for the operation of the coal based thermal power plant. NGT held that the environmental clearances should not have been granted as proper procedures with respect to public consultation etc. were not followed. NGT further explained the scope of sustainable development to mean an exercise of balancing the industrial activity with environment protection. It was further observed that the balancing act requires proper evaluation of both the aspects namely degree of environmental degradation which may occur due to the industrial activity and the degree of economic growth to be achieved.

NGT has so far taken balanced and independent views based on scientific evidence in order to ensure sustainable developments. One of the most challenging cases was where NGT was required to balance the right to environment and right to development was *B.B. Nalwade v. Ministry of Environment & Forests* wherein the tribunal upheld the grant of environmental clearance for a coal based thermal power plant on the ground that all necessary scientific studies and statistical information were taken into account while considering the viability of the project and its impact on the environment. The NGT

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22 Section 23, National Green Tribunal Act, 2010
23 Order dated 20th January 2012
24 Section 15 National Green Tribunal Act, 2010
25 Section 20, National Green Tribunal Act, 2010
26 Order dated 16th April 2013, Appeal No.10 of 2011
27 Order dated 29th November 2011
explicitly observed that the said project would contribute significantly towards sustainable industrial development and thus upheld the grant of environmental clearances.

Conclusion

NGT has so far been even handed and balanced in its approach and has given equal weightage to both the right to environment and the need for development. Having said this there have been contrary views especially from MoEF & CC and the industry that at the cost of environment protection the exigencies of development and business have suffered. In spite of receiving funding from MoEF & CC, NGT has on numerous occasions rejected its views and criticised its decisions. NGT has been criticised for over stepping its jurisdiction and also for imposing extremely high fines without any basis or measure for calculation.

However the cases decided show that the Tribunal has been encouraging a symbiotic relationship between development and environment, thus giving importance even to the interests and concerns of the industries and industrialists. In fact under the NGT Act whenever the MoEF & CC rejects any environmental clearance to an industry, it can be challenged under section 16 (i) of the NGT Act.

A broad overview of the decisions passed by NGT reflects that NGT has been largely balanced in its view while adjudicating environmental claims and has consistently applied the principles of sustainable development. It is indeed working towards keeping our valley green.
Regulatory Litigation: Safeguards available under the Enforcement Process

Administrative and regulatory authorities were established to do what was traditionally done by the government and Courts and it was expected that the authorities, due to their expertise, would perform their functions in a much simpler, transparent and more direct manner than the government and courts. Because the authorities are expected to perform their functions swiftly and in a time efficient manner they are neither obliged to follow the strict procedure laid down under the Code of Civil Procedure 1908\(^1\) nor the rules of evidence under the Indian Evidence Act, 1872.

The law of administrative procedure quickly evolved to ensure that authorities do not exceed or abuse their powers and overstep personal liberties. Judicial review of administrative action provides for the essential checks and balances to ensure controls and correction of administrative behavior. Over the years judicial review of administrative action has developed into a complex fabric of constitutional, statutory and judge made judicial principles interwoven to delineate the boundaries of administrative power. The recent trend of judicial decisions and legislative enactments, however, is to strengthen and bolster administrative authority and reduce the scope of interference by the Courts.

Regulation and litigation tend to differ along four key dimensions: (a) regulation tends to use preventive means of control (by framing rules and regulations), whereas litigation uses deterrent means by ordering compensation and costs; (b) regulation tends to use rules, (which are simpler and more specific), whereas litigation uses standards such as “due process”, “degree of care”; (c) regulation tends to use experts (or at least supposed experts) to design and implement rules, whereas litigation is dominated by generalists (judges); and (d) regulation tends to use public enforcement mechanisms. Litigation more commonly uses private enforcement mechanisms.\(^2\)

Regulation and litigation tend to merge and the distinction appears to be blurred when it comes to enquiry and/or adjudication conducted by regulatory agencies. Such proceedings are commonly referred to as enforcement proceedings. Enforcement proceedings are essentially regulatory actions with a litigation bias. The litigation bias has been thrust upon by statutes, rules, regulations and judge made law. However, in practice, enquiry/adjudication officers often fail to discharge the burden of conducting an enquiry/adjudication in accordance with judicial principles. Part of the reason for this is that the enquiry/adjudication officers lack the required legal expertise and experience. The other problem is tendency of enquiry/adjudication officers to tow the

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1. See, for example, Section 424 of the Companies Act, 2013; Section 15U of the Securities and Exchange Board of India Act, 1992; Section 28 of the Foreign Exchange Management Act, 1999.

line of their superiors (institutional bias) who have already made up their mind at an initial stage. The enquiry/adjudication proceedings therefore present a unique challenge for the persons, who are subjected to these proceedings.

In this backdrop, the present article intends to provide an overview of the rights available to a person during the enforcement process.

Broadly, regulatory enforcement proceedings can be classified under two heads, enquiry proceedings and adjudication proceedings. Generally both enquiry proceedings and adjudication proceedings arise out of an inspection and/or investigation. Most modern statutes such as the Companies Act, 2013 (“Companies Act”) and the Securities and Exchange Board of India Act, 1992 (“SEBI Act”) and the Foreign Exchange Management Act, 1999 (“FEMA”) provide wide powers to functionaries thereunder to call for documents, books and information and to seek inspection. Inspection and investigation are merely fact finding exercises and law expects the fullest co-operation from the parties to ensure thorough inspection and investigation. Whilst inspections and investigations are inquisitorial in nature, enquiry and adjudication proceedings assume adversarial and quasi judicial character.

Accordingly, as enquiry and adjudication proceedings may result in civil consequences law affords greater protection to parties at the enquiry and adjudication stage but provides for greater leniency to regulatory authorities for the conduct of inspection and investigation. For instance, a party may be able to claim a (litigation) privilege in an enquiry/adjudication proceeding but the same not be available in an inspection or investigation proceeding. Judicial and quasi judicial authorities seldom interfere with ongoing inspection and investigation unless the same appears plainly to be without jurisdiction or otherwise barred by law.

In order to ensure transparency and fairness, both substantive and procedural, statutes and delegated legislations (rules and regulations) authorizing initiation of enquiry and/or adjudication provide for the certain safeguards, which have been set out below in the form of a checklist:

1. **Did you receive a notice asking you to show cause:** Every enquiry/adjudication requires that adequate notice is served upon the person subjected to such enquiry/adjudication advising the recipient to show cause as to why enquiry/adjudication should not be initiated. The notice is required to be issued by the person who is authorized by law to issue the same and in the manner prescribed under the parent statute/regulation. The said notice also needs to provide sufficient time to the notice to reply. However, this rule does not have universal application and law does recognize certain well know exceptions. Directions issued under Section 11(4) of the SEBI Act are an exception to the rule of prior notice since the said provision expressly permits SEBI issue directions ex parte without notice in case of emergency. However, even in this case SEBI is required to issue a post decisional notice and accord a hearing to the party concerned after the directions are issued.

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4. See, for example, Section 206, Companies Act, 2013.
2. **Get legal representation early:** Since enquiry/adjudication are considered adversarial and may have result in grave civil/penal consequence, it is a right available to the noticee to have legal representation. Since procedural fairness plays a pivotal role in judicial review of administrative action it is important that the noticee is guided by an expert from the very initiation of the proceeding so that all objections can be taken at the appropriate stage in order to avoid an argument or waiver and abandonment by the authority at the appellate stage.

3. **Is it possible to compound/apply for settlement the proposed action:** In relation to certain allegations, it is possible to apply before the relevant authority for settling/compounding the alleged offence. For instance, the SEBI Act, FEMA and the Companies Act permit settlement of certain cases, civil as well as criminal. Since there is a period of limitation prescribed within which such application for settling/compounding can be made, this option needs to be explored immediately upon receipt of the notice from the authority.

4. **Has the enquiry/adjudication been initiated by the person authorized by law and in the manner prescribed:** Generally, the relevant Rules and Regulations expressly provide that an officer not below a particular rank alone shall have the authority to authorize initiation of an enquiry/adjudication. It is also specified that initiation of enquiry/adjudication shall be done by way of a written order signed by the concerned officer. The noticee is entitled to inspection or a copy of such an order in order to confirm compliance with this requirement;

5. **Have the pre-conditions for initiation of enquiry/adjudication been met:** Most Rules and Regulations require the specified officer authorized to conduct the enquiry/adjudication to have “reason to believe” or to form an “opinion” that an enquiry/adjudication should be initiated. This requirement has been interpreted to require the officer concerned to form a subjective opinion by judicious application of mind on the material available before him. The Courts have taken this aspect further by requiring such an officer to provide reasons in writing for his decision to initiate enquiry/adjudication, since a reasoned decision in writing can alone can demonstrate judicial application of mind by such an officer. Whilst the Courts have held that sufficiency or adequacy of reason so given (subjective satisfaction) is not a ground for judicial intervention, the Court would strike down such a decision if it is found that there was no material available before the concerned officer (objective test), who authorized initiation of enquiry/adjudication. The person subjected to an enquiry/adjudication is also entitled to inspection or a copy of the file note containing reasons given by the concerned officer, authorizing initiation of inquiry/adjudication as also any further note/order that may be required during the enquiry/adjudication process which evidences application of mind. It is well settled that disclosure of such reasons and orders is necessary so that such person subject to the enquiry/adjudication is able to rebut/deal with the reasons/findings so given at a further stage in enquiry/adjudication process.

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6 See, Section 15 of the Foreign Exchange Management Act, 1999; Section 441 of the Companies Act, 2013.
8 See, Section 15-I of the Securities and Exchange Board of India Act, 1992.
6. **Is the notice sufficient:** Law also requires that such a notice of enquiry/adjudication sets out all details/material on which the authority seeks to place reliance upon for the purpose of enquiry/adjudication against the person.\(^{10}\) It is also obligatory on the authority to specify the allegations, violation of law alleged and consequences/penal provisions/action proposed for the alleged violation\(^{11}\) In case, the notice does not provide all these details the same will be regarded as defective and any order passed pursuant thereto is liable to be set aside.\(^{12}\)

7. **Do you not need inspection:** A party subject to an enquiry/adjudication is entitled to a copy of or inspection of all material/documents including any inspection report/investigation report based on which enquiry/adjudication has commenced and which the authority proposes to rely on against such party in the enquiry/adjudication.\(^{13}\)

8. **How do you counter statements that are being used by the authority against you:** A party subject to an enquiry/adjudication is entitled to cross examine persons whose statements are being used to make out a case against it.\(^{14}\) However, the right to cross examine is not regarded as an essential part of natural justice in all situations.

9. **Have you filed a detailed reply to the notice along-with documentary evidence with time:** A reply to notice is expected to be accompanied by all supporting documents/material and the same is required to be filed within the time frame prescribed by the authority. Since it is permissible for the person subject to an investigation to take conflicting/alternate pleas, in appropriate cases, it is advisable that the noticee sets up a case on mitigation as an alternate to the primary case of denial of violation.

10. **Request a Personal Hearing:** Since certain issues can be explained/clarified best by way of a personal dialogue/interaction, it is advisable that a personal/oral hearing is sought in addition to filing a written reply.

11. **Seek leave to file Written Submission:** During the personal hearing, it is not uncommon that a few further clarifications are sought by the authority. It is therefore important that leave to file written submissions is sought so that the said clarifications can also be put in writing along-with the other explanation provided in reply to the notice. At the appellate stage, written submissions, serve as a consolidated record of objections/defence(s) taken against administrative action and thus, allay fears of all contentions not being recorded by the authority in its order.

12. **Does the Order deal with the issues fairly:** From the perspective of judicial review (by an appellate authority or by the High Court), it is important to consider whether the following requirements have been complied:

   a. Has the order been passed by the same person who has heard the matter?\(^{15}\)

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10 Union of India v Verma AIR 1957 SC 882.
b. Does the order provide reasons\textsuperscript{16} for arriving at a particular finding and imposing punishment?

c. Has the authority considered all relevant material/contentions placed before it? Conversely, is the decision based on irrelevant material or extraneous considerations?\textsuperscript{17}

d. Is each finding in the order supported by material/evidence produce before the authority?\textsuperscript{18}

e. Is the punishment/penalty imposed commensurate with the offence committed?

f. Is the order/direction issued within the scope of power/jurisdiction of the authority under its parent act?

g. Is the reasoning employed by the authority erroneous or perverse?

h. Does the order evidence the discharge of burden of proof of charges against the noticee?

i. Has the enquiry/adjudicating officer acted under dictation or direction from a senior authority?\textsuperscript{19}

13. What is the remedy against the Order: Modern statutes such the SEBI Act and the Companies Act provide for first appeals before an expert tribunal\textsuperscript{20} and thereafter provide for an appeal before the Supreme Court.\textsuperscript{21} Although in theory it is possible to impugn the order passed by regulatory authorities before the High Court by way of a writ petition under Article 226 of the Constitution of India, in practice, such challenges are seldom entertained since an alternate remedy of appeal is made available under the relevant statute.\textsuperscript{22} In cases where there is no appellate remedy provided, the appropriate remedy to challenge the order of a regulatory authority would be by way of a writ petition before the jurisdictional High Court under Article 226 of the Constitution of India.

While the purpose of creating regulatory authorities with quasi judicial powers is to ensure that there is efficient administration of justice by sector-specific authorities, the fact that these authorities have some sort of an adjudicatory power means that they are bound to conform with well settled judicial principles. It is clear that while statutes confer power on the statutory bodies to undertake enquiries and investigations to prevent malpractices, the person manning such authorities often lack judicial experience and discipline required to ensure that the party against whom these actions are taken are protected. This firmly casts the onus on the person subject to enquiries/adjudications to be vigilant and protect its rights.


\textsuperscript{16} SN Mukherjee v Union of India (1990) 4 SCC 594 citing Union of India v Mohal Lal Cooper AIR 1974 SC 87: "reasons in such context would mean the link between materials which are considered and the conclusions which are reached. Reasons must reveal a rational nexus between the two."

\textsuperscript{17} Hindustan Steel Limited v AK Roy AIR 1990 SC 102.

\textsuperscript{18} Union of India v Mohal Lal Cooper AIR 1974 SC 87.

\textsuperscript{19} Mahadayal Premchandra v Commercial Tax Officer AIR 1958 SC 667.

\textsuperscript{20} See, Section 15T of the Securities and Exchange Board of India Act, 1992; Section 421 of the Companies Act, 2013.

\textsuperscript{21} See, Section 15Z of the Securities and Exchange Board of India, 1992; Section 423 of the Companies Act, 2013.

Class Action Suits: Preparing for Vulnerabilities

The *Satyam Scam* and the *Bhopal Gas Tragedy* are often the first points of recall for class action conversations in India. However, massive disasters or frauds will no longer stand for the only points of reference. Everyday corporate actions such as who is nominated on the board, or declarations in quarterly financial statements, can all be the subject matter of class action litigation. The *'Coming Soon'* is a *'Now Here'*.

Section 245 of the Companies Act, 2013 (*the Act*) was notified on June 1, 2016.

In this article, we set out a summary of where the threat can come from, what vulnerabilities to watch for, who should be on the look out, how to plan ahead for the defence and what costs must weigh in.

The Plaintiff and the Plaintiff's Bar: Who can initiate a Class Action Suit?

Class actions are law suits filed by a group or *'class'* of plaintiffs who have suffered the same/similar harm from the defendant companies' actions. Under the Act, shareholders and depositors comprising the lesser of 100 in number or 10% of the total share capital/deposits, respectively, are eligible to make an application for a class action. Subject to specific jurisprudence developing through case law, past and future shareholders of the company would not be eligible to participate in a class action.

This new law on class actions under the Act, is the first forum that has been enacted in India for shareholders to have recourse to compensation or petitions for restraint under Indian law. It is common knowledge that the US securities holders of Satyam received a settlement of USD 125 Mn. This was 100% more than what their Indian counterparts received. The shareholders in India had no recourse under the law. Their representations under consumer law were refused, both by the National Commission, as well as the Supreme Court. Section 22E of the Securities Contracts (Regulation) Act, 1956 and Section 15Y read with Section 20A of the SEBI Act, 1992, bar the jurisdiction of the civil courts for securities frauds.

Class actions stand differentiated from the process and relief granted in case of oppression or prejudicial actions of the company under Section 241 of the Act. The most notable difference on this is the powers of the Tribunal in a class action, to award compensation or damages to the plaintiff class in the event of fraudulent, unlawful or wrongful acts or omissions. Additionally, under Section 241, the company would be the main defendant, whereas class actions can result in compensation demands or suitable

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1 *Midas Touch Investor Association v. Satyam Computer Services Limited* (Civil Appeal No. 4786 of 2009)
action against the company/ its directors/ the audit firm/ expert/ advisor/ consultant/ any other.

It is said that, “the more people you have speaking in one voice, the louder that voice becomes”. The single most important feature of the plaintiff class under the new law that makes it so potent is the facilitation of an 'opt out' mechanism. This is what makes it significantly different from civil actions under Order 1 Rule 8 of the Civil Procedure Code, 1908, and far more effective an option for activist shareholders to proceed with. In terms of Rule 86 of the National Company Law Tribunal Rules, 2016, a member who forms part of a 'class' for an action under Section 245 of the Act, would need to specifically seek the permission of the Tribunal to opt out of the proceedings thereunder. The inbuilt deeming provision, creates a much stronger impetus for a single voice class action and could be the game changer in an otherwise inertia driven Indian shareholding base.

A cornerstone of the class action movement in the United States, is the modality of a contingency fee that allows the plaintiff's lawyer to bear the risk of litigation with the upside of a windfall profit in the event the plaintiffs claim is allowed or settled. By way of reference, the plaintiff's lawyers in the Enron class action received a judge approved fee of USD 688 Mn. This forms the foundation of a specialized plaintiff's bar for class action suits. In India however, contingency fees for lawyers is restricted under the Advocates Act and so the development of the Plaintiff's bar is unlikely to become a major profit centre in the near future. There is however a provision for legal expenses to be met from the Investor Protection Fund. It is also within the powers of the Tribunal to order the company or other person responsible for an oppressive act to defray all costs and expenses connected with the application for class action. It is yet to be seen whether the UK model of a contractual, subject to, conditional fee arrangement will be acceptable by the Bar Council of India. This will be key to the growth of the Plaintiff's bar. An added disincentive is the “loser pays” rule. If the NCLT rejects an application for being vexatious or frivolous, the applicant will need to bear all the costs of litigation subject to a cap of INR 100,000.

**Cause of Action: Frequent Flyer Class Actions**

The substantive scope of a class action suit under Section 245 is fairly wide and includes challenging the conduct of management or affairs of the company that is prejudicial to the interests of the company or its members. The relief that can be sought would include restraining a company from taking action that is *ultra vires* its constitutional documents or the law or a resolution of its members. The members/ depositors may also seek compensation or other suitable action for fraudulent, unlawful or wrongful acts or omissions. These provisions may often be read with Section 37 of the Act that deals with misrepresentations or misstatements (including inclusions or omissions).

Based on international jurisprudence the most typical corporate actions that attract class litigation would include manipulation of accounts, managerial compensation, takeovers and accounting/auditing frauds. Misrepresentations or misstatements in the prospectus

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2 Christopher Gilreath, Attorney at law.
(akin to the Facebook class action suit in the US) may also be admitted under these provisions. In India, related party transactions and corporate reorganizations, where promoters reap a disproportionate share in the assets of the company, could result in class actions. The 'art of accounting' may also be brought under scrutiny for allegations of wrongful classification of expenses as capital costs or inflation of revenues with false entries (as was the case in the Satyam Scam as also in the landmark Worldcom class action resulting in a USD 6.1 Bn settlement). Director appointments including specifically on tenure in the new spirit of “Board Refreshment” is increasingly of interest to investors, including proxy advisory firms.

However, not all corporate decisions fall within the jurisdiction of these provisions of the Act. Consumer complaints such as the epic claims made against the pharma and tobacco companies in the US would fall under the Consumer Protection Act, 1986; employee grievances akin to the employee claims against Walmart Inc. resulting in a USD 188 Mn settlement would fall under the Industrial Disputes Act, 1947 and competition claims would be covered under the Competition Act, 2002. It may be noted that creditors and suppliers also would not fall within the scope of this Act, and would need to have recourse to the representative action provisions under civil law.

**Corporate and Personal Liability**

The defendants in a class action under Section 245 could include, the company, its directors, its audit firm, each partner of the audit firm involved in the impugned audit report, any expert or advisor or consultant or 'any other person'. The ambit is wide and could also potentially include a 'promoter' of the company (not being a director) whose wrongful conduct may result in being prejudicial to the interest of the company or its members.

Whilst the liability of the company itself may be limited because of the nature of a body corporate, there are no obvious limitations on the liability of the directors, auditors and experts. It is yet to be seen whether clauses in the appointment/engagement letter restricting liability to the fees received (or such other quantified) would hold water. Based on the jurisprudence that is yet to be developed in this space, clauses in the Director and Officer insurance contracts are also bound to evolve.

Banking companies have been excluded from the purview of class action suits under the Act. Settlements such as those won against Wells Fargo for overcharging overdraft fees continues to be a white space in India.
Planned and Post Facto Defences

Defendants will need to present fact-based defences within the larger legal propositions pertaining to knowledge, disclosure and reliance on expert opinion. Where the claim lies within the realms of business decisions that are at the discretion of the board, acting prudently, one may need to demonstrate process. Defendants may also seek to ringfence the fraud to a single ‘rogue’ actor by demonstrating that the internal controls of the company were otherwise robust. Directors may need to rely on their dissent as recorded in the minutes of board meetings and so should plan in advance.

“Market practice” or “everyone does it” is unlikely to hold water as a valid defence. In the recent hearing of the class action against Vaalco Energy Inc., it was observed that "Just as 'all the other kids are doing it' wasn't a good argument for your mother, the idea that 175 other companies might have wacky provisions isn't a good argument for validating your provision."

A key part to building the defence in a class action litigation will be to make a strong case for the application to not be admitted by the Tribunal in the first instance. Three grounds that stand out in this regard are:

(a) the minimum representation of members is not met: A class action requires at least 100 members/depositors or 10% of the share capital/deposits (whichever is lower) to file the application. Under Rule 86, any member may opt out of the proceedings at any time after the institution of the class action. A close watch may be kept in the event the actual net number of members falls below the prescribed number.

(b) the applicant is not acting in good faith: Ergo, it would be useful to maintain all correspondence and communication exchanged with the plaintiff group prior to the institution of the class action suit – including evidentiary records of any threats or blackmail or demands for settlements that can demonstrate bad faith.

(c) the cause of action is personal and not of a 'class': Class certification is part of the most contentious aspects to a class action litigation. Demonstrating that the corporate action referenced is restricted to the interests of the plaintiff alone and does not represent the interests of the larger member group would be a key part of the defense strategy.

Part of the defense strategy must necessarily include a comprehensive PR strategy since the David-Goliath aspect to class actions could be distracting and have an impact on the eventual outcome of the litigation, as also result in intermediate consequences on stock price.

Compensation and Penalties

The Act does not prescribe a maximum cap on the compensation or damages that may be awarded in a class action. This will require some precedents to set the trend and is currently a 'wait and watch'. A frivolous or vexatious suit could attract a penalty on the applicant which could extend to up to INR 100,000, at the discretion of the NCLT. Given current Indian Jurisprudence, it is likely that there will not be any punitive damages to the extent that have made class actions headline news in the United States.
A note on Process

An application for a class action must be made by the requisite number of members/depositors in the prescribed form before the National Company Law Tribunal (NCLT). At the admission stage, the NCLT is required to review the application with specific consideration *inter alia* on whether (a) the action requires a class action, (b) the applicants are acting in good faith, (c) there is evidence of involvement of anyone other than directors. If the NCLT is satisfied that the application may be admitted, it will order a public notice (including newspaper advertisements and posts on the websites of the company, NCLT and the Ministry of Corporate Affairs) to be issued to all the members. Thereafter the matter will be heard by the NCLT who will make a determination of the merits of the case and grant the prayers as it deems fit. An appeal from the decision of the NCLT will lie to the National Company Law Appellate Tribunal and thereafter, the Supreme Court of India.

Conclusion

The new regime is good news for India. It will increase corporate governance levels across the board and improve India's rating as an investment destination. But we have miles to go. The intervening flux as the jurisprudence gets developed will be a messy period of uncertainty. In the big picture and over the longer term however, this is a big step forward.
The judiciary in India has been highly responsive to social and political trends in the country. Therefore, it has evolved over time both in terms of its administrative aspects and its jurisprudence.

On the administrative side there has been progress in terms of the number of judges which has gone up from 8 to 31, in terms of procedure followed by the court and finally in the way information technology has been harnessed to make justice more accessible and transparent. However, in recent years the most important issue affecting the court in this respect has been the procedure for appointment of judges. It may be recalled in a series of cases in the nineties the supreme court created a collegium which was to decide exclusively on appointments. This was basically a reaction to the perception since the emergency that appointment to the highest court was being done on political considerations.

In recent years there has been a growing feeling both among the legal community and the executive that the collegium procedure put in place by the judgment has not been transparent and is deficient in several respects. Thus the UPA government proposed the enactment of a law to create a commission for judicial appointments and accountability. The bill was finally passed in August 2014 by the NDA government. The supreme court immediately took up the issue for review and by a majority judgment of 4:1 struck down the National Judicial Appointments Committee Act by holding that involvement of the executive in the appointment of judges impinges upon the independence of the judiciary. This the court said was a violation of the principle of separation of powers between the judiciary and executive, which is a basic feature of the Constitution.

In addition the court said that the present collegium system lacks transparency, accountability and objectivity. The trust deficit has affected the credibility of the collegium system. Therefore, the court considered introduction of appropriate measures for an improved working of the collegium system. However, this has again led to a deadlock with the executive insisting on certain powers, particularly the power to reject any name recommended by the court on ground of national security. Recently the Chief Justice of India warned that the court may be forced to intervene to break the deadlock. The new law minister has now adopted a conciliatory line and it is hoped that the deadlock would be resolved soon. My own personal view is that while the independence of the judiciary should be protected, there should be a mechanism to

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2 *Advocates-on-Record Association v. Union of India*, (2016) 5 SCC 1
ensure transparency in the appointment of judges. I can only quote Fali Nariman, the eminent jurist who in his book 'Before Memory Fades', writing on judicial governance and judicial activism has very aptly said the following:

“That sometimes some men and women who sit on the bench are not conscious of the extent (or limits) of such power, or do not have the sensitivity to exercise judicial restraint when warranted, only means that those (few) men (and women) are just not equal to the supremely difficult task of judging entrusted to them under the Constitution. It only indicates that perhaps it is time we adopted a better method of selection of judges for our higher judiciary.”

The court has evolved with respect to its jurisprudence even more so than the administrative side discussed above. The supreme court of our country is vested with writ jurisdiction (article 32), original jurisdiction (article 131), extraordinary jurisdiction (article 136), special jurisdiction (statutory appeals), orders and decrees for complete justice (article 142), advisory jurisdiction (article 143) and review jurisdiction (article 137). The court also has the power to hear curative petitions against the dismissal of review petitions. The Constitution of India remains the bedrock of rule of law in governance. The judges of the supreme court in one of the world’s largest democracies and having the largest written constitution remain independent, free, fair and progressive. The highest court has conducted itself with dignity and has generally worked within the legal framework and has always protected infringement of fundamental rights, violation of women’s rights and human rights, dealing with corruption and stepping in when there was any inaction by the executive or if there was any gap left by the legislature.

The court has consistently taken up the pressing issues of the day; in the 1960s & 1970s it dealt with issues of fundamental rights and basic structure and laid the foundation of public interest litigation. In the 1980s & 1990s there was extensive use of public interest litigation to remedy failures due to executive inaction. Since the turn of the century, the court developed new methods such as court-supervised investigations to tackle corruption cases, the Gujarat riots etc. Issues before the court in the last five years have been reflective of the overall liberalization and globalization in the economic and social spheres. Among these issues are allocation of economic resources like the 2G case, coal allocation case and capital gains tax. The court has also dealt with social issues like LGBT rights, recognizing transgenders as third gender, women’s rights and open court hearing on review petitions in death penalty cases. However, some of the judgments in these fields have had a mixed reception with some criticizing them for judicial overreach, some finding them to be disturbing trends and some say that the court is playing to the gallery.

I would agree with some of the criticism. For instance, the judgment passed by the supreme court in the coal block allocation case was worrying. The supreme court initially held that the entire exercise of allocation through the screening committee route and the government dispensation route was arbitrary and illegal.³ Thereafter the court listed the matter for deciding the consequences of the order passed by it. Finally, by its

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³ Manohar Lal Sharma v. Principal Secretary, (2014) 9 SCC 516
It remains to be seen with continuing economic and social reform how the supreme court will respond to new challenges.

order dated September 24, 2014 the supreme court cancelled allocation of 214 coal blocks and allowed 37 operational and 5 almost operational coal blocks to remain in production till March 31, 2015. However, the supreme court imposed an additional levy on the private companies from the date of extraction of coal. The judgment firstly, did not fulfill the fundamental requirement of the rule of law of hearing each party before cancelling the coal blocks. The court only heard the parties in a representative capacity and only as interveners. Secondly, the court imposed the additional levy without any evaluation. The court placed reliance on a CAG report which was not final and was subject to scrutiny of Parliament under Article 151 of the Constitution. Thirdly, even assuming that there may have been some illegality in allocation of some coal blocks but all allocations may not have been illegal. If the cancellation was not enough to damage the industry, the court imposed an additional levy which was from the time the allottees were mining coal. The court’s imposition of additional levy seemed unreasonable.

Another issue that requires some attention is the failure of Subrata Roy to comply with the orders of the supreme court and being taken into judicial custody for such non-compliance. The supreme court ordered judicial custody of Subrata Roy after the orders passed by Securities Exchange Board of India (“SEBI”) and Securities Appellate Tribunal (“SAT”), which doubted the veracity of receipt of refunds to investors, were ignored by Subrata Roy. On an appeal before the supreme court, the court directed deposit of the entire money with SEBI. Notwithstanding the fact that Subrata Roy did not deposit the money and failed not once but several times to appear before the court, he suffered a harsh order by being imprisoned. The conduct of the lawyers as well as the litigants was uncalled for and could perhaps have been handled in a better way. Of course the fact remains that the highest court has always conducted itself in a dignified manner and has not tolerated abuse of the process of court. It may be a lesson to learn from this judgment that even though many don’t agree with the harshness of this order but the orders and directions passed by the highest court should not be taken lightly.

In each era the judiciary has responded to pressing issues of the time, however it remains to be seen with continuing economic and social reform how the supreme court will respond to new challenges. It needs to be seen whether the trends in supreme court would tilt more towards judicial activism or judicial restraint.
Corporate Criminal Liability

A corporation by its very nature is a legal person, with all the attributes of a legal personality. Regulating corporations, specifically, fastening criminal liability on a corporation and/or its officers has long been the subject of rapidly evolving jurisprudence in most jurisdictions. Nevertheless, the law in this area has been marked by efforts to identify the intent of intangible, fictional entities while attempting to prosecute corporations.

The crux of the separate legal personality of the corporation lies in absolving the shareholders of liability for the acts of the company through the decisions of the management. This was complicated by the fact that shareholders are now no longer only individuals, but corporations as well. Hence, while the possibility of financial or managerial control (or both) of the subsidiary is not discounted, the presumption is to the contrary and the degree of control must be proven before such a premise is accepted in a court of law.

Attributing Mens Rea to a Juristic Entity

Indian courts previously were of the view that corporations could not be criminally prosecuted for offences requiring mens rea as it was not possible for them to possess the requisite mens rea; similarly, it was a commonly accepted principle that corporations could not be prosecuted for offences requiring a mandatory punishment of imprisonment, as they could not be imprisoned. These prerequisites had rendered the prosecution of corporations futile: a corporate body could not be said to have the necessary mens rea, nor can it be sentenced to imprisonment, as it has no physical body.

For instance, in The Assistant Commissioner, Assessment-II, Bangalore & Ors. v. Velliappa Textiles, a private company was prosecuted for violation of certain provisions under the Income Tax Act, 1961, which provided for a sentence of imprisonment and a fine in the event of a violation. The Hon'ble Supreme Court of India (“Supreme Court”) held that the Respondent Company in the case could not be prosecuted because each of

1 Criminal Liability is attracted only to those acts or omissions where there is a violation of penal provisions; the Latin maxim actus non facit reum nisi mens sit rea would be relevant in this context. An act, therefore, does not make a defendant guilty without a guilty mind. However, in the practical sense, the principle upon which responsibility is premised is autonomy of the individual, which states that the imposition of responsibility upon an individual flows naturally from the freedom to make rational choices about actions and behaviour. Courts have grappled with the issue of whether rational decision-making may be attributed to a corporation, and if so, to what extent.

2 In A.K. Khosla v. T.S. Venkatesan, (1992) Cr.L.J. 1448, two corporations were charged with having committed fraud under the Indian Penal Code, 1860 (“IPC”). It was argued, inter alia, that the corporations, as juristic persons, could not be prosecuted for offenses under the IPC for which mens rea is an essential ingredient and the court agreed. In Kalpanath Rai v. State, (1997) 8 S.C.C 732, the trial court convicted the company of the offense punishable under section 3(4) of the Terrorists and Disruptive Activities Prevention (“TADA”) Act. In appeal, the Supreme Court referred to the definition of the word ‘harbour’ as provided in Section 52A of the IPC and pointed out that there was nothing in TADA, either express or implied, to indicate that the mens rea element had been excluded from the offense under section 3(4) of TADA and that an accused corporation could not possess the requisite mens rea. Also relevant: State of Maharashtra v. Mayer Hans George, A.I.R. 1965 S.C. 722, and Nathalal v. State of M.P. A.I.R. 1966 S.C. 43.

these provisions required the imposition of a mandatory term of imprisonment coupled with a fine. This conclusion is the result of a strict and literal analysis, and to follow the same would be to presume that the legislature intended to punish corporations for less serious offences, while simultaneously disallowing prosecution for more serious crimes, including economic crimes.

The tide however turned with decisions such as, the Supreme Court's in *Standard Chartered Bank and Ors v. Directorate of Enforcement.* In this case, Standard Chartered Bank was being prosecuted for violations of certain provisions of the Foreign Exchange Regulation Act of 1973 (“FERA”). It was held that the corporation could be prosecuted and punished with fines, regardless of the mandatory punishment of imprisonment required under the respective statute. The Supreme Court also referred to an old decision of the United States Supreme Court in *United States v. Union Supply,* where the solution to the dilemma was summarized thus:

> And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape.

The Supreme Court in *Iridium India Telecom v. Motorola Incorporated and Others* further developed the above concept in the context of crystallization of the offence and held that the criminal intent of the alter ego of the company, in other words, the persons or group of persons in control of the affairs of the company or who guide the business of the company, would be imputed to the corporation.

Therefore, the legislative intent to prosecute corporations for the offences committed by them, is quite clear and the intention of the relevant statute was never to exonerate corporations from being prosecuted, given that several such offences can be committed by corporations notwithstanding the requirement for mens rea and the inability to be imprisoned. Hence, by extension, although the Supreme Court in *Iridium* did not go so far with its reasoning, it may be said that corporations are capable of possessing the requisite mens rea, particularly in the case of economic crimes.

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5 215 U.S. 50 (1909).
6 (2011) 1 SCC 74.
Principles of Attribution and Vicarious Liability

Courts in India and elsewhere, have considered several approaches while imputing liability to a corporation and its officers. In its decision (in connection with the Central Bureau of Investigation (“CBI”) investigation into the 2G scam) in Sunil Bharti Mittal v. Central Bureau of Investigation and Others, the Supreme Court, has done much to clear the air while distinguishing between corporate attribution and vicarious liability, while emphasising the fact that the principle of corporate attribution cannot be used to impose liability on corporate officers but rather only on the companies. The principle of attribution, or alter ego, can therefore be applied only in cases where the company is made liable for the actions of the person(s) who are in charge of and control the affairs of the company, as they represent the alter ego or the thinking mind of the company. The Court has additionally contrasted this with the application of the principle of vicarious liability; in other words, the directors of the company may only be held liable for an offence committed by the company, if the statute provides for it.

The Court while dealing with the above dichotomy, has referred to and relied upon the decision of the House of Lords in Tesco Supermarkets Limited v. Nattrass, and that of the Privy Council in Meridian Global Funds Management Asia Limited v. Securities Commission, wherein, attribution has been described to be akin to the principle of agency, thereby rendering the rule capable of adoption to the specific facts and circumstances of a case. The Supreme Court has also previously considered vicarious liability in the context of strict liability statutes, where a person in charge would be deemed to be responsible for the acts of the company. Hence there is now some clarity on the dichotomy between the circumstances where the principles of attribution and vicarious liability would be applicable.

Treatment of the Corporate Form: India v. Other Jurisdictions

The principle of 'Corporate Entity', which is followed by India and other Commonwealth nations, holds sacred, the legal personality of a corporation. While the concept of limited liability rests on the foundation set by Salomon v. A. Salomon & Co., Ltd, it is understood in most countries that when the corporate form is used to defraud third parties, or when the corporation in question is a mere alter ego or puppet of another person or firm, with no decision-making authority, the corporate form may be

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7 As per the directions of the Supreme Court in Centre for Public Interest Litigation and Ors v. Union of India and Ors, reported in (2012) 3 SCC 1, the CBI conducted an investigation into various irregularities in grant of licenses and allocation of spectrum in the 2G band and filed a charge-sheet before the Special Judge. The CBI named three companies, including Bharti Cellular Limited as accused persons in respect of offences under the Prevention of Corruption Act, 1988 and other allied offences. The Special Judge vide an order dated March 19, 2013 directed that the summons be issued to the three companies and Mr. Sunil Bharti Mittal (Chairman cum Managing Director of Bharti Cellular Limited), along with top managerial personnel of the other companies. The Special Judge held that in light of the capacity in which these directors acted, they can be considered as the persons controlling the affairs of the company and the directing mind and will of the respective companies and therefore the alter ego of their respective companies and the acts of the companies are to be attributed and imputed to them. This order for issuance of summons passed by the learned Special Judge was challenged in the Supreme Court. The three judge bench of the Supreme Court speaking through AK Sikri J. struck down the summons issued by the Special Court and held that the Special Court had erroneously applied the doctrine of alter ego to implicate the directors of the companies for offences committed by the companies.
8 Criminal Appeal No. 35 of 2015 (arising out of Special Leave Petition (Crl.) No. 3161 of 2013)
12 [1897]AC 22.
13 A. F. Lowenfeld, General Course on Private International Law, V.1, Recueil des Cours (1994) at 127.
disregarded and liability may be imposed on the shareholder. However, such a finding is usually on the basis of a finding of fraud or abuse, resulting in the disentitlement of the company to the corporate form. Lifting the corporate veil is normally done only where there is evidence of fraud or illegitimate use of the corporate form, where the corporate form collapses upon closer scrutiny.

On the other hand, courts in some jurisdictions are unwilling to continue to accept the independence of the individual corporation, when it no longer corresponds to the reality of the modern business enterprise. Somewhat comparable with the principle of attribution discussed above, is the doctrine of collective knowledge, i.e., the actus reus and mens rea can be constructed out of the conduct and knowledge of several individuals through an aggregation of the acts and/or omissions of two or more natural persons acting as the corporation. The reasoning followed by the Court of Appeals in United States v. Bank of New England favoured an interpretation confirming the existence of collective knowledge, because corporations often compartmentalise knowledge and sub-divide duties, thus avoiding liability.

**Directors' Liability**

While taking decisions on behalf of a company, the directors are not usually held liable for mere errors of judgment, if they have acted in good faith and in the best interests of the company. Once it is established that they have acted in good faith, they may, depending on the facts and circumstances of the case, be excused from liability for their decisions and/or conduct as directors. Certain judicial precedents have nevertheless established that since non-executive and part time directors are usually not responsible for the day-to-day management of a company, such directors can be exempted from liability for acts, wherein knowledge as to the act cannot be attributed to them.

For a director to be held liable for the acts of a company, the said director should be in charge of the company and must have been responsible to the company for the conduct of the business of the company at the time of the occurrence of the alleged offences. For instance, the Supreme Court in Lee Kun Hee & Ors. v. State of U.P. & Ors. dismissed a challenge to the summons issued by the trial court. The court's emphasis was on whether the averments in the criminal complaint constitute the ingredients of the offence(s) alleged as against the accused persons or entities. When criminal liability is sought to be attached to a director of a company, it is essential that the facts and

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14 In United States v. Bank of New England (1987) 821 F2d 844 the charge of wilfully failing to file reports relating to currency transactions was proved because the bank's knowledge was the totality of what all of the employees knew within the scope of their authority.
15 Id.
16 See, Tri-Sure India v. Registrar of Companies, Maharashtra, [1983] 54 Comp Cas 197 (Bom); Jagjivan Hiralal Doshi v. Registrar of Companies [1989] 65 Comp Cas 553 (Bom). Additionally, the Companies Act, 2013 Act also states that the liabilities of non-executive directors/independent director shall be liable, only in respect of such “acts of omission or commission by the company which had occurred with his knowledge, attributable through Board process and with his consent or connivance or where he had not acted diligently.”
18 The present appeal was filed against the order of the Allahabad High Court denying relief to the accused in a criminal complaint (complaint no. 30 of 2005) filed by the seller, the sole proprietor of JCE Consultancy, under an agreement alleging offences under Sections 403, 405, 415, 418, 420 and 423 read with Sections 120B and 34 of the Indian Penal Code, 1860, before the VII Additional Chief Judicial Magistrate, Ghaziabad against Samsung, Dubai, and its officers, including the Managing Director and President.
averments in the criminal complaint clearly delineate circumstances that would point to the commission of the offences alleged. In the absence of the same, the High Court, in exercise of its inherent powers under Section 482 of the Code of Criminal Procedure, 1973, would be competent to quash the trial proceedings.

Nevertheless, the managing director is *prima facie* in charge of and responsible for the company’s business and therefore can be prosecuted for misdeeds by the company. Furthermore, where statutes provide for imposition of criminal liability on the officers or directors of a corporation, courts have sought to enforce the same with vigour; this is so for many so-called “economic crimes” under company law, the Negotiable Instruments Act, 1881 and tax laws, among others.

Nevertheless, there are circumstances where the officers of a company are held personally liable for offences attributed to the company, notwithstanding the fact that their designation and/or duties do not correspond with the “controlling mind” of the company. For instance, in *C.B.I v. Keshub Mahindra* the Supreme Court dealt with a curative petition challenging the judgment of a Chief Judicial Magistrate who had followed the judgment in *Keshub Mahindra v. State Of M.P.* in which the Supreme Court had quashed charges under Section 304 (Part II) of the IPC. A constitution bench of the Supreme Court dismissed the curative petition filed by the CBI. The issue in the cases pertained to whether Union Carbide companies and executives, including Mr. Keshub Mahindra, the former non-executive chairman of Union Carbide, were liable to be charged for offences under Sections 304 (Culpable homicide not amounting to murder), 324 (voluntarily causing hurt by dangerous weapons or means), 326 (voluntarily causing grievous hurt by dangerous weapons or means), etc. of the IPC. The earlier judgment, at the stage of framing of charges, had found that there was no sufficient material to proceed under the above sections, and had directed the trial court to proceed only on the basis of charges under Section 304A (causing death by negligence) instead.

It is significant to note that in *Keshub Mahindra’s case* (*supra*), the charges that were eventually levied on the officers or executives of the company were those that have a closer connection with their duty of care, that may be argued is inseparable from the duties of a director, as opposed to an offence that presumably requires an intention and premeditation. Imputing liability on an entity without a natural personality and imposing punishment for the same has proven to be a judicial challenge; nevertheless, with the evolution of the jurisprudence, it is slowly becoming possible to not only hold those responsible for a crime to account but also find a way to use criminal law as a deterrent.

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21 While Section 141 of the Negotiable Instruments Act, 1881 extends culpability for offences under the said act to every person who was in charge of the conduct of business of the company, the Supreme Court has recently held that there is no requirement for specific allegations against individual directors of a company in a complaint filed under the NI Act as long as there are averments to the effect that the accused are whole-time directors and are in charge of day-to-day affairs of the company. Standard Chartered Bank v. State of Maharashtra and Ors., Criminal Appeal Nos. 271-273 of 2016 decided 06.04.2016. The Court followed the decision in Gunmala Sales Private Ltd. v. Anu Mehta & Ors., Criminal Appeal No. 2228 of 2014 [Arising out of Special Leave Petition (Crl.) No.1724 of 2013].


23 Appeal (crl.) 1672 of 1996 decided on September 13, 1996.
Why the need for a Specialized Act to deal with Commercial Disputes

About a year back, before the enactment of Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (“Commercial Courts Act” or “Act”), we were approached by a client for a written testimony to be filed in a Court in the U.S.A, as to the time which is likely to be taken for final adjudication of a trade mark infringement dispute in Karnataka. The issue came about to refute the allegations by the opposite party, that despite the fact that the evidence and the cause of action, were in India and the Court in USA was “Forum Non Conveniens”, they wanted the Court in U.S.A to adjudicate as the parties were not likely to get any speedy resolution in India. The allegation made by the opposite party and being actively considered by the US Court was that “Indian Courts are seriously backlogged and overburdened, such that it could take as long as 20-25 years for Plaintiff's claims to be fully adjudicated in India”.

While assisting the client we found that in addition to the Civil Procedure Code, 1908 (“CPC”), Karnataka High Court Rules, 1959 not only provided for speedy trial process but especially stated that for Intellectual Property disputes the Court should endeavor to decide the case within 24 months. The law was in place ready to assist the litigants but was it consonant with the ground reality? Were these laws in a position to address the malaise of backlog and pendency of cases? By doing a small empirical study of the pending litigations from existing data, we found that given the existing legal regime, the time taken for completion of a commercial matter could in fact be controlled by the lawyers along with an efficient judiciary and time bound procedure for completion of such trials. There were some matters of the same year, which had in fact progressed to an advance stage of the trial within the same time frame, whereas in some, it was stuck at the initial phases of trial. Thus, it is the parties who control the pace and intensity of litigation and the frequency of adjournments. We experience this every day in courts. This stems from the failure to recognize that adjudication is a public service, which is supposed to enforce rights and reach a correct decision within the constraints of time and cost. Therefore, consequently a change in litigation culture was required in India to shift from a litigant managed process to a court managed process.

A matter which let open the palpable state of affairs in India on this issue was the White Industries case1 of 2011. An international arbitral tribunal in a dispute involving the first bilateral investment treaty action with India, held that India’s delays in enforcing an earlier arbitral award in favour of White Industries constituted a breach of a clause in the India Australia Bilateral Treaty, laying bare the impression of the international legal community that courts in India are synonymous with delays and backlogs. In 2015, even

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a Singapore Court in a matter titled *Bunge S.A v. Indian Bank*, expressed its concern whether delays and backlogs would hamper the Indian courts from being the appropriate forum for adjudicating commercial dispute.

It is rather unfortunate to notice that there is a general impression among foreign investors and the International community that India is a difficult place to do business and quite unfortunately the same is also reflected in the World Bank’s annual report on the “Ease of doing Business”, which amongst other yardsticks for such measurement uses “ease or difficulty of enforcing contracts in a given nation.” Unfortunately, out of 189 nations surveyed in 2014, India was almost at the bottom ranking 186 in the above mentioned category.

The need for an exclusive forum dedicated only to the resolution of commercial disputes was felt way back 2003, and was taken up by the 17th Law Commission. In its 188th Report, it submitted its recommendations titled “Proposals for Constitution of Hi-tech fast Track Commercial Divisions in High Courts.”

With the change in the political landscape in the country and slogans of “Make in India”, reverberating all over, it was imperative that the image of Indian Judiciary and legal system be improved at an international level. One of the steps towards this was enactment of Commercial Courts Act and the amendment to the Arbitration Conciliation Act, 1996.

The 253rd Report of the Law Commission of India dated January 2015, stated that of the total of 32,656 civil suits pending in the five High Courts in India, with original jurisdiction, a little more than half (16,884) or almost 51.7% of the civil suits filed are commercial disputes. Therefore, it was felt the need of the hour that a “dedicated forum aimed at resolving complex commercial disputes” is the need of hour. The same would also be in sync with the worldwide practices, where nations like the U.K and the Singapore have adopted commercial courts as a means to ensure speedy delivery of justice.

The other major factors which influenced the setting up of the commercial courts and enactment of the Commercial Courts Act are rapid economic growth. The hallmark of a nation with a stable economy is the development of its trade and commerce, coupled with trust of the international trading community in the ease and flexibility of not only a hassle free commercial association but also a strong belief in the enforcement of its legal rights in a commercially viable manner by the legal institutions of the country. The major downside of a nation having little to offer in terms of its adjudication and enforcement of the legal rights of the international trading community is that in such a scenario international trading community may not pursue certain economic activities and thereby foregoing the “opportunity to specialize and exploit economies of scale; and not allocating their production among clients and markets in the most efficient fashion, thus keep resources unemployed.”

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Brief overview of the Commercial Courts Act

Setting up of Commercial Courts and Commercial Divisions

The Act was enacted with retrospective effect from October 23, 2015. The Act mandates that State Governments set up Commercial Courts at the District level to try suits and claims pertaining to commercial disputes of a value of at least Rs.1 Crore and above. In states where the High Court exercises original civil jurisdiction, the High Courts are required to set up Commercial Divisions to try such commercial disputes in addition to Commercial Appellate Divisions within each High Court to hear appeals from the orders of Commercial Courts and Commercial Divisions.

Commercial Disputes

The Act attempts to cover a broad range of disputes within the scope of a 'commercial dispute'. The definition broadly covers commercial disputes arising from ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, export and import of merchandise or service, admiralty and maritime law, transactions relating to aircraft and aircraft related business, carriage of goods, construction and infrastructure contracts including tenders, agreements relating to immovable property used exclusively in trade and commerce, infringement of intellectual property rights, exploitation of natural resources, insurance, etc. The definition also includes disputes arising out of agreements of franchising, distribution, licensing, management, consultancy, joint venture, partnership, shareholders, subscription, investment, etc. It also clarifies that a dispute shall not cease to be commercial dispute merely because it may involve action for recovery of immovable property or for realization of monies out of immovable property.

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5 Section 3 (1)
6 Section 4(1)
7 Section 5(1)
8 Section 2(1)(c)
9 December 31, 2015
Provisions to ensure speedy adjudication of disputes

The Act to curb the malpractices of protracted litigation and with an aim towards a speedy and expeditious disposal of cases has adopted global best practices. In addition to providing for dedicated courts and experienced judges to preside in such courts, the Act has sought to streamline the trial and adjudication process. This has also led to amending the CPC to bring it in sync with the purpose and spirit of the Act.

(i) **Case management:** After pleadings are completed in the time prescribed, the Court is required to mandatorily hold a meeting between the parties and fix a timeline for stages of trial which include recording of evidence, filing of written arguments, commencement and conclusion of oral arguments. The Court is further authorized to pass a wide variety of orders at such case management hearing to ensure smooth and effective disposal of the suit. To do away with the earlier system, where affidavits of witnesses were filed one after the other, it is now mandated that affidavits of all the witnesses be filed simultaneously.

(ii) **Disclosure, discovery and inspection of documents:** The Act provides for detailed procedures regarding disclosure, discovery, inspection, admission and denial of documents to ensure that documents are not filed in piecemeal. Parties have to now file all documents in their custody, power and possession with the pleadings irrespective of whether the same are in support of or adverse to the said party's case. Even verification of pleadings have stricter guidelines. Such procedures are likely to curtail the current practice of bald denials of even basic pleadings and documents and prevent pleadings being amended at any stage without proper reasons.

(iii) **Summary Judgments:** Elaborate procedures have been laid down for summary disposal of cases. Any party, prior to framing of issues, can request for such summary judgment at any stage, without trial, either for dismissal or decreeing of a suit or for acceptance or rejection of any particular claim or defense. Summary judgment can be granted if a party can show to the Court that there is no real prospect of the other party succeeding in its claim or defense, as the case may be. Further, even if the Court were to find that there is a possibility of the claim or defense succeeding after trial, but it looks improbable, the Court is empowered to put the party whose case appears to be weak, to certain terms including for deposit of monies or to provide security for costs etc., before proceeding with the trial. However, upholding the principle of natural justice, the Act also requires both parties to provide their individual explanations including documentary evidence as to why a summary judgment should or should not be passed.
(iv) **Costs as deterrent:** The Act provides for payment of costs against the defaulting party in case of procedural delays in the suit.\(^6\) The parameters reflecting the manner of determination of costs payable by one party to other have been clearly laid down. The Act specifically provides that "legal fees" and "fees and expenses of witnesses" are to be taken into consideration while awarding costs to the successful party, thus, bringing in the principle of actual cost to be imposed on the defaulting or unsuccessful party.

To ensure a speedy trial, the Act provides for timelines for important stages in a suit:

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<tr>
<td>1</td>
<td>All appeals before the Commercial Appellate Division</td>
<td>An appeal would lie against only certain identified orders of the Commercial Courts/Division and not all orders(^7) and such appeal has to be filed within sixty days from the date of the judgment/order and disposed of within six months from the date of filing.</td>
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<td>2</td>
<td>Written statement</td>
<td>Within 120 days from the date of service of summons on expiry of which, the right shall stand forfeited if the Written Statement is not filed.</td>
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<td>3</td>
<td>Filing of any additional documents in urgent filings</td>
<td>Within 30 days of filing of Suit and only after leave of the Court.</td>
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<td>4</td>
<td>Application for leave to deliver interrogatories</td>
<td>To be decided by the Court within 7 days from the day of filing of the said application</td>
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<td>5</td>
<td>Inspection of documents disclosed</td>
<td>All parties to complete inspection within 30 days of written statement or written statement to the counterclaim, whichever is later</td>
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<td>6</td>
<td>Filing of statement of admission and denials</td>
<td>Within 15 days of the completion of inspection or any later date as fixed by the Court</td>
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<td>7</td>
<td>First case management hearing</td>
<td>Within 4 weeks from the date of filing of affidavit of admission and denial of documents by all parties to the suit.</td>
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<td>8</td>
<td>Completion of trial</td>
<td>Within 6 months from the date of the first case management hearing. The Act provides for day to day recording of oral evidence.</td>
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<td>9</td>
<td>Pronouncement of Judgment</td>
<td>90 days from the completion of arguments.</td>
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\(^{17}\) Section 13 (1). Further, Section 8 of the Act provides that no civil revision application/petition shall lie against any interlocutory order of a Commercial Courts and any such grievance against the order may only be raised in appeal against the final decree.
Will it Work

Will the Act meet expectations? Is the enactment of a statute enough to free the Indian system of malaise of the backlog and pendency of cases? Will it ensure speedy trials?

There can be no disagreement that the Act is in itself, a laudable piece of legislation. It is concise and to the point and aims at curbing all the malaise of delays that the administration of justice is afflicted with. However more needs to be done to implement the Act with full force and vigor.

Inadequate Infrastructure and unfilled vacancies in the judiciary

Though the Act provides for dedicated courts and experienced judges to dispense justice in commercial matters in a time bound period, the reality is that our judiciary is already overburdened with workload which is uncontrolled and excessive. With 432 vacancies in higher judiciary and 4,432\(^{18}\) in the subordinate courts and pendency of 2.18 crores cases in subordinate courts let alone the backlog in High Courts,\(^{19}\) the commercial court cannot achieve much, unless these issues are addressed. In addition there is an urgent need for infrastructure, which is presently inadequate, even if the vacancies in the higher and subordinate judiciary were filled.

The States have started designating courts as commercial courts. However these courts are part of the existing infrastructure which is already overburdened. These commercial divisions and commercial courts are being assigned to the existing batch of judges; hence in many instances these judges will be hearing commercial disputes in addition to the matters that are already assigned to them. With the present backlog and pendency, a day to day trial of all witnesses as provided under the Case Management\(^{20}\) seems to be a daunting task. This seems counter productive to the concept of case management and speedy disposal of commercial disputes.

Further, there is no qualification laid down under the Act for appointment of judges to these courts. It is a vague qualification envisaging that judges who have “experience in dealing with commercial disputes” to be appointed as judges to these courts. The absence of an objective set of qualifications would make it difficult to assess the experience of such judges which will in turn impact the speedy and effective administration of justice in commercial disputes. The reality is also that the commercial courts will be presided over by subordinate court judges from the existing pool, who may not have experience and exposure to adjudicate on complicated commercial disputes such as disputes relating to construction and infrastructure contracts, joint venture agreements, technology and intellectual property agreements etc. The need may be for not only specialized training of existing judges but to also appoint judges having experience in these fields from the profession.

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\(^{18}\) As of December 31, 2015
\(^{19}\) 38.76 lakhs as of December 31, 2015
\(^{20}\) Order XV-A Rule 4 CPC
Commercial Courts v. Arbitration

The success of the commercial courts will also go a long way in determining whether, parties would prefer arbitration or suits before commercial courts. Arbitration in India, has for all practical purposes not yet achieved the desired objective. It has in fact become costlier and time consuming for a litigant. However, the advantage that arbitration might have today over commercial court is of experienced and specialized adjudicators deciding the commercial dispute.

All said and done, if the practical difficulties can be overcome, it is a right step towards an effective justice system and a means to impose trust in India as a commercial hub. The success of this Act and the processes envisaged therein are imperative as the commercial courts, commercial divisions and the commercial appellate divisions of the High Courts are intended to serve as a “pilot project in the larger goal of reforming the civil justice system in India”. The problem with India does not lie in its policy making initiatives or legislation; we have adequate number of laws and legislations. In fact the provisions of CPC were enough. The need of the hour is adequate machinery, will power of the stake holders to enforce and implement such laws and prevent the same from becoming a paper tiger.
No company can be completely immune to frauds but through a well structured compliance program, the chances and impact of fraud on the corporate entity can be minimized. One of the key elements of such a well structured compliance program is the ability of the company to conduct effective investigations for the conduct of its officers, employees or other third parties associated with the company. An effective investigation can often influence the manner in which the regulators and external stakeholders such as investors regard the company and have a significant impact on the company's chances of securing a favorable outcome in an adversarial context.

While each investigation has its own nuances and there is no 'one size fits all' approach to white-collar investigations, there are certain considerations that determine the credibility of such investigations. In general, investigations should be fair, comprehensive, objective and credible for those to be used as an effective defense mechanism from regulatory and potential third party claims. Following are some of the key considerations for a company to evaluate when it considers initiating a white-collar investigation.
The ideal team: In most investigations, companies struggle with the issue of when (and if) to use external help to conduct an investigation. The decision of whether to use external assistance may be determined by a number of factors. The first among such factors is the nature of allegation or conduct to be investigated. If the allegations are such that they could potentially trigger disclosures to regulators or a likely lawsuit from various third parties, it is advisable to use external support so that attorney-client privilege can be ensured from the commencement of the investigation. In addition, if the allegations could involve senior management of the company, it may be advisable to engage external counsels so as to preserve integrity and independence of the investigation. Similarly, in matters where the in-house counsels of the company may be perceived to be conflicted such as sexual harassment matters, it may be useful to use external help in conducting investigation and provide an independent report to the company’s board. On the other hand, when the allegations are purely internal such as the matters involving employee misconduct without any potential regulatory issues, investigations are best led by the in-house team which may be able to get to the issues quickly and conduct the investigation in an efficient manner.

Conducting effective interviews: Interviews, whether informational or disciplinary, are an important source of information for an investigation. At the same time, interviews need to be conducted in a manner that is compliant of the local laws. In general, as the first step, it is important to examine whether the interview sought to be conducted is an informational or a disciplinary interview with the subject of investigation. In a disciplinary interview, in particular, certain additional precautions need to be kept in mind. First, prior to conducting the interview, the investigator should obtain various details regarding the employee such as the employment contract, company’s organization structure, list of employee roles and responsibilities (if not contained in the employment contract), employee handbook or code of conduct, etc. These records are important to determine if there are any special procedures that need to be followed regarding the employee prior to taking any employment actions against the employee. Second, principles of natural justice would have to be followed in all cases. This implies that, at the very minimum, there should an independent fact-finding enquiry to determine whether the allegations are true or not and the complicity of individuals. A fact-finding report is typically followed by a charge sheet to the subject based on the contents of the fact-finding report. The subject should be informed of all the evidence identified on the basis of the internal investigation and should be accorded a chance to respond or clarify. Finally, based on the entire chain of facts, a report is to be presented to the management of the company which may give a show cause notice to the employee. Finally, based on the report submitted to the management and the response, if any, provided by the employee to the show cause notice from the management, if the management does seek to take an employment action against the subject and intends to conduct a disciplinary interview, it is important for the investigator to consult human resources department regarding the various dues that may be owed to the subject by the company in the event of employee’s severance from the company. It may be helpful to conduct such interviews in the presence of unbiased
personnel from human resources department so as to ensure that there is no challenge to the process on account of coercion or duress later on.

**Documents and technology:** In addition to interviews, investigations rely heavily on the documents available at the company, which could be financial, legal or employee related documents. Most investigations would also involve forensic imaging of various assets such as computers and mobile devices to screen those for relevant evidence for the investigation. Collection of information, therefore, offers several legal and practical challenges that need to be considered.

The first issue to be considered is the precautions that need to be undertaken by the company or its counsels when collection physical or electronic information related to the employees which may contain personal or sensitive personal information. Indian law provides for penalties under the *Information Technology Act, 2000* for negligence in handling sensitive personal data and disclosure of such data. In addition, in furtherance to the data protection rules under the Indian law, prior to the collection and during the use of such personal sensitive information, the company is also required to undertake certain precautions. When handling such issues, as the first step, the investigator or the counsel has to consult various policies of the company such as privacy policy, information technology policy, employee handbook or code of conduct. The purpose should be to understand the extent to which the company has restricted the use of corporate assets such as computers, mobiles or lockers for personal use. It is common for companies to inform employees through one of the policies that employees should restrict the use of corporate assets to a minimum for personal purposes and the company cannot assure privacy of any personal sensitive information stored in such assets. Second, the company needs to inform the employee the purpose for collection of such personal information and obtain consent of the person for collection and use of personal sensitive information by the company. It is advisable that prior to the collection of such information, the investigator should conduct a brief interview with the employee, explain the purpose of collection and use a standard format which has been reviewed by company’s counsels to document consent from the employee for collection and disclosure of such information in furtherance to company’s legal obligations or to third parties. The investigator has to be extremely sensitive to ensure that while disclosing the purpose of collection of information, not too many details regarding the investigation are offered in order to protect confidentiality and integrity of the investigation. Finally, the company has to adopt reasonable security practices and safeguards to ensure that the information collected is used only for the purpose for which it is collected, keep the data secured and do not retain information for a period longer than it is required. Some of this may already be provided for in the company’s privacy policy.

The second aspect that should be borne in mind during the collection of information is the precautions that need to be adopted when conducting forensic imaging of

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computers and mobile devices belonging to the employees. Since there could always be a possibility of issues arising out of an investigation landing up in a court of law, collection of electronic evidence should be in accordance with the rules of evidence so as to ensure its admissibility in a court of law. It is advisable that prior to conducting any imaging of electronic assets, the investigator should obtain information regarding the various electronic assets that have been allocated by the company to the employee. As a second step, the investigator should consult technology department of the company to identify the make, storage capacity and nature of encryption of the electronic document. If the imaging is conducted with the element of surprise, it may also be useful to check with the human resources department of the company to ensure that the employee should not be on a planned leave on the day of imaging. As the third step, prior to conducting the imaging, the employee needs to be informed of the purpose of imaging and a written consent should be obtained. It is important to preserve a clear chain of custody for the electronic and storage devices which should clearly identify the devices and the individuals in whose possession the devices were from time to time. Finally, it is important to ensure that the forensic images are securely kept with a clear chain of custody with one person in the investigation or legal team of the company.

Finally, the last aspect that should be borne in mind while collecting physical documents is that there could be limits to the time for which companies preserve their physical records, which is generally for 8 years in compliance with the various statutory requirements. At the commencement of the investigation, it is important that the investigators send out a notice to all the likely custodians of information to inform that they need to preserve the information for the duration identified and should not delete any record. In this regard, it may be advisable to consult applicable policies of the company (including company's information technology policy for retention of electronic data) and document the observations.

Attorney Client Privilege: The concept of attorney client privilege ensures that communication of a client with his or her legal advisor should be protected from disclosure so that the client is encouraged to be forthcoming with the entire facts and seek appropriate legal assistance. As such, attorney client privilege is an effective tool that can be used by companies undergoing internal investigation to secure confidential data from potential disclosure before regulators or law enforcement agencies. Indian law recognizes the concept of attorney client privilege under Indian Evidence Act, 1872 (“Act”). Under Indian law, it is clear that the privilege is the privilege of the client and not of the attorney. The attorney is, therefore, bound by the privilege unless it is expressly waived off by the client or impliedly waived off under section 128 of the Act by examining the legal advisor as to the privileged communication.

There are two important aspects specific to the Indian law that should be borne in mind while evaluating attorney client privilege in the context of white-collar investigations.

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3 See, for example, section 126(5) of the Companies Act, 2013.
4 Sections 126 to 129 of Indian Evidence Act, 1872 deal with attorney client privilege. In addition, there are professional conduct rules governing advocates which reinforce attorney client privilege and the requirement for attorneys to maintain confidentiality in their communications with clients. See, Bar Council of India Rules, Part VI, Chapter II, Section 4(24) and Section 4 (19) read with Bar Council of India Rules, Part VI, Chapter II, Section 2(17).
First, is the extent to which attorney client privilege applies to in-house counsels. Second, the extent to which the privilege extends to other professionals such as accountants.

Indian law offers limited privilege to the in-house counsels. Under Bar Council of India Rules, an advocate cannot be a full-time salaried employee of the company which implies that it is arguable that the communication with in-house counsels is not afforded privilege as per the Act. In addition, decisions of the Indian courts in this regard have not been as clear. As a result, the likely test of determining applicability of attorney-client privilege to in-house counsels would be whether the advice is sought in a legal capacity or executive capacity, which is a factual determination and may vary from case to case.

As far as other professionals are concerned, under Indian law, professionals such as chartered accountants are not offered the same privilege as is afforded to attorneys. The courts in India have held that when a chartered accountant disclosed the information acquired in the course of his professional engagement without the consent of his client, to third parties, he was held to be guilty of professional misconduct. However, there are several instances when during the course of an investigation companies may need to engage services of other specialists such as accountants or technology experts. In a situation, where such third parties are being engaged by the company's attorneys, there is no statutory or judicial precedent to test privilege afforded to such third parties under Indian law. The only test as is cited by English courts is whether the communication was made in contemplation of the litigation.

It is important to recognize that privilege is accorded as early on in the investigation as possible because what may appear to the company as not important from a disclosure perspective early on in the investigation may turn out to be highly sensitive and in the absence of privilege, may leave the information discoverable by the regulators, law enforcement agencies and third parties. Additionally, the company should unequivocally inform all the personnel involved in the investigation about the importance of confidentiality so that it should not amount to a waiver of privilege by the company. An important aspect of this communication is to ensure that all personnel should clearly mark the documents as privileged and confidential to reinforce the expectation of privilege and remove any potential waiver of privilege.

**Disclosure obligations:** When a company is conducting an investigation, one of the key elements to evaluate is the likely disclosures emanating from the investigation to regulators or auditors. The investigators in such cases should design the investigation plan so as to provide relevant information to the company in a timely manner to satisfy its disclosure obligations.

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6 Bar Council of India Rules, Chapter II, Section VII, Rule 49.
7 See, Municipal Corporation of Greater Bombay v. Vijay Metal Works, AIR 1982 Bom 6. The court held that “a salaried employee who advises his employer on all legal questions and also other legal matters would get the same protection as others under Sections 126 and 129 of the Evidence Act.”
8 Council of the ICAI v. Mani S. Abraham, AIR 2001 Ker 212.
In cases of white-collar investigations involving global companies, disclosure requirements may also be triggered under laws that govern extra-territorial conduct such as Foreign Corrupt Practices Act, 1977 of the United States and Bribery Act, 2010 of the United Kingdom.

Under Indian law, Companies Act, 2013 has introduced reporting requirements for the statutory auditors of the companies. Section 143(12) of the Companies Act, 2013 requires the statutory auditor of the company to report to Central Government about the fraud/suspected fraud committed against the company by the officers or employees of the company. Section 143(12) of Companies Act, 2013 read with rule 13 of the Companies (Audit and Auditors) Rules, 2014 define auditor’s responsibility based on the amount of fraud. If the amount involved or expected to involve is Rupees One Crore or more, the responsibility on the auditor is to report such an instance to the Board of Directors or the Audit Committee of the company within two days and seek their reply or observations within forty-five days. On receipt of such reply or observations of the Board or the Audit Committee, the auditor is required to report the matter to the Central Government within fifteen days of the receipt of such reply or observations in the prescribed format. If the amount involved or expected to involve is less than Rupees One Crore, the requirement cast upon the auditor is to report such matter to the Board or Audit Committee of the company within two days of the knowledge of such fraud. Such disclosures by the auditors are required to be included in the Board’s report.

For listed companies, Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulation, 2015 (“SEBI Regulations”) makes a distinction between the fraud committed by promoters or key managerial personnel and frauds committed by directors and other employees of the company. The key distinction between the two is that the frauds committed by the promoters and key managerial personnel are not subject to any materiality limit. Disclosures mandated under SEBI Regulations for fraud involve two steps where the first disclosure is required to be made at the time of unearthing of fraud and second disclosure is expected to be made subsequently quantifying the amount of fraud, impact of fraud and corrective measures taken by the listed entity.

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10 Fraud is defined under section 447 of the Companies Act, 2013 to include any act, omission, concealment of any fact or any abuse of position committed by any person or any other person with the connivance in any matter, with intent to deceive, to gain undue advantage from, or to injure the interest of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.
A perusal of the disclosure obligations make it abundantly clear that companies, both listed and unlisted, need to conduct a thorough internal investigation that, at the very least, address questions such as the extent of fraud, individuals involved in fraud and the steps undertaken by the company to plug the gaps.
Resolution of disputes through arbitration has been a mechanism of choice in high value contracts involving parties from different jurisdictions. In principle, arbitration ensures party autonomy in the dispute resolution process, permitting the choice of arbitrator and avoiding the perceived vagaries of local courts of a given jurisdiction, while providing efficacy, speed and predictability to parties.

In practice the nature of the functioning of this dispute resolution mechanism depends largely on the arbitration law of the jurisdiction, which is why the choice of the seat of arbitration is often a highly negotiated term of the underlying contract. While choosing a seat, a party must consider whether it is an arbitration friendly jurisdiction in as much as a law of the seat of the arbitration or curial law will govern the arbitration proceedings, including any challenge to the ultimate award. An arbitration friendly jurisdiction is one where the courts support the arbitration process and award with minimal court intervention. Though this was the specific intent of India's Arbitration and Conciliation Act, which replaced the old arbitration law in 1996, excessive court intervention and undue delay in disposal of proceedings, cast a long shadow on India's burgeoning ambitions of being front and centre on the global stage.

Two landmark Supreme Court decisions in Bhatia International (2002 Supreme Court) and Bharat Aluminum Company (2012 Supreme Court) (“BALCO”), and three proposals for amendment of the Act, finally culminated in some long awaited and critical amendments which came into effect from October 23, 2015.

In this piece, we discuss the amendments to the Act and their impact in practice, one year down the line. But first, let us consider the position that existed prior thereto:

The enactment of the 1996 Act was considered a progressive step in Indian jurisprudence, and coming as it did with India's liberalisation in the 90's, was greeted with enthusiasm. Unfortunately, though often well intentioned, its errant interpretation by various Indian courts created problems and a reputation that India was not a pro arbitration jurisdiction. Two judgments of the Supreme Court created havoc in the global business community. First off the mark was the judgment in Bhatia International (2002 Supreme Court), which held that Part I of the Act (which contains detailed provisions for the procedure of arbitration and challenge to domestic awards), was applicable also to foreign seated arbitrations, unless Part I was expressly or impliedly excluded by the parties. Bhatia International was helpful to the extent that the ruling then permitted recourse to Indian courts for interim relief even for foreign seated arbitrations (something that was later made a statutory provision in the 2015
amendments), where there was otherwise no provision for recourse and no provision under Indian law by which the interim order of a foreign court could be enforced.

The Bhatia International ruling gave rise to entirely new provisions in regular arbitration clauses where foreign parties insisted on an international seat and expressly excluded Part 1 save and except for the provisions relating to interim relief. By such a measure, recourse could be had to Indian courts for a limited beneficial purpose, while Indian court jurisdiction in relation to the arbitration was otherwise specifically excluded.

*Bhatia International* opened the floodgates for Indian court intervention even in foreign seated arbitrations and clever interpretations resulted in the judgment in *Venture Global* (2010 Supreme Court), where foreign were awards were held to be amenable to challenge before an Indian court. This is contrary to the internationally accepted principle that the courts of the law of the seat have jurisdiction in relation to any challenge to the award. The *Venture Global* ruling was the nadir of India’s reputation and was widely criticised. Some Indian courts were however more circumspect and judiciously ruled that the mandate of a foreign seat coupled with a foreign governing law would suggest an exclusion of Part I of the Act. However, given the delays Indian courts were notorious for and the uncertainty in rulings, several countries such as Singapore and Hong Kong became attractive destinations for arbitrations, including for Indian parties.

The criticism was not lost on the legal fraternity and the judiciary, and in BALCO the Supreme Court ruled in no uncertain terms that Part I of the Act was not applicable and Indian courts would not have jurisdiction to entertain applications in relation to foreign seated arbitrations. Jurisdiction of Indian courts was restricted to referring parties to arbitration and enforcement of foreign awards, where the arbitration was under the New York Convention. The Supreme Court noted that such a ruling meant that parties to foreign seated arbitrations would be unable to apply to Indian courts for interim relief and also that they would be unable to enforce interim orders of foreign courts.

While many breathed a sigh of relief that they would not be at the mercy of a sly Indian defendant, the resultant change in dispute resolution clauses post BALCO, was a return to an Indian seat where it was believed that the inability to obtain or enforce interim reliefs, could render a claim or the arbitration frustrated.

There was therefore an urgent need for overhauling the existing regime and bringing India back on the dispute resolution map. Taking into account all the lacunae in the Act and the various conflicting judgments, the Law Commission proposed radical extensive amendments to the Act to bring it in line with its real object and with internationally accepted practices.

The long awaited amendments finally came into effect on October 23, 2015, greeted with smiles and a flurry of positively worded updates from Indian and global firms alike.

The amendments to the Act introduce drastic changes with a view to promote doing business in India, speeding the process of arbitration and fixing the shortcomings of the earlier law. Notably, the amendments are prospective and apply only to arbitrations
which commence after October 23, 2015. Arbitrations which are pending continue to be governed by the old provisions and the judge made law.

**Applicability of certain provisions to foreign seated arbitrations:**

Perhaps the most needed amendment was curing the lacuna in the Act and the plethora of cases with poor judge made law in the wake of a faulty regime, to provide recourse to Indian courts for interim relief and court assistance in taking evidence to foreign seated arbitrations. This amendment brings Indian law in line with other comparable jurisdictions such as England and Singapore, where similar provisions emphasise the arbitration friendly nature of their courts.

As a result, the need for an Indian seat merely to ensure the ability to obtain and enforce interim relief in India, no longer exists. One could have expected that as a further result, foreign parties would then insist once again on a foreign seat – this is not necessarily the case. Other amendments that have been put in place give great comfort and where the closest nexus is Indian law and Indian subject matter, arbitration in India becomes a viable option.

A question which has not been specifically answered by the 2015 amendments is, can two Indian parties agree to arbitrate in a seat outside India?

There is no clear answer. Two High Court have come to two different decisions.

In *Addhar Mercantile Pvt. Ltd.* (2015 Bombay High Court), the Bombay High Court ruled that Indian nationals could not be permitted to derogate from Indian law and that accordingly, opting for a foreign seat was impermissible. In our view, the reasoning for the conclusion took into account provisions that may not have been strictly applicable to the choice of a foreign seat; it took into account provisions to the effect that two Indian parties cannot contract out of Indian law. If that be the only criteria, then subject to the dispute being subject to Indian governing law, a foreign seat per se would not violate this position and should be permissible.

In *Sasan Power Ltd.* (2015 Madhya Pradesh High Court), a contrary decision was reached. The Court upheld the notion of party autonomy in the choice of seat and opined that there was no bar to two Indian parties arbitrating their disputes outside India.

The Sasan Power decision was challenged before the Supreme Court and it was widely expected that India’s apex court would decide the issue once and for all. Unfortunately, the Supreme Court did not rule on this issue, holding that in the facts of the case, the arbitration was an international commercial arbitration and as such there was no bar in choosing a foreign seat.

The 2015 amendments do no clarify this issue and it remains to be decided in another case on another day.
Interim relief:

Interim relief can be sought from a court only prior to constitution of the arbitral tribunal. Once the tribunal is constituted, an application for relief must be made only to such tribunal, unless the remedy granted by the tribunal will not be efficacious. Further, to avoid a situation (as has not been completely uncommon in the past), where an applicant sits happily on an injunction for months, while it delays commencement of the arbitration, the applicant must commence the arbitration within 90 days from the date of the court's order.

Additionally, in a bid to empower the arbitral tribunal and curtail the requirement for court intervention, the arbitral tribunal has powers co-existent with that of a court to grant interim relief. Moreover, an interim order of the tribunal may be enforced as if it were an order of an Indian court, thus doing away with further applications to the court.

Appointment of arbitrators:

The amendments mandate extensive disclosures by proposed arbitrators, bringing Indian arbitration law in line with international standards where rigorous conflict and appointment related mandates exist (such as the red, green and orange list of the IBA Conflict of Interest Guidelines). This includes disclosures in relation to the parties, any circumstances which may affect independence or impartiality, ability to devote sufficient time to the proceedings, a business or financial relationship etc.

This has been an amendment already followed in some court orders. Prior to October 2015, it was commonly insisted upon by public sector companies, that the arbitrator would be an arbitrator of their choice – ultimately one of their key employees. Naturally this gave rise to considerably angst to the opposite party during the arbitration, if not a sympathetic hearing to the appointing party. Based on the new provisions, in Assignia-VIL JV (2016 Delhi High Court), it was ruled that a company's serving or retired officers/employees would be ineligible for appointment as an arbitrator – a welcome decision indeed.

Jurisdiction of courts:

Urban legend has us believe in stories of dumbstruck foreign multi-nationals languishing before a small district court with no flight connectivity, for years. No more. All applications relating to international commercial arbitrations (where at least one party is a foreign party), will be heard by the relevant High Court. This means that given the assumed sophistication and complexity of transactions in international arbitrations, High Courts have been determined as the Courts of choice. This is particularly welcome since there have been enough recalcitrant defendants who have filed proceedings before a local district court to stymie the arbitration or the enforcement of a foreign award under the erstwhile regime.
In respect of arbitration in relation to commercial disputes with a claim of INR 10 million or above, all applications will be heard by the specially constituted Commercial Court or Commercial Division of a High Court will hear the dispute.

These specialized courts are expected to ensure efficient disposal of a wide range of Commercial Disputes, a term which is widely defined to include inter alia ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, export and import of merchandise or service, admiralty and maritime law, carriage of goods, infrastructure contracts, infringement of Intellectual Property Rights, joint venture and shareholder disputes etc., subject to the claim meeting the threshold Specified Value amount of INR 10 million.

Recognising that an arbitral tribunal is ultimately best placed to decide on its jurisdiction (or lack thereof), while a court must refer matters to arbitration unless it prima facie appears that there is no arbitration agreement. This provision lends itself to increasing references to arbitration and permitting the tribunal once constituted, to rule on the issue in detail.

A non-signatory to an arbitration agreement may now also be subject to the arbitration clause as being any person claiming through or under a signatory. This would cover, for instance, successors-of-interest, alter-egos of such parties, and in cases of inter-related contracts, also group companies of the signatories.

**Speeding up and streamlining the process:**

Well intentioned, laudable, but perhaps difficult to put into practice; this sums up the reaction of most practitioners to the extensive inclusions of timelines to speed up the arbitration process. This is a controversial amendment of the Act since in practice it has introduced a lot of difficulties in implementation.

For instance, the tribunal is required to issue the final award within 12 months of entering upon the reference. A mutual extension of a maximum of a further 6 months by the parties is permitted. However, any further extension would require the court's intervention in order to continue the Tribunal's mandate. Sufficient cause must be shown for the delay, and the court may impose exemplary costs on the party(ies) causing the delay, substitute an arbitrator or order reduction in his fees. This provision is somewhat problematic in that, complex arbitrations involving multiple issues may not be capable of disposal within 1 year where extensive evidence has to be led and further, given the small pool of internationally accepted arbitrators, simply getting dates from a tribunal of three members plus two parties and their lawyers, becomes a herculean effort.

Since a year has not yet expired from the time the amendments came into force, there is no insight into the manner in which courts are treating applications for extension. That said, the arbitrators and the parties themselves have these time frames well in mind, which itself assists in a quicker process and fewer requests for adjournment and extension. Mandating timelines has, to that extent, already worked.
Timelines stipulated for other stages as well. For instance, any application challenging an award must be made within 90 days from the date of the award (in line with the New York convention), and such application must be disposed of by the court within 1 year. An application to a court for appointment of an arbitrator must be disposed of within 60 days after notice to the respondent. While courts are slower than they were to grant adjournments, they have not been quick enough to properly meet these timelines, owing in part to the huge backlog of cases, and it may be some time yet before we can see a truly swift disposal.

Fast-track arbitration is now also an option (much like the expedited arbitration procedure available before international institutions). The dispute must be decided in 6 months and without any oral hearings (though an application for an oral hearing may be made to the tribunal). This may be a useful provision for small, relatively straightforward claims.

Costs:

New provisions have been introduced to emphasise the rule of 'costs follow the event' which, though recognized in principle, is not always followed by Indian courts and arbitral tribunals. By expressly stating that as a general rule the unsuccessful party shall be ordered to pay the costs of the successful party (unless otherwise ordered for reasons recorded in writing), it is hoped that filing of frivolous claims, applications and delays will be disincentivized. Such a principle of cost imposition brings India on par with its global counterparts.

Challenge to the award:

The grounds on which an award may be set aside are limited and pertain mostly to the procedure of the arbitration and principles of natural justice.

One of the most important amendments, is the inclusion of specific wording in relation to the scope of the public policy challenge, which was perhaps the most abused provision in the Act. The amendments clarify that an award is said to be in conflict with the public policy of India only if: (a) the making of the award was induced or affected by fraud or corruption or was in violation of confidentiality provisions or admissibility of evidence provisions in the Act; (b) it is in conflict with the most basic notions of morality or justice; or (c) it is in contravention with the fundamental policy of Indian law. Specifically, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

An additional ground of challenge available only to purely domestic awards (without an international element), is patent illegality appearing on the face of the award. Even so, an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.
The limited grounds seek to ensure that the award of the arbitrator is upheld and that the courts do not substitute their judgment for that of the tribunal's. While the law has been clear for some time in this regard and most courts do not entertain a review of the award on merits (in fact, statistics show that above 80% of foreign awards are ultimately upheld), the amendments which bring statutory recognition to the legal position, are welcome and have been well received.

Further and notably, the automatic stay of an award that was occasioned by the mere filing of an application to set it aside, is done away with. Successful parties were often forced to settle for less than the awarded amount, merely to satisfy the award quickly, rather than spend years in a litigation challenging the award. Pursuant to the amendments, there is no automatic stay and a party challenging an award must separately apply for a stay thereof. While granting a stay, the court may impose such conditions as it deems fit, including requiring security from the applicant.

**Enforcement of awards:**

Insofar as an award passed in India under Part I are concerned, once it has achieved finality, or where no stay of the award is granted although it has been challenged, such award shall be enforced in accordance as if it were a decree of the court. Insofar as awards passed under Part I but in the case of international commercial arbitrations are concerned, the 'patent illegality' challenge is not available to them. These amendments ensure that the threshold for judicial intervention in relation to international commercial and foreign awards is far more stringent than for domestic awards.

**Applicability of the Act - Prospective or Retrospective?**

The amendments apply prospectively, to arbitrations commenced after October 23, 2015. How then are pending arbitration proceedings dealt with? Once again there are slightly conflicting decisions of courts and in fact, the Madras High Court in Delphi TVS Diesel Systems Ltd. (2015 Madras High Court), sought clarifications from the Central Government on the applicability of the Amendment Act.

Electrosteel Castings Ltd. (2016 Calcutta High Court), ruled that an award passed in an arbitration which commenced before the amendments came into effect, would not be covered by the amendments and there would be an automatic stay of the award.
However, in a contrary decision, in *New Tirupur Area Development Corporation* (2016 Madras High Court), the Court ruled that 'arbitral proceedings' are different from 'court proceedings' and 'post-arbitral proceedings' even where the award has been passed before the amendments and post arbitral proceedings would therefore be covered by the amendments. Thus, since the challenge to an award is a post-arbitral proceeding, New Tirupur would be required to file separate application for stay of the award.

A similar view was taken in *Board of Control for Cricket in India* (2016 Bombay High Court), in respect of an application to challenge an award which was filed prior to the amendments. The Bombay High Court held that all pending would attract the relevant amendments. This ruling means that even awards in respect of which applications for setting aside the same had been filed prior to the amendments, may now be enforceable unless a specific application for stay thereof is made and granted. This decision is however pending in appeal before the Supreme Court and the decision is awaited with great anticipation.

*Jumbo Bags* (2016 Madras High Court), ruled that the amendments do not apply to arbitral proceedings commenced before October 23, 2015, and the was not bound by the new provisions with regard to appointment of an arbitrator in the current case, as the arbitration had commenced prior to such date.

However, in *Sri Tufan Chatterjee* (2016 Calcutta High Court), it was held that despite the arbitration having commenced and application for interim relief having been filed prior to the amendments, the interim application must be decided in accordance with the new provisions. Thus, in this case, the Court dismissed the Section 9 application on the ground that the arbitral tribunal has already been constituted and that the court does not have the power to grant interim relief.

As can be seen, there are several conflicting decisions and this results in some amount of ambiguity regarding which regime applies to such cases, until a definitive pronouncement is made by the Supreme Court.

**Conclusion**

The Amendments have been a long time in coming and put in place several measures to establish that India is, indeed, an arbitration friendly jurisdiction. The success of the new provisions and the ultimate ability of India to attract parties as a viable arbitration destination, will depend largely on its practical implementation and the co-operation of parties and courts in its process. The interplay of courts and the tribunal in this regime is crucial and the present amendments attempt to strengthen this relationship. The fine balance between these two centres of power ought to be maintained without losing sight of the fact that parties choose arbitration with a view to seek an expeditious remedy. There is already a change in the mindset of the legal community and the judiciary and
India can well become one of the hubs of dispute resolution if the measures put in place towards costs, timeliness, impartiality and case management work in the way they are meant to. It remains to be seen how the dawn of this new era will translate into case disposal in real numbers, but for now, we remain quite optimistic.
Introduction:

Bilateral Investment Treaties (“BITS” or “BIT”) are signed between states to protect foreign investments by providing certain guarantees to the investor with regard to its investment in the host state. India has signed eighty two (82) BITS, although only seventy two (72) are in force. These BITS contain various protections for the rights of foreign investors, such as the most-favored nation, fair and equitable treatment, national treatment and most importantly an acquiescence to refer all disputes between the investor and India before an arbitral tribunal bound by UNICTRAL Rules. Most of the current BITS in force are based on the provisions contained in 2003 Model BIT (“2003 BITS”) released by the Ministry of Finance, Government of India.

Over the years there has been a substantial rise of BIT claims against India, these include actions by private telecom operators as a fall out of the Supreme Court’s 2 G verdict, Vodafone's claim that retrospective demand of tax, was a failure to accord 'fair and equitable' treatment; disputes related to regulatory issues with Posco Steel and claims by UK Hedge Fund The Children Investment etc. The most contentious of such claims is the White Industries Case where an investment arbitral tribunal held that as there were inordinate delays in enforcing an arbitration award India had breached its treaty obligations towards an Australian investor by failing to provide “effective means of asserting claims and enforcing rights”.

In wake of such developments India has revisited its obligations under the 2003 BITS, and re-casted them into the new Model 2015 BITS (the “Model BITS”) which will be the basis for all future negotiations. The Model BITS retracts and dilutes certain substantial rights such as MFN treatment, fair and equitable treatment, national treatment etc. which constituted the edifice of the 2003 BITS regime and the current BITS inforce. As India's regulatory measures have been challenged as treaty violations, the preamble of the Model BITS reaffirms the right of the host state to regulate investment in their territory in accordance with the law and policy objective. Nevertheless, the preamble of the Model BITS sets the tone for protecting and preserving foreign investment in the host countries. The implications of the changes contained in the Model BITS are discussed below.

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1 If both parties agree they can also use the Additional Facility under ICSID convention.
Definition of Investment

To be entitled to protection and enjoy substantive rights under BITS, an Investor is required to have made an "investment" in the host state. The 2003 BITS regime has a broad asset-based definition of investment, where investment has been defined to mean "any kind of asset" and includes all assets, tangible as well as intangible, in the host country owned by the investor. Based on such a wide definition, the tribunal in White Industries held that "contractual rights fell squarely within the definition of investment in the India-Australia BIT, which included right[s] to money or to any performance having a financial value". The inclusion of every kind of asset within the definition of investment exposes any regulatory measure taken by the host state on the investment as grounds for potential dispute.

The Model BITS curtails the broad based definition of 'investment' to mean an enterprise, constituted, organized and operated in good faith by an investor in accordance with the law of the Party in whose territory the investment is made, taken together with the assets of the enterprise. The definition provides for a non-exhaustive class of assets that an enterprise may possess, namely, (a) shares, stocks and other forms of equity instruments of the enterprise or in another enterprise; (b) debt instrument or securities of another enterprise; (c) a loan to another enterprise wherein the enterprise is an affiliate of the investor or where the original maturity of the loan is at least 3 years; (d) licenses, permits, authorizations or similar rights; (e) rights conferred by contracts of a long term nature, such as, for cultivating, extracting and exploiting natural resources; (f) copyrights, know-how and intellectual property rights such as patents, trademarks, industrial designs and trade names etc.

The definition also imposes certain elements as elucidated in Salini et. Al. v. Morocco, for an investment to qualify as an “investment” under the Model BITS. The Salini test defines an investment as having essential elements including: (i) duration of time, (ii) made with an expectation of gain or profit, (iii) commitment of capital or other resources, (iv) assumption of risk and (v) contribution and commitment to the economic development of the host state. The Model BITS adopts the negative definition of investment and specifically excludes ordinary commercial transactions such as portfolio investments, intangible rights, interest in debt securities issued by a government, an order or judgement by a court or arbitral tribunal etc. Therefore, all classes of assets do not automatically qualify as an investment if one or more of the Salini elements are absent. This may lead to some ambiguity as it is difficult to form an objective assessment (of the kind of evidence and submission) to determine the existence of Salini elements. This may cause some apprehension amongst investors as there would be lack of certainty as to the nature of their investment (for instance can a plain vanilla acquisition of a toy company or failed infrastructure projects said to have contributed to economic development to qualify as an investment?).

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Most Favored Nation

At the heart of the controversy lies the Most Favored Nation (MFN) clause that requires that a host state afford investors or investments from another host country treatment 'no less favorable' than that accorded to investors or investments from any other foreign country under any other treaty. The Model BITS has discarded the MFN clause under 2003 BITS. Under 2003 BITS, the MFN clause accords each “Contracting Party treatment which shall not be less favorable than that accorded either to investments of its own or investment of investors of any third state” such that any favorable provision provided in any of the BITS will be available to every other country with which the India has an MFN clause.

Thus, MFN clause entitles investors to borrow beneficial substantive and/or procedural provisions and rights from other treaties including right to fair and equitable treatment, national treatment, and umbrella clauses etc. For example, the India China BITS does not contain provision on Full Protection & Security but a Chinese investor can rely on the MFN provision to import provisions of Full Protection & Security under the India-UK BITS which contain such provisions.

In the White Industries case, the Australian investor initiated a claim, that as there were inordinate delays in enforcing an arbitral award, therefore India had violated the treaty obligations of providing an “effective means of asserting claims and enforcing rights.” The India-Australia BITS does not in fact contain any such provision. However the Australian investor imported this provision from the India Kuwait BIT by relying on the MFN clause. Rendering a broad interpretation of the MFN clause the tribunal dismissed India’s contention that such an importation will “fundamentally subvert the carefully negotiated balance of the BIT” and held that White Industries could import the ‘effective means’ provision contained in the India-Kuwait BIT. To make matters worse, many of the BITS currently in force containing MFN provisions do not provide for 'like circumstances clauses' which would have required the host state to accord similar treatment to investments under similar circumstances or situations (i.e. in the same region or sector etc.) Because of India’s ordeal in White Industries, the Model BITS has deliberately discarded the MFN clause. Therefore, investors will no longer be able to cherry pick from other BITS. Thus, if Model BITS is implemented investors should structure their investments through the BITS which afford maximum protection.

National Treatment

The 2003 BIT had a relatively simple national treatment clause with the objective of eliminating nationality-based discrimination. The Model BIT also accords national treatment by guaranteeing that treatment to foreign investors or their investments will not be less favorable than what is accorded to domestic investors or investments, in like circumstances. The obligation is to accord national treatment to investors with respect to management, conduct, operation, sale or other disposition of investments in the host's territory. It further imposes the relevant national treatment obligations in like circumstances also on sub-national government. While considering whether the foreign
The Model BITS identifies direct expropriation as formal transfer of title or outright seizure of property or investment.

Investment and the domestic investment are “in like circumstances” or “in like situations” the host state will consider the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate regulatory objectives. These circumstances include, but are not limited to, (a) the goods or services consumed or produced by the investment; (b) the actual and potential impact of the investment on third persons, the local community, or the environment, (c) whether the investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the investment.

**Expropriation**

The Model BITS imposes restraints on any state action that may lead to direct expropriation or other measures having the effect of expropriation unless it is justified (a) because of public purpose, (b) in accordance with the due process of law, (c) upon payment of reasonable compensation which is set out to be at least the fair market value of the investment on the day before the expropriation takes place and (d) must be paid in freely convertible currency.

The criteria to determine whether such expropriation is for a public purpose and the compensation payable in such action would be guided by local law precedents and determined by local courts. The Model BITS identifies direct expropriation as formal transfer of title or outright seizure of property or investment. Whereas, indirect expropriation occurs if any measure that has an effect equivalent to direct expropriation depriving the investor fundamental attributes of property, its investment including the right to use, enjoy, and dispose of its investment without formal transfer of title or outright seizure.  

The Model BITS clarifies that any measure or series of measures that has an adverse effect on economic value of investment does not constitute indirect expropriation. This is contrary to investment jurisprudence which suggests that any measure depriving the investor of expected economic benefit of an investment can constitute indirect expropriation. One of the factors under the Model BITS in determining whether the measure has an effect equivalent to expropriation is to take into consideration the character of the measure including the object, context and intent. The question of

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3 Clause 5.3 of the 2015 Model BITS
4 The Model BIT does not clarify whether the measures include only regulatory action.
5 The Expropriation clause in Article 5 of 2015 Model BITS has been borrowed from CETA draft and is based on the criteria developed in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).
intent would prove to be ambiguous and leaves room for subjective interpretation as it would be difficult to prove intention in state behavior.

In the present international environment dominated by bilateral investment treaties, investors hardly become victims of direct expropriations and are rather subjected to actions or conduct by host states, which do not explicitly deprive them of their assets or rights but, actually have that effect. Where expropriations occur, they are carried out "indirectly through measures tantamount to expropriation or nationalization". Therefore, breaches of assurances that had been given by the responsible state authorities or not providing a requisite license or permit which frustrates commercial operations may constitute expropriation. It is pertinent to note that such situations have been specifically carved out in the Model BIT.

Fair and Equitable Treatment & Full Protection and Security

Almost seventy one of current BITS including the 2003 BITS contain the FET clause. The FET principle as envisaged in treaty jurisprudence was to guarantee a minimum standard of treatment to foreign investors and the host country to act in good faith. However, in the last few years, investment tribunals have broadly interpreted FETS in context of legitimate expectation of investors to maintain the legal and economic framework in which the investment was made. Therefore, FET clauses impose impediments on a host state’s exercise of regulatory authority and implementation of policy decisions. As commentators have stated that FET standard has taken on a heavyweight life of its own, in effect, redefining acceptable restraints on state sovereignty whilst ringing in changes to the legal framework governing investments in these countries. Because of such constrains, Model BITS does not provide a FET clause but undertakes that the host state will not take any measures that would violate customary international law. This provision is dovetailed with additional safeguards, such as, assuring that there is access to justice, due process is followed and there are no manifestly abusive treatment such as coercion, duress and harassment to a foreign investor. Further, Clause 3.2 of the Model BITS provides full protection and security to foreign investments. However, it limits such protection to the physical security of investors and investment and not to any other obligations whatsoever.

Umbrella Clauses

On the face of it, umbrella clauses require a host state to observe its contractual obligations regarding investments. However, the legal effect is that they bring investor contracts within the umbrella of the BITS. Investment arbitral tribunals have opined that the umbrella clauses render breach of contract as violation of treaty obligations. Therefore, the Model BITS excludes umbrella clause.

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7 In Metacable's Mexico where the assurances received by the investor had been "definitive, unambiguous and repeated" and had not been inconsistent with Mexican law.
10 Article 3.1 of the 2015 Model BITS.
Arbitration

The assurance of independent international arbitration is perhaps the most important element in investor protection. Under the Model BITS, an investor is required to exhaust local remedies (for a period of five years if no resolution has been reached by local courts to the satisfaction of the investor) by referring the claim before relevant domestic court or administrative bodies prior to initiating arbitration. The Model BITS is silent on how the general principle of exhaustion of local remedies is to be applied in practice, or how they are to be interpreted. The Model BITS provides the investor with a choice to arbitrate between the ICSID Convention (if both the parties are members of the convention) and the ICSID Additional Facility Rules (if one of the parties is a member to the Convention) or ad-hoc arbitration under UNICTRAL Rules (it does not specify the priority of the choice). The Model BITS restricts arbitrability of investor claims if the investment is riddled with fraud, misrepresentation, corruption, money laundering etc.

Future Course of Action

The 2003 BITS which is the basis of most current BITS in force are for a term of ten years and deemed to have been automatically renewed unless the Contracting Party provides a notice of its intention to terminate the treaty. For investments made during the tenure of the current BITS, there is an extended protection of fifteen years from the date of termination of the BITS.

If India were to terminate its current BITS (without cause) prior to its natural expiry, there is a high risk that investors would challenge such a termination including initiating claims for compensation, restitutions and other counter measures.

Conclusion

India can re-negotiate with member states to implement the terms of the Model BITS, in accord and satisfaction. Although the Model BITS has diluted investor protection, yet it contains significant investor rights and protection measures. Whether the adoption of the Model BITS diminishes or enhances investment protection will ultimately depend on investment tribunals interpreting its provisions in the future.
Enforcing Judgments and Awards in India- The Process, Pit-falls and Strategic Options

Introduction

India is today touted as one of the fastest growing economies of the world. The Hon'ble Prime Minister has travelled far and wide, probably more than any of his predecessors, to primarily encourage and invite foreign investment to take India to the next level. The touchstone of a country’s growth is its legal system, which should afford both certainty as also legal recourse in a timely and efficient manner being designed and fashioned for growth both economic and developmental.

Resolution of disputes by a court driven process, culminates in the passing of a judgment by the Court. Invariably, the Judgment is in favour of one litigating party against the other. While a judgment and more particularly, the decree conclusively determines the rights of the parties, the successful party then has to prepare for enforcement of such rights/ decree. It is the enforcement stage of commercial disputes that currently is probably the toughest part and sets the tone for future investments into any jurisdiction.

In the Indian context, a critique we regularly face, both on the domestic as also the international stage is the lack of preparedness of Indian Courts to handle disputes arising out of such investment and development. The recurring notion is that it is well neigh impossible to enforce a foreign judgment and/or an arbitral award in India; and this is not a bare premonition but may actually be borne out in international commercial disputes. Not only is the enforcement and execution process in India time consuming, mired by procedure(s), but is equally insensitive to the face that India desires to project internationally to invite foreign investment.

The process of enforcement of judgments in civil disputes and arbitral awards is extensively laid down in statutes. Owing to the circumstances and complexities involved in the underlying dispute, which led to the passing of a judgment or an award, the modes of enforcement and/or execution of such decisions also varies.

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This article briefly describes various hacks of enforcing judgments and awards, as also how such enforcement or execution of judgments can be challenged or defeated in a legally sustainable manner.

The Court's primary power to execute Decrees is derived from Section 51 of the Code of Civil Procedure, 1908 ("CPC").\(^1\) This power is supplemented by the procedure laid down in Order XXI of the CPC, under which, the execution process is set in motion.\(^2\)

The treatment of an arbitral award, once it has attained finality, is the same as that of a decree. As such, the provisions of CPC apply \textit{mutatis mutandis} qua execution of an award.

Further, the decree-holder can pursue simultaneous proceedings both against the property and the judgment debtor individually, and the judgment debtor shall not be allowed to deal with the property until the decree-holder has exhausted his remedy against the property.\(^3\)

### Procedure for enforcing decrees in India

The procedures for enforcement of judgments vary from passing of directions qua property/ interest(s) of the judgment debtor to arrest and civil imprisonment of the judgment debtor. Depending on the quantum of decree and gravity of circumstances, the Courts, can put various execution mechanisms into process.

#### Enforcement against property of Judgment Debtor

The dispute may pertain to a specific property and a successful party can seek possession of such property to be delivered to him.\(^5\) While doing so, the decree holder must specifically establish the identity of the property.\(^6\) If the identity of the property is established satisfactorily, the decree will be executed.\(^7\) In case a decree holder does not get peaceful possession of the property, he can seek the Court's assistance for being put in possession.\(^8\)

Attachment and sale of the judgment debtor's movable/ immovable assets or interests (such a profits) is another common method of enforcing judgments. The decree holder can seek disclosure of assets of the judgment debtor as a strategic and preliminary step for execution of a decree.\(^9\) Once the details have been provided by the judgment debtor, depending upon the nature of the property, the decree holder can proceed to initiate

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1. The modes of execution of decree, \textit{inter alia}, include (a) delivery of any property specifically decreed; (b) Attachment and sale; (c) Arrest and detention in prison; (d) Appointment of Receiver; (e) Such other manner as the nature of relief granted may require.
2. Provisions for Execution of a Decree are laid down in Sections 36 to 74, 82 and 145 and Order XXI of the CPC. Execution has been defined as "the act of carrying out or putting into effect (as a court order or a securities transaction) - Bryan A. Garner, Black's Law Dictionary (Thomas Reuters) Pg. 689."
3. Order XXI, Rule 30, CPC
5. Order XXI Rule 35, CPC
6. Identity of the property can be established identifying the boundaries, or number of revenue records etc - Mulla - the Code of Civil Procedure, 18th Edition, Vol. 2, Pg. 2485.
8. Order XXI Rule 38 and Rules 97-103, CPC - the measures herein also include putting the judgment debtor or any person acting at his behest to be detained in civil prison.
9. State Bank of India v. M.K. Ravendran, AIR 2010 Ker 20; Order XXI Rule 41 of the CPC Provides for application for disclosure of assets
attachment of the same effectively. 10 In case of movable property, the attachment can be made by actual seizure of the goods. 11 Immovable property can also be attached and a judgment debtor can be prohibited from transferring or creating any third party interests in the property. 12

As a pre-emptive strategy and in order to secure the execution of a decree, which may be passed against a defendant in a suit, the plaintiff can during the course of the suit or arbitration proceedings seek attachment of defendant’s property before the passing of a judgment or an award. 13 The plaintiff in such a case, will have to establish that the defendant may attempt to defeat, obstruct or delay the execution of any decree and to that end, may dispose of the property or remove it from the local limits of the jurisdiction of the Court rendering the decree infructuous or merely a paper decree. 14

For satisfying a decree, the Court can sell the attached property by means of a public auction, the proceeds of which are given to the decree holder to the extent of the decretal amount. 15

In order to protect, preserve and manage the property during the pendency of the suit, 16 a decree holder can seek appointment of a receiver of the property. 17 The appointment of a receiver is considered to be one of the strongest hacks in law for enforcement purposes and is allowed only in extreme cases and in circumstances where the interests of the creditors are exposed to manifest peril. 18

The appointment of a receiver in an execution proceeding is likely to benefit both – the decree holder and the judgment debtor such as for collection of rents/ lease amount, realisation of attached debts and even ensuring that the decree is executed within reasonable time from the attached properties so that the Judgment Debtor may not be burdened with property while he is deprived of the enjoyment of it. 19

Enforcement against Person

Civil arrest of judgment debtor is also a well known coercive tactic for carrying out execution of the decree. However, the purpose of imprisonment is to compel the judgment debtor to pay the amount under a decree. To be able to go down this path, the decree holder has to inter alia establish before the Court that a judgment debtor, who is capable of paying the decree amount, has refused to comply with such a decree without

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10 A party seeking attachment therefore must follow the procedure for completing the proclamation of attachment as provided under Order XXI, Rule 54, without which, a mere order for attachment will not be effective. Proclamations are usually done by beat of the drum and affixing a copy of the attachment order on the property etc.

11 Order XXI, Rule 43, CPC; sale of seized property is permissible if the property is perishable in nature

12 Order XXI, Rule 54, CPC

13 Order XVIII, Rule 5, CPC

14 Govindrao v. Devi, AIR 1982 SC 989

15 A public auction is conducted by an officer of the Court in terms of Order XXI, Rule 65, CPC. A sale has to be formally confirmed in terms of Rule 92. Such confirmation happens only after objections, if any for setting aside the Sale under Rules 89-91 have been finally adjudicated by the Court.

16 Narayandas Nathumal Hemrajani v Taraben Kalimuddin Mulla Fakhri Society AIR 1998 Guj 12

17 Section 94(d), CPC

18 The Court has clarified the position in BDA Ltd. v Central Bank of India (AIR 1995 Bom 14 (DB)) that a receiver is not to be appointed unless there is some substantial background for such an interference, such as, a well-founded apprehension that the property in suit will be dissipated or there irreparable mischief may be done, unless the court appoints a receiver. The court may also appoint a receiver, if it is just and convenient, on an application of a party who is not a party to the suit but is interested in the preservation of the property (Ganpat v Prahlad, AIR 1952 Nag 253).

19 Hemendra Nadv v Prakash Chandra, AIR 1932 Cal 189
any satisfactory or just cause. However, merely because an indigent or an honest person cannot satisfy the decree, does not ipso facto indicate that such a person should suffer imprisonment.20

Money decrees can be enforced by seeking directions for payment of the decretal amount by the judgment debtor into Court.21 The party seeking enforcement can also seek direct payment to it by the judgment debtor22 and subsequently confirm to the Court about receipt of such sums to conclude the execution proceedings. Alternatively, a decree holder can also take out Garnishee proceedings when the money payable by the judgment debtor is in possession of third parties. 23

When a decree holder seeks to execute the decree in a Court other than the one, which passed the decree, the Court of first instance can, upon the decree holder's application, issue a precept to such other Court, which would be competent to execute the decree either against the person or against the property of the judgment debtor. Such other Court is, inter alia, empowered to attach the property of the judgment debtor in pursuance of the precept.24

**Enforcement of Foreign Judgments**

Decree holders may also be faced with situations, where, the decree sought to be enforced by them has been passed by a Court in a foreign country. Such other country may be a reciprocating or a non reciprocating territory.25 In terms of Section 44A of the CPC, so long as the decree has been by a court of competent jurisdiction in a reciprocating territory, the Decree holder can file a certified copy thereof before the Indian Court and it will be accorded the same recognition as a decree by a District Court for the purpose of execution. However, if the foreign decree has not been passed by the superior court of a non reciprocating territory, then the decree holder can file a fresh suit and annexe a certified copy of the foreign decree, which will be treated as evidence in support of the decree holder's cause of action in India.

The general presumption upon the production of a foreign judgment before the Indian Court is that it has been passed by a Court of competent jurisdiction.26 However, such a presumption is rebuttable.27

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20 Proviso to Section 51, CPC
22 Order XXI, Rule 1(b), CPC provides for payment of money directly to a decree holder in any manner, where the payment can be evidenced in writing
23 Order XXI, Rule 46, CPC
24 Sections 46(1) and (2), CPC; See also Karam Chand v. Harwinder Singh, MANU/DE/2847/2013
25 Explanation-1 of Section 44A, CPC describes "Reciprocating territory" as a country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of Section 44A; the expression used in Section 44A for the relevant Courts in the foreign country is "superior courts", which means such Courts as may be specified in the said notification.
26 Section 14, CPC
27 In Padmini Mishra v. Ramesh Chandra Mishra, AIR 1991 Ori. 263, it was observed that if plea of lack of jurisdiction was not taken before the foreign Court which passed the judgment, the presumption in favour of the foreign judgment under Section 14 was attracted.
Riskier hacks- pitfalls of liquidation and winding up of Judgment Debtor

When the judgment debtor is a company established under the Indian Companies Act, 1956/ 2013 and does not appear to have the means to pay, the decree-holder, *inter alia*, upon an application by a creditor may resort to the measure of winding up when the Company is unable to pay its debts. However, not only is resorting to winding up procedure a risky process, in so far as it exposes a decree holder to fall in the line of secured creditors, the power to wind up, is in any event, discretionary power of the Court and cannot be exercised as a matter of right or blatantly as a tool for recovery.

Enforcement of Domestic Arbitration Awards

Akin to judgments and decrees, which create rights in favour of the decree/ judgment holders, there are arbitration awards, and more commonly, commercial arbitration awards, which create rights in favour of the succeeding party in arbitration proceedings. Such arbitral awards may be domestic or foreign awards.

Under the present regime, in terms of Section 36 of the Arbitration and Conciliation Act, 1996 ("the Act"), an arbitration award (domestic award) becomes enforceable as a decree of the Court.

During the pendency of arbitration proceedings or prior to commencement of the same, if Section 9 proceedings are pending in the Court, a Petitioner/ prospective Claimant based on the facts and circumstances of the case, can also seek relief under Order XXXVIII Rule 5, CPC (attachment before judgment) in order to ensure that the arbitral process is not a futility.

Enforcement of Foreign Awards

Another limb of commercial arbitration where enforcement issues are commonly seen is enforcement of foreign arbitral awards.

The mechanism for enforcement of foreign awards is provided for in Part- II of the Act. While the provisions for enforcement of foreign awards are expressly laid down under part- II, enforcement of a foreign award can be a cryptic process. Besides the foreign award having to meet the requirement of being passed in a convention country in terms of Section 44 of the Act, a party seeking to enforce a foreign award in India has to be

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28 Section 433(c) of the Companies Act, 1956
29 In a winding up petition, the Court does not examine whether, if the company converts all its assets into cash, it would be able to discharge its liabilities, but would tend to examine whether, in commercial sense, the company is insolvent and whether it is unable to meet its current demands. (See Venkateswara Flexo Pack P. Ltd. v Sampre Nutritions Ltd., (2012) 106 CLA (Snr) 4 (AP))
30 A domestic award is one, which is made in India, arising out of a domestic or an international commercial arbitration. A foreign award is one, which has been made in a convention country, and is enforceable in terms of Part- II of the Arbitration and Conciliation Act, 1996.
31 The award is enforceable either after lapse of the period of 3 months of receipt of the award by the parties; or if an application challenging the award is made to the appropriate court under Section 34 of the Act and the same is refused, then from the date of the refusal of the Application.
32 GATX India Private Limited v. Arshiya Rail Infrastructure Ltd., MANU/DE/1914/2014- the principles of Order 38 Rule 5 are applicable to Section 9 proceedings.
mindful, at the very least of the provisions of Section 47 of the Act. In case the foreign award is made in the country not notified by the government or in a country that is not a party to the New York Convention, then the successful party, has to file a suit for enforcement of foreign award in India and can rely on this foreign award as evidence to proceed with its claim by filing a separate Civil Suit.

There may be circumstances when an arbitration agreement has come into existence by exchange of correspondence between the parties. In such a scenario, the party seeking enforcement may file a certified copy of the arbitral record or the relevant part thereof, which contains the requisite documents and correspondence. The existence of an arbitration agreement by exchange of correspondence between parties has been recognized by the Indian Courts.

**Recourse to challenging enforcement of Judgments**

Just as law provides various mechanisms to decree and Award holders for enforcement, defence mechanisms are also available on the other hand to resist and thwart the enforcement of judgments.

The most substantive and common method of opposing the enforcement of a judgment is filing an appeal against the decree, and seeking a stay on the execution of the decree. The first appeal is filed in a Court superior than the Court, which passed the decree. A second appeal lies against a decree passed by the First Appellate Court; it is filed in a High Court and can only be on a substantial question of law.

The directions for possession by delivery of property can be stalled if the judgment debtor establishes that the property cannot be properly identified.

A judgment debtor can oppose a prayer for attachment, if, in the garb of seeking attachment, the decree holder is resorting to a roving and fishing inquiry. A judgment debtor can also file an application for objecting to the attachment of property. If such objections are found to be sustainable by the Court, the property will be released from attachment. Such a release order will have the force of a decree and is appealable. Sale of attached property is generally considered to be a tedious process, specially in view of the fact that judgment debtor and even third parties can file objections to such sale. Only once such objections have been finally decided can a Court attached property be sold.

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33 The party seeking enforcement must, therefore file the following:
(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;
(b) the original agreement for arbitration or a duly certified copy thereof; and
(c) such evidence as may be necessary to prove that the award is a foreign award.
(d) In cases where the award is in a foreign language, the party must file an English translation of the Award certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

35 Austbulk Shipping v. PEC Ltd. MANU/DE/0479/2005
36 First Appeals are covered by Section 96-112 and Order 41 of the CPC. The First appeal is filed in a superior Court than the Court which passed the decree. A second appeal lies against a decree passed by the First Appellate Court; it is filed in a High Court and can only be on a substantial question of law.
37 Sections 100-103, 107, 108 and Order 42, CPC deal with Second Appeals
38 Ibid at 13
39 Cholamandalam Investment v. CEC Investment; 1995 (34) DRJ 379. Jurisdictional averments must be raised by the decree holding, else an application for disclosure of assets is mere roving and fishing inquiry
40 Order XXI, Rule 58, CPC
42 Order XXI, Rules 89-91, CPC
The Civil arrest of a judgment debtor can be opposed if it is proved that arrest order passed without due application of mind. As has been laid down by the Court, honest judgment debtors must be protected and dishonest ones should be punished. Further, women cannot be arrested for the purposes of execution of a decree and any such attempts by a decree holder would be contrary to Section 56 of the CPC.

In the execution of money decrees, when garnishee orders are sought by the decree holder, the same can be challenged by a judgment debtor, inter alia on the premise that decree holder is attempting to misappropriate a future debt instead of claiming a genuine present debt.

Although rare and not in the best interests of a judgment debtor, the enforcement of a judgment can also be thwarted by making a reference under Sick Industries (Companies) Act, 1985 (“SICA”). A judgment debtor seeking to oppose the execution of foreign judgment can endeavour to establish any of the exceptions to the conclusiveness of a foreign judgment in terms of Section 13 of the CPC.

### Challenge to Enforcement of Domestic and Foreign Awards

The recourse to challenging an award is provided for under Section 34 of the Act. One of the biggest blessings in favour of unsuccessful parties in domestic awards is the wide interpretation of “public policy” and “fundamental policy of India” by the Supreme Court in various judgments, although this also happens to be the biggest pitfall for the successful parties in arbitrations, which has attracted widespread international criticism.

The concept of automatic stay of operation of the arbitral award upon filing of a Section 34 petition has been done away with after latest amendments to the Act. For seeking a stay on the enforcement proceedings under the present regime, Sections 36(2) and 36(3) of the amended Arbitration and Conciliation Act (“the amended Act”) stipulate taking out a separate process by way of an application along with the Section 34 petition for setting aside the arbitral awards. In case of domestic awards, if an application under Section 34 of the Act has been unsuccessful, the Respondent can

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44 Prakash Bhagwani v. Sammati Food Products Pvt. Ltd. Sagar, AIR 2002 MP 127
45 Section 15 of the SICA, 1985
46 However, even under SICA, if the schemes fail, the decree holder may proceed under the Companies Act, 1956, under which recourse of winding up (Section 20, SICA) is available against such a judgment debtor, which is an insolvent company.
47 Section 13 provides for the following exceptions:
(i) It was not pronounced by a Court of competent jurisdiction- See Gurdyal v. Raja of Faridkot, (1895) ILR 22 Cal 222;
(ii) It has not been given on the merits of the case- See International Woollen Mills v. Standard Wool (UK) Ltd., AIR 2001 SC 2134;
(iii) It appears to have been founded on an incorrect view of international law;
(iv) The proceedings in which the judgment was obtained are opposed to natural justice;
(v) It has been obtained by fraud- See Sankaran Govindan v. Lakshmi Bharathi, AIR 1974 SC 1764;
(vi) It sustains a claim founded on a breach of any law, which is in force in India.
48 Section 34 of the Arbitration and Conciliation Act, 1996- grounds for setting aside the Award inter alia include incapacity of a party, invalidity of arbitration agreement, improper notice of constitution of Tribunal, award being beyond the scope of arbitral reference, improper constitution of Tribunal, award being in conflict with public policy of India.
50 As amended by the Arbitration and Conciliation (Amendment) Act, 2015
51 This amendment places an arbitral award for recovery of money at par with a money decree. As such, the execution/enforcement of an arbitral award may be stayed/ injunction subject to a conditional order of pre-deposit of the decretal amount or a part thereof, at the discretion of the Court.
The adjudication of Section 37 appeal or a Special Leave Petition may also be conditional to deposit of the awarded amount or a part thereof, at the discretion of the Court.

Section 26 of the Amendment Act provides that ‘nothing in the Amended Act shall apply to ‘arbitral proceedings’ commenced as per section 21 of the Act, before the commencement of the Amendment Act’, two conflicting decisions have been rendered by the Madras and the Calcutta High Courts. The Madras High Court in New Tirupur Area Development Corporation Ltd. Vs. M/S Hindustan Construction Co. Ltd (Application No.7674 of 2015 in O.P.No.931 of 2015- Madras High Court) held that Section 26 does not apply to post arbitral proceedings and therefore separate application needs to be filed u/s 36 (2) as required by the Amended Act to stay enforcement proceedings pending challenge to domestic award ((if award has been passed before Amendment Act came into force). These sections are applicable in the post arbitral proceedings and the procedures which are to be followed during the stage of arbitral proceedings and after it are very different. But the Calcutta High Court has given a conflicting decision in the case of Electro Steel Casting Limited v. Reacon (India) Pvt. Ltd. (Application No.1710 of 2015 decided on January 14, 2016) And held that where arbitral proceedings commences before the commencement of the Amending Act, the provisions of the Old Act would apply and enforcement would be stayed on filing an application u/s34 of the Act.

Application No.1710 of 2015 decided on January 14, 2016- Calcutta High Court

The Apex Court has also clarified that Section 48 of the Act does not permit to have a “second look” at the foreign award in the award enforcement stage (See Shri Lal Mahal Ltd. v. Progetto Grano SPA- (2014) 2 SCC 435). Therefore, a party seeking to challenge the enforcement of a foreign award must stick within the parameters of Section 48 of the Act and prove as to how for instance, is the arbitration agreement not valid, or the constitution of tribunal was invalid, or how the enforcement of the award would be opposed to the fundamental principles of public policy thereby rendering the award unenforceable.

A challenge to an arbitral award can only be sustained on the grounds provided for in Section 34 of the Act, and none other. An application for setting aside of the award therefore cannot be treated like an appeal arising out of a civil suit.

Resisting the enforcement of a foreign award is often misconstrued as a substantive challenge to the award. This is more so in view of the fact that the provisions of Section 48 are very similar to Section 34 of the Act. However, a party against whom, a foreign award has been passed, must, at the very least endeavour to challenge the award at the seat of the Arbitration, since that is the place where a substantive challenge to the Award lies.

Akin to resisting a foreign judgment, the enforcement of a non convention award can also be challenged by rebutting the presumption as to its conclusiveness.

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52 The adjudication of Section 37 appeal or a Special Leave Petition may also be conditional to deposit of the awarded amount or a part thereof, at the discretion of the Court.

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**Conclusion**

Litigating individuals and entities have a catena of options available to them for enforcing or challenging judgments and awards. With the diverse mechanisms available to the litigants, they tend to develop at times, a sense of adventurism and end up taking undesirable steps in the implementation/ resistance stage of their litigation.

Every successful enforcement is predicated by a well informed decree holder with sufficient intelligence on the judgment debtor. Such intelligence enables the decree holder to secure the enforcement of a decree even before it is passed.

In order to bring this ultimate and most crucial stage of litigation to fruition, a litigant should exercise his options carefully and then take appropriate steps before the Court so as to achieve the best possible result, whether it is for executing or enforcing the judgment, or it is for stalling and thwarting any attempts to enforce the judgment.
Money Laundering and CBI Investigations

Introduction

Money laundering happens in almost every country in the world, India being no exception. Various legislations like the Narcotic Drugs and Psychotropic Substances Act 1985, the Benami Transactions (Prohibition) Act 1988 and the FEMA 2000 etc. have been passed by the Indian government in the past to prevent money laundering in India. The most recent and comprehensive legislation enacted by the government for curbing money laundering problem in India is the Prevention of Money Laundering Act, 2002 ("Act" or "PMLA"). The same came into effect in 2005, and despite the legislation being in place for about 11 years, cases of conviction under the said law is rare. The 2G spectrum scam case against Mr. A. Raja & Ors., Saradha chit fund scam against Mr. Sudipta Sen & Ors. and the bank fraud case against Mr. Vijay Mallya are some recent examples wherein charges for money laundering (under the PMLA) have been framed. However, trial in the cases is ongoing and any major outcome is still awaited.

In the above context, the aim of this article is to throw some light on the concept of money laundering as understood in the Indian context, the provisions of the PMLA and to understand the nature and manner of working of the Central Bureau of Investigation with Enforcement Directorate for money laundering cases.

Money Laundering: its meaning and the process involved

Money Laundering is the conversion or “laundering” of money which is illegally acquired, so as to make it appear to have originated from a lawful source. Typically, 'black' to 'white', money laundering would involve massive amounts of money generated from illegitimate activities (viz. extortion, terrorism, gambling, selling of narcotic drugs or arms, illicit liquor trade, illegal gratification etc.), being put through a chain of processes (i.e. integrating into financial system, offshore and onshore wire transfers, commercial and investment activities) to camouflage it into becoming clean and legitimate money.

The FAQs on PMLA issued by Enforcement Directorate, Government of India, describe the process of money laundering to include three stages - Placement, Layering and Integration.

The first stage is that of Placement, wherein the Money Launderer (who has the money generated from criminal activities) introduces the illegal funds into the financial systems. This might be done by breaking up large amount of cash into less conspicuous smaller sums and depositing them into a bank account or by purchasing a series of instruments.
such as cheques, bank drafts etc., and subsequently depositing them into one or more accounts at another location.

The second stage of money laundering is layering. In this stage, the Money Launderer typically engages in a series of continuous conversions or movements of funds, within the financial or banking system by way of numerous accounts, so as to hide their true origin and to distance them from their criminal source.

Integration is the third stage of money laundering process, where the funds have reached the legitimate economy, and after getting inseparably mixed with the legitimate money earned through legal sources of income, the Money Launderer might then choose to invest the funds into real estate, business ventures & luxury assets, etc.

A Typical Money Laundering Scheme

The Prevention of Money Laundering Act, 2002
The PMLA was incorporated and enacted on 17th January, 2003 with the objective to prevent money laundering and its connected activities and for confiscation of "proceeds of crime". The Act has come into force with effect from 1st July, 2005. The PMLA (Amendment) Act, 2012 expanded the definition of “money laundering” by describing the kind of activities which if done vis-à-vis the proceeds of crime would constitute the offence of money laundering. Such activities include concealment, acquisition or use, possession and projecting or claiming of proceeds of crime. Pursuant to the said amendment, Section 3 of the PMLA defines the offence of “money laundering” as “whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting it or claiming it as untainted property shall be guilty of offence of money-laundering.”

**Proceeds of crime**

Proceeds of crime means any property derived or obtained, directly or indirectly, by a person as a result of criminal activity relating to money which is illegally acquired. It is noteworthy to mention that Section 5 (i.e. attachment of property involved in money laundering) of the PMLA is not restricted to a person accused of crime or involved in money laundering alone. Proceeds of crime in the hands of persons not involved in money laundering or accused of criminal offence can also be attached. Recently, the Enforcement Directorate urged the Delhi High Court to lift its stay on proceedings against Himachal Pradesh Chief Minister Virbhadra Singh's children (who are not named in the CBI investigation) arguing that the provisions of the PMLA operate even qua persons who conceal, possess, acquire, use and project or claim proceeds of crime, even if they may not be involved/accused in committing the offence.

**Jail is the norm, bail is an exception**

In India, the general rule is jail during the pendency of trial in money laundering cases and bail is only an exception. In terms of Section 45 of the PMLA, bail is not granted until the court is satisfied that there are reasonable grounds to believe that the accused is not guilty and that he is not likely to commit any offence while on bail. This finds support in a plethora of judgments including the recent case of *Gautam Kundu v. Manoj Kumar, Assistant Director, Eastern Region, ED (PMLA) Govt. of India*, wherein the Calcutta High Court rejected the bail application filed under Section 439 of Cr.P.C. on review of the antecedents of the petitioner, and on consideration of the manner of keeping accounts. The High Court was not convinced that the petitioner is not likely to commit any offence while on bail. The decision was confirmed by the Supreme Court.

**Who is/are liable?**

The PMLA (Section 70) provides for personal liability of the partner, Director and other responsible officers of the companies for activities covered under the Act. As per the said section every person who, at the time of the contravention was committed, was in charge of, and was responsible to the company, for the conduct of the business of the

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1. Mr. Radha Mohan Lakhotia vs The Deputy Director, Bombay High Court in First Appeal Nos.527 to 529 of 2010; C. Chellamuthu vs. Deputy Director, Prevention of Money Laundering Act, Directorate of Enforcement, Mumbai, reported as 2015 (12) TMI 1083.
2. 2016 Tax Pub (CL) 0039 (SC)
company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished under PMLA.

Defence

The exception to the above rule is that if a person can prove that the contravention took place without his knowledge, or that he exercised all due diligence to prevent such contravention.3

Investigating authority (ies) under the PMLA

The officers of the Directorate of Enforcement (“ED”) in the Department of Revenue, Ministry of Finance are responsible for investigating offences of money laundering under the PMLA. The powers of these authorities are wide and can include initiation of proceedings for attachment of property and launch of prosecution in the designated Special Court. Section 5 of PMLA allows the officers of Directorate of Enforcement to provisionally attach property believed to be involved in money laundering, for a period of 150 days. Subsequently show cause notice is issued under Section 8 of the PMLA to the accused which can be stayed only by way of filing a writ petition before the concerned High Court.

Punishment

Section 4 of the PMLA provides that any person who commits the offence of money laundering shall be punishable with rigorous imprisonment for a term between three years to seven years, and also be liable to fine which may extend to five lakh rupees. However, where the proceeds of crime involved in money laundering relate to any offence specified under the Narcotic Drugs and Psychotropic Substances Act, the punishment may extend to rigorous imprisonment for ten years.

Trial by Special Courts

Section 43 of the PMLA mandates that the Central Government shall, after consultation with the Chief Justice of High Court, for trial of offences punishable under Section 4 of the PMLA designate one or more Courts of Sessions as Special Courts for such areas or for such case of class or group of cases as may be specified in the notification. The offence of money laundering shall be triable only by such special courts constituted for the area in which the offence has been committed.

Central Bureau of Investigation led investigations and Money Laundering cases in India

The Economic Offences Division/Wing (“EOW”) of the Central Bureau of Investigation (“CBI”) investigates financial crimes, bank frauds, money laundering, illegal money market operations, graft in Public Sector Undertakings and Banks. In 2013, the CBI carried out investigation and later a charge sheet for a case of money laundering (under the PMLA) was filed against former Jharkhand Minister Mr. Anosh

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3 Section 70 (1) of the PMLA.
Ekka, based on which the Enforcement Directorate attached properties estimated worth Rs.100 crore. Similarly, based on a CBI probe, the Enforcement Directorate recently attached assets worth nearly Rs 5.80 crore belonging to Mrs. Pratibha Singh and Rs 1.34 crore of Mr. Virbhadra Singh, former Chief Minister of Himachal Pradesh.

**Arrest outside India**

When the occasion arises, CBI has the authority to affect arrest and arrange extradition/deportation of an accused from a foreign country. India is a member of the International Criminal Police Organization (“**INTERPOL**”) which presently consists of 190 member countries, which includes countries like United States, United Kingdom, Hong Kong, China, Canada, to name a few, who have agreed to "ensure and promote the widest possible assistance between all criminal police authorities in the prevention and suppression of ordinary law crimes". Recently, Enforcement Directorate had requested the INTERPOL to notify a red corner notice against Mr. Vijay Mallya in a case registered under the PMLA for over Rs. 900 crore IDBI loan fraud investigated by the CBI. Similar demand for issuance of red corner notice by the INTERPOL was also made by the Enforcement Directorate in the money laundering probe against Mr. Lalit Modi.

**Conclusion**

Money Laundering is increasingly becoming a major concern for India and therefore the Indian government has come up with various legislations in the past to tackle the problem. The PMLA is the latest attempt of the government of India at handling the money laundering situation in India. However, in spite of few amendments made to the PMLA it is observed that the money laundering investigations led by the Enforcement Directorate or the CBI have mostly led to arrests and attachment of assets but not convictions. Money Laundering is increasingly becoming a major concern for India and therefore the Indian government has come up with various legislations in the past to tackle this problem. Several factors including lengthy trials, shortage of staff in the prosecution agencies, lack of co-ordination between the investigating/prosecuting agencies in India are some of major impediments in the path to convictions in money laundering cases. The Satyam case is a clear example where the case got delayed due to lack of co-ordination between the CBI and the ED. Due to the row between the two agencies, the filing of the ED’s chargesheet got delayed by nearly five years.
problems relating to co-ordination between agencies arise even at the time of seeking deportation of accused persons from abroad. Most money laundering cases have a foreign link to them and prosecuting agencies in India face difficulties in collecting evidence from outside when there is inadequate co-operation from outside agencies. For instance, in the cases of Vijay Mallya and Lalit Modi, the ED requested the Interpol to help arrest them for deportation to India so that requisite information/evidence which may have its source abroad could be gathered. However, any such arrest is still awaited and in the absence of the evidence lying abroad, the chances of their conviction may remain a distant dream for the CBI and the ED.
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