

Emerging Trends

– New Frontiers In Dispute Resolution



cyril amarchand mangaldas
advocates & solicitors

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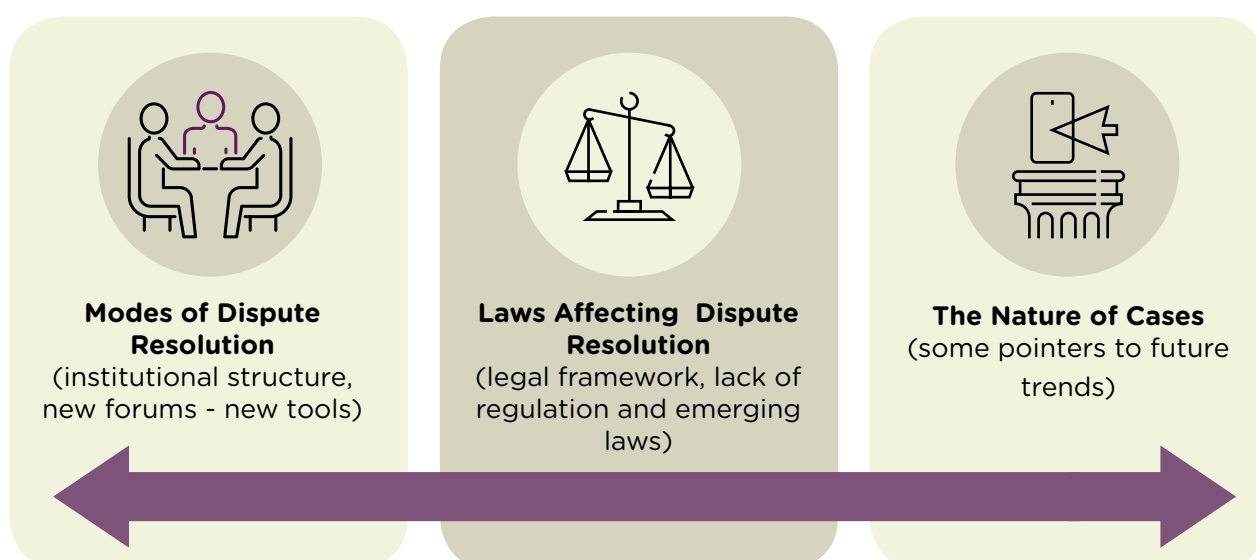
Brief Background

With the maturing of the economy and our society and the speed of modernization in all spheres contractual obligations have expanded accordingly. Dispute resolution mechanisms have to evolve over time to take into account these changes. It has been a process of gradual evolution in all aspects covering the mode of dispute resolution, the laws affecting it and the nature of cases.

One of the strengths of democracy is that it can take a fresh look at itself in order to keep pace with changing

times. The Indian legal system has always been able to adapt to the changing society. The law has changed because of globalization, development of technology and the evolving society.

This article will focus on some selected emerging areas and the impact these changes will have on the traditional areas of practise while dealing with new avenues for dispute resolution. We will look at some of the principal trends likely to be shaped by new influences as they emerge and mature:



Trend 1: Mode of dispute resolution (institutional structure, new forums - new tools) – The traditional method of practise i.e. court proceedings has seen a gradual change. Some changes have been made even to ease the pressure on courts (back log of cases) by the setting up of new forums (specialized courts and tribunals). Under this head we will look at some of the changes that have taken place in the mode of dispute resolution like litigation (commercial courts act, class action), arbitration (amendments to arbitration act) and new tools like mandatory pre-suit mediation and online dispute resolution.

Trend 2: Laws affecting dispute resolution (legal framework, lack of regulation and emerging laws) – The government has been concerned with the issues

of the economy and rapid development of technology including the failure of proper regulation. The government has taken steps keeping in mind the new challenges that are taking place in line with the nature of disputes. Under this head we will discuss some new changes in laws like the new economic offenders act, new areas of disputes under the criminal laws relating to online space (fraud), the space bill, the privacy bill, insolvency laws, social legislations like surrogacy, and issues of liability surrounding new areas of technology (drones and driverless cars) and climate change.

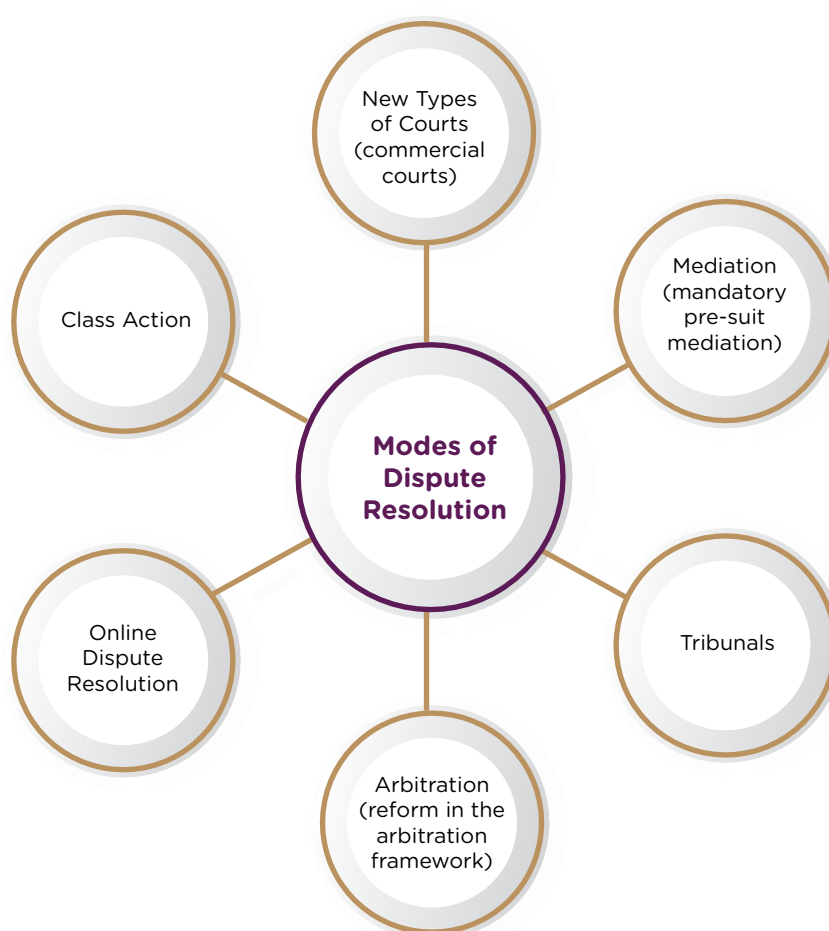
Trend 3: Nature of cases (some pointers to future trends) – The Supreme Court does not work in isolation. As the country has developed certain issues have been thrown up from time to time. The courts



have responded to the issues of each time. We will see some of the highlights of this journey and show how the court is responding to the new challenges today

and some future trends that the court may be faced with as the economy develops rapidly.

Trend 1: We will deal with the first trend which is the mode of dispute resolution. This aspect has seen a gradual change. The traditional method of dispute resolution like litigation and alternative dispute resolution mechanism have remained the same, however the government has introduced urgent reforms in these areas to ensure speedy and new ways of resolving disputes.



Setting up of commercial courts: Litigation is time consuming and has placed pressure on the court system. In order to address the issue of pendency of cases, the government introduced the commercial courts act, which contemplates time-bound resolution of commercial disputes by judges with specialized commercial expertise.

Arbitration is an efficient method of dispute resolution, however there has been interference by

Indian courts in arbitration matters on a variety of issues. This has been coupled with the fact that most domestic arbitrations were ad-hoc arbitration. With the uncertainty in the law relating to arbitration and the constantly changing legal regime the law commission suggested major reforms to the Indian arbitration act. The amendments to the arbitration act include strict timelines for completion of arbitration proceedings, reduced judicial interference in the process and making enforcement of the arbitral award easier.

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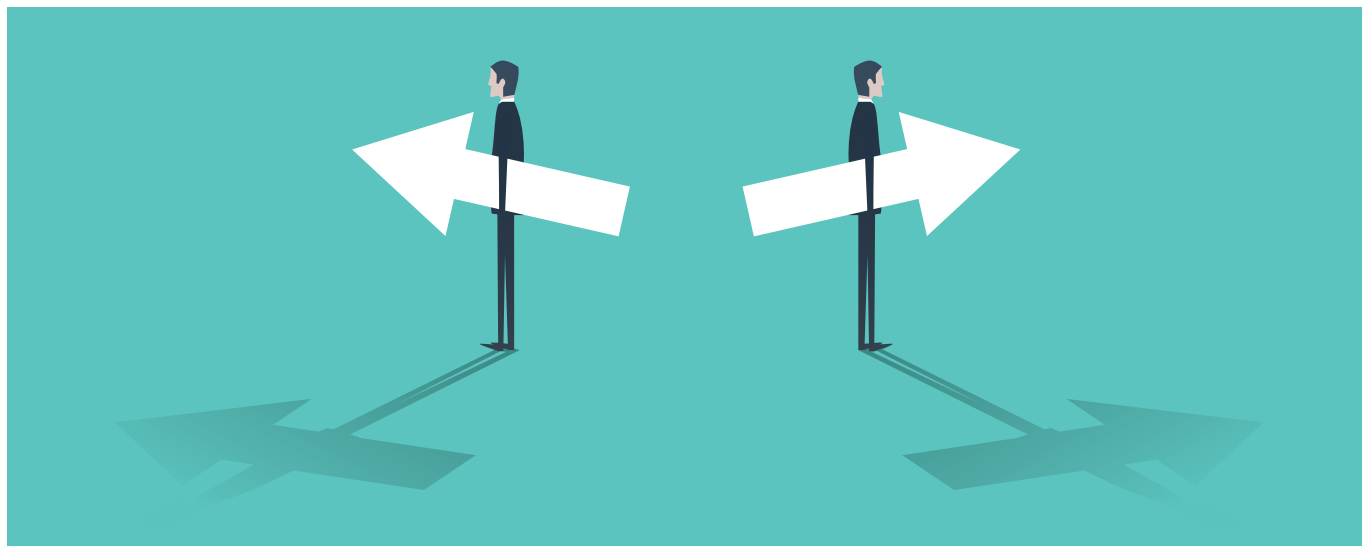
Mediation has emerged as an important tool to resolve commercial disputes in an amicable manner. The government has introduced an amendment in the commercial courts act which mandates a pre-suit mediation in commercial disputes. However, this amendment does not apply in cases where a party is seeking urgent interim relief. The government has also sought to make the mediation process more meaningful by making the settlement agreement arrived at between the mediating parties enforceable in the same manner as an arbitral award.

Tribunals have emerged as an important parallel structure to the court system for quick and technical resolution of disputes in certain areas of law. The government set up tribunals in different sectors like telecom, environment, anti-trust, electricity because of globalization and the development of technology. Recently the government has set up the national company law tribunal in different states. The NCLT has been instrumental in speedy resolution of disputes under the insolvency and bankruptcy regime. The government has also consolidated the powers in the NCLT by transferring company cases (under the erstwhile CLB), winding up proceedings which were before the high court and disputes under the BIFR to NCLT. The NCLAT which is the appellate forum also decides appeals relating to matters from the competition commission.

Online Dispute Resolution is an alternative dispute resolution technique that uses the internet as an interface to resolve disputes. The use of online techniques in the dispute resolution process such as submission of pleadings through email, videoconferencing for case hearings etc. facilitates convenient, cost-effective and expeditious resolution of disputes. Even though online dispute resolution may include the mechanisms of institutional alternative dispute resolution it is a step further for fast-track dispute resolution. This has in some way been introduced in matrimonial and mediation matters.

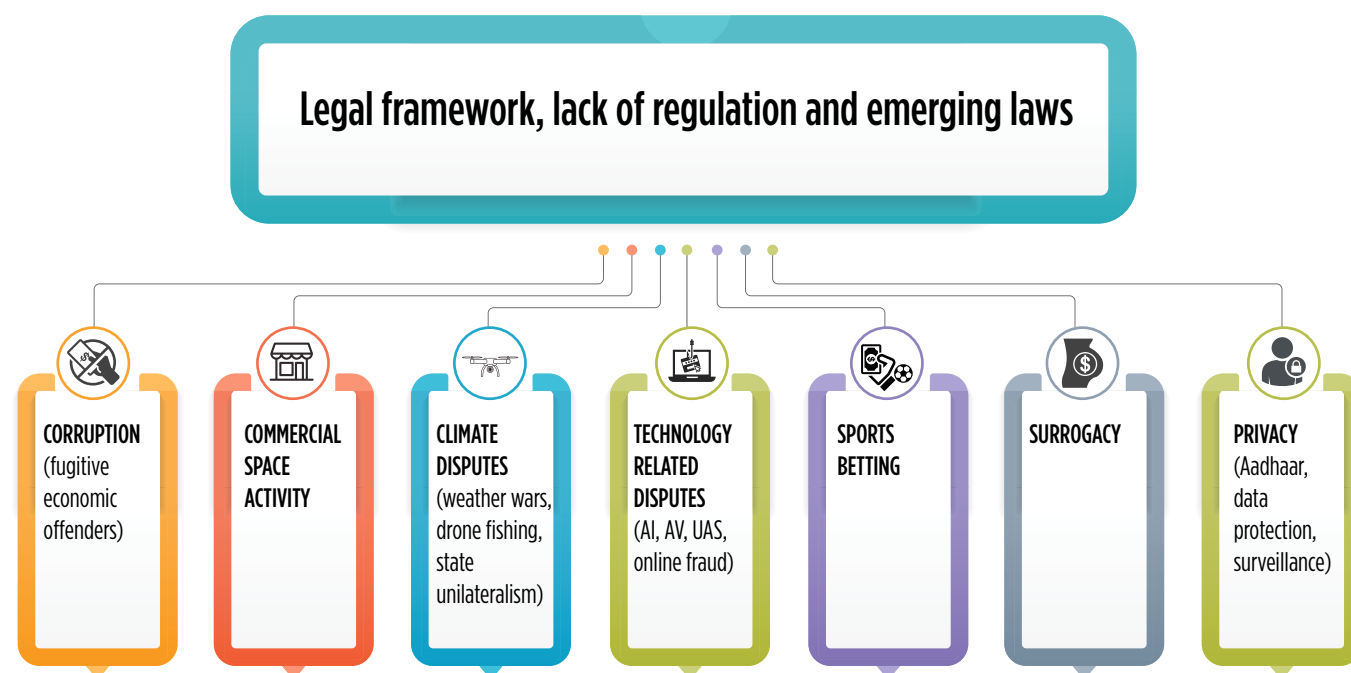
Class Action suits may be initiated in case of a mismanagement of a company and may be filed by a class of shareholders. Though class action has been introduced in the companies act a few years back but it has not taken off as in other jurisdictions.

The courts have generally been pro-reform. While the modes of dispute resolution have changed gradually, however due to the emergence of new technology and new areas requiring regulation, the government has introduced reforms in the modes of dispute resolution to address the growing needs of the economy. While the specialized tribunals, mandatory pre-suit mediation, reform in the arbitration framework and the commercial courts have reduced the burden on the court system, however more needs to be done.





Trend 2: Some of the distinct legal trends have emerged due to the changing social norms, increase in use of technology in every aspect of our lives and development of the economy.



Corruption and fugitive economic offenders - After a multi-crore bank fraud, the government introduced the fugitive economic offenders act recently to penalize an individual who is either absconding to avoid criminal prosecution or is abroad and refuses to return to India to face criminal prosecution. Once a person is declared as a fugitive economic offender, that person loses the right to defend in a civil proceeding in India. The special courts have the power to confiscate the property of the fugitive economic offender. The court appoints administrators to manage the confiscated property. The administrators have the power to satisfy creditors' claims as well.

Commercial Space Activity - The government has introduced the draft space activities bill recently. The bill is aimed at encouraging private sector participation in India's space program like manufacture of space infrastructure (space craft), space transportation system (types and classes of

launch vehicles and associated ground infrastructure) and space applications (coordination mechanisms – software) for various national requirements. Being a nascent sector with only a few entities that possess the required technical capabilities, the government proposes to encourage and regulate the sector by providing licenses for commercial space activity. Once the gates of private investment are opened in the space sector, it would be one of the biggest avenues of commercial disputes in the future.

Technology related disputes - The society has evolved due to the rapid advancement of technology. In this section, we will deal with few new technology driven areas which presently have little to no regulation and have the potential for disputes to arise in the future.

Artificial intelligence and driverless vehicles: An autonomous vehicle or a driverless vehicle uses artificial intelligence, sensors and global positioning

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system coordinates to drive itself without the active interaction of human operator.

With autonomous vehicles becoming a reality, liability issues (including compensation) in case of accidents have to be regulated. In conventional (human driven) cars, the answer is simple, the driver is responsible because they are in control. However, there is no straight formula for determining liability in the case of automated vehicles. Determination of liability depends on the level of automation adopted in the vehicles. For partially autonomous vehicles which still involve human control, assignment of liability depends on what action led to the collision and whether it was based on decisions by the driver or the artificial intelligence. For fully autonomous vehicles the blame can be assigned to or shared by one of many parties – including the manufacturer, the service centre and the vehicle owner. Manufacturers may be liable because the vehicles may have had an accident due to the failure in its system or a glitch in the software. On the other hand, liability for negligence might also fall on the owner for failing to implement a software update. Since the determination of liability in accidents involving automated vehicles is complex, there is a requirement to enact appropriate legislation.

Drone technology: The commercial applications for unmanned aircraft systems (UAS) or drones are limitless. The US government use drones to supplement existing practices, such as assessing road conditions or conducting search and rescue missions.

In India, the state of Maharashtra is considering the use of drone mapping for irrigation and improving agricultural output in drought hit areas and delivery – in health schemes and vaccination. The Central government is also using drones for 3D digital mapping of national highways for its various road widening projects.

The Directorate General of Civil Aviation (DGCA) has recently introduced regulations (Drone Regulations)

for the operation of private drones. To operate a drone, recreational flyers will have to comply with certain civil aviation requirements, including obtaining a Unique Identification Number (UIN) and Unmanned / Aircraft Operator Permit (UAOP). The operators would only be able to operate the drones within their line of sight and not more than 200 feet away. They would also have to inform the local police authorities before undertaking indoor flying activities. Further, import of drones is restricted and requires prior clearance from the DGCA and an import license from the Directorate General of Foreign Trade (DGFT). Any breach of compliance with any of the requirements will invite penal actions and imposition of penalties as per the Indian Penal Code.

Sports Betting - Presently, there is no central statute which regulates sports betting in India. The Law Commission of India (276th Report) has recommended legalisation of betting and the formation of a central law to regulate sports betting.

The Law Commission Report also noted that Sikkim is the only state which had introduced the Sikkim Online Gaming (Regulation) Rules, 2009 for allowing online sports betting and further, introduced Sikkim Online Gaming (Regulation) Amendment Act, 2015 which restricted sports betting only to parlours through internal gaming terminals within the boundaries of the State of Sikkim. The unregulated sports betting industry in India involves a lot of money and if left unregulated it may give rise to issues of a criminal nature.

Climate Related Disputes¹ - Climate change has the potential to disrupt lives and economies and is one of the biggest threats facing underdeveloped and developing countries. We will deal with some of the concerns relating to climate disputes which may arise in the future.

Weather wars: With increase in technology, there is potential for deployment of weather manipulation

¹ Global Risks Report 2019; World Economic Reform



tools such as cloud seeding to suppress or induce rain. Aside from various environmental consequences, at a time of ever-increasing geo-political tensions, there are concerns that their deployment could be viewed as hostile. For example - a neighbouring country might see large-scale cloud-seeding as theft of rain or the reason for a drought.

State Unilateralism (pulling out of a convention):

Political factors might disrupt efforts for climate change. This was highlighted last year when President Trump announced plans to withdraw the United States from the United Nations framework Convention on Climate Change (Paris Agreement). Such disagreement between nations regarding climate change can become an area of potential conflict in the future.

Drone fishing: Environmentalists have been alarmed by the rapid depletion of marine life due to fishing. There is potential for conflict between countries relating to the use of drones by the large-scale trawler fishing to map the movement of aquatic life.

Unmanned flying or floating objects are not mentioned in maritime international codes and conventions. Therefore the topic is subject to uncertainties and interpretation. Large scale fishing efforts using the aid of drones near the territorial waters or coast of a particular country may result in depletion of the maritime ecosystem belonging to that country. This in turn, could place pressure on the local fishing industry and ecosystem and lead to disputes between neighbouring countries regarding sharing of scarce natural resources.

ICC Task Force on the Arbitration of Climate Change related Disputes:

The International Chamber of Commerce (ICC) has recently constituted a task force to explore the future role of arbitration in climate change related disputes. Though, arbitration is more common in commercial disputes, the climate change related disputes often involve multiple claimants, legal systems and a large quantum. Therefore, arbitration could be the preferred dispute resolution mechanism

over court litigation for resolution of these disputes. Another, development which is likely to occur is the inclusion of climate change in treaties so as to address any investor – state disputes which may occur due to climate change.

Criminal laws in the online space (cybercrime and online fraud) -

Recently, a gang of Chinese fraudsters and hackers stole INR 130 crores from the Indian subsidiary of an Italian company by sending emails to the Indian management through an email account that was deceptively similar to that of the group CEO, who is based in Italy.

The fraudsters arranged a series of conference calls to discuss a possible acquisition in China, and the transaction was represented to be highly confidential. Several people played various roles during these calls, pretending to be the group CEO, a top Switzerland-based lawyer and other senior executives of the company, according to a complaint submitted to the Mumbai Police's cybercrime unit. The hackers convinced the India head of the company that the money for the acquisition could not be transferred from Italy due to regulatory issues and therefore, the money was transferred from India to various Chinese bank accounts, which were set up fraudulently, and from which the transferred money was withdrawn immediately.

Cases like the above illustrate the increasing role of technology in criminal activity and the need to have adequate systems in place to safeguard against cyberattacks. In the present case, forensic investigation has revealed that the email systems of the company had been penetrated by the hackers, which allowed them to successfully impersonate the officials of the company, including by drafting emails in a style similar to that of the group CEO.

Privacy - The large-scale collection and use of personal biometric information by the government and the private sector for targeted delivery of services (such as Aadhaar) has created concerns in the civil society. Protection of data and surveillance by the

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government have resulted in litigation by the civil society in larger public interest. A nine judge bench of the supreme court in K. S. Puttuswamy case held privacy to be a fundamental right, including the privacy of personal data. We list below some of the privacy related developments.

Aadhaar: In a challenge before the supreme court regarding the use of aadhaar cards in verification was challenged before the supreme court. A five judges bench of the supreme court upheld the validity of the aadhaar act, with restrictions on use of aadhaar information by the private sector.

The Central government has now introduced a bill (amending the Aadhaar Act) to allow private entities to use Aadhaar information for verification. However, the private entity must obtain prior approval from UIDAI, which must be satisfied that the private entity has complied with standards of privacy and security.

Data Protection: The Central government has also introduced the personal data protection bill recently, which seeks to regulate intrusions into the privacy of an individual which may be caused by the processing and use of personal sensitive data by the government and private entities. The bill also provides that the person whose data will be processed must give clear consent for the processing of such personal sensitive data. However, the individual's consent may not be needed where data processing is done in the interest of national security, or for legal proceedings or for journalistic purposes.

Surveillance: Recently, the Central government issued an order dated December 20, 2018 under Section 69 of the information technology act authorising security and intelligence agencies to intercept or monitor information through computer resources.

The notification has been challenged in the Supreme Court by way of a batch of public interest litigations on the ground of infringement of fundamental rights due to unfettered powers being placed in the hands of intelligence agencies.

Commercial Surrogacy - The government and courts have been concerned with reform and regulation in social and personal laws in the past few years, to reflect the needs of a changing society. In the past decade, India had emerged as a hub for surrogacy related fertility tourism due to the availability of low-cost commercial surrogates and excellent medical care.

In August 2017, the 102nd Parliamentary Report by a Rajya Sabha Standing Committee had stated that the potential for exploitation of surrogate mothers is linked to the lack of regulatory oversight for the protection of surrogates.

However, the surrogacy (regulation) bill which is pending in Parliament seeks to promote a stringent regime whereby commercial surrogacy is completely banned and altruistic surrogacy is being promoted for intending couples through close relatives only. The bill also provides for a regulatory structure to oversee the surrogacy industry, including the clinics and medical professionals undertaking procedures, by making registration and licensing compulsory. The bill also lays down stringent punishments for violation of its provisions, including imprisonment for commercial surrogacy for a period extending up to ten years with fine.

The bill has been criticized for restricting surrogacy only to married couples who are infertile and not allowing unmarried people or LGBT couples to reproduce through surrogacy. The bill permits only a close married female relative who has her own child to be the surrogate mother. The complete ban on commercial surrogacy also seems more harmful than good, as it has the potential to drive the commercial surrogacy industry into the black market. Instead, the onus should be on the government to create a framework for commercial surrogacy that eliminates exploitation.

Trend 3: The Supreme Court has evolved over time both in terms of administrative aspects and its jurisprudence. On the administrative side the court is still struggling with the appointment of judges through



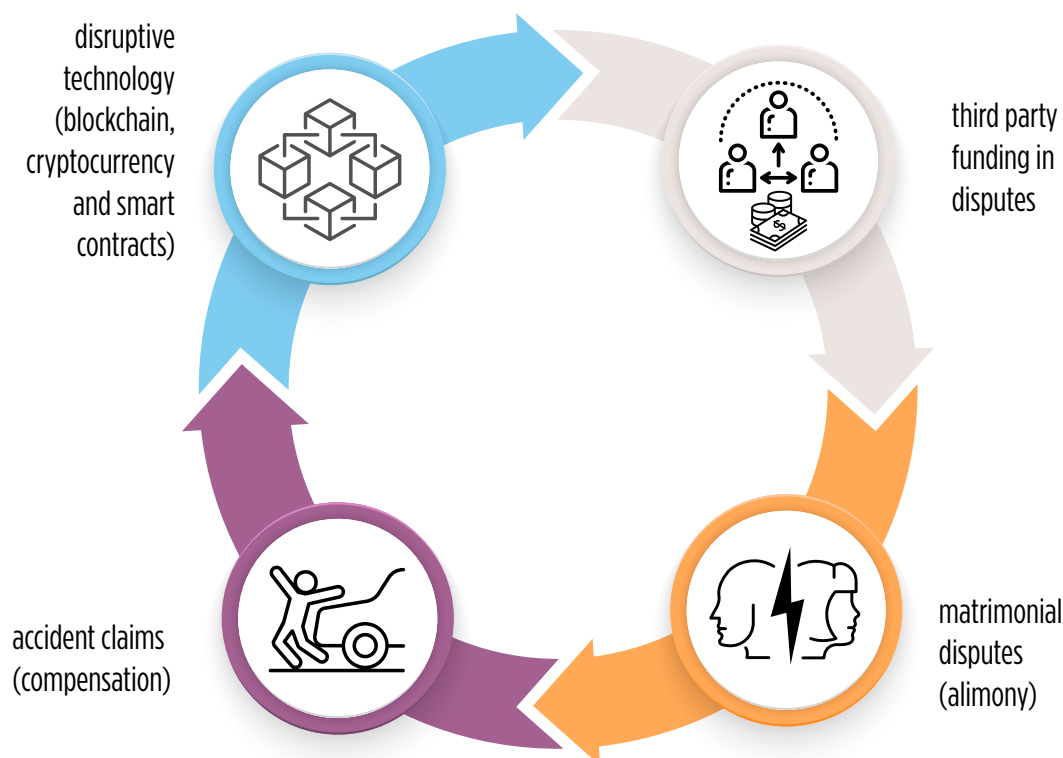
a collegium system which is an independent process with no interference from the executive. However, the appointments through this system have recently been criticised by many because of the lack of transparency and arbitrariness in appointments. The government had a few years back proposed a National Judicial Appointments Commission (NJAC) for appointment of judges through a process which was struck down by a five judges bench of the Supreme Court as being unconstitutional and impinging on the independence of the judiciary.

On the jurisprudence side the court has been concerned with the issues of the economy and failure of proper regulation and policy making. The court has recently dealt with issues of corruption that are rampant, social issues concerning womens' rights, child rights and human rights and has also struck down laws made

by parliament which are arbitrary. On the technology side the court struck down a section of the IT act which provided for arrest for posting offensive content on the internet.

If you see some of the past trends that we have cited it would show that courts are responding to the general feeling that high profile corruption cases have not been properly investigated. Some of the social trends reflect the concerns of that time. The court has struck down legislations which are against the basic structure of the Constitution by upholding the rule of law, by exercising its power to judicial review and by protecting the right of the independence of the judiciary. Though the judiciary has been at the forefront of criticism by the media and civil society it has still been active and has passed decisions and has stepped up when the executive has failed.

Some pointers to future trends:



² RBI White Paper; Applications of Blockchain Technology to Banking and Financial Sector in India; January 2017

³ RBI White Paper; Applications of Blockchain Technology to Banking and Financial Sector in India; January 2017

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Blockchain, cryptocurrency and smart contracts:

Because of modernization the contractual obligations are also rapidly changing. Blockchain technology and smart contracts seems to be one of the recent ways of doing business between parties. In its most abstract form, a blockchain may be described as a tamper-evident ledger shared within a network of entities, where the ledger holds a record of transactions between the entities . One of the prominent uses of blockchain technology is in the area of cryptocurrency. Currently India does not allow the use of cryptocurrency like bitcoin by the traditional banking system. However, a few public interest litigations have been filed against the reserve bank's decision to ban the use of cryptocurrency, which are currently pending in the courts. Smart contracts are pieces of software that extend blockchain technology's utility from simply keeping a record of financial transaction entries to automatically implementing terms of multi-party agreements . India does not have a law regarding blockchain technology and smart contracts. The law of contracts and IT may not be sufficient to deal with issues arising out of such transactions. In case of any lack of regulation the court will have to step up and look at issues arising out of such contracts.

Third party funding: Another area which we feel the court may start looking at would be third party

funding in disputes. There is no regulation in India which prevents third party funding nor any regulation that allows it. However recently the supreme court while dealing with issues of foreign lawyers held that the Indian advocates act does not bar third party funding. The court in this case was not dealing with the issue of third party funding but it definitely sets the stage for companies to get their awards / judgments enforced in countries where the enforcement regime is weak or it is not a reciprocating territory.

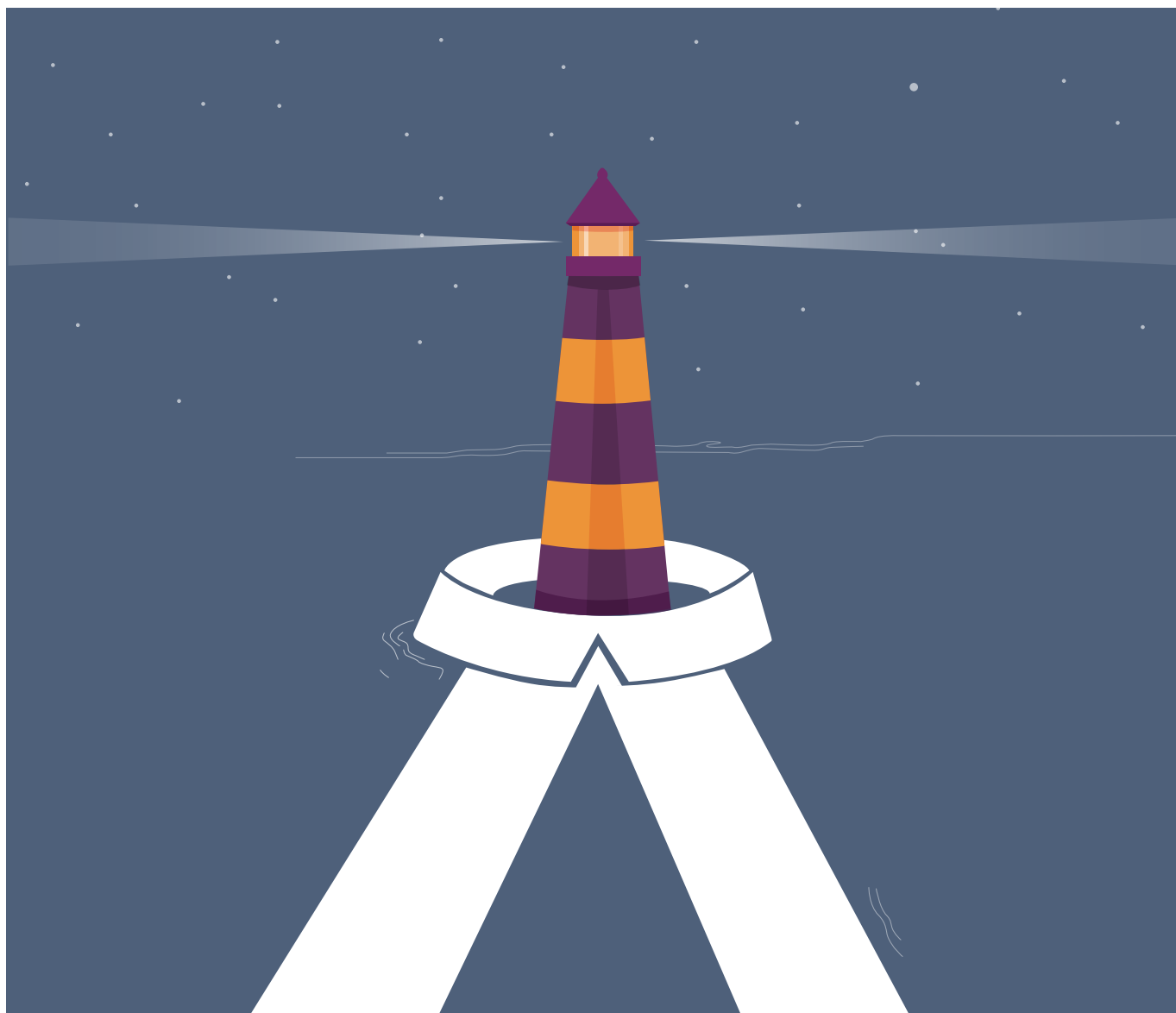
Compensation in accident claims and alimony:

As the Indian economy is developing at a fast pace, the standard of living is also moving up steadily. Compensation in India in accident claims and alimony has always been low compared to many developed countries in the world. However, matrimonial alimony and accidental claims may see a rise in compensation standards. These will be some of the trends that we may see in the courts. This trend is slow but may pick up as one of the emerging areas of disputes like other developed countries.

These are some of the pointers to the future trends and courts may be dealing with new issues, new ways of doing business and new laws. The courts will respond to the changes that are taking place due to the emergence of new technology, lack of regulation and evolving society.

CONCLUSION

As may be seen from the foregoing review there has been change in the legal system but it has been slow and a gradual process, however pace of change in technology, pace of social change and maturity of the Indian economy are pushing the system to respond faster. We need to consider what major changes in the near future can be made that will help us to deal with these major trends.



Contributed by:

Gauri Rasgotra, Partner

Omar Ahmed, Partner

George Varghese, Senior Associate

Siddhant Sharma, Associate

DISCLAIMER:

This article is not intended to serve as legal advice and the position of law expressed in the article is only valid as on 20th February 2019.



cyril amarchand mangaldas
advocates & solicitors

www.cyrilshroff.com

mumbai

peninsula chambers,
peninsula corporate park,
gk marg, lower parel,
mumbai – 400 013.
t: +91 22 2496 4455
email: cam.mumbai@cyrilshroff.com

new delhi

4th floor, prius platinum,
d-3, district centre,
saket,
new delhi – 110 017.
t: +91 11 6622 9000
email: cam.delhi@cyrilshroff.com

bengaluru

201,
midford house,
off. m. g. road,
bengaluru – 560 001.
t: +91 80 2558 4870
email: cam.bengaluru@cyrilshroff.com

ahmedabad

shapath -v, 1304/1305,
opp. karnavati club
s.g. road,
ahmedabad – 380 051.
t: +91 79 49039900
email: cam.ahmedabad@cyrilshroff.com

hyderabad

8-2-622/5/a, 3rd floor, indira chambers,
road no. 10, banjara hills,
hyderabad – 500 034,
telangana.
t: +91 40 6730 6000
email: cam.hyderabad@cyrilshroff.com

chennai

2nd floor, asv chamiers square,
87/48, chamiers road,
r. a. puram,
chennai – 600 028.
t: +91 44 6668 4455
email: cam.chennai@cyrilshroff.com

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