DEALING WITH THE BACKLOG OF CASES IN INDIAN COURTS

By Neerav Merchant

The pivotal role of a judicial system is to maintain the rule of law and to deliver justice in an expeditious manner. The Indian judicial structure is constituted of the Supreme Court of India (the “Supreme Court”) at the top level, the High Courts at the state level (the “High Courts”), the subordinate courts at the district level and other specialized courts and tribunals. Unfortunately, all these courts put together have not been able to address the accumulation of pending litigation cases in India. As per the recent quarterly news report issued by the Supreme Court it is distressing to note that the data accumulated from January 1, 2014 to March 31, 2014 reflects that 4,479,023 cases were pending in the High Courts, and 27,360,814 cases were pending in the district and subordinate courts in India.

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Congratulations to All Organizers, Panelists and Participants for their Successful Conference on

India-United States Cross Border Investment 2.0: Counseling in Reform Environments

Organized by the Society of Indian Law Firms & the American Bar Association, Section of International Law
February 17-19, 2016 at the Hyatt Regency, New Delhi
D
ing business in India is a Catch-22. On the one hand, multinational corporations are excited about the huge potential of the country’s young demography and its galloping middle-class consumerism. On the other hand, foreign investors and multinational corporations shiver at the very thought of being wrangled in a legal dispute in Indian courts. The backlog of India’s courts presents a challenge that is worthy of Hercules’ fifth labor of cleaning the Augean Stables. As of 2015, Bloomberg Businessweek has calculated that it will take India’s judicial system 35 years to catch up if it continues at its current pace. The country’s court system has become a stage where real life *Jarndyce v. Jarndyce* cases play out. The Dickensian warning rings true of Indian courts: “Suffer any wrong that can be done you rather than come here!” However, in the midst of chaos there lies hope. India has made strides in developing alternative dispute resolution mechanisms. In this context, I am delighted to present this rather timely edition of the India Law News of the India Committee with a special focus on Alternative Dispute Resolution. True to our publication’s tradition, I am proud to introduce a stellar line of authors who have contributed articles on the issue of litigation and alternative dispute resolution mechanisms in India.

In the first article, **Neerav Merchant**, of Majmudar & Partners, delivers a summary analysis of the factors that are causing the backlog of India’s courts and also offers some possible solutions. He highlights frivolous litigation, cumbersome law processes, and a serious drought of quality judges across India as areas where solutions may be implemented. A holistic reform of India’s courts may take a long time to unfold—however it is crucial to keep the conversation fluid so there may be lasting change.

In the second article, **Arjun Gupta, Sahil Kanuga** and **Vyapak Desai** of Nishith Desai Associates offer a sweeping overview of litigation and dispute resolution in India. The article offers an excellent primer on India’s court system, general hierarchy of Indian courts and the common litigation practices. The authors also shed light on the dispute resolution mechanisms available in India and the role of the Indian judiciary in shaping the country’s alternative dispute resolution mechanisms, especially arbitration. One of the lesser known facts on Indian legal landscape is the Indian Judiciary’s turnaround on the arbitration front. As the authors point out, the Supreme Court of India has come a long way since its decision in Bhatia and with the Balco decision, the Court has signaled the dawn of a non-interventionist policy by Indian courts in foreign arbitrations.

Continuing the discussion on arbitration, **Zerick Dastur** and **Ashlesha Srivastava** of J. Sagar Associates, offer a bird’s eye view of arbitration in India. The authors discuss how Indian courts have historically construed arbitration agreements and offer key pointers in drafting arbitration clauses. The authors also shed some light on the intriguing aspect of Indian judiciary’s pronouncements on the arbitrability of disputes involving allegations of fraud in India. The authors point out that the evolution of arbitration is ongoing in India—so will be imperative litigators keep abreast of changes.

The final article in this issue focuses on arbitration of antitrust claims and contains a comparative study of the laws of the United States, European Union and India. **Rudresh Singh** and **Deeksha Manchanda** of Luthra & Luthra Law Offices review the law with respect to arbitrability of antitrust disputes in the U.S. and the E.U. Interestingly, the authors examine Indian law and public policy to see whether antitrust claims can be decided by an arbitral tribunal. Competition law landscape in India, while a nascent area, is a fast evolving
practice area. While arbitration of antitrust issues doesn’t seem to be feasible in the near future, the topic promises to be of interest to foreign lawyers and Indian jurists and practitioners.

This issue also includes a general interest article entitled “Improving The Ease of Doing Business in India” by Sunil Tyagi and Nilima Pant of Zeus Law

These are exciting times for a legal practitioner focusing on alternative dispute resolution mechanisms. India offers several creative tools to an ADR practitioner: arbitration, conciliation, and mediation. These mechanisms are an asset to litigators who are unable to make headway through the backlogged court system. While the country’s dispute resolution mechanisms are dynamic and will continue to develop to meet India’s changing needs, what’s clear is that these mechanisms are here to stay.

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The India Committee is pleased to present India Law News’s latest edition focused on Alternate Dispute Resolution. This issue includes articles on: (i) Dealing With The Backlog Of Cases In Indian Courts, (ii) An Overview of Litigation and Dispute Resolution In India, (iii) Arbitration in India: A Bird’s Eye View, (iv) Arbitration of Antitrust Claims: A Comparative Study of the Laws of the U.S., E.U. and India. This issue also includes a general interest article entitled “Improving The Ease of Doing Business in India.”

We, at the India Committee would like to express our sincere appreciation and gratitude to our Editor-in-Chief, Bhalinder Rikhye and the entire editorial board for their untiring efforts in putting together the India Law News, as well as to Ashish Joshi, who served as our Guest Editor, and thank you also to all the authors.

Continuing our commitment to building bridges between the U.S. and the Indian legal communities, the India Committee was involved in the recent successfully completed legal conference in New Delhi, India—United States Cross Border Investment 2.0: Counseling in Reform Environments. The conference was sponsored by the Society of Law Firms (SILF) and co-sponsored by the American Bar Association (ABA), Section of International Law on February 18-19, 2016. (The conference announcement appears on page 45 of this issue.)

The conference presented a unique opportunity to participate in substantive programming on topics of interest to U.S. and Indian lawyers counseling clients in cross border investments and transactions. We were privileged to have the ABA President, Ms. Paulette Brown and the U.S. Ambassador to India, H. E. Richard Verma, as Guests of Honor.

Speakers included Indian government officials, U.S. and Indian private practitioners, Indian and U.S. in-house counsel, and there were many opportunities to meet and mingle with old and new friends.

We sincerely thank all organizers, panelists and participants and hope the conference helped in our efforts to strengthen the bonds of friendship and relationships amongst our legal communities.

Best wishes for a happy and healthy 2016 to all our readers.

James P. Duffy, III
Richa Naujoks
Shikhil Suri
Dealing With the Backlog Of Cases In Indian Courts

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Separately, according to data published by the Supreme Court, as on March 1, 2015, 61,300 cases were pending in the Supreme Court. See Supreme Court, Court News, IX (2) (2014). This backlog can be attributed to various causes, including the massive population in India, the filing of frivolous litigations and the inadequate strength and lack of training and self-discipline in the judiciary. The result of this backlog is the denial of justice to litigants and the creation of an unwelcoming atmosphere for commercial activities and foreign investments in India.

This article attempts to delineate the causes for the backlog in the Indian judicial system, and it also discusses possible solutions to curb such backlog.

Factors Causing the Backlog And Possible Solutions

Frivolous Litigation

In India, parties often file frivolous proceedings that lack merit and which are solely aimed to frustrate a remedy that may be available to the other side, to extract money or benefit from their opponent, or to obtain a favorable settlement. The High Court of Delhi recently noted that considerable litigation is frivolous in nature. The Court said such cases may be initiated upon inappropriate legal advice or may be purely speculative in nature. See Purnima Lal v. Udit Agrawal, IAS, CM (M) 67/2014.

Remedies to file writs and Public Interest Litigation (“PIL”) in the High Courts and the Supreme Court were introduced to protect the rights of the people in certain circumstances and also to protect the public interest. However, PILs and writs have been abused to engage in litigation that lacks merit or stems from personal matters and vengeances. This adds to the backlog of cases in Indian courts. The Supreme Court noted that PILs are being routinely heard by courts, resulting in the dockets of most of the superior courts being flooded with PILs, most of which are frivolous. See Common Cause (A Regd. Society) v. Union of India, (2008) 5 SCC 511.

In addition, there is significant delay in disposal of cases. Often, litigants file one appeal after the other in different forums. Furthermore, a never-ending series of adjournments are granted on flimsy grounds and this problem persists at every level of the judiciary. These adjournments are granted for often frivolous reasons, such as the external counsel have not apprised themselves of the matter or have committed to more cases than they possibly can attend. Therefore, to accommodate the litigants and counsels, the valuable time, resources and efforts of the courts are wasted.

Also, a plethora of appeals are filed under Article 136 of the Constitution of India, 1950 (the “Constitution”), which provides for the filing of a Special Leave Petition (“SLP”) before the Supreme Court. A SLP is based on the discretionary power vested with the Supreme Court to grant a special leave to appeal to a party in a matter involving inter alia a substantial question of law relating to the interpretation of the Constitution. See Mathai @ Joby v. George, (2010) 4 SCC 358. In Mathai, the Court observed that litigants were deliberately misusing the process of law and it was a cause of concern. The Supreme Court had previously clearly held that Article 136 of the Constitution is a discretionary power given to the Court and the Court is not mandated to interfere, even if there is a fault of law or fact in the disputed order. However, presently SLPs are filed as a matter of right, allowing litigants to abuse the process to a large extent. Such abuse must be curtailed, and SLPs must be
thoroughly scrutinized to ensure that the valuable time of the courts is not wasted.

**Countering Frivolous Litigation**

To address the issue of frivolous litigation, a possible solution would be that courts should suo motu seek to enforce Section 35 and 35A of the Code of Civil Procedure (the “CPC”) in a stringent manner. Sections 35 and 35A of the CPC provide for the power of the court to award costs in the interest of justice. The Supreme Court has reasoned that such costs have to be actual reasonable costs incurred by the successful party including transportation and lodging and any other incidental cost besides the payment of the court fee, lawyers’ fees, typing and other cost in relation to the litigation (See *Salem Advocate Bar Association v. Union of India*, [2005] 6 SCC 344). However, these costs are not an adequate deterrent because these costs, even if awarded, are negligible in comparison to quantum. Rather, costs should be substantial. The Supreme Court has observed that costs should be such as to make every litigant think twice before entering into vexatious or speculative claim or defense. See *Vinod Seth v. Devender Bajaj & Anr*, (2010) 8 SCC 1. Therefore, a change must be brought about in the concept of “actual real cost”, and exemplary costs must be imposed when the courts find that certain petitions, appeals or adjournments are frivolous. This would prove effective in curbing vexatious litigation.

In keeping with the provisions of the Tamil Nadu and Maharashtra Vexatious Litigation Acts and the 192nd Law Commission Report, it should be made uniform law that once a person is declared as a vexatious litigant, such person must obtain leave of the court to initiate further civil or criminal proceedings. See Section 2 of the Vexatious Litigation (Prevention) Act, 1949; Section 2 of Maharashtra Vexatious Litigation (Prevention) Act, 1971; Law Commission of India, 192nd Report on Prevention of Vexatious Litigation, 76-77 (2005). The leave should not be given unless the court is satisfied that the proceeding is not an abuse of the process of the court and there are reasonable grounds for the proceedings. Also, the Parliament should consider tabling the Vexatious Litigation (Prevention) Bill, 2005, as suggested by the Law Commission, and deterrence costs provisions must be added to this draft. 192nd Law Commission Report, at 88).

In regards to frivolous PILs, the Supreme Court had directed lower courts to effectively discourage and curb PILs filed for extraneous considerations and formulate rules in this regard. See *State of Uttaranchal v. Balwant Singh Chaufal*, AIR 2010 SC 2550. Several High Courts have framed rules to curb the practice by allowing the court to impose exemplary costs. High Court of Calcutta, Notification No. 7613-RG (August 23, 2010); High Court of Delhi, Notification No. 451/Rules/DHC (November 25, 2010); Odisha High Court, Notification No. 270-R (April 20, 2010); Bombay High Court, Notification No. 1603/2010. Therefore, courts must ensure that these rules are strictly followed by litigants instituting PILs and heavy costs must be imposed if the litigation lacks merit. A similar approach must be taken by High Courts and Supreme Courts in respect to the writ jurisdiction exercised by them.

Recently, the law ministry has reportedly proposed passing a national litigation policy that would seek to address the issue of backlog of cases and provide for mandatory arbitration in intra-governmental disputes as such disputes form a major chunk of court backlog. See Nistula Hebbar, Government Plant Steps to Slash Volume of Intra-Govt. Litigation, The Economic Times, May 20, 2015, available at [http://articles.economictimes.indiatimes.com/2015-05-20/news/62413018_1_tribunals-national-judicial-appointments-commission-law-commission](http://articles.economictimes.indiatimes.com/2015-05-20/news/62413018_1_tribunals-national-judicial-appointments-commission-law-commission) (last visited June 1, 2015). It remains to be seen what measures this policy will consider. The effective implementation of
such policy may address, to a certain extent, the problem of backlog.

Another possible remedy to reduce the backlog of cases is for the courts to ensure that the litigants have first exhausted all alternate dispute resolution mechanisms under Section 89 of the CPC. Also, the court could impose time frames for disposing each case if the matter is not disposed of within a particular time period, the court would be required to record the reasons for the delay caused by litigants in adducing evidence, and thereafter, the court would conclude the trial summarily on the basis of the representations made by the litigants, or the evidence as produced by the litigants until such time. Timely resolution of disputes as is exercised by international arbitration institutions should also be exercised by the courts.

The biggest problem as identified earlier in this article is the fact that too many appeals and adjournments are allowed by Indian courts. Typically, a litigant must be allowed only two appeals from the first order received, as all the facts of the case are set out in the first instance, and thereafter, assessed by two main judicial forums. Adjournments must be shunned by courts, except when there is a genuine and properly evidence cause which does not allow litigants or lawyers to appear before the court. The amendment to the CPC in 2002, in Order XVIII, Rule 2(3) clearly provides that no adjournment can be granted for the purpose of filing written arguments unless the court feels it to do so and record its reasons in writing. Section 12 of the Code of Civil Procedure (Amendment Act), 2002.) Although the law is amply clear in this regard, its execution by the courts is not firm. Also, any remedy under the prerogative writ jurisdiction of the High Courts and Supreme Courts and SLP jurisdiction of the Supreme Court must be exercised cautiously. Most importantly, wherever it is found that appeals and adjournments are frivolous in nature, heavy costs must be imposed by the courts, over and above actual costs, so that litigants and lawyers alike are deterred.

Issue: Cumbersome Process of Law

The procedure guiding litigation in Indian courts is cumbersome and to a certain extent, protracted. The procedural law, i.e., the CPC, the Indian Evidence Act, 1872, read with the rules framed by the courts, sets out the detailed procedure to be followed by litigants, lawyers and the court in India. Typically, the filing of the petition, service of summons to the defendant, filing of the written statement by the defendant, framing of issues, evidence and cross examination and obtaining the order in the matter are the main stages in a trial. Certain stages of the proceedings, including those discussed below, have been known to cause a delay in the disposal of cases, which in turn lead to a backlog of cases.

In the initial stage, defendants often try to evade the service of summons by changing their address or by manipulating the circumstances or delivery so as to ensure that their refusal of the service of the summons is not recorded by the messenger. As there is no direct way to track or solve this problem, there is a delay in the progress of the matter. Secondly, considerable time is spent in framing of issues by the court in many of the suits instituted. Recently, the lower and subordinate courts have been expediting the time spent for the framing of issues. However, the High Courts often take excess time to frame issues. It is pertinent to note that considerable delay is also caused due to the fact that litigants file various interim applications, including frivolous applications for amendments to their submissions.

Further, at the evidence stage, witness testimony and cross examinations takes up a lot of time. Regarding the evidence stage, the procedure set out in the CPC and the Indian Evidence Act, 1872, is
extremely detailed, so as to ensure that evidence is recorded properly. However, lawyers and the courts frequently take unwarranted time to draw this stage of the matter to a close. The Law Commission of India in its 77th report records an observation made by Harold Laski after his grueling cross-examination at the hands of Sir Patrick Hastings, wherein he states, inter alia, “He treats you; not as a human being, but as a surgeon might treat some specimen he is demonstrating to students in a dissecting room!” See Law Commission of India, 77th Report on Delay and Arrears in Trial Courts 103 (1978). The Law Commission has noted that counsels often deviate from the major issue at the time of examination-in-chief and cross-examination, and prove unessential allegations, harass and confuse witnesses or record unnecessary details, which may not enrich the value of the evidence of the witness. These activities take up the valuable time of the court and lead to needless delay.

Solution: Simplifying the Cumbersome Process of Law

Firstly, it is important to ensure that persons of high caliber and integrity manage and control the administrative process of the courts. Secondly, the courts must implement strategic case management techniques and clearly define time frames for every stage in a matter so that the lawyers, litigants or the court itself cannot prolong the proper time frames. As the practice stands today, applications are expedited only where orders are received from higher authorities or if the concerned litigants are aged.

It is important that proper administrative supervision takes place over the process of summons. Moreover, collusion of defendants with the postal messengers must be tackled, and if such collusion is identified, heavy costs must be imposed on the defendants and the messenger. However, as was correctly stated by the Law Commission in its 77th report, taking this forward would require an increase in the pay scale of the process servers so that better-qualified people are employed. See 77th Law Commission Report, at 12. Summons would then be duly served and the court could expeditiously examine the serving officer on oath as to whether proper procedure and effort was made to serve the summons under Order V Rule 19 of the CPC. These improvements would help prevent the need for applications for setting aside ex-parte decrees under Order IX of the CPC.

As regards framing of issues, some subordinate courts have been framing issues in a timely manner. However, surprisingly, in the High Courts, excessive time is taken to frame issues for any given matter. Essentially, once the written statement is filed by a party, the matter very often becomes dormant and is added to the already large pile of pending litigation. It is therefore important that every court set out a limitation on the number of days that it takes to frame issues in a given matter.

In respect of recording evidence, courts should use the discretionary power accorded to them under Order XXVI of the CPC, and delegate the time consuming procedures involved in recording evidence to commissions, subject to certain prescribed guidelines. This would substantially cut down the time required to record evidence in a matter. Courts and commissions must also actively intervene where examinations of persons are prolonged without reason and must discourage recording evidence unnecessarily. At the stage of cross-examination and admissibility of evidence, trial judges must strengthen their stand under Sections 148 to 152 of the Indian Evidence Act, 1872 and prevent lawyers from misleading the court. In civil cases, evidence must be recorded on a day-to-day basis and baseless adjournments should be avoided.

Finally, the courts must exercise the discretion allowed to them under Section 89 of the CPC to settle cases out of court where a matter appears to have
elements of settlement which may be acceptable to parties. In addition, if more cases are referred to arbitration or other means of dispute resolution like conciliation, mediation or judicial settlement, including by reference to “Lok Adalats” (Indian alternative dispute resolution system), long drawn litigation would be reduced.

Issue: Difficulties with the bench

India is facing a serious drought of quality judges across all levels of the judiciary. The problem is twofold. Firstly, the sanctioned strength of the benches is not fully filled. Secondly, even the full sanctioned strength of the bench across courts is not sufficient to address the issue of the backlog of cases. As a result, the backlog grows and judges are constantly under pressure to deliver judgments and orders in a hurry, which may impair their ability to assess a matter peacefully or to give a quality judgement. As of 2014: (a) in the Supreme Court, the total sanctioned strength of judges was 31 and the actual strength was 25; (b) in all the High Courts combined, the total sanctioned strength of judges was 906 and the actual strength was 641; and (c) in the subordinate judiciary across all States and Union Territories, the total sanctioned strength of judges was 19,726 and the actual strength was 15,438, thereby resulting in 4,288 vacant positions. Supreme Court, Court News, IX (2) (2014).

Other countries, like the United States of America, incur heavy spending to ensure the speedy disposal of cases. This is not seen in India, and it is clear that adequate budgets must be allocated to ensure that the pendency in litigation and the backlog of cases is resolved. Also, the remuneration paid to judges in the lower or higher courts is not sufficiently attractive. Additionally, inadequate judicial training of the subordinate judiciary and the benches of specialized tribunals is becoming a roadblock in dealing with the problem of pendency of litigation and the backlog of cases.

It has also been noted that in comparison with the executive branch of the Government, judicial officers draw a lower remuneration when they start off. Also, promotions come less often in the judicial service. These elements tend to affect the overall outlook of the judge, and thereby significantly affect his or her approach towards a suit.

Solution: Addressing the delay due to the difficulties with the Bench

The most important solution is to increase the number of judges immediately. Naturally, this would ease the workload of the courts and ensure that the pendency in litigation is reduced. Separately, as regards the quality of the bench, improved judicial would ensure that judges are prepared to hear the type of commercial or regulatory cases that are brought before them, and that the judges apply the correct principles and procedures of law as required in that forum. Also, judges must be instructed to handle matters expeditiously, without allowing the litigants or the lawyers to hamper the process of litigation. It would be useful to invite retired judges to chair special tribunals since their experience would help dispose of cases at a great pace. The remuneration of judges must be increased to ensure that the bench is attractive to talented people, and such people are drawn to choose a career in the judiciary.

The National Judicial Appointments Commission Act, 2014, had the objective of permitting a well-formed and adequately represented commission to appoint judges of the Supreme Court and High Courts on merit basis. If this is properly implemented, it would help to address possible vacancies in the judiciary. In keeping with the recommendations of the 125th Law Commission Report, judges on the verge on retirement should be allowed to remain on the bench until a substitute for them is found. See Law Commission of India, 125th Report on The Supreme Court—A Fresh Look 13 (1988).
Lastly, the formation of additional tribunals to deal specifically with particular enactments clogging the judicial system like Section 138 of the Negotiable Instruments Act, 1881 and provisions of the Motor Vehicles Act, 1988, must take place. As of 2008, over 3,800,000 check-bouncing cases were pending across various courts. In fact, in one instance, an incredible 73,000 cases were filed on a single day by a private telecom company before a Bangalore court. Law Commission of India, 213 Report on Fast Track Magisterial Courts for Dishonoured Cheque Cases 10-11 (2008).

It is essential to provide for a larger number of special courts like the debt recovery tribunal, the consumer forum etc., and it is also important to establish specialized fast track courts to deal with other cases of a particular kind (e.g., family courts, domestic violence, etc.), so as to reduce the burden on the judiciary. These actions over time would considerably free up valuable court time and reduce the judiciary workload.

**Conclusion**

In the larger scheme of achieving economic development at a global level, efficient dispute resolution becomes a critical element for increasing foreign collaboration. Foreign investors are primarily hesitant to enter the Indian market because of its sluggish dispute resolution process. While this issue has been discussed at length, very little implementation of effective remedial steps has occurred. The judicial, executive and legislative wings of the country must take the steps that have been recommended by various law commissions and experts to ensure, once and for all, that the problem of pendency of litigation and backlog of cases is resolved. It is clear that justice delayed is justice denied and full justice therefore must be restored to the Indian judicial system.

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Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser— in fees and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln.

With India opening up its markets in the early 1990’s, the Indian judicial system has had to come to terms with the reality of globalization. As a large country in terms of population and area, there is tremendous pressure on India’s resources and its institutions. The legal system is no exception.

The pace of reform in the Indian judicial system has been slow and often found wanting. With the backlog of cases in courts across the country not reducing at the pace one would like, litigants are being driven to embrace alternate dispute resolution techniques. India still has a long way to go.

The Indian legal system is akin to the English legal system, being the common law system. Courts follow previous decisions on the same legal issue and decisions of the appellate courts are binding on lower courts. However, unlike England, India has a written constitution.

Nature of the Constitution of India

The Constitution of India is quasi-federal in nature, or one that is federal in character but unitary in spirit. The Constitution possesses both federal and unitary features and can be both unitary and federal according to requirements of time and circumstances. The federal features of the Constitution include distribution of powers between national (or federal) government and government of the various constituent states. There are two sets of governments: one at the central level and the other at state level. The distribution of powers between them is enshrined in the Union, State and Concurrent lists of the Constitution (See, His Holiness Kesavananda Bharati Sripadagalvaru v State of Kerala, AIR 1973 SC 1461). The Constitution also possesses strong unitary features such as the unified judiciary (while the federal principle envisages a dual system of courts, India has a unified Judiciary with the Supreme Court at the apex) and appointment on key positions (e.g. governors of states, the Chief Election Commissioner, the Comptroller and Auditor General) being taken by the national government (See, COMMENTARY ON THE CONSTITUTION OF INDIA, Arvind P Datar, Ed. 2, Volume 2, Lexis Nexis Butterworths Wadhwa Nagpur).

The Court System in India

General Hierarchy of Courts

The Supreme Court of India is the highest appellate court and adjudicates appeals from the state High Courts. In addition, Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights (including the power to issue writs upon petition such as writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari). The High Courts for each of the states (or union territories) are the principal civil courts of original jurisdiction in such state (or union territory). The High Courts adjudicate on appeals from lower courts and writ petitions under Article 226 of the Constitution of India (See, SARKAR, CODE OF CIVIL PROCEDURE, Sudipto Sarkar, VR

The district courts administer justice at district level. These courts are under administrative and judicial control of the High Court of the relevant state. The highest court in each district is that of the District and Sessions Judge. This is the principal court of civil jurisdiction. This is also a court of Sessions (for criminal matters), which has the power to impose any sentence including capital punishment (See, Section 28, Code of Criminal Procedure, 1973).

There are several other courts subordinate to the court of District and Sessions Judge. Broadly, there is a three-tier system of courts. On the civil side, at the lowest level is the court of Civil Judge (Junior Division). On the criminal side, the lowest court is that of the Judicial Magistrate Second Class. Judicial Magistrates decide criminal cases which are punishable with imprisonment of up to 5 years (See, MULLA, THE CODE OF CIVIL PROCEDURE, B.M. Prasad, Manish Mohan, 18th ed., Volume 2, Lexis Nexis Butterworths Wadhwa Nagpur).

There are also certain tribunals set up to impart speedy justice on certain specific matters (e.g. the debt recovery tribunals, the competition commission).

Representation Before the Judiciary

For a dispute to be presented and argued before a court, the norm is that a litigating party must be represented by an advocate who is duly admitted to the bar. In fact, in cases where a person has been arrested by the State, the arrested person has the fundamental right to be represented by a legal practitioner of his choice (See, to Article 22, Constitution of India, 1950). However, there is no specific bar on disputing parties appearing before the courts and arguing their own case.

Dispute Resolution Mechanisms

India has well-defined substantive and procedural laws along with a well-established system of judicial enforcement of rights. An elaborate mechanism is provided for redress of grievances under Indian statutes. Yet, litigation in India is perceived by many as an unending and frustrating process. The Indian judicial system is marred by exceptional judicial delays and slow process. The website of the Supreme Court of India has data pertaining to the pendency of cases. A glimpse at the data is grave enough to give pause. As of March 2015, approximately 61,300 cases were pending with the Supreme Court of India.

Litigation in India should be initiated only after a well-considered analysis including on the process, timeline and cost involved. Litigation in India should not be initiated impulsively. While it may not be possible to avoid litigation, strategies can be implemented to successfully end the litigation by achieving practical objects. One should not lose sight of the fact that Indian Courts are rarely grant heavy damages or actual costs. Alternative Dispute Resolution mechanisms like arbitration are a well-recognized method of avoiding the Indian courts, at least to some extent.

Litigation

As is the practice worldwide, India also prescribes to judicial, quasi-judicial as well as other alternate dispute resolution methods (See, Ujiam Bai v State of U.P., AIR 1962 SC 1621). Beside courts, in certain cases other forums such as tribunals and administrative bodies have been set up and may be approached for resolution of certain disputes. Further, following the international trend, arbitration has also gained
popularity as a mode of dispute resolution. We shall now deal with certain aspects of litigation in India.

Jurisdiction

Jurisdiction of the courts may be classified under the following categories:

Territorial or Local Jurisdiction

Every court has its own local or territorial limits beyond which it cannot exercise its jurisdiction (See, Section 16, Code of Civil Procedure, 1908).

Pecuniary Jurisdiction

The Code of Civil Procedure, 1908 (“CPC”) provides that a court will have jurisdiction only over those suits the amount or value of the subject matter of which does not exceed the pecuniary limits of its jurisdiction (See, Section 6, Code of Civil Procedure, 1908). Some courts have unlimited pecuniary jurisdiction i.e. High Courts and District Courts in certain states.

Subject Matter Jurisdiction

Different courts have been empowered to decide different types of suits. Certain courts are precluded from entertaining certain suits. For example, the Presidency Small Causes Courts have no jurisdiction to try suits for specific performance of contract or partition of immovable property. Similarly, matters pertaining to the laws relating to tenancy are assigned to the Presidency Small Causes Court and, therefore, no other Court would have jurisdiction to entertain and try such matters (See, Harshad Cl Modi v DLF Universal Limited, (2005) 7 SCC 791 See, also Manda R. Pande v Jankibai S. Dubey, AIR 2005 Bom 397[400]).

Original and Appellate Jurisdiction

Munsiff’s Courts (the lowest courts handling civil actions), Courts of Civil Judge and Small Cause Courts possess original jurisdiction only, while District Courts and High Courts have original as well as appellate jurisdictions, subject to certain exceptions. In addition to the above, the High Courts and the Supreme Court also have writ jurisdiction by virtue of Articles 32, 226 and 227 of the Constitution. Indian courts generally exercise jurisdiction over a specific suit in the following manner (See, New Moga Transport Co. v United India Insurance Company Ltd., AIR 2004 SC 2154, 2156):

- Where the whole or part of the cause of action arises in the territorial jurisdiction of the court.
- Where the defendant resides or carries on business for gain within the territorial jurisdiction of the court.
- Where the subject matter of the suit is an immovable property (real property and items permanently affixed thereto), where such immovable property is situated within the jurisdiction of the court.

All trials in India are bench trials, jury trials having been abolished in 1960.

Interim Relief

Due to heavy case load and other factors, legal proceedings initiated before Indian courts can often take inordinate amounts of time before final resolution. It is, therefore, common for the plaintiff to apply for urgent interim relief, such as an injunction requiring the opposite party to maintain the status quo, freezing orders, deposit of security amount.

Prima Facie Case

The plaintiff/petitioner must make out a prima facie case in support of the right claimed by her and should be a bona fide litigant i.e. there must be a strong case for trial which needs investigation and a decision on the
merits, and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him (See, Martin Burn Ltd. v Banerjee, AIR 1958 SC 79).

*Irreparable Injury*

The applicant must further satisfy the court that if the injunction, as prayed, is not granted she will suffer irreparable injury such that no monetary damages at a later stage could repair the injury done, and that there is no other remedy open to her by which she can be protected from the consequences of apprehended injury (See, Martin Burn Ltd. v Banerjee, AIR 1958 SC 79).

*Balance of Convenience*

In addition to the above two conditions, the court must also be satisfied that the balance of convenience must be in favour of the applicant (See, Nani Bala Saha v Garu Bala Saha, AIR 1979 Cal 308; Dorab Cawasji Warden v Coomi Sorab Warden and Ors. AIR 1990 SC 867; Gujarat Bottling Co. Ltd. & Ors. v Coca Cola Co. & Ors., (1995) 5 SCC 545).

*Specific Relief*

The Specific Relief Act, 1963 provides for specific relief for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing civil law and includes all the cases where the Court can order specific performance of an enforceable contract.

*Damages*

The remedy of damages for breach of contract is laid down in Sections 73 and 74 of the Contract Act. Section 73 provides that where a contract is broken, the party suffering from the breach of contract is entitled to receive compensation from the party who has broken the contract. However, no compensation is payable for any remote or indirect loss or damage (See, Hadley v Baxendalev (1854) 9 Exch 341 followed by Indian Courts in State of Kerala v K. Bhaskaran, AIR 1985 Ker 49; Titanium Tantalum Products Ltd. v Shriram Alkali And Chemicals, 2006 (2) ARBLR 366 Delhi). Section 74 deals with liquidated damages and provides for the measure of damages in two classes (See, Fateh Chand v Balkishan Das; [1964] 1 SCR 515):

(i) Where the contract names a sum to be paid in case of breach; and

(ii) Where the contract contains any other stipulation by way of penalty. In both classes, the measure of damages is, as per Section 74, reasonable compensation not exceeding the amount or penalty stipulated for.

**The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015**

In line with the current Government’s mission to improve India’s image as an investment destination, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was promulgated on December 23, 2015 for expeditious and efficient resolution of commercial disputes. The Act has taken into account some of the changes proposed by the Law Commission of India’s 253rd Report.

The Act provides for the establishment of Commercial Courts, which shall have the jurisdiction to try all suits and applications relating to a Commercial Dispute of a Specified Value. Further, the High Court’s having original civil jurisdiction would constitute a Commercial Division and a Commercial Appellate Division to adjudicate suits and applications filed in the High Court.

The definition of “Commercial Disputes” in the Act is broad and covers most instances of a commercial
transactions (a commercial transaction includes general commercial contracts, shareholder and joint venture agreements, intellectual property rights, contracts relating to movable and immovable property, natural resources etc.). “Specified Value” pertains to the value of the subject matter in respect of the suit which shall not be less than INR Ten (10) million [about USD 150,000] or such higher value, as may be notified by the Central Government.

The Code of Civil Procedure, 1908 (CPC) has also been amended to give effect to the provisions of Act, and with a view to streamline the processes and bring a cultural change in the litigation system in India. It is estimated that the total time period from filing of a suit till final decree would be approximately 16 months. Global practices such as holding of case management hearing have been introduced. Indicative timelines have been prescribed such as a six (6) month period for completion of trial post first case management hearing to bring about an efficient and faster dispute resolution mechanism in India. The Act has introduced the concept of “cost to follow event” wherein costs would be awarded by the court against any party which has made frivolous and vexatious claims, with the intention to ensure that litigants come to court with clean hands.

The Act has prescribed a process for summary judgment to be passed at the discretion of the Court wherein any party has the ability to request for summary judgments irrespective of the nature of relief sought.

The Act has prescribed timelines for institution of appeals (60 days) from the date of decision and endeavor for disposal of appeals by the Commercial Appellate Division, within six (6) months. The scope of appeal has been reduced to only the prescribed orders passed by the Commercial Court/Division and that no other appeal under any law including the Letters Patent of a High Court could be preferred against the orders of Commercial Court/Division.

The Act prescribes that applications and appeals arising out of arbitration in an International Commercial Arbitration and any other arbitration proceedings which would have been filed in the original side of the High Court shall be heard by the Commercial Appellate Division and for any other arbitration other than International Commercial Arbitration by the Commercial Court.

With the promulgation of this Act in tandem with the Arbitration and Conciliation (Amendment) Act, 2015, the government has taken tangible measures to ease doing of business in India. The intent is to harmonize the two regimes of court processes and arbitration proceedings to complement each other.

Arbitration

To overcome the huge pendency of cases that plagued the courts in India, there was a dire need for effective means of alternative dispute resolution. The mechanism of the Arbitration (Protocol and Convention) Act, 1937 and the Arbitration Act, 1940 along with the complementary Foreign Awards Act, 1961 did not help matters much because arbitration thereunder was found wanting and led to further litigation as a result of rampant challenge of awards.

The legislature enacted the current Arbitration & Conciliation Act, 1996 (“Act”) to increase the efficacy of arbitration, domestic and international, in India. The Act is based on the UNCITRAL Model Law (as recommended by the U.N. General Assembly) and facilitates International Commercial Arbitration as well as domestic arbitration and conciliation. Under the said Act, an arbitral award can be challenged only on limited grounds and in the manner prescribed. India is party to the New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards, 1958.
The Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation (Amendment) Act, 2015 was promulgated on December 23, 2015. The Act substantially amends the provisions of the Arbitration and Conciliation Act, 1996. The Act is aimed at taking drastic and reform oriented steps to bring Indian arbitration law at par with global standards and provide an effective mechanism for resolving disputes with minimum court interference. The Act has taken into account some of the changes proposed by the Law Commission of India’s 246th Report.

Some of the highlights of the Act are as follows:

- Flexibility for parties to approach Indian courts for interim reliefs in aid of foreign-seated arbitrations;
- Jurisdiction insofar as international commercial arbitrations, whether seated in India or abroad, to lie before the High Court;
- Extensive guidelines incorporated relating to the independence, impartiality and fees of arbitrators;
- Detailed schedule on ineligibility of arbitrators;
- A twelve-month timeline for completion of arbitrations seated in India;
- Expeditious disposal with indicative timelines of arbitration applications which are required to be filed before Courts;
- Incorporation of expedited/fast track arbitration procedure;
- Interim orders passed by Tribunals seated in India are deemed to be order of Courts and are thus enforceable;
- Detailed provisions in relation to award and determination of costs by Tribunals seated in India – introduction of ‘costs follow the event’ regime;
- Limitation of grounds on which awards arising out of International Commercial Arbitrations seated in India may be challenged; and
- No more automatic stay on filing of a challenge to an arbitral award - requirement of a specific order from Court.

Kinds of Arbitration

Ad-hoc Arbitration

Ad-hoc arbitration is where there is no institution administering the arbitration. The parties agree to appoint the arbitrators and either set out the rules which will govern the arbitration or leave it to the arbitrators to frame the rules. Ad-hoc arbitration is quite common in domestic arbitration in India.

The absence of any reputed arbitral institution in India has allowed ad-hoc arbitration to continue to be popular. In cross border transactions it is quite common for parties to spend time negotiating the arbitration clause, since the Indian party would be more comfortable with ad-hoc arbitration whereas foreign parties tend to be more comfortable with institutional arbitration. However, with ad-hoc arbitrations turning out to be a lengthy and costly process, the preference now seems to be towards institutional arbitration as the process for dispute resolution (See, Namrata Shah, Niyati Gandhi, ARBITRATION: ONE SIZE DOES NOT FIT ALL – THE NECESSITY OF DEVELOPING INSTITUTIONAL ARBITRATION IN DEVELOPING COUNTRIES, 6(4) Journal of international Commercial Law and Technology (2011)).

Institutional Arbitration

Institutional arbitration refers to arbitrations administered by an arbitral institution.
Institutions such as the International Court of Arbitration attached to the International Chamber of Commerce in Paris (“ICC”), the London Court of International Arbitration (“LCIA”) and the American Arbitration Association (“AAA”), which are well known the world over and often selected as institutions by parties from various countries.

A greater role is played within Asia by institutions such as the Singapore International Arbitration Centre (“SIAC”), the Hong Kong International Arbitration Centre (“HKIAC”) and China International Economic and Trade Arbitration Commission (“CIETAC”). While Indian institutions such as the Indian Council of Arbitration attached to the Federation of Indian Chambers of Commerce and Industry (“FICCI”), the International Centre for Alternative Dispute Resolution under the Ministry of Law & Justice (“ICADR”), and the Court of Arbitration attached to the Indian Merchants’ Chamber (“IMC”) are in the process of spreading awareness and encouraging institutional arbitration, it would still take time for them to achieve the popularity enjoyed by European and American institutions (See, W. K. Slate II, INTERNATIONAL ARBITRATION: DO INSTITUTES MAKE A DIFFERENCE, 31 Wake Forest Law Review (Spring 1996).

Statutory Arbitration

Statutory arbitration refers to scenarios where the law mandates arbitration. In such cases the parties have no option but to abide by the law of the land. It is apparent that statutory arbitration differs from the above types of arbitration because (i) the consent of parties is not required; (ii) arbitration is the compulsory mode of dispute resolution; and (iii) it is binding on the Parties as the law of the land (See, Krishna Sarma, Momota Oinam, Angshuman Kaushik, DEVELOPMENT AND PRACTICE OF ARBITRATION IN INDIA HAS IT EVOLVED AS AN EFFECTIVE LEGAL INSTITUTION, Center on Democracy, Development, and The Rule of Law Freeman, Spogli Institute for International Studies, Working Paper [October 2009]).

Sections 24, 31 and 32 of the Defence of India Act, 1971, Section 43(c) of The Indian Trusts Act, 1882 and Section 7B of the Indian Telegraph Act, 1885 are certain statutory provisions which deal with statutory arbitration.

Foreign Arbitration

When arbitration proceedings are seated in a place outside India and the award is required to be enforced in India, such a proceeding is termed as a Foreign Arbitration. The seminal judgment of the Supreme Court of India in Bharat Aluminum Co. v Kaiser Aluminum Technical Service Inc. (2012 [9] SCC 552 [“BALCO”]), has altered the landscape of arbitration in India and has overturned the law laid down in Bhatia International vs. Bulk Trading (AIR 2002 SC 1432 [“Bhatia”]). According to the BALCO judgment, provisions of Part I of the Arbitration & Conciliation Act, 1996 are not applicable to foreign awards and foreign seated arbitrations where the arbitration agreement was entered into on or after September 6, 2012. This has considerably reduced the level of interference by Indian courts in foreign arbitrations. Awards passed in such foreign-seated arbitrations would now not be subject to challenge under section 34 of the Act. However, another consequence of the judgment was that parties to a foreign-seated arbitration could not seek interim relief in aid of arbitration from an Indian court. This issue has been resolved with the passing of the Arbitration & Conciliation (Amendment) Act, 2015. However, interim orders passed by a foreign-seated arbitral tribunal still cannot be directly enforced in India.
Recent Trends

With several recent landmark judgments of the Supreme Court, the arbitration regime in India has witnessed a paradigm change with greater degree of sanctity being afforded to arbitral decisions and arbitration as a mechanism for resolution of disputes. The changes introduced by way of the Arbitration & Conciliation (Amendment) Act, 2015, and the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 would certainly work towards making India more attractive as a preferred seat for International Arbitration. The Courts in India in recent times have taken into consideration the judicial intervention which has hampered arbitration proceedings in India and through several pro-arbitration rulings removed many hurdles, which parties face while arbitrating against Indian opponents.

Role of the Indian Judiciary in Shaping Arbitration

Unlike recently, the Indian Judiciary was known to have adopted an interventionist approach in arbitration matters and a consequence of which most of the existing judicial decisions were inconsistent with the spirit of the act. Initially, the judgments emanating from the courts defeated the primary objective of the act and this can be gauged by the decisions of the various Indian courts.

From Bhatia to Balco

The Supreme Court in Bhatia extended part I of the Act to international commercial arbitration held outside India; however, in Venture Global Engineering v Satyam Engineering ([2008] 4 SCC 190), which relied on Bhatia, the Supreme Court largely rendered superfluous the statutorily envisaged mechanism for the enforcement of foreign awards and consequently setting aside the foreign award (under part I of the Act as against merely refusing to enforce the foreign award under part II of the Act).

The view taken in the Bhatia and Venture Global judgments came into consideration before a five-judge constitution bench of the Supreme Court in BALCO, wherein the Supreme Court, overruling the judgments with prospective application ruled in favor of non-intervention by Indian courts in arbitrations seated outside India. The Court, relying the principles of territoriality, party autonomy and minimal judicial intervention, held that Indian Courts did not have the power to intervene in foreign arbitrations by way of providing interim relief or entertaining a challenge to foreign arbitral awards in India. The BALCO judgment has laid down the position that no interim relief would be available in foreign arbitrations (i.e., arbitrations seated outside India either under the Code or Section 9 of the Act). In addition, the judgment also reinforces the fact that the seat of arbitration would be the determining factor in deciding the curial law and Part I and Part II of the Act apply to arbitrations seated in India and outside India respectively. This judgment has gone a long way towards clearing past ambiguity in the judicial pronouncements preceding it. Significantly, the law set forth in BALCO applies only prospectively giving rise to a situation where two parallel streams of law co-exist and simultaneously develop.

Public Policy: The Unending Debate

The Supreme Court judgment in Oil and Natural Gas Corporation Ltd. v Saw Pipes Ltd., ([2003] 5 SCC 705) widened the scope of “public policy” by including “patent illegality” as an additional head within the ambit of “public policy,” which is now one of the grounds available for setting aside a domestic arbitral award. Until that point, the concept of “public policy” was interpreted in a narrower sense, in line with the court’s previous decisions.
In *Shri Lal Mahal v Progetto Grano Spa*, (2013 [8] SCALE 489) the Supreme Court overruled its own also-recent decision in *Phulchand Exports v OOO Patriot*, ([2011] 10 SCC 300) and held that the “public policy” in relation to challenging the enforcement of an international award, would be construed in a narrow manner, i.e. a lower level of judicial interference. In *Progetto Grano Spa*, the Supreme Court was quick to overturn its own judgment in *Phulchand Exports*.

**Appointment of Arbitrator: Judicial or Administrative?**

A further blow came by way of the Supreme Court’s decision in *SBP & Co v Patel Engineering Limited*, ([2005] 8 SCC 618), where the power of the Chief Justice in appointing an arbitrator was held to be a judicial power and not an administrative one. This meant that Indian Courts had to actually look into the validity of the arbitration agreement and the dispute itself before proceeding to appoint arbitrators. Subsequently there have been a number of instances where the Supreme Court and various High Courts have assumed jurisdiction in arbitration matters, both onshore and offshore.

**Joinder In Arbitration: Enabled**

A full bench judgment, in *Chloro Controls (I) P Ltd v Seven Trent Water Purification* (2013 [1] SCC 641), clarified the scope of judicial authority to make a reference in cases of non-signatories, in exceptional circumstances. This was a case where several parties to a composite arrangement, although having multiple agreements containing different dispute resolution mechanisms, were all referred to one common arbitration proceeding.

**Fraud and its Arbitrability**

Arbitrability of fraud has also been revisited by the Supreme Court. The Supreme Court in *Swiss Timing Ltd v Organising Committee, Commonwealth Games* (2010 AIR 2014 SC 3723) held that arbitration proceedings can commence even if allegations of fraud have been made in domestic arbitrations. This judgment, although arguably *per incuriam*, is indicative of the pro-arbitration stance being adopted by India’s Supreme Court.

**Other recent trends: pro-arbitration**

The Supreme Court, in *Dozco India P Ltd v Doosan Infracore Co Ltd.*, ([2011] 6 SCC 179), *Videocon India v Union of India* ([2011] 6 SCC 161) and *Yogrj Infrastructure Limited v Ssang Yong Engineering and Construction Company Limited*, ([2011] 9 SCC 735), has helped to blur the requirement of “express exclusion” of Part I of the Act, which was initiated by the *Bhatia International* case.

Similarly, in matters dealing with domestic awards, an example of non-interference can be seen in *Sumitomo Heavy Industries v ONGC*, where the Supreme Court demonstrated that if the award by the arbitration is well-reasoned, then courts should not interfere.

As regards favoring enforcement of foreign awards, the Delhi High Court in *Penn Racquet Sports v Mayor International Limited*, (201 [1] ARBLR 244 [Delhi]), refused the challenge to the enforcement of foreign award by holding that the ground of “public policy” must be narrowly interpreted when refusing enforcement of foreign awards. Subsequently, in *Pacific Basin Ihx (UK) Ltd v Ashapura Minechem Ltd.* (2011 [2] ARBLR 548 [Bom]), the Bombay High Court was faced with the dilemma of being technically forced to stay the proceedings seeking enforcement of a foreign award. The Bombay High Court ordered a stay, however, on the condition that the claim amount awarded should be deposited in full by the party seeking the stay.

Recently, a positive step ordering the enforcement of a foreign award was taken by the Supreme Court in
Fuerst Day Lawson v Jindal Exports, ([2011] 8 SCC 333), where it was held that no letters patent appeal will lie against an order enforcing a foreign award. This is because Section 50 of the Act provides for an appeal only against an order refusing to enforce a foreign award.

The Bombay High Court recently held in Mulheim Pipecoatings v Welspun Fintradee ([2014(2) ABR 196], that an arbitration agreement would survive even if the agreement (containing the arbitration clause) was suspended by a subsequent agreement. However, this position has been slightly modified by the Supreme Court’s decision in M/s Young Achievers v IMS Learning Resources Pvt Ltd. ([2013] 10SCC 535), where the Court held that an arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded.

The Supreme Court in Enercon v Enercon GmBH, ([2014] 5 SCC 1), while determining whether an arbitration clause is unworkable or incapable of being performed, held that the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. It further held that the arbitration clause cannot be construed with a purely legalistic mindset, as if one is constraining a provision in a statute. Moreover, if the seat of arbitration is in India, Indian Courts would have exclusive supervisory jurisdiction. Foreign Courts, therefore, would not be able to exercise concurrent jurisdiction. Furthermore, the Supreme Court in the above case, also held that an arbitration agreement cannot be avoided on the basis that there is no concluded contract between the parties. A reference to arbitration can only be avoided (in the context of international commercial arbitration) if the arbitration agreement is “null and void, inoperative or incapable of being performed.”

In Pricol Limited v Johnson Controls Enterprise Ltd. & Ors. (2014 [14] SCALE 74), the Supreme Court held that the appointment of a sole arbitrator by the Singapore International Arbitration Centre, and a partial award having being passed by the arbitral tribunal on the issue of jurisdiction, cannot be examined in a petition under Section 11(6) of the A&C Act.

With these decisions, the pro-arbitration stance adopted by the Indian Courts with lower levels of interference in arbitration matters emanates.

Mediation

While the A&C Act, in Section 30, refers to and even encourages mediation as a form of alternative dispute resolution, it does not provide any rules for mediation (as it does for conciliation). In 1999, the Government enacted the Code of Civil Procedure (Amendment) Act, 1999 (CPC Amendment Act) where a new Section 89 was introduced into the CPC. This newly inserted section introduces the concept of “judicial mediation,” as opposed to “voluntary mediation.” A court can now identify cases where an amicable settlement is possible, formulate the terms of such a settlement and invite observations thereon of the parties to the dispute.

Judicial mediation is carried out in the form of court-annexed mediation. Court-annexed Mediation and Conciliation Centers are now established at several courts in India, including the trial courts in Delhi, Allahabad, Lucknow, Chandigarh, Ahmedabad and the courts have started referring cases to such centers. In court-annexed mediation, the mediation services are provided by the court as a part and parcel of the same judicial system as against court-referred mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants are all participants of the mediation and thus, the negotiated settlement is achieved by all the three actors in the
justice delivery system. In court-annexed mediation, the court is the central institution for resolution of disputes. The advantage of court-annexed mediation lies in the fact that since the ADR procedures herein are overseen by the court, the effort of dispensing justice can become well-coordinated. Thus, both voluntary and court-assisted mediations have gained popularity in the domestic Indian legal landscape. There is, however, a long way for it to go (See, Anil Xavier, MEDIATION: ITS ORIGIN & GROWTH IN INDIA, Hamline Journal Of Public Law & Policy, Vol. 27).

**Conciliation**

Conciliation is provided for in Part III of the Act and it has been adopted as one of the efficient means of settlement of disputes. It is for the first time that the process of conciliation has been given statutory recognition. Elaborate rules of engagement are also provided. Conciliation under the Act remains a non-binding procedure in which a neutral conciliator assists the parties to a dispute in reaching a mutually agreed settlement. Section 61 of the Act reads that conciliation shall apply in disputes arising out of a legal relationship whether contractual or not and to all proceedings relating thereto (See, O.P. MALHOTRA, LAW AND PRACTICE OF ARBITRATION AND CONCILIATION, Indu Malhotra, 3rd ed., Thomson Reuters).

Conciliation has the following benefits:-

*Confidentiality:* The Arbitration Act requires confidentiality between parties as to all matters of the conciliatory proceedings. This aspect of confidentiality also extends to settlements, unless the settlement must be declared to be enforced. Therefore, parties are prohibited from bringing up the events of the conciliatory proceedings in any future court case or arbitral proceedings. Anything said by either party, conciliator, the conduct of one party expressing willingness to enter into settlement, cannot be introduced as evidence or brought up in a legal proceeding in any manner.

*Enforceability:* The settlement arrived at under conciliatory proceedings under the arbitration act will be enforceable as if it were a decree of the court.

**Conclusion**

With the exponential growth in cross-border commercial transactions and open-ended economic policies acting as a catalyst, there has been no dearth of international commercial disputes involving Indian parties. In 2013, the Singapore International Arbitration Center (“SIAC”) was involved in almost 260 new cases. Indian and Chinese parties are possibly the largest contributors demonstrating that offshore arbitration of India-related disputes is growing. Other comparable arbitral institutions like the London Court of International Arbitration (“LCIA”) and the International Chamber of Commerce (“ICC”) have seen a significant rise in international arbitration disputes involving Indian parties. SIAC opened its first overseas office in Mumbai in 2013. Clearly, India and Indian parties are on the international arbitration radar.

It is quite clear that litigating parties are progressively preferring various modes of ADR over other dispute resolution mechanisms. The attitude of the Indian judiciary towards arbitration is also witnessing a paradigm shift and India is rapidly evolving into an arbitration-friendly destination. Never before has one seen so many pro-arbitration rulings by Indian courts. From 2012 to 2014, the Indian Supreme Court has, amongst other decisions, declared Indian arbitration law to be governed by the territoriality principle, held non-parties to be within the purview of reference to arbitration proceedings to settle disputes through arbitration, defined the scope of public policy in foreign seated arbitration, held that fraud is arbitrable (which is somewhat remarkable as this may
not necessarily be in line with other jurisdictions) and has got the attention of the international community. Additionally, the effects of recent legislative changes such as the Arbitration & Conciliation (Amendment) Act, 2015, and the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, will begin to filter into jurisprudence and should work to give an additional impetus to efficient dispute resolution.

Dispute resolution is not static. It will develop with changing needs of society. The crises of judicial delay, judicial arrears, high litigation costs, time-consuming and complicated nature of lawsuits discourages parties from approaching the Court of law for redressal of their disputes. All these factors have necessitated the need of a widespread evolution and acceptance of different alternative dispute resolution mechanisms like arbitration, conciliation, mediation. These are all here to stay, as if to provide a rejoinder to Benjamin Franklin’s famous plea “When will mankind be convinced and agree to settle their difficulties by arbitration?”

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Nishith Desai Associates is a research-based Indian law firm with offices in Mumbai, Silicon Valley, Bangalore, Singapore, Mumbai BKC, Delhi and Munich that aims at providing strategic, legal and tax services across various sectors.
Litigation in India is a legal phenomenon that ensures that every corporation spends at least a decade in Court. The time taken for disposing matters, the procedural objections, jurisdictional challenges and maintainability issues which very often form part of a court proceeding, reemphasize the need for corporate clients to take effective steps to minimize the possibility of contracts being brought before a court for interpretation of their true meaning.

It is often said that there is no better way to exercise your imagination than the study of law. No artist can interpret nature more freely than how a litigation lawyer can interpret a contract. A legal right may be a right conferred by law or devolve upon a party under a contract. It is, therefore, important to clearly spell out the rights, remedies, obligations and the enforcement mechanism for implementation of those rights within the contract itself. It is in this context that providing for an effective and speedy dispute resolution mechanism in the form of arbitration agreements becomes important.

Arbitration as an alternate dispute resolution mechanism was intended to be an effective and speedy means for disposal of commercial disputes. Presently, arbitration in India is governed by the Arbitration and Conciliation Act, 1996 (“Arbitration Act”). Before the passing of the Arbitration Act, the law on arbitration was largely contained in The Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961.

By the 1990s, however, the general law contained in these three statutes had become obsolete and a need was felt to evolve a law which was dynamic and met with the requirements of the day while acting as a comprehensive piece of legislation consolidating the law on the subject. The new Arbitration Act repealed the Arbitration Act, 1940; the (Arbitration Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961 and provided for a complete code covering domestic and international commercial arbitration, conciliation and enforcement of foreign arbitral awards.

One of the main objectives of the Arbitration Act was to ease the ever-increasing burden of cases on the regular judiciary and provide for an effective, speedy, fair and efficient mechanism of alternate dispute resolution. For commercial contracts, where time is of the essence with an increasing need to ensure speedy resolution of corporate and commercial disputes, this was a welcome development. Speedy resolution of disputes was one of the principal driving forces behind the enactment of this law. As the saying goes “Delay defeats equity,” this particularly in commercial contracts where huge sums are at stake and the outcome of a dispute could determine the course of business relationships between two partners.

Since its enactment, the law has undergone sweeping changes, with Courts interpreting various provisions in an effort to throw light on the legislative intent. The Supreme Court has described the beneficial features of the Arbitration Act as providing for (i) fair resolution of a dispute by an impartial tribunal without any unnecessary delay or expense; (ii) party autonomy being paramount, only being subject to such safeguards as are necessary in the public interest; and (iii) the Arbitral Tribunal is enjoined with a duty to act fairly and impartially.
The Arbitration Agreement

An agreement for arbitration is the sine qua non for adjudication of disputes in arbitration. The Arbitration Act provides that an agreement to arbitrate disputes must be in writing. The Act confers a certain degree of freedom on the parties to the contract to agree upon the procedural aspects of the arbitration. The parties to an arbitration agreement may also agree to arbitration being conducted under the aegis of specialized institutions such as the International Chambers of Commerce, Singapore International Arbitration Centre, London Court of International Arbitration. Recently the Indian Merchants Chamber has set up its own arbitration center in Mumbai. These institutions have their own set of rules governing the conduct of the arbitration proceedings. This law is also of particular interest to transactional lawyers in addition to being a matter of regular practice for litigating lawyers. Arbitration clauses are carefully crafted to cater to the needs and intent of parties entering into an arbitration agreement. Issues such as seat of arbitration, governing law, jurisdiction of courts, applicability of the Indian Arbitration Act to international commercial arbitrations and provisions for seeking interim relief from courts are some of the issues which are carefully considered while drafting an arbitration clause.

How Arbitration Agreements Have Been Construed by Indian Courts

The intention of the parties to enter into an arbitration agreement is gathered from the terms of the agreement. In Jagdish Chander v. Ramesh Chander ([2007] 5 SCC 719), the Supreme Court held that where the terms of the agreement clearly indicate an intention of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is an arbitration agreement. The Court clarified that even the omission of the words “arbitration,” “Arbitral Tribunal” or “arbitrator” in an agreement is not dispositive of an intent not to arbitrate if the agreement has the attributes or elements of an arbitration agreement.

The jurisprudence in this regard was further expanded by the recent Supreme Court judgment in the matter of Swiss Timing v. Commonwealth Games Organising Committee ([2014] 6 SCC 677), where it was held that a reference to arbitration may be declined only where the Court can reach the conclusion that the contract is void on a meaningful reading of the contract document itself, without requirement of any further proof.

Adding to the suite of pro-arbitration decisions, the Supreme Court in Enercon (India) Ltd. v. Enercon Gmbh ([2014] 5 SCC 1), held that courts have to adopt a pragmatic and not pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. The Court further held when a court is faced with a seemingly unworkable arbitration clause, it is the duty of the court to make the same workable within the permissible limits of the law.

Arbitration Clause Is Independent Of The Main Contract

The Supreme Court has, time and again, interpreted arbitration clauses widely to cover all disputes arising under an agreement unless specifically excluded by the parties. An arbitration clause is often compared to a lifeboat in a sinking ship. In an effort to widen the scope of disputes which can be resolved by arbitration, in a momentous decision by a seven judge bench of the Supreme Court, in SBP & Co. v. Patel Engineering Ltd. [AIR 2006 SC 450], the Court held that an arbitration agreement could stand independent of the main agreement and did not necessarily become otiose even if the main agreement, of which it is a part, is declared void. This view has been recently reaffirmed by the Supreme Court in Today Homes &
Infrastructure (P) Ltd. v. Ludhiana Improvement Trust ([2014] 5 SCC 68), wherein it clarified that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause.

**Third Parties**

An arbitration agreement is an agreement in writing and binds parties to the said agreement. A third party or a non-signatory cannot be proceeded against in arbitration. The exception to this general rule was laid down by the Supreme Court in Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. ([2013] 1 SCC 641), where applying the group of companies doctrine it was held that in international commercial arbitrations non-signatories to arbitration agreements can be referred to arbitration especially in the cases of composite transactions.

**Choice of Law**

The Supreme Court in National Thermal Power Corporation v. Singer Company & Ors. (1992 [3] SCC 551), recognized that the concept of “Party Autonomy” is a widely accepted principle in all systems of law so far as it is not incompatible with the proper law of the contract or the mandatory procedural rules of the place where the Arbitration is agreed to be conducted or any overriding public policy of that place.

On determination of validity of an arbitration agreement and the applicable law the Supreme Court, in Sumitomo Heavy Industries v. ONGC Ltd. ([1998] 1 SCC 305), held that the validity of an arbitration agreement is determined by the law specified in the agreement, and the application of curial law is limited to the conduct of the arbitration including procedural powers and duties of the arbitrator, questions of evidence etc. The relationship between the substantive law specified in an agreement and the procedural law governing the conduct of the arbitration has been further elaborated upon in the judgment of Reliance Industries Ltd. v. Union of India ([2014] 7 SCC 603).

**Drafting Arbitration Clauses: Key Pointers**

In another landmark judgment the Supreme Court held in Bharat Aluminium v. Kaiser Aluminium, ([2012] 9 SCC 552), that the selection of the seat of arbitration is decisive in determining the jurisdiction of courts for the purpose of issues arising out of the arbitration. Similarly, there is a difference between the seat of arbitration and the venue for conducting arbitration proceedings. The venue of the arbitral proceedings may be changed as per the convenience of the parties, but this act does not shift the seat of arbitration. Recently, the Supreme Court observed that in international commercial arbitrations, the venue of arbitration does not confer jurisdiction upon courts of that place to adjudicate upon issues arising out of the arbitration.

**Reference Of Disputes To Arbitration And Extent Of Judicial Intervention**

Sections 8 and 45 of the Arbitration Act deal with the power of Courts to refer disputes to arbitration in case of domestic and international arbitrations, respectively. It is a widely accepted principle that where parties have agreed to refer disputes to arbitration, the court should, as far as possible, abstain from interfering in the matter. Where the agreed mode of resolution of disputes is arbitration, courts if approached, would normally refer the parties to arbitration for resolution of the dispute in question. The Supreme Court in the case of Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. ([2011] 5 SCC 532) laid down various examples of issues which need to be decided before referring the parties to a domestic arbitration and also discussed the well-recognized examples of non-arbitrable disputes such as matrimonial disputes, guardianship matters, insolvency and winding-up matters. In so far as foreign seated arbitrations are concerned, the Supreme Court in the case of Shin-ELstu
Chemical Co. Ltd. v. Aksh Optifibre Ltd (2005 [7] SCC 234), held that where a judicial authority is approached under Section 45 of the Arbitration Act, the authority must prima facie examine the documents and material on record including the arbitration agreement on which request for reference is made by one of the parties, without going into the trial of the case. The principle of least judicial adjudication has further been recognized in Enercon and Swiss Timing where the Supreme Court expressed that courts should play a supportive role in encouraging the arbitration to proceed, with least intervention by the courts.

Arbitrability Of Disputes Involving Allegations Of Fraud

Reference of disputes involving allegations of fraud to arbitration has been a subject matter of debate and discussion. In 2009, the Supreme Court of India in N. Radhakrishnan v. Maestro Engineering & Ors. ([2010] 1 SCC 72), held that though the dispute forming the subject matter of the pending suit was covered within the scope of the arbitration agreement, such dispute would not be referred to arbitration due to there being complicated matters involving allegations of fraud, which in the opinion of the Court, could not be decided through the arbitration mechanism and ought to be decided by a court which was a public forum. The Court, however, has recently diluted its decision in N. Radhakrishnan in two cases: World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd. (AIR 2014 SC 968), and Swiss Timings holding that its decision in Swiss Timings was per incuriam.

Grant of Interim Measures

The Arbitration Act provides for a unique interplay between an arbitral tribunal and the regular judiciary in connection with an arbitrable dispute. The relationship between courts and arbitral tribunals has been best described by eminent English jurist and authority on arbitration, Lord Mustill, who stated that handling of arbitral disputes resembles a relay race wherein in the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court and once the arbitrators take charge they take over the baton and retain it until they have made an award. Then, having no longer a function to fulfill, the arbitrators hand back the baton so that the court can, in case of need, lend its coercive powers to the enforcement of the award. It is in the above background that one has to view the role of courts under the provisions of the Arbitration Act for interim relief or interim protection and preservation of the subject matter of the dispute pending arbitration.

Section 9 of the Arbitration Act empowers Indian courts to grant interim relief before, during and after the conclusion of arbitration proceedings. This enables a party to move an Indian court and seek urgent interim relief/injunctions even before the arbitration proceedings are initiated in cases where the party apprehends that the counter party is planning or attempting to dispose off or alienate assets/property situated in India to the detriment of the party seeking the injunction. This was emphasized by the Supreme Court in Sundaram Finance Ltd. v. NEPC India Ltd. (AIR 1999 SC 565), where it held that in order to give full effect to the words “before or during arbitral proceedings” in Section 9 of the Arbitration Act, it would not be necessary to file a notice invoking the arbitration clause. The expression “before arbitration proceedings” implies that arbitral proceedings are actually contemplated or manifestly intended and positively going to commence within a reasonable time.

Challenge to an Arbitral Award

Section 34 of the Arbitration Act provides that an arbitration award may be challenged before a court only on the grounds provided therein. These include challenges in connection with the incapacity of a party to the proceedings, validity of an arbitration agreement, natural justice, scope of the reference or
submission or the composition of the arbitral tribunal. A court may also set aside an arbitration award if the award is in conflict with public policy.

The term “public policy” was famously described in the House of Lords decision in *Richardson v. Mellish* (1824, 2 Bing. 252), as an unruly horse, that when once you get astride it, you never know where it will carry you. This phrase is a befitting description of the position taken by Indian courts to set aside an award on the ground of “public policy.” The proposition of challenging an arbitration award on the ground of public policy was first put to the test before the Supreme Court in the matter of *ONGC v. Saw Pipes, Ltd* ([2003] 5 SCC 705). An award was challenged on the ground that the arbitral tribunal had incorrectly applied the law in rejecting a claim for liquidated damages. The Supreme Court expanded the concept of public policy to add that the award would be contrary to public policy if it was “patently illegal.” The judgment thus substantially expanded the grounds on which an arbitration award could be challenged before a court. However, in *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (Civil Appeal No. 5085 of 2013), the Supreme Court provided much needed clarification on the applicability of its judgment in ONGC to foreign-seated arbitrations. While dealing with objections to enforceability of foreign awards on the grounds that such awards are opposed to the public policy of India, the Supreme Court curtailed the scope of “public policy” to exclude patent illegality, thereby reducing the scope of challenge to enforcement of awards passed in foreign-seated arbitrations.

However, in so far as domestic arbitrations are concerned, two recent decisions of the Supreme Court namely, *ONGC v. Western Geco International Ltd.* ([2014] 9 SCC 263), and *Associated Builders v. Delhi Development Authority* ([2014] 4 ARBLR 307), have further expanded the scope of the term “public policy,” which is likely to open floodgates for insidious litigators aiming to avoid enforcement of an adverse award. Interestingly, the Law Commission in a Supplementary Report to its 246th Report proposing changes to the Arbitration Act, has taken note of the two aforementioned judgments of the Supreme Court and has proposed to add an explanation to Section 34(2)(b)(ii): “For the avoidance of doubt the test as to whether there is a contravention with fundamental policy of Indian law shall not entail a review on the merits of the dispute.” This is a significant development and the proposed amendment, if implemented, may have a vital impact in the number of objections raised by parties to arbitral awards.

### Enforcement of Arbitral Awards

An important factor for determination of arbitration as an effective means of dispute resolution is the efficiency and efficacy of its award enforcement regime. In the case of domestic arbitration, the award of a tribunal will have the same effect and shall be treated as a decree of a court and enforced accordingly. Unfortunately, under the prevailing scheme of the Arbitration Act, the mere filing of an application to set aside an award will result in an automatic suspension of execution of the award. The Supreme Court in *National Aluminium Co. Limited v. Pressteel and Fabrications Pvt. Ltd.* ([2004] 1 SCC 5400, observed that once challenged under Section 34 within the time stipulated under the Act, an arbitral award becomes impossible to execute. Thus, until the disposal of the application under Section 34 of the Act, there would be an automatic stay of the impugned award.

In cases of a foreign award, the award will be directly enforceable in India if it is rendered or if it is passed in a country which is a signatory to the New York Convention Award or the Geneva Convention Award and has made a reciprocal declaration with the Government of India in this regard.
Anti-Arbitration Injunctions

An anti-suit/arbitration injunction is an order issued by a court that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction. A recent order of the Delhi High Court in *Vikram Bakshi v. McDonalds India Private Limited* (Order dated December 22, 2014 in C.S. [OS] No. 962/2014) marks a significant development in this area of arbitration. The Court granted an injunction restraining McDonalds from pursuing arbitration proceedings before the London Court of International Arbitration. The Court took into account the fact that proceedings had already been initiated before the Indian Company Law Board where a status quo order had been issued. The Court observed that there was a possibility of a conflict of decisions between the two forums and hence an injunction restraining McDonalds from pursuing arbitration proceedings in London was appropriate.

Significantly, the Court also observed that the disputes sought to be raised before an arbitral tribunal in London suffered from forum non conveniens particularly because all except one of the defendants carried on business in India, the cause of action had occurred in India, the governing law between the parties was Indian and the award would eventually be required to be enforced in India. (Forum non conveniens is the discretionary power of a court to direct that there exists another court which would be in a better position to decide the matter in question.)

The Court issued an order restraining arbitration proceeding in London despite the fact that the agreement provided for arbitration in London. The Court rejected McDonalds strenuously argued position that the arbitration agreement providing for London-based arbitration was signed by the parties with open eyes and, therefore, neither party could credibly argue London was a forum non conveniens. The Court also held that anti-arbitration injunctions can be granted on the same principles as those governing anti-suit injunctions. The law governing the equitable remedy of the grant of anti-suit injunctions has been dealt in detail by the Supreme Court in *Modi Entertainment Network & Anr. v. W.S.G. Cricket Pte. Ltd* ([2003] 4 SCC 341).

Arbitration is a creature of an agreement between parties. While it may be reasonable to hold that there is a possibility of conflicting decisions where two forums are seized of the same dispute between the parties, allowing parties to derogate from written terms of an agreement on the ground of forum non conveniens could potentially open up a new dimension of jurisdictional and maintainability challenges that parties may raise at the time when the disputes actually occur. The implications of this decision will become clear in the days to come.

Analysis

Analyzing the various landmark decisions of the Supreme Court, it is clear that the law relating to arbitration in India is continuing to evolve. The Law Commission has recently proposed changes to the Arbitration Act in view of the various developments in the field over the years including the significant rise of institutional arbitrations over ad hoc arbitrations. An ordinance was also issued by the Government bringing about certain changes which are yet to be notified (promulgated) in the form of a Statute. Any development in this regard which brings about clarity and consistency in the applicable law is always welcome. Napoleon once said that, “There is one kind of robber whom the law does not strike at, and who steals what is most precious to men: time”. The ADR mechanism in India is geared towards this end to provide a speedy, effective and efficient means of resolution of disputes.

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A brief look at any commercial agreement would indicate that arbitration is a highly popular mode of settlement of commercial disputes. The benefits of settlement of disputes through arbitration are obviously undeniable and wide ranging: the possibility of speedy disposal, appointment of experts as arbitrators, flexibility of the procedural requirements, ensuring confidentiality of sensitive disputes is maintained are just a few benefits that immediately come to one’s mind.

With the increasing prevalence of arbitration agreements in commercial contracts, a debate that has been going on for a while, centers on whether competition or antitrust issues can be settled by an arbitral tribunal. The issue involves public versus private enforcement and the suitability of private enforcement for antitrust issues. While, as we discuss in this article, the law on these issues is almost settled in both the United States and the European Union, the debate of whether it is appropriate is still ongoing, India, with its still nascent competition law regime, is yet to deal with the interface of competition laws and arbitration; however, it is almost certain that such issues will arise in the near future. The paper reviews the law with respect to arbitrability of anti-trust disputes in the U.S. and the E.U., examines Indian law to see if antitrust claims may be decided by an arbitral tribunal, evaluates whether antitrust claims ought to be arbitrated given the policy considerations in India.

Arbitration of Antitrust Claims in The United States

The Federal Arbitration Act (codified as amended 9 U.S.C. Sections 1 et seq. [2006]) is the federal U.S. legislation that implements the United Nations Convention (i.e., the New York Convention and the Panama Convention). Section 4 of the Act provides that if a dispute is subject to arbitration, the district court “shall make an order directing the parties to proceed to arbitration”. The validity of an arbitration clause in contracts has been explored in various cases. Until 1985, antitrust claims could not be decided by arbitral tribunals. The Second Circuit in 1968 in American Safety Equipment Corporation v. J.P. Maguire & Co. (391 F.2d. 821, 826 [2d Cir. 1968]) created the antitrust exception to arbitrability. The court analyzed the policy considerations present in arbitrating an antitrust dispute and held that claims alleging violations of the Sherman Act were inappropriate for arbitration. The court ruled that anti-trust matters were far too important to the nation’s public policy to allow their disposition by arbitration. This interpretation was subsequently re-examined on appeal by the U.S. Supreme Court in 1985 in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (473 US 615 [1985]).

Mitsubishi Motors involved an international dispute between a Japanese automobile manufacturer (Mitsubishi) and a Puerto Rican auto dealer (Soler). Soler entered into a distribution agreement with Chrysler International, S.A. (a parent of Mitsubishi and hereinafter referred to as Chrysler) for the sale of automobiles manufactured by Mitsubishi. This agreement envisioned arbitration of any disputes in Japan. Mitsubishi commenced an action against Soler in federal district court under the Federal Arbitration Act alleging breach of contract and sought arbitration of the dispute as envisioned under the distribution agreement. Soler counterclaimed against Mitsubishi and Chrysler under the Sherman Act claiming that Mitsubishi and Chrysler had conspired to divide the markets in restraint of trade.
The U.S. District Court for the District of Puerto Rico ordered arbitration of the dispute and held that Soler’s antitrust claims could also be decided by arbitration. However, the Court of Appeals reversed the District Court’s order in respect of whether anti-trust claims were arbitrable. The Court applied the American Safety doctrine developed by the Second Circuit and held that arbitration was an inappropriate mechanism for resolution of antitrust claims. On appeal the U.S. Supreme Court ruled that if an international contract contains a broad arbitration agreement, policy favoring arbitration overrides the domestic public policy against arbitration of antitrust claims. Further, the majority stated that an arbitration clause need not specifically mention a given statute in order to require the arbitration of claims arising from the statute. Thus, the Supreme Court settled the issue that arbitrability of antitrust claims was possible in international disputes as the domestic policy questions raised in American Safety were not of relevance in this dispute.

The Supreme Court further extended its rejection of American Safety doctrine to purely domestic disputes in subsequent complex cases that did not involve antitrust claims. Therefore, in Shearson/American Express v. McMahon, the Court relied on Mitsubishi to hold that RICO claims could be dealt with by arbitration. The Court accepted that even though Mitsubishi applied only to international disputes, its reasoning was equally applicable in domestic disputes. Post McMahon, antitrust disputes that are subject to valid arbitration agreements, both domestic and international, are arbitrable.

There is, however, enough scholarly literature to suggest that the Mitsubishi court may have been incorrect in holding that antitrust claims have be decided by arbitration. Critics of Mitsubishi say that the history of the Federal Arbitration Act and the language of the United Nations Convention support the dissent’s view that antitrust issues in Mitsubishi should not have been resolved by arbitration as the public policy exception applies to antitrust claims. It is probably on this account that in nearly 30 years since Mitsubishi, very few antitrust disputes have gone to arbitration.

Arbitration of Competition Claims in the European Union

While the presence of arbitration clauses in commercial agreements is relatively common in the E.U., settlement of antitrust claims by arbitration is fairly limited. The quintessential feature of the E.U. is its supranational status, which has obvious implications for the settlement of community competition issues through arbitration. Until 2003, or to be more precise April 1999, when the European Commission introduced the White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, the regulatory framework was too centralized for arbitration to have any conceivable role to play in community competition law issues. However, post the decentralization attempts through Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003), arbitration of competition issues was conceivable. In fact many scholars suggest that arbitration would help achieve the goal of decentralization that Regulation 1/2003 sought to achieve.

The speculation and hope that competition issues could be arbitrated was not in vain. In fact, though not as directly as the courts in the United States, national courts as well the European Court of Justice have implicitly indicated that arbitration of competition issues is possible. There is authority to suggest that issues of competition law are arbitrable, implying that an arbitral tribunal can look into the allegations of infringement of Article 101 (prohibiting restriction of trade) and 102 (prohibiting market dominance) of the Treaty of Functioning of the European Union (“Treaty”). In fact, as discussed above, the arbitrability of such issues seems to be an accepted fact in view of
U.S. Supreme Court decision in Mitsubishi, which appears to have influenced E.U. law.

The Validity of Arbitration Clauses And Violation of Competition Law

The primary issue when dealing with arbitration and competition laws is the validity of an arbitration agreement in a contract which is allegedly in violation of Article 101 and 102 of the Treaty. Under the doctrine of severability an arbitration clause would survive even where the agreement is found to be in violation of Article 101 and/or 102 of the Treaty.

Application of Competition Laws And The Obligation of The Arbitral Tribunal

While not directly dealing with the obligation of arbitral tribunals to apply Article 101 and 102 of the Treaty, the European Court of Justice in Nordsee v. Reederei Mond ([1982] ECR 1095, referred to the Court by a German arbitrator), held that, “community law must be observed in its entirety throughout the territory of all the Member States; parties to a contract are not, therefore, free to create exceptions to it.” The Court of Justice goes on to state that:

At paragraph 12, however, the Court observes:

The Federal Republic of Germany, as a Member State of the Community responsible for the performance of obligations arising from Community law within its territory pursuant to Article 5 and Articles 169 to 171 of the Treaty, has not entrusted or left to private individuals the duty of ensuring that such obligations are complied with in the sphere in question in this case.

The observations indicate that while the parties cannot escape the applicability of provisions of Community law including Article 101 and 102 of the Treaty, the arbitral tribunal as such is not bound to apply the law. These observations are somewhat buttressed by the decision of the Court of Justice in Eco Swiss China Time Limited v. Benetton International N.V. (Case C-126/87 [1997] ECR I-3055) where the decision in Nordsee was accepted, indicating that while the parties cannot escape the applicability of Community rules, the arbitral tribunal is not bound to apply them.

Enforcement Of Arbitral Awards And Compliance With The Community Law

The conclusion that the arbitral tribunals have no obligation to determine competition issues may not, however, be completely correct. In Eco Swiss the Court of Justice has held that the award of the arbitral tribunal which is given in disregard of competition laws, when an issue with respect to the same is raised by the parties can render the award as unenforceable. The Court at paragraph 37 held, “(i)t follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty (prohibiting the prevention,
restriction of distortion of competition).” The Court of Justice has hence indicated that community rules regarding competition fall within the rules of public policy and failure to apply the them, will render an arbitral award unenforceable. The national courts have also arrived at similar conclusions as is evident from a 1992 ruling of the Swiss Federal tribunal, annulling an arbitral award on the grounds of failure to apply competition rules.

**Limitations for The Arbitral Tribunal**

While the Court of Justice has indicated that competition issues are arbitrable and that the arbitral tribunal will have to adjudicate on them when they are raised by parties, the arbitral tribunal itself has various limitations, raising a question on the efficacy of arbitral tribunals to deal with the issues. As Nordsee (at paragraph 13) stated and Eco Swiss (at paragraph 40) accepted, the arbitral tribunal would have no power to refer the questions to the Court of Justice. Further the decentralization envisaged in Regulation 1/2003 has no applicability on arbitral tribunals. A reading of the decisions of the Court of Justice suggests that in the EU, much like the United States, competition issues are arbitrable, and failure to apply might lead to the annulment of the award on public policy grounds, however, it appears that the arbitral tribunal has no obligation per se to apply the competition rules. This view is buttressed by the observations of Advocate General Saggio in Eco Swiss at paragraph 26. What also emerges, but has not been discussed in great detail, is that choice of law in a contract does not allow the parties to escape from the community competition laws, inapplicability of which would render the award unenforceable on ground of public policy.

**Arbitration Of Competition Issues In The India**

As the above review of the law in the U.S. and the E.U., has shown it can be said with some level of certainty that competition issues may be arbitrable in both these jurisdictions. Our discussion now turns to whether antitrust claims can be a subject matter of arbitration in India under the Competition Act, 2002.

India has no direct precedent relating to arbitration of competition issues and the Competition Act, is silent in this regard. In this backdrop, we will attempt to examine the prevailing jurisprudence on arbitration to determine if, India would follow other developed jurisdictions like the U.S. and the E.U. and hold that competition issues are arbitrable.

**Overview of the Competition Act**

The Competition Act was enacted in India in 2002. However, the regulation of anticompetitive agreements and monopolies existed even prior to that in form of the Monopolies and Restrictive Trade Practices Act, 1969 along with the Consumer Protection Act, 1986. In view of the necessity to modernize this regime, a High Level Committee on Competition Policy and Law was set up in 1999 to give recommendations regarding the establishing a new competition regime in line with the laws of other developed jurisdictions which led to the enactment of the Competition Act.

Section 18 of the Competition Act states that “it shall be the duty of the Competition Commission of India (“Commission”) to eliminate practices having adverse effect on competition, to promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.”

In line with international developments in this field, the Competition Act prohibits anti-competitive agreements (§ 3) and abuse of dominant positions (§ 4)
and regulates combinations, (i.e., mergers, acquisitions, etc.) (§ 5). In addition, the Act gives the Commission the responsibility of undertaking competition advocacy, awareness and training about competition issues.

The Competition Act gives the Commission a wide range of remedies in case violation of Sections 3 and 4. Section 27 of the Competition Act empowers the Commission to issue a cease and desist order and impose a penalty not exceeding 10% of the average turnover during the preceding three years of the delinquent enterprise. In the case of a cartel, the penalty could be 10% of the turnover or three times the amount of profit derived from the cartel agreement, whichever is higher. Further, the Commission can recommend to the government that the dominant enterprise be broken-up. Under Section 53N of the Act, the Competition Appellate Tribunal has the power to grant compensation for loss or damages suffered from established contravention of the Competition Act. Hence, there is very limited private enforcement of competition laws in India.

Further, the Act provides detailed procedures and parameters for the inquiry by the Commission. Sections 19 and 20 lay down the factors to be taken into consideration by the Commission in an inquiry into agreements creating a dominant position of an enterprise and combinations. The Act hence creates a mechanism of public enforcement of the competition law regime, akin to the criminal enforcement mechanism in India—where determination of actual contravention rests with a government authority. This is probably recognition of the fact that maintaining competition in the market is a responsibility of the State.

The Competition Act incorporates into it both the per se rule and the rule of reason. While horizontal anti-competitive agreements do not follow the per se rule which approach is consistent with other jurisdictions.

The Limits of Jurisdiction of the Commission the Trilogy of Sections 60, 61 And 62 of the Competition Act

The limits and contours of the jurisdiction of the Commission as well as the jurisdiction of other authorities vis-à-vis the Commission are set out in Sections 60, 61 and 62 of the Competition Act. Section 60, which is a non obstante clause, provides pre-eminence to the provisions of the Competition Act. Section 62 states that the provisions of the Competition Act are in addition to and not in derogation of the provisions of any other law for the time being in force. While prima facie it appears that Section 60 and 62 are in contradiction with each other, principles of harmonious construction would apply to ensure that the two provisions are read together so as to render both effective.

Section 61 of the Competition Act, excludes the jurisdiction of civil courts with respect to matters which the Commission or the Competition Appellate Tribunal is empowered to determine by or under the Act. This implies that no civil court can determine issues dealing with anti-competitive agreements and/or abuse of dominance. This would further imply that no civil court may entertain a claim of compensation arising out of an established contravention of the Act. The implications of this section to the arbitrability of the competition issues will be discussed below. At this stage, it is sufficient to say that civil courts would have no jurisdiction to entertain any suits or proceeding in respect of any matter which are covered by the Competition Act.
The Arbitrability of Competition Issues in India

As indicated earlier, the arbitrability of competition issues in India, unlike the U.S. and the E.U., has not been addressed by any judicial authority. This does seem surprising since a significant number of orders passed by the Commission, specifically with respect to imposition of unfair and discriminatory conditions are based on agreements which have arbitration clauses. Prominent amongst these are the agreements in Belaire Owners’ Association v. DLF Limited, HUDA & Ors. (Case No 19/2010) and M/s Maharashtra State Power Generation Company Ltd. v. M/s Mahanadi Coalfields Ltd. & Ors (Case No 03/2010). However, in both cases, instead of approaching the arbitral tribunal, the aggrieved parties approached the Commission. In the almost innumerable complaints filed against DLF Limited, for instance, the failure to approach the arbitral tribunal may have been influenced by the evident unfairness of the arbitration clauses itself, which provided for a sole arbitrator who could be an employee of DLF itself. Notwithstanding the fact-specific aspects of the DLF case, the fact remains that despite various cases pertaining to commercial contracts with arbitration clauses, the courts in India have not yet examined the arbitrability of competition issues. That is not to say that there is no guidance on this issue. It appears that India may not adopt the jurisprudence as settled in the U.S. and the E.U.

The Nature of Arbitration and its Implications on “Arbitrability”

Section 16 of the Arbitration and Conciliation Act, 1996 incorporates the doctrine of competence, which implies that the decision of whether an issue is arbitrable or not rests with the arbitral tribunal and is only subject to judicial review at the stage of enforcement. However, the risk of annulment implies that issues of arbitrability are highly relevant for any tribunal. Section 34 of Arbitration and Conciliation Act, 1996, grants powers to a civil court to set aside an arbitral award on specified grounds and Section 34(b)(i) states that the Court may set aside the arbitral award if the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Therefore, any arbitration of competition issues would be rendered futile if competition issues are found to be incapable of settlement by arbitration.

The term “arbitrability” has different meanings in different contexts. The Supreme Court of India in Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. and Ors. (2011 [5] SCC 532 at ¶ 21) has very aptly described three issues which are central to the determination of arbitrability which are: whether the disputes are capable of adjudication and resolution by arbitration; whether the disputes are covered by the arbitration agreement; and whether the parties have referred the disputes to arbitration.

It is almost well-settled in India that only commercial disputes which deal with in personam as opposed to in rem may be adjudicated by arbitration. Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. and Ors., (2011) 5 SCC 532 at ¶ 23. The arbitral tribunals are private forums chosen by the parties to only settle disputes that concern rights and obligation inter se. As the Supreme Court of India very aptly stated in Booz Allen:

Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals),
may by necessary implication stand excluded from the purview of private fora.

Id. at ¶ 22.

What is to be determined therefore is whether competition issues are excluded expressly or by necessary implication from the purview of adjudication by arbitration. To determine if there is express exclusion, an assessment of the provisions of the Competition Act and the Arbitration and Conciliation Act, 1996 is necessary. The Arbitration and Conciliation Act, 1996, understandably, is silent on arbitrability of competition issues. The Competition Act on the other hand expressly excludes the jurisdiction of civil courts with respect to matters which the Commission or the Competition Appellate Tribunal is empowered by or under the Competition Act to determine. This raises the issue of whether an arbitral tribunal can be considered as a civil court. In this regard, the law is unambiguous. The courts in India have in various judgments categorically held that arbitral tribunals do not constitute courts and hence the express bar under the Competition Act would not apply to arbitral tribunals (Tribunals Collector of Varanasi v. Gauri Shankar Misra and Ors, [1968] 1 SCR 372; M.M.T.C. through its General Manager v. Vicnivass Agency through its Partner, T.P.S. Ponkumaran and Mr. Justice P.N. Nag (Retd.), Sole Arbitrator, [2009] 1MLJ 199.

The next step is to determine whether competition issues are excluded by necessary implication. In Booz Allen the Supreme Court held:

The well-recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Id.

The Court linked its rationale to the nature of the dispute. According to the Court, these exclusions relate to actions in rem, i.e., actions which are valid against the world at large, as contrasted against specific individuals. Booz Allen is in fact not the only decision on this point and the Supreme Court in this case has only reaffirmed what it has often previously.

Competition issues, especially as envisaged under the Competition Act, do not seek to address claims between individual but rather the competitive concerns in the market. This is further buttressed by the fact the orders of the Commission are not limited to the parties to the suit but are in the nature of general cease and desist orders. Competition issues are hence not in nature of action in personam and Booz Allen, along with other decisions would suggest that such issues may not be arbitrable.

The “Unruly Horse” Of Public Policy

In addition to the issue of arbitrability, arbitration of competition issues poses the additional challenge of being in conflict with the public policy of India. As discussed earlier, the E.U. regards failure to deal with competition issues as a violation of public policy, rendering the award unenforceable. India is likely to take a two-pronged approach.

An award given by an arbitral tribunal for enforcement of an agreement which is in contravention of the Competition Act, would be a clear violation of public policy in view of the landmark decision of the
Supreme Court in *Renusagar Power Company Limited v. General Electrical Company Limited* (1994 Supp (1) SCC 644) where the Court held that an award which violated any legislative provisions would be contrary to the public policy of India.

While this conclusion is obvious, the unruly horse of public policy (to use the timeless phrase of Burrough, J., in *Richardson v. Mellish*, [1824] 2 Bing. 252) could also be used to challenge the application of competition issues by the arbitral tribunal on the ground that adjudication of certain issues is reserved to specified state authorities and cannot be outsourced to private tribunals. The Supreme Court in *Booz Allen* at paragraph 23 has in fact observed that, “[a]djudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy.” While nothing conclusive can be said about the applicability of public policy in this manner, the courts in India as in the United Kingdom are aware that public policy is an “unruly horse.”

**Possibility Of Adjudication Of Competition Claims By Arbitration**

As discussed earlier, the Competition Act by itself does not restrict the arbitral tribunals from dealing with competition issues. The application of competition issues by a tribunal, however, is bound to be fraught with problems. The application of competition law by an arbitral tribunal, especially in international commercial arbitration is bound to a complex process. The lex contractus might not indicate the appropriate competition regime. Failure to apply the principles of competition law, which appear to be in the nature of mandatory principles, de hors the lex contractus, might render the award un-enforceable. The resources available with a tribunal to determine competition issues is itself questionable and hence the capability of a private tribunal to appropriately deal with competition issues, especially the determination of appreciable adverse effect on competition in India may be too complicated. It is also clear that the nature of remedies that can be offered by an arbitral tribunal are extremely limited when compared with the remedies that may be offered by the Commission.

The Indian courts and the Commission are both yet to deal with the issues that arise on the interface of arbitration and competition laws. An analysis of the jurisprudence indicates that India might not follow the U.S. or the E.U. and we may see jurisprudence to the effect that competition issues might be held to be non-arbitrable. In fact, the High Court of Delhi in the *Union of India v. Competition Commission of India* (AIR 2012 Delhi 66) has held that presence of an arbitration clause in an agreement does not oust the jurisdiction of the Commission as the scope of proceedings and focus of investigation and consideration before Commission is very different from the scope of an inquiry before an arbitral tribunal. This indicates that an arbitration agreement cannot oust the jurisdiction of the Commission; however, the Court did not make any observation on whether the arbitral tribunal can adjudicate on competition law issues.

However, it would not be difficult for the Indian judiciary to permit arbitration of competition issues, in view of the well developed and accepted principles of arbitrability of competition issues in the U.S. and the E.U. Given the nascency of the competition landscape in India, entrusting a private tribunal to adjudicate on competition issues may raise significant risks. Moreover, regulatory enforcement is extremely important in developing a competition culture in the country, and arbitration of competition issues might not be well suited for private enforcement.

In addition, the scheme of the Competition Act envisages a mechanism of public enforcement, with a very limited role for the informant, who may not even be aggrieved by the alleged conduct. It appears that the State has the responsibility of ensuring that competition is maintained in the market and a private enforcement
by an arbitral tribunal might run contrary to the legislative intent and policy of the statute. Though it may be argued that the enforcement of arbitral awards ensures some degree of control of the State over an arbitration proceeding, it is not clear whether such control can replace supervision guaranteed by a specialized regulator like the Commission.

**Conclusion**

In light of the limited jurisprudence as well as policy considerations, arbitration of competition issues in India may not be feasible in the near future. We will have to wait to see how the law evolves and whether India will adopt or diverge from the law of other jurisdictions in this area.

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IMPROVING THE EASE OF DOING BUSINESS IN INDIA

By Sunil Tyagi and Nilima Pant

To enhance economic growth of a country, it is imperative to create an efficient ethos for businesses. This can be achieved by making regulatory environment more conducive to the setting up and operation of domestic business entities. Further easier regulatory norms and efficient business environment directly influence the inflow of foreign investment which is an important resource for development of an economy as it leads to employment generation, achievement of advanced technology and knowhow etc.

Aiming for economic growth, the new government is taking several initiatives to improve ‘ease of doing’ business so as to facilitate smooth and efficient functioning of businesses in the country. The government has made emphasis on simplification of procedures, rationalization of the rules and increased use of information technology in order to make governance more efficient, simple and business friendly. To achieve its aim of ease of doing business in India, the government has taken following initiatives.

**Liberalization in FDI Policy**

The Government of India (GOI) is constantly taking significant steps in attracting foreign investment inflows in the country. The Foreign Direct Investment Policy (FDI Policy) in several sectors like defense, railways, insurance etc. has been liberalized. The initiatives to liberalize the FDI Policy are discussed hereunder.

**Alignment of FDI Policy with NIC-2008**

The FDI Policy, issued by DIPP, has been aligned with the upgraded National Industrial Classification (NIC)-2008, issued by National Statistical Organization, Ministry of Statistics & Programme Implementation, GOI. NIC-2008 is an advanced version of industrial classification which provides a basis for the standardized collection, analysis and dissemination of industry (economic activity) wise economic data for India. All the economic activities are classified as per the NIC code and the classification is necessary for seeking industrial licenses. As the structure of NIC-2008 is identical to United Nations International Standard Industrial Classification (ISIC), it allows Indian businesses to be part of globally recognized and accepted classification that facilitate smooth approvals/registration.

**Carve Out For Medical Devices**

Medical device industry has been carved out from the Pharmaceutical sector and 100% foreign investment in this industry is allowed under the Automatic Route (for both Greenfield and Brownfield projects). Previously, the medical device sector was under pharmaceutical sector where 100% foreign investment was allowed under the Automatic Route for Greenfield projects and 100% foreign investment was allowed under Government Route for Brownfield projects, subject to certain conditions (e.g. Non-compete clause). Since medical device industry was under the pharmaceutical sector, it was also bound by the stringent norms for foreign investment. The carve out of medical device sector from pharmaceutical sector will encourage foreign investment inflows in medical device sector where there is lack of adequate capital and technology.
Increase in foreign investment cap in Insurance Sector and Pension Sector

With a view to increase foreign investment in Insurance Sector and Pension Sector, foreign investment caps of the sectors have been revised to increase the limit from 26% to 49% where foreign investment up to 26% is allowed under the Automatic Route and foreign investment beyond 26% but up to 49% is allowed under Approval Route.

Foreign Investment in Railway Sector

In order to boost development in Railway Transport Sector, GOI has reviewed the FDI Policy to permit 100% foreign investment under the Automatic route in construction, operation and maintenance of specified railway infrastructure sector viz. (a) suburban corridor projects through PPP, (b) high speed train projects, (c) dedicated freight lines, (d) rolling stock including sets, locomotive coaches manufacturing and maintenance facilities, (e) railway electrification, (f) signaling systems, (g) freight terminals, (h) passenger terminals, (i) infrastructure in industrial park pertaining to railway line/sidings including electrified railway lines and connectivities to main railway line and (j) mass rapid transport systems.

Relaxation in FDI in Construction, Development Sector

With an aim to increase foreign investment in construction sector and opportunities for growth and employment, GOI has eased the norms for FDI in construction and development sector. For instance (a) the conditions of minimum land area and minimum capitalization have been removed; (b) easier exit norms have been introduced. Investors are now permitted to exit on completion of the project or after development of trunk infrastructure, or after completion of 3 year lock-in period; and (c) in order to encourage construction of low-cost affordable housings and prevention of proliferation of slums in and around the cities, a categorization has been made for affordable housing projects which are exempt from the minimum land area requirement and minimum capital requirement.

Foreign Investment in White Label ATMs

Foreign investment in White Label ATM operation up to 100% under the Automatic Route has been recently permitted to ease and expedite foreign investment inflows in the sector and to enhance ATM networks in semi-urban and rural areas. White Label ATM operators are non-banking companies which operate and run ATMs. The move will increase the penetration of ATMs across the country and promote financial inclusion.

Increase in Foreign Investment Cap in Defense Sector

The majority of India’s requirement in defense is catered by imports. To save outflow of foreign currency, increase foreign investment in the defense sector, help build domestic capabilities, bring in top-notch technology, and strengthen exports in the long run, foreign investment cap of the sector was increased in 26th August, 2014 from 26% to 49% under Government Route and investments beyond 49% required approval of Cabinet Committee on Security. In a further attempt to attract foreign investment in this sector, the government has recently revised sectoral route and cap for defense sector to permit 100% foreign investment in this sector wherein foreign investment up to 49% can be raised under the Automatic route and foreign investment beyond 49% can be raised under Government route and approval of Cabinet Committee on Security shall not be required.
**Foreign Investment in Retail**

Conditions for foreign investment in single brand retail trading have been relaxed. Entities may now undertake wholesale/ cash & carry trader and single brand retail trading simultaneously subject to maintaining of separate books of accounts. Also in case of entities operating in high technology segments having state of art and cutting edge technology and where local sourcing is not required, the government may relax 30% sourcing norms.

**Foreign Investment in Ecommerce**

Indian entities engaged in single brand retail trading operating physical stores are now permitted to engage in retail trading through e-commerce. Indian manufacturers are also now permitted to sell, whether in wholesale or retail, their own products through e-commerce platform.

**Foreign Investment in Other Sectors**

To further ease, rationalize and simplify the process of foreign investments in the country and to put more and more FDI proposals on automatic route instead of Government route, FDI Policy has been recently revised. Some of the key changes of the amendments are: (a) Foreign investment in duty free shops are now permitted under the Automatic route subject to compliance stipulated under the Customs Act, 1962 and other laws, rules and regulations. (b) Foreign investment in broadcasting carriage sector is also increased from 74% to 100%. (c) Foreign Investment in tea plantation has been brought under the Automatic route. Up to 100% of foreign investment under the Automatic route has been permitted in coffee, rubber, cardamom, palm oil tree and olive tree plantation. (d) Foreign Investment limit in private banking has been increased from 74% to 100%. (e) NRIs are now permitted to make investment through an overseas trust, company or partnership firm owned and controlled by the NRI and such investment will be deemed domestic investment at par with the investment made by residents. (f) 100% foreign investment has been allowed under the Automatic route in LLPs operating in sectors under the Automatic route and without FDI linked performance conditions. LLPs are also permitted to make downstream investment in an Indian company or LLP engaged in sectors under the Automatic route and without FDI linked performance conditions.

**Simplification in Industrial Licensing**

The process for applying for industrial license has been made online and the service is made available on the e-biz platform. Initial validity period of the Industrial License was also increased from 2 years to 3 years in July 2014 and later in October, 2014 two extensions of 2 years each, up to 7 years, in the initial validity of the Industrial License was made. In April 2015, the initial validity of Industrial licenses for Defense Sector was increased from 3 years to 7 years. Recently in September 2015 the validity was increased to 15 years and further extendable up to 18 years for existing as well as future license. The move to increase the validity of Industrial Licensing is made keeping in mind the long gestation period of Defense Contracts.

This has enabled the licensees to have more time for implementation of the Industrial License by way of obtaining the necessary clearances/approvals from local authorities, putting in place the security aspects, machinery manpower, implementation of technology, etc.

**Boost in Manufacturing Sector**

Further in order to boost foreign investment in manufacturing sector, the government has de-reserved the items reserved for exclusively manufacturing by Micro Small and Medium Enterprises (MSME). So far manufacturing of 20 items, including bread, wax
candles, exercise books and registers, steel almirah, domestic utensils, were reserved for MSME sector.

As per the FDI Policy, foreign investment in manufacturing sector is allowed under the Automatic route. However, if any Industrial undertaking, not being an MSME, was engaged in the manufacturing of items reserved for the MSME sector, then it had to obtain government approval for raising foreign investment. Such undertakings were also required to obtain industrial license and to undertake an export obligation of minimum 50% of the new or additional annual production of the MSME reserved items within a maximum period of three years.

Due to de-reservation of MSME items, the segregation in the foreign investment norms for MSMEs and non-MSMEs has been done away with. Therefore, at present, foreign investment in the manufacturing sector is 100% under the Automatic Route for MSMEs and non-MSMEs.

**E-biz**

In a bid to create a business and investor friendly ecosystem, a government-to-business portal, viz. e-biz portal, has been launched. This will create an investor centric online single window model for providing clearances and filing compliances thereby reducing time, cost and effort taken in obtaining clearances and permits and meeting compliance requirements. The e-biz platform provides end-to-end online submission and processing of forms and integrated payment gateway. So far 14 services have been integrated with the e-biz portal, including process to apply for industrial license and industrial entrepreneur memorandum, importer exporter code license, issue of TAN, PAN, name availability for incorporation of companies, certificate for incorporation of a company etc.

Further to bring transparency and accuracy in the regulatory compliances and to trigger healthy competition among States, DIPP has also released a framework to assess and rank States in terms of ease of doing business. Under the framework, a comparative study of various States is done and the assessment is done on the basis of various factors enabling ease of doing business such as securing permits and licenses, availability of land, taxation, labor compliances, environment clearances etc.

**Ease in Setting Up and Operating Companies**

As an initiative to make it easier for corporate to do business, the Companies Act, 2013 has been amended.

**Easier Incorporation Norms:** (a) The Companies Act, 2013 required Private Companies and Public Companies to have a minimum paid-up capital of Rs. 100,000 and Rs. 500,000 respectively. The Amendment has removed these requirements. Thus no initial capital is required to incorporate a company (both private and public companies). (b) An integrated process for incorporation of a company has been introduced. The application for allotment of DIN, reservation of name, incorporation of company and appointment of directors of the proposed company can be filed in an integrated form no. INC-29. (c) The requirement of common seal has been made optional. As a substitute, authorization by two directors and Company Secretary can be accepted. (d) The requirement to obtain certificate of commencement of business has also been done away with.

**Loan to Wholly Owned Subsidiary Companies:** (a) Now the holding companies/ parent companies are permitted to give loans to its wholly owned subsidiaries and guarantees and security to its subsidiary companies, if the loans are utilized for their principal business activity.
**Related Party Transactions:** Earlier, approval of shareholders by way of ‘Special Resolution’ was required in certain related party transactions. Now such related party transactions may be approved by passing ‘Ordinary Resolution’ and not ‘Special Resolution’.

**Exemptions to Private Companies:** With a view to provide easier and simpler legal framework for private companies, Ministry of Corporate Affairs, GOI, has notified amendments to exempt private companies from certain provisions of the Companies Act, 2013.

**Related Party Transactions:** The definition of ‘related party’ has been amended for private companies to exclude holding, subsidiary and associate company and other subsidiary(ies) of the holding company of the private company. Therefore any contract or arrangement of private companies with such entities shall not be regarded as related party transactions and will not come under the ambit of section 188 that requires shareholders resolution.

Also section 188 restricts related party to vote on resolution to approve any contract or arrangement on which it is interested. Now this restriction is not applicable to private companies. Therefore every member, including those who are related party, of private company is entitled to vote on such resolutions.

**Provisions for General Meeting and Restriction on Power of Board:** Private Companies are now exempted from filing Board Resolutions with the Registrar of Companies. Provisions with respect to general meetings relating to notice of meetings, statement to be annexed to notice, quorum for meetings, chairman of meetings, proxies, restriction on voting rights, voting by show of hands and demand for poll has also been exempted for private companies. Further, the Board of Directors of a private company can exercise borrowing powers, dispose of an undertaking of the company, and remit any debt due from a director etc., without obtaining Shareholders’ approval.

**Participation of Interested Directors:** Section 184 (2) refrains director(s) in participating in the board meetings where contract or arrangement in which they are interested is to be discussed. Now interested directors of private companies will be permitted to participate in the board meetings after they make disclosure of their interest.

**Relief to Overseas Indians**

**Liberalization of FDI norms for NRI, PIO and OCI**

In order to enhance FDI inflows, FDI norms for NRIs, PIOs (Person of Indian Origin) and OCI (Overseas Citizen of India) have been liberalized. The definition of NRI will now include OCI cardholders as well as PIO cardholders. Also investment by NRIs, PIOs and OCIs on non-repatriable basis will be deemed to be domestic investment at par with the investment made by residents. Therefore with a view to channelize the funds from NRIs, non-repatriable investments by NRIs will now be treated as domestic investment.

**Simplification of Immigration norms**

The Citizenship Act, 1955 is also amended to simplify the immigration process. After the amendment, all PIO cardholders are now deemed to be OCI cardholders with effect from January 9, 2015. Thus PIOs are entitled to the following benefits: (a) PIOs will be entitled to a lifelong visa allowing them to visit India at any time and for any purpose. Earlier, PIO cardholders had the benefit to visit India without any visa only for a period of 15 years from the date of the issue of PIO card. (b) There will be no requirement for registration at the concerned jurisdictional FRRO/FRO. Earlier, a PIO was required to get the registration done within 30 days if their stay in India exceeds 180 days. Further a minor child whose both parents are citizens of India or one of the parents is a citizen of India will
now be eligible to apply for registration as an OCI cardholder.

**Listing Reforms**

To make it easier for startups to raise funds from the domestic market, SEBI has notified a new set of listing norms for such entities on a separate platform namely, Institutional Trading Platform (ITP). The new norms provide significant relaxations in the disclosure requirement, lock-in period etc.

i. Minimum lock-in period of Promoter’s capital is only 6 months, against 3 year for normal IPOs.

ii. There is no need to make detailed disclosures on how the IPO funds will be used.

iii. Regulations of normal IPO relating to advertisement, allotment, underwriting, pricing will not be applicable.

iv. An option to migrate to the main board after 3 years is also given to the entities which will be listed in the ITP.

v. Minimum 75% of the net offer is to be allotted to institutional investors and the minimum application size is Rs. 1 million. Therefore, only institutional investors and high net-worth individuals can invest under the new platform.

**Ease of Visa**

The Government of India has launched Tourist Visa on arrival enabled by Electronic Travel Authorization on 27th November 2014 initially for 43 countries at 9 airports. The facility is now extended to 113 countries at 7 more Indian airports.

Under e-tourist Visa scheme, foreign tourists can apply for a Visa by uploading their passport and photograph and paying the Visa fee online. The authorities then process the application and send an electronic travel authorization, or e-visa through email within 72 hours.

The government has taken a series of initiatives to bring positive changes in the business environment. As per news reports in recent months, to further facilitate the “ease of doing” business, the government has proposed certain measures for simplification of tax procedures, such as reduction in the rate of corporate tax from 30% to 25% over the next 4 years, abolition of wealth tax, and introduction of GST. The government is constantly engaged in discussion with the representatives of e-tailers in resolving outstanding taxation issues, requirement of road permits for entering certain states for the goods entering and exiting its territory. To further smoothen the route of foreign investment, government is also contemplating to remove sectoral conditions from the FDI Policy such as minimum capitalization, shareholding restrictions and non-compete clauses for foreign investors.

As per DIPP Foreign Direct Investment database, India has witnessed significant growth in foreign investment in the past one year. The increased inflow of FDI in India indicates faith in overseas investors in India’s economy and the reforms initiated by the government towards ease of doing business.

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Conference on India-United States Cross Border Investment 2.0: Counseling in Reform Environments
Organized by SILF & ABA SIL
February 17-19, 2016, Hyatt Regency, New Delhi

Dear All,

We are pleased to invite you to attend "India-United States Cross Border Investment 2.0: Counseling in Reform Environments", a legal conference sponsored by the Society of Law Firms (SILF), co-sponsored by the American Bar Association (ABA), Section of International Law on February 17-19, 2016 at the Hyatt Regency, New Delhi, India.

The conference will feature substantive programming on topics of current interest to US and Indian lawyers counseling clients in cross border investments and transactions. Speakers will include Indian government officials, US and Indian private practitioners, Indian and US in-house counsel, and international arbitration experts. American Bar Association leaders have been invited. Attorneys from leading US and Indian law firms are expected to attend. There will also be networking events in the evening.

Please BLOCK YOUR DATES for February 17 - 19, 2016. We earnestly look forward to seeing you at the conference. More details will follow soon.

Best Wishes,

Dr. Lalit Bhasin
President, SILF
Founder, Co-Chair, India Committee of ABA - SILF
February 23, 2016  
9:15 AM - 10:45 AM ET  
JAMS (Global ADR Provider), Boston Resolution Center  
One Beacon Street, Suite 2210  
Boston, Massachusetts  
Section of International Law  
China Committee

The Global Refugee Crisis, Part 2: Rights, Rule of Law, & Rational Remedies.  
Teleconference  
February 24, 2016  
12:00 PM - 1:30 PM ET  
Section of International Law  
International Human Rights Committee
Annual Year-in-Review

Each year, ABA International requests each of its committees to submit an overview of significant legal developments of that year within each committee’s jurisdiction. These submissions are then compiled as respective committee’s Year-in-Review articles and typically published in the Spring Issue of the Section’s award-winning quarterly scholarly journal, The International Lawyer. Submissions are typically due in the first week of November with final manuscripts due at the end of November. Potential authors may submit articles and case notes for the India Committee’s Year-in-Review by emailing the Co-Chairs and requesting submission guidelines.

India Law News

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