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Ease of doing

BUSINESS

Distance to Destination

Corporate Governance – Rising Tide

Solving Insolvency – The New Bankruptcy Code

Anti-Corruption Enforcement – Changed Landscape

Arbitration – High Expectations

FOREWORD

In 2014, Government of India launched the unique 'Make in India' initiative with the primary goal of making India a global manufacturing hub, by encouraging both multinational as well as domestic companies to manufacture their products within the country. Emphasizing the importance of 'Ease of Doing Business' as a major pillar of the 'Make in India' initiative, the Government simultaneously initiated an ambitious programme of regulatory reforms covering a wide range of areas. The programme entails policy interventions for promoting business friendly environment and making India a preferred place for doing business.

The Government introduced many reforms during the course of last two years in areas such as starting a business, labour laws, FDI, getting environmental clearances, deregulation of licensing, getting electricity connections, single window clearances for import and export, etc. This in-depth overhaul of processes and policies has yielded encouraging results. Not surprisingly, India witnessed the steepest rise in rankings in the World Bank Group's Doing Business Study in 2016; improving its position to 130 from 142 in 2015.

We are happy to present to you this publication which illustrates the facilitative measures implemented during the last two years in the areas of corporate and securities law, the Insolvency & Bankruptcy Code, Anti-Corruption laws, etc. We are thankful to Trilegal for partnering with us in development and production of this publication.

We shall continue our work with the various departments of the Government and assist in the efforts to build an industry-friendly, flexible, liberalized and transparent business environment.

A Didar Singh
Secretary General
FICCI

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INTRODUCTION

In recent years, India has placed greater emphasis on its positioning with respect to the ease of doing business. This has been accompanied by a growing realization that there is a direct correlation between improvements in the ease of doing business and success in attracting investments and generating economic growth. While such improvements have come (and need to continue) across a broad front, in this paper, we have focused on four themes – corporate governance, insolvency laws, anti-corruption laws, arbitration.

In many contexts, ease of doing business can be equated to "business friendly" i.e. reducing the complexity, time and cost of complying with business regulation, and in general, less government intervention – for instance, tax laws (other than GST, which is welcome development), regulations governing foreign investment, labour laws and licensing requirements.

In each of these areas, there has been a welcome trend of greater government engagement with commercial concerns, which called for structural reform. All of these reforms aim to bring more clarity and predictability in conducting trade and commerce, which will make it easier to do business in India. For instance, greater involvement in establishing objective standards for corporate governance improves the investment environment while enhancing the efficiency of markets and corporate decision making. Similarly, recent legislation with respect the arbitration and commercial courts has been aimed at increasing confidence in commercial dispute resolution mechanisms. A renewed focus on anti-corruption legislation, which now proposes to cover private commercial transactions, will instill greater transparency and confidence in business processes.

The new Bankruptcy Code of 2016 is one of the most significant pieces of commercial legislation in recent times, with scope to kick off a virtuous cycle of improvement in capital markets, banking, infrastructure, distressed opportunities and commerce more generally. The government's active pursuit of this project, which is still in the making (as the infrastructure to implement the bankruptcy code is in the process of being established) has been emblematic of a pro-active emphasis on the ease of doing business.

To be sure, much work remains in furthering this agenda, including in the areas addressed by this paper. However, it is encouraging to note that the trend has been in the right direction, and that changes that have been implemented in recent times will drive improvements in the ease of business going forward.

Harsh Pais
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01.

CORPORATE GOVERNANCE – RISING TIDE

Corporate Governance Regulation in India

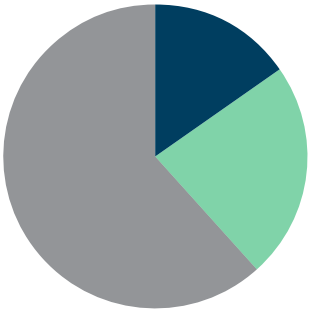
Corporate governance is founded on the principles of transparency, accountability, fairness and responsibility. Many empirical studies have shown the direct relationship between corporate governance and long term equity value. Good corporate governance structures encourage companies to create an ethical business environment and protect value for its shareholders. It is well recognised that well-governed companies perform better, inspire investor's confidence, are valued higher and are able to raise capital efficiently and effectively. Institutional investors evaluate corporate governance in their investment policies and are willing to pay premium for a well- governed company. Higher standards of corporate governance also minimises the risk of corruption and mismanagement. Thus, a strong corporate governance framework is a key indicator for ease of doing business and has an overall benefit to the economy.

Over a period of time, emphasis on improving corporate governance standards around the world has increased. Legislation should provide for a clear set of rules, best practices and a predictable path for both corporates and investors on each pillar of corporate governance, including board practices, disclosures and shareholder rights.

Current corporate governance laws in India are a combination of broad principles (broadly in line with the OECD principles on corporate governance) and specific rules. There is usually some overlap between the two on certain issues, the principles offering general guidance and the rules offering specific direction on such issues.

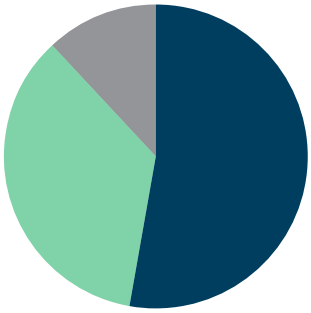
The diagrams below describe the evolution of codified corporate governance law in India.

Corporate Governance Regulations - 2000



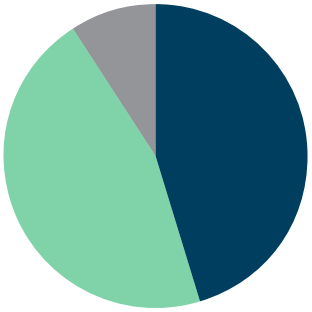
- Companies act
- Listing Agreement
- General principles of law

Corporate Governance Regulations - 2013



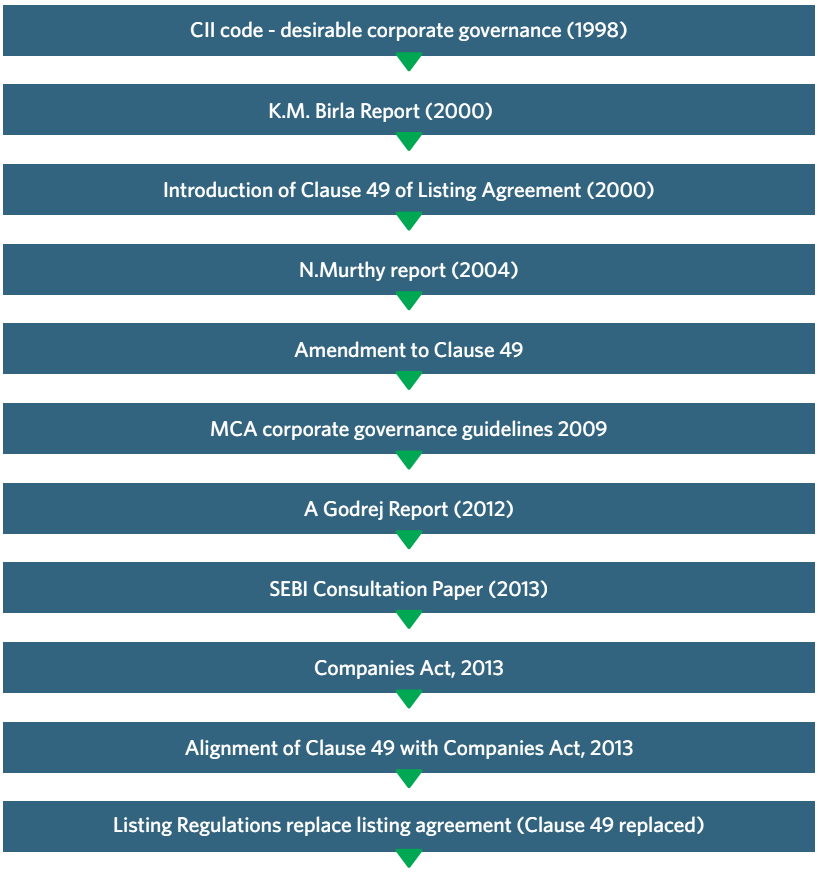
- Companies act
- Listing Agreement
- General principles of law

Corporate Governance Regulations - 2014 onwards



- Companies act
- Listing Agreement/ Regulations
- General principles of law

1. MILESTONES IN THE DEVELOPMENT OF INDIA'S CORPORATE GOVERNANCE LAWS



While corporate governance regulations have evolved rapidly over the last few years, the government and regulators have strived to raise standards, improve transparency and ease barriers to doing business in India. Some of the notable changes in the recent past have been

- Significantly shortening the timeline (down to 24 hours in some cases) for setting-up new companies;
- Introducing requirements for rotation of a company's external auditors, internal audit, obligation on auditors to notify frauds to the government, limitation on other services that an external auditor can provide, and significantly increasing penalties on auditors;
- Introducing requirement for secretarial audit by a practicing company secretary for certain companies, and clarifying the functions of a company secretary;
- Introducing 'class action' proceedings to protect stakeholder interests;
- Introducing e-voting facilities for shareholders of listed public companies;
- Introducing electronic participation at board meetings;
- Introducing the requirement for listed companies and large public companies to have a CEO, CFO and company secretary.
- Establishment of the Serious Fraud Investigation Office for investigation into frauds ;
- Providing incentives and simplifying the steps involved in establishing a start-up.

Highlights of Indian corporate governance

While corporate governance regulation throws up a number of significant issues, the core aspects of corporate governance comprise

- Director responsibilities;
- Conflict of Interest; and
- Change of Control.

2. DIRECTOR RESPONSIBILITIES – PLACEHOLDERS NO MORE

Evolution

The evolution of director responsibilities in the context of corporate governance is represented by the following diagram



Effect of the companies act, 2013 on director responsibilities

The Companies Act, 2013 brought about two major changes to the corporate governance regime in India

- Codifying the principles on director responsibilities; and
- Codifying the responsibilities of independent directors.

The principles on director's responsibilities are set forth below along with the associated rules pertaining thereto.

COMPANIES ACT, 2013	
Principles (Section 166)	Rules
A director must act in accordance with the company's articles.	• A board is entitled to exercise powers which the company is authorised to do subject to the memorandum and articles of the company (S.179).
A director of a company must act in good faith in order to promote the objectives of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment.	• A director vacates his office if he absents himself/ herself from all board meetings over 12 months without board approved leave. (S. 167). • Every listed company and every other public company having a paid up share capital of 25 crore rupees must include, in its board report, a statement on formal annual evaluation of its own performance and the performance of individual directors by the board. (S. 134).
A director of a company must exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.	• A director cannot hold more than 20 directorships at the same time (including not more than 10 directorships in public companies) (S. 165). • Independent directors are subject to a code of conduct which inter alia requires them to have the skills and awareness of the business. (S.149).
A director of a company must not involve himself/ herself in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.	• Directors must disclose their interest in transactions/ arrangements involving a conflict of interest. (S. 184). • Interested directors must not vote on matters where they are conflicted (private company directors are exempt) (S. 184). • Directors failing to make such disclosure, should vacate their office (S. 167). • Management must seek board approval for certain types of transactions (including related party transactions) (S. 179, 188). • The board must seek shareholder approval for related party transactions above a certain threshold (discussed in detail below) (S. 188).
A director of a company must not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates.	• If a director is found guilty of any undue gain, he is liable to pay an amount equal to that gain to the company (S. 166).
A director must not assign his office.	-
Independent directors are subject to a code of conduct (we have addressed this separately below).	• The code of conduct has certain specific rules in addition to broader guiding principles (S.149).

There are additional rules/ principles on directors' responsibilities contained under the Listing Regulations. Annexure 1 has a list of these principles together with the associated rules.

The Key takeaways of Companies Act 2013 with regard to Directors are

1. Addressing Conflict of interest

The Act restricts directors of public companies from participating in transactions, involving a conflict of interest. This goes a long way in helping board independence on such matters. However while this is a positive move, the relationship between directors may enable an interested director to influence the board's decision.

2. Restricting Loans to directors

The Companies Act 2013 explicitly prohibits directly or indirectly advancing loans to directors or parties in which they have an interest, including providing security in connection with loans availed by directors. As a result of more stringent rules, the ability of directors to 'move money around' within their corporate group through book debts/ inter-corporate loans has been severely curtailed. In general, directors will not have a free-hand with public money, and this is a welcome improvement from a corporate governance perspective.

3. Emphasising role and importance of Independent Directors

Companies Act 2013 stipulates that for public companies, at least one third of the directors should be independent directors. Also, independent directors are expected to be truly independent and not proxies for the promoter, significant shareholder, and strategic investor. The Listing Regulations are more stringent, and stipulates that where the chairman performs executive functions, no less than half the board must consist of independent directors. In other cases, no less than one third of the board must be independent. In case of unlisted public companies, the Companies Act requires that every unlisted public company with a turnover of over 100 Crores, share capital of over 10 crores or outstanding debt of over 50 crores must have at least 2 independent directors on its board. The Companies act 2013 also lays down a code of conduct for independent directors. It defines the role of independent directors as being responsible for scrutinising management, bring independent structure to bear on board meetings, safeguard stakeholder interests, balance conflicting interests and appointing senior management.

The code of conduct for independent directors brings much needed clarity and certainty to their roles. It is also a wake-up call for persons who fashion themselves as career 'independent directors' while not being fully competent or abreast with the company operations. Needless to add, it is a red flag for proxy 'independent directors' who simply toe the promoters' line and do not exercise independent judgment.

In order to counter-balance any undue deterrence that the new provisions on independent directors may have on persons performing/ aspiring to perform this role, the Companies Act, 2013 has clarified that an independent director may be held liable, only in respect of such acts of omissions or commissions by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

There are specific rules requiring the presence and role of independent directors both under the Companies Act and the Listing Regulations which are set forth below.

COMPANIES ACT, 2013	LISTING REGULATIONS
Audit Committee • Independent directors must form the majority on the committee.	**Audit Committee** • Two thirds of the members must be independent directors. • The chairperson must be an independent director. • A minimum of 2 independent directors are required for quorum at Audit Committee meetings. It is also relevant to note that Audit Committee approval is required for • All related party transactions by a listed company; • Payment to statutory auditors for any other services rendered by the statutory auditors. • Appointment of chief financial officer after assessing the qualifications, experience and background, etc. of the candidate.
Nomination and Remuneration Committee • At least 50% of the members must be independent directors.	**Nomination and Remuneration Committee** • At least 50% of the members must be independent directors. **The role of this committee inter alia is** • Formulating the criteria for directors, determining qualifications and recommending the policy on director/ management remuneration. • Devising a policy on diversity of the board.
Shorter Notice Board Meetings • When calling a board meeting by shorter notice, the presence of an independent director is required to constitute quorum.	**Material Subsidiaries** • At least one independent director of the listed entity must be on the board of each unlisted material subsidiary.
	Limitation on Independent Director Appointments • A person cannot not serve as an independent director in more than 7 listed entities, and if the person is serving as a whole time director in any listed entity, the ceiling comes down to 3 listed entities.

The above provisions mark an evolution from the erstwhile Companies Act and Listing Agreement (pre-2014). For instance

a. there was no requirement for a Nomination and Remuneration Committee; and
b. no requirement for Audit Committee approval for related party transactions.

3. CONFLICT OF INTEREST – PRESERVING VALUE WITH STRICTER NORMS

3.1 Evolution

The Companies Act, 1956 contained the following limitations on related party transaction

- **Section 295, loans to directors**
  This section was similar to the provisions of Section 185 of the Companies Act, 2013. The differences in the provisions have been highlighted above.
- **Sections 299 and 300, disclosure of interest by directors and non-participation in board decisions**
  These sections have a similar import to Section 184 of the Companies Act, 2013. The improvements introduced by Section 184 are
  - Higher penalties for violating the provision.
  - Provision along the board to avoid any contract/ arrangement entered into in violation of this restriction.
- **Sections 297 and 314, board approval for transactions in which directors are interested**
  These sections are similar to Section 188 of the Companies Act, 2013. The import of Section 188 is described in detail below. However, to summarize, Section 188 introduced:
  - The requirement for shareholder approval where the transaction crosses a certain threshold (Unlike the previous Companies Act, 1956, no Central Government approval for transactions by large size corporates).
  - Different thresholds for different categories of transactions.
  - Amending the restrictions on directors' relatives holding an office of profit in the company (i.e., removing the requirement for central government approval and replacing it with shareholder approval instead).
- **Clause 49 of the Listing Agreement**
  Clause 49 of the Listing Agreement contained disclosure requirements with respect to related party transactions. In addition, such transactions were reviewed by the Audit Committee. The Listing Regulations have significantly enhanced the regime on related party transactions – these have been detailed below.

3.2 Relevant provisions of The Companies Act and the listing regulations

The Companies Act, 2013 has a number of provisions that address circumstances involving a conflict of interest. The table below reflects a compilation of the relevant provisions along with their import.

SECTION	IMPORT
184	Disclosure of interest by director and limited/ restricted participation in board decisions on transactions/ arrangements involving a conflict of interest. (discussed above)
185	Limitations on loans/ security/ guarantee to directors or companies in which they are interested. (discussed above)
188	Limitations on transactions with related parties.

In addition, checks and balances on transactions involving conflicts of interest are also contained under the Listing Regulations. These are set forth below.

REGULATION	IMPORT
23(1)	The company must formulate a policy on materiality of related party transactions and on dealing with related party transactions. A transaction with a related party is considered material if the transaction(s) to be entered into individually or taken together with previous transactions during a FY, exceeds 10% of the annual consolidated turnover of the company as per its last audited financial statements.
23(2)	All related party transactions require Audit Committee approval.
23(3)	The Audit Committee can grant omnibus approval (valid for one year) for related party transactions that are repetitive in nature subject to certain prescribed conditions.
23(4)	All material related party transactions require shareholder approval.
23(7)	All related parties must abstain from voting irrespective of whether the entity is a party to the particular transaction or not.

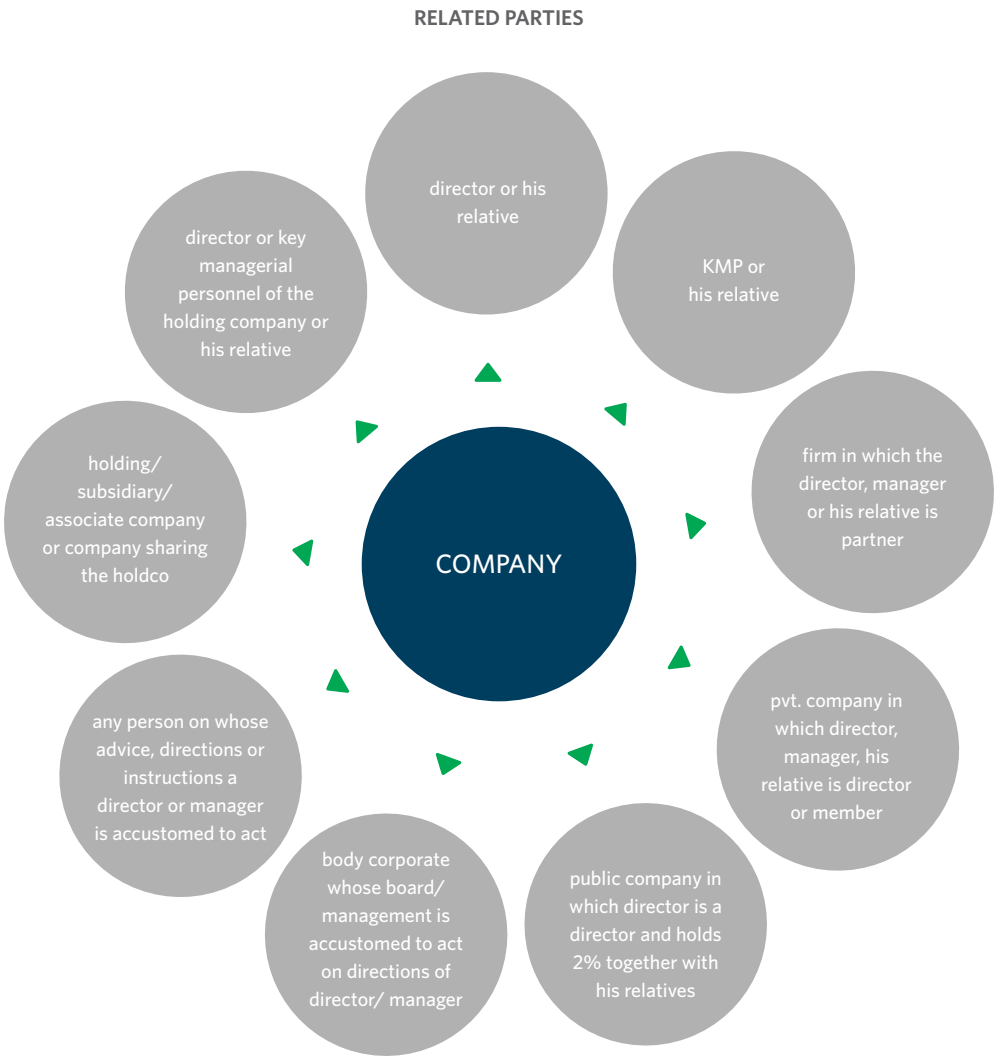
(A) Section 188 – Related Party Transactions under the Companies Act, 2013

We have discussed the import of Sections 184 and 185 under the section above. The table below describes the import of Section 188.

In short, Section 188 identifies a set of related party transactions that the management cannot proceed with without board approval. Where the transactions breach certain materiality thresholds, the shareholder approval is also required. There are general exceptions to the requirement of board and/or shareholder approval. These have also been identified in the table below.

Board Approval at a board meeting required for the following contracts of arrangements with **RELATED PARTIES** (see general exception below)	The same transactions also require shareholder approval **IF** (each of the first five items apply equally if the transaction is entered into through an agent)
▪ sale, purchase or supply of any goods or materials	▪ they exceed ten per cent. of the turnover of the company or rupees 100 crore, whichever is lower
▪ selling or otherwise disposing of, or buying, property of any kind	▪ they exceed ten per cent. of net worth of the company or rupees 100 crore, whichever is lower
▪ leasing of property of any kind	▪ if it exceeds ten per cent. of the net worth of the company or ten per cent. of turnover of the company or rupees 100 crore, whichever is lower
▪ availing or rendering of any services	▪ if it exceeds ten per cent. of the turnover of the company or rupees 50 crore, whichever is lower
▪ appointment of any agent for purchase or sale of goods, materials, services or property	▪ sale, purchase or supply of any goods or materials, exceeding ten per cent. of the turnover of the company or rupees one hundred crore, whichever is lower selling or otherwise disposing of or buying property of any kind, exceeding ten per cent. of net worth of the company or rupees one hundred crore, whichever is lower ▪ availing or rendering of any services, exceeding ten per cent. of the turnover of the company or rupees 50 crore, whichever is lower
▪ appointing such related party to any office or place of profit in the company, its subsidiary company or associate company	▪ If the monthly remuneration exceeds 2.5 lakh rupees
▪ underwriting the subscription of any securities or derivatives thereof, of the company	▪ If it exceeds 1% of the net worth
Voting Limitations N.A., but restrictions under other sections (such as Section 184) may apply	**Voting Limitation** Shareholders that are related parties cannot vote on such resolutions.
General exception to each the above Arm's length transactions entered into by the company in its ordinary course of business. Arm's length transaction is defined to mean a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.	**General exception to each of the above** Transactions between the company and its wholly-owned subsidiary

The term 'related party' is defined under the Companies Act, 2013. The diagram on the next page covers the various persons who would be treated as a related party to the company (for all purposes including Section 188). The Listing Regulations follow the same definition of 'related party' as contained under the Companies Act, 2013.



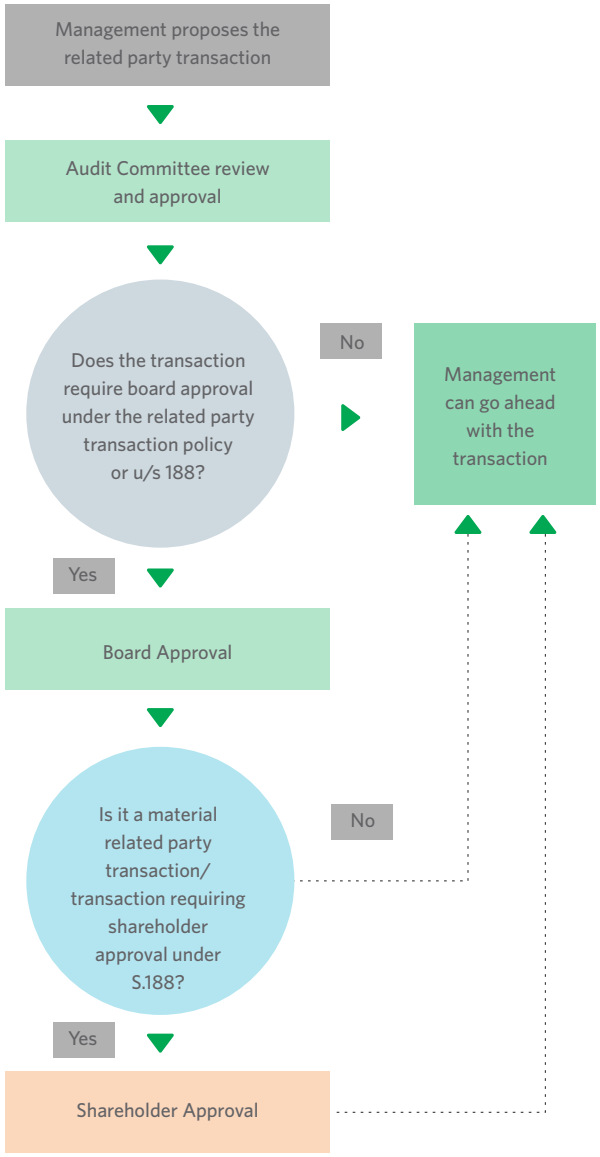
(B) Interplay between shareholder approval matters under Section 188 and shareholder approval matters under the Listing Regulations

As mentioned above, the Listing Regulations identify 'material related party transactions' (i.e., transaction(s) that individually or in the aggregate with previous transactions during a FY, exceed 10% of the annual consolidated turnover of the company as per its last audited financial statements) as requiring shareholder approval.

On the other hand, Section 188 identifies certain categories of related party transactions and imposes thresholds beyond which shareholder approval is required for such transactions (as mentioned in the table above).

As a result of the two provisions, related party transactions by a listed company could trigger shareholder approval requirements by virtue of either
a. the circumstances under 188 or
b. the 'material related party transaction' test under the Listing Regulations. On the other hand, unlisted public companies and private companies are only subject to the Section 188 tests.

(C) Steps to approve of a related party transaction by a listed public company



TAKEAWAYS

i. The Companies Act and Listing Regulations have imposed strong checks and balances against abuses by related parties.

ii. The increased role and duties of independent directors with respect to related party transactions mean increased onus on them to 'do the right thing' as opposed to 'doing what they are told by management'.

iii. Empowering shareholders to regulate significant related party transactions lends more legitimacy to the process (especially since related parties are excluded from the shareholder vote).

4. CHANGE OF CONTROL

Corporate governance in the context of change of control is most prominently addressed under SEBI (Substantial Acquisition of Shares and Takeover Regulations), 2011 **(Takeover Regulations)**. However, it is also addressed to a limited extent under the Companies Act, 2013 and other securities regulations.

A. For reference, the typical steps involved in a takeover of a listed company are set forth below

Appointment of Manager
The person seeking to takeover the company (acquirer) appoints a manager in anticipation of making an open offer.
Takeover Agreement
The acquirer executes an agreement with the selling shareholders/ company to takover the company.
Public announcement
The acquirer makes a public announcement of the agreement on the same day that it is executed containing prescribed deal specifics including price (prescribed by SEBI). The date of this announcement is different if the transaction tiggering the open offer is a conversion of securities/ market purchase, etc.
Escrow amounts
The acquirer must deposit a certain proportion (25% for first INR 500 Cr and 10% for balance) of the amount that may be payable under the open offer in escrow.
Detailed public statement
The acquirer publishes a detailed statement of the deal (in a SEBI prescribed format) within 5 working days of the public announcement. The target company's board to constitute independent directors' committee to comment on open offer.
Draft letter of offer
Within 5 working days of the detailed public statement, the acquirer must file a draft letter of offer with SEBI, the company and the stock exchange(s) where the company is listed.
Dispatch of letter of offer to shareholders
Within 7 days of receiving SEBI's comments on the draft letter of offer, the acquirer must dispatch the letter of offer to the shareholders. Target company's committee to publish reasoned recommendations on open offer at least 2 days prior to open tendering period.
Acceptance of offer
Within 10 working days of the tendering period for the shares, the acquirer must complete all formalities for purchase of the tendered shares.
Completion of the original transaction
The original transaction can be closed only after completion of the offer period for the open offer (but within 26 weeks).

Originally the Takeover Regulations did not facilitate delisting as part of the takeover process. However, this was amended in 2015, and the current regulations, read with the SEBI (Delisting of Equity Shares) Regulations, 2009 have operationalized this process.

B. The Takeover + Delisting process is similar to the process mentioned above with the following variations

- The acquirer must mention the fact that he/she/it intends to delist the company in the detailed public statement
- The company must obtain board and shareholder approval for the delisting
- The company must apply to the stock exchanges for in-principle approval to delist
- As part of this process the board of directors have certain compliances including appointment of a merchant banker for a due diligence, and disclosure on the stock exchange that the acquirer intends to delist the company.
- Deposit in escrow the entire amount that is estimated to be payable to shareholders in connection with the delisting offer.
- Upon receipt of in-principle approval from the stock exchanges, the acquirer must make a public announcement in a SEBI prescribed form
- Letters of offer to be sent to public shareholders within 2 days of the public announcement
- Price discovery shall be through the book-building process, and the floor price will be the price of the takeover offer.
- A delisting offer is successful only if the post-offer shareholding of the promoter is 90% or more and no less than 25% of the public shareholders participated in the book-building process.
- All shareholders whose offers are genuine must be paid the purchase consideration within 10 working days of closure of the open offer.

C. The following summarizes the corporate governance provisions pertaining to a takeover/ delisting

Takeover Regulations

- No representative of the acquirer to be appointed to the board of the target during the open offer period.
- In case of competing offers, neither contender's nominees can be appointed to the board.
- If the acquirer is already represented on the board, the representative must not participate in any matter concerning the offer.
- During open offer period, the target company's business must continue in the ordinary course consistent with past practice.
- Shareholder approval by special resolution is required for:
- alienation of material assets.
- material borrowings outside the ordinary course.
- issue and allot authorized but unissued voting capital.
- buy-backs or changes to the capital structure.
- termination of any material contracts of the target or its subs.
- accelerate contingent vesting of any obligation of the target or its subs (whether under ESOPs or otherwise).
- upon receipt of the detailed public statement, the target company's board must provide the shareholders with a reasoned recommendation on the open offer.

Delisting Regulations

- board to notify stock exchanges of the acquirer's proposal to delist
- appoint a merchant banker for due diligence.
- obtain 2 years trading details by top 25 shareholders.
- board must certify that delisting is in the interest of the shareholders and company is in compliance with the law.

Insider Trading Regulations

- There are restrictions on sharing of price sensitive information by the directors of a listed company.
- The company must have a code of conduct for fair disclosure of Unpublished Price Sensitive Information.
- The company is permitted to disclose Unpublished Price Sensitive Information (on a confidential basis) in connection with a transaction which may or may not trigger a takeover, so long as the directors believe that the transaction is in the best interests of the company.

Companies Act, 2013

- Issue of voting/ equity capital and/or capital that is convertible into equity, other than on a rights basis (i.e., to the existing shareholers and proportionate to their existing shareholding) requires super-majority shareholder approval.
- Section 180 of the Companies Act, 2013 prevents directors of a public company from selling or disposing of the whole or substantially the whole of the company's undertaking (or where the company has multiple undertakings, any of such undertakings) without shareholder approval.

Change of control through fresh issue of capital

The board of directors of a company (whether listed or unlisted public company or private company) cannot engineer a change of control of the company by disproportionately issuing voting capital to a third party without first obtaining shareholder approval for the same through a super-majority resolution. In addition, where the company is a listed public company, all of the compliances that apply to a secondary market takeover equally apply to a takeover through primary acquisition.

Change of control of the business by asset/ business transfer

The board of directors of a public company (whether listed or unlisted) cannot pursue an effective change of control (through transfer of the company's undertaking) without first obtaining shareholder approval for the same.

Change of control through secondary transactions

In case of a change of control of a listed public company through a secondary market transaction, the takeover code imposes duties on the target company's board to maintain status quo, remain uninfluenced by the acquirer, and provide guidance to shareholders on the merit of the open offer.

Disclosure of unpublished price sensitive information

Where a listed company's board is approached for non-public information in the context of a proposed transaction with that company as a target, the board needs to make a judgement call on whether the transaction is in the best interests of the company before disclosing the information.

TAKEAWAYS

The corporate governance norms on change of control provide significant coverage in the context of

a. primary acquisitions for all companies and
b. secondary transactions/ holdco level transactions with respect to listed companies. In other cases, there is room for corporate governance norms to be further tightened in this regard.

However, these shortcomings do not necessarily result in larger systemic concerns for the following reasons

i. Public investors are generally only exposed to listed public companies. The stakeholders in private companies and unlisted public companies are typically persons related to the promotes and/or sophisticated investors/ professionals. Such persons usually pre-agree on the modus operandi to deal with change of control situations.

ii. Shares of a private company are not freely transferrable and any transfer requires board approval. The potential for promoters/ investors/ their relatives to exit leaving the others high and dry is restricted so long as the stakeholders are duly represented on the board with the appropriate consent rights.

5. PROPOSED AMENDMENTS UNDER THE COMPANIES (AMENDMENT) BILL, 2016

The Companies (Amendment) Bill, 2016 proposes a second round of amendments to the Companies Act, 2013 (i.e., the Companies (Amendment) Act, 2015 was the first round of amendments). A number of these amendments touch upon corporate governance issues under the Companies Act, and the table below summarizes the import of these proposed amendments.

SECTION	IMPORT
Section 2(6) – definition of 'associate company'	**Amendment to the definition of 'Associate Company'** The term 'associate company' is relevant in the context of 'related party transactions' and 'independent director eligibility'. The amendments seek to expand the criteria of significant influence to three potential tests • Control over 20% of voting • Control over business decisions • Participation in business decisions A new definition of joint venture has been included. This goes some way to limit purely financial participation from being treated as a joint venture participation. But the distinction may be academic given the amendments to 'significant influence'.
Section 2(76) – definition of related party	**Amendment to the definition of 'related party'** The amendment extends the existing definition of related party to financial investors in the company (whether foreign or domestic).
Section 2(91) -definition of turnover	**Amendment to the definition of 'turnover'** This is relevant in the context of thresholds for shareholder approval on related party transactions. The amendment simplifies the definition of turnover by tying it to 'gross amount of revenue recognized in the P&L account' as opposed to 'aggregate value of realisations'.

SECTION	IMPORT
Section 149(6) - eligibility criteria for independent directors	**Amendment to the qualifications of 'independent directors'** The changes include • A carve-out for director remuneration (from the no pecuniary relationship criteria). • Conversion of the common ceiling for pecuniary relationships between relatives of the independent director and the company, into separate ceilings for - Security holdings in the company. - Indebtedness to the company. - Guarantee/ security for third party indebtedness to the company. - Other pecuniary transactions. • Relaxation on the criteria for relatives of the independent directors not being employees of the company.
Section 177 - Audit Committee	**Amendment to clarify the role of the Audit Committee** The role of the Audit Committee has been clarified to include • Avoiding transactions above Rupees 1 Crore that it does not approve of. • Making recommendations to the board on transactions it does not agree with. • Clarification that this section does not apply to transactions between a holding company and its wholly owned subsidiary (except S. 188 transactions).
Section 184 - Disclosure of interest by director	**Amendment to expand items in which a director must disclose his/ her interest and relaxation on penalties** • Removal of the floor on penalties. • Expansion to cover bodies corporate (i.e., which would cover foreign companies).
Section 185 - Loans to directors	**The Section on loans to directors has been replaced with a new section 185.** The import of the section remains the same, except • Giving of loans/ guarantee/ security to/ for the benefit of directors/ persons in whom they are interested has been relaxed – now companies can give such loans if - it is approved by a super-majority of shareholders; and. - it is used by the company for its principal business activities. • Companies that give loans/ guarantee/ security in the ordinary course of business are exempt so long as they charge interest at a rate no lower than the prevailing yield on government bonds.
Section 188 - Related party transactions	**Amendment to Section 188 to relax the circumstances in which related party shareholders can vote.** Section 188 have been amended to allow related parties that are shareholders of a public company to vote on shareholder resolutions under Section 188, if the related parties constitute 90% or more of the company's members.

ANNEXURE 1

LISTING REGULATIONS, 2015	
Principle	Rule
Responsibilities of the Board The board of directors has the following responsibilities • Directors and KMPs must disclose to the board their direct/ indirect in any company transaction/ matter. • Directors and senior management must meet the expectations of operational transparency to stakeholders while maintaining confidenti ality of information. • Reviewing/ guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans, performance objectives, corporate performance, and major capital expenditures, acquisitions and divestments. • Monitoring the effectiveness of governance practices. • Selecting, compensating, monitoring and, when necessary, replacing KMPs and overseeing succession planning. • Aligning remuneration of KMPs and directors with the longer term interests of the company and shareholders. • Ensuring a transparent nomination process to the board. • Monitoring and managing potential conflicts of interest. • Ensuring the integrity of the company's accounting and financial reporting systems. • Overseeing disclosure process and communications. • Monitoring and reviewing board of director's evaluation framework. *The Listing Regulations impose ancillary responsibilities on directors which we have not addressed here.*	• Directors must disclose their shareholding, held either by them or on a beneficial basis for any other persons in the listed entity in which they are proposed to be appointed as directors, in the notice to the general meeting called for appointment of such director. • Senior management must make disclosures to the board of directors relating to all material, financial and commercial transactions, where they have personal interest. • The board must meet at least four times a year, with a maximum time gap of one hundred and twenty days between any two meetings. • The board must periodically review compliance reports pertaining to all laws applicable to the listed entity, prepared by the listed entity as well as steps taken by the listed entity to rectify i instances of non-compliances. • The board must lay down a code of conduct for all members of board of directors and senior management of the listed entity. This code of conduct shall suitably incorporate the duties of independent directors as laid down in the Companies Act, 2013. • The board must be responsible for framing, implementing and monitoring the risk management plan for the listed entity.

LISTING REGULATIONS, 2015

LISTING REGULATIONS, 2015	
Principle	Rule
Protection of Shareholder Rights The company must protect the following shareholder rights • Participation in, and sufficient information of, decisions on fundamental corporate changes. • Effective participation in general shareholder meetings. • Information on rules, including voting procedures, for shareholder meetings. • Opportunity to question the board of directors, introduce new agenda items for general meetings, and to propose resolutions, subject to reasonable limitations. • Participation in key corporate governance decisions. • Ownership rights of the shareholders. • Access to grievance redressal mechanism. • Protection of minority shareholders from abusive.	• The company must disclose any events or information which, in the opinion of the board of directors of the listed company, is material. • The company must provide facility of remote e-voting to its shareholders, in respect of all shareholders' resolutions. • The company must submit to the stock exchange, within forty-eight hours of conclusion of its General Meeting, details regarding the voting results in the format specified by the Board. • The company must send proxy forms to holders of securities in all cases mentioning that a holder may vote either for or against each resolution. • The company must constitute a Stakeholders Relationship Committee to specifically look into the mechanism of redressal of grievances of shareholders.
Equitable treatment of Shareholders The company must equitable treatment of all shareholders as follows • Shareholders of the same series of a class to be treated equally. • Facilitating effective shareholder participation in key corporate governance decisions. • Facilitating exercise of voting rights by foreign shareholders. • Implementing a framework to avoid insider trading and abusive self-dealing. • General meetings procedures to allow for equitable treatment of all shareholders. • Procedures must not make it unduly difficult or expensive to cast votes.	
Stakeholder role in Corporate Governance The company must recognise the rights of its stakeholders and encourage co-operation, as follows • Respecting the rights of stakeholders under law or mutual agreements. • Effective redress for shareholders for violation of their rights. • Providing stakeholders with access to timely, relevant, sufficient and reliable information to participate in corporate governance process. • Implementing an effective whistle blower mechanism.	• The company must send its annual report, to the holders of securities, not less than twenty-one days before the annual general meeting.

LISTING REGULATIONS, 2015	
Principle	Rule
Disclosure and Transparency The company must ensure timely and accurate disclosure on all material matters as follows • Compliance with prescribed standards of accounting, financial and non-financial disclosure. • Channels for disseminating information must provide for equal, timely and cost efficient access. • Minutes of meetings must be maintained explicitly recording dissenting opinions.	
Disclosure of Information to Shareholders The company must provide adequate and timely information to shareholders, including • Information on date, location, issues and agenda of general meetings. • Capital structures and disproportionate ownership/ control arrangements with shareholders. • Rights attached to all series and classes of shares.	

Annexure 2

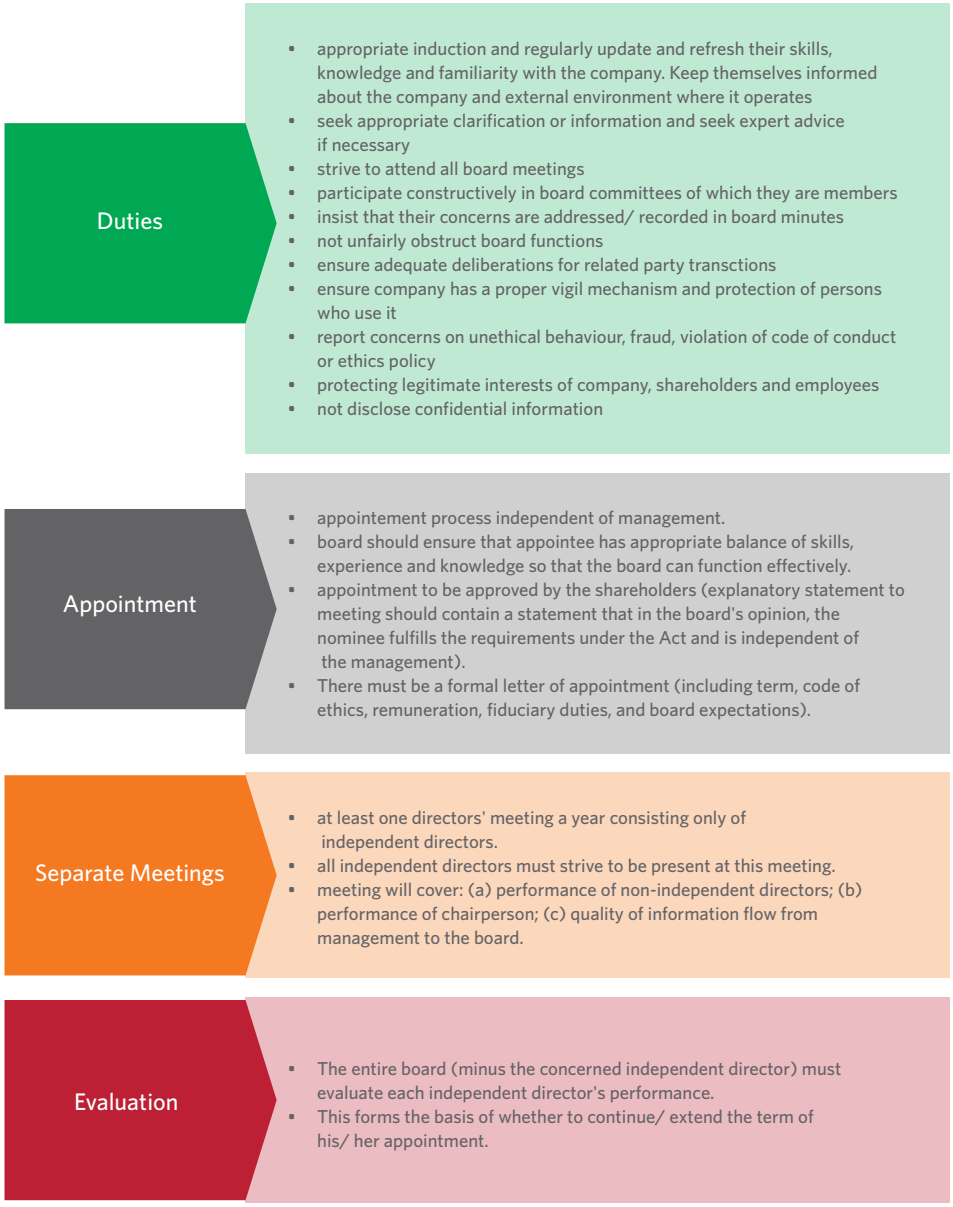
Guidelines on professional conduct

- uphold ethical standards of integrity and probity and act objectively.
- exercise responsibilities bona fide in the interests of the company and not allow extraneous considerations to affect decision making.
- devote sufficient time to professional obligations for informed and balanced decision making.
- not abuse position to the detriment of the company/ shareholders or for personal gain.
- refrain from action leading to loss of independence and immediately inform the board where director loses his/ her independence.
- assist the company in implementing best corproate governance practices.

Role

- help bringing independent structure to bear on board deliberations
- bring objective view on evaluation of the board and management
- scrutinize management performance and monitor performance
- satisfy himself/ herself on integrity of financial information and robustness of financial controls and risk management
- safeguard stakeholder interests
- balance conflicting interests of stakeholders
- role in appointing and determining levels of remuneration for KMPs, executive directors and senior manangement
- moderate interests of company as a whole where there is conflict between management and shareholder interests

Annexure 2


Duties
appropriate induction and regularly update and refresh their skills, knowledge and familiarity with the company. Keep themselves informed about the company and external environment where it operates
seek appropriate clarification or information and seek expert advice if necessary
strive to attend all board meetings
participate constructively in board committees of which they are members
insist that their concerns are addressed/ recorded in board minutes
not unfairly obstruct board functions
ensure adequate deliberations for related party transctions
ensure company has a proper vigil mechanism and protection of persons who use it
report concerns on unethical behaviour, fraud, violation of code of conduct or ethics policy
protecting legitimate interests of company, shareholders and employees
not disclose confidential information
Appointment
appointement process independent of management.
board should ensure that appointee has appropriate balance of skills, experience and knowledge so that the board can function effectively.
appointment to be approved by the shareholders (explanatory statement to meeting should contain a statement that in the board's opinion, the nominee fulfills the requirements under the Act and is independent of the management).
There must be a formal letter of appointment (including term, code of ethics, remuneration, fiduciary duties, and board expectations).
Separate Meetings
at least one directors' meeting a year consisting only of independent directors.
all independent directors must strive to be present at this meeting.
meeting will cover: (a) performance of non-independent directors; (b) performance of chairperson; (c) quality of information flow from management to the board.
Evaluation
The entire board (minus the concerned independent director) must evaluate each independent director's performance.
This forms the basis of whether to continue/ extend the term of his/ her appointment.

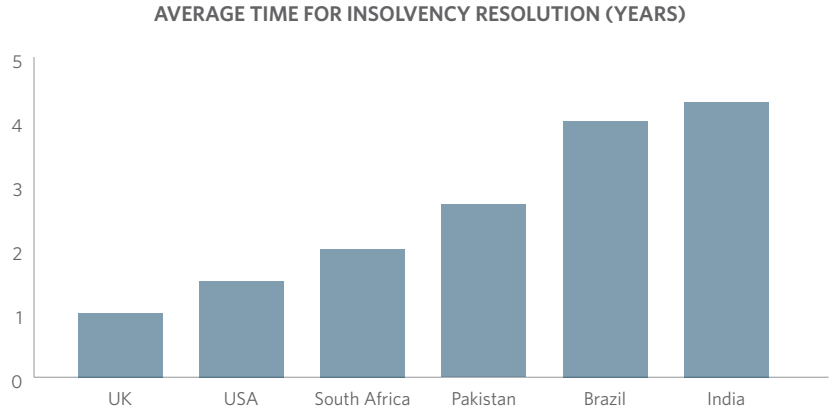
02.

SOLVING INSOLVENCY; THE NEW BANKRUPTCY CODE

1. Background and objectives of the Code

Ease of entry is not the only concern for the business but also the ease of exit from a business. India currently fares poorly in this aspect; ranking 136 out of 189 countries on the World Bank's Index for the ease of resolving insolvencies. For a long time, India's insolvency framework has been fragmented across multiple overlapping laws. This led to parallel proceedings for recovery and rehabilitation in different judicial forums, causing delays and rendering the system ineffective. India's weak insolvency regime and its systemic abuse are also contributors to the poor environment for credit markets today.

A new bankruptcy legislation, the Insolvency and Bankruptcy Code, 2016 ***(Code)*** *was passed by the Indian Parliament of India in May 2016, and makes wholesale reforms to the legal framework with a thrust on creditor-driven insolvency resolution in line with international standards. The Code aims to facilitate faster exits and improve rates of recovery for all classes of creditors.*



(Source: 'Time to resolve insolvency', World Bank, 2015)

SOME OF THE KEY OBJECTIVES OF THE CODE ARE

i. Consolidated law

The Code offers a uniform, comprehensive insolvency legislation encompassing all companies, partnerships and individuals (other than financial firms)[1]. Before the Code, corporate insolvency was administered by multiple laws and judicial forums. For instance, if a corporate debtor defaults on its debt, some lenders would file an application in a debt recovery tribunal under the DRT Act[2] , whereas others may have simultaneously initiated enforcement action under the SARFAESI Act to enforce their security interest without the intervention of the court. At the same time, other creditors (including trade creditors) could file recovery suits in the civil courts, or even a winding-up petition in the high court under the provisions of the Companies Act. Furthermore, the debtor could declare itself financially "sick" and initiate proceedings for reconstruction and rehabilitation before the Board for Industrial and Financial Reconstruction (BIFR) under the SICA Act[4]. Under a common Code, the resolution can be synchronised, less costly and help recovery become more efficient.

ii. Time bound process to better preserve economic value

The current legal and institutional framework did not aid lenders in effective and timely recovery or restructuring of defaulted assets. The speed of resolution, whether by way of a viable revival plan or by liquidation is fundamental to an efficient insolvency regime as delay destroys value. The Code introduces a linear, time-bound process in which a resolution plan to keep the firm as a going concern must be agreed upon within a defined timeline, failing which it would proceed to liquidation.

iii. Creditor driven process

A sound bankruptcy policy distinguishes between insolvencies caused due to current cash flow constraints (in an otherwise sound business model) and insolvencies resulting from fundamental business failures. While in the latter case, a quick and efficient liquidation would maximize value, in the former case, the objective should be to preserve the enterprise as a going concern with a revised debtor-creditor arrangement. The systemic reforms in the Code will allow creditors to make a collective assessment of the viability of a debtor, as a business decision through negotiations between the creditors and debtor, rather than through a judicial process.

1. The Government is proposing a separate framework for bankruptcy resolution in failing banks and financial sector entities.

2. The Recovery of Debts due to Banks and Financial Institutions Act, 1993.

3. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

4. The Sick Industrial Companies (Special Provisions) Act, 1985.

iv. Early identification of financial distress

Early recognition of financial distress and timely intervention are key to the efficiency of any insolvency regime. The Code introduces the concept of information utilities which aim to reduce information asymmetry and allow all stakeholders to access the relevant information needed for insolvency resolution easily when it is required. Thus, the Code promotes early identification of financial failure so that viable businesses can quickly be separated from unviable ones, and the asset value of insolvent firms can be maximized.

v. Promoting credit markets generally

Financing in India is largely driven by equity financing and secured lending by banks. It is important for the progress of Indian corporates across sectors to encourage lending on the strength of future cash flows rather than the security of fixed assets. A crucial reason for the unsatisfactory growth of corporate bond markets in India is that the current insolvency regime is more favorable to secured creditors. By creating a time-bound resolution process in which both secured and unsecured creditors are on an equal footing, the Code hopes to bring unsecured financing within the fold of mainstream credit markets. The Code would also facilitate the early exit of inefficient businesses so that credit can circulate to other corporates.

Possible outcomes of Insolvency Proceedings

A major change introduced by the Code is a streamlined two-stage approach in insolvency resolution

FIRST STAGE - RESOLUTION PLAN

A financial creditor (for a defaulted financial debt) or an operational creditor (for an unpaid operational debt) can initiate an Insolvency Resolution Process **(IRP)** against a corporate debtor at the National Company Law Tribunal **(NCLT)**. The defaulting corporate debtor, its shareholders or employees may also initiate voluntary insolvency proceedings. Once the IRP is initiated, the Code offers a six-month period for a committee of creditors to assess the commercial viability of the debtor and decide on a resolution plan for the debtor's revival.

i. Moratorium

The NCLT orders a moratorium on the debtor's operations for the period of the IRP. This operates as a 'calm period' during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the debtor. The period may be extended by the creditors' committee up to nine months.

ii. Appointment of Resolution Professional

The NCLT appoints an insolvency professional or 'Resolution Professional' to administer the IRP. The Resolution Professional's primary function is to take over the management of the corporate borrower and operate its business as a going concern under the broad directions of a committee of creditors. This is similar to the approach under the UK insolvency laws, but distinct from the "debtor-in-possession" approach under Chapter 11 of the US bankruptcy code. Under the US bankruptcy code, the debtor's management retains control while the bankruptcy professional only oversees the business in order to prevent asset-stripping on the part of the promoters.

Therefore, the thrust of the Code is to allow a shift of control from the defaulting debtor's management to its creditors, where the creditors drive the business of the debtor with the Resolution Professional acting as their agent.

iii. Creditors Committee and Revival Plan

The Resolution Professional identifies the financial creditors (i.e., creditors arising from a pure financial contract such as a bank, an inter-corporate lender, a bondholder etc.) and constitutes a creditors' committee. Operational creditors (i.e., creditors arising from transactions on operations such as trade creditors, employees etc.) whose claims are above 10% of the total debts are allowed to attend meetings of the committee but do not have voting power. Each decision of the creditors' committee requires a 75% majority vote in which each financial creditor votes in proportion to their outstanding claims. Decisions of the creditors' committee are binding on the corporate debtor and all its creditors.

The creditors' committee considers proposals for the revival of the debtor and must decide whether to proceed with a revival plan or liquidation within a period of 180 days (subject to a one-time extension of 90 days). The Code seeks to protect the interests of operational creditors by directing that any resolution plan agreed by the committee of financial creditors must provide for the payment of operational creditors at least to the extent of their share in a liquidation.

The Code does not elaborate on the types of revival plans that may be adopted, which may include fresh finance, sale of assets, haircuts, change of management etc.

During the IRP, while day-to-day operations of the debtor are not subject to creditors' committee supervision, certain significant matters require prior creditors' committee approval by a 75% vote. Some of these matters are

- Raising interim finance in excess of the limit stipulated by the creditors' committee;
- Creating security interest over the debtor's assets;
- Change in the debtor's capital structure;
- Recording any change in ownership of the corporate debtor;
- Undertaking related party transactions; and
- Changing the management of the corporate debtor.

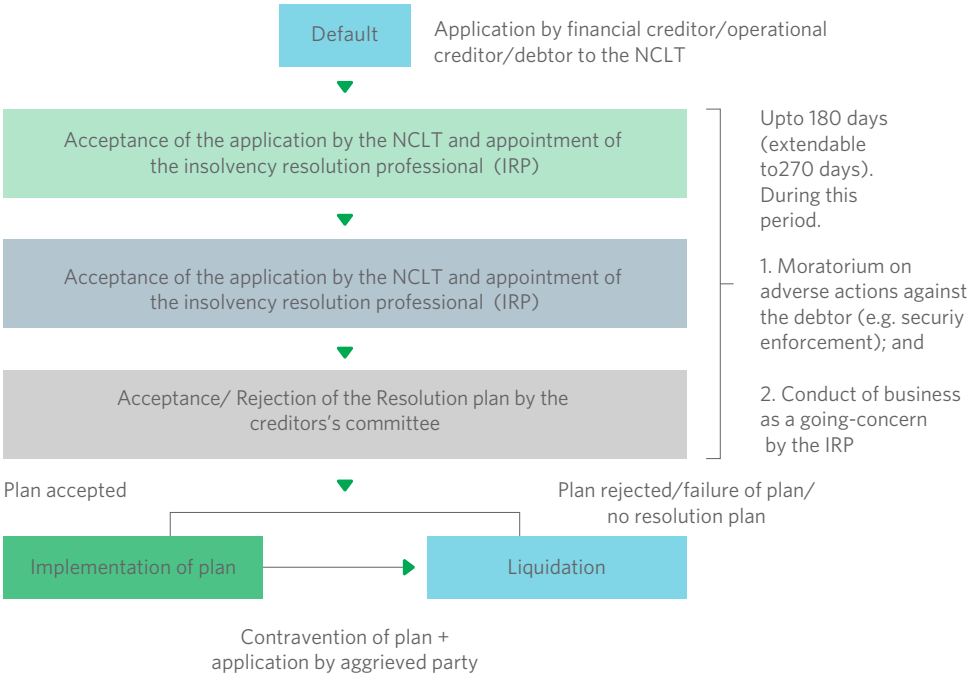
SECOND STAGE – LIQUIDATION

Where revival is not possible, the creditors' committee may vote for liquidation of the debtor before the expiry of the 6-month IRP period. Alternately, if the 6-month resolution window lapses without agreement on a resolution plan, liquidation follows.

The process for liquidation under the Code is similar to the process under the current company law, but has been streamlined for better efficiency. The Resolution Professional managing the IRP ordinarily continues as the liquidator. Once the NCLT passes an order of liquidation, a moratorium is imposed on the pending legal proceedings against the debtor, and the assets of the debtor (including the proceeds of liquidation) vest in the liquidation estate.

During liquidation, if the liquidator finds any transactions of fraudulent transfers, or fraudulent preference of a certain creditor or class of creditors in the one-year period (two years in case of related parties) prior to liquidation, such transactions will be reversed and assets that were fraudulently transferred will be included as a part of the assets in liquidation.

INSOLVENCY RESOLUTION PROCESS UNDER THE CODE



During liquidation, if the liquidator finds any transactions of fraudulent transfers, or fraudulent preference of a certain creditor or class of creditors in the one-year period (two years in case of related parties) prior to liquidation, such transactions will be reversed and assets that were fraudulently transferred will be included as a part of the assets in liquidation.

Priority amongst Competing Creditors

NO PRIORITY DURING IRP

In line with the broader philosophy of impartial treatment of all financial creditors, votes in the creditors' committee are based on the weight of the outstanding debt irrespective of security interest. This ensures that unsecured creditors can participate in resolution decisions to the full extent of their claims.

Upon liquidation, a secured creditor has the option of either

a. relinquishing his/its interest to the liquidation trust and receiving proceeds from the sale of assets in first priority, or

b. withdrawing the secured assets outside the liquidation estate and realizing its security interest. If the secured creditor enforces his claims outside the liquidation, he must contribute any excess proceeds to the liquidation trust. Further, in case of any shortfall in the recovery, the secured creditors will be junior to the unsecured creditors to the extent of the shortfall.

PRIORITY WATERFALL IN LIQUIDATION

The Code significantly changes the priority waterfall for distribution of liquidation proceeds. After the costs of insolvency resolution (including any interim finance), secured debt together with workmen dues for the preceding 24 months rank highest in priority. Central and state Government dues stand below the claims of secured creditors, workmen dues, employee dues and other unsecured financial creditors. Under the earlier regime, Government dues were immediately below the claims of secured creditors and workmen in order of priority.

PRIORITY OF PAYOUT IN LIQUIDATION UNDER THE CODE



Institutional infrastructure

INSOLVENCY REGULATOR

The Code provides for the constitution of a new insolvency regulator i.e., the Insolvency and Bankruptcy Board of India (Board). While the Code lays down the broad principles for insolvency resolution, questions of detail will be dealt with by the Board as the rule-making body. Given that one of the key objectives of the Code is to create certainty in procedures, the role of the Board in making the implementing rules and regulations will be crucial. Its role includes

i. overseeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities; and
ii. regulating the insolvency process.

Some of the areas on which the Board is expected to provide clarity through rules are discussed below

a. Operation of Information Utilities

While the Code set outs the broader features and purpose of information utilities, the Board will regulate specific aspects of their functioning by framing regulations, including on,

i. eligibility, registration process and corporate governance standards for information utilities;
ii. procedure for submission and modification of information;
ii. inter-operability amongst different utilities;
iv. ensuring consistency and integrity of financial information and regulating fraud; and
v. access to information and data privacy.

b. Regulating Insolvency Practitioners

The Board will regulate insolvency professionals who will act as Resolution Professionals in the IRP. All insolvency professionals are members of 'insolvency professional agencies' that will be registered with and regulated by the Board. The Board is expected to introduce regulations for ensuring high standards of professional conduct by insolvency professionals and the extent of personal liability of the resolution professionals for misconduct (and lay down related safe harbor provisions).

c. Establishing a default to initiate the IRP

Under the Code, financial creditors may initiate insolvency by relying on information submitted to an information utility or by any other means that the Board may prescribe. The Board will clarify any alternate methods for establishing default through regulations, which should provide a similar level of transparency and reliability as an information utility.

INSOLVENCY PROFESSIONALS

The Code provides for insolvency professionals as intermediaries who would play a key role in the efficient working of the bankruptcy process. The Code contemplates insolvency professionals as a class of regulated but private professionals following prescribed standards of professional and ethical conduct.

In the resolution process, the insolvency professional verifies the claims of the creditors, constitutes a creditors' committee, runs the debtor's business during the moratorium period and helps the creditors in reaching a consensus for a revival plan. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee.

Thus, the success of the Code will also depend on the development of a vibrant market of competent insolvency professionals.

INFORMATION UTILITIES

A notable feature of the Code is the creation of information utilities to collect, collate, authenticate and disseminate financial information of debtors in centralised electronic databases. The Code requires creditors to provide financial information of debtors to multiple utilities on an ongoing basis.

Such information in information utilities would be available to creditors, resolution professionals, liquidators and other stakeholders in insolvency and bankruptcy proceedings. The purpose of this is to remove information asymmetry and dependency on the debtor's management for critical information that is needed to swiftly resolve insolvency.

During liquidation, the liquidator will also have access to all information available in information utilities and other financial repositories in order to fully verify claims of creditors and identify the assets of the debtor.

In terms of detail, the procedure for submitting and accessing financial data and the attendant concerns of data protection will be addressed under regulations. The idea behind a large number of competing utilities is to ensure service quality, customer choice and efficient price determination. In this regard, the regulations formed by the Board must guard against creating prohibitive entry barriers such as high capital requirements and costly compliance requirements.

ADJUDICATING AUTHORITIES

The adjudicating authority for corporate insolvency and liquidation is the NCLT. Appeals from NCLT orders lie to the National Company Law Appellate Tribunal and thereafter to the Supreme Court of India. For individuals and other persons, the adjudicating authority is the Debt Recovery Tribunal (DRT), appeals lie to the Debt Recovery Appellate Tribunal and thereafter to the Supreme Court.

In keeping with the broad philosophy that insolvency resolution must be commercially and professionally driven (rather than court driven), the role of adjudicating authorities is limited to ensuring due process rather than adjudicating on the merits of the insolvency resolution. For instance, while a IRP can only commence once the NCLT has issued an order, the degree of judicial determination of whether or not a firm is insolvent is significantly reduced. After the IRP period, the NCLT will issue an order to give effect to the decision of the creditor's committee but does not go into the merits of the plan.

To ensure that the creditors get the full value of the liquidation estate, the NCLT has been given wide powers to reverse the effects of preferential/undervalued transactions and extortionate credit transactions within the prescribed look-back period upon application by the liquidator.

CROSS BORDER INSOLVENCY

In an increasingly globalized environment, a modern insolvency law should provide for efficient ways of dealing with cross border assets. In this regard, concerns may arise on two counts: a) participation of foreign creditors in the IRP; and b) access to debtor assets located abroad. As regards the former, the Code allows for equal participation of both domestic and foreign debtors in the insolvency process. In respect of the more complicated issue of debtor assets located abroad, the Code provides that the government may enter into bilateral agreements with other countries for purposes of enforcing the Code. Furthermore, the Code enables Indian courts to issue letters of request to a foreign court or tribunal seeking its assistance in situations where a debtor's assets may be located abroad.

Opportunities for potential acquirers

One of the ways of restructuring insolvency to keep the defaulting firm as a going concern is through change of ownership or management. Recent high profile examples, arising out of the global financial crisis, illustrate the possibilities of M&A activity in insolvency scenarios.

TAKEOVERS OF DISTRESSED FIRMS POST 2008 CRISIS

DISTRESSED FIRM	ACQUIRER
Lehmann Brothers	Barclays
Bear Sterns	JP Morgan
Countrywide Financial	Bank of America
Merrill Lynch	Bank of America
Northern Rock	Government of the UK

Possibilities of takeover of distressed firms by financial/strategic investors under the current framework in India are limited to the Joint Lenders Forum (JLF)/ Corporate Debt Restructuring (CDR) processes. Moreover, revival packages envisaging third party takeovers are extremely rare in practice. Takeovers in India in such cases are usually limited to change of control in favour of senior lenders as part of the revival package in the JLF/CDR and the related Strategic Debt Restructuring (SDR) process. Under the Code, the six-month revival period offers significant possibilities for potential acquirers who believe in the possibility of a turnaround in principle. Revival plans can be submitted to the creditors' committee for approval by anyone (including potential outside acquirers). However, in what could be seen as a missed opportunity, potential acquirers cannot attend creditors' committee meetings – perhaps, allowing the committee itself to give interested investors an 'observer' status in committee meetings would have facilitated more coherence in takeover proposals.

A related possibility that the Code seeks to encourage is distressed financing during the revival period. By placing such financing at the top of the liquidation waterfall, the Code seeks to create an important avenue for funding potential turnarounds.

Insolvency Resolution Process for Individuals/ Unlimited Partnerships

For individuals and unlimited partnerships, the Code applies in all cases where the minimum default amount is INR 1000 (USD 15) and above (the Government may later revise the minimum amount of default to a higher threshold). The Code envisages two distinct processes in case of insolvencies: automatic fresh start and insolvency resolution.

Under the automatic fresh start process, eligible debtors (basis gross income) can apply to the DRT for discharge from certain debts not exceeding a specified threshold, allowing them to start afresh.

The IRP consists of preparation of a repayment plan by the debtor, for approval of creditors. If approved, the DRT passes an order binding the debtor and creditors to the repayment plan. If the plan is rejected or fails, the debtor or creditors may apply for a bankruptcy order.

Transition

A key feature of the Code is the transitioning process from the fragmented framework under current laws to the unified approach under the Code. In this regard, while the Code has received presidential assent, it has still not been actually enforced. Given the complex nature of processes and the institutional infrastructure envisaged, the Code allows for the Central Government to enforce provisions in a staggered manner. The powers of the yet to be constituted Board can be exercised by the Central Government pending constitution.

For corporate insolvency, proceedings already instituted under the Companies Act will continue unabated. Once the relevant provisions are enforced, newly instituted insolvency proceedings will be governed under the Code. Significantly, the Code provides for suspension of ongoing proceedings under the SICA Act from a date to be appointed by the Central Government. Thereafter, such cases may be transferred to the NCLT upon application by the relevant corporate entity.

As regards insolvency for individuals and partnerships, the Code repeals the existing legislations. However, such repeal is prospective - pending proceedings will continue to be governed under the repealed acts.

03.

ANTI-CORRUPTION ENFORCEMENT IN INDIA – CHANGED LANDSCAPE

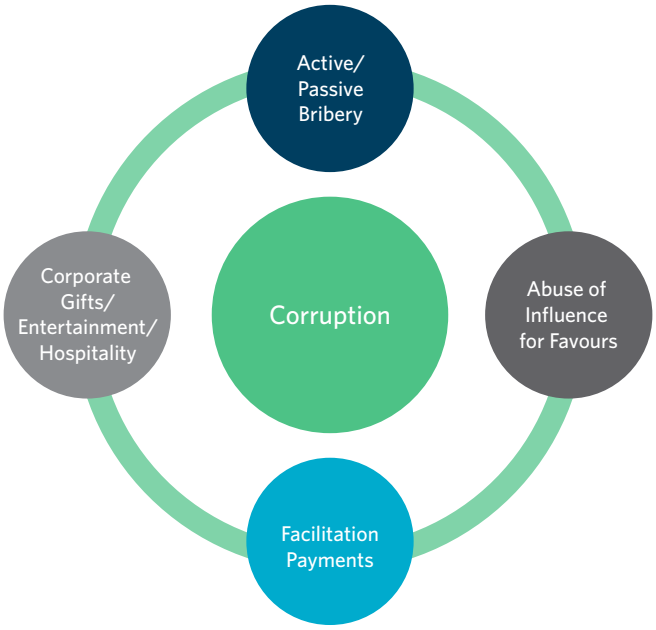
Growing emphasis on compliance

There has been a global initiative and political will to investigate and prosecute corruption taking place both domestically as well as in foreign jurisdictions. Internationally, the United Nations Convention Against Corruption came into force on 14 December 2005. Statutes like the Bribery Act 2010 in the United Kingdom and Foreign Corrupt Practices Act, 1977 (FCPA) in the United States empower prosecuting agencies to expand their jurisdiction beyond national borders. Emerging economies like India, China and Brazil have also enacted penalties for corruption related offences. A greater coordination is also visible between prosecutors and regulators across the world leading to secondary channels of enforcement, e.g. through ethical standards of auditors. In this paradigm, multinational corporations operating in diverse law enforcement environments, are especially exposed to bribery related offences.

It is no secret that there is an immediate need to address corruption in India. India is ranked 76 out of 168 countries under Transparency International's Corruption Index for 2016. Although there was no shift in this rank from the past year, anti-corruption policy in India has seen progress, e.g. the draft Bilateral Investment Treaty proposed by the Law Commission of India in 2015, for example, recognises the India's right to deny benefits of investment to foreign investors owing to involvement in corruption. There are other major legislations in the pipeline that seek to address corruption, and the process of appropriation of its proceeds.

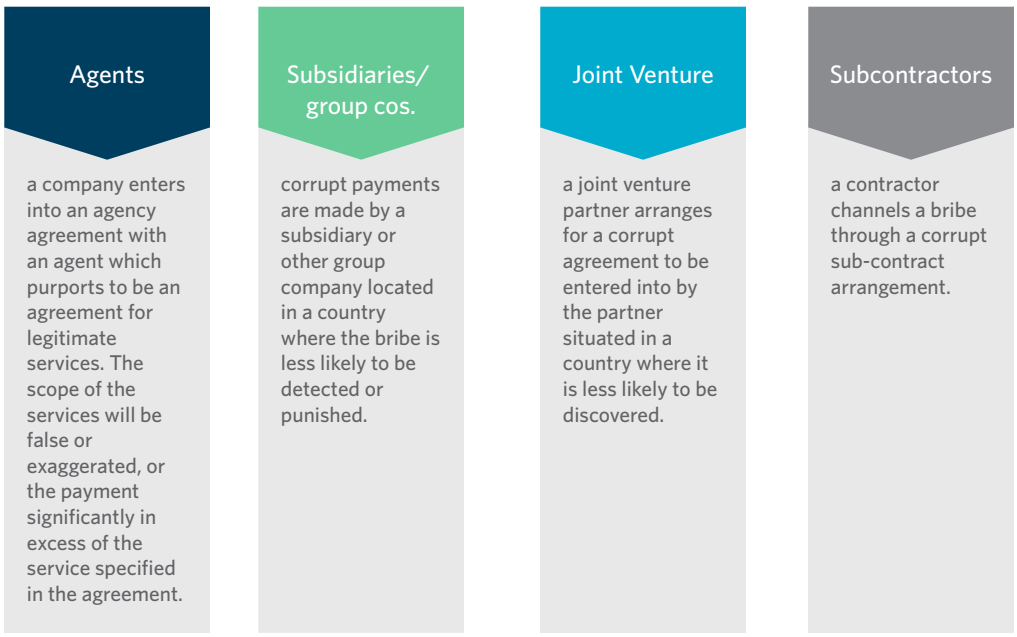
There can be differing schools of thought with regard to the impact of this movement on ease of doing business. Stricter enforcement may mean added compliance costs for companies. Never the less in the longer term corruption does distort markets and reduces competitiveness. A clean business environment offers a level playing field and encourages entrepreneurship. Evidentally the benefits offered by a strict anti-corruption regime outweigh the additional compliance hassles that it entails.

Corruption – the general understading



Acts of corruption include active and passive bribery, abuse of influence to seek favours, facilitation payments, corporate hospitality etc. A bribe may be a cash payment or any type of non-cash advantage. Corruption can occur both in the public sector, (in bribing public servants) and also in the private sector (ex-gratia kickbacks to agents/employees for choice of suppliers). As a legal matter, any activity involving corruption constitutes an offence, regardless of whether it is committed knowingly for personal gain, or reluctantly for staying in competition, or unknowingly, as an unintentional adherence to business custom.

It is important to note that foreign entities operating in India may be exposed to corruption through various local tropes. This includes corporate gifts, entertainment or hospitality. Public servants are likely to have strict hospitality policies which prevent them from accepting gifts in excess of a token value. Any gift or hospitality in excess of that amount may amount to a bribery offence. In order to shield direct liability, it is common for corporates in India to engage in corruption through intermediaries such as agents, sub-contractors, subsidiaries and joint ventures.



The use of intermediaries however does not excuse the company from liability under most statutes.

Current legal framework in india

*In India, several statutes cover offences related to corruption. They include the Prevention of Corruption Act, 1988 **(PCA)**, the Prevention of Money Laundering Act, 2002 **(PMLA)**, Indian Penal Code, 1860 **(IPC)** and the tax statutes.*

PCA

The PCA applies to all Indian citizens (in India or abroad). In this sense, it is a predominantly territorial statute.

Accepting bribes

Under the PCA, it is a criminal offence for public servants (threshold for assessing who is a 'public servant' is the performance of a 'public duty') to

a. accept, illegal gratification as reward or motive to do or forbear from doing any official act; or

b. show favor or disfavor to any person in the exercise of official functions

Intermediary accepting bribe to influence a public servant

The PCA also prohibits persons from receiving any gratification for illegally influencing a public servant to perform, or refrain from performing, any official act. Providing gratification in the above sense is also prohibited.

Paying a bribe

The act of paying a bribe is not specifically prohibited under the PCA (i.e., the PCA does not expressly target the payer). However, courts have brought such acts within the PCA by treating the payment of bribes as amounting to 'abetment' of the above offences.

Offences under the PCA are non-cognizable, bailable, non-compoundable and punishable with imprisonment of 3 years to 7 years and/or fine.

Corporate Criminal Liability under the PCA

Criminal liability under the PCA and other criminal statutes is fastened on corporates through the 'attribution principle' that has been evolved by Indian courts. This principle is essentially an import of standards evolved under common law. The Indian Supreme Court has held that a company can be held criminally liable for the actions of its management if the management acts as the 'alter ego' of the company. Applying the above principle, the Supreme Court recently held a company liable under the PCA. Further, it held that managers and directors of a company may be personally liable for acts related to corruption if their involvement can be established.

In line with international standards, the Prevention of Corruption (Amendment) Bill, 2013 incorporates express provisions pertaining to corporate criminal liability (which was not covered originally under PCA). Statutory recognition of the concept will add to certainty in scope and give teeth to investigating agencies wishing to press charges against errant corporates.

PMLA

The second key legislation that deals with corruption is the PMLA. It was enacted with the object of preventing money laundering and providing for confiscation of property involved in money laundering. The PMLA imputes criminal liability for laundering of property derived from corruption and utilizing proceeds of corruption.

Under the PMLA, the offence of 'money laundering' involves,

i. an attempt to indulge in; or

ii. knowingly assisting; or

iii. being a party to any process or activity connected with,

the "proceeds of crime" including its concealment, possession, acquisition or use and projection or claim as untainted property.

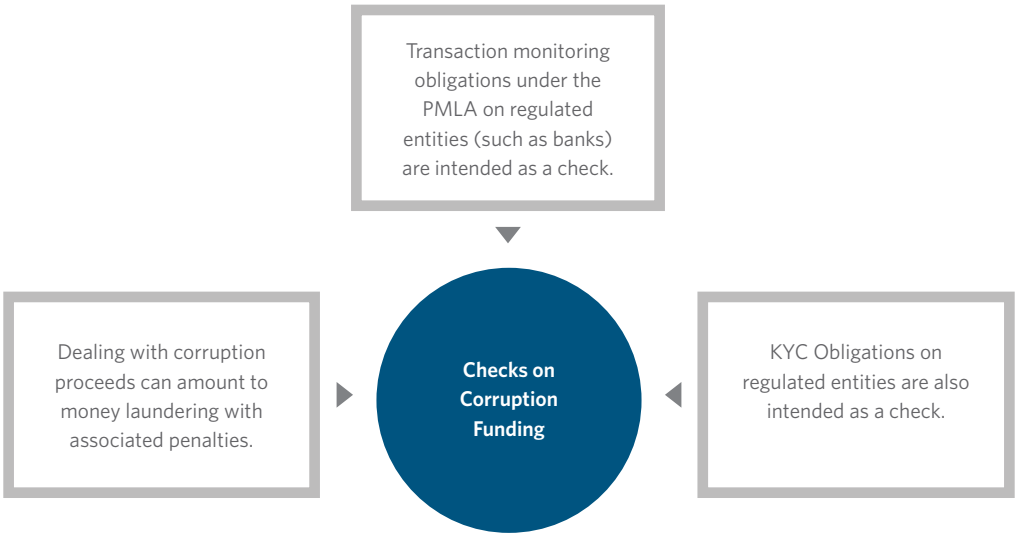
Any property derived, directly or indirectly, as a result of criminal activity under any of the scheduled statutory provisions under the PMLA is considered "proceeds of crime".

Interplay with the PCA

The offence of "criminal misconduct" under the PCA is a scheduled offence under the PMLA. Therefore, specific forms of corrupt practices that are punishable as criminal misconduct under the PCA are also implicated under the PMLA. Considering that knowingly assisting a person involved in "proceeds of crime" is an offence under the PMLA, anyone guilty of abetment under PCA will also be guilty of money laundering under the PMLA.

Any offender under the PMLA could be punished with imprisonment of 3 to 7 years and be liable to fine.

PMLA AND CHECKS ON CORRUPTION FUNDING



Corporate criminal liability under the PMLA

Like the PCA, the PMLA does not expressly deal with how criminal liability is to be fastened on a company. In theory, the "attribution principle" evolved by Courts would apply with equal force in the context of the PMLA. The PMLA does, however, lay down that in case an offence is shown to be committed by a company, persons in charge of or responsible for the affairs of the company and senior management with whose consent or because of whose neglect the offence was committed are also liable.

IPC

Senior management and employees of a company can be proceeded against under the IPC as well. In the context of the IPC, most offences would involve the employees committing a wrong against the company. Specifically, the most commonly used IPC charges in case of employees bribing on behalf of a company are those of criminal misappropriation of property belonging to the company and criminal breach of trust against the company. These offences under the IPC are more likely to be used in prosecution by the company itself, or any of its stakeholders while prosecuting clandestine acts of corruption which are expressly prohibited by management policy.

Separately, in acts of bribery by companies, employees may be charged along with a company on counts of conspiracy and abetment.

TAX LAWS

The Income Tax Act, 1960 **(ITA)** does not expressly prohibit or criminalise acts of corruption. However, expenditure that is incurred for any purpose that is illegal is not considered as a business expenditure and thus, is not deductible for tax purposes. Consequently, money spent on acts related to corruption from a company's account is in fact money on which income tax was payable. This tax liability is often diverted by errant companies by routing the corrupt act through agents or third parties and recording the transaction as a purchase expense on their books of accounts.

Such accounting of expenses might attract penalty for mis-reporting book of accounts under the ITA, thus leading to further compliance costs for delinquent companies.

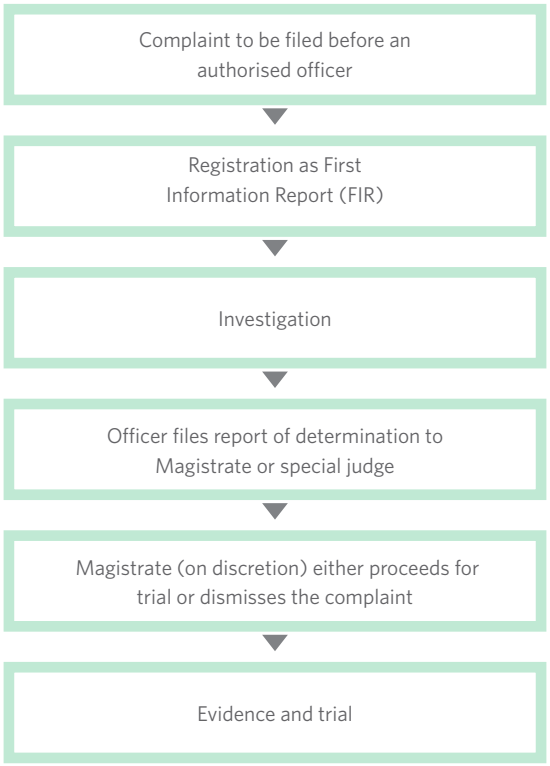
Reporting and enforcement

*Under the Code of Criminal Procedure, 1973 (**CrPC**) a person who is specifically aware of the commission of specified offences under the PCA has a general duty to forthwith report such knowledge to the nearest Magistrate or police officer.*

For offences falling under PCA, the following officers/authorities have power to investigate

- *Local police officer;*
- *Vigilance branch of police; or*
- *Central Bureau of Investigation (CBI)*

INVESTIGATIVE PROCESS



While the above process is largely consistent with criminal investigations in common law countries, the process of registering the complaint generally takes three to six months, and the process of trial thereafter takes three to five years. In spite of efforts to reduce the length of the process by introducing anti-corruption branches in state police and special courts for prosecutions, protracted timelines continue to remain a significant challenge - for businesses fighting long court battles adds to costs and lessens certainty.

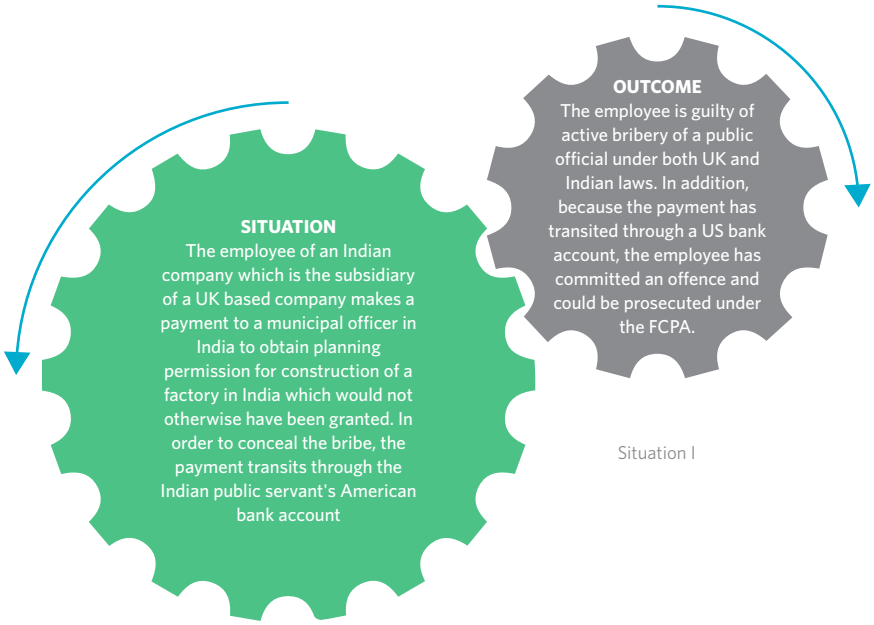
Investigating authorities have wide powers under the PCA including power to inspect and take certified copies of bankers books if they relate to persons suspected under the PCA or of any other person suspected to be holding money on behalf of such person.

However, for prosecution of public servants under PCA. Previous sanction is necessary either from the Government in matters connected with affairs of the Union and State - this particular provision has attracted significant criticism.

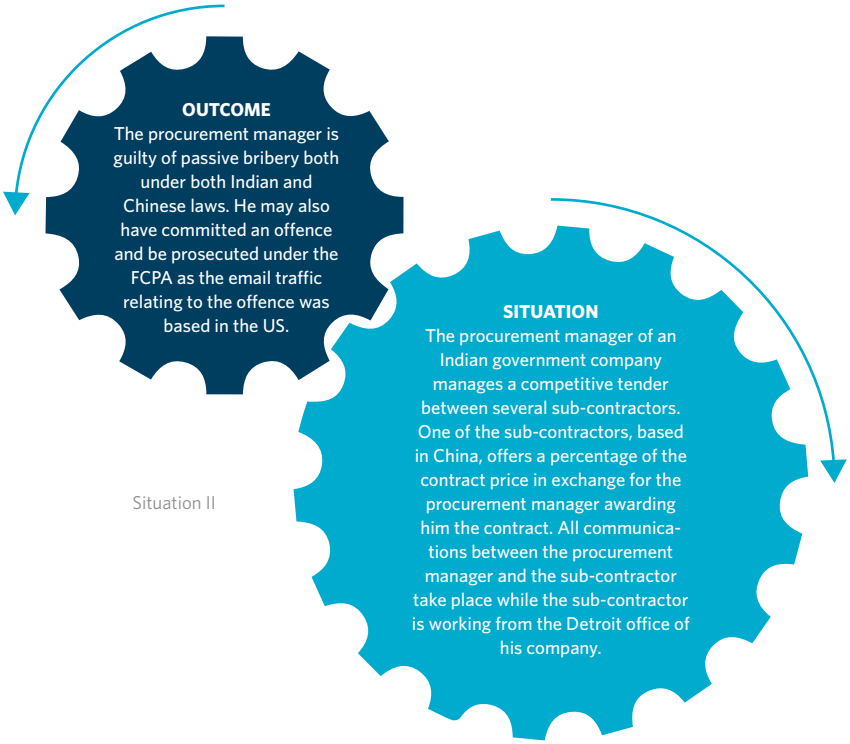
Under the PMLA, the officers of the Directorate of Enforcement (ED) have powers to investigate and initiate proceedings in the designated Special Court. These powers are quite wide and include power to provisionally attach any property derived from money laundering.

PROVISION	PCA, INDIA	FCPA, U.S.A	UK BRIBERY ACT
What is unlawful?	The PCA prohibits: • public officials from receiving "any gratification" for performing or refraining from performing any official act; • any person from receiving or giving "any gratification" for illegally influencing a public officer to perform or refrain from performing any official act; and • abetment of any of the above and hence giving a bribe, or receiving the same on behalf of a third party.	The FCPA anti-bribery provisions make it unlawful to corruptly make, offer, promise or authorise a payment of money or anything of value, directly or indirectly, to a foreign official to influence or induce misuse of an official position to obtain or retain business	The UK Bribery Act prohibits general paying or receiving an advantage to reward or induce "improper performance" (payment / receipt may itself constitute "improper performance" Improper performance is performance in breach of a "relevant expectation" (good faith, impartiality...) offences **Bribery of foreign public officials** Offering or giving any advantage to a foreign public official intending to influence the foreign public official to obtain business unless the official is permitted or required by local written law to accept.
Scope of Jurisdiction	The PCA applies to • Indian citizens residing in India; • Indian citizens residing abroad; and present or prospective Public Servants who are Indian citizens.	The FCPA applies to • any U.S. affiliates of an entity based in the US, and their officers, directors and employees. • any officers, directors and employees of a non-U.S. entity who are U.S. nationals are required to comply, wherever in the world they are located	The UK Bribery Act applies to • British nationals/citizens • UK residents • UK incorporated companies • Anyone acting in the UK, even if the act or omission takes place outside of the UK
Punishment prescribed	Imprisonment of 3 years to 7 years and/or fine.	Corporations have incurred fines of up to $2 million. The penalty for individual violators maybe a fine of up to $100,000 and a maximum of 5 years in prison.	For individuals, up to 10 years in prison and an unlimited fine. Companies may also face unlimited fines.

ILLUSTRATIONS OF INTERPLAY BETWEEN ANTI-CORRUPTION LAWS



Situation I



Situation II

Importantly, the companies in both of the above cases may also be found to guilty of bribery based on the principle of alter ego. Such liability could extend personally to the management for failing to prevent bribery.

Impending legislative changes

Various legislative changes are in the pipeline in this area of law in India. Most of these changes are aimed at adding more certainty to existing laws and giving more teeth to enforcement.

A. THE PCA (AMENDMENT) BILL, 2013

- Makes giving of bribe to a public servant an offence.
- Expressly includes commercial organisation under abetment provision;
- Redefines criminal misconduct to cover misappropriation of property and possession of disproportionate assets only;
- Modifies definitions and penalties for offences related to taking a bribe, being a habitual offender and abetting an offence; and
- Introduces powers and procedures for the attachment and forfeiture of property of public servants accused of corruption.

B. THE PUBLIC PROCUREMENT BILL, 2012

- Aims to ensure transparency in procurement by the central government and its entities;
- Applies to all central government ministries, departments, central PSUs, constitutional and statutory bodies and other organisations owned, controlled, or substantially funded by the central government; and
- Exempts certain procurements from the specified process, besides allowing the government to limit competition in certain cases.

C. THE PREVENTION OF BRIBERY OF FOREIGN PUBLIC OFFICIALS AND OFFICIALS OF PUBLIC INTERNATIONAL ORGANIZATIONS BILL, 2011

- Aims to empower the Central Government to enter into agreements with other countries (contracting states) for enforcing this law and for exchange of investigative information;
- Criminalizes acceptance or solicitation of bribes by foreign public officials and officials of public international organisations for acts and abetment;
- Imprisonment between six months and seven years;
- Extradition treaties entered into by India with other countries that are signatories to the convention are deemed to be amended to include offences.

D. THE BENAMI TRANSACTIONS (PROHIBITION) AMENDMENT BILL, 2015

- Amends the definition of *'benami'* transactions to add transactions which qualify as *'benami',* such as property transactions where
  - i. the transaction is made in a fictitious name,
  - ii. the owner is not aware of or denies knowledge of the ownership of the property, or
  - iii. the person providing the consideration for the property is not traceable;
- establishes adjudicating authorities and an Appellate Tribunal to deal with benami transactions; and
- specifies penalty for entering into benami transactions.

Compliance programmes – increasing importance in pro-enforcement landscape

In an increasingly pro-enforcement environment, emphasis on prevention of bribery and development of robust internal compliance standards becomes important for corporates. The costs of compliance, in theory, are ever increasing due to statutes like the FCPA and the UK Bribery Act. However, the long term economic benefits of reducing corruption and attendant gains in efficiency, transparency and certainty are well worth the growing pains of increased initial compliance costs.

Anti-corruption policies of corporates need to keep up with the ever increasing momentum of the anti-corruption movement and its transactional nature. Policies can look to address the following issues, given that they are particularly high risk areas

- *Purchase of privileges or special benefits against payment of bribes, gratuities, or other forms of payoffs in cash or in other benefits.*
- *Payments or services to political parties, elected officials or candidates for office, irrespective of whether such payments are lawful in the country where they are made.*
- *Payments to obtain favourable action from a government or administrative agency, including gifts, services or lavish entertainment offered to government or administrative employees or officer.*

Given the high exposure to companies from corruption arising out of contracting with intermediaries, preventing red flags at the threshold stage is highly important.

- *Contracts between the company and intermediaries must clearly list services to be performed, basis for fees or price and all relevant terms and conditions;*
- *All payments must be determined and paid in relation to the actual services provided; and*
- *Intermediaries must not act on behalf of the company unless expressly authorised to do so in writing by duly empowered company representatives.*

Of course, implementing policies on ground and creating a culture of compliance assume far more significance than the fine print of internal anti-corruption policies. In this connection, having robust vendor diligence processes, investing in internal training programmes, and educating employees on the importance of compliance become imperative.

Safe Harbours

A company facing trial for one of its employees being involved in acts of corruption can take the defence that the act of corruption was unauthorised or prohibited by the management of the company. In this regard in the proposed amendments to the PCA, liability of "commercial organisations" can be excused if it proves that adequate procedural safeguards were in place.

Further, as far as the general law on abetment is concerned, in case of a potential trial for corruption where the company is arraigned as an accused, one of the possible defences available to the management could be to establish the lack of authorisation and/or knowledge for such acts.

Conclusion

India's movement towards a stricter anti-corruption framework is broadly in line with developments abroad. Multi-national companies are increasingly aware of the benefits of a business environment which ensures order and fairness. In that sense, a robust anti-corruption framework can be a feather in India's cap as it looks to attract foreign businesses to India.

At the level of corporates, it is increasingly being noticed that companies are investing into compliance programs and codifying their ethics standards in India. This has helped companies and employees prevent, as well as effectively manage, situations where they are faced with serious allegations of bribery and corruption. At the start of any investigation into allegations of bribery or corruption, investigation agencies and regulators tend to look for internal compliance programs and safe guards to understand if the company has a strong policy against such practices. These policies significantly assist a company during an investigation and suggest that the company is serious about complying with Indian law. Thus, there is a change from a 'reactive' approach to a 'pro-active' one in how companies are addressing bribery and corruption issues in India.

04.

CHANGING FACE OF ARBITRATION IN INDIA: THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

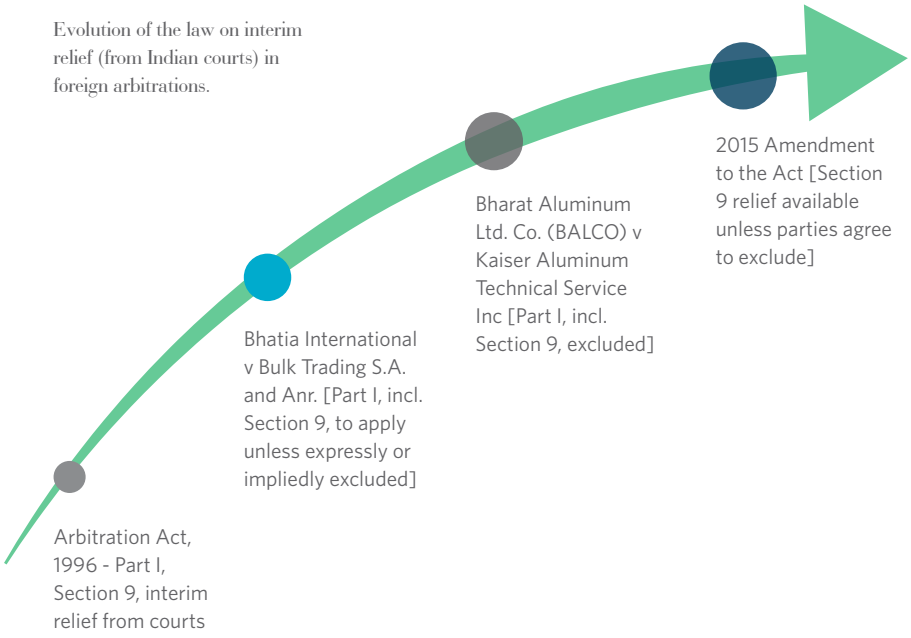
The Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation Act, 1996 ***(Act)*** *was enacted to provide an effective and expeditious dispute resolution framework outside the traditional system of courts. With the Act, India sought to harmonize its national law with the model law proposed by the UNCITRAL to comply with its international treaty obligations under the New York Convention, 1958. However, there were many difficulties in the interpretation of the provisions of the Act and the conflicting views taken by different Indian courts created uncertainties in the law. Judicial interference in matters referred to arbitration leads to delays and increased costs, other than being inconsistent with the main objectives of arbitration as an alternative dispute resolution mechanism. With the intention of removing various difficulties in the Act, recent amendments were made by way of the Arbitration and Conciliation (Amendment) Act, 2015 (2015 Amendments). Besides, it is important for a rapidly globalizing India to accept dispute resolution processes that accord to international standards and do not hinder international commerce.*

The changes introduced by the 2015 Amendments aim at making the arbitral process under the Act less time-consuming and more cost effective. The amended Act reinforces the principle of limited judicial interference and enhances the powers of the arbitral tribunal, while addressing the confusion on the applicability of Part I of the Act to arbitrations seated outside India. It also recognizes the need for a balanced approach as judicial involvement may be needed to support an arbitral process but should not supplant the extra-judicial process chosen by the parties.


2015 Amendment
Greater powers to Indian arbitral tribunals
Non-signatories may also trigger arbitration
Interim order will have the force of court order
Part I application to foreign arbitrations
Part I does not apply but interim relief available from Indian courts
Time-efficiency
Compressed timelines for arbitral proceedings
Court's limited role
Challenge on public policy defined
No determination on arbitrability of the dispute
No automatic stay if award is challenged
Mandatory reference to tribunal if prima facie arbitration agreement
Increased credibility
Independence / Impartiality of arbitral tribunal
Mechanism for fixing arbitral fee

INTERIM MEASURES OF PROTECTION



INTERIM MEASURES OF PROTECTION BY INDIAN COURTS

Since the introduction of the Act, Indian courts have taken different positions on the issue of whether a party to a foreign seated arbitration is entitled to seek interim reliefs in India. The Supreme Court, in the much discussed case of Bhatia International v Bulk Trading S.A. and Anr. (2002)4 SCC 105), had held that an application for interim measures under Section 9 under Part I of the Act could be made to a court in India even in case of international commercial arbitrations held outside India, unless the provisions of Part I of the Act have been excluded by agreement between the parties, expressly or by implication. While the underlying intent may have been to allow parties to protect the subject matter of the arbitration, the decision was later used by parties and Indian courts as the basis for greater judicial interference even in foreign seated arbitrations.

This led to judicial anomalies like the decision in Venture Global Engineering v Satyam Computer Services Ltd. and Another (2008)4 SCC 190 judgment, wherein the Indian courts assumed jurisdiction to hear challenge of an award of a foreign seated arbitration. Such liberal judicial interference had the effect of creating a negative image of India as a country with a protectionist arbitration policy.

In its subsequent decision in Bharat Aluminum Ltd. Co. (BALCO) v Kaiser Aluminum Technical Service Inc. (2012)

9 SCC 649, the Supreme Court sought to set right this anomaly, by holding that Parts I and II of the Act were mutually exclusive of each other, and if the seat of arbitration was chosen by the parties to be outside India, then Part I would not apply. In other words, Indian courts did not have any jurisdiction to interfere with a foreign seated arbitration, save and except for purposes of enforcement of the foreign arbitral award. However, the application of the ruling was limited only to arbitration agreements concluded after the judgment and for all arbitration agreements prior to the date of the judgment, the judgment in the Bhatia International case continued to apply. In light of this judgment, it was impossible for parties engaged in a foreign seated arbitration under an arbitration agreement entered into after 6 September 2012 (date of the decision in the BALCO case) to obtain interim protection in India.

While the judgment in BALCO was in the right spirit, it created difficulties in cases where urgent interim reliefs were necessary against parties whose assets were located in India. As parties could not approach an Indian court for interim measures of protection, they would have to apply to the foreign seated arbitral tribunal or a foreign court (where the arbitral tribunal was seated) for any interim reliefs. Even if an interim relief was granted by the foreign seated arbitral tribunal or foreign court, the interim order could not be directly enforced in India as it would not qualify as a "foreign award" capable of being enforced in India under Part II of the Act. Thus, it was possible that in an international commercial arbitration, with seat outside India, a party obtaining an arbitral award in its favour could enforce the award as the assets could have been dissipated in the interim.

To address this difficulty, the 2015 Amendments have conferred power on Indian courts to grant interim measures of protection even in foreign seated arbitrations, unless parties have contracted out of this provision. However, the amendment is silent on whether the agreement excluding the jurisdiction of Indian courts can be implied or if the same must necessarily be explicit. If the Indian courts were to assume the position that the exclusion could be implied, it could defeat the purpose of the amendment, given that Indian courts had already held in the past that jurisdiction of Indian courts would be ousted if the governing law of the contract and/or the arbitration agreement and the seat are not Indian. In this regard note: Hardy Oil and Gas Limited v Hindustan Oil Exploration Company Limited and Ors. (2006)1 GLR 658); Videocon Industries Ltd. v Union of India (AIR 2011 SC 2040).

Further, it is still not clear whether the above amendment granting Indian courts the power to grant interim measures in foreign seated arbitrations is limited to international commercial arbitrations alone, i.e. where at least one party is a foreign party, or whether such power would also extend to a foreign seated arbitration between two Indian entities. Importantly, the issue of whether two Indian parties can choose to arbitrate outside India is still pending at the Supreme Court. If the Supreme Court rules that a dispute involving only Indian parties can be settled by way of an arbitration seated outside India, there could be an anomalous situation where the parties are left without any interim remedy from Indian courts unless it is clarified otherwise.

WIDE POWERS GIVEN TO ARBITRAL TRIBUNALS TO GRANT INTERIM ORDERS

For arbitrations with seat in India, the power to grant interim reliefs vests both with courts as well as the arbitral tribunals. An arbitral tribunal has the power to order interim measures of protection, unless the parties have excluded such power by agreement. In this manner, parties can approach the arbitral tribunal for interim reliefs rather than await orders from a court. While this is an important provision and crucial to the working of the arbitration system as a whole, its efficacy was seriously compromised on account of lack of suitable statutory mechanisms for the enforcement of interim orders passed by an arbitral tribunal.

Previously under the Act, interim relief granted by an arbitral tribunal did not have the force of a court's decision and it did not invoke any penal consequences. In Sundaram Finance Ltd v NEPC India Ltd. (1999) 2 SCC 479), the Supreme Court observed that though Section 17 of the Act gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court. The problems with enforceability of interim orders passed by arbitral tribunals was also recognized by the Supreme Court in M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd. (2004) 9 SCC 619, where it was held that, under Section 17 of the Act, neither any power is conferred on the arbitral tribunal to enforce its order nor does the Act provide for judicial enforcement of such interim orders passed by the arbitral tribunal.

In an attempt to find a workable solution within the statutory framework of the Act, the High Court of Delhi in Sri Krishan v Anand, (2009) 3 Arb LR 447 held that failing to comply with the order of the arbitral tribunal under Section 17 would be deemed to be "making any other default" or "guilty of any contempt to the arbitral tribunal during the conduct of the proceedings" under Section 27 (5) of Act.

To overcome the difficulty in enforcement of an arbitral tribunal's interim order, the 2015 Amendments introduce a statutory provision to empower the arbitral tribunal with the same powers as that of a court in granting interim orders, and further states that the interim order issued by an arbitral tribunal shall be deemed to be an order of a civil court and statutorily enforceable in the same manner. This would give more teeth to the arbitration process, as failure to comply with the interim orders of an arbitral tribunal would have the same effect as contempt of an order of a court. Furthermore, in order to facilitate parties to approach the arbitral tribunal and reduce the intervention of courts, the amendments provide that once the arbitral tribunal has been constituted, courts cannot entertain application for interim measures, unless there are circumstances which may render the remedy of obtaining interim orders from the arbitral tribunal inefficacious.

While the amendment to Section 17 is significant, some issues in its efficacy have already surfaced. In a recent judgment passed by the Kerala High Court, (Writ Petition (Civil) No. 38725 of 2015, on 16 March 2016) a Single Judge of the High Court has taken the view that pursuant to the 2015 Amendments, the arbitral tribunal cannot pass an order to enforce its own orders and the parties will have to approach the courts for seeking such enforcement, thereby making the enforcement of interim orders cumbersome.

However, the 2015 Amendments did not address the issue of enforceability of interim orders passed by an arbitral tribunal in foreign seated arbitrations. Therefore, in a foreign seated arbitration which excludes the ability of Indian courts to grant interim relief under Section 9 of the Act (as amended), parties could only approach the arbitral tribunal or the foreign court (where the arbitral tribunal is seated) for interim reliefs. However, the interim reliefs so passed will not be directly enforceable in India.

Intervention of courts

Arbitrations governed under the Act witnessed excessive intervention by courts at the pre-litigation stage, i.e. at the stage of Section 8 (when an application was moved before a judicial authority seeking reference to arbitration in a pending proceeding) and Section 11 (for appointment of arbitrators in case of deadlock between the Parties). Indian courts have often resorted to detailed examination of the existence and the validity of arbitration agreements as well as the arbitrability of disputes. Such determinations on the existence/validity of the arbitration agreements under Sections 8 and 11 of the Act were final and binding on the parties as well as the arbitral tribunal eventually constituted. This, in effect, frustrated the power of the arbitral tribunal to determine its jurisdiction (the principle of kompetenz-kompetenz enshrined in Section 16 of the Act), which would otherwise include a decision on the existence and the validity of an arbitration agreement.

In order to reduce court intervention to the bare minimum, the 2015 Amendments provides that while referring parties to arbitration under Section 8 of the Act or while appointing arbitrators under Section 11 of the Act, Indian courts shall only determine the mere existence of an arbitration agreement and take a prima facie view on the validity thereof.

Furthermore, Section 8 of the amended Act now provides that not only parties to an arbitration agreement but also any third party claiming through or under him, can make a request for reference to arbitration in an action brought before a court, where an arbitration agreement exists. This changes the existing position set by the Supreme Court in Sukanya Holdings Pvt. Ltd v Jayesh H. Pandya & Anr. (2003) 5 SCC 531) which held that if a dispute before a court involved non-signatories who were not strictly within the arbitration agreement, the matter could not be referred to arbitration.

Under the amended Act, the court would also be duty bound to direct the parties to arbitration if a valid arbitration agreement exists, notwithstanding any concerns raised regarding the arbitrability of the disputes being referred to arbitration. Thus, the amended Section 8 may prove especially useful in settling the debate on the arbitrability of fraud notwithstanding the Supreme Court's judgment in N. Radhakrishnan v Maestro Engineers & Ors. (2010) 1 SCC 72) wherein it was held that fraud is a serious allegation which should be determined by courts and not arbitral tribunals.

Additionally, the 2015 Amendment aims to reduce the judicial intervention at the stage of challenge for a part I arbitration and enforcement in case of a foreign award. The grounds for challenge, particularly public policy of India has been defined to address this issue. This aspect is dealt with in detail in the following sections.

Sanctity of awards

In order to maintain the sanctity of an arbitral award and the arbitration process as a whole, the scope of challenge to an arbitral award ought to be limited. However, the level of judicial scrutiny that arbitral awards were subjected to prior to the 2015 Amendments, was extremely high, particularly on the ground that the award was contrary to the public policy of India. The Supreme Court of India gave a rather broad meaning to the term "public policy of India" in the case of ONGC v. Saw Pipes, including within its meaning

a. fundamental policy of Indian law

b. interest of India

c. justice or morality

d. patent illegality

In this context see: Oil and Natural Gas Corporation Ltd. v Saw Pipes Ltd. (2003) 5 SCC 705). Patent illegality was understood as anything that is so unfair and unreasonable that it shocks the conscience of the court. For instance, an award inconsistent with a statute or any judgments of the Indian courts were understood to be contrary to the fundamental policy of Indian law and patently illegal.

With the intent of providing interpretational clarity, the scope of "public policy of India" has now been defined in Section 34 (for domestic awards) and Section 48 (for foreign awards) of the amended Act. An award can be set aside/refused to be enforced on the ground of public policy of India only if such award

i) was induced or affected by fraud or corruption; or

ii) is in contravention with the fundamental policy of India; or

iii) conflicts with the most basic notions of morality or justice.

The 2015 Amendments seek to overcome any potential interference by expressly providing under Section 34 and Section 48 of the Act that "the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute". Additionally, in relation to the setting aside of an arbitral award under Section 34 of the Act, the 2015 Amendments provide that "an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence."

The definition of "public policy of India" under the amended Act excludes interest of India and patent illegality, which were previously included in the definition in the Saw Pipes judgment. However, 'patent illegality' has been introduced as a separate ground for setting aside an arbitral award.

While these amendments sought to provide more certainty in relation to the grounds for challenge to an award, the definition included is still not precise or clear. Public policy of India has been tied to abstract concepts such as the fundamental policy of India and notions of morality or justice – terms which will continue to be understood on a case to case basis. The amendment, thus, appears to be in the nature of according legislative sanctity to the Supreme Court's interpretation in the Saw Pipes case.

Additionally, there seems to be no distinction made with respect to international commercial arbitrations, as foreign arbitral awards can also be challenged during an enforcement proceeding under Part II of the Act based on the same notions of domestic public policy. Such an expansive construction to the public policy exception has undermined the finality and enforceability of foreign arbitral awards in the past.

Therefore, while an attempt has been made to narrow the scope of challenge to an award in the context of there being a conflict with the public policy, the legislature has not covered the full distance.

On a positive note, prior to the 2015 Amendments, if the losing party challenged a domestic award under Section 34 of the Act, it would act as an automatic stay on the enforcement of the arbitral award. In a welcome move, the 2015 Amendments provide that there would be no automatic stay on the enforcement of an arbitral award and a separate application will have to be filed seeking stay. This should discourage challenges to an arbitral award on frivolous grounds and avoid further litigation at the post-arbitration stage except where the party challenging the award demonstrates sufficient reasons for such stay.

Compressing timelines

The 2015 Amendments provide for stricter timelines and procedures that have been streamlined for speedy and effective conclusion of arbitration proceedings as well as disposal of applications/petitions

TIME PERIOD FOR AN ARBITRATION	
Initiation of arbitration	In case any party has approached the court for interim reliefs and an order has been passed granting such interim relief, 90 days from such order.
Fast track arbitration	6 months (presentation of the cases by parties would be only by written pleadings and documents).
Regular arbitration	12 months, which can be extended to 18 months with the consent of both parties. Any further extension would require the permission of the courts and subject to such conditions and costs that the court may impose. Additionally, arbitral tribunal must a. hold oral hearings for evidence and oral arguments on a day-to-day basis and not grant any adjournments unless sufficient cause is made out; b. impose heavy costs for adjournments without sufficient cause.
TIME PERIOD FOR ARBITRATION RELATED COURT PROCEEDINGS	
Section 11 application for appointment of arbitrator	Application to be disposed of within 60 days from the date of service of notice of the application on the opposite party.
Application for setting aside an award under Section 34	1 year

Heightening credibility

REGULATING ARBITRATORS' FEES

Ad-hoc arbitrations, in practice, are usually associated with high costs, particularly on account of high fees charged by arbitrators. To overcome this issue, the 2015 Amendments provide for an indicative schedule of fees and empower High Courts to frame appropriate rules for fixation of fees for arbitrators. This recommendation is restricted to ad hoc arbitrations between two Indian parties only. Insofar as the effectiveness of such provision is concerned, High Courts are yet to frame rules fixing the maximum fee that an arbitrator may charge. Given that the fee schedule provided in the 2015 Amendments is merely indicative, in the absence of a proactive approach by the Indian judiciary to give effect to this provision, it is unlikely that the desired result will be achieved. Further, since the High Court of each state is required to frame rules for the fixation of fees for arbitrators, there is a possibility of a disharmonized fee regime across the country.

IMPARTIALITY OF ARBITRATORS

The 2015 Amendments borrow the disclosure requirements from the IBA Guidelines on Conflict of Interest in International Arbitration. The amended Section 12(1) of the Act read along with the fifth schedule requires an arbitrator to disclose circumstances which give justifiable doubts to the independence and impartiality of an arbitrator. These instances include the arbitrator being a legal representative of an arbitrating party, the arbitrator having significant financial interest in one of the parties or the outcome of the case and the arbitrator's previous involvement in the case. In these cases, the arbitrator can continue with the consent of the parties. However, in relation to circumstances set out in the seventh schedule to the Act, the arbitrator cannot continue to act and would have to recuse himself. These include the arbitrator being an employee, consultant or advisor of a party, the arbitrator having a close family relationship with one of the parties and the arbitrator representing the lawyer/law firm which is acting as counsel for one of the parties.

These amendments will be particularly important in relation to government contracts, which as matter of common practice have government employees/ officials as named arbitrators in the contracts. Recently, the Delhi High Court in Assignia-VIL JV and the Rail Vikas Nigam Ltd, refused to appoint an employee of the government entity, namely, Rail Vikas Nigam Limited, as that would "definitely give rise to justifiable doubt as to his independence and impartiality."

Conclusion

It is apparent from these amendments that the Government seeks to address the problems, which have caused concern in the past and instill confidence in investors who had been wary of choosing India as a seat of arbitration. The amendments will help in speedier resolution of disputes and in improving India's image as an arbitration friendly jurisdiction.

In recent years, there has also been a move towards institutionalization of arbitration in India. Various international arbitration institutions such as the LCIA have set up centers in India to facilitate institutional arbitration. Over a period of time, it is hoped that India can develop into a preferred hub for conducting international commercial arbitrations.

While it will be interesting to see how the reforms brought by the 2015 Amendments will play out, the main challenge is to create a culture of arbitration in India as an effective alternate dispute resolution mechanism to mainstream litigation. Enforcement of contracts and dispute resolution is key to business transactions and creating a conducive environment for arbitrations in India will inspire the confidence of foreign investors and the business community as a whole.

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Established in 1927, FICCI is the largest and the oldest apex business organization in India. FICCI has contributed to the growth of the industry by encouraging debate, articulating the private sector's view and influencing policy.

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