

# Dispute Resolution: Recent Trends & Legislative From An Indian Perspective

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## Introduction

India's legal system is well established with a hierarchy of courts and specific tribunals (i.e. Customs & Excise, Competition Commission and Telecom etc.) have been created to provide an effective resolution of disputes.

India's Arbitration and Conciliation Act, 1999 provides for domestic as well as international disputes to be settled by arbitration.

Alternative Dispute Resolution ("ADR") techniques, such as mediation and arbitration are being employed by the courts in India. Recent amendments to the Code of Civil Procedure provides the parties to a dispute the option to exercise arbitration and/or mediation as an ADR technique, with some of the courts in India even establishing mediation centres with specific rules governing the procedure aspects of mediation.

## Commercial Issues That Affect Foreign Investors Operating In India

Some of the commercial issues that affect foreign investors operating in India are adequate handling of statutory legal compliances by the Indian partner, management control i.e. (Indian corporate laws over ride any private contractual terms between the joint venture partners, unless such terms are addressed and reflected in the Articles of Association of the company) and protection of intellectual property rights, and double tax issues. Foreign investors may take pre-emptive steps against frivolous litigation (criminal charges) by including suitable arbitration clauses in their agreements.

Thus a practical aspect to consider may be uniformity and alignment between applicable law, rules, venue and forum for arbitration, enforcement of foreign judgments and awards in India, apart from logistics of perhaps having to manage multi-jurisdictional legal teams, including costs.

## Companies Bill, 2011

The existing Companies Act, 1956 was enacted by the Indian Legislature over half-a-century ago. In the ensuing years, much has changed in the nature of businesses and the manner in which they are conducted both domestically and internationally. Hence there is a requirement to develop a legislation that is compact, amenable to clear interpretation, and able to adequately respond to the needs of the ever evolving economic activities and business models of India Inc. – all the while nurturing a positive environment conducive to investment and growth.



The Companies Bill 2011 provides for Compromises, Arrangements and Amalgamations which are likely to have an impact on restructuring transactions. While some of the proposals are intended to make it easier for companies to implement the scheme, others impose checks and balances to prevent possible abuse of these provisions by companies.

One of the key provisions in the Bill permits Indian companies to merge into companies located in specific foreign jurisdictions (to be notified) and vice versa. The Bill also permits any shareholder, creditor or other "interested person" to object to a scheme of arrangement, however subject to an onerous requirement that only persons holding at least 10% of the shares of the Company or at least 5% of the total debt outstanding in the Company are eligible to raise an objection.

This provision is likely to substantially erode the power of minority shareholders and creditors in case of restructuring schemes. However, the Bill seeks to protect the interest of minority by introducing the concept of exit opportunities to dissenting shareholder in case of any restructuring, which may be insufficient protection.

## Corporation Can Have A Guilty Mind

In India, the Courts have finally started recognizing that a corporation can have a guilty mind but were reluctant to punish them since the criminal law in India does not allow this action as to whether a company can be convicted for an offence where the punishment prescribed by the statute is imprisonment and fine. Under Sec.420 of the Indian Penal Code the punishment is imprisonment but the question that is always asked is how can a company be indicted for such an offence and be given such a punishment. This confusion was first addressed in *M.V.Javali Vs. Mahajan Borewell & CO. and Others* where the court held that mandatory sentence of imprisonment and fine is to be imposed where it can be imposed but where it cannot be imposed, namely on a company fine will be the only punishment. In *Standard Chartered Bank & Ors. Vs. Directorate of Enforcement and Ors (2005)*, the court held that the legislative intent should be considered and all penal provisions should be construed like all other statutes fairly to bring out the legislative intent expressed in the enactment.

## Electronic Commerce - Alternative Dispute Resolution (ADR) Mechanism To Resolve E-Commerce Disputes In India

E-commerce regulations and laws in India are limited in nature and this does not allow use of ADR mechanisms and technology driven solutions. Online dispute resolution (ODR) in India is still not known.

Similarly, establishment of e-courts in India can also facilitate early and effective e-commerce disputes resolutions in India. However, till February 2012 we are still waiting for the establishment of first e-court in India. E-courts and ODR in India are urgently required to reduce backlog of cases and for reducing increasing pressure upon traditional courts. E-courts and ODR can also help in e-commerce disputes resolutions in India.

Some of the areas where we must pay special attention include technology related dispute resolution in India, film, media and entertainment industry dispute resolution in India, cross border e-commerce dispute resolution in India, etc. E-courts and ODR can be effectively used for all the above mentioned purposes.

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