

DEALING WITH THE BACKLOG OF CASES IN INDIAN COURTS

By Neerav Merchant

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

continued on page 5

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

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

***Organized by the
Society of Indian Law Firms & the
American Bar Association, Section
of International Law
February 17-19, 2016 at the
Hyatt Regency, New Delhi***

GUEST EDITOR'S COLUMN

By Ashish S. Joshi

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

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

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

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

The final article in this issue focuses on arbitration of antitrust claims and contains a comparative study of the laws of the United States, European Union and India. **Rudresh Singh and Deeksha Manchanda** of Luthra & Luthra Law Offices review the law with respect to arbitrability of antitrust disputes in the U.S. and the E.U. Interestingly, the authors examine Indian law and public policy to see whether antitrust claims can be decided by an arbitral tribunal. Competition law landscape in India, while a nascent area, is a fast evolving

CONTENTS

OVERVIEW

2 *Guest Editor's Column*

4 *Co-Chairs' Column*



COMMITTEE NEWS

45 *ABA SILF Conference
New Delhi*

47 *Submission Requests*

48 *Join the India Committee*



SPECIAL FOCUS

1 *Dealing With The Backlog Of
Cases In Indian Courts*

11 *An Overview of Litigation and
Dispute Resolution In India*

23 *Arbitration in India: A Bird's
Eye View*

30 *Arbitration of Antitrust
Claims: A Comparative Study
of the Laws of the U.S., E.U.
and India*



GENERAL INTEREST

39 *Improving The Ease of Doing
Business in India - By Sunil
Tyagi and Nilima Pant*



46 **UPCOMING SECTION
EVENTS**

practice area. While arbitration of antitrust issues doesn't seem to be feasible in the near future, the topic promises to be of interest to foreign lawyers and Indian jurists and practitioners.

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

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

Ashish S. Joshi is the Managing Partner and a trial lawyer at Lorandos Joshi P.C. in Ann Arbor, Michigan. Mr. Joshi's practice focuses on complex litigation cases. Mr. Joshi's cases have covered a wide spectrum, from international cases involving theft of trade secrets to highly contentious celebrity divorce cases involving millions of dollars of marital estate, from cases involving severe parental alienation and holding children hostage to cases of false allegations of sexual abuse, from a case involving the Hague Convention on International Child Abduction to a World Bank project mired in litigation in a foreign jurisdiction amidst allegations of local corruption, from cases alleging Medicare and healthcare fraud, insider trading, RICO and money laundering to alien smuggling. Mr. Joshi and his team have represented clients around the country and internationally. Mr. Joshi's unique background –with substantial litigation experience in India—has also provided him an edge in cross-border investigations and international dispute resolution. He can be reached at a.joshi@lorandoslaw.com.

CHAIR'S COLUMN

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

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

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

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

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

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

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

James P. Duffy, III
Richa Naujoks
Shikhil Suri



EDITORIAL BOARD (2016 - 2017)

Editor-in-Chief

[Bhalinder L. Rikhye](#)

Bartlett, McDonough & Monaghan, LLP, New York, NY

Co-Editors

[Poorvi Chothani](#)

LamQuest, Mumbai, India

[Aseem Chawla](#)

Mohinder, Puri & Company, New Delhi, India

[Farrell A. Brody](#)

Chaffetz Lindsey LLP, New York, NY

[Daniel Hantman](#)

Much Shelist, P.C., Chicago, IL

[Sylvana Q. Sinha](#)

Independent Practitioner & Consultant

[Desktop Publishing](#)

LamQuest, Mumbai, India

India Law News is published quarterly by the India Committee of the American Bar Association's Section of International Law, 740 15th Street, N.W., Washington, DC 20005. No part of this publication may be reproduced, stored in a retrieval system (except a copy may be stored for your limited personal use), or transmitted in any form or by any means (electronic, mechanical, photocopying, recording, or otherwise) without the prior written permission of the publisher. To request permission, contact the Co-Chairs of the India Committee.

India Law News endeavors to provide information concerning current, important developments pertaining to law in India, Committee news, and other information of professional interest to its readers. Articles reflect the views of the individuals who prepared them and do not necessarily represent the position of the American Bar Association, the Section of International Law, the India Committee, or the editors of *India Law News*. Unless stated otherwise, views and opinions are those of the authors and not of the organizations with which they are affiliated. This newsletter is intended to provide only general information and should not be relied upon in the absence of advice from competent local counsel.

SUBMISSION DEADLINES

Fall Issue August 1st

Winter Issue November 1st

Spring Issue February 1st

Summer Issue May 1st

Potential authors should review the [Author Guidelines](#) and send manuscripts via email to the [Editorial Board](#).

© 2016 American Bar Association

All rights reserved

Produced by India Committee



AN OVERVIEW OF LITIGATION AND DISPUTE RESOLUTION IN INDIA

By Arjun Gupta, Sahil Kanuga and Vyapak Desai

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

Abraham Lincoln.

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

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

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

Nature of the Constitution of India

The Constitution of India is quasi-federal in nature, or one that is federal in character but unitary in spirit. The Constitution possesses both federal and unitary features and can be both unitary and federal according

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

The Court System in India General Hierarchy of Courts

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



Manohar, 11th ed., Volume 1, Lexis Nexis Butterworths Wadhwa Nagpur).

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

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

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

Representation Before the Judiciary

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

Dispute Resolution Mechanisms

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

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

Litigation

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



popularity as a mode of dispute resolution. We shall now deal with certain aspects of litigation in India.

Jurisdiction

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

Territorial or Local Jurisdiction

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

Pecuniary Jurisdiction

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

Subject Matter Jurisdiction

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

Original and Appellate Jurisdiction

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

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

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

Interim Relief

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

Prima Facie Case

The plaintiff/petitioner must make out a prima facie case in support of the right claimed by her and should be a *bona fide* litigant i.e. there must be a strong case for trial which needs investigation and a decision on the



merits, and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him (See, *Martin Burn Ltd. v Banerjee*, AIR 1958 SC 79).

Irreparable Injury

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

Balance of Convenience

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

Specific Relief

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

Damages

The remedy of damages for breach of contract is laid down in Sections 73 and 74 of the Contract Act. Section 73 provides that where a contract is broken, the party suffering from the breach of contract is entitled to receive compensation from the party who has broken the contract. However, no compensation is payable for any remote or indirect loss or damage (See, *Hadley v*

Baxendalev (1854) 9 Exch 341 followed by Indian Courts in *State of Kerala v K. Bhaskaran*, AIR 1985 Ker 49; *Titanium Tantalum Products Ltd. v Shriram Alkali And Chemicals*, 2006 (2) ARBLR 366 Delhi). Section 74 deals with liquidated damages and provides for the measure of damages in two classes (See, *Fateh Chand v Balkishan Das*; [1964] 1 SCR 515):

- (i) Where the contract names a sum to be paid in case of breach; and
- (ii) Where the contract contains any other stipulation by way of penalty. In both classes, the measure of damages is, as per Section 74, reasonable compensation not exceeding the amount or penalty stipulated for.

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

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

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

The definition of "*Commercial Disputes*" in the Act is broad and covers most instances of a commercial



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

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

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

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

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

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

Arbitration

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

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



The Arbitration and Conciliation (Amendment) Act, 2015

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

Some of the highlights of the Act are as follows:

- Flexibility for parties to approach Indian courts for interim reliefs in aid of foreign-seated arbitrations;
- Jurisdiction insofar as international commercial arbitrations, whether seated in India or abroad, to lie before the High Court;
- Extensive guidelines incorporated relating to the independence, impartiality and fees of arbitrators;
- Detailed schedule on ineligibility of arbitrators;
- A twelve-month timeline for completion of arbitrations seated in India;
- Expeditious disposal with indicative timelines of arbitration applications which are required to be filed before Courts;
- Incorporation of expedited/fast track arbitration procedure;
- Interim orders passed by Tribunals seated in India are deemed to be order of Courts and are thus enforceable;
- Detailed provisions in relation to award and determination of costs by Tribunals seated in India – introduction of 'costs follow the event' regime;

- Limitation of grounds on which awards arising out of International Commercial Arbitrations seated in India may be challenged; and
- No more automatic stay on filing of a challenge to an arbitral award - requirement of a specific order from Court.

Kinds of Arbitration

Ad-hoc Arbitration

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

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

Institutional Arbitration

Institutional arbitration refers to arbitrations administered by an arbitral institution.



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

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

Statutory Arbitration

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

Development, and The Rule of Law Freeman, Spogli Institute for International Studies, Working Paper [October 2009]).

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

Foreign Arbitration

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



Recent Trends

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

Role of the Indian Judiciary in Shaping Arbitration

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

From Bhatia to Balco

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

as against merely refusing to enforce the foreign award under part II of the Act).

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

Public Policy: The Unending Debate

The Supreme Court judgment in *Oil and Natural Gas Corporation Ltd. v Saw Pipes Ltd.*, ([2003] 5 SCC 705) widened the scope of “public policy” by including “patent illegality” as an additional head within the ambit of “public policy,” which is now one of the grounds available for setting aside a domestic arbitral award. Until that point, the concept of “public policy” was interpreted in a narrower sense, in line with the court’s previous decisions.



In *Shri Lal Mahal v Progetto Grano Spa*, (2013 [8] SCALE 489) the Supreme Court overruled its own also-recent decision in *Phulchand Exports v OOO Patriot*, ([2011] 10 SCC 300) and held that the “public policy” in relation to challenging the enforcement of an international award, would be construed in a narrow manner, i.e. a lower level of judicial interference. In *Progetto Grano Spa*, the Supreme Court was quick to overturn its own judgment in *Phulchand Exports*.

*Appointment of Arbitrator:
Judicial or Administrative?*

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

Joinder In Arbitration: Enabled

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

Fraud and its Arbitrability

Arbitrability of fraud has also been revisited by the Supreme Court. The Supreme Court in *Swiss Timing Ltd*

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

Other recent trends: pro-arbitration

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

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

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

Recently, a positive step ordering the enforcement of a foreign award was taken by the Supreme Court in



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

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

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

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

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

Mediation

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

Judicial mediation is carried out in the form of court-annexed mediation. Court-annexed Mediation and Conciliation Centers are now established at several courts in India, including the trial courts in Delhi, Allahabad, Lucknow, Chandigarh, Ahmedabad and the courts have started referring cases to such centers. In court-annexed mediation, the mediation services are provided by the court as a part and parcel of the same judicial system as against court-referred mediation, wherein the court merely refers the matter to a mediator. One feature of court-annexed mediation is that the judges, lawyers and litigants are all participants of the mediation and thus, the negotiated settlement is achieved by all the three actors in the



justice delivery system. In court-annexed mediation, the court is the central institution for resolution of disputes. The advantage of court-annexed mediation lies in the fact that since the ADR procedures herein are overseen by the court, the effort of dispensing justice can become well-coordinated. Thus, both voluntary and court-assisted mediations have gained popularity in the domestic Indian legal landscape. There is, however, a long way for it to go (See, Anil Xavier, MEDIATION: ITS ORIGIN & GROWTH IN INDIA, Hamline Journal Of Public Law & Policy, Vol. 27).

Conciliation

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

Conciliation has the following benefits:-

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

introduced as evidence or brought up in a legal proceeding in any manner.

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

Conclusion

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

It is quite clear that litigating parties are progressively preferring various modes of ADR over other dispute resolution mechanisms. The attitude of the Indian judiciary towards arbitration is also witnessing a paradigm shift and India is rapidly evolving into an arbitration-friendly destination. Never before has one seen so many pro-arbitration rulings by Indian courts. From 2012 to 2014, the Indian Supreme Court has, amongst other decisions, declared Indian arbitration law to be governed by the territoriality principle, held non-parties to be within the purview of reference to arbitration proceedings to settle disputes through arbitration, defined the scope of public policy in foreign seated arbitration, held that fraud is arbitrable (which is somewhat remarkable as this may



not necessarily be in line with other jurisdictions) and has got the attention of the international community. Additionally, the effects of recent legislative changes such as the Arbitration & Conciliation (Amendment) Act, 2015, and the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, will begin to filter into jurisprudence and should work to give an additional impetus to efficient dispute resolution.

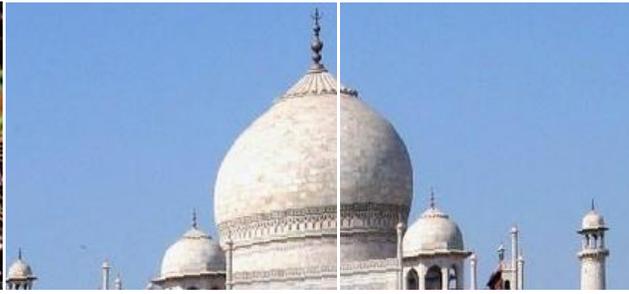
Dispute resolution is not static. It will develop with changing needs of society. The crises of judicial delay, judicial arrears, high litigation costs, time-consuming and complicated nature of lawsuits discourages parties from approaching the Court of law for redressal of their disputes. All these factors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

Vyapak Desai is a Partner and heads the International Dispute Resolution and Litigation Practice at Nishith Desai Associates. He can be reached at vyapak.desai@nishithdesai.com.

Sahil Kanuga is a Senior Associate at the firm with the International Dispute Resolution and Litigation Practice at the firm and can be reached at sahil.kanuga@nishithdesai.com.

Arjun Gupta is an Associate with the firm's International Dispute Resolution and Litigation Practice at the firm and can be reached at arjun.gupta@nishithdesai.com.

Nishith Desai Associates is a research-based Indian law firm with offices in Mumbai, Silicon Valley, Bangalore, Singapore, Mumbai BKC, Delhi and Munich that aims at providing strategic, legal and tax services across various sectors.



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



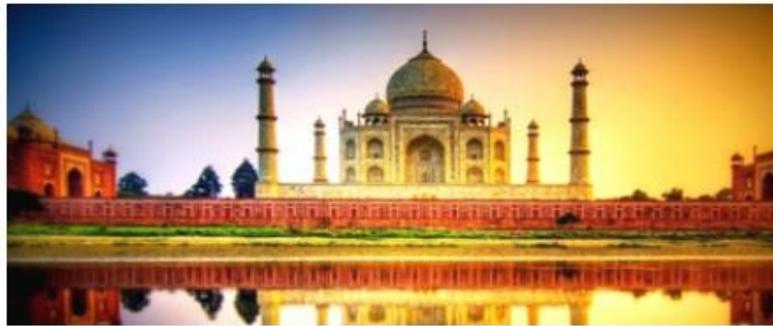

INDIA-UNITED STATES CROSS BORDER INVESTMENT 2.0 : COUNSELING IN REFORM ENVIRONMENTS

February 17-19, 2016
Hyatt Regency, New Delhi, India

- HOME
- MESSAGES
- PROGRAM
- PANELISTS
- REGISTRATION
- ACCOMMODATION
- PRE- AND POST- TOURS
- ACCOMPANYING PERSONS' PROGRAMME
- GENERAL INFORMATION
- SPONSORS & EXHIBITION
- CONTACT US

Site is best viewed with a resolution of 1024x768 or higher. To view and experience the full benefits, we recommend Firefox, Google Chrome and IE 8+. © Copyright SILF - ABA 2016. All Rights Reserved.

Design & Developed by

Dear All,

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

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

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

Best Wishes,



Dr. Lalit Bhasin
President, SILF
Founder Co-Chair, India Committee of ABA - SILF

PARTNERS



SPONSORS





UPCOMING SECTION EVENTS

Resolving Business Disputes in Asia Pacific: Litigation? Mediation? Arbitration? "Friendly Communication"?

February 23, 2016

9:15 AM - 10:45 AM ET

JAMS (Global ADR Provider), Boston Resolution
Center

One Beacon Street, Suite 2210

Boston, Massachusetts

Section of International Law

China Committee

The Global Refugee Crisis, Part 2: Rights, Rule of Law, & Rational Remedies.

Teleconference

February 24, 2016

12:00 PM - 1:30 PM ET

Section of International Law

International Human Rights Committee



SUBMISSION REQUESTS

Annual Year-in-Review

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

India Law News

India Law News is looking for articles of approximately **2,000 words** and recent Indian case notes on significant legal or business developments in India that would be of interest to international practitioners. The Summer 2016 issue of *India Law News* will carry a special focus on *Free Speech in India*. Please read the [Author Guidelines](#) available on the [India Committee website](#). Please note that, *India Law News* **DOES NOT publish any footnotes, bibliographies or lengthy citations**. Citations, if deemed by the author to be absolutely essential, may be hyperlinked to an existing web page. Submissions will be accepted and published at the sole discretion of the Editorial Board.

INDIA COMMITTEE

The [India Committee](#) is a forum for ABA International members who have an interest in Indian legal, regulatory and policy matters, both in the private and public international law spheres. The Committee facilitates information sharing, analysis, and review on these matters, with a focus on the evolving Indo-U.S. relationship. Key objectives include facilitation of trade and investment in the private domain, while concurrently supporting democratic institutions in the public domain. The Committee believes in creating links and understanding between the legal fraternity and law students in India and the U.S., as well as other countries, in an effort to support the global Rule of Law.

BECOME A MEMBER!

Membership in the India Committee is free to all members of the ABA Section of International Law. If you are not an ABA Section of International Law member, you may become one by signing up on the [ABA website](#). We encourage active participation in the Committee's activities and welcome your interest in joining the Steering Committee. If you are interested, please send an email to the Co-Chairs. You may also participate by volunteering for any of the Committee's projects, including guest editing a future issue of the *India Law News*.

Membership in the India Committee will enable you to participate in an online "members only" listserv to exchange news, views or comments regarding any legal or business developments in or concerning India that may be of interest to Committee members.

We hope you will consider joining the India Committee!

LEADERSHIP (2015-2016)

Co-Chairs

[Richa Naujoks](#)

[James P. Duffy, III](#)

[Shikhil Suri](#)

Immediate Past Chairs

[Sajai Singh](#)

[Sanjay T. Tailor](#)

Senior Advisors

[Aaron Schildhaus](#)

[Vandana Shroff](#)

[Priti Suri](#)

[Eric B. Wulff](#)

Vice Chairs

[Hanishi Thanawalla Ali](#)

[Aseem Chawla](#)

[Poorvi Chothani](#)

[Ashish Prabhakar Jejurkar](#)

[Robert S. Metzger](#)

[Kavita Mohan](#)

[J.L.N. Murthy](#)

[Bhalinder L. Rikhye](#)

