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INTRODUCTION

The Indian economic success story is well-known. While not totally immune, even during the present troubled, tough recessionary times globally India and China are the two jurisdictions that continue to show growth, albeit reduced. One of the prime concern of corporations entering a foreign land relate to the judicial process, including the enforceability of contracts/judicial orders, and the speed at which the courts operate. For those operating in India, it is no deep secret that while the legal system is fair and powerful, yet, simultaneously, it is cumbersome and protracted. Disputes are known to linger for decades. Numerous challenges exist that are specific to India which range from procedural delays to massive backlog of cases. This is certainly not attractive for anyone looking at the country for long-term plans.

The present newsletter aims to provide an overview of several fundamental aspects regarding civil litigation, including procedural matters, jurisdiction, and a variety of special issues that are often not examined while contracting with Indian companies, and instead are pushed in the background only to be dealt with in the event of a dispute. However, it is worthwhile to be aware of them, and to consider them particularly when anticipating initiation of litigation.

1. Court System

1.1 Overview of the hierarchy of the courts

Each state is empowered to have its own judicial system. A three-tier system exists. The highest court of appeal for civil and criminal matters is

Supreme Court of India, located in Delhi, which also possesses original appellate and advisory jurisdiction. Each state has a High Court, which is the highest court of civil and criminal appeal. High Courts also have original jurisdiction which is tied in with pecuniary limits. Moreover, winding-up petitions are filed at a state High Court. The lowest level of judiciary is the District Court, which is subordinate to the High Court. The Court of the District Judge is the highest in the hierarchy of courts in the respective district. Both, civil and criminal cases can be filed at the District Court.

1.2 Applicable Statues

The applicable substantive law is Indian Contract Act, 1872. The Code of Civil Procedure, 1908, (hereinafter “**Code**”) governs the procedure for suits.

For recovery of debts on a written contract, the Code also provides for summary procedure, where the defendant does not automatically get a right to defend the suit. In summary suits, the defendant has to apply to the court for leave to defend and if such leave is not granted, the suit is decreed. Such summary suits are a quicker way to recover the amounts through the courts. If the borrower is a company which has admitted its liability, yet refused to pay it after being served with a legal notice, then the lender has recourse to an action for winding-up of the borrower under the Companies Act, 1956. It is important to bear in mind that winding-up is often used as a threat to bring the borrowing entity to negotiate.

2. Duration/Jurisdiction

2.1 Duration

The Code was amended with intent to expedite proceedings. However, a typical case can take anywhere between 6 to 7 years in the first instance. It is not uncommon for defendants to use dilatory tactics and adjournments are extremely frequent. Duration of summary suits may be two to three years in case leave to defend is not granted to the defendant.

2.2 Appeals

Once the court passes a decree, the defendant has a right to file an appeal, which if admitted, may take approximately 3-4 years to be decided, depending upon the nature of the case. The first appeal from a decree can be filed on merits; the second appeal (from a decree passed in appeal by a court subordinate to the High Court) shall lie to the High Court only if it involves a substantial question of law. However, this would be the case only where the suit was filed in the District Courts.

2.3 Court Location

In New Delhi, all recovery suits for amounts exceeding Rs. 2 million (\$ 42,500 approximately) have to be filed in the High Court. For lower amounts, the jurisdiction lies with the District Court in Delhi. The District Courts form the bottom rung of the Indian judiciary.

2.4 Basis of Jurisdiction

The suit has to be instituted in a court under whose jurisdiction the defendant, at the time of commencement of the suit, resides/carries on business/ personally works for gain; or the cause of action arises. If an agreement is silent about jurisdiction, the court's jurisdiction can be invoked on the basis of the foregoing grounds. The object is to establish a nexus between the court and the place of execution of the agreement or the office of the plaintiff or defendant. Otherwise, the defendant may raise preliminary objections to the jurisdiction.

3. Injunctive Relief

Under Order 39 of the Code, if it is established that the defendant threatens or intend to dispose of his property with an intent to defraud his creditors, the court may issue a temporary injunction preventing such alienation. Applications for temporary injunctions are usually filed along with the plaint and the court may pass an ex-parte interim order granting such injunctions at the first hearing itself. Sometimes, injunctions are granted after notice is issued to the defendant. Temporary injunctions may be extended and continue for the entire duration of the proceedings or may be vacated by an application by the opposing side provided the court is satisfied that such an injunction has caused undue hardship or there has been a change in circumstances. A provision has been added in the Code which empowers the court to direct the plaintiff to give security or otherwise in cases where the court grants a temporary injunction.

4. Special issues

4.1 Interest

The applicable statute for interest is Interest Act, 1978. Normally, in a recovery suit, which has been decreed, the Code empowers the courts to award interest (which must be claimed in the plaint) at a reasonable rate from the date of the suit to the date of the decree (*pendente lite interest*), in addition to any interest adjudged on the principal sum for any period prior to the execution of the suit. The courts may also grant further interest from the date of the decree to the date of the payment. Though it is normal to claim 18% interest, yet, in practice, the rate of interest awarded by the court is never more than the contractual rate of interest and may even be lower, depending on the facts and circumstances of the case. If there is no contractual rate of interest, then the prevailing bank rate of interest usually applies.

4.2 Costs and Court Fees

The Indian courts may also award costs including attorneys' fees, of the suit. However, awarding costs and the extent to which they have to

be awarded is solely at the discretion of the court. Legal costs at foreign rates are normally not awarded.

In recovery suits, ad valorem court fees have to be paid at the time of filing the suit. The rates of the court fee vary from state to state. In Delhi, the court fee payable is calculated as per the Schedule provided in the Court Fees Act 1870 read with the Delhi High Court Rules. This may also be awarded, at the discretion of the court. In case of winding-up, there is no ad valorem court fee and a nominal court fee is payable at the time of filing the petition for winding up.

4.3. Senior Advocates

There is a fair amount of integrity in the Indian judicial system at the appellate level. However, it is common, in high-profile cases both at the High Court and Supreme Court, to pick reputed designated “Senior Advocates” (Indian equivalent of English QCs) who have equations with the judges. Since “senior advocates” have face value, appointing them for arguments can prove to be helpful in securing interim orders.

5. Discovery and financial search tools

5.1 Discovery

Under the Code, discovery takes place by means of interrogatories. The interrogatories are in writing and have to be answered by affidavits. An application may also be made for production of documents in the possession or power of the other party. However, this is not a procedure frequently used in India and the practice of discovery is, by no means, as extensive and exhaustive as in the US.

5.2 Title/Asset Search

Scrutiny of documents relating to immovable property can be done at the local Sub-Registrar’s office within whose jurisdiction a property is located. An investigation of public records primarily includes the history of ownership of a property, liens, unpaid

claims or restrictions. During such a search certified copies of the documents can be procured, which could be of strategic importance during the course of court proceedings. For example, a copy of no encumbrance certificate can also be obtained from the Sub-Registrar’s office, which states that a property is free from any liens and encumbrances such as mortgage, lease, easements etc.

5.3 Charges

Details of any charge on the properties of a company can be found from a search at the office of the Registrar of Companies (“ROC”) of the state where the registered office of the company is located. It is mandatory for companies to register charges on their property with the ROC. With the Department of Company Affairs, and the ROC going online, accessing the information is far easier now than it used to be.

CONCLUSION

Changes need to be brought about in the Indian judicial system to match the exponential economic growth. To start with, it is imperative to fill in the vacant judicial positions and court staff, overhaul archaic laws and procedures which allow for frequent adjournments so that the process is revamped and is in sync with the other economic changes. Mr. Veerapaa Moily, the new Law Minister has expressed an opinion that one of his principle priorities is to work towards reducing the huge number of cases pending in various courts. While this is much-needed, it is also time for the legal fraternity, along with the judiciary, to come together and dispel the perception of investors and business persons that law enforcers are apathetic.

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