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Kavita Mohan

Amy Tolbert Harris

Aseem Chawla

Chandni Javeri

Jonathan Blank

See next page for additional authors

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South Asia/Oceania & India

Authors

Kavita Mohan, Amy Tolbert Harris, Aseem Chawla, Chandni Javeri, Jonathan Blank, Nikhil Narayanan, Shruti Singh, Tarang Shashishekar, Supratim Chakraborty, Sumantra Bose, Namrata Patodia Rastogi, and Katherine Maddox Davis

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KAVITA MOHAN, AMY TOLBERT HARRIS, ASEEM CHAWLA,
CHANDNI JAVERI, JONATHAN BLANK, NIKHIL NARAYANAN,
SHRUTI SINGH, TARANG SHASHISHEKAR, SUPRATIM CHAKRABORTY,
SUMANTRA BOSE, NAMRATA PATODIA RASTOGI,
KATHERINE MADDOX DAVIS, DANIEL R. COOPER

This article surveys significant legal developments in South Asia and Oceania during the calendar year 2018.¹

I. The Indian Insolvency REGIME

The Insolvency and Bankruptcy Code, 2016 (IBC) came into force in late 2016 to overhaul India's corporate insolvency regime and address India's rising non-performing assets.² The IBC provides for a "UK-style" administration process known as the corporate insolvency resolution process (CIRP), which can be initiated on the occurrence of a default of INR 100,000 or more³ by a financial creditor or operational creditor⁴ or by the corporate debtor itself,⁵ as well as mandatory liquidation if the CIRP fails.⁶

During the CIRP, the corporate debtor's board ceases to exercise its powers and a court appointed administrator called a "resolution

* The committee editors were Kavita Mohan, Of Counsel, GDLSK LLP (Washington D.C.); Amy Tolbert Harris, GDLSK LLP (Washington D.C.); Aseem Chawla, Founder, ASC Legal, Solicitors & Advocates (New Delhi, India); Chandni Javeri, ASC Legal, Solicitors & Advocates (New Delhi, India); and Jonathan Blank, North American Representative, Surana & Surana International Attorneys (Chennai, India). Section I was authored by Nikhil Narayanan, Partner, Shruti Singh, Partner, and Tarang Shashishekar, Senior Associate, Khaitan & Co (New Delhi, India); Section II was authored by Supratim Chakraborty, Partner, and Sumantra Bose, Senior Associate, Khaitan & Co (Kolkata, India); Section III was authored by Namrata Patodia Rastogi, Senior Consultant, Institute for Sustainable Communities; Section IV was authored by Katherine Maddox Davis, Associate, Gibson, Dunn & Crutcher (Washington D.C.); Section V was authored by Daniel R. Cooper, Attorney at Law, Cooper & Kurz (Stamford, CT).

1. The information provided in the article is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein.

2. Rajeswari Sengupta & Harsh Vardhan, *Non-Performing assets in Indian Banks: This time it is different*, INDIRA GANDHI INSTITUTE OF DEV. RES. (Sept. 2017), <http://www.igidr.ac.in/pdf/publication/WP-2017-019.pdf>.

3. Insolvency & Bankr. Code, No. 31 of 2016, INDIA CODE (2016), vol. 1, § 4.

4. *Id.* § 6.

5. *Id.* § 10.

6. *Id.* § 33.

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professional” (RP)⁷ manages the corporate debtor in accordance with instructions of a committee comprising the secure and unsecured financial creditors of the corporate debtor (COC).⁸ The RP invites resolution plans for revival of the corporate debtor from eligible bidders.⁹ The COC votes to approve the most viable plan, which is thereafter submitted for approval before the National Company Law Tribunal (NCLT).¹⁰ The CIRP concludes on the earliest of: (i) approval of a plan by NCLT; (ii) expiration of 180 or 270 days after commencement of the CIRP; or (iii) COC deciding to liquidate the corporate debtor.¹¹

Regulatory changes and case law have resulted in a number of developments in 2018 in relation to the Indian insolvency regime.

A. IBC AND RELATED REGULATIONS

In 2018, IBC and the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) were amended multiple times¹² to, amongst others, provide for the following changes:

Bidder Eligibility: In 2017, IBC was amended to disqualify certain classes of persons (persons in control of companies under default, criminal offenders, etc.) from bidding during the CIRP (Section 29A).¹³ But the wide impact of this provision led to protracted litigation and unintended disqualifications since its introduction. In June 2018, exemptions from some provisions of Section 29A were granted to “pure play” financial entities, bidders that have acquired assets under IBC, and bidders of small-scale industries.¹⁴ In a recent order that analyzed the scope of Section 29A, the Supreme Court held that the corporate veil may be pierced to assess whether a bidder is eligible under Section 29A and that “control” of a company for the purpose of Section 29A eligibility will not include negative control or veto rights.¹⁵ Section 29A has disqualified many promoters from bidding for their

7. *Id.* § 5.27.

8. *Id.* § 23 and 28

9. *Id.* § 25.2(h).

10. *Id.* §§ 30.4, 60.2.

11. *Id.* §§ 31, 5.14, 12.3, 33.2.

12. IBC has been amended through the (i) Insolvency and Bankruptcy Code (Amendment) Act, 2018 on 18 January 2018; (ii) Insolvency and Bankruptcy (Amendment) Ordinance, 2018 on 6 June 2018; and (iii) Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 on 17 August 2018. The CIRP Regulations have been amended 4 times in 2018 on 5 October 2018, 4 July 2018, 27 March 2018 and 6 February 2018. *Amendments to Regulations for Corporate Insolvency Resolution – Too Prescriptive or necessary for increasing efficiency?*, KHAITAN & CO. (July 26, 2018), [https://www.khaitanco.com/PublicationsDocs/Khaitan%20&%20Co-Ergo-News flash-26July2018CIRP.pdf](https://www.khaitanco.com/PublicationsDocs/Khaitan%20&%20Co-Ergo-News%20flash-26July2018CIRP.pdf).

13. Insolvency and Bankr. Code (Amendment) Ordinance, 2017, No. 7 of 2017.

14. Insolvency and Bankr. Code (Amendment) Ordinance, 2018, No. 6 of 2018, at §22, 37.

15. *Arcelormittal India Pvt. Ltd. v. Satish Kumar Gupta*, (2018) 9402 SCJ 74 (India).

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companies and its constitutionality has been challenged before the Supreme Court in an ongoing case.¹⁶

Withdrawal: Previously, an application to commence CIRP could only be withdrawn if allowed by the Supreme Court under its inherent powers.¹⁷ But in June 2018, IBC was amended to provide for withdrawal of CIRP with 90 percent financial creditor approval.¹⁸

Consent Threshold: In June 2018, while specifying that IBC's objective is resolution over liquidation, the threshold for plan approval and other key decision was reduced from 75 percent to 66 percent vote share of the COC.¹⁹ The voting threshold for all other decisions was reduced to 51 percent.²⁰

Prescriptive Process: Under IBC's original scheme, the process to invite and approve resolution plans was left to the discretion of the COC and the RP. But the market-developed process has now been codified into a two-step process involving submission of a non-binding expression of interest followed by a binding plan.²¹

Contingent Claims: While IBC provides the regime for creditors to file their claims with the RP, it does not prescribe any treatment for claims not filed during CIRP. This has led to significant uncertainty about whether unfiled pre-CIRP claims are capable of being extinguished under the plan. This uncertainty increased due to a recent judicial order in which IBC's appellate authority held that a contingent liability claimant may choose to step out of the insolvency resolution process and not file a claim.²²

Previously, creditors were allowed to file their claims with the RP until approval of the plan by the COC.²³ Therefore, while submitting its plan, a bidder could not know the aggregate amount of debt that needed to be settled under the plan. In July 2018, this deadline was shortened to ninety days after commencement of CIRP.²⁴

B. DEBT RESTRUCTURING

With a view to simplifying the regulatory mechanism for debt restructuring, in February 2018, the Reserve Bank of India (RBI) replaced all existing mechanisms for debt restructuring with a single mechanism to be

16. *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 99 SCC 3 (India).

17. *Lokhandwala Kataria Constr. Private Limited v. Nisus Finance & Inv. Managers LLP*, 2017, 9279 Gen. S.R. & O. 1 (India).

18. Insolvency and Bankr. Code (Amendment) Ordinance, 2018 at §9.

19. *Id.* at §23, 16, 21.

20. *Id.* at §15.

21. Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2018, Gazette of India, pt. III sec. 4 (July 4, 2018).

22. *Andhra Bank v. F.M. Hammerle Textile Ltd.*, (2018) 61 NCLAT 3 (India).

23. Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Gazette of India, pt. III sec. 4 (November 3, 2016), §12.2

24. Insolvency Resolution Process for Corporate Persons (Third Amendment) at § 11 (b).

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implemented immediately upon default.²⁵ If the default is unable to be resolved under this mechanism within the prescribed time period, the defaulter is necessarily required to be referred for CIRP.²⁶

A recently instituted committee on stressed assets resolution submitted its report in July 2018 recommending a five-pronged approach for resolution of stressed assets including: establishment of a reconstruction company as well as an investment fund for acquisition and turnaround of stressed assets, and setting up of a trading platform for trading loan assets to increase liquidity in the banking system.²⁷ These recommendations have not been implemented yet.²⁸

C. OTHER LAWS

Securities Regulations: In 2018, a number of reliefs and measures were introduced in relation to acquisition of listed corporate debtors under a resolution plan, including a simplified delisting process,²⁹ a longer time period for meeting the minimum public shareholding requirements,³⁰ and exemption from prior consent (of the securities regulator or shareholders) for specified corporate actions.³¹

Tax: Debt write-off may lead to incidence of minimum alternate tax (MAT) on the corporate debtor. In January 2018, the Indian government issued a clarification to mitigate this liability by allowing corporate debtors to reduce the total loss brought forward, including unabsorbed depreciation from the book profit for the purposes of levy of MAT.³² This relief is not applicable to pre-IBC debt restructuring.³³

25. Resolution of Stressed Assets – Revised Framework, 2018, Reserve Bank of India, RBI/2017-18/131, ¶ 1 (Feb. 12, 2018).

26. RBI has prescribed 180 days for resolution of defaulters with loans exceeding INR 20,000,000,000. RBI has not prescribed the time period for resolution of smaller accounts as yet. *Id.* ¶ 8.

27. Sunil Mehta, Committee Chairman; Rajnish Kumar, Committee Member; PS Jayakumar, Committee Member; and C Venkat Nageswar, Committee Member; *Committee Report on Resolution of Stressed Assets Project Sashakt*, (July 2, 2018).

28. See Ashwini Mehra, Sashakt will not solve the NPA problem (August 6, 2018) (<https://www.livemint.com/Opinion/vu3BuEstOWodcv5G2MUFJ/Sashakt-will-not-solve-the-NPA-problem.html>).

29. Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009, Gazette of India, pt. III sec. 4 (June 10, 2009).

30. Securities Contracts (Regulation) Rules, 1957, 576 Gen. S.R. & O. 19 (India).

31. Sudhir Bassi *et al.*, *Amendments to SEBI Circular on Schemes of Arrangements by Listed Entities*, LEXOLOGY (Jan. 10, 2018), <https://www.lexology.com/library/detail.aspx?g=9b1401f6-a8c9-44d2-a286-63ff520dafd1>.

32. Press Release, Cent. Bd. of Direct Taxes, Relaxation in the provisions relating to levy of Minimum Alternate Tax (MAT) in case of companies against whom an application for corporate insolvency resolution process has been admitted under the Insolvency and Bankruptcy Code (Jan. 6, 2018) (on file with Government of India).

33. *See id.*

D. CONCLUSION

The Indian insolvency regime is undergoing rapid change and even as some issues are addressed, others arise or persist. Further changes to the legal regime are bound to take place in the coming year, whether in the form of amendments, statutes, promulgations of new regulations, or new case law.

II. Indian Data Privacy Legal Framework

A. INTRODUCTION

The current Indian legal framework governing data privacy and protection in India is fragmented across legislations, such as the Information Technology Act of 2000, the India Penal Code of 1860, and sectoral regulations, all of which have proven to be inadequate to protect personal data. But recently there have been several legislative and judicial developments in this sphere.

B. LEGISLATIVE DEVELOPMENTS

1. *The Personal Data Protection Bill of 2018*

On July 27, 2018, the draft Personal Data Protection Bill of 2018 (Bill) was presented to the Ministry of Electronics and Information Technology by a Committee of Experts formed under the Chairmanship of Justice B. N. Srikrishna.³⁴ The Bill seeks to regulate the processing of personal data of data principals (i.e. natural persons) by entities and individuals, including the State (termed as “data fiduciaries” akin to data controllers) or by entities and individuals, including the State engaged by a data fiduciary for the same (termed as “data processors”).³⁵ Data fiduciaries and data processors are required to comply with certain regulations while processing personal data such as purpose and collection limitation and ensuring adequate security safeguards.³⁶

2. *Proposed Data Protection Authority and Enhanced Rights*

A Data Protection Authority of India has been proposed to implement the provisions of the Bill, as well as to adjudicate penalties under the Bill through a separate adjudicating wing.³⁷ The Bill envisages principles such as privacy by design and transparency in the processing of personal data.³⁸ The Bill also provides data principals with rights in relation to personal data, such as the right to access, edit, and seek portability.³⁹

34. The Personal Data Protections Bill, 2018, Acts of Parliament, 2018 (India) *available at* https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill%2C2018_0.pdf.

35. The Personal Data Protections Bill, 2018, Acts of Parliament, 2018 § 2.1(a)-(b) (India).

36. *Id.* §§ 4–6.

37. *Id.* § 49, § 68.

38. *Id.* §§ 29–30.

39. *Id.* §§ 24–26.

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3. *Data Localization – The Buzzword*

An important obligation under the Bill is the requirement to store at least one copy of personal data on a server or data center located in India.⁴⁰ Further, the Central Government may by notification designate certain personal data as critical personal data that will be mandatorily required to be processed in a server or data center located in India.⁴¹ It may be pertinent to note that the Government of India seems to be inclined toward data localization in several spheres. For example, the Reserve Bank also mandated system providers that are registered under the Payment and Settlement Systems Act of 2007 to localize payment system data by October 15, 2018.⁴²

4. *Protecting Digital Health Data*

Another draft legislation, the Digital Information Security in Healthcare Act was released on March 21, 2018 by the Ministry of Health and Family Welfare, inviting comments from the public.⁴³ The legislation aims to regulate the transmission, storage, and processing of digital health data.⁴⁴

C. JUDICIAL DEVELOPMENTS

1. *Privacy a Fundamental Right*

In its landmark judgement in *Justice K.S. Puttaswamy v. Union of India*, the Supreme Court of India held that the right to privacy is a fundamental right under the Constitution of India.⁴⁵ The Supreme Court recognized that the right to privacy forms part of the fundamental right to life and liberty guaranteed under the Constitution of India⁴⁶. Further, informational privacy in relation to data of an individual has been held to be a part of the right to privacy.⁴⁷

2. *The Aadhaar Decision*

In a separate ruling under the above-mentioned case, the Supreme Court also upheld the constitutionality of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits, and Services) Act of 2016 (Act).⁴⁸

40. *Id.* § 40(1).

41. *Id.* § 40(2)-(3).

42. Letter from Nada S. Dave, Chief General Manager-in-charge, Reserve Bank of India, to all Indian banks, (Apr. 6, 2018), available at <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11244&Mode=0>.

43. Digital Information Security in Healthcare, Act, 2017, No. Z-18015/23/2017-eGov, Acts of Parliament, 2017 (India).

44. *Id.* at Chapter IV.

45. Justice K.S. Puttaswamy (Retd) v. Union of India, (2012) 494 SCC 1, 255 (India).

46. *Id.*

47. *Id.* at 37.

48. *Justice K.S. Puttaswamy (Retd) v. Union of India Writ Petition (Civil) 494 of 2012, delivered on 26 September 2018.*

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The Act provides the legislative framework for the Aadhaar scheme, which is India's biometric-based unique identity project aimed at ensuring that only persons eligible for certain governmental benefits, subsidies and services receive them after digital authentication of their biometric information.⁴⁹ But the Supreme Court struck down certain provisions of the Act for violating the right to privacy, among other grounds.⁵⁰

D. CONCLUSION

The right to privacy in India has now been given judicial backing. It appears that a proper legislative framework adequately safeguarding the same is imminent. This paradigm shift not only has major implications for the lives of millions of Indians, it may be a game changer for businesses, both domestic and foreign.

III. Australia, New Zealand, And India Climate Change and Clean Energy Update

A. AUSTRALIA

Australia had a tumultuous year in relation to climate policy. The National Energy Guarantee (NEG), the signature climate policy proposed by the Turnbull administration as a pathway to meet Australia's commitment under the Paris Agreement, was abandoned due to inadequate support from conservatives.⁵¹ The inability to pass climate legislation, the Turnbull government's third attempt to do so, became a politically charged issue that led to the toppling of his government, bringing Prime Minister Scott Morrison in as his replacement.⁵²

The NEG was a broad energy policy mechanism that aimed to provide both energy reliability while at the same time reduce greenhouse gas emissions.⁵³ It mandated energy suppliers and retailers to guarantee a minimum amount of power (energy reliability) at certain average emissions

49. AADHAAR (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act, 2016, No. 18, Acts of Parliament, 2016 (India).

50. Justice K.S. Puttaswamy (Retd) v. Union of India Writ Petition (Civil) 494 of 2012, delivered on 26 September 2018, at page 546.

51. Damien Cave & Isabella Kwai, *Australian Prime Minister Abandons Climate Targets, Bowing to Party Pressure*, N.Y. TIMES (Aug. 20, 2018), <https://www.nytimes.com/2018/08/20/world/australia/turnbull-energy-emissions-climate-change.html>.

52. *Id.*; Adrian Beaumont, *How the Hard Right Terminated Turnbull, only to See Scott Morrison become PM*, THE CONVERSATION (Aug. 24, 2018, 2:09 AM), <http://theconversation.com/how-the-hard-right-terminated-turnbull-only-to-see-scott-morrison-become-pm-102036>.

53. Brittnay Hope Flamik, *'The NEG' Aims to Be Australia's Latest Energy Solution. Will It Work?*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/world/australia/neg-energy-emissions.html>.

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levels that would ensure meeting Australia's commitments under the Paris Agreement.⁵⁴

The new Morrison administration has confirmed that there will be no policy to replace or extend the existing Renewable Energy Target (RET) policy in Australia.⁵⁵ It has also confirmed that as the largest exporter of coal, the current administration will continue to support coal as "renewable energy cannot replace baseload coal power."⁵⁶

In spite of the lack of a national agenda, several states in Australia are continuing to pursue renewable energy. The announcement by the state of Victoria of the "outcome of its renewable energy auction and new support for household solar and storage," and the state of South Australia "outlining the details of its home battery scheme," is encouraging.⁵⁷ State leadership will be critical in the absence of a national climate agenda.⁵⁸

B. NEW ZEALAND

As part of the Paris Agreement, New Zealand announced its Nationally Determined Contribution as reducing emissions by 30 percent below 2005 levels by 2030.⁵⁹ New Zealand also has a long-term target of reducing greenhouse gas emissions to 50 percent below 1990 levels by 2050, which was announced in 2011.⁶⁰ The government is, however, reviewing its 2050 target as part of a Zero Carbon Bill that it is considering.⁶¹ The Zero Carbon Bill (which is currently in consultation phase and the government plans to enforce it by June 2019) would reduce emissions to net zero by 2050

54. *Australia's Energy Transformation*, CLEAN ENERGY COUNCIL, <https://www.cleanenergy.council.org.au/advocacy-initiatives/energy-transformation> (last visited Feb. 14, 2019); Katherine Murphy, *What is the national energy guarantee and why is it taking so long?*, THE GUARDIAN, July 25, 2018, available at <https://www.theguardian.com/australia-news/2018/jul/26/what-is-the-national-energy-guarantee-and-why-is-it-taking-so-long>; Charis Chang, *What is the National Energy Guarantee and Will it Reduce Power Prices?*, NEWS.COM.AU (Aug. 16, 2018), <https://www.news.com.au/technology/environment/climate-change/what-is-the-national-energy-guarantee-and-will-it-reduce-power-prices/news-story/252c6aea07a501bd1d206f2056321a76>.

55. Marija Maisch, *Australian energy policy vacuum beyond 2020 officially confirmed*, PV MAG. (Sept. 25, 2018), <https://www.pv-magazine.com/2018/09/25/australian-energy-policy-vacuum-beyond-2020-officially-confirmed/>.

56. Paul Karp, *Australian government backs coal in defiance of IPCC climate warning*, GUARDIAN (Oct. 8, 2018), <https://www.theguardian.com/australia-news/2018/oct/09/australian-government-backs-coal-defiance-ipcc-climate-warning>.

57. Louis Brailsford *et al.*, *Powering Progress States Renewable Energy Race*, CLIMATE COUNCIL (2018), <https://www.climatecouncil.org.au/wp-content/uploads/2018/10/States-Renewable-Energy-Report.pdf>.

58. *Id.*

59. *About New Zealand's emissions reduction targets*, MINISTRY FOR THE ENV'T (June 6, 2018), <http://www.mfe.govt.nz/climate-change/what-government-doing/emissions-reduction-targets/about-our-emissions-reduction>.

60. *Id.*

61. Hon James Shaw, *First Important Step towards the Zero Carbon Act*, BEEHIVE (Dec. 18, 2017), <https://www.beehive.govt.nz/release/first-important-step-towards-zero-carbon-act>.

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and place the country on a path to a low emission and climate resilient future.⁶² As part of this bill, New Zealand is establishing an independent Climate Change Commission; and New Zealand's Emission Trading Scheme (NZETS), first enforced in 2008, is being strengthened as well.⁶³

The New Zealand Productivity Commission, an independent organization that advises on increasing New Zealand's productivity, released its Low Emissions Economy report in August of this year,⁶⁴ which will be used to inform the government on its Zero Carbon Bill.⁶⁵ The Report outlines the opportunities and challenges that New Zealand faces in becoming a low-emissions economy, highlighting that early action is needed. It further emphasizes that the country's economy must shift in three fundamental ways: end the burning of fossil fuels and transition to use of electricity and other low-emission energy sources; undertake efforts for new afforestation; and make structural and methodological changes to agricultural production.⁶⁶

C. INDIA

India made significant strides in its renewable energy policy and energy efficiency policy in 2018, with the announcement of new policies and measures, as well as strengthening several of its existing ones.

1. *Energy Efficiency Policy*

Under the leadership of the Bureau of Energy Efficiency, India developed its first State Energy Efficiency Index.⁶⁷ The aim is to “track progress in managing states’ and India’s energy footprint[,] encourage healthy competition among Indian states[,] provide a foundation to set state-specific” energy efficiency targets, and spearhead “program implementation at the state and local level[.]”⁶⁸ The states that have been leaders (or front-

62. *Id.*

63. *The transition to a low-emissions and climate-resilient Aotearoa New Zealand*, MINISTRY FOR THE ENV'T (Aug. 13, 2018), <http://www.mfe.govt.nz/climate-change/what-government-doing/emissions-reduction-targets/about-our-emissions-reduction>.

64. *Low-emissions economy: Final report*, N.Z. PRODUCTIVITY COMMISSION (Aug. 2018), https://www.productivity.govt.nz/sites/default/files/Productivity%20Commission_Low-emissions%20economy_Final%20Report_FINAL.pdf.

65. Hon James Shaw, *Productivity Commission's path to a low carbon emissions economy*, BEEHIVE (Sept. 4, 2018), <https://www.beehive.govt.nz/release/productivity-commissions-path-low-emissions-economy>.

66. *Id.*

67. *State Energy Efficiency Preparedness Index*, ALLIANCE FOR AN ENERGY EFFICIENT ECON. (July 2018), http://www.aeee.in/state-ee-index/wp-content/uploads/2018/08/State-EE-Preparedness-Index-FINAL_July2018.pdf; Utpal Bhaskar, *To combat climate change, India comes up with first energy efficiency index*, LIVEMINT (July 31, 2018), <https://www.livemint.com/Industry/wSLu5BSfzVuEDYYTRz9mLI/To-combat-climate-change-India-comes-up-with-first-state-en.html>.

68. *State Energy Efficiency Preparedness Index*, *supra* note 67, at vi.

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runners) in energy efficiency implementation in this inaugural edition of the index are “Andhra Pradesh, Kerala, Maharashtra, Punjab, and Rajasthan.”⁶⁹

2. *Renewable Energy*

The Modi government announced that it had met its target of 100% Rural Electrification of Indian villages (that was set in 2015) ahead of schedule.⁷⁰

In late 2017, the Modi government announced the Saubhagya Scheme to provide electricity to all households in rural and urban areas by December 2018.⁷¹ To encourage states to meet their goals early under this scheme, the Modi government announced a INR one hundred crore award and a INR fifty lakh award for employees of discoms (distribution companies).⁷²

To incentivize farmers in remote areas, the government of India announced the KUSUM Scheme.⁷³ The Scheme provides solar water pumps to farmers to make them independent of the grid while enabling them to sell their surplus electricity to discoms and generate additional income.⁷⁴ Aspects of the scheme call for the “installation of grid-connected solar power plants each with capacity of up to 2 MW in the rural areas”; the “installation of standalone off-grid solar water pumps to fulfill irrigation needs of farmers not connected to grid”; the “solarization of existing grid-connected agriculture pumps to make farmers independent of grid supply and also enable them to sell surplus solar power generated to DISCOM and get extra income”; and the “solarization of tube-wells and lift irrigation projects of Government sector.”⁷⁵

India announced the establishment of a National Energy Storage Mission (NESM). This mission aims to establish India as a leader in the energy storage sector by “creating an enabling policy and regulatory framework that encourages manufacturing, deployment, innovation and further cost reduction.”⁷⁶ Based on a joint report by NITI Aayog and Rocky Mountain

69. *Id.*

70. *After 100% electrification, focus on generation, distribution, pricing*, HINDUSTAN TIMES (Apr. 30, 2018), <https://www.hindustantimes.com/editorials/after-100-electrification-focus-on-generation-distribution-pricing/story-vAltKFTufWBOKlvmvpU8sL.html>.

71. *PM launches ‘Saubhagya’ scheme to provide power to all*, HINDU BUS. LINE (Sept. 25, 2017), <https://www.thehindubusinessline.com/news/pm-launches-saubhagya-scheme-to-provide-power-to-all/article9872678.ece>.

72. *States to get Rs 100 cr award for being efficient under Saubhagya scheme*, ECON. TIMES (Oct. 15, 2018, 7:21 PM), <https://economictimes.indiatimes.com/industry/energy/power/states-to-get-rs-100-cr-award-for-being-efficient-under-saubhagya-scheme/articleshow/66223925.cms>.

73. Press Release, Press Information Bureau Government of India Ministry of New and Renewable Energy, *Kusum Scheme – harnessing solar power for rural India* (Mar. 15, 2018) (on file with author).

74. *Id.*

75. *Id.*

76. *National Energy Storage Mission*, PRESS INFO. BUREAU GOV'T OF INDIA MINISTRY OF NEW AND RENEWABLE ENERGY (Aug. 9, 2018), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=181698>; see also Andy Colthorpe, *India’s draft National Energy Storage Mission focuses on reducing costs of domestic EV batteries*, ENERGY STORAGE NEWS (Aug. 13, 2018, 2:34 PM), <https://www>

Institute the draft focuses on a three-stage solution approach: creating an environment for battery manufacturing growth; scaling supply chain strategies; and scaling of battery cell manufacturing.⁷⁷

IV. India Permits Capital Punishment for Rape of Female Children

In an era when most states disallow or strictly limit capital punishment, India expanded its capital-eligible crimes.⁷⁸ The 2018 Criminal Law Amendment Ordinance amended Indian Penal Code 376 to raise the minimum sentence for rape of a female less than 16 years old to 20 years old, and to permit a lifetime sentence; and added Section 376AB, which permits capital punishment for the rape of a female less than 12 years old.⁷⁹ While the amendments respond to an undeniable crisis, analysts question whether this law will deter the crime.

The first known death sentence issued under Section 376AB was handed down to a 19-year old man convicted of raping an infant.⁸⁰ India is home to more child sexual abuse victims than any other nation.⁸¹ According to a 2007 study commissioned by India's Ministry of Women and Child Development, 53 percent of children surveyed were sexual abuse victims.⁸² Thereafter, rapes reported in India rose from 25,000 in 2012 to 38,000 in 2016.⁸³

Rape in India has received persistent international coverage since the 2012 gang rape and murder of a twenty-three year old female college student by six men in New Delhi.⁸⁴ In response, the Indian government commissioned

.energy-storage.news/news/indias-draft-national-energy-storage-mission-focuses-squarely-on-reducing-c.

77. *India's Energy Storage Mission: A Make-in-India Opportunity for Globally Competitive Battery Manufacturing*, NITI AAYOG AND ROCKY MOUNTAIN INST. (2017), http://niti.gov.in/writereaddata/files/document_publication/India-Energy-Storage-Mission.pdf.

78. Ministry of Law and Justice (Legislative Department) *The Criminal Law (Amendment) Act, 2018*, Gazette of India, pt. II sec. 1 (Aug. 11, 2018); Press Release, Amnesty Int'l, *The Death Penalty in 2017: Facts and Figures* (Apr. 12, 2018) (on file with author).

79. *The Criminal Law (Amendment) Act*, at 2.

80. Harley Tamplin, *Teenager Given Death Penalty for Raping Seven-Month-Old Baby in India*, METRO (July 23, 2018, 6:07 PM), <https://metro.co.uk/2018/07/23/teenager-given-death-penalty-raping-seven-month-old-baby-india-7750340/>.

81. *Why an MP Wants India to Talk About Child Sex Abuse*, BBC (Dec. 5, 2015), <https://www.bbc.com/news/world-asia-india-34971791>.

82. Geeta Pandey, *Abuse of Indian Children 'Common'*, BBC (Apr. 9, 2007), http://news.bbc.co.uk/2/hi/south_asia/6539027.stm.

83. Annie Gowen, *India's Supreme Court Reaffirms Death Penalty for 'Diabolical' Assaults in 2012 Fatal Gang Rape*, WASH. POST (July 9, 2018), https://www.washingtonpost.com/world/asia_pacific/indias-supreme-court-reaffirms-death-penalty-for-diabolical-assaults-in-2012-fatal-gang-rape/2018/07/09/c37c5239-4961-4580-b5ae-8c96eccc4945_story.html.

84. *Id.*; Prachi Sharma, et al., *Sexual violence in India: addressing gaps between policy and implementation*, OXFORD U. PRESS (Mar. 10, 2014), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.894.3386&rep=rep1&type=pdf>.

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an expert judicial panel to address sexual assault reform.⁸⁵ That panel, led by former India Supreme Court Chief Justice J.S. Verma,⁸⁶ published 630 pages of recommendations to combat sexual assault in India.⁸⁷ The commission expressly denounced making rape a capital-eligible crime:

In our considered view, taking into account the views expressed on the subject by an overwhelming majority of scholars, leaders of women's organisations, and other stakeholders, there is a strong submission that the seeking of the death penalty would be a regressive step in the field of sentencing and reformation.⁸⁸

The Indian government ignored most Verma Report recommendations.⁸⁹ Indeed, the Criminal Law Amendment Ordinance of 2013 increased capital-eligible crimes to include rape that ultimately led to death.⁹⁰

Now, an array of critiques decry the 2018 amendment. Journalist Amrit Dhillon deemed Section 376AB powerless “because no effort is made to alter the way many men regard women as objects, [thus] the rape figures continue to rise.”⁹¹ Dr. Anup Surendranath, Executive Director of National Law University's Project 39A, warns that Section 376AB could easily decrease victim reporting: most Indian rapists are known to their victims, and the “further burden” of “sending a person they know to the gallows” will mute already-low reporting rates.⁹² Others posit that rapists will now be more likely to kill their victims rather than risk the gallows themselves.⁹³ Section 376AB is also critiqued for failing to address the rape of boys—particularly given the government's own 2007 study, which found that Indian girls and boys are equally sexually victimized.⁹⁴

While much of the world abolished capital punishment over the twentieth century, India's support strengthened. In 2018, the Indian Express reported that twelve of fourteen states and Union Territories opposed a Home

85. Jim Yardley & Neha Thirani Bagri, *Notorious Attack Spurs India to Approve New Rape Laws*, N.Y. TIMES (Feb. 3, 2013), <https://www.nytimes.com/2013/02/04/world/asia/india-approves-tougher-rape-laws.html>.

86. *Id.*

87. Comm. Report 11003, CODE CRIM. PROC. (2013) (India).

88. *Id.* at 245-46; see also Aditi Malhotra et. al., *We Pored Over the Verma Report So You Don't Have to*, WALL S. J. (Jan. 31, 2013, 9:00 AM), <https://blogs.wsj.com/indiarealtime/2013/01/31/we-pored-over-the-verma-report-so-you-dont-have-to/?ns=prod/accounts-wsj>.

89. Sharma, et al., *supra* note 84, at 657.

90. *India: Crime of Sexual Assault Penalized*, U.S. LIBR. OF CONGRESS: GLOBAL LEGAL MONITOR (Feb. 11, 2013), <http://www.loc.gov/law/foreign-news/article/india-crime-of-sexual-assault-penalized/>.

91. Amrit Dhillon, *The death penalty won't stop child rape in India*, GLOBE & MAIL (Aug. 7, 2018), <https://www.theglobeandmail.com/opinion/article-the-death-penalty-wont-stop-child-rape-in-india/>.

92. Divya Arya, *India death penalty: Does it actually deter rape?*, BBC (July 31, 2018), <https://www.bbc.com/news/world-asia-india-44922084>.

93. Abhishek Gupta, *Decoding 'Deterrence': A Critique of the Criminal Law (Amendment) Act, 2018*, ILLI L. REV., 136, 146 (2018).

94. *Why an MP Wants India to Talk About Child Sex Abuse*, *supra* note 81.

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Ministry proposal to abolish the death penalty.⁹⁵ By comparison, just after gaining independence, India's Constituent Assembly debated everything from the death penalty's disproportionate impact on the impoverished to potential false identification of perpetrators.⁹⁶ From 1958 to 1962 alone, three capital punishment abolition resolutions were proposed.⁹⁷

In regional perspective, rape has long been capital-eligible in Pakistan, Bangladesh, and Afghanistan;⁹⁸ countering Nepal, Bhutan, and Sri Lanka, which abolished capital punishment entirely.⁹⁹ While Nepal abolished its death penalty in 1990, India's Section 376AB is prompting some Nepalese to consider resurrecting the measure.¹⁰⁰

As India grows in international standing, the nation measures itself less against regional neighbors and more against other major powers. That stage is varied: while a majority of the world's states have abolished capital punishment, major powers such as China, Japan, and the United States practice capital punishment without notable repercussion.¹⁰¹ Section 376AB will not likely spawn an international relations fallout. Still, in 2019 and beyond, analysts should monitor whether this new threat of capital punishment effectively increases reporting or reduces child rape.

V. Singapore - Choice of Law and Jurisdiction

Singaporean law underwent a significant change in how it handles enforcement of jurisdiction clauses in international commercial contracts. In *Vinmar Overseas (Singapore) Pte. Ltd. v. PTT Int'l Trading Pte. Ltd.*, the Court of Appeals of Singapore, the country's highest court, reevaluated the standards by which to determine whether an application for a stay of proceedings should be granted in favor of a forum in another country, pursuant to a commercial agreement.¹⁰² The *Vinmar* Court held that its earlier approach of considering the merits of a stay applicant's defense was no longer good law.¹⁰³ Such an inquiry would be henceforth limited to

95. Ragul Tripathi, *Death penalty should stay, say 12 out of 14 states, UTs*, INDIAN EXPRESS (Mar. 12, 2018, 9:26 AM), <https://indianexpress.com/article/india/death-penalty-should-stay-say-12-out-of-14-states-union-territories-5094533/>.

96. Rahul Tripathi, *Beyond The News: The Debate over Death*, INDIAN EXPRESS (Mar. 14, 2018, 8:57 AM), <https://indianexpress.com/article/explained/the-debate-over-death-penalty-law-commissions-supreme-court-on-capital-punishment-5096813/>.

97. *Id.*

98. See Arya, *supra* note 92.

99. Deepika Thapa Magar, *Down with the death penalty*, KATHMANDU POST (May, 4, 2018), <http://kathmandupost.ekantipur.com/news/2018-05-04/down-with-the-death-penalty.html>.

100. *Id.*

101. AMNESTY INT'L, *supra* note 78.

102. *Vinmar Overseas Singapore PTE LTD v. PTT International Trading PTE LTD*, Court of Appeals of the Republic of Singapore, [2018] SGCA 65, [https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/final-version-for-release-\(v1\)-pdf-1.pdf](https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/final-version-for-release-(v1)-pdf-1.pdf).

103. *Id.* ¶ 127.

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examining whether the application for a stay in favor of a chosen forum constituted an abuse of process.¹⁰⁴

Choice of jurisdiction or, in this context, choice of forum clauses are integral parts of all commercial agreements, especially those with a multinational dimension. As Justice of Appeal Steven Chong noted, such clauses are “ubiquitous” in international commercial contracts.¹⁰⁵ The jurisdiction chosen as the forum by these types of agreements is usually stipulated to be the exclusive jurisdiction for resolution of disputes and the commercial relationship between the parties. Logically, then, because the parties have agreed on a given forum, a party to a proceeding related to an application of the agreement that is initiated in a forum not contemplated by the agreement is entitled to have that proceeding stayed in favor of proceedings in the jurisdiction specified by the contract.

But rather than automatically staying proceedings, Singaporean courts (and courts in other Commonwealth countries) previously took the view that exclusive jurisdiction clauses apply only if the defendant—who is usually the party applying for the stay of proceedings—has a “genuine” defense against the plaintiff’s claims.¹⁰⁶ Therefore, Singaporean courts first analyzed whether the defendant had a meritorious defense to a case in order to determine whether a stay should be granted.

The theory underlying this evaluation on the merits is that only “genuine” disputes should be litigated in the chosen forum, because it does not matter what forum hears a non-meritorious claim.¹⁰⁷ A defendant without a meritorious defense, therefore, was deemed to be merely forum shopping for procedural advantage rather than genuinely seeking to enforce an exclusive jurisdiction clause. On the other hand, as recent court decisions from other Commonwealth countries have made clear, an overly substantial analysis of the merits of the defendant’s case as a precondition for a stay should be avoided as not keeping with the expectations of parties to an agreement containing an exclusive jurisdiction clause and, at best, it is irrelevant to the inquiry of whether to enforce a jurisdiction clause.¹⁰⁸

Originally, the required meritorious defense was one factor among several to be considered in whether to grant the stay application.¹⁰⁹ In general, an exclusive jurisdiction clause is to be enforced unless there is “strong cause”

104. *Id.* ¶ 128.

105. *Id.* at ¶ 1.

106. Colin Chow, *et al.*, *Singapore Court of Appeal Restates Law Governing Stay Applications Pursuant to Exclusive Jurisdiction Clause*, ALLEN & GLEDHILL (Dec. 20, 2018), <https://www.allenandgledhill.com/media/3511/ag-singapore-court-of-appeal-restates-law-governing-stay-applications-pursuant-to-exclusive-jurisdiction-clause.pdf>.

107. *Id.*

108. *Id.*; See, e.g., *Euromark Ltd. v. Smash Enterprises Pty Ltd.*, [2013] EWHC 1627 (noting that the party applying for a stay has a “right to rely on the exclusive jurisdiction clause which was agreed as part of the contract.”); *Hyundai Engineering & Const. Co., Ltd. v. UBAF (Hong Kong) Ltd.*, [2012] H.K.C. 175 (holding that courts cannot proceed to hear a claim in defiance of an exclusive jurisdiction clause in another forum).

109. *Id.*

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to refuse enforcement and deny a stay of proceedings in favor of the chosen jurisdiction.¹¹⁰ Singaporean courts, adopting a similar test from their English judicial fellows, identified five factors to be considered in determining whether strong cause was present, the fourth factor of which was the merits of the stay applicant's defense.¹¹¹

Over time, however, the meritorious defense factor gained outsized importance. In a succession of decisions by Singaporean courts, the existence of a meritorious defense to a plaintiff's claims came to be considered the *sine qua non* for the granting of an application for a stay.¹¹² The enforcement of an exclusive jurisdiction clause and the "strong cause" standard came to be synonymous with the existence of a meritorious defense by the stay applicant. In the *Jian He* case and its progeny, the Court of Appeal routinely held that strong cause existed to refuse a stay of proceedings if the applicant did not have a *bona fide* defense to the claim.¹¹³ This was true even in absence of other *Eleftheria* factors tending to support the enforcement of an exclusive jurisdiction clause. The preeminence of the meritorious defense inquiry remained the law in Singapore even as other Commonwealth jurisdictions were moving away from such an approach.¹¹⁴ This movement away from the meritorious defense inquiry appears to have caused the Court of Appeal to reexamine its views.

In the end, the *Vinmar* Court held that the lack of a meritorious defense only relates to the "strong cause" inquiry in respect to whether the defendant's application for a stay constitutes an abuse of process.¹¹⁵ This substantially diminishes the importance of the meritorious defense inquiry. As the Court emphasized, diminishing this inquiry in relevance to a stay application upholds the expectations of the parties to the jurisdiction

110. Rebecca Saunders, UK: *Forum Non Conveniens—The English Approach to Deciding Which Jurisdiction Governs a Dispute*, MONDAQ (Aug. 21, 2006), <http://www.mondaq.com/uk/s/42210/Forum+Non+Conveniens+The+English+Approach+to+Deciding+Which+Jurisdiction+Governs+a+Dispute>.

111. *Amerco Timbers Pte. Ltd. v. Chatsworth Timber Corp. Pte. Ltd.*, [1977-78] SLR(R) 112, ¶ 11 (the other factors being the accessibility of evidence, the similarities or differences of the law of the forum with Singaporean law, the connections between the parties and either Singapore or the contracted forum, and whether the plaintiff would be prejudiced by having to sue in the contracted forum).

112. Lawrence Teh, *Starboard News: "EXCLUSIVE" MEANS EXCLUSIVE*, DENTONS (Jan. 31, 2019), <https://dentons.rodyk.com/en/insights/alerts/2019/january/31/starboard-news-exclusive-means-exclusive>.

113. *Id.*; *Singapore Court of Appeals Establishes Law on Exclusive Jurisdiction Clauses, Rajah & Tann Asia* (Nov. 2018), https://eoasis.rajahtann.com/eoasis/lu/pdf/2018-11_SG-Establishes-Law-Exclusive-Jurisdiction-Clauses.pdf.

114. See, e.g., *CH Offshore Ltd. v. PDV Marina SA*, [2015] EWHC 595 (Comm) at para. 64 (holding that it is "irrelevant" whether a plaintiff's claim is likely to succeed in the non-contractual forum); *Deltatre Spa v. Hong Kong Sports Indus. Dev. Ltd.*, [2018] HKCU 2939, at para. 89 (holding that the lack of a meritorious defense did not amount to strong cause to deny a stay application *per se*).

115. *Vinmar Overseas Singapore PTE LTD v. PTT International Trading PTE LTD*, *supra* note 71, ¶ 146-47.

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agreement and provides greater certainty to commercial litigants that a chosen forum for the resolution of disputes will be upheld.¹¹⁶ In short, *Vinmar* presents a notable change in the Singaporean approach to choice of forum clauses that will have significant reverberations in international commercial law beyond 2018.

116. *Id.* ¶ 137.