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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

India

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This article surveys significant legal developments in India during the year 2013.¹

I. Changes To Company Law

On August 8, 2013, the Indian Parliament passed the Companies Bill.² The Bill received presidential assent on August 29, 2013, updating the half-century-old Companies Act of 1956 (1956 Act).³ The provisions of the Companies Act 2013 (New Act) are being gradually phased in, and provisions requiring statutory and regulatory consultation, the functioning of new bodies, or the prescription of relevant rules will be effective after certain actions are completed. The 1956 Act has not been repealed, but existing provisions that correspond to the approximately ninety-eight sections of the New Act will cease to have effect once the new provisions become effective.

The New Act has made material changes to corporate law and procedures. It prescribes thirty-three new definitions.⁴ It also empowers the Central Government to regulate the formation, financing, functioning, and winding up of companies and to inspect a company's accounting books, to direct special audit, to investigate companies, and to launch prosecutions for violations of the New Act.⁵ The New Act makes meaningful changes in relation to corporate governance of the companies through corporate social responsibility, increased director accountability, ensuring more powers to the Serious Fraud Investiga-

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1. For developments in 2012, see Hanishi T. Ali et al., *India*, 47 INT'L LAW. 597 (2013).

2. See The Companies Bill, No. 121-C of 2011 (India), *available at* http://www.mca.gov.in/Ministry/pdf/The_Companies_Bill_2012.pdf (last visited Mar. 30, 2014).

3. See The Companies Act, No. 1 of 1956, *available at* <http://indiacode.nic.in/> (last visited Mar. 30, 2014).

4. The Companies Act, 2013, No. 18, § 2, Acts of Parliament, 2013 (India), *available at* <http://indiacode.nic.in/acts-in-pdf/182013.pdf> (last visited Mar. 30, 2014).

5. *Id.*

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tion Office, introduction of class action suits, and establishment of special courts for speedy trials.⁶ Some of the key highlights of the New Act are as follows:

A. INCORPORATION OF A COMPANY AND MATTERS INCIDENTAL

- Section 2 of the New Act allows a private company to have a maximum of 200 members, up from fifty in the 1956 Act.⁷
- Section 3 of the New Act introduces the concept of the One Person Company (OPC), to provide more flexibility and to relax governance and reporting requirements.⁸
- The New Act allows one person to form a Private Limited Company by subscribing his or her name to the Memorandum of the Company and after complying with other specified registration requirements.⁹ In addition, the New Act provides that the words “One Person Company” or “OPC” must be mentioned below the name of the company.¹⁰ In an OPC, the individual member is deemed to be the first director until another director is appointed.¹¹
- In addition, the New Act requires that the Memorandum of an OPC must indicate the name of another as a nominee—with the nominee’s prior written consent—in case of the subscriber’s death or incapacity to contract.¹² That nomination is to be filed at the time of incorporation along with the Memorandum and the Articles.¹³ The nominee is also allowed to withdraw consent.¹⁴
- All companies must follow the uniform financial year, running from April to March.¹⁵ Exceptions can be made only in limited cases with approval of an independent tribunal called the National Company Law Tribunal (NCLT). NCLT replaced the Company Law Board and assumed the responsibility of the High Court as the sanctioning authority with respect to Restructuring. An OPC is also required to file a copy of the financial statements adopted by its member, along with relevant documents, within 180 days from the closure of the financial year.

B. DIRECTORS

- The New Act increased the maximum number of directors from twelve to fifteen and requires every company to have at least one resident Indian director who has resided in India for a period of no fewer than 182 days in the previous calendar year.¹⁶

6. *Id.*

7. *Id.* § 2(68)(ii).

8. *Id.* § 3(1).

9. *Id.* § 3.

10. *Id.* § 12(3).

11. *Id.* § 152(1).

12. *Id.* § 3(1).

13. *Id.*

14. *Id.*

15. *Id.* § 2(41).

16. *Id.* § 149.

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- Prescribed class or classes of companies are now required to appoint at least one woman director.¹⁷
- To increase transparency and to safeguard the interest of the stakeholders, the concept of Independent Directors (IDs) has been introduced.¹⁸ At least one-third of the total number of directors of every public listed company should be IDs.
- An ID's appointment must be approved by the company during a general meeting and an explanatory statement must be annexed.¹⁹ A specific code and duties for IDs has been prescribed by the New Act, which include guidelines for professional conduct, roles and functions, duties, manner of appointment, reappointment, resignation or removal, separate meetings, and an evaluation mechanism.
- IDs can hold office for a term of up to five consecutive years on the board of a company but shall be eligible for reappointment upon passing of a special resolution by the company and upon the disclosure of such appointment in the Board's Report.²⁰
- No ID shall hold office for more than two consecutive terms in one company but the ID is eligible for re-appointment after a three-year period where the individual has not been an ID.²¹
- An ID's liability is limited and he or she is liable only for such acts or omissions by a company that occurred with his or her knowledge, and with consent, connivance, or through lack of diligence.²²

C. CORPORATE SOCIAL RESPONSIBILITY (CSR)

- The New Act introduces a new initiative of the Ministry of Corporate Affairs. It mandates every company having a net worth of rupees 500 crore or more, or turnover of rupees one thousand crore or more, or a net profit of rupees five crore or more during any financial year to constitute a Corporate Social Responsibility (CSR) Committee of the Board consisting of three or more directors, out of which at least one director shall be an ID.²³
- The CSR Committee must formulate and recommend to the Board of Directors the CSR policy of the company, the expenditures to be incurred on such activities, and a plan for monitoring the company's CSR activities.²⁴
- The board in turn must ensure that the company spends, in every financial year, at least 2 percent of the average net profits of the company made during three financial years immediately preceding.²⁵ If the company fails to spend the amount, the board must specify the reasons for not doing so.²⁶

17. *Id.*

18. *Id.*

19. *Id.* § 150.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* § 135.

24. *Id.*

25. *Id.*

26. *Id.*

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- The specific activities that could be regarded as CSR are specified in Schedule VII of the New Act.²⁷

D. SERIOUS FRAUD INVESTIGATION OFFICE (SFIO)

- Section 211 of the New Act empowers the Central Government to establish the Serious Fraud Investigation Office (SFIO) to investigate frauds relating to a company. The SFIO is headed by a director and comprises such number of experts as may be appointed by the Central Government.²⁸ Statutory status has been conferred upon SFIO.²⁹
- The New Act empowers SFIO to make arrests for certain offenses, including fraud. Reports filed by SFIO to the relevant court shall be treated as a report filed by a police officer.³⁰
- In the event that SFIO is investigating an offense under the New Act, other state agencies, police, or income tax authorities that have any information or documents shall provide all such information and documents to SFIO.³¹

E. CLASS ACTION SUITS

- Section 245 of the New Act also introduces the vehicle of the class action as a mechanism to protect small investors and allow them to sue as a group.³² Members, depositors, or their representatives have been empowered to file an application before NCLT if they are of the opinion that the management or the conduct of the affairs of the company is being conducted in a manner prejudicial to the interests of the company or its members or depositors.³³
- The most important part of such a class action is that prescribed members can claim damages or compensation against the company, directors, auditors, experts, and advisors for wrongful conduct.³⁴

F. AUDIT AND AUDITORS

- Chapter X, Sections 139–148 of the New Act make major changes in the appointment procedure and tenure of appointment for auditors.³⁵ These sections ensure the independence of audit partners and the mandatory rotation of auditors.³⁶ The ratification of auditor appointments by the members at every annual general meeting of the company is now mandatory.³⁷

27. *Id.* sched. VII.

28. *Id.* § 211.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* § 245.

33. *Id.*

34. *Id.*

35. *Id.* ch. X, § 139–48.

36. *See id.* § 139.

37. *Id.*

- More stringent laws have been enacted for listed companies so that no listed company may (a) appoint an individual as auditor for more than one term of five consecutive years or (b) appoint an audit firm as auditor for more than two terms of five consecutive years.³⁸
- Members of the company have been empowered to decide by resolution whether the auditing partner and his or her team will be rotated every year or whether more than one auditor will conduct the audit.³⁹

G. MERGERS, ACQUISITIONS, AND SCHEMES OF ARRANGEMENT

- The New Act contains certain revisions relating to mergers, amalgamations and compromises, and arrangements.⁴⁰ The New Act has not, as practitioners had hoped, completely done away with the requirement in the 1956 Act for court approval of arrangements and related mergers.⁴¹ Nevertheless, instead of making an application to the appropriate High Court, a company or its creditors/members or any class of creditors/members seeking to enter into such a transaction are now required to apply to the newly-created NCLT.⁴² Under the New Act, as under the 1956 Act, the NCLT may order a meeting of creditors/members prior to approving the compromise.⁴³ The constituent companies to such a transaction are now required to send the notice of the transaction to the Securities Exchange Board of India (SEBI), the income tax authorities, Reserve Bank of India (RBI), and the Competition Commission of India, any of which may object to the transaction.⁴⁴

Additionally, the New Act has introduced the following three welcome changes to the mergers and acquisitions (M&A) regime:

- Cross-Border Mergers: The New Act permits the merger of a foreign company into an Indian company, and also permits the merger of an Indian company into a foreign company.⁴⁵ RBI approval will be required for cross-border mergers.⁴⁶
- Short Form Mergers: There is now a simplified process for mergers and amalgamation between two “small companies” (defined as non-public companies with a less than specified level of paid up capital or turnover) or between a holding company and its wholly owned subsidiary.⁴⁷ Instead of a court process, such companies are required to notify the Registrar of Companies and Official Liquidators, which has thirty days to raise any objections.⁴⁸ Additionally, the transaction must be approved by members holding 90 percent of the shares and a majority representing 9/10th in value of the creditors/class of creditors.⁴⁹

38. *Id.* § 139(2)(a), (b).

39. *Id.* § 139(3)(a), (b).

40. *Id.* ch. XV.

41. *Id.* § 394.

42. *Id.* § 230.

43. *Id.*

44. *Id.* § 230(5).

45. *Id.* § 234. The Central Government has yet to provide this list of foreign countries, however.

46. *Id.* § 234(2).

47. *Id.* § 233(1).

48. *Id.* §§ 233(1)(a), 233(4).

49. *Id.* § 233(1)(b)–(d).

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- **Minority Squeeze-Out:** Where a scheme or contract involving the transfer of shares in a transferor company to a transferee company has, within four months after the offer by the transferee company, been approved by the holders of not less than 9/10th in value of the shares to be transferred, then the transferee company has the ability within an additional two months to give notice to any dissenting minority shareholders to acquire the shares of the dissenting shareholder.⁵⁰ The dissenting shareholder may apply to the NCLT to oppose the squeeze-out offer.⁵¹ If the NCLT does not block the purchase, then one month after the offer by the transferee company, it has the ability to require the transferor company to register the transferee company as the holder of the shares.⁵² On the other hand, the New Act has also introduced protections for minority shareholders—if a company acquires 90 percent of the issued share capital of another company, it must make an offer to purchase the remaining shares at a price determined on the basis of valuation by a registered valuer.⁵³

H. RELATED PARTY TRANSACTIONS

Under the New Act, board approval is required for a company to enter into any contract or arrangement with a related party of the company.⁵⁴ In a welcome change, there is an exception for arm's length transactions entered into by the company in the ordinary course of business.⁵⁵

I. PRIVATE PLACEMENT

The New Act provides for private placements by both public and private companies. Private placement is described as an offer of securities or invitation to subscribe securities through issue of a private placement offer letter to not more than fifty persons.⁵⁶ Qualified institutional buyers (QIBs) and employee-issued securities under an employee stock option scheme are excluded from the count.⁵⁷ An offer to a greater number will be treated as a public offering and require compliance with applicable SEBI regulations.⁵⁸

The process for a private placement is as follows: prior to making the offer, the names of the persons to whom offers are to be made will be recorded by the company, and only persons whose names have been recorded may receive the offer.⁵⁹ Information about the offer must be filed with the Registrar of Companies within thirty days of circulation of the private placement offer letter.⁶⁰ Securities must be issued within sixty days of receipt of funds by the investors.⁶¹ The New Act restricts public solicitation through public adver-

50. *Id.* § 235(1).

51. *Id.* § 235(2).

52. *Id.*

53. *Id.* § 236.

54. *Id.* § 188.

55. *Id.*

56. *Id.* § 42(2).

57. *Id.*

58. *Id.* § 42(4).

59. *Id.* §§ 42(7), 42(9).

60. *Id.*

61. *Id.* § 42(6).

tisements or utilization of media, marketing, distribution channels, or agents.⁶² A company undertaking a private placement is also required to file a return of allotment with the Registrar of Companies.⁶³

J. INSIDER TRADING

The New Act has specifically included the concept of “insider trading,” which is defined as directly or indirectly communicating any non-public price-sensitive information (i.e., information relating to a company, which, if published, is likely to materially affect the price of securities of the company) by any director or key managerial personnel to any person.⁶⁴ The New Act also prohibits buying, selling, or dealing in securities by any director, key managerial personnel, or any other officer of a company either as principal or agent if such person is reasonably expected to have access to any non-public price sensitive information in respect of securities of the company.⁶⁵ Punishment for insider trading includes imprisonment for up to five years and/or a fine of not less than five lakh rupees (approximately \$10,000) and up to twenty-five crore rupees (approximately \$5,000,000) or three times the amount of profits made out of insider trading, whichever is higher.⁶⁶

K. FRAUD

“Fraud” has been specifically defined in Section 447 of the New Act to include any, act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.⁶⁷

Specific acts and omissions that will be punishable under Section 447 have also been identified in various provisions of the New Act, such as knowingly or recklessly making false, deceptive, or misleading statements; deliberately concealing material facts to induce another person to purchase, sell, or underwrite securities or making use of price fluctuations; or obtaining credit from any bank or financial institution⁶⁸ and in the case of auditors, acting in a fraudulent manner or abetting or colluding in any fraud by or in relation to the company.⁶⁹

Punishment for fraud is prescribed as imprisonment for not less than six months and up to ten years and a fine in an amount not less than the amount involved in the fraud and up to three times the amount involved in the fraud.⁷⁰ Where the fraud involves “public inter-

62. *Id.* § 42(8).

63. *Id.* § 42(9).

64. *Id.* § 195(1).

65. *Id.*

66. *Id.* § 195(2).

67. *Id.* § 447.

68. *Id.* § 36.

69. *Id.* § 140(5).

70. *Id.* § 447.

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est,” the term of imprisonment shall not be less than three years.⁷¹ Public interest is not defined in the New Act, and it will be interesting to see the situations in which this provision will be used, if at all. Establishing a mandatory minimum penalty is a clear signal by the government about the seriousness with which such offences will be treated.

II. Tax Policy Developments

As compared to the preceding year, 2013 has been more sublime for the development of tax policies. The Central Board of Direct Taxes (CBDT), the apex tax administration body, made changes in direct tax that are perceived to be the Indian Government’s effort to bring about certainty in the Indian tax regime and to boost the foreign investor confidence. The year 2013 witnessed a wide array of changes, including the introduction of General Anti Avoidance Rules (GAAR); the inclusion of specified domestic transactions within the ambit of transfer pricing; and the introduction of Safe Harbor rules to plug the proliferation of transfer pricing litigation.

A. GAAR DEFERMENT AND DILUTION

GAAR, encapsulated in Chapter X-A of the Income Tax Act of 1961 (Act), was incorporated into the tax statute and was supposed to enter into effect on April 1, 2014. The Government, however, deferred application of GAAR until April 1, 2016 via the Finance Act of 2013, accepting the recommendation of the Shome Committee.⁷²

To streamline the Tax Policies and Tax Laws in India with the global best practices and to recommend measures for reforms, the Government recently constituted⁷³ the Tax Administration Reform Commission (TARC) under the chairmanship of Dr. Parthasarathi Shome, who will work as an advisor to the Ministry of Finance. The work of the TARC is expected to cover a wide range of issues in tax administration, including a review of the existing mechanism of dispute resolution; recommended measures to strengthen the dispute resolution mechanisms; methods to encourage voluntary tax compliance; and recommended measures for deepening and widening of tax base and taxpayer base.⁷⁴

The operative criterion for application of GAAR has been diluted. Amended Section 96 of the Act states that for an arrangement to be classified as an impermissible avoidance arrangement, the “main purpose” of such arrangement should be to obtain tax benefits.⁷⁵

71. *Id.*

72. Expert Committee on GAAR formed to undertake stakeholder consultation to finalize the guidelines for GAAR, constituted under chairmanship of Dr. Parthasarathi Shome. See *Final Report on General Anti Avoidance Rules (GAAR) in Income-tax Act, 1961*, EXPERT COMMITTEE ¶ 1(i) (2012), available at http://finmin.nic.in/reports/report_gaar_itact1961.pdf.

73. See *Tax Administration Reform Commission (TARC)*, PRESS INFO. BUREAU GOV’T OF INDIA (Oct. 21, 2013), http://finmin.nic.in/press_room/2013/TARC21102013.pdf.

74. *Id.*

75. The Income Tax Act, No. 43 of 1961, § 96 INDIA CODE (2013), available at http://www.incometaxindia.gov.in/incometaxindia/incometaxAct_index.jsp. The Income Tax Act, 1961, § 96 provides, “(1) An impermissible avoidance arrangement means an arrangement, the main purpose of which is to obtain a tax benefit, and it—(a) creates rights, or obligations, which are not ordinarily created between persons dealing at arm’s length; (b) results, directly or indirectly, in the misuse, or abuse, of the provisions of this Act; (c) lacks commercial substance or is deemed to lack commercial substance under section 97, in whole or in part; or (d) is entered into, or carried out, by means, or in a manner, which are not ordinarily employed

The GAAR rules⁷⁶—issued by the CBDT—have recently provided some guidelines for its application. The rules have prescribed a fiscal threshold of Indian National Rupees (INR) 30,000,000 (INR Three Crores)⁷⁷ for aggregate tax benefits accruing to all the parties in the arrangement, under which GAAR shall not apply.⁷⁸ Also, the rules regarding income accruing or arising, or deemed to accrue or arise, to any person from transfer of investments made before August 30, 2010, have been grandfathered in. In order to provide certainty and respite to Foreign Institutional Investors (FIIs), the GAAR rules have kept FIIs out of the purview of Chapter X-A (containing GAAR provisions subject to certain conditions, among others, inability to avail of a treaty benefit).⁷⁹ Furthermore, any non-resident person investing directly or indirectly in a FII has also been excluded from the GAAR.

B. TAX RESIDENCY CERTIFICATE (TRC)

It is also imperative to note that the requirement for obtaining a tax residency certificate (TRC) to claim a treaty benefit mandated under Section 90(4) of the Act has now been eased by insertion of Section 90(5),⁸⁰ which clarifies that any other documentation and information as may be prescribed could be provided by the assessee to claim a treaty benefit.

C. LOWER WITHHOLDING OF TAXES FOR FIIs

The FIIs-friendly nature of the Act is also highlighted by incorporation of Section 194LD, which provides for deduction of tax at lower rate of 5 percent for FIIs and Qualified Institutional Investors (QII) on interest income from rupee denominated bonds of an Indian Company or Government Security earned between June 1, 2013, and June 1, 2015.⁸¹

D. TRANSFER PRICING

After April 1, 2013, transfer-pricing provisions under Chapter X of the Act have also been made applicable to Specified Domestic Transactions (SDTs).⁸² The accountant's re-

for bona fide purposes. (2) An arrangement shall be presumed, unless it is proved to the contrary by the assessee, to have been entered into, or carried out, for the main purpose of obtaining a tax benefit, if the main purpose of a step in, or a part of, the arrangement is to obtain a tax benefit, notwithstanding the fact that the main purpose of the whole arrangement is not to obtain a tax benefit.”

76. See generally *Notification No. 75/2013*, DIGEST OF CBDT NOTIFICATIONS & CIRCULARS (Sept. 9, 2013), <http://182.18.132.100:8088/cbdtforprsite/fileopen.aspx?page=cirno&cid=2013092300007520&path=%5Cnotifications%5Ccbdtlaws%5Chtmlfiles%5Cnotification75%E2%80%A6>.

77. INR 3 crores is equivalent to USD \$483,030 based on the approximate present exchange rates (USD \$1 = INR 62). See XE Currency Converter, XI (Mar. 31, 2014), <http://www.xe.com/currencyconverter/convert/?Amount=1&From=USD&To=INR> (INR 3 crores is equivalent to U.S. \$483,030 based on the approximate present exchange rates USD \$1 = INR 62).

78. *Notification No. 75/2013*, *supra* note 76, ¶ 2(a).

79. *Id.* ¶ 2(b).

80. The Income Tax Act, No. 43 of 1961, § 90 INDIA CODE (2013).

81. *Id.* § 194LD.

82. See *Tax Relief for “Specified Associations” in Respect of Income Earned Outside India When Such Income is Earned in a Country Where Double Taxation Avoidance Agreement “Exists Between India & Such Country,”* Ex-

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port detailed in Form 3CEB under Rule 10E has been amended to require additional disclosures on international transactions and also SDTs.⁸³

In an attempt to bring certainty to transfer pricing as well as to reduce transfer-pricing disputes, CBDT released Safe Harbor Rules⁸⁴ under which the department shall accept the price declared by the assessee. Under the now-enacted safe harbor regime, the taxpayers would follow a simple set of rules/margins under which transfer prices as such would be accepted by the Income Tax authorities. The practice of using voluminous documentation—a holdover from the earlier requirements—is still, however, frequently used.

In conclusion, the tax landscape in India has witnessed some unprecedented occurrences in the recent past. Both the tax administration and the policy makers have taken active cognizance of the same developments, though the current macroeconomic situation does not suggest an immediate easing. The tax administration believes that if a fine balancing act were to be adopted, then to a large extent, the woes of the investor community, and in particular those of multinational enterprises, would at least be acknowledged, if not redressed completely. With the upcoming elections in the next year, it is widely believed that because tax is a federal subject, the new central government will certainly have the advantage of assimilating the gaps and shortcomings in the light of the Direct Tax Code, the proposed new tax legislation.

**III. International Arbitration and the Recent Supreme Court Ruling in
*Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc.***

The Arbitration and Conciliation Act, 1996 (Act) contains two distinct parts dealing with arbitration. Part I provides a framework of rules for disputes, both domestic and those with an international element but where the seat of arbitration is in India. Part I confers significant powers on the Indian courts to order interim measures, appoint and replace arbitrators, and hear challenges to arbitral awards. Part II restricts the scope of judicial intervention and deals with recognition of arbitration agreements and arbitral awards rendered in a foreign seat and also incorporates the New York and Geneva Conventions.

Section 9 of Part I empowers Indian courts to grant interim relief to an Indian-seated arbitration. But in *Bhatia International v. Bulk Trading S.A.*,⁸⁵ the Supreme Court held that Indian courts could exercise the powers conferred on them by Part I of the Act even in cases where the seat of the arbitration was outside India, unless Part I was excluded by the parties to the arbitration agreement, either expressly or by necessary implication. The Court reasoned that the parties would be left without any remedy if no interim relief was granted in international commercial arbitrations that take place outside India, even though the properties and assets are situated in India. The ruling in *Bhatia International* considerably extended the scope of potential interference by Indian courts in international

EXPLORE INCOME TAX (2013), <http://www.exploreincometax.com/Indian-Income-tax-Act-1961/Section-90A> (last visited Mar. 30, 2013).

83. *Rules on Taxation of Domestic and International Transactions Amended*, INT'L L. OFF. (Aug. 30, 2013), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=ffb60bb0-075a-4ffa-9bf1-790a02058d0d>.

84. *Indian Tax Administration Issues Final Rules on Transfer Pricing Safe Harbor*, ERNST & YOUNG LLP (Sept. 19, 2013), [http://www.ey.com/Publication/vwLUAssets/TP_Indian_Tax_Admin_issues_final_TP_safe_harbor_rules/\\$FILE/TP_Indian_Tax_Admin_issues_final_TP_safe_harbor_rules.pdf](http://www.ey.com/Publication/vwLUAssets/TP_Indian_Tax_Admin_issues_final_TP_safe_harbor_rules/$FILE/TP_Indian_Tax_Admin_issues_final_TP_safe_harbor_rules.pdf).

85. *Bhatia Int'l v. Bulk Trading S.A. & Another*, (2002) 4 S.C.C. 105, ¶ 25 (India).

arbitrations and also cast a shadow of uncertainty over internationally-seated arbitrations involving Indian parties.

The rationale in *Bhatia International* was also applied in *Venture Global Engineering LLC v. Satyam Computers Services Ltd.*,⁸⁶ wherein the Supreme Court went one step further and stated that whole of Part I would apply in case of international commercial arbitration. It permitted the Indian courts to reopen and set aside awards rendered in arbitrations seated outside India.

The rulings in *Bhatia International* and *Venture Global* were subjected to intense criticism in India as well as abroad for authorizing Indian courts to exercise excessive jurisdiction and for introducing substantial uncertainty in offshore arbitrations involving Indian parties.

It is in this context that the Supreme Court in *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Services Inc. (Kaiser)*⁸⁷ decided to review and overrule its previous decision in *Bhatia International*. On September 6, 2012, a specially constituted five-member bench of the Supreme Court in its landmark decision overturned a decade-old line of precedents that had controversially given the Indian courts disproportionate jurisdiction to intervene in arbitrations seated outside India.

BALCO and Kaiser (the Parties) executed an agreement dated April 22, 1993, under which Kaiser was to supply and install computer-based systems for Shelter Modernization at BALCO's premises. Under the agreement's arbitration clause, any dispute or claim was to be settled amicably by negotiation, failing which, the same would be settled by arbitration pursuant to the English Arbitration Laws and subsequent amendments thereto. Both the Parties had the right to appoint one arbitrator each and the arbitration would be held wholly in London, England. The prevailing law of India governed the Agreement even though the arbitration was to be governed by English law. Accordingly, when a dispute arose between the parties that could not be resolved by negotiation, it was referred to arbitration in England. The arbitral tribunal's decisions were later challenged in India's district court of Bilaspur under Section 34 of the Act. The district court and the High Court of Chhattisgarh rejected the appeals. Therefore, BALCO filed an appeal to the Supreme Court.⁸⁸

The court held that Part I deals with domestic arbitration and Part II deals with international commercial arbitration and there can be no overlap between Part I and Part II of the Act. Part I, therefore, has no application in the case of international commercial arbitrations seated outside India.⁸⁹

The court also held that Section 9 of Part I, which grants the courts inherent powers to grant interim relief in case of arbitration cannot be extended to international commercial arbitrations seated outside India, because Part I applies only to arbitrations seated in India.⁹⁰

Further, the court held that the power to set aside an arbitral award under Section 34 again falls under Part I of the Act and would apply only if the seat of arbitration is in India.

86. *Venture Global Engineering v. Satyam Computer Services Ltd. & Another*, (2008) 4 S.C.C. 190, ¶ 32 (India).

87. *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.*, (2012) 9 S.C.C. 552, ¶ 54 (India).

88. *Id.*

89. *Id.*

90. *Id.*

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The court observed that awards passed in non-convention countries cannot be incorporated into the Act by way of interpretation and could only be done by suitable amendments made to the Act by the Parliament.⁹¹

Under the Supreme Court's ruling, the seat of arbitration would be that provided for in the arbitration agreement. The venue of the arbitration may be elsewhere and may change as per the convenience of the parties but it will have no bearing on the seat of arbitration. It is the seat of arbitration that will decide the applicable law governing the arbitration proceedings. Accordingly, even when the Act is the curial law governing the arbitration but the seat of arbitration is outside India, provisions of Part I of the Act would not be applicable to the extent they are inconsistent with the arbitration law of the seat.⁹²

The judgment has, therefore, clarified several legal anomalies that had tarnished the image of Indian arbitration regime and judicial system. But the law declared in *BALCO* will apply only to arbitration agreements made after September 6, 2012. This timeline has led to more confusion as any arbitration agreement executed before this date will have to follow the rules applied in *Bhatia International* and *Venture Global*, leading to two conflicting sets of jurisprudence.

IV. LGBT Rights and the Naz Foundation Judgment Review: SK Koushal & Anr V Naz Foundation & Ors⁹³

In a landmark judgment, the Indian Supreme Court ruled that the sodomy law in Section 377 of the Indian Penal Code did not violate the Indian Constitution.⁹⁴ The Supreme Court held that the separation of powers shifted the burden of constitutionality of Section 377 to the Parliament.⁹⁵ The Delhi High Court had previously declared, in 2009, that Section 377 violated Articles 21, 14, and 15 of the Constitution of India.⁹⁶

The Naz Foundation argued that Section 377 harmed peoples' lives and impeded public health due to its direct impact on the lives of gay persons, that the section served as a weapon for police abuse, and that the section perpetuated negative and discriminatory beliefs towards same-sex relations and sexual minorities in general.⁹⁷ The sodomy law drives gay men, males having sex with males (MSM), and other sexual minorities underground, a result that cripples HIV/AIDS prevention methods.⁹⁸

Another argument made against Section 377 was that it creates a classification between "natural" (penile-vaginal) and "unnatural" (penile-non-vaginal) penetrative sexual acts.⁹⁹ The legislative objective "of penalising unnatural acts has no rational nexus with the classification between natural (procreative) and unnatural (non-procreative) sexual acts and is

91. *Id.*

92. *Id.*

93. Suresh Kumar Koushal & Another v. Naz Foundation & Others, Civil Appeal No. 10972 of 2013 (arising from S.L.P. (C) No. 15436 of 2009) (Supreme Court of India, Dec. 11, 2013), *available at* <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>.

94. *Id.* ¶ 56; *see also* INDIA CONST. art. 21, *available at* <http://indiankanoon.org/doc/1199182/>.

95. *Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, ¶ 56; *see also* INDIA CONST. art. 13, *available at* <http://indiankanoon.org/doc/134715/>.

96. *Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, ¶ 2.

97. *Id.* ¶ 3(ii).

98. *Id.*

99. *Id.* ¶ 3(iv).

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thus violates Article 14.”¹⁰⁰ “The criminalization of homosexuality condemns, in perpetuity, a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, and cruel and degrading treatment at the hands of the law enforcement machinery.”¹⁰¹ The Delhi High Court borrowed the language of the South African Constitution and held that these individuals are denied “moral full citizenship.”¹⁰² The Supreme Court, however, was not of the same opinion. The Supreme Court reasoned that Section 377 applied irrespective of age and consent.¹⁰³ The Supreme Court denied that Section 377 criminalizes “a particular people or identity or orientation.”¹⁰⁴ The Court concluded that Section 377 “merely identifies certain acts which if committed would constitute an offence.”¹⁰⁵ “Such a prohibition regulates sexual conduct regardless of gender identity and orientation.”¹⁰⁶

The Supreme Court further held that the Naz Foundation failed to furnish the particulars of the incidents of discriminatory attitude exhibited by the state agencies towards sexual minorities and also failed to furnish the particulars of the cases involving harassment and assault from public and public authorities to sexual minorities.¹⁰⁷ The affidavit filed before the court on behalf of the Ministry of Health and Family Welfare, Department of AIDS Control, had averred that estimated HIV prevalence among FSW (female sex workers) is 4.60 to 4.94 percent; among MSM is 6.54 to 7.23 percent; and among IDU (injecting drug users) is 9.42 to 10.30 percent.¹⁰⁸ The total population of MSM in 2006 was estimated to be 2.5 million, and 10 percent of them are at risk of HIV.¹⁰⁹ According to the Court, however, “[t]hese details [were] wholly insufficient for a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by the State or its agencies or the society.”¹¹⁰

In a very narrow approach, the court held “that a miniscule fraction of the country’s population constitute lesbians, gays, bisexuals, or transgenders and in the last 150 years less than 200 persons have been prosecuted (as per the reported orders) for committing offence[s] under Section 377.”¹¹¹ According to the court, “this cannot be made a sound basis for declaring that section ultra vires the provisions of Articles 14, 15, and 21 of the Constitution.”¹¹²

While examining the question of whether a particular classification is unconstitutional, the Court relied upon the test prescribed by the case *In Re: Special Courts Bill*,¹¹³ which provides that, in order to pass the test of equality, two conditions must be fulfilled: “(1) that the classification must be founded on an intelligible differentia which distinguishes

100. *Id.*

101. *Id.*

102. *Id.* ¶ 3(iv).

103. *Id.* ¶ 38.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* ¶ 40.

108. *Id.* ¶ 40.

109. *Id.*

110. *Id.*

111. *Id.* ¶ 43.

112. *Id.*

113. *In re: Special Courts Bill*, . . . v. Unknown, (1979) 1 S.C.C. 380 (India).

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those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.”¹¹⁴ In the Court’s words, “[t]hose who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that Section 377 suffers from the vice of arbitrariness and irrational classification.”¹¹⁵

Advocates argued that Section 377 violates Article 15 of the Constitution by discriminating on the ground of sexual orientation because, although facially neutral, it imposes an unequal burden on gay men.¹¹⁶

Though facially neutral, [Section 377] predominantly outlaws sexual activity between men which is by its very nature penile non vaginal. While heterosexual persons indulge in oral and anal sex, their conduct does not attract scrutiny except when the woman is underage or unwilling. In fact, courts have even excluded married heterosexual couples from the ambit of Section 377.¹¹⁷

The general aim of Article 15 is to prohibit discrimination on the enumerated grounds.¹¹⁸ Article 15(3) uses the expression “women.” But advocates argued that Article 15(3) must not be allowed to limit the understanding of Article 15(1) and reduce it to a binary norm of man and woman only.¹¹⁹ “This becomes clear when Article 15(2) is applied to transgendered persons who identify as a third gender.”¹²⁰ The Delhi High Court had supported its finding of a violation of Article 15 by relying on the foreign judgments, for example *Lawrence v. Texas*¹²¹ and *National Coalition for Gay and Lesbian Equality, Dhirendra Nadan v. State*.¹²²

It was also contended that “[c]ourts in other countries have struck down similar laws that criminalise same-sex sexual conduct on the ground that they violate the right to privacy, dignity, and equality.”¹²³ On the question of whether morality can be a ground for imposing restriction on fundamental rights, the Delhi High Court referred to the judgments in *Lawrence v. Texas*,¹²⁴ *Dudgeon v. United Kingdom*,¹²⁵ *Norris v. Republic of Ireland*,¹²⁶

114. *Id.* at ¶ 7.

115. Suresh Kumar Koushal & Another v. Naz Foundation & Others, Civil Appeal No. 10972 of 2013, ¶ 42 (arising from S.L.P. (C) No. 15436 of 2009) (Supreme Court of India, Dec. 11, 2013), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>.

116. *Id.* ¶ 19.19.

117. *Id.*

118. *Id.* ¶ 19.19

119. *Id.*

120. *Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, ¶ 19.19.

121. *Id.* ¶ 19.18; see also *Lawrence v. Texas*, 539 U.S. 558 (2003).

122. Suresh Kumar Koushal & Another v. Naz Foundation & Others, Civil Appeal No. 10972 of 2013, ¶ 19.18 (arising from S.L.P. (C) No. 15436 of 2009) (Supreme Court of India, Dec. 11, 2013), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>; see also *McCoskar v. The State*, [2005] FJHC (Crim) 500 (Fiji).

123. *Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, ¶ 19.19

124. *Id.* ¶ 10; see also *Lawrence v. Texas*, 539 U.S. 558 (2003).

125. *Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, ¶ 10; see also *Dudgeon v. The United Kingdom*, App. No. 7525/76, [1981] ECHR 5 (1981).

126. *Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, ¶ 10; see also *Case of Norris v. Ireland*, App. No. 10581/83 [1988] ECHR 22 (1988).

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National Coalition for Gay and Lesbian Equality v. Minister of Justice,¹²⁷ and the opinion of Justice Michael Kirby, former Judge of the Australian High Court and observed,

Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interest, it must be “constitutional” morality and not public morality

In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view. In Indian context, the latest report (172nd) of Law Commission on the subject instead shows heightened realization about urgent need to follow global trends on the issue of sexual offences. In fact, the admitted case of Union of India that Section 377 IPC has generally been used in cases of sexual abuse or child abuse, and conversely that it has hardly ever been used in cases of consenting adults, shows that criminalization of adult same-sex conduct does not serve any public interest. The compelling state interest rather demands that public health measures are strengthened by de-criminalization of such activity, so that they can be identified and better focused upon.¹²⁸

But the Supreme Court discarded the rationale of the High Court and declared that the High Court could not apply the judgments of foreign jurisdictions in deciding the constitutionality of a law enacted by the Indian legislature.¹²⁹ The Supreme Court also refused to rely on the provision laid down by Halsbury’s Laws of England, reasoning that statements of law applicable to foreign countries, cited without making a critical examination, are often inapposite in India.¹³⁰

On several occasions, merely because courts in foreign countries have taken a different view than that taken by our courts or in adjudicating on any particular matter we were asked to reconsider those decisions or to consider them for the first time and to adopt them as the law of this country While we should seek light from whatever source we can get, we should however guard against being blinded by it.

The court then dealt with the issue of violation of Article 21 of the Constitution. The requirement of substantive due process has been read into the Indian Constitution through Articles 14, 21, and 19. “[A] provision which purports to restrict or limit the right to life and liberty, including the rights of privacy, dignity, and autonomy, as envisaged under Article 21” will be tested to ensure that it is not only “competently legislated but also be just, fair and reasonable.”¹³¹ The court relied on *Maneka Gandhi v. Union of*

127. *Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, ¶ 10; see also *National Coalition for Gay and Lesbian Equality and others v. Minister of Justice and others* 1999 (1) SA 6 (CC) (S. Afr.).

128. *Suresh Kumar Koushal & Another v. Naz Foundation & Others*, Civil Appeal No. 10972 of 2013, ¶ 10 (arising from S.L.P. (C) No. 15436 of 2009) (Supreme Court of India, Dec. 11, 2013), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>; see also *McCoskar v. The State*, [2005] FJHC (Crim) 500 (Fiji).

129. *Id.* ¶ 52.

130. *Id.* ¶ 53.

131. *Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, ¶ 45.

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*India*¹³² for the same. But the court held that even though Section 377 has been used to perpetrate harassment, blackmail, and torture on certain persons, especially those belonging to the LGBT community, this treatment is neither mandated by the section nor condoned by it. The court reasoned that the mere fact that police authorities and others misuse the law is not a reflection of its legality.¹³³ The police misuse of Section 377 may, however, be a relevant factor for the Legislature to consider while judging the desirability of amending it.

Section 377 does not take into account the differences in individuals in terms of their sexual orientation and makes criminal the sexual practices relevant to, and associated with, a class of homosexual persons. It criminalizes acts that are normal sexual expressions for gay men. Distinctions based on a prohibited ground cannot be allowed regardless of how laudable the object is. If a law operates to discriminate against some persons only on the basis of a prohibited ground, it must be struck down.

132. *Id.*; see also *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).

133. *Suresh Kumar Koushal*, Civil Appeal No. 10972 of 2013, ¶ 51; see also *Sharma v. Union of India*, (2005) 6 S.C.C. 281 (India).