



Law enforcement

The ease of evading inconvenient court orders, laws and regulations threatens to undermine India's economic growth. The time for reform is ripe

Ben Frumin reports

Vikram Nankani's client had what seemed to be a straightforward deal – to sell another company a significant amount of material used in the steel and cement industry. When the buyer backed out for what Nankani's client believed was a bogus reason, the parties found themselves in arbitration.

Nankani, a partner at Economic Laws Practice in Mumbai, thought he had “a very simple, straightforward case of breach of contract”. The three-member arbitration tribunal seemed to agree, awarding his client around US\$1 million.

Then came the hard part: enforcement. The buyer appealed and a district judge threw out the award over an alleged procedural miscue, saying Nankani's side had dropped two witnesses after filing affidavits. “Groundless, preposterous,” Nankani responds, calling the decision “totally alien and foreign to the award or the merits” of the case.

The issue has yet to be resolved. While the arbitration was completed in just 10 months, the matter has since spent five years languishing in the courts. “It's really frustrating,” Nankani laments. “And there's nothing that can be done.”

Nankani's story illustrates an ongoing trend that is both troubling and frustrating for many lawyers: lax and

inconsistent enforcement of laws, judgments, regulations and awards. No matter the sector – intellectual property rights, financial regulation, arbitral awards, taxation – the refrain is the same: India's enforcement regime needs urgent reform.

“India has a plethora of laws covering almost every sector,” says Anindita Roy Chowdhury, an associate at LexCounsel. “But unfortunately, it is the enforcement of these laws that is severely lacking and rather challenging.”

That means trouble for clients who “find uncertainty more frustrating than a rigid set of rules – or no rules at all,” says Eliab Erulkar, a partner at Baker & McKenzie in New York.

“Very often you'll get a judgment for payment of a sum of money,” says Clifford Chance partner Martin Rogers. “But if the defendant doesn't pay up, what do you do?”

The paucity of options is a major problem for India. “Unless there is a change in the mindset and attitude, the lack of proper enforcement may be a stumbling block for India's economic success and growth,” says Vijaya Sampath, group general counsel and company secretary at Bharti Enterprises.

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Partner
Clifford Chance



Systemic problems

Enforcement is a particular problem in criminal proceedings and contracts, says Trilegal partner Anand Prasad. Rogers adds that enforcing an international decision is a “nightmare”.

Enforcing intellectual property rights (IPR) can also be a headache. “Weak intellectual property enforcement is a major barrier to increased trade,” says Ajit Warriar, a partner at Luthra & Luthra. “This is unfortunately the case with IPR enforcement in most developing countries, including India.”

One of the major problems in enforcing patent rights, Warriar says, “is the acute lack of awareness of patent basics in the judiciary and even the legal fraternity. Moreover, there is no criminal remedy available for the infringement of patents. This often leads to insufficient remedy in the infringement suits.”

For the most part, India’s laws and regulations are satisfactory. It’s enforcement that’s the problem. Many of the country’s worst enforcement problems stem from massive backlogs in the courts and antiquated administrative procedures that are easily exploited by those seeking to derail the enforcement process.

“There are certainly ways of slowing down dramatically, if not stopping, the process of enforcement of judgments,” Rogers says. “Anecdotally, one hears that it is very typically through payment of some form of small fee, which is obviously a corrupt payment, for that file and the execution of that order to be held up.

“You do hear that files get ‘lost’,” Rogers notes ruefully.

Corruption and inefficiency

“Rampant corruption is another area affecting Indian governance like cancer,” says Roy Chowdhury. “It has unfortunately spread deep in the Indian system and is one of the single largest causes of non-enforcement of rules and regulation. From illegal construction in breach of the by-laws to violation of traffic laws to more serious offences, things can be ‘sorted out’ with the help of police and law enforcing agencies.”

However, there are also plenty of enforcement issues that can be traced to more innocent causes, such as simple inefficiencies. Rogers points to “an antique court

administration groaning under the weight of literally millions of pieces of litigation”, a system that’s well illustrated by a typical day at the Supreme Court.

“It’s quite a scene,” he says. “The judges are sitting there deciding whether, essentially, to give leave for appeals to be heard by the Supreme Court. The judges are perched up high on their seats, an army of clerks below them, and the barristers are in what’s almost a holding pen.”

When it’s their turn, the barristers are each given roughly 30 seconds to argue their case. A clerk will pass the judges a file. And then “they will literally throw the file forward and off from their height,” Rogers says. “And they just land in a pile on the floor in front of them. It really is quite Dickensian.”

Rogers says this system “is not indicative of the quality of the judiciary or the lawyers involved, which is generally quite high”. However, with antiquated administrative procedures such as this, even excellent lawyers and judges may struggle to make sure Indian laws and judgments are speedily and properly enforced.

“Some investment needs to be made in the administrative processes, just file handling, literally,” Rogers says. “One would have thought that India of all places, with its proud achievements in technology development, might be able to get a handle on that. But it’s a major problem, with the millions of court cases that are rattling their way through the courts.”

The high costs of failure

These conditions force lawyers working on India-related deals to invest great time and care in ensuring that the awards, agreements or stipulations in a deal can be effectively enforced. As a result, “deals are more complicated than they need to be”, Rogers says, “and sometimes they don’t happen”.

Clients looking to invest in India often want to negotiate a security package involving the Indian entity’s assets offshore – a high-quality, accessible source of security. However, as Rogers points out, “a lot of Indian businesses which are worthy of investment don’t have the scale or the structure to provide investors with that offshore security”. In such cases, deals potentially worth tens of millions of dollars simply don’t happen,

The lack of proper enforcement may be a stumbling block for India’s economic success and growth

Vijaya Sampath
Group General Counsel
Bharti Enterprises



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Ravi Singhania
Managing Partner
Singhania & Partners



due to the wariness of private equity fund investors about India's lax enforcement regime.

Even deals that do happen are made more expensive because of the possibility of costly enforcement issues. "The outcome of not reforming India's enforcement regime is that the cost of doing business significantly increases to accommodate additional costs associated with prolonged adjudication processes," explains Ravi Singhania, managing partner of Singhania & Partners.

Glenn Gerstell, head of the India practice at Milbank, says his international clients "are often eager to do business in India, but they are also quick to point out shortcomings in the legal and regulatory landscape that have the effect of curtailing the amount of the investment". They've grown accustomed to putting up with restrictions on foreign ownership and licensing requirements, but the "pervasiveness of central and state bureaucracies can all operate as brakes on foreign investment", Gerstell notes. Even more difficult and frustrating, he says, are restrictions on "the practical ability of foreign investors to obtain judicial resolution of disputes in India in a commercially reasonable timeframe".

"At first glance it might appear that this state of affairs benefits Indian companies at the expense of foreign

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Tahir Sarkar
Partner
Cleary Gottlieb Steen
& Hamilton



entities," Gerstell notes. "But on a more profound level, this actually harms India too since it causes some investors to put arbitrary limits on the amount they are willing to put into India or it causes some banks to charge Indian borrowers a higher interest rate for overseas loans due to the perceived increased regulatory and enforcement risk, or in some cases keeps some more conservative investors out of the Indian market entirely."

Cleary Gottlieb Steen & Hamilton partner Tahir Sarkar agrees, saying "If India does not address its enforcement regime, businesses in India will suffer – and in turn their employees, investors and suppliers – as foreign investors will be wary of investing in India."

Strategic improvements

In the view of Sanjeev Kapoor, a partner at Khaitan & Co, a number of judicial and legal bottlenecks must be removed for India's enforcement regime to be improved. In addition to electronic filing systems, India's courts need more judges, higher filing costs (to discourage

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Juris Corp



frivolous litigation), improved tracking of cases, more alternative options for dispute resolution, pre-litigation measures and plea bargaining.

And not least, "everybody needs to be confident that the element of corruption has been dealt with", says Rogers. A will to reform is vital.

Nankani suggests that specialized courts should be set up to replace civil courts in the appeals process. Judges and courts who are trained in specific areas of the law would be better equipped to consistently enforce laws and judgments in a relatively small area than courts which are forced to deal with widely disparate areas of law. Setting up such courts ought to be a joint effort of the government and the bar, Nankani believes.

Prasad says enforcement could be improved by better training for the police and judiciary; placing a limit on the number of adjournments and injunctions granted; and imposing higher costs on parties that lose commercial disputes. It's not easy for Indian law firms to enact that change though, Prasad says, because "their political leverage with the government is limited".

Lawyers in the dock

Sonali Sharma, a partner at Mumbai-based Juris Corp, has a different point of view about the source of inefficiencies: “While the courts are normally blamed for this, lawyers need to be equally blamed, if not more.”

Sampath agrees. Lawyers “are to a large extent responsible for the lax enforcement regime”, she says. “There needs to be consensus among the executive, judiciary and legislative arms to enforce laws more effectively and lawyers can play a pro active and positive role to make this happen,” Sampath says.

While Indian law firms have succeeded in raising the standards and awareness of corporate law in India, in Sampath’s view they have “failed in improving the quality of litigation and continue with some very archaic practices in this field.

“While acknowledging that change is required, [they] have done little to foster this change,” she says.

Sometimes lawyers not only fail to fix an ailing system but nurture and exploit it.

“Indian law firms have, by and large, become adept

at overcoming and even leveraging the shortfalls in the system,” says Anuj Puri, chairman and country head of Jones Lang LeSalle Meghraj. “They have done little by way of petitioning for the rectification of major inconsistencies.”

Some believe that lobbying for systemic improvements is an issue for independent lawyers rather than law firms. “Looking at the contribution of Indian law firms, specifically vis-à-vis enforcement of laws, regulations and judgments, the fact which is to be noted is that their involvement and contribution in the entire setup is minuscule,” Kapoor says. “Most of the actual litigation in the court, especially at the lower levels, is handled by independent lawyers as opposed to law firms.”

Regardless of who’s to blame, some, like Subrata Bhattacharjee, a partner at Canada’s Heenan Blaikie, believe legal and business leaders must try harder. “The Indian business community must play a strong role in communicating with the government of India, or state governments, about the impact of regulatory schemes upon commerce,” he says.

The chance of a lifetime

Manmohan Singh’s decisive election victory gives his Congress-led coalition a unique opportunity to tackle enforcement failures head on

Many lawyers believe the time is ripe for the Indian government to take the lead in reforming the country’s enforcement regime – especially given its decisive general election victory and the opportunities presented by the reshaping of the global economy.

“The government needs to implement administrative, judicial and labour reforms on an urgent basis and needs to take steps to further liberalize the Indian economy,” says Anand Prasad, a partner at Trilegal. “The clear mandate secured by the government makes it easier to provide special focus on implementation issues.”

“A decisive mandate for the incumbent government in the 2009 general election may lead to more reforms in the legal sector as well as in the judiciary,” agrees Sanjeev Kapoor, a partner at Khaitan & Co.

Others take heart from comparing India’s current position to where it was decades ago. “There has been unbelievable progress in many sectors and in its own unique way India has met its challenges. The trick is to allow India and Indians to do it at their own pace – slow enforcement should not be misinterpreted as lax or no enforcement,” observes Shabbir S Wakhariya, a partner at Kelley Drye & Warren. “The world may move faster than India – but the past two years have shown that India is steadier than the rest of the world.”

Wakhariya continues “The recent election results have presented India with a unique opportunity to accelerate reforms, enforcement of laws and regulations and growth. I am sure it will do it.”

Others aren’t quite so optimistic. Is there an opportunity for government action on enforcement on the horizon? “Highly unlikely,” says Sonali Sharma, a partner at Juris Corp.

“It’s not at the top of the list of things to do,” Clifford Chance partner Martin Rogers adds, “but it’s in the list, and there is a reasonable prospect that a government with a solid majority is going to push it through.”

That seems to be the general belief, cautious though it may be. Change, it’s hoped, is coming.

“There is a great opportunity for action toward better enforcement, and in establishing the credibility of the legal system, much can be done,” says Vijaya Sampath, group general counsel and company secretary for Bharti. “It is early days yet, but there is hope that the future will bring with it modern practices, thinking and action in tune with global trends.

“India is taking huge strides to ensure that it emerges from its ‘emerging economy’ status to take its rightful place as a superpower, but for this a cleaner, efficient and faster legal system is critical for success,” Sampath adds.

Anindita Roy Chowdhury of LexCounsel points to the Indian government’s 2009-2010 budget as a sign of things to come, saying that Rs4.3 billion will be spent to modernize police machinery, along with a proposed law forcing judges to disclose their personal wealth. “Even though these are small measures,” she says, “they may go a long way in creating robust law-enforcement bodies.”

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Associate
LexCounsel



Exaggerated impact?

While observers discuss the changes that are needed, some are keen to stress that the problem isn't always as bad as many foreign investors are made to believe.

"There is a lack of uniformity in the enforcement of laws in India, but it is incorrect to state that they are rarely enforced," says Sampath. "Litigation may take more time for resolution than in some parts of the world, but it is possible, for example, to enforce contracts, take up issues against the government and win orders from courts and arbitrators."

Anand Prasad, a partner at Trilegal, notes that enforcement is robust in foreign investment regulation, tax and intellectual property protection.

Shabbir S Wakhariya, a partner at Kelley Drye & Warren and at its Indian affiliate, Wakhariya & Wakhariya, cautions that it is inappropriate to "apply a western standard of enforcement to India and therefore wrongly conclude that enforcement of India's laws is lax". His view is that many factors explain the nature of India's enforcement regime: "It is undoubtedly slow, but that delay needs to be considered in light of the historical circumstances, the local culture and beliefs which engender a 'fatalistic' attitude to life, the fact that the population is more than one billion and therefore any development activity or enforcement is always a challenge, and the fact that our judiciary is overworked, understaffed and underpaid and do not have the technological resources to speed up enforcement."

Sensible precautions

While opinions over the scale of the problem may be divided, there's no doubt that domestic and international companies should implement careful precautions to safeguard their interests.

As Sarkar explains: "In the absence of a predictable enforcement environment, corporates rely on arbitration to ensure that their rights are enforced. Alternatively, parties can contractually agree that their relationship will be governed by the law of another country."

However, the difficulty of enforcing foreign laws and awards can be particularly acute. As Reed Smith partner Gautam Bhattacharyya says, "There remains a perception amongst foreign corporates that there will be difficulties in

the enforcement of arbitral awards in India, and given India's immense global commercial significance it is a perception that it would be helpful to banish."

So what else can corporations do? "Adopt anti-corruption policies such as refusing to give undue favours or bribes to government officials to get their work done, and take steps to report any unethical practice to the law enforcement agencies," is Roy Chowdhury's advice. She says companies should also continue "regular lobbying" of the government to push for "reforms in primitive laws and policies".

Wakhariya believes more corporations need to divorce family ownership from management. "If all or the majority of Indian companies had professional management, then businesses would have the ability to take a more dispassionate view of their contractual rights and remedies," he says.

It is also important for major Indian corporations to start valuing their in-house lawyers more highly, Wakhariya notes, "Even today, a majority of Indian corporates treat their in-house lawyer as a glorified litigation manager and not a true general counsel to guide management on corporate risk.

"In my view, if we make this one change, we will see immediate results in the quick enforcement of rights." ■



THE COST OF FAILURE: Lax enforcement of laws is driving up the cost of doing business in India.