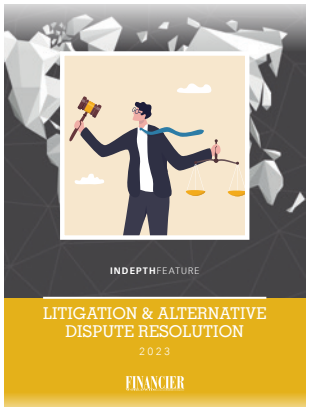

Shardul Amarchand Mangaldas

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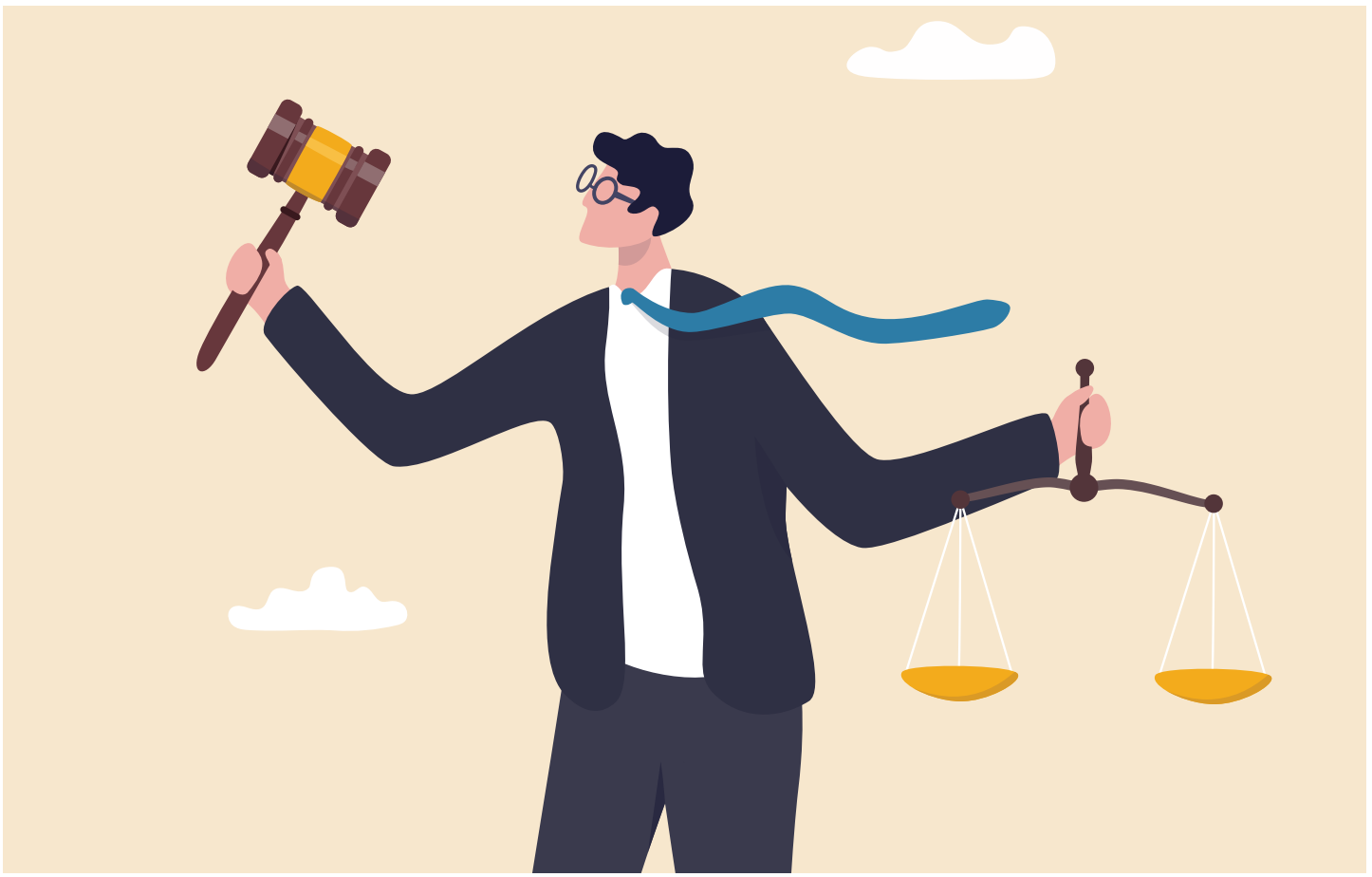
LITIGATION & ALTERNATIVE DISPUTE RESOLUTION

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in litigation and alternative dispute resolution.



INDIA

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Respondents

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Binsy Susan is a partner in the firm's dispute resolution and arbitration practice group. She has over 18 years of experience in handling corporate and commercial litigation and arbitration. She is a well-known name in the arbitration field and routinely handles both foreign seated as well as domestic arbitration matters. Her experience spans various sectors including construction, information technology, telecommunications, oil & gas, and infrastructure. She has represented clients in arbitrations administered under the auspices of several international arbitration institutions. She also routinely advises and represents IT companies and intermediaries in cutting-edge matters concerning data privacy, cyber security and intermediary liability.

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Q. Over the last 12-18 months, what key trends have you seen in commercial disputes in India? Do any particular industries or sectors seem to be playing host to a significant number of disputes?

A. In our experience, infrastructure projects and the construction space have given rise to a significant number of disputes in the last 12-18 months. With the onset of the coronavirus (COVID-19) pandemic, and related delays to project completion, cost overruns and financing costs, courts were flooded with commercial disputes involving the application of force majeure clauses, invocation of bank guarantees, termination of contracts, imposition of liquidated damages, and so on. We have also seen an increase in shareholder disputes, including post-M&A disputes relating to mismanagement, indemnity claims and the preservation of shareholder value.

Q. What is your advice to companies on implementing an effective dispute resolution strategy to deal with conflict, taking in the pros and cons of mediation, arbitration, litigation and other methods?

A. First, it is important that parties clearly agree and stipulate the terms of the dispute resolution or arbitration clause in the contract, including the seat of arbitration and governing law. In order to avoid ambiguity, the clause should be worded in simple language and be as clear as possible. Parties may also choose to adopt model clauses from institutional arbitration rules. If the parties intend to use a multi-tiered dispute resolution mechanism, such as mediation or amicable discussions followed by arbitration, the clause should precisely set out the procedure, in addition to the timelines for each step. The choice between litigation and other alternative procedures, such as arbitration and mediation, depends on many factors, such as the subject matter of the contract, the stakes involved and the parties' convenience, among others. In most commercial contracts, institutional arbitration is likely to be more time and cost efficient, compared to litigation. Mediation can also be effective, where the parties are inclined to reach a settlement. There is also a mandatory requirement for pre-institution mediation in all commercial civil suits.

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Q. What kinds of situations or circumstances might lead companies to pursue litigation instead of arbitration?

A. While arbitration is a more efficient dispute resolution mechanism for commercial disputes, there may be certain situations in which litigation is preferable, such as for disputes which may be considered non-arbitrable, like certain intellectual property (IP) disputes, landlord-tenant disputes, disputes relating to rights and liabilities arising out of criminal offences, and so on. This may also apply to disputes where it may be strategically advantageous to initiate proceedings before a specialised tribunal, or where there is statutory recognition for dispute resolution of specific subject matters, such as consumer forums or telecommunications dispute tribunals. It may also be the case for disputes where claims or interim relief is required to be sought from third parties that are not signatories to an arbitration agreement.

Q. How important are external advisers to help companies navigate their way through a commercial conflict?

A. External advisers play an important role in providing an independent analysis of the claim and guiding the overall strategy of the dispute. Apart from seeking advice from external legal consultants, parties may also approach an independent technical, delay or quantum expert. The involvement of external non-legal consultants helps clients to make accurate and legally sustainable claims at the start of the litigation. Evaluating potential risks and undertaking a fair analysis of the strength of the claims, from a neutral perspective, also helps parties mitigate financial exposure and other risks.

Q. In your experience, what steps should companies take at the outset of a commercial agreement to manage disputes that may arise in the future? Is enough attention paid to dispute resolution clauses in commercial agreements, for example?

A. Apart from carefully reviewing the dispute resolution clause and governing law provisions, parties must also pay attention to other important commercial terms, such as liquidated damages, indemnity, termination, price escalation

and time extensions. Disputes often arise due to ambiguity in commercial contracts, which may be eliminated by prudent drafting, keeping in mind the commercial purpose of the contract.

Q. To what extent can companies avoid disputes by being more diligent in their dealings with business partners?

A. To the extent possible, correspondence, including emails, letters or notices exchanged with business partners, must undergo an internal review to keep an open line of communication and consistency. Oral discussions must be documented by preparing internal notes, emails or minutes. In large construction contracts, it may be useful to appoint specific contract managers who may effectively respond to letters exchanged throughout the duration of the contract. In the event there is an indication of a future dispute, relevant correspondence must be reviewed or vetted by the in-house legal team or external lawyers at an early stage.

Q. What is the outlook for commercial disputes in India? What issues and

India is making positive strides in strengthening its dispute resolution landscape and constantly revisiting its legislation to make the country an investor-friendly jurisdiction.

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challenges do you expect to see in the months ahead?

A. The outlook for the resolution of commercial disputes in India is progressive, forward looking and business friendly. India is making positive strides in strengthening its dispute resolution landscape and constantly revisiting its legislation to make the country an investor-friendly jurisdiction. Some of the positive developments include the establishment of specialised commercial courts, restricting the scope of the court's discretion in specific relief, restricting the scope of the court's intervention and judicial review in arbitral proceedings, stricter timelines for completion of arbitration proceedings, greater certainty of enforcement, deposit of the decretal amount, and the establishment of world class arbitration institutions. However, despite strides toward making India a global economy and streamlining its dispute resolution mechanisms, the large backlog of cases in local courts continues to put a strain on the country's judicial system. ❑

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SHARDUL AMARCHAND MANGALDAS & CO, founded on a century of legal achievement, is one of India's leading full service law firms. It is one of India's most recognised firms, and is known globally for its integrated approach. The firm's 775 lawyers, including 157 partners, provide exceptional services across practice areas which include general corporate, mergers & acquisitions, private equity, banking & finance, insolvency & bankruptcy, competition law, dispute resolution, projects & project finance, capital markets, tax, intellectual property and venture capital. The firm has offices in seven cities across India – New Delhi, Mumbai, Gurugram, Bengaluru, Chennai, Ahmedabad and Kolkata.

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