



ICLG

The International Comparative Legal Guide to: **Business Crime 2018**

8th Edition

A practical cross-border insight into business crime

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General Chapters:

1	The Next Big Thing: ICOs and Cryptocurrencies – Is There a Coming Wave of Enforcement Activity? – Ryan D. Junck & Stuart D. Levi, Skadden, Arps, Slate, Meagher & Flom LLP	1
2	Extraterritorial Regulatory and Criminal Enforcement – Barry A. Bohrer & Adam S. Hoffinger, Schulte Roth & Zabel LLP	5
3	The Use of Foreign Compelled Testimony in Cross-Border Investigations – The Impact of the Second Circuit’s <i>Allen</i> Decision – Sean Hecker & Karolos Seeger, Debevoise & Plimpton LLP	9

Country Question and Answer Chapters:

4	Australia	Clayton Utz: Tobin Meagher & Greg Williams	17
5	Belgium	Linklaters LLP: Stefaan Loosveld & Gert-Jan Hendrix	26
6	Bermuda	MJM Limited: Jennifer Haworth	34
7	Brazil	Vilardi Advogados Associados: Celso Sanchez Vilardi & Luciano Quintanilha de Almeida	42
8	British Virgin Islands	Maples and Calder: Arabella di Iorio & David Welford	50
9	Cayman Islands	Maples and Calder: Martin Livingston & Adam Huckle	58
10	Czech Republic	Gürlich & Co.: Richard Gürlich & Kamila Janoušková	68
11	England & Wales	BCL Solicitors LLP: Shaul Brazil & Anoushka Warlow	75
12	France	Bonifassi Avocats: Stéphane Bonifassi	84
13	Germany	stetter Rechtsanwälte: Dr. Sabine Stetter & Stephanie Kamp	95
14	Greece	Anagnostopoulos Criminal Law & Litigation: Ilias G. Anagnostopoulos & Jerina (Gerasimoula) Zapanti	105
15	Hong Kong	Haldanes: Felix Ng & Emily Cheung	114
16	India	Kachwaha and Partners: Ashok Sagar & Sumeet Kachwaha	124
17	Ireland	Matheson: Carina Lawlor	135
18	Italy	Studio Legale Pisano: Roberto Pisano	147
19	Japan	Nishimura & Asahi: Yoshinori Ono & Norimitsu Yamamoto	158
20	Jersey	Baker & Partners: Stephen Baker & William Redgrave	171
21	Liechtenstein	Lampert & Partner Attorneys at Law Ltd.: Siegbert Lampert	179
22	Netherlands	Van Oosten Advocaten: S.G.C. (Sanne) Bocxe & B.E.J. (Dinya) Torny	187
23	Pakistan	Josh and Mak International: Aemen Zulfikar Maluka & Pir Abdul Wahid	195
24	Poland	Sołtysiński Kawecki & Szlęzak: Tomasz Konopka	201
25	Portugal	Rogério Alves & Associados, Sociedade de Advogados, RL: Rogério Alves	211
26	Romania	USCOV Attorneys at Law: Adrian Uscov & Silvia Uscov	222
27	Russia	Ivanyan & Partners: Vasily Torkanovskiy	230
28	Serbia	Hrle Attorneys: Vladimir Hrle	242
29	Singapore	Allen & Gledhill LLP: Jason Chan Tai-Hui & Evangeline Oh JiaLing	249
30	Spain	De Pedraza Abogados, S.L.P.: Mar de Pedraza & Paula Martínez-Barros	256
31	Switzerland	Homburger: Flavio Romero & Roman Richers	272
32	Taiwan	Brain Trust International Law Firm: Hung Ou Yang & Hung-Wen Chiu	283
33	Turkey	Moroglu Arseven: Orçun Çetinkaya & Burak Baydar	291
34	Ukraine	BOGATYR & PARTNERS: Volodymyr Bogatyr	300
35	USA	Skadden, Arps, Slate, Meagher & Flom LLP: Ryan D. Junck & Gary DiBianco	307

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India



Ashok Sagar



Sumeet Kachwaha

Kachwaha and Partners

1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

India has a quasi-federal political structure comprising 29 states and seven centrally administered Union Territories. It has a democratically elected Union Government (also called the Central Government) and each state has its own democratically elected state Government. ‘The Police’ are a state subject, and therefore the establishment and maintenance of a police force are both in the hands of the state Governments. Each state has a police force. Investigations are normally handled by the police force of the state where the crime has been committed.

However, there is a unified (all India) legislation under the Indian Penal Code, 1860 (IPC) and the Code of Criminal Procedure, 1973 (CrPC) for substantive and procedural laws relating to crime.

The Central Government has established a central investigative agency called the ‘Central Bureau of Investigation’ (CBI). The CBI has its own prosecution wing called the Directorate of Prosecution.

The CBI normally investigates and prosecutes cases of serious fraud or cheating which may have ramifications in more than one state. It is also involved in serious crimes where it is necessary to procure the services of an agency independent of local political influence.

Where needed, the CBI can be assisted by specialised wings of the Central Government, especially in economic or cross-border crimes including the Serious Fraud Investigation Office, which is a multidisciplinary organisation under the Ministry of Corporate Affairs consisting of experts in the field of accountancy, forensic auditing, law, information technology, investigation, company law, capital market and taxation for detecting white-collar crimes/fraud.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

The CBI will not investigate a crime in a state without the prior consent of that state. The Supreme Court or the High Court can, however, direct the CBI to investigate the crime without the consent of the state (or the Centre).

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

The Government of India, under the Department of Revenue, has set up various agencies to enforce the law and combat crime. Some of the significant ones are:

1. The Central Economic Intelligence Bureau (for various economic offences, and the implementation of COFEPOSA).
2. The Directorate of Enforcement (for foreign exchange and money laundering offences, and implementation of FEMA and PMLA).
3. The Central Bureau of Narcotics (for drug-related offences).
4. The Directorate General of Anti-Evasion (for central excise-related offences).
5. The Directorate General of Revenue Intelligence (for customs, excise and service tax-related offences).
6. The Securities and Exchange Board of India (established on April 12, 1992 in accordance with the provisions of the Securities and Exchange Board of India Act, 1992) to protect the interests of investors in securities and to promote their development, and to regulate the securities market and for matters connected therewith.
7. The Directorate General of Income Tax (Investigation).
8. The Financial Intelligence Unit, India (for the collection of financial intelligence to combat money laundering and related crimes).
9. The Directorate General of Foreign Trade under the Ministry of Commerce and Industry (to monitor and curb illegal foreign trade).

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

The specialised and exclusive criminal courts constituted in each state are:

- (i) courts of Judicial Magistrates, second class;
- (ii) courts of Judicial Magistrates, first class (in metropolitan areas, these are called courts of Metropolitan Magistrates); and
- (iii) courts of Session.

Each state is divided into administrative divisions called Districts. Each District consists of a court of Sessions and courts of Judicial Magistrates. In metropolitan areas, Judicial Magistrates are called Metropolitan Magistrates.

Special courts are set up to deal with cases investigated by the CBI.

2.2 Is there a right to a jury in business crime trials?

No, there are no jury trials in India.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Securities fraud

The Securities and Exchange Board of India Act, 1992 (SEBI Act) and Rules framed thereunder deal with, *inter alia*: buying, selling or dealing in securities in a fraudulent manner; using or employing any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the Rules in connection with the issue, purchase or sale of security listed or proposed to be listed on a recognised stock exchange; and engaging in any act, practice or course of business which operates or would operate as fraud or deceit in connection with any dealing in, or issue of, securities which are listed or proposed to be listed on a recognised stock exchange. Fraud includes any act, expression, omission or concealment committed, whether in a deceitful manner or not by a person with his connivance or by an agent to deal in securities (whether or not there is any wrongful gain or avoidance of any loss), and also includes a knowing misrepresentation of the truth or concealment of material fact.

Under the SEBI Act, the Board set up thereunder has the power to prohibit fraudulent or unfair trade practices relating to securities markets. Penalties include a fine for failure to furnish information, failure by any intermediary to enter into any agreement with clients, failure to redress investors' grievances, etc.

o Accounting fraud

Accounting fraud includes forgery, falsification of accounts, professional misconduct including failure to disclose a material fact which is not disclosed in a financial statement, and failure to report a material misstatement which is to appear in a financial statement. Under the Companies Act, 1956, the Central Government is empowered to inspect the books of accounts of a company, direct special audits, order investigations and launch prosecutions. The Indian Penal Code sets out the punishment for forgery and falsification of accounts.

o Insider trading

The SEBI Act prohibits insider trading. No 'insider' shall (directly or indirectly) deal in securities of a listed company when in possession of unpublished price-sensitive information. Also, an insider cannot communicate, counsel or procure unpublished price-sensitive information to any person. Prosecutions are launched by SEBI to prohibit insider trading in securities. The penalty can be approximately USD 5 million or three times the amount of profits made out of insider trading, whichever is higher. In furtherance of its stance against insider trading, SEBI also notified the Prohibition of Insider Trading Regulations, 2015, through which it seeks to effectively curb malpractice in the securities market and

provide a level environment for investors. With the introduction of the Regulations, the scope of who is an 'insider' or a 'connected person' is significantly widened. Therefore, any person, whether or not related to the company, may come within the purview of the Regulations if he is expected to have access to, or possess, unpublished price-sensitive information. The new Regulations specifically define trading and prescribe a more structured disclosure regime. The Regulations prescribe for initial and continuous disclosures to be made by certain categories of persons in a company whose securities are listed on a stock exchange, along with public disclosure requirements for the company. Further, the Board of every listed company is required to formulate and publish a code of practices and procedures to be followed regarding disclosure of unpublished price-sensitive information.

o Embezzlement

Embezzlement under the IPC includes criminal breach of trust and dishonest misappropriation of property. The person entrusted with such property should have either dishonestly misappropriated or converted to his own use the property concerned, or have used and disposed of that property in violation of law. The offence carries imprisonment for a term which may extend to two years or a fine, or both.

o Bribery of government officials

The law dealing with the bribery of Government officials is contained in the Prevention of Corruption Act, 1988. The following offences by public servants/other persons attract a penalty under the Act:

- (i) Taking gratification other than legal remuneration in respect of an official act.
- (ii) Taking gratification by corrupt or illegal means to influence a public servant.
- (iii) Taking gratification for the exercise of personal influence with a public servant.
- (iv) A public servant obtaining valuable things without consideration from the person concerned in proceedings, or business transacted by such public servant.

The Act also provides for punishment for abetment by a public servant, whether or not the offence has been committed. For all the above offences, the acceptance, or agreement to accept or attempt to obtain such gratification, is enough to constitute an offence. Further, a public servant may also be charged for criminal misconduct, wherein the public servant abuses his position to gain a pecuniary advantage for himself or any other.

Other acts, such as the Indian Penal Code, the Benami Transactions (Prohibition) Act and the Prevention of Money Laundering Act, are also used for penalising acts such as the bribery of Government officials.

o Criminal anti-competition

The Indian anti-competition laws do not envisage any criminal prosecution (see below).

o Cartels and other competition offences

Under Indian law, remedies for cartel and other competition offences are civil in nature, i.e. in the form of a cease and desist order or penalty, or both. However, wilful disobedience of these orders or failure to pay the penalty may result in imprisonment for a term which may extend to three years, or a fine which may extend to Rupees 250m. The Magistrate has the power to take cognisance of the offence, provided that it is on the basis of a complaint filed by the Competition Commission or a person authorised by it.

o Tax crimes

Under the Income Tax Act, 1961, the Customs Act, 1962, the Central Sales Tax Act, 1956 & VAT, and the Central Excise Act, 1944,

various tax crimes (such as tax evasion, smuggling, customs duty evasion, valued added tax evasion, and tax fraud) are prosecuted. It should be a deliberate act by a person and not an act of negligence, viz. a “deliberate act or omission prohibited by law”.

o Government-contracting fraud

See “Bribery of government officials” above.

o Environmental crimes

The significant statutes dealing with the subject are: (i) the Water (Prevention and Control of Pollution) Act, 1974; (ii) the Air (Prevention and Control of Pollution) Act, 1981; and (iii) the Environment (Protection) Act, 1986.

The Water (Prevention and Control of Pollution) Act, 1974

The Act seeks to promote cleanliness of water bodies. It functions through various Pollution Control Boards (at the Centre and state level) which lay down standards for treatment of sewage and trade effluents. Any person who knowingly causes or permits any poisonous, noxious or polluting matter into any stream, well, sewer, land or otherwise contravenes the provisions of the Act, and is liable to imprisonment for a term which shall be no fewer than 18 months, but which may extend to six years and a fine. A subsequent contravention shall render the person liable for imprisonment for a term which shall be no fewer than two years, but which may extend to seven years and a fine.

The Air (Prevention and Control of Pollution) Act, 1981

Once again, the functioning of the Act is entrusted to the Pollution Control Boards, and they lay down the standards for emission of air pollutants into the atmosphere. The punishment for contravention of the provisions of the Act is the same as in the case of the Water Pollution Act described above.

The Environment (Protection) Act, 1986

This is an omnibus Act, under which the Central Government is empowered to protect and improve the quality of the environment. The Act works through delegated legislation. A significant statutory Rule framed under this Act is called the ‘Hazardous Waste (Management and Handling) Rules, 1989’.

Violation of any Rule framed under the provisions of the Act renders the offender liable for imprisonment for a term which may extend to five years (with a fine), and if the contravention continues beyond a period of one year, the term of imprisonment may extend to seven years.

o Campaign-finance/election law

The law regulating elections and electoral campaigns in India is the Representation of the People Act, 1951 (RPA) and the Conduct of Elections Rules, 1961 framed thereunder. The RPA contains provisions regulating the activities of both individual candidates and political parties. The elections are conducted by the Election Commission, which is a body set up under the RPA. The RPA provides for fixing a ceiling on the expenditure that may be incurred by candidates. At present, a candidate standing for election to the Lower House (*Lok Sabha*) may incur an expenditure of up to USD 100,000 (approximately) for all states except for Arunachal Pradesh, Goa, Sikkim, Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Lakshwadeep and Puducherry, where it is USD 90,000 (approximately), and a candidate for election to the state Assembly may incur an expenditure of up to approximately USD 47,000 in all states except Arunachal Pradesh, Goa, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura and Puducherry, where it is USD 35,000 (approximately). However, it is provided that the following expenditure in computing incurred by a candidate shall be excluded: party and supporter expenditures not authorised by the candidate; and expenditure incurred by leaders of a political

party on account of travel by air or by any other means of transport for propagating the programme of the political party.

Candidates who exceed these limits face the prospect of disqualification and annulment of their elections by the Election Commission. It is mandatory for political parties to declare their income, assets and liabilities, electoral expenses and contributions received, thereby bringing about greater transparency in campaign finance.

The Companies Act, 2013 regulates corporate contributions to individual candidates and political parties. It mandates that the amount contributed must not exceed 7.5% of the average profits of the past three years. Any contravention would result in a pecuniary liability of up to five times the contributed amount and imprisonment for a maximum period of six months.

Political parties are entitled to accept any amount of contribution voluntarily offered by companies other than Government companies under the Representation of People’s Act. It does, however, place an absolute restriction on contributions from foreign sources.

The Income Tax Act, 1961 provides that corporations are allowed a deduction from the total income to the extent of contributions made to political parties. There is an absolute prohibition on foreign contributions to any candidate for election or to a political party or office bearer thereof. Both the RPA and the IPC provide for sanctions on candidates and political parties for violation of the provisions regulating campaign finance. Civil penalties, *inter alia*, include disqualification for bribery/violating rules relating to campaign finance for a period of up to six years. The criminal penalties, *inter alia*, include imprisonment for furnishing false information, violation of foreign contribution rules, and failure to maintain election accounts. In cases where the offences are punishable by imprisonment, or a fine, or both, the Election Commission files written complaints in the court of the jurisdictional Magistrate for prosecuting the offenders.

o Market manipulation in connection with the sale of derivatives

The sale of derivatives is controlled by the provisions of the Securities Contracts (Regulation) Act, 1956 (SCR Act) and the Securities and Exchange Board of India Act, 1992 (SEBI Act), as well as the Rules, Regulations and Circulars issued thereunder. Section 12 A of the SEBI Act prohibits the use of manipulative and deceptive devices, insider trading and substantial acquisition of securities. It provides that no person shall, *inter alia*, use or employ in connection with the issue, purchase or sale of any securities listed or proposed to be listed on a recognised stock exchange any manipulative or deceptive device or contrivance in contravention of the provisions of the SEBI Act or the Rules or Regulations made thereunder. Contravention of said provisions is punishable under section 24 of the SEBI Act, with imprisonment for a term which may extend to 10 years (with a fine which may extend to Rupees 250m or both).

o Money laundering or wire fraud

Offences related to money laundering are dealt with under the provisions of the Prevention of Money Laundering Act, 2002 (PMLA). The PMLA was amended in 2009, and then again in 2012. The offences are mentioned in the Schedule to the Act. The Act lays down obligations on Reporting entities (i.e. banking companies, financial institutions and intermediaries), *inter alia*, in relation to maintenance of records, confidentiality of information, etc. The Reporting entities are under an obligation to furnish information to the Financial Intelligence Unit – India (a central national agency responsible for processing, analysing and disseminating information relating to suspect financial transactions). An investigation can be initiated only by authorities designated by the Central Government, including the Directorate of Enforcement (DOE). The Act prescribes

a list of officers such as police officers, officers of the Reserve Bank, etc. to assist the authorities in enforcement of the Act. The Act provides for agreements with foreign countries to facilitate the exchange of information with them. It states that the Central Government may enter into an agreement with the government of any country outside India for: (a) enforcing the provisions of the Act; or (b) exchange of information for the prevention of any offence under the Act or under the corresponding law in force in that country or an investigation of cases relating to any offence under this Act. The PMLA provides for rigorous imprisonment for a maximum period of seven years in cases of conviction for the offence of money laundering.

o Cybersecurity law

The Parliament of India passed the Information Technology Act, 2000 (“Act”) and the Amendment Act, 2008 to deal with technology in the field of e-commerce, e-governance, as well as prescribe punishment for offences committed under the Act. The Act extends to offences or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

The Act prescribes punishment for various offences including cyber-terrorism, identity theft, violation of privacy, sending offensive messages, etc. The Amendment Act, 2008 introduced amongst other things corporate responsibility for data protection by stating that a body corporate shall be liable to pay damages by way of compensation to a person if the corporate is negligent in implementing reasonable security practices, thereby causing wrongful gain or loss to any person.

The Indian Penal Code, 1860 (as amended by the Act) now penalises several crimes which include forgery of electronic records, destroying electronic evidence, etc.

Section 43 of the Act enumerates various offences for which a person shall be liable to pay damages by way of compensation to the person affected. The offences include introducing viruses to a computer network, disruption of computer network or denial of access to the computer system, etc.

The adjudication of these offences under the Act is done by quasi-judicial bodies, namely adjudicating officers set up under Section 46. A first appeal would lie before the Cyber Appellate Tribunal. A second appeal may be filed before the High Court having jurisdiction.

In addition, Section 66 of the Act prescribes punishments for computer-related offences falling under Section 43 which are criminal in nature, such as cyber-terrorism, identity theft, etc.

The Central Bureau of Investigation has notified a Cyber Crime Investigation Cell which has been in force since March 3, 2000. It has a pan-India jurisdiction and can look into the offences punishable under the Act as well as into other high technology crimes. A majority of states including Delhi, Mumbai, Bangalore, Gujarat, etc. have their own Cyber Crime Cell to handle offences within their jurisdiction.

o Any other crime of particular interest in your jurisdiction

In addition to the aforesaid, the law on whistle-blowers is fairly recent in India. The Parliament (*Lok Sabha*) passed the Whistle-blowers Protection Act, 2014 on February 21, 2014 (which, however, has not yet been brought into force). The Act seeks to provide for setting up a regular mechanism to encourage persons to disclose information on corruption or wilful misuse of power by public servants, including ministers. It also aims at providing “adequate protection to persons reporting corruption or wilful misuse of discretion which cause demonstrable loss to the Government or commission of a criminal

offence by a public servant”. In the meantime, the Government has issued recommendations to safeguard the interest of the whistle-blowers, and the Central Vigilance Commissioner has been designated as the agency to act on complaints from whistle-blowers until such time as the Parliament passes appropriate legislation on the subject. There is a Whistle-blowers Protection (Amendment) Bill, 2015 that has been passed by the *Lok Sabha* (Lower House) which, *inter alia*, provides for instances where disclosures shall not be made. It is currently pending in the *Rajya Sabha* (Upper House).

In order to deal with the menace of black money (non-taxed money or illegally sourced money) and, in particular, black money stashed away by Indians and corporations in tax havens, the Supreme Court of India had directed the Central Government to constitute a High Level Committee known as the ‘Special Investigation Team’ (SIT) to investigate and initiate proceedings and prosecution, both civil and criminal. The SIT is chaired by a former Judge of the Supreme Court of India. The Vice Chairman of the SIT is a former Judge of the Supreme Court of India. The other members of the team are high-ranking bureaucrats, namely the Revenue Secretary, the heads of the Intelligence Bureau, Central Bureau of Investigation, Research and Analysis Wing and Enforcement Directorate, Chairman of the Central Board of Direct Taxes, a Deputy Governor of the Reserve Bank, Head of the Narcotics Control Bureau, and Director of the Financial Intelligence Unit.

The Parliament has passed the Black Money (Undisclosed Foreign Income and Assets) Imposition of Tax Act, 2015 (on May 27, 2015) and the Companies (Amendment) Act, 2015 (on May 26, 2015) to improve transparency and combat business crime.

The Government has recently announced its intention to introduce new laws to address financial crimes in relation (i) to confiscation of property of absconders, and (ii) to deal with illicit deposit schemes such as Ponzi schemes. The aim is to confiscate the assets of such persons located within the country until they submit to the appropriate forum. A Bill entitled The Banning of Unregulated Deposit Schemes and Protection of Depositors Interests Bill, 2016 has been drafted and circulated to the general public and stakeholders for their comments. This is aimed at providing a comprehensive code to ban unregulated deposit schemes in order to protect the interests of depositors. The Bill, *inter alia*, seeks to impose punishment of up to 10 years and fines of up to Rs. 50 Crore. These new proposals have emerged particularly in light of a number of cases where the accused have fled the country and are not cooperating with the ongoing criminal investigation in India.

The Government’s focus has also been on tackling cyber-crimes. Recently, in February, 2017, the Reserve Bank of India (India’s central bank) constituted a Standing Committee on Cyber Security to establish an ongoing system of security review and analysis of emerging threats to protect the banking system in India.

3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Yes; however, not every inchoate crime is punishable. An attempt to commit a crime has not been defined under the IPC. Various judicial decisions have laid down the ingredients constituting the offence to include: a) the intention to commit that offence; b) once the preparations are complete and with the intention to commit any offence, performing an act towards its commission; and c) that such an act need not be the penultimate act towards the commission of the offence but must be an act during the course of committing that offence.

In some cases, the commission of an offence, as well as the attempt to commit to such offence, is dealt with under the same section and the extent of punishment prescribed is the same for both, e.g. bribery. In some cases, attempts are treated as separate offences (e.g. an attempt to commit murder or robbery). In very few cases, preparation to commit an offence is a crime.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

An earlier view was that a company/legal entity does not have the *mens rea* for the commission of an offence. However, various judicial decisions have clarified the position that a company/legal entity is virtually in the same position as any individual, and may be convicted of a breach of statutory offences including those requiring *mens rea*.

Most statutes have a clause covering criminal liability of a corporate which typically reads as follows:

“Offences by companies – (1) where any offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.”

The circumstances under which an employee's conduct can be imputed to the entity are:

- The employee must be acting within the scope and course of his employment.
- The employee must be acting, at least in part, for the benefit of the corporation, regardless of the fact that it actually receives any benefit or whether the activity might even have been expressly prohibited.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

Yes; in India, there is personal liability for managers, officers and directors for aiding, abetting, counselling or procuring the commission of any offence. (See also question 4.1.)

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

See question 4.1. Usually, both are pursued. There have been judicial pronouncements wherein it has been held that impleading the company as an accused is *sine qua non* for prosecution of the directors/individuals employed with the company.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

To a large extent this will depend on the mode of merger or acquisition. In a court-approved merger, the court-sanctified scheme will itself provide for successor liabilities. Generally, in a simpler case of acquisition of assets (slump sale mode), liability will not follow.

The Supreme Court in *McLeod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri and others*, 2014(8) SCALE 272 held the successor entity liable to pay damages for any default in remitting provident fund (social security) contributions. The said default was committed by the transferor entity prior to the date of transfer of employees. The Supreme Court clarified that the transferee shall not stand absolved of the liabilities even if such liabilities have been specifically assigned to the transferor entity by way of an express agreement.

In addition, the Courts have enumerated five circumstances under which successor liability can be recognised:

- expressed or implied assumption of liability;
- transfer of asset by the purchaser for fraudulent purpose of escaping liability for the seller's debt;
- mere continuation of the enterprise amounting to consolidation or *de facto* merger;
- the purchasing corporation is merely continuation of the seller for continuity of the enterprise; and
- charge on the property.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

In India, the CrPC provides for the calculation of a limitations period. As per section 468 thereof, no court can take cognisance of an offence after expiry of (a) six months, if the offence is punishable only with a fine, (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year, or (c) three years, if the offence is punishable with imprisonment for a term not exceeding three years. The limitations period commences on the date of the offence. However, with regard to certain economic offences/business crimes, the Economic Offences (Inapplicability of Limitation) Act, 1974 provides that provisions of the CrPC relating to limitation shall not apply in relation to, *inter alia*, the following statutes:

- The Income Tax Act, 1961.
- The Companies (Profits) Surtax Act, 1964.
- The Wealth Tax Act, 1957.
- The Gift Tax Act, 1958.
- The Central Sales Tax Act, 1956.
- The Central Excises and Salt Act, 1944.
- The Customs Act, 1962.
- The Emergency Risks (Goods) Insurance Act, 1971.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

Yes, if it is a “continuing offence” (as opposed to an offence committed once and for all), a fresh period of limitation shall begin to run at every moment of time during which the offence continues.

5.3 Can the limitations period be tolled? If so, how?

The limitations period can be tolled in the following circumstances, if the court is satisfied that the delay has been properly explained or if it is necessary to do so in the interest of justice:

- (i) the time during which a person has, with due diligence, been prosecuting another action against the offender in another court of first instance, court of appeal or revision, if it relates to the same facts and is prosecuted in good faith in another court which could not entertain it or want of jurisdiction or another cause of a similar nature;
- (ii) where the institution of the prosecution has been stayed by an injunction or order (the time excluded is the period during which the injunction or stay operated);
- (iii) where the previous sanction of the Government is required for the institution of the offence (the time excluded is from the date of the application for obtaining the sanction to the date it is obtained); and
- (iv) the time during which the offender has been absent from India or has avoided arrest by absconding or concealing himself.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Under the provisions of the Prevention of Money Laundering Act, 2002, if an order is passed freezing any property of a person in possession of proceeds of crime, and such property is situated outside India, the concerned authority may request the appropriate court in India to issue a Letter of Request to a court or authority in the Contracting State to execute the order. ‘Contracting State’ means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise. (Please also see question 6.3.)

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Normally, investigations are initiated by the filing of a report with the concerned police station, called a First Information Report (FIR). Based on the FIR, the police then initiate an investigation. The procedure for conducting an investigation is prescribed in the CrPC.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Yes, under the provisions of the CrPC (section 166 A), there are formal mechanisms for cooperating with foreign enforcement authorities. One such mechanism is via a Letter Rogatory or a Letter of Request.

During the course of an investigation into an offence, an application can be made by an investigating officer that evidence is available in a country or place outside India. Subsequently, the court may issue a Letter of Request to such court or authority outside India to examine any person acquainted with the facts and circumstances of the case and to record his statement. The court may also require that such person or any other person produce any document or thing which may be in his possession pertaining to the case, and forward all the evidence to the court issuing such Letter.

India has designated the CBI to serve as the National Central Bureau for the purpose of correspondence with ICPO-INTERPOL (an international police organisation to extend cooperation between member countries and their police forces which may furnish or request information or services for combating international crime) to cooperate and coordinate with each other in relation to the collection of information, the location of fugitives, etc.

India has negotiated Double Tax Avoidance Agreements and finalised Tax Information Exchange Agreements with various countries to strengthen the exchange of information relating to tax evasion, money laundering, etc.

Further, Mutual Legal Assistance Treaties (MLATs) facilitate cooperation in matters relating to service of notice, summons, attachment or forfeiture of property or proceeds of crime, or execution of search warrants. MLATs have been given legal sanction under section 105 of the CrPC.

India has adopted the Convention on Mutual Legal Assistance in Criminal Matters. It has operationalised agreements with 34 countries so far. In addition, three more countries have signed the Convention (though not yet ratified it). The nodal agency to carry out such agreements is the Ministry of Home Affairs (at the Central Government). As on March 10, 2016, the Central Government has given its approval for signing and ratification of the Bay of Bengal Initiative on Multi-sectoral Technical and Economic Cooperation (BIMSTEC) Convention on Mutual Legal Assistance in Criminal Matters. The BIMSTEC comprises of seven countries – Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka and Thailand. The Convention aims to enhance the effectiveness of the Member States in the investigation and prosecution of crimes, including crimes related to terrorism, transnational organised crime, drug trafficking, money laundering and cyber-crimes.

India signed and ratified the United Nations Conventions against Corruption on May 9, 2011.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

Generally, the investigation agencies have statutory power to obtain documents, records and other information from any person, including employees, and to record statements as required. The

authorities can conduct search and seizure operations at the premises of the companies or their employees, including directors. Under the Prevention of Money Laundering Act, 2002, the DOE has the power to require banks to produce records and documents relating to suspect transactions. Electronic evidence may also be procured under section 69 of the Information Technology Act, 2000 (IT Act).

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Please see question 7.1 above.

A court or an investigating agency which considers that the production of any document or thing is necessary for the purposes of an investigation, inquiry, trial or other proceeding, may issue summons or a written order for production of such document or thing. A search warrant may also be issued if the court has reasons to believe that the person to whom the summons has been issued will not comply. A search and seizure operation may be conducted with respect to suspected stolen property, forged documents, and objectionable articles, including counterfeit coins, currency notes, false seals, etc. The police officer also has the power to seize certain property which is alleged or suspected to be stolen, and which creates suspicion of commission of the offence.

Under the Prevention of Money Laundering Act, 2002, if there are suspected violations of the Act, the Enforcement Directorate can demand production of documents during investigation, and attach and seize properties of those involved in money laundering.

For information to be procured under section 69 of the IT Act, the Central Government, state Government or any of its officers must be satisfied that collection of such information/evidence is expedient in the interest factors such as sovereignty of the state, public order, etc.

Authorities under special statutes, including fiscal statutes, have also been empowered thereunder to compel production of documents if considered necessary for any inquiry or investigation.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel? Do the labour laws in your jurisdiction protect personal documents of employees, even if located in company files?

Indian law recognises privilege or non-disclosure of documents in limited circumstances. Insofar as Government documents are concerned, privilege can be claimed only on the grounds that disclosure will be injurious to public interest (including national security or diplomatic relations).

Communication between husband and wife during marriage is generally privileged.

A lawyer/client communication is privileged if it is made in the course of, or for the purposes of, professional employment.

Mere confidentiality or protection of business secrets is not a ground to resist production of documents. In some cases, the court may examine the document concerned confidentially to judge its relevance/admissibility before ordering its production.

Labour laws of India do not protect personal documents of employees even if they are located in company files.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

Please see question 7.2.

7.5 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

Please see question 7.2.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

The CrPC empowers the investigating authority to examine any person who appears to be acquainted with the facts and circumstances of the case being investigated. Normally, the questioning takes place at the office of the investigation agency. Similar powers have been given to investigation agencies under other special statutes.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

Please see question 7.6.

7.8 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

In India, the right of silence is available only for an accused individual. This does not apply to a person under investigation. At the same time, any confession made to a police officer is inadmissible in evidence, and a person cannot be compelled to sign any statement given by him to a police officer in the course of an investigation. Such a person does not have a right to be represented during questioning. He is, however, entitled to an advocate of his choice during interrogation, though not to be present throughout interrogation. The assertion of the right of silence will not result in an inference of guilt at trial. The accused is presumed innocent until he is proved guilty.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

- (i) A Magistrate may take cognisance of an offence in the following manner (Chapter XIV of the CrPC):
- upon receiving a complaint constituting an offence;
 - upon a police report;
 - upon information received from any person other than a police officer; or
 - upon his own knowledge that such offence has been committed.
- (ii) In cases described under (i) (a) above:
- An individual (of any nationality) or a corporate entity may file a complaint in the court of the jurisdictional Magistrate in respect of a crime.
 - Complaints may also be filed by statutory authorities under various enactments; for instance, for evasion of income tax, a complaint is filed by the competent authority under the Income Tax Act in the court of the jurisdictional Magistrate.
- (iii) In cases described under (i) (b) above:
- On completion of an investigation, the police force is required to file a report (whether an offence appears to have been committed or not). This is referred to as a charge sheet, and is filed in the court of the jurisdictional Magistrate. On receipt of such police report, the Magistrate takes cognisance of the offence and issues summons to the accused persons named therein.
- (iv) In cases described under (i) (c) above:
- The Magistrate may also take cognisance of an offence on the basis of information received by him, other than from a police officer. This may be information received from an unnamed source or an informer.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

Please see question 4.3 above.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

There is no such procedure.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

Please see question 8.3.

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

In India, a defendant can additionally be subjected to civil penalties or remedies. However, civil penalties or remedies cannot be used as a substitute for the criminal disposition. Under criminal remedies, the CrPC provides for compensation to any person for any loss or injury caused by the offence if the court is of the opinion that it would be recoverable by such person in a civil suit.

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The burden of proof in criminal cases lies on the prosecution, and does not shift during the trial. Under sections 101 and 102 of the Evidence Act, it may shift from party to party. With respect to affirmative defence, generally, the party taking such defence bears the burden of proof.

9.2 What is the standard of proof that the party with the burden must satisfy?

The prosecution is required to prove its case "beyond all reasonable doubt". Criminal cases are governed by a higher standard of proof as compared with civil cases (where only "preponderance of probabilities" is required to be proved). Where the accused pleads an exception in law, it has the same burden as in a civil case (i.e. preponderance of probabilities).

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The Judge is the arbiter of fact and determines whether the prosecution has satisfied its burden of proof. There are no jury trials.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Yes, a person who conspires or assists another to commit a crime can be held liable. These acts include abetment, conspiracy and acts done in furtherance of a common intention. An offence of 'abetment' arises when a person voluntarily causes or procures, or attempts to cause or procure, a thing to be done, and is said to instigate the doing of that thing by wilful misrepresentation or wilful concealment of a material fact which one is bound to disclose (section 107, IPC). A person will also be liable for abetment if he abets the commission of any act beyond India which would constitute an offence if committed in India (section 108 A, IPC). Criminal conspiracy (section 120 A, IPC) arises when two or more

persons agree to commit or cause an illegal act to be done or an act which is not illegal, by illegal means. For acts done “in furtherance of a common intention” (section 34, IPC), the two elements required to be established are common intention and participation of the accused in the commission of the offence.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Yes, lack of requisite intent/*mens rea* to commit a crime is a defence to a criminal charge. Virtually every offence under the IPC requires criminal intent or *mens rea* in some form or another. The burden of proof lies on the prosecution and it must be proved “beyond all reasonable doubt”. However, in some cases, the law has omitted to prescribe a particular mental condition, and in these cases, the doctrine of *mens rea* is not applicable, e.g. negligence.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant’s knowledge of the law?

The maxim ‘*ignorantia juris non excusat*’ (i.e. ignorance of law is not an excuse) applies.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant’s knowledge of the facts?

Sections 76 and 79 of the IPC provide for a mistake of fact as an exception and a complete defence to a criminal charge. The necessary prerequisites here are: that the act must be due to ignorance of fact; and that there must be good faith, i.e. reasonable care and caution in doing the act. The burden of proof to prove the exception will lie on the accused/defendant. (See question 9.2 above.)

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or “credit” for voluntary disclosure?

If a person knows or has reason to believe that an offence has been committed and intentionally omits to give such information, where he is legally bound to disclose such information, he will be held liable for failure to report (section 202 IPC). The punishment would include a term which may extend to six months or a fine, or both. Please see question 13.1 for leniency/credit for voluntary disclosure.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or “credit” from the government? If so, what rules or guidelines govern the government’s ability to offer leniency or “credit” in exchange for voluntary disclosures or cooperation?

The power to grant a pardon can be exercised by the Magistrate during the investigation into an offence. The provision for pardon applies only to cases triable by the Sessions Court, i.e. where the offence would attract a punishment of imprisonment of seven years or more. (For other cases, see the provisions relating to plea bargaining in section 14 below.) A pardon is granted with a view to obtaining evidence from any person supposed to have been directly or indirectly concerned with or privy to an offence. A condition for the grant of pardon is that the person makes a full and true disclosure of all facts within his knowledge. Any person who accepts a tender for pardon shall be examined as a witness in the trial.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

Where a person has accepted a tender of pardon (as described in question 13.1 above) and it is alleged by the public prosecutor that such person has wrongfully concealed an essential fact or given false evidence, or has not complied with the conditions on which the tender was made, he may be tried for the offence in respect of which the pardon was tendered or for any other offence which he appears to have been guilty of, and also for the offence of giving false evidence.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

(Sections 265 A to 265 L of the CrPC.) Plea bargaining is available only for offences that are penalised by imprisonment for fewer than seven years. However, if the accused has previously been convicted of a similar offence, then he will not be entitled to plea bargaining. It is not available for offences which might affect the socio-economic conditions of the country or for offences against a woman or a child below 14 years of age. A charge sheet must be filed with respect to the offence in question, or a Magistrate must take cognisance on a complaint before plea bargaining can proceed.

14.2 Please describe any rules or guidelines governing the government’s ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

To begin with, the accused is required to file an application for plea bargaining in the court where the trial is pending. On receiving the application, the court must examine the accused *in camera* to

ascertain whether the application has been filed voluntarily. The court must then issue notice to the public prosecutor and the investigating officer (if the case is instituted on a police report) or the complainant (if the case is instituted otherwise) to work out a mutually satisfactory disposition of the case. The negotiation of such a mutually acceptable settlement is left to the free will of the prosecution (including the victim) and the accused. If a settlement is reached, the court can award compensation based on the outcome to the victim, and then hear the parties on the issue of punishment. The court may release the accused on probation if the law allows for it. If a minimum sentence is provided for the offence committed, the accused may be sentenced to half of such punishment; in other cases, the accused may be sentenced to a quarter of the punishment provided or extendable for such offence. The accused may also avail of the benefit under section 428 of the CrPC, which allows for setting off the period of detention undergone by the accused against the sentence of imprisonment in plea bargained settlements. The court must deliver the judgment in an open court. This judgment is final, and no appeal can be made.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

When the court determines that a defendant is guilty of a crime, it may order either a fine or imprisonment or both, depending on the statutory provisions and the severity of the crime. The court may, while passing judgment, order the whole or any part of the fine or imprisonment period to operate. The court's imposition of a sentence is largely discretionary in nature. An order to pay compensation may include expenses incurred in the prosecution. With regard to criminal misappropriation, criminal breach of trust or cheating, it would include compensating the *bona fide* purchaser or victim. If the Magistrate finds the accused not guilty, he shall record an order of acquittal (section 248 of the CrPC). If the accused is convicted, the Judge shall hear him on the question of sentence and then pass the sentence according to law, unless there is an order to release the person on probation of good conduct or after admonition (section 235 of the CrPC). It should be mentioned that, in India, imposition of a sentence for a business crime is generally not perceived to be harsh.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

The court must look into the facts and circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, and all other attendant circumstances which would enter into the area of consideration.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Yes, there is at least one statutory right of appeal. Thereafter, a discretionary appeal may lie to the High Court and thereafter to the Supreme Court of India, depending on the facts.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

Both parties are entitled to appeal if they are dissatisfied with the verdict in whole or in part.

16.3 What is the appellate court's standard of review?

If an appeal is from a Magistrate's Court to a Sessions Court, then there is a full review of facts, appreciation of evidence as well as law. If the appeal is to the High Court or the Supreme Court, the review would be confined to issues of law alone, unless there is a gross miscarriage of justice or error apparent on the face of the record. However, if the appeal is from a Magistrates' Court or a Court of Sessions on a sentence of more than seven years to a High Court, then there is a full review of facts, appreciation of evidence as well as law. The review by the Supreme Court would be the same as stated above.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

If the appellate court upholds the appeal (section 386, CrPC), it may:

- (a) From an order of acquittal, reverse such order and direct that further inquiry be made or the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence.
- (b) In an appeal from a conviction or for enhancement of sentence, it may:
 - (i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court of competent jurisdiction subordinate to the appellate court or committed for trial;
 - (ii) maintain the sentence; or
 - (iii) with or without altering the finding, alter the nature or the extent or the nature and extent of the sentence but not enhance the same.
- (c) In an appeal from any other order, alter or reverse such order.
- (d) Make any amendment or any consequential or incidental order that may be just and proper.

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Ashok Sagar has approximately 39 years' experience in the legal profession. Mr. Sagar started his career in criminal law before moving on to general litigation. Besides business crime, his areas of speciality include tax and litigation. Over the years, Mr. Sagar has been involved in various high-profile crime cases, including the well-known *Bofors* case where he represented the Swedish arms manufacturer, A. B. Bofors. This high-profile case (arising out of defence arms procurement) involved some of the highest politicians in the country.

His current assignments on the criminal side include: representing a major Korean construction company in relation to a bridge collapse which led to the loss of 48 lives; representing a UK-based university in a criminal complaint by its erstwhile partner; representing a Hong Kong-based company in an infrastructure project in India; and representing a Qatar-based company in accounting and fraud issues in India.

**Sumeet Kachwaha**

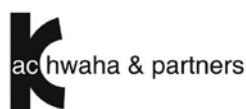
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Sumeet Kachwaha has approximately 38 years' experience in the legal profession, mainly in corporate and commercial law. Mr. Kachwaha holds a Band One ranking in the Arbitration section of *Chambers Asia* 2009–2016. He also features in *Who's Who Legal* in the Construction, Arbitration, Procurement, Government Contracts and Asset Recovery section, and has a Band One ranking in the Dispute Resolution section of the *The Legal 500 Asia Pacific*. He also figures in GAR's *Who's Who Legal* Arbitration Section. He has handled some of the leading and landmark commercial litigations ever to come up before Indian courts.

Mr. Kachwaha has also been involved in the non-contentious side in several high-stake projects, especially in infrastructure, power, construction and telecoms. He has advised a wide range of clients (on the victims' side) in relation to business crimes.

He has served as a Chair of the Dispute Resolution & Arbitration Committee of the Inter-Pacific Bar Association (three-year term). He is currently serving as the Vice-President of the Asian Pacific Regional Arbitration Group (APRAG), and is on the Advisory Board of the Kuala Lumpur Regional Centre for Arbitration (KLRCA).



Kachwaha and Partners is a full-service law firm which has offices in New Delhi and Mumbai and associate lawyers in the major cities of India. The main office of the firm is in New Delhi.

The firm has a leading practice in litigation and arbitration and enjoys one of the highest ratings from international law directories.

The firm regularly renders advice in relation to business/corporate crimes and acts for victims of business fraud and crimes.

The firm was an exclusive member from India for ICC Fraudnet – a leading global independent network of international lawyers specialising in fraud and white-collar crime (www.icc-ccs.org).

Partners of the firm are senior professionals with rich and diverse experience, and are in tune with the work culture of international law firms, as well as expectations of large corporate clients. The firm services clients from all corners of the world.

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