In the Board Rooms of global enterprises across the world, India is firmly on the strategic agenda. India’s promise of a low cost, highly skilled, English speaking work force has secured its position as the world-leading centre for outsourced back office services. It is not only a service industry success story: India is rapidly growing in popularity as a primary sourcing and manufacturing base for skill-intensive industries such as automotive components, pharmaceuticals and chemicals, electrical goods and steel.

A recent survey of global investor confidence conducted by management consultants A T Kearney showed that India is now the second most attractive territory for foreign direct investment after China, pushing the USA into third place. If you visit the region, you can see the effects of this success with your own eyes. Flights are full, hotel and office developments are filling the skyline and some 450 shopping malls are under construction. The outsourcing of business processes to India is estimated to be worth $8bn as more and more companies seek to achieve cost savings of typically 40-50 per cent.

Behind the success story

However, behind this extraordinary success story lies a worrying truth that is not widely recognised by the companies who are rushing to invest so much of their shareholders’ money in the region: you are as likely to face a legal dispute in India as in the USA; and if you do, it could take you literally a decade and many millions of pounds to resolve it, eliminating any financial benefits you had hoped to achieve.

The risk of litigation in the region is highlighted by figures released recently by the Indian government which show that the number of civil and criminal cases pending before India’s courts today stands at an astonishing 30 million.
While India is rightly lauded for its well developed legal infrastructure, the reality is that the Indian court system is sadly plagued with inefficiencies. To start with, there are far too few judges — around 10 judges per million of the population in India compared to over 50 in the UK and over 100 in the US — meaning that cases are not assigned to a particular judge for their duration. There is no focus within the Indian judiciary on a given judge’s expertise to deal with the case in question. Cases are regularly adjourned for reasons that would be considered outrageous in the UK or the US – such as the barrister being “on his legs” in another court and unable to show up on the day. Trials do not generally take place on consecutive days meaning that they can stretch into weeks or months, at huge expense. It is not untypical to find as many as 65 cases being heard every day in every courtroom of every one of India’s High Courts especially those in Delhi or Mumbai.

There is also a very limited number of commercial lawyers in India – the vast majority of Indian lawyers trained as litigators. As a result, the backlog of cases languishing in the Indian courts is growing by the day. It is not an exaggeration to say that parties involved in an Indian dispute should expect them to take at least 10 years to resolve, resembling a chapter straight out of Dickens’ Bleak House.

Providing for dispute resolution

There is, however, the prospect of a happier ending to this story if company Board Rooms heed some simple and straightforward advice and ensure that their lawyers follow suit.

While most companies focus on issues such as warranties when they are entering into contracts in India, a far more important priority is to ensure that they have the right dispute provisions in place. In my many years’ experience of handling disputes in India involving overseas parties, the dispute resolution clause is nowhere near high enough on the agenda of commercial lawyers negotiating a contract. In India (and no doubt the same could be said of many other emerging markets), it should be right at the top of the list. Without an effective means of resolving a dispute, all the other provisions in a contract are, from an enforcement perspective, entirely academic.

In determining the dispute resolution provisions, your first priority should be to agree a clause which provides for resolution outside India, whether it be in the courts or by way of arbitration. There may be arguments for a different forum, but for UK or US corporations the London Court of International Arbitration or the English Commercial Court are obvious choices. Indian parties do not generally feel uncomfortable with an English forum because it is recognised as an impartial, incorrupt, fair system and London is a popular city to visit. They are also comfortable with English law since so much of Indian law is derived from English law. Furthermore, India and England not only have reciprocal

“...it should be right at the top of the list. Without an effective means of resolving a dispute, all the other provisions in a contract are, from an enforcement perspective, entirely academic.”
enforcement of judgment treaties but both are parties to the New York Convention on the enforcement of arbitration awards, both of which mean something. There is also very limited interference not only in theory but also in practice from the English courts in an arbitration process. So lesson number one is to choose the right venue over the right law. Indian law in London is infinitely preferable to English law in Delhi.

Key rules

If you do end up in a dispute in India, there are some key rules to follow in order to reduce the impact of the problems that are endemic within the Indian legal system.

The first sounds almost too obvious to mention, but it is essential to retain a reputable local firm of lawyers in India on the back of a recommendation of a trusted adviser to your company. In India, an assurance of quality of advice is not enough of itself: the promise of responsiveness and availability is an equally important concern in a legal environment which cannot cope with its case load. Be aware also that India is a very diverse region in every sense and the style and availability of the 25 High Courts and their local Bar can be materially different.

Senior management should also recognise the importance of giving up the time to travel to India on a regular basis to meet their local lawyer and keep the matter moving, or instructing an international disputes lawyer with experience of India to represent them together with local representation. As a result of these factors, you should manage the expectations of your Board and shareholders as to the timescale required to resolve a dispute. There is no short cut where the Indian legal system is involved, but the steps outlined above should help you to resolve your dispute in 3–4 years which is a vast improvement on the more usual 10 year duration.

Perhaps the most important lesson of all is to avoid the temptation to rush into a commercial relationship without being certain that you have the right partner and to avoid being falsely optimistic about nothing going wrong in the future. If it were not for client confidentialities, I could give you more examples than you would care to hear of legal nightmares born originally of choosing the wrong contracting party. You may face considerable commercial pressures to realise efficiencies by outsourcing to India or to capitalise on the region’s fast growing domestic economy by investing there. But before committing, it is well worth remembering this cautionary tale.

Nick Archer
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Nick Archer has been a partner in the Dispute Resolution department since 1988. He has extensive experience in major litigation and arbitration, both domestic and international, handling complex and substantial disputes and seeking their effective and efficient resolution in whatever way is in the best interests of the client. His work includes, for example, claims arising out of banking transactions, insurance disputes, share and asset sale and purchase agreements, oil and gas industry agreements and joint ventures. He acts for major corporates and banks as well as sovereign governments and international organisations.

A large proportion of his work, whether in the litigation or arbitration field, is international in nature. He deals with complex jurisdictional issues as well as co-ordinating litigation in different parts of the world, including India, Brazil, Italy, France, Egypt, Turkey and the United Arab Emirates. This work has included tracing assets and obtaining injunctive relief in a number of jurisdictions, as well as enforcing judgments and arbitration awards through foreign courts.

Nick has had extensive experience in India over the past 20 years. That work has taken him to India over 50 times during this period. He has acted both for and against Indian parties which has given him a considerable insight into the ways disputes are dealt with in the Indian context. As a result, Nick is able to offer clients proactive advice in the context of a dispute and tactical guidance in a difficult jurisdiction. This work has also enabled him to get to know many of the leading lawyers both at Solicitor and Senior Counsel level. These personal relationships with local Indian lawyers are vital to achieving the client’s objectives in this part of the world.

Nick is listed in both the Banking Litigation and Commercial Litigation sections of Legal Business’s 2007 Directory of Legal Experts and is named as a leading individual in Dispute Resolution and Banking Litigation in Chambers UK 2008.

“Nick Archer is an ‘excellent strategist’ whose ‘creative thinking and ability to view a case from all perspectives’ make him a valuable asset in complex, multi-jurisdictional disputes. Peers and clients agree that he is extremely well skilled in litigation originating in India and the United Arab Emirates.”

(Chambers UK 2008)