

Pre-arbitration bouts cause delays

Choice of arbitrators is a thorny issue even after change in the law



OUT OF COURT

M J ANTONY

When contesting parties move court, they have no choice in selecting judges, though in their hearts they would like to have that power. Forum-shopping and bench-fixing are strict taboos. Parties which resort to them are blackballed by judges. The Maharashtra government had to apologise last month when it tried to keep a particular high court judge out of its case on noise pollution. But in the celebrated alternative dispute resolution

mechanism, or arbitration, parties have such a delightful choice. Each of them can choose their candidate and if three are needed to form a tribunal, the chosen two will nominate the umpire.

This sounds simple, but in recent weeks, several judgments had to be written by the Supreme Court and the Delhi High Court on the selection of arbitrators. The Arbitration and Conciliation Act was amended in 2015 to avoid this chronic bitterness accompanying the nomination of arbitrators. This acrimony must be a worldwide phenomenon because the International Bar Association has set out three lists — red, orange and green — to label potential arbitrators. Following the 246th Law Commission Report, the Arbitration Act was amended to introduce two sets of disqualifications for arbitrators.

However, statutory definitions and elaborate schedules do not constrain the legal profession, which can still stall the choice of arbitrators and consequently arbitration itself by raising the

issue of bias and independence of the nominees of the rival party. Such squabbles are often the prologue to arbitration. In a recent case that travelled from the Delhi High Court to the Supreme Court (HRD Corporation vs GAIL) the US corporation argued that two retired judges in the three-member tribunal were ineligible to act as arbitrators under the amended Act. The allegation against the judges was mainly about their relationship with GAIL. One of them allegedly acted as arbitrator in a case involving GAIL, but the court stated that it could not be called a "business relationship" that disqualifies him from the present arbitration.

The other judge had reportedly given legal advice to GAIL on another matter, but that would not disqualify him as he was not giving advice regularly. A "relationship" of an advisor would signify an association that is continuing and would not include obtaining a solitary opinion from an independent practitioner. Taking a legal opinion does

not constitute a relationship of an advisor to the party seeking such opinion, the high court explained. The appeal of the US corporation was dismissed by the Supreme Court with an even more elaborate judgment.

When it comes to public sector undertakings (PSU), the cynicism is worse confounded. They hand out the most high-priced projects, but do not offer a level playing field to private contractors. The agreements often contain a term in which the disputes are arbitrated by the PSU officials themselves. Consider what BSNL offered Motorola India: "There will be no objection to any such appointment on the ground that the arbitrator is a government servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a government servant he has expressed his views on all or any of the matters in dispute." The Supreme Court called it unfair.

Government servants retire or get

transferred (sometimes deliberately) prolonging arbitration for decades. In the latest such case from the Jharkhand High Court (Sahil Projects vs Eastern Railway), three arbitral tribunals consisting of railway officials were constituted but did not conclude the proceedings in a decade. When the aggrieved contractor moved the high court, it appointed its own ex-judge as arbitrator. It remarked that leaving the private firm at the mercy of officials against whom claims were made would add insult to injury and affect the credibility and impartiality of the whole process. Last week, the National Highways Authority of India received a dubious certificate from the Delhi High Court for repeatedly raising untenable objections in arbitration appeals.

If the country has to speed up infrastructure projects and get a fair name in the field of arbitration, PSUs must change their mindset and bring contracts in line with the new law. Even after the amendment, bickering over choosing arbitrators has not ended. Courts are struggling to interpret the words in the schedules; there are enough vague phrases to make the judges' foreheads furrow and lawyers' jawbones ache.

CHINESE WHISPERS

Lust for money?

The leadership of the Confederation of All India Traders (CAIT), a traders' body, was in Surat to protest the problems traders were facing because of a "hurried" roll-out of the goods and services tax. However, the leadership did not ignore other issues of import. On Tuesday, it shot off a letter to Union Consumer Affairs Minister Ram Vilas Paswan, objecting to an "unethical advertisement of condoms by Sunny Leone". It stated that the condom manufacturer had indulged in unethical marketing as hoardings across Gujarat "are shouting out to encourage youths" to use "condoms in the name of Navaratri festival". The complaint stated that while the hoardings did not use the word "condom", the "intention is very clear" given the "combination" of words such as "play", "love" and "Navaratri" were printed over the large logo of the manufacturer. It said "in the lust of earning huge money, these brand ambassadors (Sunny Leone) can go to any level", including to disrespect the "pious and religious occasion of Navaratri". The CAIT has demanded the advertisement be banned.



Dissent from the kitchen

A minister of state in the Narendra Modi government recently fired his cook. The minister's office claimed that the cook quit on his own. The cook tells a different story. He says he was sacked because of one of his posts on a social networking site. The cook, who hails from the minister's constituency in Rajasthan, wrote on a social media site that it was a mistake to have voted for the Bharatiya Janata Party (BJP) in the last election. Word reached the minister, the cook apologised. The minister, or so says the cook, asked him to delete his post and look for another job. The minister was nervous that his job might be at risk if the news reached the Prime Minister.

Sushil Modi's advice for Tejashwi

By declaring that Bihar Deputy Chief Minister Sushil Modi could stay in whichever bungalow he wanted, Rashtriya Janata Dal (RJD) President Lalu Prasad sought to bring the curtains down on the row between his son and the Bharatiya Janata Party (BJP) leader over the 5, Deshratna Marg house. Prasad's son, Tejashwi Yadav, lost the official bungalow after the Grand Alliance government — of which the RJD was a constituent — was dissolved by Chief Minister Nitish Kumar and the Janata Dal (United) formed a government with the BJP in July. Modi had a word of advice for Yadav after Prasad's gesture: "He (Yadav) is single and not married. Unmarried people should stay with their parents." Yadav is said to have never stayed in the bungalow, but used to meet well-wishers there. He lived with his parents at 10, Circular Road.

A macro perspective

Macroeconomic stability with low inflation has been achieved with policy perseverance. Throwing the gains away would not be judicious



ASHOK K LAHIRI

Indians now compare their living standards, not with their fathers' and grandfathers', but with those of countries to the east, particularly China. From 1979, China, under Deng Xiaoping, stole the march over India. Between 1980 and 2013, it grew at an average annual rate of 9.9 per cent relative to India's 6.2 per cent (Figure 1). With the magic of compounding, in US dollar terms, the Chinese economy, only 1.6 times India's in 1980, became 5.2 times by 2013.

There were encouraging signs of India starting to catch up with China from 2014. In growth, among G-20, India improved its ranking from third in 2013 to second, next to China in 2014, and surpassed it in 2015 and 2016 to be the fastest growing economy. In every quarter between April 2015 and March 2016, India grew faster than China (Figure 2).

In this context, the recent signs of a slowdown, with growth declining from 7.9 per cent in 2015-16 to 6.6 per cent in 2016-17, are disturbing. So is the relegation of India in terms of growth in the five quarters ending June 2017 to the second position in four, and fourth position in one. Growth has decelerated in four of these five quarters. The slowdown started well before demonetisation on November 8, 2016, and cannot be all because of it. So, why is growth decelerating?

Investment demand is the culprit.

Between 2011-12 and 2016-17, as a proportion of gross domestic product (GDP), while private final consumption expenditure went up from 56.2 per cent to 58.8 per cent, gross fixed capital formation declined from 42 per cent to 38.4 per cent.

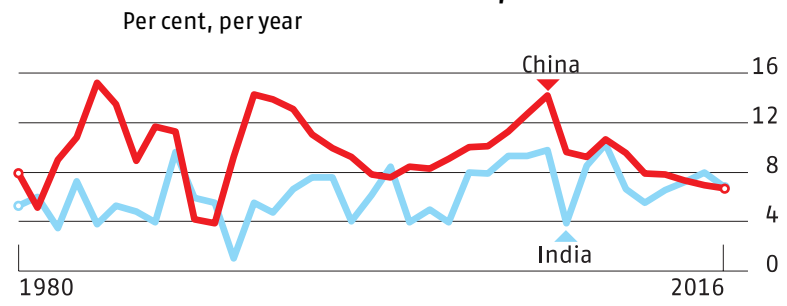
Low investment looks a bit incongruous with the high Indian stock market valuation. The trailing 12-month price-earnings (PE) ratio at a record high of 23 may reflect two encouraging signs rather than just irrational exuberance. First, Indian companies have become lean and mean or, in other words, efficient producers with better capacity utilisation. Second, investors are betting on earnings, the PE denominator, to grow.

Five policy issues appear important in reviving growth to eight-nine per cent or more, an imperative to rapidly create jobs, wipe out poverty and improve the well-being of the people.

First, a more expansionist fiscal and monetary policy could indeed produce a temporary blip in growth, but would be counterproductive in the medium run. For example, much of today's large non-performing assets (NPA) through the over-leveraging problem are inevitable after-effects of the steroid of such policies following the global financial crisis. Macroeconomic stability with low inflation has been achieved with a lot of policy perseverance. Throwing all the gains away now would not be judicious.

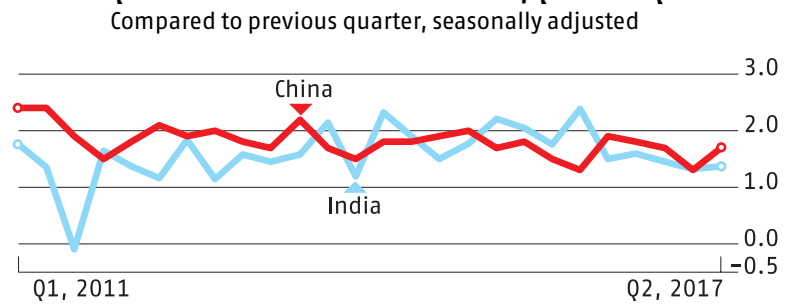
Second, India continues to need boosts to its infrastructure. Progress on the Delhi-Mumbai Industrial Corridor needs to be expedited. In this context, the Ahmedabad-Mumbai bullet train, for which the foundation stone was laid during the Japanese Prime Minister's recent visit, is welcome. It will cost ₹1.1 lakh crore, a lot of money, but Japan will fund 81 per cent of the cost over 50 years at 0.1 per cent interest. Objections

FIGURE 1 GROWTH OF GDP: CHINA & INDIA, 1980-2016



Sources: International Monetary Fund, World Economic Outlook Database, April 2017

FIGURE 2 QUARTERLY GROWTH: CHINA & INDIA, Q1 2011 TO Q2 2017



Source: OECD

to the bullet train are similar to those in the past against multi-lane highways. The midnight's children grew up to see the first highway either in a foreign country or only in their late 40s. Highways transformed mindsets, and along with highways, India built rural roads as well. India should be able to improve her existing railway network while having a bullet train as well. A few showcase projects are important to open the mental horizons of the young, the builders of the India of tomorrow.

Third, credit growth to infrastructure remained negative between April 2016 and June 2017. But, just throwing money at infrastructure is not going to

suffice. Projects are stalled not only because of shortage of funds, but also because of structural reasons such as design flaws, inefficient implementation and problems such as land acquisition, regulatory inadequacies and difficulties in enforcing contracts. The power sector, whose debt was restructured twice before in 2001 and 2012 through state government-backed bonds, provides a good example. The pre-conditions attached were not met or did not produce the desired results. With distribution companies threatening to pack up with unsustainable debts again, another debt restructuring plan, UDAY, was launched in November 2015.

Hope UDAY meets with better success.

Fourth, the twin balance sheet problem, with banks, particularly the public sector ones, saddled with NPAs, and debtor firms under heavy debt, requires a careful, graduated response. Gross NPA as a proportion of gross advances of banks has almost quadrupled from 2.5 per cent in March 2011 to 9.6 per cent in March 2017. While a matter of great concern, this is not the first NPA problem post-independence. The gross NPA ratio had reached 15.7 per cent in 1996-97 and remained above 10 per cent until 2001-02. Growth forgives a lot of sins and annual average growth of 6.5 per cent between 1996-97 and 2008-09 helped. The Reserve Bank of India and the government adroitly managed to soft-land the banking system through a combination of recapitalisation of public sector banks and regulatory forbearance. The NPA ratio came down gradually to 2.3 per cent in 2008-09. Two issues that require careful attention in the recent context are how to restructure public sector banks and how to reduce moral hazard in the financial sector through the new insolvency and bankruptcy institutional architecture.

Finally, stopping and even reversing the appreciation of the rupee in real terms may help exports. In recent times, China appears to be using up a part of its enormous international reserves for macroeconomic stability. But, for India, it may be useful to consider the scope for more aggressive intervention in the foreign exchange market not only to shore up reserves but also to stop the premature real appreciation of the rupee and boost exports.

This is an abridged version of a speech delivered at the CII Banking Colloquium in Kolkata on September 16, 2017

The writer is an economist

BUSINESS LIFE

The Dutch are doing just fine without a govt

Strong performance could be result of systems enforced after 2008 debt crisis

ELLEN PROPER

The Dutch economic machine is roaring, government or not.

As the caretaker government of Prime Minister Mark Rutte prepares to unveil its 2018 budget on Tuesday, the country is growing at its fastest clip in a decade.

With a new government yet to be formed more than 185 days after the Dutch general elections in March — the second-longest such period since World War II — many see the strong performance as an indication that systems put in place after Europe's debt crisis in 2008 are helping shelter the country from the vagaries of international events and political uncertainty at home.

"Does it matter a lot that we have a caretaker government? No, honestly, it doesn't," said ING Groep NV Chief Economist Marieke Blom. "For now, the economy is in good shape. Although there are things that can be improved, I don't really believe they're very urgent."

Trade concerns after the election of Donald Trump in the US, the Brexit vote in the UK and uncertainty over the vote in France barely made a dent on the Dutch economy, which expanded 1.5 per cent in the second quarter compared with the three previous months, beating economist estimates. ING, ABN Amro Group NV and Rabobank UA have all raised their growth forecasts for the year, expecting an expansion of more than three per cent.



Despite only a caretaker government led by Mark Rutte (pictured), the Dutch economy has not suffered PHOTO: REUTERS

If the three largest Dutch banks are right, economic growth in the Netherlands this year would be higher than in France, Italy, Spain, Germany and the euro-area as a whole, according to forecasts collected by Bloomberg.

So while its politicians struggle to find common ground, the Netherlands' economic machine is chugging along. Raising the pension age and trimming health care benefits have helped put the Netherlands ahead of other European Union countries in terms of age-proofing the economy. While the country needs to further reform its tax system, "it's a longer-term thing", Blom said.

Also, the stress put on the system by the financial crisis has eased, said Hans Schenk, a professor of economics at Utrecht University.

"Financial institutions have recovered, an important signal to other companies that they can sufficiently trust the economy to boost investments," he said.

The Dutch state, which nationalised financial firms during the crisis, this month cut its stake in ABN Amro and sold its holding in insurer ASR Nederland NV.

The engines of the Dutch economy, industries including technology and health sciences with such companies as Royal Philips NV, NXP Semiconductors

NV and Royal DSM NV, have thrived. Over the summer, Philips announced a series of acquisitions, including the \$1.7-billion purchase of Spectranetics Corp, its third-biggest takeover in the health sector.

Chip-machine maker ASML Holding NV sees a 25 per cent revenue growth this year, while vitamin maker DSM posted its highest quarterly profit in nine years. NXP is being bought by Qualcomm Inc in what would be the largest deal in the chip industry.

Things have been less stellar on the political front. While the rise of Geert Wilders had cast a shadow over the Netherlands — and the rest of Europe — ahead of the March election, with the populist leader now excluded from any potential cabinet discussions, the Dutch are largely shrugging off the twists and turns of coalition politics.

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LETTERS

A bullet train for whom?

With reference to Shreekanth Sambrani's article, "Discounting the bullet train" (September 19), at a time when the country is struggling with employment problems, setting up domestic industries with high employment potential should be the need of the hour.

A mammoth investment of ₹1.1 lakh crore, with a loan component of ₹88,000 crore, 0.1 per cent interest payable over a 50-year period and a moratorium of 15 years is indeed a big step by India at this juncture, that too, to fulfil the personal ambition of the Prime Minister.

Even as the country struggles with burgeoning current account deficit and balance of payments, bullet trains are a redundant investment. Gross domestic product has slumped, exports are down, retail and wholesale inflation are up. Against this background, the bullet train is aimed at whom? How many people can afford to travel on it? Due to rising cost of living driven by prices of essential commodities, can the country afford a bullet train?

The government should improve roads all over India, provide better health care in rural and semi-urban areas, make housing and education affordable and connect rivers in stages.

The government should not fritter away revenue earned from taxes paid by citizens. While the government's intentions are good, it has to prioritise and differentiate between need and urgency.

B Venkateswaran Chennai

Beyond curiosity

The editorial, "Good tidings from Japan" (September 18), covers almost everything positive that can be said about the India-Japan current cooperation scenario. Some other aspects may not be as flattering, especially those about the bullet train project.

What good Suzuki as a common man's car has done to the Japanese image in India can be replicated if a similar loan on soft terms and conditions is given by



Japan to upgrade our tottering railway network. As Suzuki revolutionised personal transport in India, similar improvement of the Indian Railways will make the common man beholden to the Japanese commitment to this nation.

However, except for carrying a few rich passengers every day, the proposed bullet train carries no traction. The technology is a black box and is not likely to be shared in the near future with our railway network.

The low rate of interest of 0.1 per cent for 50 years is being touted as a selling point. Nobody is asking what the penal interest would be if there is a default in repayment or if India wants to repay the loan early or if it does not avail of the full loan. Also, are there any hidden service charges for this loan?

For a few months initially, curiosity will likely fill seats on the bullet train, with one asking the other, "Bullet train mein baithe kya (Should we take a ride on the bullet train)?"

Y P Issar Karnal

Riding on glamour

T T Ram Mohan's article, "Raghuram Rajan in the limelight" (September 19) was timely. Rajan's recent visit has grabbed more headlines than it deserved. But the opening line that Rajan "conquered" the media was more a comment on its gullibility than his charm. The media stopped short of questioning his contribution during his tenure to the absurd drama of the non-performing assets playing out now. Although there was a surge in NPAs during Rajan's term, he manages to lead a Teflon-coated existence.

On demonetisation, Rajan found it discomforting that black money has found its way into the banking system. He said black money would cause damage to banks. It is like commenting that it was all right that the criminals were walking free and avoiding jail. Now that they have been arrested, the government will have to provide them food in jails.

Rajan added glamour to the fact that the government did not grant him another term. It found him unsuitable for the job; this can't add glamour to anyone's character. It is a comment on his performance.

Deba Pratim Ghatak Durgapur

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HAMBONE

BY MIKE FLANAGAN



Expedite oil price reform

Replace pricing based on trade parity with a cost-plus formula

The pressure on the Union government to reduce the retail prices of petrol and diesel is understandable. The price of the Indian basket of crude oil has gone up to \$55 a barrel, almost 96 per cent higher than \$28 a barrel in January 2016. The retail prices of petrol and diesel, which have been linked to the markets, have also been rising, though by smaller margins of 18 per cent and 33 per cent, respectively, in the same period. That, however, is no cause for comfort as what consumers are fretting about is that the price of the Indian basket of crude oil ruled at \$107 a barrel in May 2014 and is today almost half of that level. So why have retail prices already breached levels that prevailed in May 2014?

Such a question has arisen because of the Union government's tax initiatives, which between May 2014 and January 2016 saw the central excise duty go up by 127 per cent on petrol and by 387 per cent on diesel. Most state governments took some time to see this fiscal opportunity but later latched on to it by raising sales tax and value-added tax rates on these products. In 2016-17, the Centre's excise revenue from petroleum products increased by 35 per cent on top of a higher increase of 80 per cent in the previous year. The states' tax revenue from the same sector increased by 16 per cent last year compared to a modest rise of 4 per cent in 2015-16.

The fiscal move was unexceptionable, justified as it was by the need to tax a scarce imported resource, raise revenues to bridge fiscal deficits and reduce the Centre's oil subsidy bill. The need for shoring up the finances of the Centre as well as the states is even greater today with rising shortfalls in revenues, increasing expenditure on account of higher government wages and higher demand for capital outlays in order to revive growth. Cutting tax rates on petrol and diesel, therefore, might help reduce their prices for the present, but the damage and risks to public finances will be significant and, therefore, should be avoided. For the same reasons, the inclusion of petrol and diesel in the goods and services tax should be sequenced in a manner that the effects of a consequent reduction in tax rates on revenues can be absorbed gradually.

What the government can, instead, do is to move ahead on petroleum product pricing reforms. Linking the retail prices of petrol and diesel to the markets and making them dynamic, subject to change on a daily basis, have been the right steps. But to introduce greater cost efficiency and increased competition among the oil companies, it is now necessary to move away from the pricing formula based on trade parity and embrace a cost-plus pricing system. The formula based on trade parity fixes the landed cost of petrol and diesel at a level that is slightly higher because of the inclusion of customs duty in it. The logic of an 80 per cent weight in favour of imports in the formula is questionable with negligible imports of petrol and diesel taking place at present. It also discourages oil refining companies from achieving greater operational efficiency since their cost of petrol or diesel is pre-determined by a formula irrespective of their actual refining costs. A cost-plus pricing formula will also introduce transparency and help reflect a more reasonable and correct picture of the oil companies' under-recoveries, which, in turn, could help reduce the government's subsidy bill and even reduce retail fuel prices.

Avoidable 'Lakshmi'

India does not need its own cryptocurrency

The government is reportedly considering the possibility of introducing its own cryptocurrency, code-named "Lakshmi". Being backed by fiat, this would provide an alternative to popular non-flat cryptocurrencies such as bitcoin and ethereum. If it is introduced, "Lakshmi" would run on some variation of the blockchain technology employed by bitcoin that verifies every trade and rules out dual transactions employing the same coin. The introduction of such a new cryptocurrency, which would be legal tender alongside the rupee, requires legislative action in amendments to the Currency Act. The new currency would also, presumably, be subject to the same capital account controls as the rupee in terms of cross-border transactions. Users would have to submit to the usual know-your-customer norms.

Before launching such a currency, the Reserve Bank of India (RBI) would have to solve several tricky questions. Would it decide on a peg to the rupee and hence an exchange rate tied to rupee fluctuations? Or would it allow free-float of Lakshmi? The RBI would also have to devise a method of money supply. Bitcoin and ethereum have mathematically exact generation processes and the total coinage in existence is capped. The money supply at every instant is known and cannot be manipulated, unlike with normal fiat currencies. Moreover, the blockchain method makes standard procedures such as fractional reserve banking very difficult. The only way to carry out such operations is via an exchange of the cryptocurrency for normal currencies (be it the rupee or the US dollar). But doing so leads to complex transactions that affect exchange rates.

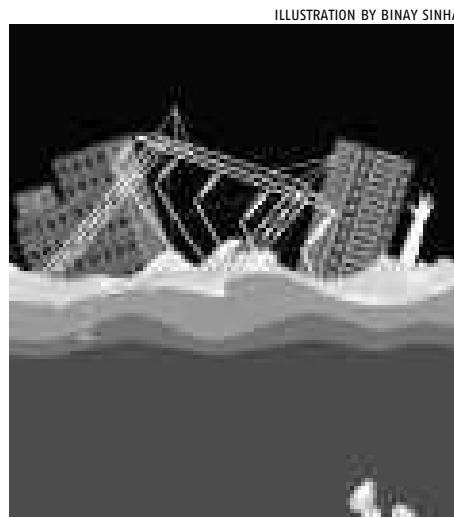
Even assuming the RBI successfully solved all these issues, a key question still remains: Why would the RBI bother? Cryptocurrencies are popular for several reasons and all of those are unacceptable to a normal central bank. Cryptocurrencies are useful in providing anonymity, especially when making cross-border transactions. In fact, China recently imposed controls on these coins because these have been used to enable vast capital flight out of the mainland. Japan and South Korea have picked the more pragmatic alternative of recognising bitcoin as legal tender and laying down strict rules for usage. Moreover, "cryptos" are also extensively used for money-laundering purposes and to fuel criminal activities such as drug deals on the Dark Web and for ransomware payments. It is hard to see the RBI allowing users to avail of greater anonymity than is the case with digital rupee transactions. Another reason why "cryptos" are popular is the high-volume speculative trading of these as potential stores of value; traders bet on bitcoin movements in the same way that they bet on the price of gold and crude oil. Once again, it is hard to see the RBI taking a policy decision to allow for a free float where the value of Lakshmi could swing by vast amounts.

India already has a currency that is extensively used and traded digitally. The mechanics of trading and managing its money supply are well known. There may be a case for easing capital controls and allowing a more free-float of the rupee, given massive reserves. But introducing a new digital cryptocurrency, which cannot reasonably be a substitute for the currently popular ones, does not seem like a good idea. The RBI should consider adopting the Japanese model of regulation instead.

CLIMATE RISK INDEX (CRI), TOP 5 COUNTRIES

Ranking 2015	Country	CRI score	Death toll	Absolute losses (million \$ PPP)	Losses per unit GDP in %
1	Mozambique	12.17	351	500.07	1.50
2	Dominica	13.00	31	611.22	77.37
3	Malawi	13.83	111	907.98	4.45
4	India	15.33	4,317	40,077.22	0.50
5	Vanuatu	20.33	11	278.86	40.65

Source: Global Climate Risk Index 2017, Germanwatch



Surface warming and climate risk

Reducing vulnerability and restoring infrastructure remain challenges

Recent weather events in the United States — hurricanes Harvey and Irma — affecting Texas through the southern states — and in the Indian sub-continent deluging northern Bihar, Bangladesh and Nepal have, once again, brought under the lens the matter of ocean warming and climate change. Harvey's intensification occurred after travelling over unusually warmer ocean temperatures (2 degree C) in the Gulf of Mexico, before land-fall. The sea surface warming in the Gulf has occurred over a century and is continuing. The Arctic Report Card also describes how sea surface temperature (SST) is increasing in the Arctic Ocean and adjacent seas. Seas of Alaska and Greenland have the largest warming trends — 1/2 degree C per decade since 1982. Instances can be drawn from other seas and continents including Antarctica where a chunk as large as the US has broken off and is floating.

Though the UN-established Inter-governmental Panel on Climate Change (IPCC) has indicated that they have not found a definitive link, nevertheless a large portion of the scientific community has postulated the existence of a link between climate change and a greater number of major hurricanes as a percentage of total tropical cyclones in a season. Earth cannot get away from the self-harm it is inflicting. US President Donald Trump's 2017 abrogation of the 2015 Paris Agreement on climate change — a global commitment to limit global temperature

increase to 1.5 degrees C and to allocate adequate financial resources to achieve it — cannot be assessed in any other light.

Given the harsh reality, however, it is every country's responsibility to minimise its own climate risk brought on by worsening natural disasters. The 2017 Global Climate Risk Index published by Germanwatch, Bonn, in "Who suffers most in extreme weather events?", has revealed how vulnerable India is, ranking as high as fourth in climate risk among 182 nations. Table 1 shows that, in 2015, only Mozambique, Dominica and Malawi were affected more than India. Even Vanuatu, Myanmar, Bahamas, Ghana and Madagascar in the top 10 were less affected (not in Table).

Germanwatch elaborated that, in 2015, India's damage was upwards of \$40 billion in purchasing power parity, with higher than 4,300 dead. Unseasonal rainfall caused floods in February and March, a deadly heat wave took 2,300 lives, and floods in August and December caused enormous damage. The situation continues for, as per the UNICEF, the 2017 deluge in the northern Indian subcontinent cost 1,288 lives, with 40 million people (16 million children) being affected. India's death count was variously estimated around 800. Hurricane Harvey cost the US 60 lives and the Irma cost Cuba 10.

What is revealing is that the pattern of climate change disasters is also changing. Thus, print media



PARTHASARATHI SHOME

Insolvency Code needs a few tweaks

The Supreme Court's decision to stay the order passed by the Allahabad Bench of the National Company Law Tribunal (NCLT), which initiated insolvency proceedings against Jaypee Infratech, has come in for some sharp criticism. Even senior officials in the corridors of power say that the decision would only help in derailing the insolvency process, as some of the big bad boys in India Inc would take advantage of the ruling by the country's apex court to delay efforts to oust them from their companies.

Such criticism is unwarranted. For one, the ruling will not affect other insolvency cases, as the Jaypee Infratech case is unique in nature. The Supreme Court was hearing a case that dealt exclusively with homebuyers. It's a fact that under the Insolvency and Bankruptcy Code of India (IBC), 2016, lenders to builders are ranked above unsecured creditors such as homebuyers. In any case, the IBC is not a consumer-protection law, and while it gives representation to all types of creditors in the resolution proceedings of a company, it doesn't recognise homebuyers as creditors.

While writing the IBC, its authors perhaps never thought that such a case involving thousands of homebuyers would ever come up before the NCLT. This is a glaring omission and the government would be well advised to bring in amendments to the IBC on an urgent basis so that homebuyers do not lose out to banks and financial institutions when a defaulting builder's properties are liquidated and debts settled.

What makes it worse for homebuyers is that the insolvency resolution process (IRP) puts a moratorium on fresh suits, recoveries, etc, leaving them

with simply no remedy once a real estate company is admitted for insolvency. Admittedly, the job is a tricky one as the amendments would have to even-ly meet the interests of both homebuyers and financial creditors, without harming the interests of either party. That's because banks will not lend to real estate if their right to recover money is affected. After all, they are in the business of mortgaging — a point the Supreme Court missed while observing that banks need not be so selfish.

On the other hand, one has to also agree with the court when it says that thousands of homebuyers, many of whom have already paid 95 per cent of the price as demanded by Jaypee Infratech as early as 2011-12, can't be left in the lurch. It can't be that public interest should be ignored. One tends to agree with the public interest litigation which said that when the assets will be liquidated, flat buyers will virtually get peanuts since secured creditors will be safeguarded first in the insolvency proceedings.

There have been suggestions that if changes in Section 9 of the Code take time, the other option before the government is to elevate homebuyers to a new category of trustees just through a notification so that their interests are protected.

It's unclear, however, what the apex court is trying to achieve by asking Jaiprakash Associates to deposit ₹2,000 crore by October 27 this year. Apart from the fact that it's too little as the homebuyers' money at stake is much more — around ₹25,000 crore — will the court order detention of the promoters if they fail to pay up, just as it did in the case of Sahara's Subrata Roy? The case of the latter is dragging on for years without any viable solution in sight. But that's



POWERPOINT

SHYAMAL MAJUMDAR

Decoding BJP's winning formula



BOOK REVIEW

ARCHIS MOHAN

The successive electoral triumphs of the Bharatiya Janata Party (BJP) have mesmerised its supporters and rivals alike. After their election victories in Assembly polls this year, particularly in Uttar Pradesh (UP), Prime Minister Narendra Modi and BJP chief Amit Shah are perceived to be invincible.

If the 1984 Lok Sabha verdict can be attributed to a sympathy wave in favour of the Congress, a majority of Indians were either not born or too young to remember a leader and party exercise such sway over voters, last seen in the heydays of Indira Gandhi in the early 1970s.

In his latest book Prashant Jha credits the BJP's electoral success to Mr Modi's near hypnotic grip over the masses that few lead-

ers have had since 1991, and to Mr Shah's "school of election management".

Mr Jha's book was officially launched on Monday at the Nehru Memorial Museum and Library, with the venerable institution advertising the event in leading newspapers.

In this exhaustive but racy account, Mr Jha credits the BJP's electoral successes to Mr Modi's credibility and popular connect, Mr Shah's indefatigable energy, their willingness to learn from mistakes, ability to raise resources efficiently, a dash of social engineering and appropriate table-spoonfuls of communal polarisation.

The book doesn't, however, provide historical contexts of how elections have been planned and fought in India since 1935. While the dexterity of their skill cannot be doubted, Messrs Modi and Shah come across as pioneers in the *esoteric* art of election management.

Yet Mr Jha quotes K N Govindacharya, one of the BJP's most influential leaders of the 1990s, who says Mr Modi's "forte is political marketing". On April 6, 2014, L K Advani had put it a bit differently: Mr Modi was not his protégé, but he was "an excel-

lent event manager".

Apart from its eulogy to the Modi-Shah duo, the book highlights the key role of another rising star, Ram Madhav, who some in the Sangh would love to see as the next BJP chief. It is unsparing in its criticism of Congress Vice President Rahul Gandhi.

Mr Jha, however, goes beyond collating his own reportage and that of others to present this account *sans* "theoretical mumbo-jumbo".

The chapter "Shah's Sangathan" is enlightening even for journalists who cover the party. It details the organisational changes that Mr Shah and his Man Friday in Uttar Pradesh, Sunil Bansal, have effected since 2014.

"Social Engineering" is another engrossing chapter that explains BJP's caste calculations. "H-M Chunav" brings out the Sangh Parivar's majoritarian project, how it helped it win UP and encouraged the demise of "secular politics".

The final chapter, "The Future of the Hegemon", charts the uphill task for the Opposition in the next general elections, but also the challenges for the BJP in maintaining its support among competing caste and

class groups.

Mr Jha ably elaborates how Mr Modi reinvented himself as an icon of the poor after Rahul Gandhi's barb that he ran a "sui-boot ki sarkar".

In UP, the BJP leveraged data from the Socio-Economic Caste Census (SECC) to project itself as a party for the poor. Effective roll-out of the Ujjwala scheme to provide cooking gas to poor families, toilet construction under the Swachhata Mission, the Jan Dhan Yojana and the Mudra Yojana helped. Mr Jha recounts how the BJP chief persuaded the PM, after feedback from the state unit, on the importance of a farm loan waiver.

Another interesting peep into the BJP's UP campaign is the money the party spent. According to Mr Jha, the estimates range from ₹16 crore to ₹1,500 crore! There was a bottom-up resource collection, he says. The candidate was expected to be "economically strong", but the bulk of BJP's resource mobilisation happened at the central level.

Mr Jha says that unlike the Congress, which goes through a leaky, corruption-prone chain to collect money, the BJP leadership knows which ministry in which state government offers opportunities and it deals with the businessmen or individuals concerned directly.

During the UP Assembly polls, the

authorities seized ₹115 crore from the day the model code of conduct came into force to the conclusion of the election, three times the money seized in the 2012 polls. Mr Jha argues that this was evidence enough that demonetisation didn't impact resource mobilisation for major political parties.

Instant political analysis is fraught with risks — more so in a country as diverse as India where the political ground can shift within weeks.

The book has tried to make sense of the events from 2014 Lok Sabha polls till the end of July, when Bihar Chief Minister Nitish Kumar jumped ship to align with the BJP. "It is striking that three years into his term, there is no anti-incumbency against Narendra Modi. In fact, power has only added to his appeal," Mr Jha writes.

But August and September have brought about some of the worst days for the Modi government since it lost in Delhi and Bihar in 2015. The list is long — the Supreme Court verdict on privacy, the mess in Haryana, the unabated farmers' agitation in parts of the country, the embarrassing failing to ensure the defeat of Congress leader Ahmed Patel in a Rajya Sabha election, the controversy around the murder of journalist Gauri Lankesh, and the anger over steep diesel and petrol prices.

Most of all, the government is being

reported that flood-prone districts in Bihar were no longer the only ones to be affected this year. Further, the intensity of rains increased even where total rainfall remained the same. Thus unexpected flash floods — rather than just embankment breaches — have increased. Hence preparations were not adequately targeted. All this cries out for more resources to achieve correct forecasting, preparations and infrastructural care, the kind usually accomplished in the US.

Shunondo Basu, meteorologist at Bloomberg New Energy Finance based in New York, elaborated on Bloomberg TV the relentless lashing by Harvey and its immediate deleterious impact on the US's energy sector. He focussed on Harvey's impact on US energy markets. Production of gasoline, petrochemicals, and other refined products declined severely during the days of the storm and immediately thereafter. Refinery shutdowns and disruptions to pipeline infrastructure caused a sudden supply constraint. Gasoline prices rose nationwide. The impact on pipelines tightened even the market in Northeastern US. The Texas power grid, ERCOT, saw total load down by as much as 40 per cent. Given that natural gas is the primary fuel source for power generation, demand for this commodity was down significantly. Crude oil tankers drifted on the Gulf, unable to deliver at ports. Natural gas exports to Mexico were also interrupted as force majeure was declared on a number of pipelines.

In subsequent bulletins, Mr Basu elaborated on selected aspects of industry recovery. Despite being hit by the storm, shale oil production resumed fairly quickly, with a return to near-normal operations by end of August. A number of ship channels that had been flooded out became accessible by September beginning. No doubt, in the US, normalcy appears to be restored relatively quickly, butressed by government financial support. By contrast, as a post-climate event period unfolds, it typically takes long for infrastructure to be reinstated methodically in India's environment. To no small extent it appears to reflect leakage of relief funds, a matter India has found tough to grapple with.

India's lack of mitigation, and absent or slow rehabilitation, are tough to reliably measure in toto. Even here, the brunt of the weighing down of corruption is on the silent, helpless, rural denizen. Without frontal and full throttle confrontation on corruption, India will remain unable to pick up and move forward in economic, leave alone social, terms, when natural disasters precipitated by the increasingly complex ramifications of climate change hit India's expanse.

another story.

It's a good signal that the Insolvency and Bankruptcy Board of India is open to the idea of tweaking the law. That is evident from its decision to ask for public comments on the bankruptcy code. There is no doubt that the IBC is a significant step forward from the earlier regime, which had a series of overlapping regulations under which lenders, company promoters and other creditors could initiate competing proceedings in different forums and regions.

But beyond the Jaypee Infratech case, there are other areas as well where the IBC needs to improve. For example, the Code should specifically provide that the promoters of companies, which have entered the insolvency process, are not allowed to bid for them. If lenders have not been able to convince them to repay debts and make their companies solvent for so long, it's patently unfair to allow them an opportunity to regain control at bargain prices. Lenders should not be the only ones to lose out. A case in point could be the Ruias who are reported to be dead set against giving up ownership of their steel business and are interested in bidding for Essar Steel, which has entered the bankruptcy process. Also, the Code should give an opportunity for borrowers to get a fair hearing before any matters are admitted to tribunals empowered to rule on these cases.

The other area to look at is to prevent recurrence of cases such as Synergies Dooray Automotive, which was earlier seen as the first success case of debt recast under the insolvency code. The case is now embroiled in a major controversy after allegations of related party transaction executed through a complicated transaction. The matter is now before the tribunal.

These are early days for the Insolvency Code and a few amendments are necessary to make the significant experiment a success and improve the credibility of the entire process.

accused of running the economy into the ground with demonetisation and the hurried roll-out of the goods and services tax (GST) regime. The narrative, has shifted enough for the BJP chief to recently caution supporters, with no hint of irony, not to trust all they read on social media, which remains the backbone of Sangh Parivar campaigning. The Rashtriya Swayamsevak Sangh is unhappy, as are its fraternal organisations working among farmers and workers.

In the past two months, opposition parties have been persistent in raising economic issues and resisted the trap of binary identity politics. Interesting bypolls are due in Uttar Pradesh, Rajasthan and Bihar that will test the index of opposition unity. Assembly polls are round the corner in Gujarat and Himachal Pradesh.

It is possible that the BJP will recover some lost ground as the Supreme Court starts daily hearings in the Ram Janmabhoomi dispute. But stranger things are known to have happened in Indian politics.

HOW THE BJP WINS

Inside India's Greatest Election Machine

Prashant Jha

Juggernaut

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