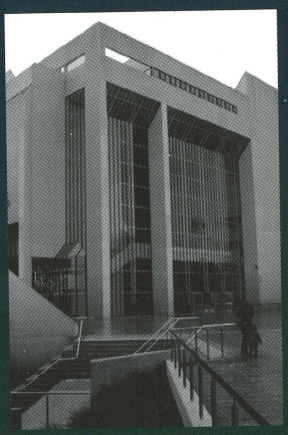
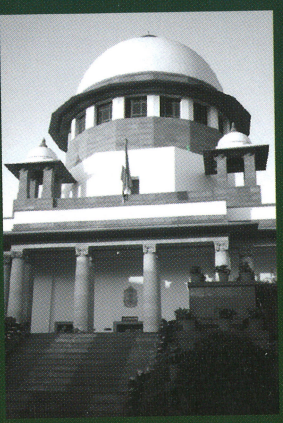
AUSTRALIA and INDIA

A COMPARATIVE OVERVIEW OF THE LAW AND LEGAL PRACTICE



Shaun Star



Forewords by

The Honourable Justice Robert French AC
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Litigation and Civil Procedure

GOPAL SUBRAMANIUM* AND S. STUART CLARK AM**

1. Overview

1.1 Introduction

The Australian and Indian legal systems share many similarities as a consequence of their shared common law heritage. The English common law has significantly influenced the legal principles, both substantive and procedural, of both countries. Both countries are federations and have similar hierarchies of courts.

There are also some significant differences. For example, parties to litigation in Australia are able to obtain discovery of documents held by their opponent with the opponent obliged to identify and disclose documents in their possession that relate to particular issues or, sometimes, the matter more generally. In India, a party can only obtain discovery of specific documents which are known to exist. Second, a successful party can generally recover the bulk of their costs in Australian litigation, the so called 'loser pays' rule, but not in India. Third, the conditions placed on practising foreign lawyers vary from the Australian and Indian perspectives.

In addition, while the level of litigation has from time to time tended to overwhelm the judicial systems in both Australia and India, Australian courts have adopted effective case management systems to streamline the way in which disputes are resolved, freeing up resources in the system. The sheer number of cases before the courts in India continues to be a major obstacle in resolving disputes in a cost-effective and timely manner.

These similarities and differences will be illustrated throughout this chapter. In particular, this chapter will *first* compare and contrast the structure of the court systems in Australia and India, *secondly*, the way in which litigation is practiced in both jurisdictions will be explained and *finally*, the issues which may arise in enforcing decisions, including foreign judgments, will be considered.

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1.2 Structure of the Court System, Jurisdiction and Appeals Process

AUSTRALIA

Australia has a federal system of government, in which powers are divided between a central (Commonwealth) government and individual States and Territories. The structure of the Australian legal system reflects the federal system. Each State and Territory is a separate jurisdiction and has its own hierarchy of courts and tribunals. In addition, there is a hierarchy of Federal courts and tribunals which have jurisdiction over laws made by the Commonwealth Government. Thus, Australia effectively has nine court systems – the eight State and Territory systems and one federal system. The High Court of Australia unites these nine court hierarchies: it is the ultimate court of appeal for all Australian courts.

The High Court of Australia

The High Court of Australia ("**High Court**"), the highest court in Australia, is a court of both original and appellate jurisdiction. The High Court cannot give advisory opinions.[1] In modern times, the only matters heard by the High Court in its original jurisdiction are challenges to the constitutional validity of Commonwealth laws and judicial review cases concerning migration powers. The majority of the High Court's matters are appeals from the appellate divisions of the Supreme Courts of each State and Territory or the Federal Court of Australia. The High Court will only hear an appeal after special leave to appeal is granted.[2] Applications for special leave are heard by two or three High Court Justices. Special leave is rarely granted: generally only where the appeal gives rise to a question of law of public importance.

The High Court's decisions are binding on all lower courts in Australia,[3] not just the courts of the State or Territory in which the matter arose. This ensures there is a single uniform Australian common law. This can be contrasted with the United States of America, where there is a common law of each State, as the United States Supreme Court lacks a general appellate jurisdiction over the State Supreme Courts.

The State and Territory Court Systems

Each of Australia's six States and two Territories has a Supreme Court. Each of those Supreme Courts is the highest court in that State's court system, subject only to the High Court. Each has unlimited civil jurisdiction. However, most civil claims do not commence in the Supreme Court. The Supreme Court hears, at first instance, monetary claims above a certain threshold based on the amount claimed in the proceedings (typically, from A$ 750,000), or claims for equitable relief. Monetary claims below that threshold are heard by a lower court in the State court hierarchy. State Supreme Courts may, in certain matters, exercise jurisdiction under federal law.

Each State Supreme Court has an appellate division, or Court of Appeal, which hears appeals from the single judges of the Supreme Court, lower courts in the State system and certain State tribunals.

1. *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.
2. *Judiciary Act, 1903* (Cth), section 35(2).
3. *Farah Constructions Pty. Ltd.* v. *Say-Dee Pty. Ltd.*, (2007) 230 CLR 89.

Most of the States have two further levels of inferior courts. The District Court (in Victoria called the County Court) is the intermediate trial court in most States' court hierarchy. The District Court has jurisdiction for most civil matters within a monetary threshold (typically, from A$ 100,000 to A$ 750,000).

The lowest court in the State court hierarchy is the Local Court (in some States called the Magistrates' Court), which hears smaller civil matters.

In addition, some States have established specialist courts of limited statutory jurisdiction, designed to hear specific categories of disputes. For example, the Land and Environment Court of New South Wales is responsible for interpreting and enforcing planning and environmental law in the State.

Most States have also established a variety of specialist tribunals, in addition to the formal court structure outlined above. The tribunals are informal and parties are often unrepresented. Tribunals also actively engage in alternate dispute resolution techniques.

The Federal Court System

Much like the hierarchies of courts established under the laws of each State, there is also a hierarchy of courts which deal with disputes relating to Commonwealth, or federal, law. In addition, as a consequence of a complex legislative regime of 'cross vesting' the courts of all States and Territories have the jurisdiction to hear and determine claims arising under both federal law or a law of another state and territory.

The Federal Court of Australia ("**Federal Court**") is a superior court of record and a court of law and equity.[4] The Federal Court's jurisdiction now covers almost all civil matters arising under Australian federal law and some summary and indictable criminal matters. Most notably, the Federal Court has jurisdiction to hear disputes on issues including trade practices law, bankruptcy, corporations, industrial relations, intellectual property, administrative law, native title and taxation.

While there are limited circumstances in which civil actions are tried by a judge sitting with a jury in the state court systems,[5] all civil matters in the Federal Court are heard by a judge alone. Appeals from a single judge are heard by the Full Federal Court – a court constituted for that purpose by three Federal Court judges.

The Federal Circuit Court is the lower Commonwealth trial court and hears less complex disputes in family law, administrative law, bankruptcy, industrial relations, migration and trade practices matters. The Federal Circuit Court was established to provide a simpler and more accessible alternative to litigation in the superior courts (such as the Federal Court) and to relieve the workload of those courts.

There are also a range of tribunals created under Commonwealth law. For example, the Administrative Appeals Tribunal reviews a broad range of administrative decisions made by Australian Government ministers and officials,

4. *Federal Court of Australia Act, 1976* (Cth), section 5(2).

5. For example, in New South Wales civil juries are all but extinct, save in actions for defamation.

authorities and other tribunals. The Federal Court hears appeals from the Administrative Appeals Tribunal, but appeals are limited to questions of law.

INDIA

India is a *quasi*-federal republic with a unified judiciary. The distribution of legislative and executive competence of the Central and the State Governments is defined in the Constitution.[6] Broadly put, all subordinate courts and tribunals in a State are under the administrative supervision of the High Court of that State. Apart from being the final Court of Appeal, the Supreme Court of India has been conferred with plenary powers under articles 136, 139A read with articles 32, 141 and 142 of the Constitution of India.

The procedure of the Courts of Civil Judicature in India, except those in the State of Jammu & Kashmir,[7] Nagaland and other tribal areas, is governed by the *Code of Civil Procedure, 1908* ("**CPC**"). Initially, the High Courts were established in the Presidency towns (Chennai, Kolkata and Mumbai) and are also called 'Chartered High Courts' since they were set up under the Charter issued pursuant to the *Indian High Courts Act, 1861* passed by the British Parliament on 6 August 1861 and have original jurisdiction.[8] The High Courts of Delhi, Himachal Pradesh and Jammu & Kashmir, though not Chartered High Courts, have also been conferred with original jurisdiction.[9]

The Supreme Court of India also exercises original jurisdiction in any dispute between the Government of India and one or more States; or between the Government of India and any State or States on one side and one or more other States on the other; or between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of the legal right depends.[10]

In other towns of India, while the specific hierarchy and nomenclature of Courts differs from one State to another,[11] broadly, the Civil Courts are divided into three categories:

(a) Court of District Judge;

(b) Court of Civil Judge (Senior Division);

(c) Court of Civil Judge (Junior Division).

Given the volume of cases, additional judges are appointed to prevent inordinate delay in disposal of cases.[12] The language of subordinate Courts is generally the vernacular language of the region, but that of the High Court and the Supreme Court is English.[13]

6. *See* The Constitution of India, articles 245-248 and Seventh Schedule.
7. *See* The civil procedure in the State of Jammu and Kashmir is governed by the *Jammu and Kashmir Civil Procedure Code, 1920,* which is similar to the CPC.
8. M.P. Jain, *Outlines of the Indian Legal and Constitutional History* (6th Edn., 2006), 259.
9. Mulla, *The Key to Indian Practice* (9th Edn., 2008), 11.
10. The Constitution of India, article 131.
11. The Constitution of India, Seventh Schedule, List II, Entry 65.
12. The provision for this is made under the respective High Court Acts. For instance, section 5 of the *Karnataka Civil Courts Act, 1964* deals with the appointment of Additional District Judges.
13. The Constitution of India, article 137.

In a presidency town, the High Court is the principal Court and there is no upper limit to its jurisdiction. The jurisdiction of the City Civil Court and that of Court of Small Causes is limited to a specified amount or value of the property in question. In addition, for a certain specified class of cases, the jurisdiction of the Court of Small Causes is specifically barred.

In ordinary towns, the Court of District Judge is the principal Court of original civil jurisdiction in the district with no upper pecuniary limit. Next in hierarchy are the Courts of Civil Judge (Senior Division).

At the bottom of the hierarchy is the Court of Civil Judge (Junior Division), which is regarded as equivalent to *Munsiff's* Court in State of Tamil Nadu and State of West Bengal. In addition, there are Provincial Court of Small Causes established under the *Provincial Small Cause Courts Act, 1887*, which are Courts of limited jurisdiction for trying certain kind of disputes.[14]

In terms of section 15 of the CPC, a suit must be instituted in the court of the lowest grade competent to try it. The pecuniary jurisdiction of the Courts varies from one State to another, and is subject to revision by the State Government. Generally, matters relating to admiralty, vice-admiralty and testamentary succession are amenable to the jurisdiction of the High Court concerned.

The general rule regarding jurisdiction of Civil Courts is contained in section 9 of the CPC,[15] which provides that the Civil Courts shall have the power to try all suits of a civil nature unless their cognizance is expressly or impliedly barred.

The pecuniary as well as subject-matter jurisdiction of the subordinate judiciary is subject to the law made by the State legislatures. Thus, provision of appeal may vary from one State to another. It is settled law in India that there can be no appeal unless specifically provided by the statute, and in respect of civil suits the right to appeal is regulated by the CPC.[16] Generally, the Court of District Judge has appellate jurisdiction over decrees passed by Civil Judge (Senior Division) of lesser valuation, and for matters of higher valuation appeals lie to the High Court.[17] Decrees passed by the Court of Civil Judge (Junior Division) are appealable before the Court of Civil Judge (Senior Division). Further, certain specified interlocutory orders are also appealable under the CPC.[18] For all other orders, an aggrieved person may approach the High Court for revision of the order, provided either of the conditions in section 115 of CPC is satisfied.[19] Second Appeals can be filed before the High Court if a substantial question of law is involved.[20] The High Court, while admitting the Second

14. *The Provincial Small Cause Court Act, 1887*, section 15(1).
15. *Code of Civil Procedure, 1908*, section 9: "Courts to try all civil suits unless barred. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."
16. *Code of Civil Procedure, 1908*, sections 96 and 100.
17. *See The Karnataka Civil Courts Act, 1964*, sections 19 and 20.
18. *Code of Civil Procedure, 1908*, Order XLIII.
19. In terms of section 115 of the CPC, revision lies to the High Court if no appeal from such order is provided and the subordinate court has exceeded its jurisdiction, failed to exercise its jurisdiction or exercise its jurisdiction illegally or with material irregularity.
20. *Code of Civil Procedure, 1908*, section 100.

Appeal is required to formulate a 'substantial question of law' involved in the case at the threshold.[21] Courts have the power to review their decisions if an error apparent on the face of record is shown to exist. Subordinate courts in limited circumstances may also exercise their power to refer a case to the High Court for determination of a question of law.[22]

Ordinarily, the judgments of the High Courts are subject to intra-Court appeal in the event that the High Court entertains the matter in its Original Jurisdiction. Thereafter, one can appeal to the Supreme Court under various provisions, depending on the nature of the case. Under the Constitution itself, appeals to the Supreme Court may lie in the circumstances contemplated under article 132 to 134. Under Article 136 of the Constitution, the Supreme Court may grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed by any court or tribunal in the territory of India.[23] The petition under Article 136 of the Constitution is called the special leave petition and such a petition is usually entertained where a substantial question of law is shown to exist.[24]

The Indian Constitution empowers the High Court and the Supreme Court to entertain and admit petitions seeking judicial review of executive or administrative actions. One can approach either the High Court or the Supreme Court of India seeking issuance of prerogative writs where violation of 'Fundamental Rights'[25] is alleged. The High Court is regarded as a court of first instance for issuance of prerogative writs in matters seeking judicial review. While the Supreme Court can be approached only for enforcement of fundamental rights,[26] one can approach the High Court[27] for enforcement of both fundamental rights as well as statutory and legal rights.[28] The right to approach the High Court and the Supreme Court for issuance of prerogative writs and seeking judicial review has been held to be a part of basic structure of the Indian Constitution, and is an immutable feature of Indian constitutionalism.[29]

Article 143 of the Constitution of India contains advisory jurisdiction of the Supreme Court wherein the President of India can seek the opinion of the Supreme Court, on a question of law or fact, which has arisen or is likely to arise and which is of such a nature and public importance that it is expedient to seek opinion of the Supreme Court.[30] The Supreme Court also has plenary powers to pass such orders or decree which are necessary to ensure 'complete justice'.[31]

21. *Kundan Singh* v. *Salinder Kaur*, (2010) 15 SCC 160.
22. *Code of Civil Procedure, 1908*, section 113.
23. However, the Supreme Court may not grant special leave to appeal a judgment or order passed by a tribunal constituted under law relating to Armed Forces.
24. *Tirupati Balaji Developers Pvt. Ltd.* v. *State of Bihar*, AIR 2004 SC 2351.
25. Certain rights, which broadly correspond to the civil and political rights, are referred to as 'Fundamental Rights' and are guaranteed by Part III of the Constitution of India.
26. The Constitution of India, article 32.
27. The Constitution of India, article 226.
28. *A.K. Gopalan* v. *State of Madras*, AIR 1950 SC 27.
29. *Subhash Sharma* v. *Union of India*, 1991 Supp (1) SCC 574.
30. The Constitution of India, article 143.
31. The Constitution of India, article 142.

In addition to the provision of an appeal, the Indian Constitution has also conferred supervisory jurisdiction upon the High Court to exercise judicial oversight over all courts and tribunals functioning within its territorial jurisdiction.[32]

The Constitution of India empowers the Government to establish tribunals for determination of certain classes of disputes.[33] Various Central and State Tribunals have been established for adjudication of disputes relating to (i) matters of service conditions of government employees;[34] (ii) matters of the armed forces';[35] (iii) the expeditious disposal of consumer disputes;[36] (iv) claims arising out of motor vehicle accidents;[37] (v) compensation from railways.[38] In addition, specialist and independent tribunals have been established in areas of law requiring expertise such as matters involving: (i) environmental matters;[39] (ii) administration of direct[40] and indirect taxes;[41] (iii) recovery of a certain class of debts;[42] (vi) the securities market;[43] and (v) competition litigation.[44] Orders passed by some tribunals are subject to appeals to either the High Court or the Supreme Court.[45] Various administrative authorities have also been clothed with *quasi*-judicial powers. Most tribunals have been empowered to devise and follow their own procedure.

The CPC empowers the High Courts to make rules to regulate their own procedure and the procedure of the Courts subordinate to them. The High Courts[46] and the Supreme Court[47] are also Courts of record and their judgments are binding on subordinate courts. They are also empowered to punish a person for committing contempt of court.

1.3 Rights of audience of barristers and solicitors

AUSTRALIA

Lawyers are admitted to practise in a particular State or Territory by its Supreme Court. In most Australian jurisdictions, admitted lawyers can obtain a practising certificate which entitles them to practice as both a solicitor and

32. The Constitution of India, article 227.
33. The Constitution of India, articles 323A and 323B.
34. *The Administrative Tribunals Act, 1985.*
35. *The Armed Forces Tribunal Act, 2007.*
36. Section 9 of the *Consumer Protection Act, 1986* sets-up a three-tiered grievance redressal mechanism – District Forums, State Consumer Disputes Redressal Commissions and a National Consumer Disputes Redressal Commission.
37. *The Motor Vehicle Act, 1988.*
38. *The Railway Claims Tribunals Act, 1987.*
39. *National Green Tribunal Act, 2010.*
40. *The Income Tax Act, 1961.*
41. *The Central Excise Act, 1944.*
42. *The Recovery of Debts Due to Banks and Financial Institutions Act, 1993.*
43. *The Securities and Exchange Board of India Act, 1992.*
44. *The Competition Act, 2002.*
45. *See National Green Tribunal Act, 2010,* section 22 which provides for an appeal to the Supreme Court of India from an order passed by the tribunal.
46. The Constitution of India, article 215.
47. The Constitution of India, article 129.

barrister. Solicitors and barristers both have unlimited rights of audience in all courts and most tribunals in any State and Territory.[48]

Nevertheless, the vast majority of the Australian legal profession falls into the traditional roles of solicitor and barrister. In jurisdictions where there is a fused profession, a functional bar still operates and there are independent barristers. Australia's equivalent of "Queen's Counsel" are now known as "Senior Counsel", though some States have reintroduce the former title.

Typically, barristers will appear in hearings in the Supreme Courts, Courts of Appeal, the Federal Court and the High Court. While barristers are now rarely briefed in Local Court proceedings, they will often appear in District Court proceedings. Solicitors often appear in small matters and for minor interlocutory skirmishes in larger matters.

Australia is moving towards a uniform national framework for the regulation of the legal profession, with the aim of replacing individual state and territory regimes with a uniform national scheme.[49] It has been adopted in New South Wales and Victoria in July 2015.[50] Some aspects of practice are already close to uniform, such as the recently introduced uniform professional conduct rules for solicitors.[51]

INDIA

The right of lawyers to practice in India is regulated by the *Advocates Act*, 1961 (**"Advocates Act"**). Section 29 of the Advocates Act provides that *"only one class of persons are entitled to practise the profession of law, namely, advocates"*. In *Lawyers Collective* v. *Bar Council of India*,[52] the Bombay High Court held that:

> "the expression 'to practise the profession of law' in section 29 of the 1961 Act is wide enough to cover the persons practising in litigious matters as well as persons practising in non-litigious matters."

'Advocate' is defined in section 2(a) of the Advocates Act to mean *"an advocate entered in any roll under the provisions of this Act"*. Every State Bar Council maintains a roll of Advocates containing the names and addresses of all persons who were entered as an Advocate on the roll of any High Court under the *Indian Bar Council Act, 1926* or who were admitted to be Advocates on the roll of the State Bar Council under the Advocates Act on or after the appointed date.

Section 24(i) of the Advocates Act provides that a person shall be qualified to be admitted as an advocate on a state roll if he:

(a) is citizen of India;
(b) has completed 21 years of age; and
(c) has obtained a degree in law.

48. *Mutual Recognition Act, 1992* (Cth); National Legal Profession Model Bill published in 2004 and endorsed by the States' and Territories' Attorneys Generals, and enacted in state legislation.
49. The uniform regime in NSW and Victoria will account for more than 70% of all Australian lawyers.
50. *See* for example the *Legal Profession Uniform Law Application Act, 2014* (NSW) and the *Legal Profession Uniform Law, 2014* (NSW).
51. Australian Solicitors' Conduct Rules.
52. (2010) 2 Mah LJ 726.

The Advocates Act does not provide for barristers and solicitors as a different class. As a legacy, for some Chartered High Courts such as the Bombay High Court, examinations are held for one to qualify as a solicitor, for persons already enrolled as advocates. In Bombay, the Solicitors' Exam is conducted by Bombay Incorporated Law Society. However, even in the Bombay High Court the said examination is not mandatory for practicing in that Court. Recently, at the instance of the Supreme Court of India, the Bar Council of India[53] amended, the Bar Council of India Rules,[54] making it mandatory for every advocate enrolled to pass the All India Bar Examination in order to practise law.[55]

The Advocates Act recognises a separate class of advocates, called 'Senior Advocates', who are designated by the High Court or the Supreme Court because of their standing at the Bar or because they have special knowledge or experience in law.[56] They are regarded as Indian equivalents of 'Queen's Counsel' in England or 'Senior Counsel' in Australia. Senior Advocates can only appear along with a junior advocate and are barred from drafting and filing petitions in their own name.

In the Supreme Court of India, no Advocate is entitled to file an appearance or act for a party in the Court unless he is instructed by an Advocate-on-Record. Senior Advocates can only appear/plead along with an Advocate-on-Record in the Supreme Court, or with a junior advocate in any Court or Tribunal in India.[57]

1.4 Rights of appearance of foreign practitioners

AUSTRALIA

As a general statement, the practice of Australian law in Australia is restricted to lawyers holding a practising certificate issued by an Australian State or Territory regulator.[58]

A foreign lawyer is entitled to practice foreign law in Australia for a maximum period of 90 days in any 12 month period, without any requirement to register with any authority in Australia.[59] This may occur, for example, if the foreign lawyer flies into Australia with his or her clients to act for them in commercial negotiations or international arbitrations.

If a foreign lawyer wishes to practise for more than 90 days, he or she is required to register with the local State or Territory regulator to qualify as an "Australian-registered foreign lawyer."[60] The foreign lawyer is then permitted

53. *See* orders dated 29 June 2009, 6 October 2009 and 14 December 2009 passed by the Supreme Court of India in S.L.P. (C) No. 22337 of 2008, [*Bar Council of India* v. *Bonnie FOI Law College*].
54. *See* All India Bar Examination Rules, 2010 (notified in the official Gazette on 5 June 2010).
55. The Rule was made effective for those who graduated in the academic year 2009-2010 or thereafter.
56. *Advocates Act, 1961*, section 16.
57. *Supreme Court Bar Association* v. *B.D. Kaushik*, (2012) 8 SCC 587. Also *see* Order IV of the Supreme Court Rules, 2013.
58. The following is based on the law of New South Wales, which is typical of the other States and Territories.
59. *Legal Profession Uniform Law, 2014* (NSW), section 60.
60. *Legal Profession Uniform Law, 2014* (NSW), Part 3.4, Div. 3.

to practise the law of their foreign jurisdiction, in arbitrations and international law, in Australia. One of the requirements of registration is that the lawyer must have professional indemnity insurance, or disclose to their clients that they do not.[61]

Alternatively, a foreign practitioner can apply to practise Australian law. In order to be admitted in Australia on the basis of foreign qualifications, the foreign practitioner must satisfy the following requirements:

- hold a law degree comparable to an Australian three year full-time degree;
- have completed subjects in their law degree which are substantially similar to subjects which Australian applicants have completed prior to application;
- demonstrate skills and knowledge substantially similar to that necessary for the practice of law in Australia; and
- have undertaken or be exempt from an English language test.

An admitting authority may waive the applicant's requirements to complete subjects similar to Australian law subjects and demonstrate skills and knowledge of the practice of law in Australia for experienced practitioners from overseas. It is also possible for a foreign lawyer to be conditionally admitted as an Australian lawyer.[62]

INDIA

The Advocates Act provides that subject to the other provisions of the Act, a national of any other country may be admitted as an Advocate on a State roll, if he is a citizen of India and is permitted to practice law in that other country.[63]

Section 47(2) of the Advocates Act provides that the Bar Council of India is allowed to prescribe conditions subject to which persons other than citizens of India who hold foreign qualifications in law could be admitted to practice as an advocate under the Advocates Act.

Interestingly, section 47(1) of the Advocates Act empowers the Central Government to notify the countries that prevent Indians from practicing law or subject them to unfair discrimination and debar citizens of such countries from practicing in India.

In *A.K. Balaji* v. *Government of India*,[64] the Madras High Court has held that foreign lawyers are not allowed to practice law in India unless they are enrolled with a State Bar Council in terms of the Advocates Act. The Madras High Court held:

(a) Foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they

61. *Legal Profession Uniform Law, 2014* (NSW), section 214.
62. *Legal Profession Uniform Law, 2014* (NSW), section 20.
63. *Advocates Act, 1961*, Proviso to section 24(1)(a).
64. AIR 2012 Mad 124.

fulfil the requirement of the Advocates Act and the Bar Council of India Rules.

(b) However, there is no bar for foreign law firms or foreign lawyers to visit India for a temporary period on a 'fly in and fly out' basis, for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.

(c) Moreover, having regard to the aim and object of the international commercial arbitration introduced in the *Arbitration and Conciliation Act, 1996,* foreign lawyers cannot be debarred from coming to India and conducting arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.

(d) Business process outsourcing companies ("**BPOs**") providing a wide range of customised and integrated services and functions to their customers (such as word processing, secretarial support, transcription services, proof-reading services) do not come within the purview of the Advocates Act. However, in the event of any complaint made against these BPOs violating the provisions of the Advocates Act, the Bar Council of India may take appropriate action against such erring companies.

An appeal from the decision of *A.K. Balaji* v. *Government of India* is currently pending before the Supreme Court of India.[65]

2. Practice and procedure

2.1 Origins of the system

AUSTRALIA

New South Wales, the first British colony in Australia, was initially established as a penal colony. Acts of the British (Imperial) Parliament established a court system based in essence on the English model by 1824.[66] The reception of English law was effected in 1828 by Imperial legislation which provided that all laws and statutes in force in England should be applied in Australian courts so far as they were applicable.[67]

As subsequent colonies were founded in Australia, Supreme Courts were established. Appeals from the State Supreme Courts could be made only to the Judicial Committee of the Privy Council, sitting in London.

In 1901, the self-governing colonies formed one nation, collectively becoming States of the Commonwealth of Australia. The High Court was created under the new Commonwealth Constitution.

For much of the 20th century, Australian courts followed the decisions of the English courts. Decisions of the House of Lords were accepted in Australia as binding authority.

It was not until 1963 that the High Court declared its judicial independence from the House of Lords[68] although appeals from Australian courts to the Privy

65. Special Leave Petition (Civil) 17150-17154 of 2012 (*Bar Council of India* v. *A.K. Balaji).*

66. *New South Wales Act, 1823* (Imp) 4 Geo IV c. 96, section 2.

67. *Australian Courts Act, 1828*(Imp) 9 Geo IV c. 83, section 24.

68. *Parker* v. *The Queen,* (1963) 111 CLR 610 at 632–3.

Council were not finally abolished until 1986.[69] Until that time, Australian Courts were bound by Privy Council decisions.

In modern times, there has been a divergence between Australian and English law on a growing and diverse range of issues, partly attributable to the influence of European law on English jurisprudence.[70]

Historically, Australia's most significant divergence from England, in terms of practice and procedure, was the continued refusal of New South Wales to adopt the Judicature reforms, adhering to a court structure in which Law and Equity were administered separately by distinct branches of the Supreme Court of New South Wales.

This separate administration of Law and Equity served to focus attention in New South Wales on the historical origins and traditions of the Equity jurisdiction in England.[71] The result was an emphasis in equitable intervention in contract and commercial dealings, an area where there was no parallel English development.[72]

INDIA

India's legal system has evolved over time from an era where customary law, as determined and/or interpreted by a select few or the ruler, governed the day. During the period when India was an English colony, the courts and substantive laws applied by courts depended upon the local customs and religion and nationality of the parties. Progressively, the distinction between British subjects and Indian subjects thinned but major reforms were not visible until the 20th century. Until 1861, the Supreme Courts established by Royal Charters in Calcutta, Bombay and Madras had original jurisdiction of the Presidency towns. The Government under the East India Company had established Sadar Diwani Adalat (Chief Civil Court) and Sadar Nizamat Adalat (Chief Criminal Court). The first attempt to harmonise the civil procedure was made by enacting the *Code of Civil Procedure, 1859*. Between 1865 and 1875, the system of courts across the then existing ten provinces was harmonised. By the *Indian High Courts Act, 1861*, the Crown of England was empowered to establish, by Letters Patent, High Courts in Calcutta, Madras and Bombay as successors of the Supreme Court.[73]

69. *Australia Act, 1986* (Cth), section 11.

70. For examples *see* the imposition of fiduciary obligations in a commercial context: *Cobbe* v. *Yeoman's Row Management Ltd.*, [2008] 1 WLR 1752, 1785–6 [81]; *Hospital Products Ltd.* v. *United States Surgical Corporation*, (1984) 156 CLR 41, 100; the availability of exemplary damages: *Rookes* v. *Barnard*, [1964] AC 1129; *Broome* v.*Cassell & Co Ltd.*, [1972] AC 1027. Cf. *Uren* v. *John Fairfax & Sons Pvt. Ltd.*, (1966) 117 CLR 118; barristers' immunity for negligence: *Arthur J.S. Hall* v. *Simons*, [2002] 1 AC 615. Cf. *D'Orta-Elenaike* v. *Victoria Legal Aid*, (2005) 223 CLR 1; the grant of proprietary relief in relation to agents' bribes or secret commissions: *Sinclair Investments (UK) Ltd.* v. *Versailles Trade Finance Ltd.*, [2012] Ch 453; *Grimaldi* v. *Chameleon Mining NL [No. 2]*, (2012) 200 FCR 296, 320-1; *FHR European Ventures LLP* v *Cedar Capital Partners LLC* [2015] 1 AC 250.

71. *See* Geoff Lindsay SC, "Equity: Principles, Practice and Procedure" (25 November 2003), available at <www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Equity%20-%20Principles,%20Practice%20and%20Procedure%20-%20Lindsay%20SC.pdf>.

72. Justice Paul Finn, "Common Law Divergences" (2013) 37(2) *Melbourne University Law Review* 509.

73. *See*, M.P. Jain, *Outlines of Indian Legal & Constitutional History* (6th Edn., 2006, New Delhi, Lexis Nexis Butterworths Wadhwa Nagpur) 252-61.

Accordingly, the first three chartered High Courts were established in 1861 by Letters Patent and vested with power to adjudicate upon civil and criminal matters, both original and appellate. Some other High Courts were created subsequently. In 1865, fresh Charters were issued. However, these new charters did not bring about any significant modifications and merely continued the existence of the High Courts with minor changes.[74] The High Courts remained the highest judicial bodies in India until the *Government of India Act, 1935* established the Federal Court from which a further appeal lay to the Privy Council. After independence, in 1947, the Supreme Court of India replaced the Federal Court, and is now the final court in India.

The principles of procedure, in civil as well as in the criminal justice system, were drawn from the English system and were based on the recommendations of lawyers and scholars, both Indian and English. Therefore, the present day system of administration of justice is largely a reflection of the model of independent judiciary which was promoted in England. After the *Code of Civil Procedure, 1859*, the civil procedure underwent major overhauls in 1877 and 1882.

The Indian legal system has consistently followed the general principle that all civil cases are within the jurisdiction and competence of the Civil Courts. Therefore, it is only where the jurisdiction is specifically barred and conferred in favour of another forum that the Civil Courts lack the jurisdictional competence. All administrative action is open to judicial review by the High Court, whether or not specifically provided.

The Constitution of India specifically provides for adaptation of pre-constitutional legislation in India.[75] Pursuant to this, the Government of India had issued Adaptation of Laws Order, 1950, which provided for 'adaptation' of (then) existing 'Central Laws' and 'Provincial Laws'.

2.2 Extent and nature of divergence from the English system

AUSTRALIA

Perhaps Australia's most significant divergence from the English legal system is the enactment in Australia of statutes which proscribe unfair trade practices, unconscionable conduct and misleading or deceptive conduct in trade or commerce.[76] Most commercial disputes in Australia include claims based on these statutes, particularly the prohibition on misleading or deceptive conduct.

Modern practice and procedure in Australian and English courts is substantially similar. In the last 10-15 years, both the Australian and English court systems have introduced some methods of court-instigated 'management' of litigation, in order to address the perceived faults of the judicial system, including the length and costs of litigation. The reforms in both jurisdictions have involved shifting control of aspects of the conduct of litigation from lawyers

74. *Ibid.*, 259.

75. The Constitution of India, article 372(2).

76. *See* for examples the Australian Consumer Law, Schedule 2 to the *Competition and Consumer Act, 2010* (Cth) (formerly the *Trade Practices Act, 1974* (Cth)); the *Fair Trading Act, 1987* (NSW) and the *Contracts Review Act, 1980* (NSW).

to the courts. Indeed, in several respects the modern English reforms were modelled on developments in Australia.[77]

Some Australian Courts, most notably the Federal Court, have adopted an individual docket system. Under the docket system, each case commenced in the Court is to be randomly allocated to a judge of the Court, at the time of filing, who is then responsible for managing the case until final disposition. The Docket Judge monitors the parties' compliance with the court's directions, deals with interlocutory issues and ensures that the proceedings progress according to the particular timetable. The judge may direct the parties to participate in alternative dispute resolution processes, such as mediation.

Other Australian Courts administer their cases through various case management lists to which specific judges are assigned. For example, the Supreme Court of New South Wales has a Commercial List to deal with disputes arising out of commercial transactions involving substantial amounts of money or issues of importance to trade and commerce. The list system provides litigants with judges who have specialist expertise and access to a relatively high level of case management where needed.

The Federal Court and most state Supreme Courts have also instituted specific "Fast Track" or Expedition Lists. The principal object of these lists is to ensure that urgent matters, including those relating to commercial transactions, can be heard and determined quickly. These Lists provide for significantly streamlined court procedures. In some very urgent cases, a matter may progress from trial, through an intermediate appellate court to a judgment in the High Court within a month.[78]

Finally, some Australian courts now allow pleadings and other documents to be filed at the court electronically, by uploading the court documents over the internet.

INDIA

The Civil Procedure was inherited from India's colonial past and largely mirrored civil procedure as it existed in England, the object of which is to secure 'fair trial'.[79] The CPC was enacted in 1908, emulating the English principles of civil procedure. Therefore, the functioning of the civil procedure system in India is similar to that in England and Australia. There are no material points of difference in the principles of civil procedure in India and England, the difference exists in the system of administration of justice and in the process of trial. In fact, English precedents on the principles of civil procedure and evidence have persuasive value before the courts in India.[80] Civil procedure in

77. N. Thomson, "Life after Woolf: The impact of the civil procedure reforms" (2001) 11 *Journal of Judicial Administration* 81.

78. *See* for example, *Patrick Stevedores Operations No 2 Pty. Ltd.* v. *Maritime Union of Australia* (1998) 195 CLR 1.

79. *See* Law Commission of India, *Twenty Seventh Report of the Law Commission of India* (1964).

80. See *Satyabrata Ghose* v. *Mugneeram Bangur*, AIR 1954 SC 44; *Sahara India Real Estate Corporation Limited* v. *SEBI*, (2012) 10 SCC 603.

India specifically applies the doctrine of *res judicata*,[81] *res sub judice*,[82] attachment before judgment,[83] garnishee proceedings and the like. However, owing to the Indian legal system's unique circumstances, amendments became necessary and have been effected.

The *Civil Procedure Rules of England & Wales, 1998* ("**CPR**") have gone at least a step ahead and have included an 'Overriding Objective'.[84] While the spirit of 'Overriding Objective' is embodied in the CPC and is reflected in various judicial precedents, it does not find a specific mention in the CPC itself. One could, however, read the above aspects into the inherent powers of the court.[85] Courts in India do not have any statutory basis and guidance for exercise of 'case management' powers unlike the powers vested with the Australian and English Courts.[86] The Supreme Court of India established a court management system in 2012 which also includes devising a plan for 'case management'.[87] While the CPC provides for timelines within which pleadings have to be filed, they are subject to limited relaxation by the courts, and the courts usually do not fix any timetable for determination of the case. The High Courts are now in the process of appointing qualified court managers to handle docket management.

The volume of cases filed and pending before the courts in India pose a serious challenge. Conscious of costs and the delay in administration of justice, the CPC was amended in 1999 and 2002 to provide, *inter alia*, for mandatory examination-in-chief to be done by way of an affidavit.[88] Re-examination and cross-examination could take place in the presence of the judge in Court. In England and Australia, the general rule under the CPR is giving of evidence by way of witness statements in presence of the judge.[89]

The CPC limits the number of adjournments available to a party to three.[90] The approach in England is somewhat different, where the overriding objective

81. *Code of Civil Procedure, 1908*, section 11.
82. *Code of Civil Procedure, 1908*, section 10.
83. *Code of Civil Procedure, 1908*, Order XXXVIII.
84. The (English) *Civil Procedure Rules, 1998*, rule 1.1 "These Rules are a new procedural Code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost." Most Australian jurisdictions have formally adopted similar statements of principle. For example, section 56 of the *Civil Procedure Act, 2005* (NSW) provides that: "The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings." The High Court has recently emphasised that courts should exercise their broad powers of case management to facilitate these "guiding principles" and avoid unduly technical and costly interlocutory disputes about non-essential issues: *Expense Reduction Analysts Group Pty Ltd.* v. *Armstrong Strategic Management and Marketing Pty Ltd.*, (2013) 250 CLR 303, 323 [57].
85. *Code of Civil Procedure, 1908*, section 151.
86. See CPR, rule 3. See *Salem Advocate Bar Association* v. *Union of India*, (2003) 1 SCC 49, Para 11 and 12 where the Supreme Court of India had directed for 'case management formula' to be devised by a select committee.
87. *See* Supreme Court of India, *Policy & Action Plan: Supreme Court of India's National Court Management System*, released on 27 September 2012.
88. *Code of Civil Procedure, 1908*, Order XVIII; *See* also *Salem Advocate Bar Association (II)* v. *Union of India*, (2005) 6 SCC 344.
89. The (English) *Civil Procedure Rules, 1998*, rule 32.2. *See* also, Practice Direction 32, Para. 1.2.
90. *Code of Civil Procedure, 1908*, Order XVII, Proviso to rule 1(1). In State of West Bengal, however, by an amendment such limit has been dropped.

of the CPR is necessarily a factor in considering the need for an adjournment.[91] The present provision states that no more than three adjournments shall be granted, except in circumstances where the reason for the adjournment is beyond the control of the party seeking it;[92] but the said rule is not always strictly observed. The Court's general powers of case management,[93] even in India, do not permit adjournments as a right.

A major point of difference between the Indian and English systems is regarding finding out about the material documents. The mechanism of providing access to documents prior to commencement of trial is available in India as well as in England. While the CPR has switched from 'discovery' to 'disclosure' of documents,[94] Indian procedural rules continue to provide for 'discovery' of documents.[95] Under the CPR, a party is required to disclose the existence of all the relevant documents and provide the other side with an opportunity to inspect such documents. In India, a party can only seek 'discovery' of documents by seeking a direction from the court for provision of some documents which are known to exist. The consequences of failure to provide discovery in India and disclosure in England are largely the same – disallowing the party to rely upon the said document and/or dismissal of party's case.[96]

Unlike in England, Indian law does not provide for 'discovery' or 'disclosure' of documents unless proceedings have commenced.[97]

While a party may incur significant costs in prosecuting or defending a claim in Civil Courts, the courts in India, even though empowered by CPC,[98] do not generally award costs of litigation. Even where costs are awarded, they will either be nominal or be directed to be paid to a legal aid fund. This is a significant departure from the CPR which provides for an independent and strong 'costs regime'.

2.3 Course of Litigation

AUSTRALIA

While there are minor differences between the processes to be followed in the various Australian courts, the course of litigation is broadly the same throughout Australia. There have been partially successful attempts to introduce uniform court rules for civil procedure and a uniform law of evidence.[99]

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91. See *Elliott Group Ltd.* v. *GECC UK*, [2010] EWHC 409 (TCC). *See* also the English Civil Procedure Rules, 1998, 1.1. and 1.2. The position is similar in Australia: *AON Risk Services Australia Limited* v. *Australian National University*, (2009) 239 CLR 175.
92. *Salem Advocate Bar Association (II)* v. *Union of India*, (2005) 6 SCC 344, paragraph 30.
93. The (English) *Civil Procedure Rules, 1998*, rule 3.1(2).
94. The (English) *Civil Procedure Rules, 1998*, rule 31.
95. *Code of Civil Procedure, 1908*, Order XI, rules 12 and 15.
96. *See* Adrian Zuckerman, *Zuckerman on Civil Procedure*, Chapter on "Disclosure and Inspection" (2nd Edn., Sweet and Maxwell, 2006), 549.
97. The (English) *Civil Procedure Rules*, rule 31.16.
98. *Code of Civil Procedure, 1908*, sections 35 and 35A.
99. *See Uniform Civil Procedure Rules, 2005* (NSW); *Evidence Act, 1995* (Cth); *Evidence Act, 1995* (NSW); *Evidence Act, 2008* (Vic); *Evidence Act, 2001*, (Tas).

Some Australian jurisdictions require the parties to engage in alternative dispute resolution before proceedings can be commenced.[100] However, even in these jurisdictions, the requirements are fairly minimal. Failure to do so may result in adverse cost orders.

Proceedings are commenced by way of originating process (the form varies between courts). Once service has been effected and the defendant has entered an appearance, the parties exchange pleadings (such as a statement of claim and defence), which serve to define the issues in dispute between the parties.

Once the parties have closed their pleadings, the parties will give discovery (now sometimes referred to as 'disclosure') – disclosing their relevant documents and inspecting their opponent's relevant documents. Subpoenas may be used to obtain documents from third parties. In most jurisdictions, discovery and inspection takes place before the parties serve the evidence on which they intend to rely at trial.[101]

The standard approach to discovery is to limit the documents to be discovered to those falling within specific categories or classes.[102] Most courts will consider the nature and complexity of the proceedings, the likely cost and the expected significance of the documents before making an order for discovery.[103] Interrogatories may only be administered with the leave of the court and are now rarely used.

Each party will then prepare its evidence for use at the final hearing, often utilising written witness statements or affidavits in place of oral evidence in chief. Where relevant, parties may also engage expert witnesses to give evidence concerning fields of specialised knowledge. Most Australian jurisdictions have Codes of Conduct with which expert witnesses must comply before their evidence will be accepted.[104] Occasionally, the court will direct both parties' experts to prepare a joint report, setting out their areas of agreement and disagreement.[105]

Throughout the proceedings, the parties will attend court at regular intervals for case management. At directions hearings, orders will be made to govern the conduct of the matter up to its final hearing.

Once all the parties' evidence has been prepared and all the interlocutory disputes resolved, the case proceeds to a final hearing. Final hearings are conducted in the usual process for common law jurisdictions:

- The parties (plaintiff, then defendant) make opening submissions to outline the issues in dispute and the evidence they will adduce.

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100. *See* for example *Civil Dispute Resolution Act, 2011* (Cth), section 6.
101. *See* however Supreme Court of NSW Practice Note No. SC Eq 11, under which parties will not obtain disclosure of documents until evidence has been served. The Federal Court is also increasingly adopting this approach.
102. *See* for example *Uniform Civil Procedure Rules, 2005* (NSW), rule 21.2(1)(a) and (b).
103. *See* for example *Federal Court Rules, 2011* (Cth), rule 20.14(3).
104. *See* for example *Uniform Civil Procedure Rules, 2005* (NSW), Sch. 7, rule 1.
105. *See* for example *Uniform Civil Procedure Rules, 2005* (NSW), rule 31.24(1)(c).

- The plaintiff adduces its evidence. The plaintiff will tender documents and call its witnesses. The defendant has the opportunity to cross-examine each of the plaintiffs' witness, and the plaintiff may re-examine the witnesses as necessary.
- Similarly, the defendant then adduces its evidence.
- The parties then make written and oral closing submissions in support of their respective cases.

Today, comparatively few civil cases are heard by judge and jury. Most civil cases are heard by a judge sitting alone, who will then usually deliver a written judgment. In five States, any party in a defamation case may elect for a trial by jury.[106] The retention of juries for defamation actions reflects the role of community standards in assessing defamation, and the fact that the general community is often the audience to which the defamatory publication was addressed.[107]

The successful party is *prima facie* entitled to an order that the unsuccessful party pay its legal costs.[108] This is in contrast to practice in India. Experience shows, however, that ordinarily a party will only recover between 60% and 75% of its total costs.

INDIA

Civil litigation in India commences with the institution of a suit[109] before a court having jurisdiction to entertain it. The plaintiff is required to sign and verify the plaint, attach a supporting affidavit, and submit a list as well as copies of the documents he/she intends to rely on.[110] Thereafter, the court may admit or reject the plaint, however, it is rare that a plaint is rejected.

Once the court admits the plaint, it will order for service of summons on the defendant(s), who will have to appear before the court and file their written statement of defence.[111] The written statement is also an opportunity for the defendant to make a counter-claim or seek set-off. It is permissible for the defendant to file an application for dismissal of the suit or return of the plaint on certain limited aspects that effect the maintainability of the case before it.[112]

After both the plaintiff and defendant have presented the court with the plaint and the written statement respectively, the process of discovery and inspection begins.[113] A mechanism used to achieve this is interrogatories

106. Section 21(1) of the Defamation Acts of New South Wales, Victoria, Queensland, Western Australia and Tasmania.

107. *See* Justice Steven Rares, "The jury in defamation trials" (2010) 33 *Australian Bar Review* 93.

108. *Laguillo* v. *Haden Engineering Pty. Ltd.*, [1978] 1 NSWLR 306. The presumption will only be displaced where there has been some sort of disentitling conduct on the part of the successful party: see *Tomanovic* v. *Global Mortgage Equity Corporation Pty Ltd. (No. 2)*, (2011) 288 ALR 385, 402 [97]-[98].

109. *Code of Civil Procedure, 1908*, Order IV, rule 2.

110. *Code of Civil Procedure, 1908*, Order VIII, rule 14(1).

111. *Code of Civil Procedure, 1908*, Order VIII.

112. *Code of Civil Procedure, 1908*, Order VII, rules 10 and 11.

113. *Code of Civil Procedure, 1908*, Order XI.

(however, these may be used only with the prior permission of the court). The court oversees this whole process where documents change hands between the parties. A party may seek discovery and inspection of documents before filing a substantive defence. Once the written statement is filed, parties are called upon to agree on undisputed documents and facts.[114] After completion of the above stage, both parties are sufficiently aware of the other's case, and the court is required to frame issues for determination. The court may, in some cases, examine witnesses before the framing of issues. Both parties then inform the court which witnesses they wish to call for the trial and the court accordingly issues summons depending upon the issues that have been framed.[115]

Once the issues are settled and the list of witnesses has been supplied, the (typical) order in which proceedings take place is as follows:[116]

- Plaintiff's counsel opens the proceedings with a brief overview of the plaint and lays down an outline of the evidence he will rely upon.
- Defendant's counsel addresses brief arguments in defence.
- The examination, cross-examination and re-examination of the plaintiff's witnesses take place.
- Plaintiff's counsel closes his case.
- Defendant's counsel presents the defence and lays out what evidence the defence will be relying on.
- The examination, cross-examination and re-examination of the defence's witnesses take place.
- Defence's counsel closes his case.
- Plaintiff's counsel replies to the case as set out.

The court may permit recording of evidence through a court appointed commissioner where the parties reside outside the jurisdiction of the court or are unable to attend the court due to infirmity. It is also possible to have the evidence recorded through audio-video link.[117]

Judges sitting singly hear most civil cases. Once the hearings are concluded, the court gives the judgment. Ordinarily, the court is required to pronounce judgments on all the issues. However, amendments to the CPC made by some States require preliminary issues to be adjudicated first.[118]

Section 89 of the CPC obliges the court to refer the case for dispute resolution by alternative methods including mediation and conciliation, where the case so requires. If on the facts and circumstances of a given case, the court is of the opinion that a settlement emerges in the matter, the court may formulate the same and request the parties to consider arbitration, conciliation, mediation or

114. *Code of Civil Procedure, 1908*, Order XII, rules 2 to 5.

115. *Code of Civil Procedure, 1908*, Order XVI.

116. *See Code of Civil Procedure, 1908*, Order XVIII, rules 1 and 2.

117. *Twentieth Century Fox Film Corporation* v. *NRI Film Production Associates Private Limited*, AIR 2003 Kant 148.

118. *Code of Civil Procedure, 1908*, section 9A. (Amendment made by State of Maharashtra).

judicial settlement including settlement through Lok Adalat. The court however, has no power to direct parties to arbitrate without their consent.[119]

3. Cross-Border Issues

3.1 Service of Process

AUSTRALIA

Proceedings in foreign court against Australian defendant

Australia is a party to the *Hague Convention on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters, 1965* (**"Hague Service Convention"**),[120] which governs the international service of process on a defendant who resides in Australia. The central authority in Australia for receiving requests under the Hague Service Convention is the Commonwealth Attorney-General's Department. Documents must be translated into English unless the person being served voluntarily receives them in a foreign language. Australia does not object to the use of private process servers, diplomatic channels or local agents, but other service requirements vary between the States and Territories.

Proceedings in Australian court against foreign defendant

Service of process outside Australia is regulated under the rules of the Australian court in which the process is issued.[121] These rules are not uniform.

In most Australian jurisdictions, an originating process does not need to be served personally so long as it is served in accordance with the law of the country in which service is effected,[122] even though in Australia, personal service of an originating process is required.[123] Generally, the court's leave is not required prior to service of the originating process.[124] However, leave to proceed must be obtained if the defendant fails to appear.[125] For an application for leave to proceed to succeed, a plaintiff must prove proper service on the defendant.[126]

The various courts' rules have a number of categories of cases in respect of which service outside the jurisdiction is authorised, and the plaintiff must demonstrate the proceedings come within one of these categories.[127] Generally

119. See *Afcons Infrastructure Limited* v. *Cherian Varkey Construction Co. (P) Ltd.*, (2010) 8 SCC 24, paragraphs 33-39.

120. Australia has made reservations to article 10 of the Hague Service Convention with respect to the use of postal channels for the service of documents. Australia requests that only registered post be used if documents are to be served by post.

121. *See* for example *Uniform Civil Procedure Rules*, 2005 (NSW), Part 11 (without reliance on the Hague Service Convention) or Part 11A (which incorporates Australia's obligations under the Hague Service Convention). Service via the Hague Service Convention is not mandatory but is convenient where the country, in which the party to be served resides, is a party.

122. *See* for example *Uniform Civil Procedure Rules*, 2005 (NSW), rule 11.6.

123. *BP Exploration Co (Libya) Ltd.* v. *Hunt*, [1980] 1 NSWLR 496 at 501-2; (1980) 47 FLR 317.

124. *See* for example *Uniform Civil Procedure, Rules* 2005 (NSW), rules 11.2, 11.4. *See* however *Rules of the Supreme Court, 1971* (WA), Order X, rule 1A; *Federal Court Rules, 2011* (Cth), rule 10.43.

125. *See* for example *Uniform Civil Procedure Rules*, 2005 (NSW), rule 11.4(1). *See* however *Uniform Civil Procedure Rules*, 1999 (Qld), Ch. 4 Pt. 7.

126. *Castagna* v. *Conceria Pell Mec SpA* (unreported, 15 March 1996, NSWCA); *Bulldogs Rugby League Club Ltd.* v. *Williams* [2008] NSWSC 822.

127. *See* for example *Uniform Civil Procedure Rules*, 2005 (NSW), Schedule 6; *Federal Court Rules 2011* (Cth), rule 10.42.

speaking, the jurisdiction granted to each Australian court under its respective rules is very broad. For instance, service outside Australia is permitted when damage is suffered wholly or partly within the jurisdiction as a result of a tort, wherever the tort occurred.[128]

A defendant served with an originating process outside Australia may apply for an order setting aside the originating process,[129] on the ground that the service of the originating process is not authorised by the rules, or on the ground that the Australian court is an inappropriate forum for the trial of the proceedings.[130] The degree of satisfaction required by the court to keep the matter within its jurisdiction is that of an arguable case that would be sufficient to survive an application for summary judgment.[131]

For service of documents in Hague Service Convention countries, various courts' rules provide that default judgment must not be entered against the defendant unless the Court is satisfied that the initiating process was served in accordance with the law in the Convention country with sufficient time to enable the defendant to enter an appearance in the proceedings.[132]

Australia is also a party to a number of bilateral treaties on judicial assistance. Australia still utilises its bilateral service treaties where the country is not a Hague Service Convention country, such as the Republic of Korea[133] and Thailand.[134]

Where bilateral or Convention arrangements do not exist, diplomatic channels may be used for the transmission of documents. In Australia, these communications are sent and received by the Department of Foreign Affairs and Trade.

INDIA

Once a suit has been properly instituted before the appropriate court, a summons may be issued to the defendant to appear and answer the claim within a period of 30 days from the date of institution of the suit.[135] India is a signatory to the Hague Service Convention with reservation in respect of articles 8, 10, 15 and 16 of the Hague Service Convention.[136]

128. *See* for example *Uniform Civil Procedure Rules*, 2005 (NSW), Schedule 6, Para (d); *Federal Court Rules, 2011* (Cth), rule 10.42, Item 5.
129. *Uniform Civil Procedure Rules*, 2005 (NSW), rule 12.11.
130. *Uniform Civil Procedure Rules*, 2005 (NSW), rule 11.7; see *Re Mustang Marine Australia Services Pty Ltd. (In Liq)*, (2013) 94 ACSR 601.
131. *Agar* v. *Hyde*, (2000) 201 CLR 552 at [9], [51], [56] and [60].
132. *See* for example *Uniform Civil Procedure Rules*, 2005 (NSW), rule 11A.2.
133. Treaty on Judicial Assistance in Civil and Commercial Matters between Australia and the Republic of Korea.
134. Agreement on Judicial Assistance in Civil and Commercial Matters and Co-operation in Arbitration between Australia and the Kingdom of Thailand.
135. Service of summons upon the defendant is required to be in accordance with Order V of the CPC.
136. Such reservations are: (1) All requests for service of documents should be in English language or accompanied by an English translation; (2) The service of judicial documents through diplomatic or consular channels will be limited to the nationals of the State in which the documents originate; (3) India is opposed to the methods of service provided in Article 10; (4) In terms of Article 15, Indian courts may give judgment if all conditions specified in the second paragraph of that Article are fulfilled; and (5) For purposes of Article 16, an application for relief will not be entertained if filed after the expiration of one year following the date of the judgment.

The CPC deals with service of a foreign summons and provides that a summons issued by a court of a notified country may be served in India as if such a summons had been issued by courts in India. Pursuant to section 29(c), the Ministry of Law and Justice, Government of India has issued a notification in 2009,[137] declaring that section 29(c) of the CPC shall apply to all civil courts in all the countries which are parties to the Hague Services Convention.

Accordingly, requests for delivery of summonses in India from courts of countries which are parties to the Hague Service Convention can be sent to the Ministry of Law and Justice, Government of India in the manner prescribed.[138] India has objected to the service of process by mail, or directly on defendants through judicial officers in India (*i.e.*, advocate or private process server), without the involvement of the designated Central Authority. Further, the documents for service must be written in English or accompanied by an English translation.

Where the defendant resides outside of India and has no agent in India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him either by post or by such courier service as may be approved by the High Court, by fax, by electronic mail or by any other means as may be provided by the rules made by the High Court.[139] Requests for delivery of summons issued by courts in India should be made to the Central Authority of the destination State pursuant to Article 3 of the Hague Convention.[140]

3.2 Requesting Evidence under the Hague Convention

AUSTRALIA

Taking evidence in Australia for foreign proceedings

The primary method for taking evidence in Australia for a foreign proceeding is through the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* ("**Hague Evidence Convention**"). Australia has made several reservations and declarations with respect to the Hague Evidence Convention.

The Australian authorities will not accept any Letters of Request that require a person to state what documents relevant to the proceedings are or have been in their possession, or produce any documents, other than particular documents specified in the Letter of Request which the requested Court believes to be in their possession. Given the strict statutory regime regarding pre-trial discovery

137. See *Gazette of India*, 13 January 2009, Extraordinary Notification dated 12 January 2009 bearing No. GSR 24(E) [F. No. 11(28)/2004 – Judl.].

138. See Information Concerning Delivery of Summonses in India on the website of the Hague Conference on the Private International Law, available at <www.hcch.net/index_en.php?act=authorities.details&aid=712>.

139. *Code of Civil Procedure, 1908*, Rule 25 of Order V. Separate provisions for Bangladesh and Pakistan have been provided for.

140. Article 3 of the Hague Convention: The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality. The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

in Australia, any veiled request for pre-trial discovery that circumvents that process is likely to be rejected by the Australian courts.

Australian law also permits the taking of evidence without compulsion and the giving of evidence by video link testimony, provided it is otherwise consistent with evidentiary requirements of the relevant court.

Taking Evidence Overseas for Australian Proceedings

When taking evidence overseas for Australian proceedings, the taking of evidence must comply with the procedural and evidentiary rules of both the relevant Australian court and the overseas jurisdiction. Various rules of evidence apply depending on the Australian court in which the matter is to be heard.

Whether an Australian subpoena can be served overseas varies between Australia's jurisdictions. There is currently no uniform principle between federal, State and territory jurisdictions on what constitutes an Australian court document that can be served overseas.

For example, in the Federal Court of Australia, first leave must be granted to issue the subpoena,[141] and then leave must be granted to serve the subpoena overseas. When considering whether to grant leave to issue the subpoena, the court considers a variety of factors, including whether the material sought by the subpoena has an apparent relevance to the proceedings,[142] and whether the party issuing the subpoena has a legitimate forensic purpose to that extent. The court weighs this against whether the subpoena casts a serious and unfair burden or prejudice upon the respondent to the subpoena.[143]

Traditionally, considerations for the grant of leave to serve a subpoena outside Australia include the principles of comity and sovereignty.[144] Australian courts are more willing to issue a subpoena against a foreign entity where it can be shown that the entity has a presence in Australia and therefore that the principle of comity would not be easily offended.[145]

If a subpoena cannot be served overseas, it may be possible to obtain the required evidence using an evidence request or letters rogatory.

INDIA

India is also a signatory to the Hague Evidence Convention. There are two methods of obtaining evidence from a person in a foreign country. First is by a Letter of Request addressed to a foreign Court,[146] and second is by means of a Commission appointing an individual to take the evidence.[147] Ordinarily, a Commissioner lacks the power to compel the attendance of a witness. On the other hand, if a Letter of Request is addressed to the foreign Court concerned, the latter can, if necessary, exercise its power of compulsion.

141. *Federal Court Rules*, 2011 (Cth), rule 24.01.
142. *Stemcor (Asia) Pty. Ltd.* v. *Oceanwave Line SA*, [2004] FCA 391 at [11].
143. *Trade Practices Commission* v. *Arnotts Ltd. (No. 2)*, (1989) 21 FCR 306 (Beaumont, J.).
144. For a summary of the case law regarding the issue of subpoena outside jurisdiction, see *Caswell* v. *Sony/ATV Music Publishing*, [2012] NSWSC 986 at [49] – [123].
145. *See* for example *Caswell* v. *Sony/ATV Music Publishing*, [2012] NSWSC 986; *News Corporation Ltd.* v. *Lenfest Communications Inc.*, (1996) 40 NSWLR 250.
146. *Code of Civil Procedure, 1908*, section 77.
147. *Code of Civil Procedure, 1908*, section 78.

The procedure in respect of taking evidence from persons in India for proceedings abroad and *vice-versa* is provided in section 75 to 78 read with Order XXVI of the CPC. This order deals with Commissions which are considered as enabling and are to be read along with the provisions of the Hague Evidence Convention.[148] Section 78 read with rules 19 to 22 of Order XXVI of the CPC deals with situations where commissions may be issued at the instance of foreign courts. High Courts in India are empowered by rule 19 of Order XXVI to issue commissions for examination of witnesses, if it is satisfied that: (a) in a civil proceeding; (b) a foreign court wishes to obtain the evidence of a witness in any proceeding before it; and (c) that witness is residing with the limits of the High Court's appellate jurisdiction. In terms of rule 22, the evidence so collected is required to be transmitted to the foreign court through the Central Government.

The general rule in respect of issuing Commissions is contained in rule 1 of Order XXVI, which provides that any court may issue a Commission for the examination on interrogatories or otherwise, of any person resident within the local limits of its jurisdiction who is exempted under the CPC from attending the Court or who is, due to sickness or infirmity, unable to attend Court. In respect of persons living outside India, rule 5 provides that where an application is made to any Court for the issue of a Commission, for examining a person residing outside India, the Court may issue such a Commission or a Letter of Request upon satisfaction of necessity of such evidence.

The declaration made by India under Article 23 of the Hague Evidence Convention stipulates that in case of a pre-trial discovery of documents which are likely to be in the possession/custody/power of a person, India cannot refuse the execution of a Letter of Request requiring the production of pre-trial discovery of documents which are specified in the concerned Letter of Request.[149]

3.3 Enforcement of Foreign Judgments

AUSTRALIA

The enforcement of foreign judgments in Australia is governed by a statutory regime and common law principles. Enforcing a foreign judgment in Australia depends on where the judgment was issued and the type of judgment that was issued.

Australia is not party to the *Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971*. However, Australia has reciprocal arrangements for the enforcement of judgments with a number of countries.[150]

Statutory Enforcement of Foreign Judgments

Australia has a statutory scheme in the *Foreign Judgments Act, 1991* (Cth) for the recognition and enforcement of judgments entered in foreign countries with

148. *Upaid Systems Limited* v. *Satyam Computer Services*, 163 (2009) DLT 45.

149. *Aventis Pharmaceuticals Inc.* v. *Dr. Reddy's Laboratories Inc.*, 2009 (1) ALT 362.

150. For example, a bilateral treaty with the United Kingdom: *Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 1994.

which Australia has reciprocal arrangements. The *Foreign Judgments Regulations, 1992* (Cth) list the countries to which the statutory scheme applies. The countries covered by the scheme include:

- Canada (certain provinces);
- Hong Kong;
- Japan;
- South Korea;
- Singapore;
- Taiwan; and
- the United Kingdom.

The statutory scheme does not apply to many of Australia's most significant trading partners, including:

- the United States of America;
- China; and
- India.

Judgments of the courts of those countries can only be enforced according to common law principles, discussed below.

The *Foreign Judgments Act, 1991* (Cth) applies to enforceable money judgments that are obtained either on a final or interlocutory basis. Non-monetary judgments must be enforced at common law.

Common law enforcement

Where no international treaty or statutory arrangement operates, a foreign judgment may be enforced under common law principles. A judgment may be enforceable at common law provided the Australian court is satisfied the foreign court exercised jurisdiction in the international sense, which includes circumstances where:

(a) the defendant voluntarily submitted to the foreign court's jurisdiction; or

(b) the defendant was ordinarily resident in the foreign jurisdiction, or present in the foreign jurisdiction at the time that the defendant was served with the originating process.

Provided that the relevant Australian court is satisfied that the jurisdiction of the foreign court to make the order can be shown, *prima facie* the judgment will then be entitled to recognition at common law. Generally, the only objections that the defendant can raise against enforcement of the judgment are that:

(a) the judgment was obtained by fraud;

(b) the foreign court acted contrary to natural justice;

(c) the foreign judgment is contrary to Australian public policy; or

(d) the judgment is penal in character or for the recovery of taxes.[151]

151. *Re Visser; Queen of Holland* v. *Drukker* [1928] Ch 877.

INDIA

Judgments rendered by Courts outside India and by Courts not established by the Government of India are regarded as judgments rendered by foreign courts.[152] Foreign judgments are regarded as conclusive between the parties or persons claiming under them,[153] in respect of matters directly adjudicated upon.[154] However, a foreign judgment is not regarded as conclusive and the judgment does not operate as *res judicata*[155] in the following circumstances:[156]

(a) where it is not rendered by a court of competent jurisdiction;[157]

(b) where it is not a decision on the merits of the case;

(c) where it has been obtained by fraud;[158]

(d) where the judicial proceedings resulting in such a judgment are opposed to natural justice;

(e) where it refuses to recognise the laws of India, if applicable;

(f) where it is based upon an incorrect view of international law; and/or

(g) where it sustains a claim arising from a breach of Indian law.

The general rule in respect of foreign judgments under Indian law is that a separate suit is required to be filed on the basis of the foreign judgment and a decree is required to be obtained thereon, before proceedings for enforcement. The burden of proving that a foreign judgment is not on merits under section 13 of the CPC is on the party alleging it.[159] When a certified copy of a foreign judgment is produced, the court is required to presume that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record. Such presumption is a rebuttable presumption.[160]

Money decrees of courts of certain jurisdictions which are notified by the Central Government[161] to be reciprocating territories, are directly enforceable like decrees of courts in India in terms of section 44A of the CPC,[162] upon production of a certified copy of the decree. However, in the execution proceedings, it is open to the judgment-debtor to raise all objections which he may take in a suit.

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152. *Code of Civil Procedure, 1908*, section 2(6).
153. *Code of Civil Procedure, 1908*, section 13.
154. *Union of India* v. *M.V. Damodar*, AIR 2005 Bom 137.
155. *Y. Narasimha Rao* v. *Y. Venkata Lakshmi*, (1991) 3 SCC 451.
156. *Code of Civil Procedure, 1908*, section 13.
157. See *R. Vishwanath* v. *Rukn-ul-Mulk Syed Abdul Wajid*, AIR 1963 SC 1; *Dallah Albaraka Investment Co. Ltd.* v. *Ajitabh Bachhan*, (2000) 4 CCC 270 (Bom.).
158. See *Satya* v. *Teja Singh*, (1975) 1 SCC 120.
159. *International Woollen Mills* v. *Standard Wool (U.K.) Limited*, (2001) 5 SCC 265.
160. *Code of Civil Procedure, 1908*, section 14.
161. Certain courts of the following countries have been notified by Government of India: United Kingdom, Singapore, Bangladesh, UAE, Malaysia, Trinidad & Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea, Fiji and Aden.
162. *M. V. Al Quamar* v. *Tsavliris Salvage (International) Ltd.*, (2000) 8 SCC 278.

4. Conclusion

Despite Australia and India's shared colonial roots, it is evident from this brief review that there are significant differences between the two legal systems. As noted above, the divergent approaches to discovery and costs have significant practical consequences on parties pursuing litigation. Furthermore, Australia's courts have introduced some methods of judicial management of litigation in order to address concerns of the duration and costs of litigation. While India's courts have adopted a range of procedural reforms to address the serious challenges posed by the volume of cases filed and pending, the lack of a statutory basis and guidance for the exercise of case management powers represents an important distinction between the two systems.

However, these differences serve only to highlight the fundamental similarities between the Australian and Indian legal systems. First, the court systems share a federal structure with various court hierarchies. Second, both legal systems have emulated English principles of practice and procedure. Finally, both countries are signatories to the Hague Service Convention and the Hague Evidence Convention, and the courts of both countries will, in certain circumstances, enforce judgments of foreign courts.

5. Further Resources

AUSTRALIA

5.1 Overview

Books

Bernard Cairns, *Australian Civil Procedure* (2013, 10th edn, Thomson Reuters).

Prue Vines, *Law and Justice in Australia: Foundations of the Legal System* (2005, Oxford University Press).

Legislation

Legal Practitioners Act, 1981 (SA).

Legal Profession Uniform Law, 2014 (NSW).

Legal Profession Uniform Law, 2014 (Vic).

Legal Profession Act, 2006 (ACT).

Legal Profession Act, 2006 (NT).

Legal Profession Act, 2007 (QLD).

Legal Profession Act, 2007 (TAS).

Legal Profession Act, 2008 (WA).

Websites

Administrative Appeals Tribunal, <www.aat.gov.au>.

Australian Competition Tribunal, <www.competitiontribunal.gov.au>.

Law Institute Victoria, <www.liv.asn.au>.

Law Society of New South Wales, <www.lawsociety.com.au>.

Law Society of South Australia, <www.lawsocietysa.asn.au>.

Law Society of Tasmania, <http://lst.org.au/>.

New South Wales Bar Association, <www.nswbar.asn.au>.

New South Wales Supreme Court, <www.supremecourt.justice.nsw.gov.au/>.

South Australian Bar, <www.sabar.org.au>.

Tasmanian Bar, <www.tasmanianbar.com.au>.

Victorian Bar, <www.vicbar.com.au/home>.

5.2 Practice and Procedure

Federal Court Act, 1976 (Cth).

Federal Court Rules, 2011 (Cth).

Civil Procedure Act, 2010 (Vic).

Civil Procedure Act, 2005 (NSW).

Uniform Civil Procedure Rules, 2005 (NSW).

Uniform Civil Procedure Rules, 1999 (Qld).

Supreme Court (General Civil Procedure) Rules, 2005 (Vic).

Supreme Court Civil Rules, 2006 (SA).

Rules of the Supreme Court, 1971 (WA).

5.3 Cross-border Issues

Attorney-General's Department, *Serving a legal document across international borders*, <www.ag.gov.au/Internationalrelations/PrivateInternationalLaw/Pages/Servingalegaldocumentacrossinternationalborders.aspx>.

Attorney-General's Department, *Taking evidence in Australia for foreign court proceedings*, <www.ag.gov.au/Internationalrelations/PrivateInternationalLaw/Pages/Takingofevidenceacrossinternationalborders.aspx>.

Attorney-General's Department, *Recognising and enforcing foreign judgments*, <www.ag.gov.au/Internationalrelations/PrivateInternationalLaw/Pages/Recognisingandenforcingforeignjudgments.aspx>.

Douglas Bishop, Scott Grahame and Garth Williams, *Enforcing foreign judgments in Australia: A case study*, Clayton Utz Insights, <www.claytonutz.com.au/publications/edition/29_march_2012/20120329/enforcing_foreign_judgments_in_australia_a_case_study.page>.

Hague Conference on Private International Law, *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, <www.hcch.net/index_en.php?act=conventions.text&cid=17>.

Judicial Commission of New South Wales, *Enforcement of foreign judgments*, <www.judcom.nsw.gov.au/publications/benchbks/civil/enforcement_of_foreign_judgments.html>.

Judicial Commission of New South Wales, *Service of process outside New South Wales*, <www.judcom.nsw.gov.au/publications/benchbks/civil/service_of_process_outside_nsw.html>.

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5.4 Overview

Books

Justice T.S. Doabia, *Madras Law Journal's The Code of Civil Procedure*, (13th Edn. 2008, Lexis Nexis Butterworths).

S.C. Sarkar, Prabhas C. Sarkar, *Sarkar's The Law of Civil Procedure* (11th Edn. 2006, Wadhwa Nagpur).

C.K. Thakkar, *Code of Civil Procedure* (Edn. 2000, Eastern Book Company).

B.M. Prasad, Manish M. Valechha, *Mulla's The Code of Civil Procedure* (18th Edn. 2011, Lexis Nexis Butterworths).

Vinay Kumar Gupta, *A Summary of the Code of Civil Procedure* (9th Edn., 2008, Lexis Nexis Butterworths Wadhwa Nagpur).

Legislation

The Indian High Courts Act, 1861.

The Provincial Small Cause Court Act, 1887.

The Code of Civil Procedure, 1908.

The Constitution of India, 1950.

The Adaptation of Laws Order, 1950.

The Companies Act, 1956.

The Advocates Act, 1961.

The Karnataka Civil Courts Act, 1964.

Websites

The Ministry of Law and Justice, <http://lawmin.nic.in>

The Supreme Court of India, <www.sci.nic.in>.

The Bombay High Court, <http://bombayhighcourt.nic.in>.

The Karnataka High Court, <http://karnatakajudiciary.kar.nic.in>.

The Delhi High Court, <http://delhihighcourt.nic.in>.

The Calcutta High Court, <http://calcuttahighcourt.nic.in>.

The Bar Council of India, <www.barcouncilofindia.org>.

5.5 Practice and Procedure

Cross-border issues

Law Ministry's Mutual Legal Assistance Treaty Links, <http://lawmin.nic.in/treaty.htm>.