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India News:

Amendment to the Indian Prevention of Corruption Act, 1988

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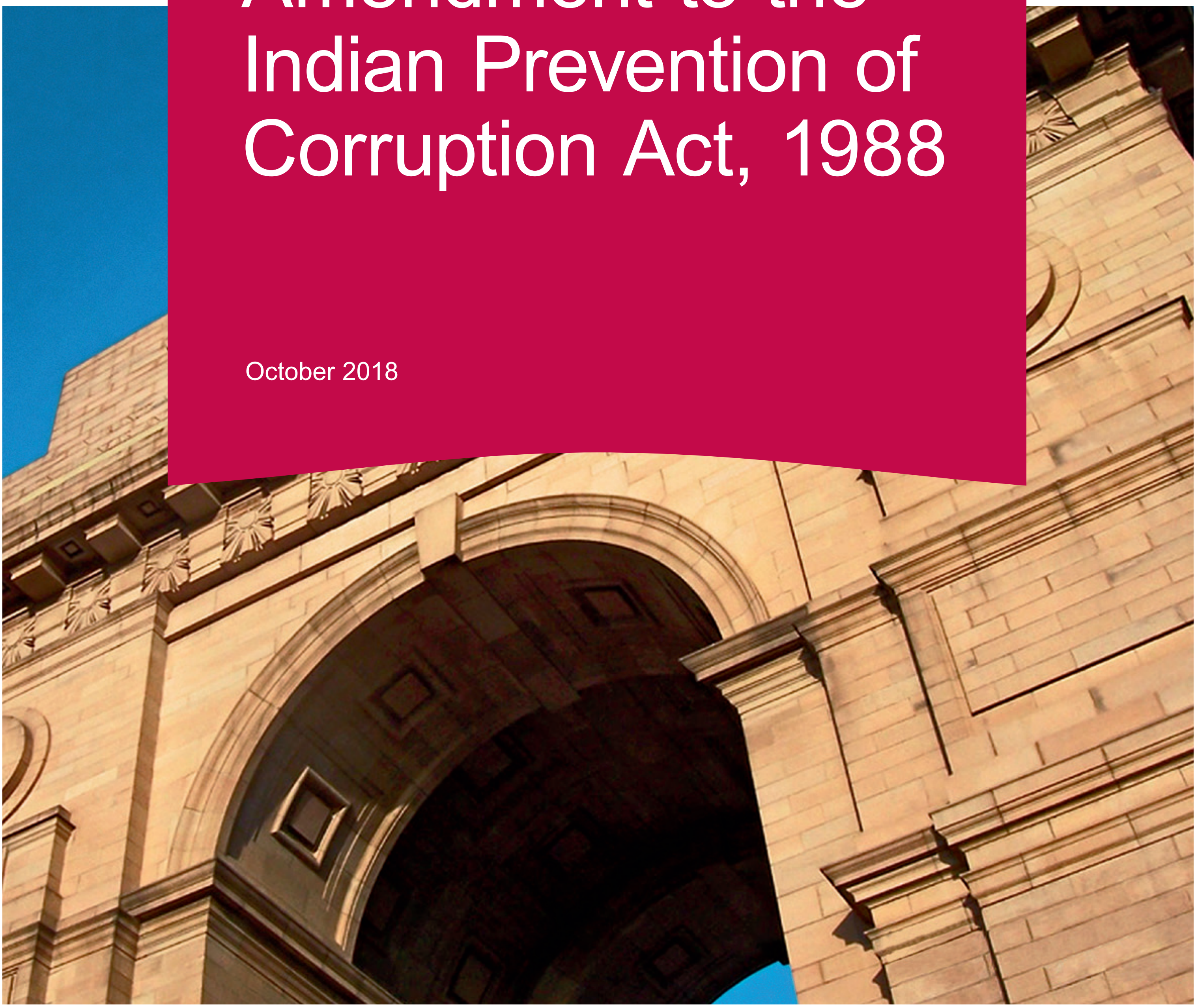

Introduction

On July 26th, 2018, the Prevention of Corruption (Amendment) Act, 2018 (“Amendment”) was published in the Gazette of India. It amends the Indian Prevention of Corruption Act, 1988 (“Act”) by introducing new bribery and corporate liability provisions discussed in depth further below.

India is signatory to the United Nations Convention against Corruption (UNCAC), ratified in 2011, but not the OECD Anti-Corruption Convention. Under the legislative framework of the Act, there was no provision to criminalise directly the offering of bribe for getting an undue advantage. Further, only individuals could be found liable for corruption.

The introduction of the new provisions is in fulfilment of India’s commitment under the UNCAC. Unlike other jurisdictions, the amended Act continues to regulate corrupt and bribery practices involving public officials, whereas corruption in business transactions and of foreign public officials are still not covered by the law.

Key Changes

The Amendment aims to bring about the following significant changes:

1. Bribing of a public servant – Section 8 of the Amendment

It has introduced giving of bribes as an independent criminal offence. Prior to the amendment, a person giving bribe was punishable only for abetment to a crime under the Indian Penal Code. Sec. 8 (1) makes it now punishable to offer or promise to give an undue advantage to another person(s) with the intention-

(i) to induce a public servant to perform improperly a public duty; or
(ii) to reward such public servant for the improper performance of public duty.

The penalty is fine or/and imprisonment of up to seven (7) years. By penalising the supply side of corruption, India takes an important step in aligning its anti-corruption laws with international standards.

2. Corporate Liability- Section 9 of the Amendment

The Amendment has further introduced the principle of corporate liability. It includes a broad definition of a commercial organisation (“CO”) and associated persons and states that a CO shall be punishable if:

“ […] any person associated with such commercial organization gives or promises to give any undue advantage to a public servant intending-

(i) to obtain or retain business for such commercial organization; or
(ii) to obtain or retain an advantage in the conduct of business for such commercial organization.”

In essence, if an associated person commits a corruption offence, its offence will be imputed to the organisation. The penalty for the CO is fine. The ‘associated person’ may be a director, partner, employee, agent, sub-contractor or any person who performs services for and on behalf of a commercial organization. In the case of employees it shall be presumed unless the contrary is proved that such person has performed services on behalf of the company.

3. Liability of a person in charge of CO – Section 10 of the Amendment

Directors, partners, managers, secretaries or other officers shall bear criminal responsibility if it is proved in the court that an offence under Sec. 9 has been committed with their consent or connivance. Please note that **non-resident foreign directors** also fall under the provision.

The penalty is imprisonment of three (3) to seven (7) years and a fine.

4. Defence: The law provides for some relief if the CO proves that it has established adequate procedures and exercised due diligence to prevent corruption within the organisation or on its behalf.

The Central Government has yet to issue guidelines relating to these adequate procedures. In the meantime it is advisable for COs to follow an international anti-bribery management system such as the UK guidelines on adequate procedures according to the 2010 UK Bribery Act, the ISO 37001 by the International Standards Organisation (ISO), the OECD guidelines or similar (list is not exhaustive). The UK guidelines highlight six areas that may help to satisfy the requirement for adequate procedure, namely: proportionate procedures, top level commitment, risk assessment, due diligence, communication and monitoring/review.

Recommendations:

Since the applicability and scope of the Prevention of Corruption Act, 1988 has been widened to bring within its fold the culpability of COs and foreign non-resident directors are exposed to the risk of being prosecuted with imprisonment, it is essential for COs doing business in India to take immediate steps to implement or update adequate procedures in order to ensure compliance with the Amendment and decrease the risk for the CO and its management.

Luther provides assistance which is essential to managing risk under the Anti-Corruption laws in India and can help by providing preventive measures and training sessions.

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