

# Muddled draftsmanship

Certain words that are defined vaguely become a nightmare for judges



**OUT OF COURT**  
M J ANTONY

Cynics would say that half of the litigation is the result of bad legal draftsmanship. The lawyers make a rich harvest out of it. The judges have called it their nightmare. In two high-profile cases in the Supreme Court last week, judges seemed to grope in the dark for a

black cat that did not exist, while dealing with certain terms in the Representation of People Act (RPA), the Prevention of Corruption Act and the Delhi Special Police Establishment Act (CBI Act).

While asking for a review of the Supreme Court judgment barring criminals from standing for elections, the government counsel tried hard to distinguish between the words "elector" and "voter". None was wiser after half an hour of laboured explanation. The RPA does not define a voter, to start with. Then how can a distinction be made? The judges remarked at the end that the law was "clumsily drafted". Such a poor rating for a long-standing law that is crucial to the democracy.

In another court, the "coalgate" case was being argued with judges

stumbling on words such as "sanction" and "approval" for prosecuting government functionaries for malfeasance. The Prevention of Corruption Act talks about "sanction", while the CBI Act refers to "approval" of the authorities. The lawyers also quibbled on the difference between "enquiry" and "investigation" in the Criminal Procedure Code. Those who watched these scenes could only wonder, "what the Dickens?"

Fuzzy illogic legislation hit the courts at all levels and in several situations. Two years ago, for instance, the Supreme Court pointed out a big hole in the Civil Procedure Code that affected alternative disputes resolution mechanism (*Afcons Infrastructure Ltd vs Cherian Varkey*). Section 89 provides for five

modes of alternative disputes resolution — arbitration, conciliation, judicial settlement, including settlement through Lok Adalat or mediation. One of the several anomalies, according to the judges, is the mixing up of the definitions of "mediation" and "judicial settlement".

"When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in Section 89 with interchanged meanings has led to confusion, complications and difficulties in implementation," the judgment remarked. "The mix-up of definitions of the terms 'judicial settlement' and 'mediation' is apparently due to a clerical or typographical error in drafting, resulting in two words being interchanged."

Some years ago, in its judgment in the Salem Bar Association case, the court pointed out another gaffe that placed the defendant's witness in place of the plaintiff's witness. Is it a printer's devil or a case of bad

typist? Courts of first instance might still be confounded by the jumble. They would not have read the solution suggested by the Supreme Court: "To avoid confusion, we direct that till the legislature corrects the mistake, the word plaintiff's witnesses would be read as defendant's witnesses in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the legislature."

There are hazy patches in economic laws, which delight no one except corporate lawyers. In the its judgment, *Commissioner of Excise vs SKF India*, the Supreme Court observed: "If the object of the law is to state clearly and unambiguously the obligations of the person whom the law addresses and to spell out plainly and without any confusion the consequences of failure to discharge the obligations cast by the law, then four sections of the Central Excise Act fall miles short of the desired objective. Even, as originally cast, the provisions were

far from very happily framed and worded. Subjected to amendments from time to time, those provisions have now become so complicated that in order to discern their meaning, it becomes necessary to read them back and forth several times." The judges were talking of Sections 11A, 11AA and 11AB of the Act.

The Arbitration and Conciliation Act also makes the judges wring their fingers for meaning. It gave poor marks for the law in the case, *Bhatia International vs Bulk Trading case*. It remarked that the Act was not well-drafted, leading to contrary judgments by various high courts on its applicability to foreign and Indian awards. The Recovery of Debts Due to Banks and Financial Institutions Act is another statute bristling with ambiguities.

In one case, *Amco Batteries vs Collector of Excise*, the court said: "It is apparent that in taxation matters, amendments, clarifications, exemption notifications or their withdrawal play an important role

in increasing litigation. Repeatedly, it is stated that law and procedure is required to be streamlined and simplified. Yet clarifications, amendments and notifications are issued creating confusion and leaving judges and lawyers to search for their meaning. In such a state of affairs, in some cases, it is difficult to draw the inference of fraud, willful concealment or suppression of facts so as to attract penal consequences."

These are only specimens; there are rows of them. In *JP Bansal vs State of Rajasthan*, referring to the Rajasthan Taxes Ordinance, the court lamented: "The tragedy is that although in the matter of cor-respondence or conversation the person who has used the language can be approached for clarification, the legislature cannot be approached after enacting a law... it is necessary that the statute is expressed in clear and unambiguous language. In spite of courts saying so, the draftsmen have paid little attention to it."

# St Petersburg G20 Summit: Unintended consequences

This is the first G20 summit not dominated by economic issues. Is this an indication of how the G20 is likely to shape up in future as the global economy recovers?



ALOK SHEEL

The eighth G20 Summit Declaration issued from St Petersburg, Russia, on September 6, is another humungous 27-page document that incorporates and builds on much, if not all, of what was said in previous summits, mostly reiterating motherhood statements and constructive ambiguities concealing sharp internal differences that we have come to expect from the G20, while adding its own distinctive "St Petersburg" veneer.

So what is distinctive about the St Petersburg Summit Declaration for which it will be remembered by G20 historians? The first G20 Summit in Washington is remembered for what it was — the first G20 Summit, where leaders of systemically important countries resolved to co-ordinate macroeconomic policies to counteract the global financial crisis, and where they first diagnosed its deeper, underlying causes, namely financial deregulation and mounting global imbalances. The second "London" Summit remains Gordon Brown's summit where leaders, staring down the barrel of a gun, resolved to do whatever it takes to avoid a second Great Depression, and also put together a "trillion dollar" package to insulate developing countries from the its worst effects. At the third "Pittsburgh" Summit, with green shoots of recovery clearly visible, leaders famously shot the gun with their infamous "It worked" fifth paragraph, declared that the G20 had replaced the G7 as the premier multilateral forum for international economic co-operation, agreed greater voting power for emerging market and developing economies (EMDEs) in the International Monetary Fund and the



**BRIC WALL (left to right)** Brazil's President Dilma Rouseff, India's Prime Minister Manmohan Singh, Russia's President Vladimir Putin, China's President Xi Jinping and South African President Jacob Zuma after a BRICS leaders' meeting at the G20 Summit in Strelina, near St Petersburg on September 5. EMEs' diminishing prospects seem to have muted their voice and influence at the Summit.

PHOTO: REUTERS

World Bank, and turned their attention to addressing long-standing structural constraints in the global economy with the launch of the G20's signature "Framework for strong, sustainable and balanced growth". With the beginnings of market revolt against mounting public debt, the natural corollary of crisis management, at their fourth "Toronto" Summit, leaders first underscored the need for targeted fiscal consolidation. The fifth "Seoul" Summit is best remembered for injecting "development" into the G20 agenda. With global economic prospects worsening sharply again in the wake of the euro zone crisis, the sixth Cannes and seventh Los Cabos summits, following close on the heels of the other, will be remembered for the policy dilemma that pitched austerity against growth.

The first big new issue on the St Petersburg agenda of interest to emerging markets and economies (EMEs) was the devastating impact of exit from unconventional monetary policies that is leading to a sudden stop of capital flows foreboding a currency and exter-

nal payments crisis. The second issue was "Base Erosion and Profit Shifting" (BEPS), a G7 initiative to counter tax avoidance by their own transnational corporations. The Summit however seems to have been hijacked by what happened on the sidelines — the crisis in

	At market exchange rates		At PPP	
	AD economies	EMDEs	AD economies	EMDEs
1990	79.9	20.1	69.3	30.7
2000	79.7	20.3	62.8	37.2
2008	68.7	31.3	54.5	45.5
2013	60.7	39.3	49.1	50.9

PPP: Purchasing power parity  
AD economies: Advanced economies  
EMDEs: Emerging market and developing economies  
Source: WEO April 2013, International Monetary Fund

Syria — especially since concerns regarding the economy were muted on account of the apparent recovery in the US, UK, Japan and even Europe. This was the first summit where the forward-looking prospects of EMEs were actual-

ly worse than those of Organisation for Economic Co-operation and Development (OECD) countries, although the decline is not of crisis proportions to date.

Be it as it may, EMEs' diminishing prospects seem to have muted their voice and influence at the Summit. The speech of the Indian prime minister stood out amongst his EME counterparts in voicing concern over the absence of G20 co-ordination on monetary policies in general, and the disorderly unwinding of unconventional policies in particular. Equally eloquent was his silence on the issue of BEPS, indicating that EMEs are still some way from thinking through its implications on their own tax base. While the St Petersburg (Framework) Action Plan was the first that clearly spelt out the monetary policy stance of the four reserve currency area central banks, the St Petersburg Accountability Assessment bared the sharply differing perspectives of advanced and emerging market economies. The final summit declaration underscored that mon-

etary policies respond to domestic conditions while underplaying cross border spillovers, and also endorsed the G7 BEPS initiative.

Did EMEs gain anything substantive from the Summit? This is not the first time that a G20 Summit agenda, meticulously negotiated by Sherpas, finance deputies and working groups over a full year, has been overtaken by events and hijacked by the flavour of the month. The euro zone crisis had hijacked the agenda at Cannes. But this is the first G20 summit not dominated by economic issues. Is this an indication of how the G20 is likely to shape up in future as the global economy recovers — an opportunity for leaders of systemically important countries to directly exchange views on the sidelines of the Summit on the most pressing strategic international issue of the day? The main action was of course on the sidelines, and not reflected in the Summit document. But this could change in future summits, for leaders are not bound by pre-set rules.

If things were indeed to turn out that way, EMEs perhaps need to worry less about the short-term unintended consequences of "tapering" and quietly celebrate the long-term unintended gains from the Syrian crisis at St Petersburg. At their Pittsburgh Summit, leaders anointed the G20 as the premier multilateral forum for international co-operation. The G7/G8 however remained the pre-eminent forum for non-economic issues. If this were to change, and a consensus amongst systemically important countries worked out in G20 summits rather than in a fractious and indecisive United Nations security council, where they are anyway under-represented, this could mark a major victory for EMEs at the expense of the G7/G8.

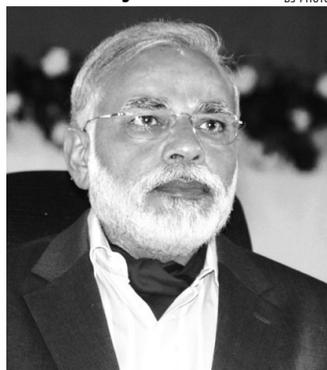
This would merely reflect the tectonic shift occurring in the global economy in the new millennium. While the rise of EMEs' share in the global economy measured in purchasing power parity has long been written about, what is even more striking is the doubling of their share over the last 13 years when measured at market exchange rates, which matters more to OECD countries since this measure is more relevant for international trade and therefore for their own growth prospects (see table). Indeed, their share has increased from around 30 per cent since the first G20 Summit in 2008 to 40 per cent currently. All forward looking growth projections indicate that this rapid shift would continue, the current downturn notwithstanding. As Paul Kennedy underscored several years ago, geo-political advances are invariably preceded by economic rise.

The author is a civil servant. The views expressed are personal

## CHINESE WHISPERS

Twice unlucky

BS PHOTO



Gujarat Chief Minister Narendra Modi (pictured) may be on the verge of being declared the Bharatiya Janata Party's prime ministerial candidate, moving one step towards fulfilling a long-held ambition. But he appears to have less luck with technology on which he relies heavily to spread his message. During the Vibrant Gujarat Global Agriculture Summit in Gandhinagar the audio-visual systems failed as soon as he began his address. This was the second time in succession that the Gujarat CM had to face such an embarrassment during a mega-event at his favourite venue of Mahatma Mandir. In June this year at the inaugural session of the All India Conference on Livestock and Dairy Development Modi was left red-faced as the audio-visual system collapsed just as he began his address.

'Send me a young cow'

BS PHOTO



Politics involves a lot of give and take but it was worth wondering if there was a political message to be read in Punjab Chief Minister Parkash Singh Badal (pictured) requesting his Gujarat counterpart Narendra Modi to send him a young cow of the Gir breed. Badal was speaking at the Vibrant Gujarat Global Agriculture Summit and said Modi had once gifted him a Gir cow and he was particularly fond of the quality of milk it produced so he made it a point to drink it whenever he visited his village in Punjab. But the cow has aged, he said, which is why he requested a replacement from Modi.

## LETTERS

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### CPI and inflation

In the forthcoming mid-quarter review of policy the Reserve Bank of India (RBI) should announce shifting its focus to consumer price index (CPI) from wholesale price index (WPI). It has already given up the inappropriate use of the concept of "core inflation" derived from WPI. The RBI is no doubt reckoning with a number of indicators that include CPI also, but the focus has been on WPI due to the historical reason of its more frequent availability. The rationale for not using the comprehensive CPI as the anchor for policymaking is that the new index does not have a long-enough time series. Does it really matter if one can get the latest year-on-year inflation rate for consumer prices from the available series? The consumer is concerned with the current inflation rate and it is no consolation to him to be told that it is lower than what it had been a year ago. It is the research worker who should be worried about the number of observations and the degrees of freedom for his statistical tests of significance.

The case for the shift to CPI is buttressed by the fact that the RBI proposes to issue inflation-proof certificates indexed to CPI.

A Seshan Mumbai

### Exchange risk

Apropos Devangshu Datta's column "Now, over to the politicians" (Front Running, September 9), I'd like to correct the impression that the Reserve Bank of India (RBI) is accepting a large share of exchange risk by fixing a swap rate of 3.5 per cent for foreign currency non-resident deposit funds of banks for three-year maturity. There is no exchange risk in the swap mechanism. The RBI would be simply returning the dollars at the end of three years, against rupees received from the banks at fixed exchange rate, with interest at 3.5 per cent per annum. Banks in turn would be returning the dollars to the depositors, or deploying the funds in foreign currency term loans or rupee loans at their own risk.

In the proposed swap, the RBI is only subsidising the swap cost which actually is forward premium determined by market forces. The RBI would be earning only nominal return on its dollar funds — thus the effective cost to RBI is higher.

The swapped dollars do not technically add to forex reserves, since the RBI also has to account for its liability (return of dollars after three years) which sets off the dollar inflow.

C Chandrasekhar Mumbai

**Devangshu Datta replies:** I made the assumption that nominal rupee treasury yields would remain significantly higher than dollar treasury yields. Right now, the 10-year government of

India bond trades at about 8.4 per cent while the US 10-year bond trades at 2.9 per cent. Under the swap terms, if the exchange rate remains unchanged, the RBI loses the difference between available rupee yields and the 3.5 per cent per annum it is offering. This difference is actually the incentive it is offering banks.

If the dollar strengthens, while the yield differential remains the same or similar, the RBI loses because it receives an unfavourable exchange rate when the swap unwinds.

If the dollar weakens, the RBI gains, since it receives a favourable rate when the swap unwinds.

While the swaps don't technically add to reserves, in practice it makes the dollar available for the RBI at a point of time when that may be useful.

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## HAMBONE

BY MIKE FLANAGAN



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TABLE TWO

Eavesdrop on candid conversations over lunch between the people who move India and Business Standard journalists and editors. Table For Two. The very best of 'Lunch with BS'.

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