

CHAPTER 7

Criminal Problems

in the Use of Agents in India *Priti Suri**

§ 7.01 Introduction

§ 7.02 Notable Criminal Cases Involving Foreign Corporations

- A. The Bofors Scandal
- B. HDW Submarine Sale
- C. Airbus A-320
- D. Sumitomo

§ 7.03 Regulations on the Use of Indian Agents

§ 7.04 Conclusion

Appendix A No. RegnJ./Indian Agents/89

Appendix B D.G.S. & D.-237-Special Conditions for Imported Scores in Addition to those ConLamed in Form D.G.S. & D.-230

§ 7.01 Introduction

The latter half of this century has witnessed remarkable economic changes between the nations of the world. In India, decades of socialist.

Priti Suri is a member of the Bar Council of Delhi, India, and currently is affiliated with the law firm of Rekhi, Taisky & Singh in New Delhi, India. She specializes in international legal transactions and international business law.

State planning has resulted in slow economic growth rates. On the other hand, countries like Taiwan, Hong Kong, and Japan have achieved double digit economic growth rates~ A push for free market policies was initiated by Former Prime Minister Rajiv Gandhi, who was voted into office in 1984 after the assassination of his mother and predecessor. His administration started this liberalization process by eliminating the regulations that restricted economic growth and by promoting foreign investments through equity participation, transfer of technology, and direct sales. For the first few years, this liberalization process quickly produced positive results. Then the Bofors arms-procurement scandal surfaced with allegations that high political officials within the Gandhi administration had been receiving kickbacks.

The Bofors scandal involves the sale of 400 155mm field howitzers worth \$1.4 billion. The contract for producing these howitzers was awarded to AB Bofors of Sweden in March 1986 when Mr. Gandhi was the Prime Minister and Minister of Defense. The government policy at that time prohibited the use of middlemen in defense deals. However, less than a year after making this contract, the newspapers were alleging that Bofors had paid "commissions" to middlemen amounting to \$40 million. Both Bofors and the Indian government denied the payments to Indian agents for securing the contract, but the courts have not yet made their final determination.

As indicated by the Bofors case, governmental and public-sector purchasing bodies in India buy large volumes of high-tech equipment from transnational corporations. Foreign firms usually engage local agents to market their equipment to these purchasing bodies. These agents procure tender documents, communicate the positions of their overseas principals, and monitor the local market.

The purpose of this chapter is to apprise foreign businesspeople of the criminal sanctions for violations of the Indian criminal laws that may arise from the use of agents in India. This chapter analyzes the role of agents who act for foreign principals and the potential criminal law problems that may arise from using these agents. To demonstrate these criminal law problems, four prominent criminal cases that involve allegations of illegal commissions to agents for the purpose of securing vital sales contracts will be analyzed. The controversy sparked by these cases prompted the government to pass certain regulations controlling the activities of agents. The remainder of this chapter analyzes these new regulations as they apply to corporations with overseas business interests. It is also the goal of this chapter to help foreign businessmen avoid the potential criminal law pitfalls involved in the use of agents in India.

§ 7.02 Notable Criminal Cases

Involving Foreign Corporations

Recently, there have occurred several notable cases involving allegations of corrupt practices by foreign corporations. These cases illuminate the functioning of the Indian government in matters involving international transactions and the manner it carries out investigations.

A. The Bofors Scandal

On March 24, 1986, India signed a \$1.4 billion contract with AB Bofors, a unit of Nobel Industries Sweden AB, to purchase 400 155mm howitzers and ammunition for the Indian army. The contract was negotiated by the countries' two prime ministers and was supposed to be free of commissions or agents' costs. The purpose of this condition was to ensure that India obtained the best price by keeping to a minimum the overhead expenses to be paid by the company.

On April 16, 1987, Swedish National Radio reported that about \$40 million—nearly 3 percent of the total contract—had been paid by Bofors as commissions to middlemen. This allegation was denied by Bofors and by the administration of the then Prime Minister, Mr. Rajiv Gandhi.¹

In June 1987, Sweden's National Audit Bureau released a report confirming the payment of \$40 million by Bofors to certain Indians, but a portion of the report was withheld on the basis of bank secrecy requirements. The report stated that investigations were hampered severely by lack of cooperation from Bofors. In August 1987, Bofors confirmed the payments, but refused to identify the middlemen on the ground that it would jeopardize industrial confidentiality.²

In April 1988, a Madras-based newspaper, *The Hindu*, published facsimiles of bank documents for foreign exchange remittances and letters between Bofors and certain private companies related to the sale of guns to India. Four days later, a Joint Parliamentary Committee (JPC) dominated by the Congress (I) Party concluded that there were no middlemen in the deal and no payment to any Indian individual or company.³

The whole affair then was investigated by the Comptroller and Auditor General of India (CAG). On July 18, 1989, serious lapses in the government's technical and financial evaluation of (the Bofors deal were reported by the CAG.⁴)

1. Spaeth, *Rajiv Gandhi Sets Himself for Verdict*, WALL. ST. J., Oct. 18, 1989.

2. *Id.*

3. *Id.*

4. *The Smoke Screen Clears (GAG Report)*, INDIA TODAY, Aug. 15, 1989, at 28-30.

A General Staff Qualification Requirements (GSQR) was prepared for all the competing guns. “Normally the parameters of a GSQR are assigned *in fieri* importance through a matrix of marks. This exercise is necessary for balanced appreciation of different characteristics of the minimum parameters.” This was not prepared in the Bofors case, making the selection process unscientific and defective.

The four countries whose guns were competing for the contract were France, Britain, Austria, and Sweden. French Sofma guns topped the list of evaluators initially, with Swedish Bofors trailing a poor second. This choice was made on the basis of results sent by the Army Headquarters in March 1985. This evaluation, however, was followed by yet another evaluation, which added eight characteristics and two sub-characteristics to the list. When judged according to these new parameters, Bofors moved to the top position. The bottom line justification was that the Bofors gun’s burst fire capacity was better than that of the Sofma gun.

One more factor that helped Bofors obtain the contract was their financial package. They reduced the price by several million dollars.

Soon after the news of commissions paid by Bofors was revealed, the Government of India wrote to Bofors asking details regarding the amount paid by Bofors, to whom was it paid, and what services were rendered by the payee. Bofors’ response was sheltered behind a plea of commercial secrecy.

By this time, it was realized that the only way to get an answer from Bofors was to use the leverage of Bofors’ interest in negotiating a new project of another gun system in India. The managing director of Bofors was told, on his visit to India, that all their top officials would be summoned to India to discuss cancellation of the contract and blacklisting of Bofors.⁵ Bofors agreed to send a delegation, including the president of their company, to Delhi to answer all the questions that had been posed to them by the Indian government.⁶

For unexplained reasons, the Indian government then backed off from its efforts to question Bofors. The Prime Minister, in a meeting on July 4, 1988, said that India had gone too far in its “arm twisting tactics.” After this meeting, Bofors was advised not to send the delegation.⁷

5. *Getting Away—Bofors*, **INDIA TODAY**, Sept. 15, 1989, at 22-23.

6. *Id.*

7. *Id.*

The Bofors scandal galvanized the opposition parties in Indian politics before the nation went to polls in 1989, and apparently went a long way in causing the defeat of the ruling Congress (I) party. The new government, under the leadership of Mr. V.P. Singh, acted swiftly by framing a First Information Report, which was filed in the district court of Delhi by the Central Bureau of Investigation (CBI), India's equivalent of the FBI.⁸

The CR1 filed allegations of criminal conspiracy, corruption, abuse of official position by public servants, cheating, criminal breach of trust, and forgery against 14 persons and companies, including: Mr. Martin Adbo, former president of Bofors; Mr. Vin Chadha, the Swedish company's former principal agent in India; and Mr. C. P. Hinduja, a London-based Indian industrialist. Mr. Chadha was alleged to be the president of Anatron General Corporation of New Delhi, and Mr. Hinduja the owner of Pitco/Moresco/Moineas SA. Both were accused of having illegally received payments from Bofors. The 11 other accused were not identified by name, but referred to as directors and beneficiaries of some companies, including Bofors, Anatron General Corporation of New Delhi, Svenska Inc. of Panama, Pitco/Moresco/Moineas SA of Switzerland, and A.E. Services of the United Kingdom.⁹

The initiation of criminal proceedings laid the groundwork for seeking information from Swiss banks about accounts into which "commissions" were paid by Bofors, as well as the possible freezing of the accounts.¹⁰ The head of the Swiss police and justice department, Dr. P. Schmid, agreed that the Indians had a strong prima facie case, and all five accounts in the Swiss banks were frozen. The Swiss learned that one of the five accounts had been closed and the money in it transferred to a sixth account. If the Indians wanted this account to be frozen also, they had to give names of the beneficiaries of the account. With feverish speed, the CBI prepared a list of 18 names alleged to be probable beneficiaries. One of the names on the list coincided with the name of the beneficiary of the account and hence Schmid also froze that sixth account.¹¹

The Swiss then sent letters to the account-holders asking them to explain why their names should not be turned over. If the investigation judge concluded that their reply was not satisfactory, the names would be turned

8. A First Information Report amounts to a formal complaint to the police and is the starting point of their investigation.

9. *Indian Govt. files Criminal Charges Against Bofors of Sweden*, FIN. TIMES, Jan 23, 1990.

10. *Id.* The Swiss authorities had insisted on the filing of criminal charges before such action would be considered.

11. *Bofors: Is the ease Dead*, PRORE INDIA, Sept. 1990, at 3-7.

over to the CBI. To pursue this plan, the CBI obtained a ‘letter rogatory’¹² from a New Delhi magistrate. A cantonal court in Geneva upheld an appeal against the letter rogatory filed by the CBI.

After further work, CBI’s request to get the documents pertaining to secret Swiss accounts was accepted by the Swiss authorities in October 1990. However, three petitions were filed in the Swiss federal court regarding the question of whether the documents should be handed over to the India government or not. The Cantonal Judge in Zurich decided that vital documents relating to AE Services, one of the accused companies, would be handed over to the Indian authorities for their investigation. The Swiss federal court earlier had rejected an appeal by AE Services because that company was no longer in existence. This heightened the suspicion that AE Services was floated to serve as a conduit for the Bofors kickbacks.¹³

Earlier, in Delhi, a revision petition in the public interest had been filed in the High Court¹⁴ by an advocate, Mr. H. S. Chowdhary, requesting the court to quash the First Information Report lodged by the CBI on January 22, 1990, and to stop issuance of the letter rogatory to seek assistance of the Swiss courts in the Bofors case.¹⁵ Mr. H. S. Chowdhary’s claim was that by virtue of his profession, he was bound as a citizen to fight for upholding the rule of law, which was severely violated by bringing a case against Hindujas and others in spite of the JPC report in the entire matter. The judge, Mr. Justice M.K. Chawla, declined to decide the preliminary issue of the petitioner’s locus standi (i.e., the petitioner’s standing to sue) and proceeded to conduct the hearings.¹⁶

Three political parties—the Janata Dal, the fundamentalist Bhartiya Janata Party, Communist Party of India, Marxist (CPI-M) — filed intervention applications. Judge Chawla refused to entertain their applications, compelling the interveners to file a petition in the Supreme Court of India.

12. A letter rogatory is a letter request issued by an Indian court seeking assistance of the foreign judicial authorities in the investigations they are conducting. In this case, the letter rogatory mentioned names of certain banks and sought details of the beneficiaries of some accounts from the Swiss investigating judge.

13. *Release of Vital Swiss Papers*, **INDIA ABROAD**, Dec. 7, 1990.

14. An appellate court in the hierarchy of the Indian judiciary.

15. The effect of non-issue of the letter rogatory would have helped the account-holders whose frozen accounts would be released and all documents collected by the court returned to the bankers.

16. It is well established that a petition in public interest can be filed only to protect the interests of the economically deprived, weak, and illiterate sections of society.

The Supreme Court directed the High Court to hear the arguments of the interveners.

The attempts by the interveners' counsels to prove the inappropriateness of filing a revision petition¹⁷ were subverted by Judge Chawla. A Division Bench of the Bombay High Court had held in a case, 1980 Criminal Law Journal 258, that at the investigation stage even an accused had no locus standi to interfere with the Central Bureau of Investigation's right to have a letter rogatory issued by the special judge. The appropriate remedy available to the petitioner was to file a writ petition.

On December 19, 1990, after considerably heated hearings, Judge Chawla dismissed all petitions pertaining to the Bofors case on the ground that neither the petition nor the interveners had any locus standi in the present case. Instead, he invoked the Suo-Moto power of the High Court,¹⁹ which has supervisory jurisdiction over all other criminal courts, and issued a show-cause notice to the Union of India and the CBI asking why the FIR (First Information Report) and letter rogatory should not be quashed.²⁰

Since the decision of Judge Chawla to continue the hearing in the new dispensation was violative of court procedures,²¹ a Special Leave Petition

-
17. A revision petition cannot be filed to quash an investigation. Under § 397 of the High Court rules, a revision petition can be filed only if any proceeding is pending before an inferior criminal court. Furthermore, it cannot be filed in relation to any "interlocutory order" passed by a criminal court. The only proceeding, if at all, pending before the special judge (against whose order Mr. Chawla had filed a revision petition) was an interlocutory proceeding relating to the issue of letter rogatory. The High Court therefore possessed no jurisdiction under 397 to interfere in the matter. *See also* comments by a legal correspondent entitled *A Farce or a Fraud or Perhaps Both*, **INDIAN EXPRESS**, December 20, 1990.
 18. When two judges are hearing a matter, it is referred to as a Division Bench. A judgment rendered by DB is considered good precedent.
 19. The provisions of §§ 190, 397, 401, and 402 of the Criminal Procedure Code were cited as the sources under which Suo-Moto jurisdiction, was invoked. Suo-Moto powers, in exercise of inherent jurisdiction, can be exercised by a High Court normally, if there is an order of a proceeding which is "Shocking to the Conscience or the Court." In the Bofors case, Judge Chawla invoked this jurisdiction to quash the investigations intended to detect the identity of holders of foreign bank accounts who had received commissions.
 20. *See Chawla Dismisses Pleas, Serves Notice on Government, CBI*, **INDIAN EXPRESS**, Dec. 20, 1990.
 21. No power is vested in the judge initiating Suo-Moto proceedings and assuming jurisdiction himself in the matter. The new proceedings have to be marked and assigned to some judge by the High Court Registry and cannot be appropriated by the judge issuing the notice himself. Furthermore, time has to be given to the respondents to file their replies, but with a total disregard of procedural norms, Judge Chawla asked the counselors of Union of India to start arguments within 15 minutes of passing the order.

(SLP)²² was filed in the Supreme Court seeking an injunction against the High Court ruling. The Supreme Court Bench presided over by the Chief Justice of India stated not only the proceedings but also the findings of the High Court.²³ The case would be argued in the Supreme Court on January 10, 1991.

The unprecedented order of Judge Chawla was nullified by the swiftness and decisiveness of the Supreme Court's intervention. But for the effective order of the Supreme Court, Judge Chawla's findings would have been cited as the judicial view of a High Court in India and prevented the C131 from getting any assistance from the Swiss Courts in the proceedings before them.²⁴

In early November 1990, Mr. V.P. Singh's government fell due to loss of confidence in the parliament, and a new government with the support of Congress party was formed. The government's interest in prosecuting the case further may be affected by this change.

B. HDW Submarine Sale

During the probe of the alleged illegal commissions by Bofors, a team of Indian investigators sent to Switzerland discovered money in Swiss banks linked to a 1981 submarine contract with the West German firm, Howaldstwerk-Deurschewerft AG (HDW).

In 1979, the Cabinet Committee on Political Affairs (CCPA) under the then Prime Minister Mr. Morarji Desai had decided to buy submarines for the Indian Navy with a diving depth of 350 meters. Out of eight interested manufacturers, four were short listed. These were the Swedish firm Kockums, the West German firm HDW, the Italian firm Sauro, and TNSW-1400. A committee was formed to look into the details of all four submarines. The result of this committee placed Kockums on the top, followed by Italian Sauro. HDW was rejected on the basis that its diving depth was only 250 meters. A month *later*, HDW was added to the list with the proviso that it would be considered only if it increased its depth to 350 meters.

22. Article 136 of the Constitution of India provides:

Special leave to appeal by the Supreme Court –

- Notwithstanding anything in this chapter, the Supreme Court may in its discretion grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.
- Nothing in clause (1) shall apply to any judgment, decree, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed forces.

23. *SC Stays Proceedings in Bofors case—Chawla findings made inoperative*, INDIAN EXPRESS, Dec. 20, 1990

24. *See also Subversion Halted*, INDIAN EXPRESS, Dec. 21, 1990.

In 1981, India ordered two completed submarines from HDW and placed an additional order for two in kit form for construction near Bombay. Critics complained that the government had awarded a contract for submarines that were not the best choice technically and, excluding spares, cost 115 million rupees (\$8.7 million) more than a competing vessel.²⁵ A Comptroller and Auditor General's Report, released in part, said India failed to get the best deal in buying the four boats from HDW.²⁶ Evaluation reports showed that submarines from the Swedish firm Kockums were rated at 1700 marks out of a maximum of 2,000 whereas HDW had only 1,690.²⁷

It was alleged at that time that a \$23 million "commission" was paid to an Indian agent to secure the sale of the HDW submarines.²⁸ The preliminary information regarding the commissions was provided by the Indian Embassy in Bonn, which detailed a telex to New Delhi describing HDW's reluctance to reduce the price of submarines because of an alleged 7 percent commission paid to an Indian agent.

HDW later said that negotiations had been held directly with the Indian government and that no agents were involved apart from Globtech of New Delhi, of whom the Indian government had been notified in 1982, and no commission was involved. HDW "declared categorically that no commission was paid to any Indian or non-Indian in India or abroad."²⁹

In June 1990, the CBI was authorized to ask the Swiss government to help them in obtaining information regarding HDW's submarine deal. A letter rogatory was approved by a judge designated for this purpose in Delhi. He granted only a part of the request made by the CBI.³⁰

The letter rogatory permitted the CBI to seek the assistance of the Swiss authorities in examination of witnesses, recording of statements, and production of documents. A restriction was placed on the CBI's power to initiate prosecution on the basis of information received after the conclusion of investigations.

Further investigations into the IIDXV sale appear to have halted when the Indian government changed in November 1990.

25. *Indian Govt Criticized Over West German Submarine Deal*, REUTERS LIBRARY REPORT, May 13, 1988

26. *Id.*

27. *The Scandal Surfaces (HDW Submarine Deal)*, INDIA TODAY, Mar. 15, 1990, at 32-33.

28. Elliott, *Delhi Police Rules Out Submarine Deal Bribery*, FIN. TIMES, Apr. 22, 1985.

29. Battenfeld, *Indian Government Says No Payoff in German Sub Deal*, REUTERS REPORT, Apr. 21, 1988.

30. The court denied CBI's requests to ask the Swiss authorities to interrogate about 25 witnesses, including Swiss bank officials, to ask the Swiss bank officials to freeze the accounts into which the alleged pay-off money in the HDW deal had been transferred, and to issue a letter of request for penal seizure and sanctions.

C. Airbus A-320

In the early 1980s, the administration of Mr. Rajiv Gandhi negotiated and settled a deal with Airbus Industries, a four-nation European consortium, to purchase 31 Airbus A-320 passenger planes for the Indian national airlines. When one of these aircraft crashed near Bangalore, South India, killing 91 people in February 1990, the government initiated an inquiry into the purchase of the aircraft and grounded the airline's remaining A320s.

The Central Bureau of Investigation began investigations into the Airbus sale and discovered the following.³¹

In August 1983, an expert committee was set up by the Indian Airlines under Air Vice Marshal Dilbagh Singh to consider a suitable aircraft. The aircraft considered were the Airbus 320, the McDonnell Douglas MD-80, the British Aerospace 146-100, the Fokker F-28-4000, and the Boeing 757. Mr. Singh recommended purchase of the Boeing 757 and not Airbus A-320 because the latter plane had not yet been launched officially.

On July 24, 1984, Boeing was issued a letter of intent to purchase 12 planes. This was accompanied by a refundable advance of \$900,000. A firm order was set to be placed by October 31, 1984. The Aviation Ministry, instead of going forward with the order, forwarded to the Cabinet Committee an unsolicited offer to sell the A-320 aircraft. This plane was not on the list prepared by the expert committee headed by Air Vice Marshall.

On August 16, 1984, the Cabinet Committee decided that the A-320 should be bought because it had more advantages as compared with the Boeing 757. Critics noted that although the Boeing aircraft had been rested for almost two years, the Airbus was accepted within a few months even though the plans for the engine (the V-2500) were still on the drawing board.³² There was no opportunity to test whether the machine would prove adequate for Indian weather conditions.

The A-320, a highly sophisticated plane equipped with the latest "fly by wire" technology, was chosen by the Indian government although the conditions of Indian airports are not generally as sophisticated as those in the West. Critics said that: there were no adequate facilities for storing the aircraft (which requires air-conditioned hangars), nor were the airports equipped with the equipment required for a sophisticated aircraft like the A-320.³³ The principal advantage of the A-320 appeared to be the price factor

31. *A Sordid Saga (Airbus A 320 Purchase)*, INDIA TODAY, Mar. 15, 1990, at 22-29.

32. *Id.*

33. *Id.*

With the death of Mrs. Gandhi and the necessity of seeking certain administrative approvals, little happened with respect to the aircraft purchase for over a year. On September 21, 1985, the government canceled the letter of intent that was earlier sent to the Boeing corporation. Soon after that, India entered into an arrangement to purchase 19 aircraft from Airbus A-320 and reserved the option to buy 12 more at a later *stage*. The final purchase agreement with Airbus Industries was signed in March 1986.

In October 1988, the government went ahead with placing order for 12 more A-320 aircraft, even though an accident involving an A-320 had occurred at the 1988 Paris air show.

In 1990, as a result of the CBI investigation, a First Information Report was filed in a New Delhi court by the Indian government accusing Airbus of bribery and corruption in connection with the awarding of aircraft contracts worth nearly \$2 billion. Also charged were four former officials of the state-owned Indian Airlines and the Ministry of Civil Aviation, as receiving kickbacks on the agreements to buy A-320 aircraft. The charges also referenced unidentified partners and directors of M/S International Aero Engines of East Hartford, Connecticut, who also may have been involved in criminal misconduct.

Airbus Industries vehemently denied all accusations, saying it was the victim of a malicious campaign and “reserved the right to undertake any legal action against the originators of such injurious, offensive and calumnious accusations.”³⁵ The charges are still pending.

D. Sumitomo

The Sumitomo transaction was yet another controversy over allegedly corrupt practices that rocked the nation when Bofors and I-IDW cases had not yet been conclusively decided. A New Delhi-based newspaper, *The Statesman*, alleged that Sumitomo paid \$4.6 million to a firm owned by a New Delhi-based businessman, Mr. Lalit Sun, when it signed a pipeline construction deal with India’s state-owned Oil and Natural Gas Commission (ONGC).³⁶

Since the recipient of the commission was not a civil servant, the charges levied were that the payments violated India’s foreign exchange regulations. Mr. Sun denied the charges, saying that the sum of \$4.6 million was paid to Jyotsna Holding Private for consulting work in providing advice to Sumitomo prior to its successful bids for work on state-run projects. The said amount had been shown in income tax assessments of Sun’s firm and described as consultant fees.

Investigations by government officials indicated that no illegal payments had been made since the ONGC had not dealt with an Indian “agent” of Sumitomo Corporation. Nevertheless, the Ministry of Petroleum’s public-sector units made an administrative decision to blacklist nine Japanese firms, including Sumitomo, Mitsubishi, C-Itoh, Nippon Steel, and Kawasaki, from selling products to the government in the future.

34. *Id.* Airbus had claimed that no extra expenditure would be necessary on airports, runways, etc. But it was later realized that training of pilots and engineers on A-320 would cost 50 crores (\$2.8 million),

35. Tarant, India Suggests Bribes Were Paid in Airbus Deal, REUTER LIBRARY REPORT, Mar. 30, 1990.

36. Indian Govt. Orders Probe Into New Bribery Scandal, REUTERS LIBRARY REPORT, Aug. 1, 1988.

§ 7.03 Regulations on the Use of Indian Agents

Sparked by the controversies over illegal commission payments to local agents, separate reports have been prepared on the use of Indian and foreign agents and codes of conduct by the Ministry of Defense officials. As a reaction to the scandals involving defense contracts, the Indian government issued a directive prohibiting the use of local agents in sales of any products to departments of the Defense Ministry. However, the ban on local agents was modified in 1989.³⁷ A distinction was made between full agents, who have a sales role and are paid commissions, and others who handle routine business such as appointments, hotel bookings, and freight activities.

A predicament for a foreign company arises when it enters into business dealings with a private Indian company (or the Indian government through equity participation or direct sales) and appoints a local agent to look after its interests. Under India's Foreign Exchange Regulation Act, commission payments may be made only through Indian banks.³⁸ Payments to offshore accounts of Indian agents without permission of the Reserve Bank of India is a violation of the foreign exchange regulation statute, resulting in liability of the foreign entity. All contracts violating the provisions of the Foreign Exchange Regulation Act are prohibited.³⁹

The Bofors scandal necessitated new registration requirements and guidelines defining the functions of local agents, which were issued in April 1990. Agents of foreign suppliers selling to Indian government departments and public-sector units (PSUs) now must register with the Directorate General of Supplies and Disposals (DGS&D) and with respective public-sector units.⁴⁰ Foreign suppliers' bids will not be considered unless they are registered.⁴¹ The directive covered agents, consultants on retainer, representatives, and servicing agents. New Delhi has left it to the PSUs individually to determine their registration procedure. Public-sector units under (the Ministry of Petroleum's (MOP) administrative control, for example, have formulated new guidelines restricting the use of agents and limiting their role only to certain well-defined functions.

37. "This knee-jerk decision touched off serious problems: bureaucrats found it difficult to negotiate with foreign suppliers, purchases were delayed and after-sales service suffered. Foreign firms were compelled to forgo business or open costly sales offices not justified by the market's size. Even the local agents selling the equipment lodged muted protests. As a result, the Ministry of Defense decided to limit the prohibition to weaponry, the sector that prompted the original ban." *New Delhi Lifts Ban On Use of Local Agents for Defense Sales*, Bus. ASIA, Aug. 21, 1989

38. F.E.R.A., 1973 § 28.

39. F.E.R.A., 1973 § 47. This section makes no exception for foreign nationals.

40. Regn. 1/Indian Agent/89, Ministry of Commerce Dept of Supply, D.G.S.& D., dated April 19, 1990. A copy of the regulation and the selected new implementing rules are attached as Appendices A and B to this chapter.

41. Registration of an agency agreement was not a prerequisite under § 17 of the Indian Registration Act. Instead, § 18 left it to the option of the parties to register the contract

Under the rules of D.G.S. & D., each foreign principal must comply with registration formalities separately. Agents are required to complete an elaborate form detailing such information as the company's legal status, after-sales service facilities, relationship with foreign principals, commission percentage, and income tax payments. They also must furnish a copy of the agency agreement and a declaration that no other agreements for payment of commission in India or abroad exist. Significantly, these requirements are operative with immediate effect even though legislation requiring registration has not been enacted.

An agent's role is now restricted to:

1. Informing prospective foreign suppliers about tender notices
2. Obtaining tender documents on foreign suppliers' behalf;
3. Submitting bids in sealed covers;
4. Attending tender openings if bidders provide letters of authority;
5. Making arrangements for local travel and accommodations for principals' representatives;
6. Advising principals on local laws, regulations and tax liabilities;
7. Helping principals with custom clearance for goods shipped; and
8. Providing after-sales service.

If agents/consultants attempt to influence contract-award decisions, their bids will be disqualified. In addition, it should be noted that all commissions to agents must be paid in rupees and brought to the notice of the Reserve Bank, in compliance with existing F.E.R.A. provisions.

§ 7.04 Conclusion

The preceding discussion highlights the potential criminal law problems that may arise in using agents in India. Foreign businessmen should learn from the Bofors scandal, the HDW submarine sale, the Airbus A-320 case, and the Sumitomo case. They also should pay particular attention to the new regulations that govern the use of agents in India. By heeding these examples and following these regulations, foreign businesspeople should be able to utilize agents in India without encountering any criminal law problems.

Although the government is trying to prevent further problems with its directive defining the nature of an agent's functions, it needs to do more. The officials need to specify the parameters within which agents should function and to promulgate more stringent laws to prevent secret remuneration to overseas accounts of Indian agents. Moreover, for the protection of foreign businessmen and the Indian people, it is imperative that the Indian government take further measures regulating the duties and functions of Indian agents to prevent any future cases of the Bofors magnitude.

APPENDIX A

**No. Regn. I/Indian Agents/89
Ministry of Commerce
Department of Supply
Directorate General of Supplies and Disposals Jeevantara Building, Sansad Marg
New Delhi - 110001.**

Dated: 19.4.90

Sub:-Registration of Indian Agents of Foreign Suppliers

The Directorate General of Supplies & Disposals, New Delhi has been nominated as the Nodal Agency for registration of Indian Agents of Foreign Suppliers/Manufacturers in respect of contracts to be entered into by the various departments/ministries of the Government. These firms who are interested may apply to the Registration Branch of this office at the above address in the forms available on sale, at the Tender Sales Section Counter.

It may be noted that Registration of Indian Agents would be a pre-requisite for the quotation of their Principals being considered by all Government Departments and Public Sector Undertakings of the Government. This scheme of registration would also apply in respect of those Indian firms whose services are being retained by foreign Principals against retainer fees, in whatever form they may be.

APPENDIX B

APPENDIX II

D.G.S. & D.-237

Special Conditions for Imported Stores in Addition to those Contained in Form D.G.S. & D.-230

I. In case of F.O.B./F.A.S. offers, the tenderers should indicate separately:--

- 1) The net ex-factory Prices.
- 2) The net F.O.B./F.A.S. prices exclusive of profit, commission and
- 3) The commission payable to the Indian Agent, if any, in rupees in terms of Agreement (enclosing copy of the same). The Agency Commission payable to the tenderer in terms of agreement with their Principals/Manufacturers should be indicated in rupees as a separate item which would not be subject to variation on account of variation in exchange rate.

II. (A) Indian Agents/Associates quoting on behalf of the Principal/Manufacturer abroad on F.C.B./F.A.S./C.I.F. basis should:

- 1) Certify that net prices are exclusive of commission, profit etc. to be paid to their Principals/Manufacturer, in foreign currency and indicate separately the amount of remuneration/ commission/profit which Indian Agents/Associates are entitled in terms of their Agreements with the Foreign Principals.
- 2) Produce their Principal's/Manufacturer's pro-forma invoice or certificate indicating remuneration/commission/discount, etc. to be allowed in the particular transaction, to their Indian Agents/Associates and the nature of their sales service to be rendered by Indian Agents/Associates.

❖ The following includes only a selection of certain, relevant, new implementing rules. These implementing rules appeared in Appendix II of the Regn. I/Indian Agent/89, Ministry of Commerce Dept of Supply, D.G.S.& D., dated April 19, 1990, which is included as Appendix A to this chapter.

(B) Foreign firms quoting direct against the query and who have Indian Agents/Associates at servicing facilities in India should indicate to offer the name of their Indian Agents/Associates the representative they have for servicing in India. They should quote net: F.O.B./F.A.S. Price, exclusive of the amount of remuneration or commission provided for the Indian Agents/Associates. It should be understood that: the purchaser will indemnify the supplier against payment of such commission and would undertake to pay such commission to the India Agents/Associates in rupees in India in respect of contract arising out of invitation to tender, where the Indian Agents/Associates remuneration/or commission covers a part of the price against the tender.

(C) Besides the above, the following particulars should also be furnished by the tenderers, the Indian Agents/Associates/and/or the foreign firms:

- i. “The precise relationship between the foreign manufacturer/Principals and their Indian Agents/Associates;
- ii. The mutual interest which the manufacturer/Principal and the Indian agents/associates have in the business of each other;
- iii. Any payment which the Agent/Associate receives in India or abroad from the manufacturer/Principal whether as a commission for the contract or as a general retainer fee;
- iv. Indian Agent’s Income Tax Permanent Account number;
- v. The Foreign supplier’s Income Tax Permanent Account Number;
- vi. All services to be rendered by the Agent/Associate whether of general nature or in relation to the particular contract.

N.B, Tenders which do not comply with the above stipulations are liable to be ignored.

(D) The agency commission finally payable to tendered under the contract will, however, be converted in Indian rupees at the IT buying rate of exchange ruling on the date of placement of order which shall not be subject to any further exchange variation.