

GIR KNOW-HOW EXTRADITION

India

Sherbir Panag and Samudra Sarangi
Law Offices of Panag & Babu (New Delhi)

AUGUST 2019

1 Are extradition proceedings regulated by domestic legislation, treaties or both?

The overarching legislation that governs the extradition of a fugitive from India to a foreign country, or vice versa, is The Extradition Act, 1962 (the Extradition Act). The Extradition Act is required to be read with the treaties that India has entered into with foreign countries.

The full statute can be accessed at www.mea.gov.in/Uploads/PublicationDocs/153_The-Extradition-Act-1962.pdf.

2 Is there a central register of extradition treaties that your state has entered into?

India has signed extradition treaties with 37 foreign countries and has extradition arrangements with countries such as Antigua and Barbuda, Croatia, Fiji, Italy, Papua New Guinea, Peru, Singapore, Sri Lanka, Sweden and Tanzania.

A full list of treaties and arrangements can be found at www.cbi.gov.in/interpol/extradition.php#et.

3 Do special extradition arrangements apply to certain foreign states, for example states that are geographically proximate, or politically, legally or economically closely linked?

While strong diplomatic and economic connections and similarity in legal systems can catalyse the extradition process, India does not have a notified special extradition arrangement with any foreign country.

4 Is extradition possible to states that have no bilateral or multilateral extradition treaty with your state if they are party to an international convention?

Under the Extradition Act, if no extradition treaty exists with a foreign country, central government may, by notification, treat any international convention to which India and that foreign country are parties as an extradition treaty in respect of offences specified in that convention.

5 Is extradition possible to states that are not extradition treaty partners as an ad hoc arrangement?

The only situation in which a fugitive can be extradited to a non-treaty partner is by following the procedure set out in Section 3(4) of the Extradition Act, which requires a notification to be issued by central government by which an international convention signed by both India and the non-treaty partner country is treated as extradition treaty for the offences set out in that international convention. In these circumstances, the only offences for which extradition can be sought are the specific offences that are set out in the relevant international convention.

In the event that an extradition request is made (i) by a country with whom India does not share a common international convention and (ii) where a common international convention exists, but the extradition request pertains to an offence that is not specified in that international convention, India shall not honour the extradition request.

6 For which offences is extradition from your state allowed?

Section 2(c) of the Extradition Act defines 'extradition offence' and provides:

- for states that are extradition treaty partners, an offence that is specified in the extradition treaty;
- for states that are non-extradition treaty partners (but are a party to a relevant international convention), an offence that is punishable with an imprisonment term of not less than one year under the laws of India or a foreign state and includes a composite offence.

A composite offence has been defined in Section 2(a) of the Extradition Act as an offence that has occurred, wholly or in part, in a foreign state or in India, which when examined holistically would constitute an extradition offence in India or in a foreign state.

7 Is there a requirement for double (dual) criminality? How is this assessed?

Dual criminality usually forms an integral part of an extradition treaty. Extradition treaties entered into between India and foreign states require the principle of dual criminality to be satisfied prior to granting extradition requests and, in the absence of the same, extradition requests shall be refused.

The basic test of dual criminality is that extradition is only applicable in cases in which the offence for which extradition is sought by a requesting state is recognised as a crime in the requested state. The nomenclature of the offence is not material, but

the substance of the offence is tested while applying the principle of dual criminality. The extradition request documents usually state a specific requirement for requesting states to identify the essentials of the offence and provide material regarding the legal position thereof. This is a criterion for evaluating whether the extradition request passes the test of dual criminality.

8 How would your state deal with a request that includes an offence for which extraterritorial jurisdiction is claimed?

The definition of a composite offence, as laid down under Section 2(a) of the Extradition Act, means that extradition is possible in respect of an extraterritorial offence that occurred, wholly or in part, in the foreign state, or in India if its effects would constitute an extradition offence in India or in a foreign state.

Section 34 of the Extradition Act provides that an extradition offence committed by any person in a foreign state shall be deemed to have been committed in India and that the person shall be liable to be prosecuted in India for the offence. Under Section 34A, if central government is of the opinion that a fugitive criminal cannot be surrendered or returned, it may, as it deems fit, decide to prosecute that fugitive criminal in India.

9 What must be included as part of a valid extradition request made by the foreign state?

The Extradition Act does not contain any specific provision setting out the documents that must form part of the extradition request. The documents to be provided with a valid extradition request are usually set out in the extradition treaty between the two countries and extradition requests have to be customised to meet the exact requirements laid down in the extradition treaty. However, as a general guide, the following documents are usually required to be submitted with an extradition request. (Note that this list is only indicative and the documents required to be submitted with an extradition request to India by a foreign country would be as per the extradition treaty in effect between the countries. In the absence of an extradition treaty and no specific procedure specified in the international convention under which a non-treaty state is seeking extradition, the following list can be used as a guiding tool in relation to submissions of documents in support of an extradition request.)

- Documents, statements or other types of information that describe the identity and probable location of the person sought to be extradited;
- information describing the facts of the offence and the procedural history of the case;
- a statement of provisions of law describing the essential elements of the offence for which extradition is sought;
- for persons sought for prosecution, extradition requests shall also be supported by (i) a copy of the warrant or order of arrest by a judge or other competent authority, (ii) a copy of the charging document, if any, and (iii) any information that would justify the committal for trial of the person had the offence been committed in India; and
- for persons who have been convicted of an offence for which extradition is sought, extradition requests shall also be supported by (i) a copy of the judgment of conviction, and if no such copy is available, a statement by a judicial authority that the person has been convicted, (ii) information establishing that the person whose extradition is sought is the person to whom the conviction pertains, and (iii) a copy of the sentence imposed, if the person being sought has been sentenced.

10 What are the stages of the extradition process?

The procedure for processing extradition requests is different for countries with whom formal extradition treaties are in place and for countries with whom no extradition arrangements are in place.

Procedure for extradition if an extradition treaty exists

Receipt of an extradition request

Extradition proceedings are initiated upon receipt of a request for extradition through the following modes:

- directly through diplomatic channels between India and the requesting country;
- a red notice received by the General Secretariat of Interpol; or
- other settled modes of communication.

The Ministry of External Affairs of the Government of India is the central authority that handles all extradition requests.

Magisterial inquiry

Upon receiving an extradition request, central government, if it deems fit, issues an Order to the jurisdictional magistrate to enquire into the matter.

Issue of an arrest warrant

On receiving an order from central government, the magistrate shall issue a warrant for the arrest of the fugitive offender.

Power of a magistrate to issue a warrant in certain cases

When it appears to any magistrate that a person residing within the jurisdiction of the magistrate is a fugitive offender of a foreign state and that, based on evidence placed before him or her, the magistrate is of the opinion that the issuance of a warrant is justified, he or she may issue a warrant. Upon issuing an arrest warrant, the magistrate is required immediately to issue a report to central government with the specified information. Any arrest warrant issued by a magistrate must be confirmed by an Order of central government within three months. If it is not, the person arrested cannot be detained further.

Procedure before a magistrate

When a fugitive offender appears or is brought before a magistrate, the magistrate shall enquire into the case by examining the evidence that is provided in support of the extradition request and the evidence presented by the fugitive offender. If on examination of the evidence on record, the magistrate is of the opinion that a prima facie case can be made to justify the extradition request, the magistrate shall submit his or her inquiry report with the specified material to central government and may commit the fugitive offender to prison to await further orders from central government. If the magistrate is not satisfied that a prima facie case has been made, the magistrate shall discharge the fugitive offender.

- Scope of a magistrate's inquiry: An inquiry before a magistrate cannot be made into a fully fledged trial. The inquiry is not supposed to decide the guilt or innocence of the fugitive offender and does not go into the merits of the matter. The main purpose of the inquiry is to determine whether there is a prima facie case or reasonable grounds that warrant the fugitive criminal being sent to the requesting state, by verifying the authenticity of the evidence presented before the court by the requesting state and considering the evidence produced by the fugitive offender to contest the extradition request.
- Prima facie case: 'Prima facie' is defined as 'at first sight' or 'accepted as so until proved otherwise' or 'on the face of it' or 'so far as it can be judged from the first disclosure'. A prima facie case will prevail until contradicted and overcome by other evidence. While determining whether a prima facie case has been made, the relevant consideration is whether on the basis of the evidence laid before the magistrate, it was possible to arrive at the conclusion in question.

Surrender of a fugitive offender

After receiving a magistrate's enquiry report, if central government is of the opinion that a fugitive offender is required to be surrendered to the requesting state, a warrant in relation thereto is issued for the custody and removal of the fugitive offender and of his or her his delivery at a place and to a person so named in the warrant.

Procedure for extradition if there are extradition arrangements

India has extradition arrangements with certain non-treaty states and the same procedure does not apply to every non-treaty state, but only those non-treaty states with whom India has an extradition arrangement. A list of the countries with whom India has an extradition arrangement is provided under question 2.

Endorsed warrant

If a warrant for the apprehension of a fugitive offender has been issued by a foreign state with whom India has an extradition arrangement and that fugitive is thought to be in India, central government (provided it is satisfied that the warrant has been issued by a person having lawful authority) shall endorse the warrant, which shall be sufficient authority to apprehend the fugitive offender named in the warrant and presenting him or her before any magistrate in India.

Procedure before a magistrate

When an apprehended fugitive offender is presented before a magistrate, once the magistrate is satisfied that the endorsed warrant is duly authenticated and that the offence of which the fugitive offender is accused, or convicted, is an extradition offence, the magistrate shall commit the fugitive offender to prison to await his or her return and shall send a certificate of the committal to central government. In the event that the magistrate is not satisfied with the authentication of the endorsed warrant or that the offence falls within the scope of an extradition offence, the magistrate may, pending further orders from central government, either detain the fugitive offender in custody or release him or her on bail. The magistrate, upon concluding the inquiry, submits his or her report with the specified documents to central government.

Return of a fugitive offender by warrant

At any time after a fugitive criminal has been committed to prison, central government may issue a warrant for custody and removal to the foreign state concerned and for delivery of the fugitive offender at the place and to the person specified in the warrant.

11 If an initial political decision is required, what factors can be considered?

Extradition proceedings in India are partly judicial and partly administrative. The first stage is the handling of a request received by the foreign state. Consideration thereof as to whether to issue an order to a magistrate to enquire into the offence is an administrative decision made by the Government of India. The judicial part (ie, the magistrate's inquiry) is the second stage. After that inquiry is concluded, central government again considers the matter.

Before ordering a judicial inquiry, upon receipt of an extradition request, central government is required to conduct a preliminary inquiry into the prima facie validity of the request and the nature of the offence for which extradition is sought. The initial inquiry is not supposed to be a detailed examination of the extradition request. The Extradition Act does not specify any specific factors which central government is required to consider before ordering the judicial inquiry and is therefore at the discretion of central government.

12 Is provisional arrest, before the extradition request is received, possible?

Yes. Section 34B of the Extradition Act sets out the provisions in relation to provisional arrest and states that upon receipt of an urgent request from a foreign state for the immediate arrest of fugitive criminal, central government may request the jurisdictional magistrate to issue a provisional warrant for the arrest of the fugitive criminal.

Unless there is an extradition treaty between the foreign state and India that specifies a particular time limit, the Extradition Act requires the foreign state that has made the provisional arrest request to make a formal request for extradition within 60 days of the date of the provisional arrest.

If no formal request of extradition is received within the time limit specified in the relevant extradition treaty or the Extradition Act, as may be applicable, the person who has been provisionally arrested shall be discharged by the magistrate. However, the fact that the person has been discharged shall not preclude subsequent re-arrest and extradition of that person, if the extradition request and supporting documents are received at a later date.

13 Must a domestic arrest warrant be issued or can an Interpol red notice be used to carry out a provisional arrest?

Any request for a provisional arrest must satisfy the requirements of section 34B of the Extradition Act (which requires a warrant to be issued by the magistrate before a provisional arrest can be made). Such requests from a foreign country must be accompanied by the requisite documents and not a communication from Interpol alone by way of a red notice. Provisional arrest can be effected at the instance of central government only when the request is made by the foreign country and not otherwise. Therefore, a red notice by Interpol cannot form the sole basis of a provisional arrest in India and the requirements of the Extradition Act must be met.

14 What is required to apply for a domestic extradition arrest warrant?

Once an extradition request is made and central government has passed the requisite orders, an inquiry is initiated before a magistrate. Before issuing any warrant for arrest, the magistrate is required to satisfy himself or herself regarding the following:

- an arrest warrant for the person exists in the foreign country or the person has been convicted of an offence against the law of the foreign country;
- the offence to which the warrant or conviction relates is an extradition offence as defined; and
- the dual criminality principle is complied with.

15 What rights does the requested person have while under arrest?

A person committed to custody by a magistrate would be treated as a 'criminal prisoner' under the provisions of the Prisoners Act, 1894. The rights of a criminal prisoner include:

- to be housed separately from 'convicted criminal prisoners';
- to be permitted to maintain themselves and to purchase or receive from private sources at proper hours, food, clothing, bedding or other necessaries, as per the applicable rules in this regard. If the person is unable to maintain himself or herself, bedding and clothing shall be provided by the prison;
- access to visits from persons with whom the prisoner would like to communicate, at specified times and under proper restrictions; and
- to meet legal advisers without anyone else being present.

16 Is bail available in extradition proceedings?

Section 25 of the Extradition Act confers a magistrate charged with an extradition inquiry with powers of granting bail, under the terms of the Code of Criminal Procedure, 1973, to any fugitive offender who is arrested or detained under the provisions of the Extradition Act.

There are two types of bail, for which a person may apply: anticipatory and regular. Anticipatory bail is sought in anticipation of an arrest and regular bail is sought after an arrest.

17 If so, what are the factors that a court will take into account in deciding whether to grant bail?

Under Indian law, bail is the rule and jail is the exception. Bail law in India is split into two overarching segments: bailable offences and non-bailable offences. In respect of bailable offences, bail can be claimed as a matter of right. In cases of non-bailable offences, bail is at the discretion of the court.

When a person accused of a bailable offence is arrested or detained without a warrant, or appears or is brought before a court, and the court is prepared at any time to give bail, that person shall be released on bail.

For non-bailable offences, under which most extradition offences typically fall, the following factors are considered:

- the enormity, nature and gravity of the accusations;
- the severity of punishment upon conviction;
- a prima facie case being made from the evidence presented in support of the accusations;
- the social and financial background and status of the accused with reference to the victim and witnesses;
- the accused's prior criminal record;
- the possibility of witness tampering;
- the likelihood of the accused fleeing;
- the probability of the accused committing further offences;
- the possibility of a protracted trial;
- the health, age and gender of the accused; and
- an opportunity for the accused to adequately prepare a defence and have access to legal counsel.

Bail is usually not granted for offences that are punishable by death or life imprisonment, providing there are reasonable grounds to show that the accused is involved in the commissioning of the offence.

18 Can the court impose conditions when granting bail? What conditions can be, and usually are, imposed?

Before granting bail to an accused person, the court has the discretion to impose certain conditions, which may include:

- executing a personal bond, the amount of which is decided by the court. Note that money does not have to be deposited with the court. Only a personal bond for an amount specified by the court, which essentially is a guarantee, is required to be executed;
- providing sureties who will secure the bond executed by the accused. In the event that an accused violates bail conditions, the surety will be required to deposit in court the amount specified in the personal bond;
- requiring a personal appearance before the court, as and when directed;
- other conditions to ensure that the conditions mentioned in the bond are not violated, at the discretion of the court;
- that the accused person shall not commit an offence similar to the offence of which he or she is suspected;
- that the accused person shall not, directly or indirectly, induce, intimidate or make promises to any persons who are acquainted with the facts of the case so as to prevent disclosure of facts to the police or court, or otherwise tamper with any evidence in any manner; and
- other conditions in the interest of justice.

19 What bars can be raised to resist extradition?

Section 31 of the Extradition Act sets out the circumstances in which a fugitive offender shall not be surrendered or returned to a foreign state. These restrictions include the following:

- The offence for which extradition is sought appears to be of a political character or the fugitive offender proves to the satisfaction of the magistrate or central government that the extradition request has been made with a view to try to punish an offence of a political character. A Schedule to the Extradition Act sets out a list of offences that would not fall within the scope of 'political character'.

- The offence for which extradition is sought is barred by time as per the laws of the requesting foreign state.
- The fugitive offender is accused of an offence in India, other than the extradition offence.
- The fugitive offender is already serving a prison sentence in India for any conviction.
- A minimum consideration period of 15 days from the date on which the magistrate committed the fugitive offender to prison must have elapsed.

The fugitive offender is provided with an opportunity to present evidence that rebuts the prima facie case for extradition. This is required to be considered by the magistrate and then, if applicable, by central government. Similarly, if an objection to extradition is raised by the fugitive offender on the ground that such a request is barred under the terms of section 31 of the Extradition Act, the accused may present evidence to establish that the case falls within the scope of one or more of the aforesaid restrictions to extradition, which would be required to be considered by the magistrate or central government before surrendering or returning the fugitive offender to the requesting state.

20 Does your state extradite its own nationals and residents?

India permits the extradition of its own nationals. However, several bilateral treaties with foreign states preclude extradition of Indian nationals, in which case Indian nationals cannot be extradited to those foreign states. In practice, the extradition of Indian nationals is usually decided on the basis of reciprocity (ie, if the foreign treaty state does not extradite its own nationals to India, India also bars extradition of its own nationals).

21 Are potential breaches of human rights after extradition considered in the extradition process?

If a bilateral treaty provides for considerations to be given to the protection of certain human rights, the magistrate and central government shall give fair consideration to the same before deciding any extradition request. Another important factor that is considered is whether the accused will be given a free and fair trial in the requesting country post-extradition.

22 Can a person consent to extradition, and what is the procedure? Is consent irrevocable?

When a fugitive offender appears or is presented before a magistrate, he or she may choose not to contest the extradition request. However, the Extradition Act neither provides for any specific provisions regarding the fugitive offender consenting to extradition, nor does it set out a separate procedure to be followed in such cases.

23 Is there a speciality protection? How is it provided? Does it apply if a person consents to extradition?

The Extradition Act recognises the doctrine of speciality in section 21 of the Extradition Act. Section 21 of the Extradition Act provides that a person extradited to India shall only be tried for (i) the specific extradition offences for which the person was surrendered or returned; (ii) a lesser offence disclosed by the facts proved for the purpose of securing surrender or return; and (iii) the offence in respect of which the foreign state has given its consent.

There is no exclusionary provision in the Extradition Act that restricts the application of the provisions of section 21 in cases where the fugitive offender has consented to the extradition.

24 If there is a political decision at the end of the extradition process, what factors can be considered?

As discussed question 11, the extradition process is partly judicial and partly administrative. The final decision on whether a extradition request is to be granted rests with central government. Before making a final decision, the government is required to bear in mind the terms of the bilateral treaty, if there is one, and the provisions of section 31 of the Extradition Act, which provides for restrictions on granting extradition requests. However, in practice, factors such as diplomatic relations between India and the foreign state and prior reciprocity play a significant role in final decisions regarding extradition proceedings.

25 What ability is there to appeal against or judicially challenge decisions made during the extradition process? What are the requirements for any appeal or challenge?

The Extradition Act does not provide for any statutory right to appeal the decisions taken during the extradition proceedings. Therefore, the decisions taken in the extradition proceedings can only be challenged before the constitution courts (ie, the jurisdictional high court or the Honourable Supreme Court of India under writ jurisdiction).

A decision by a magistrate or central government taken under the provisions of the Extradition Act can be challenged by filing a writ petition before the jurisdictional high court. If a party is aggrieved with a high court decision, an appeal against that decision may lie before a larger bench of the same high court (depending on the strength of the bench of the high court that heard the matter at first instance) or the Honourable Supreme Court of India, as the case maybe.

Writ jurisdiction is typically exercised to examine the legality and validity of an impugned order passed by a magistrate or central government. In such proceedings, the writ court rarely delves into the merits of a case, but only examines whether the impugned order conforms with established legal principles, constitutional parameters and public policy.

26 What are the time limits for the extradition process? How long does each phase of the extradition process take in practice?

The Extradition Act does not provide for prescriptive timelines to be followed while dealing with extradition requests. Therefore, legal proceedings in relation to the extradition process can be a long drawn-out affair. If appellate recourse is sought, as aforementioned, the timelines could be further protracted. Litigation proceedings in India, including extradition proceedings, may last several years before being finally decided.

27 In what circumstances may parallel proceedings delay extradition?

The existence of parallel proceedings, including those pertaining to domestic criminal proceedings, may cause significant delays in an extradition request being processed. For example, if a fugitive offender whose extradition is sought is already accused of committing an offence in India, other than the extradition offence, or is serving a sentence in India, then until such time as the domestic criminal proceedings against the fugitive offender are concluded or the sentence term is completed, as the case may be, extradition requests may not be processed.

28 What provision is made for legal representation of the requesting state or the requested person?

The fugitive offender whose extradition is sought has a right to legal representation in the extradition proceedings and if the person cannot afford legal representation, the state shall make provision.

The prosecution case is conducted by the public prosecutor's office. There is no specific provision in the Extradition Act that the requesting state has a right to legal representation in the extradition proceedings. However, a magistrate has wide discretionary powers in the interests of justice and if special circumstances are cited, the magistrate, upon a request being made, may, at his or her discretion, permit the requesting state to address the matter or make submissions before the magistrate through its legal counsel. Similarly, at the appellate stages, the writ court, at its discretion, may permit the requesting state to intervene in the proceedings and make submissions before it through its legal counsel, if circumstances so merit.



Sherbir Panag

**Law Offices of Panag & Babu
(New Delhi)**

Sherbir Panag is one of India's foremost white-collar crime lawyers and a partner at the Law Offices of Panag & Babu. Sherbir's multi-disciplinary white-collar crime practice has been listed and ranked by *Chambers & Partners*, *Who's Who Legal* and *The Legal 500*. He was recently recognised as a Thought Leader for Business Crime Defence (Corporates) by *Who's Who Legal* and *Global Investigation Review*, and has been ranked as one of the 40 under 40 Rising Stars of India by *Legal Era*.

Sherbir has led investigations and acted as defence counsel in some of India's most high-profile cases, which have also had an interplay with law enforcement in the United States, Europe and Asia. These matters have involved allegations of bribery and other misconduct under Indian and foreign anti-corruption laws; financial and regulatory fraud; procurement fraud; violation of sanctions laws; and violation of corporate governance norms. Sherbir's representative experience spans the entire spectrum of India courts including the Supreme Court of India.

Sherbir is a Senior Fellow at the Wharton School's Carol and Lawrence Zicklin Center for Business Ethics Research and a member of Cornell University's – Meridian 180. He also serves on the Advisory Group of the Deutsche Gesellschaft für Internationale Zusammenarbeit's Alliance For Integrity.



Samudra Sarangi

**Law Offices of Panag & Babu
(New Delhi)**

Samudra Sarangi is a leading white collar and commercial litigator in India and a partner at the Law Offices of Panag & Babu. Samudra has comprehensive litigation experience across all major jurisdictions and provides location agnostic litigation representation to his clients across India.

Samudra is one of India's foremost money laundering and anti-corruption lawyers. He has been at the centre of some of India's leading cases involving conflict between money laundering laws and other special fiscal laws. Samudra regularly advises in matters involving interplay between elements of domestic and foreign anti-corruption and money laundering laws. Samudra represents banks, financial institutions, asset reconstruction companies, multinational companies with global operations, Fortune 500 companies and senior management employees of these companies facing investigation or prosecution in relation to business crimes and matters involving regulatory interplay.

Samudra also provides litigation advice to domestic and foreign clients in relation to complex commercial mandates arising out of commercial arrangements, joint venture arrangements, shareholders' disputes, insolvency proceedings and white-collar crimes. Samudra has advised foreign investors in developing multifocal strategies targeted at effective investment protection.

Samudra specialises in developing customised, holistic and complex litigation strategies for his clients and personally argues on behalf of his clients before various judicial forums, including the Supreme Court of India, Delhi High Court, the High Court of Judicature in Bombay, the High Court of Karnataka, national company law tribunals, national company law appellate tribunals, among others.



The Law Offices of Panag & Babu is a boutique firm with offices in New Delhi and Bengaluru, India, specialising in white-collar crime defence. Our focus is on niche yet diverse areas of law, and our clientele ranges across domestic and international organisations with an interest in the Indian markets. In addition to white collar practice, we specialise in compliance and investigations (anti-corruption), international commercial arbitration, and litigation and dispute resolution.

K45, South Extension,
Block K,
South Extension II,
New Delhi,
Delhi 110049,
India
Tel: +91 11 4909 4558

Sherbir Panag
sherbir@pblawoffices.com

Samudra Sarangi
samudra@pblawoffices.com