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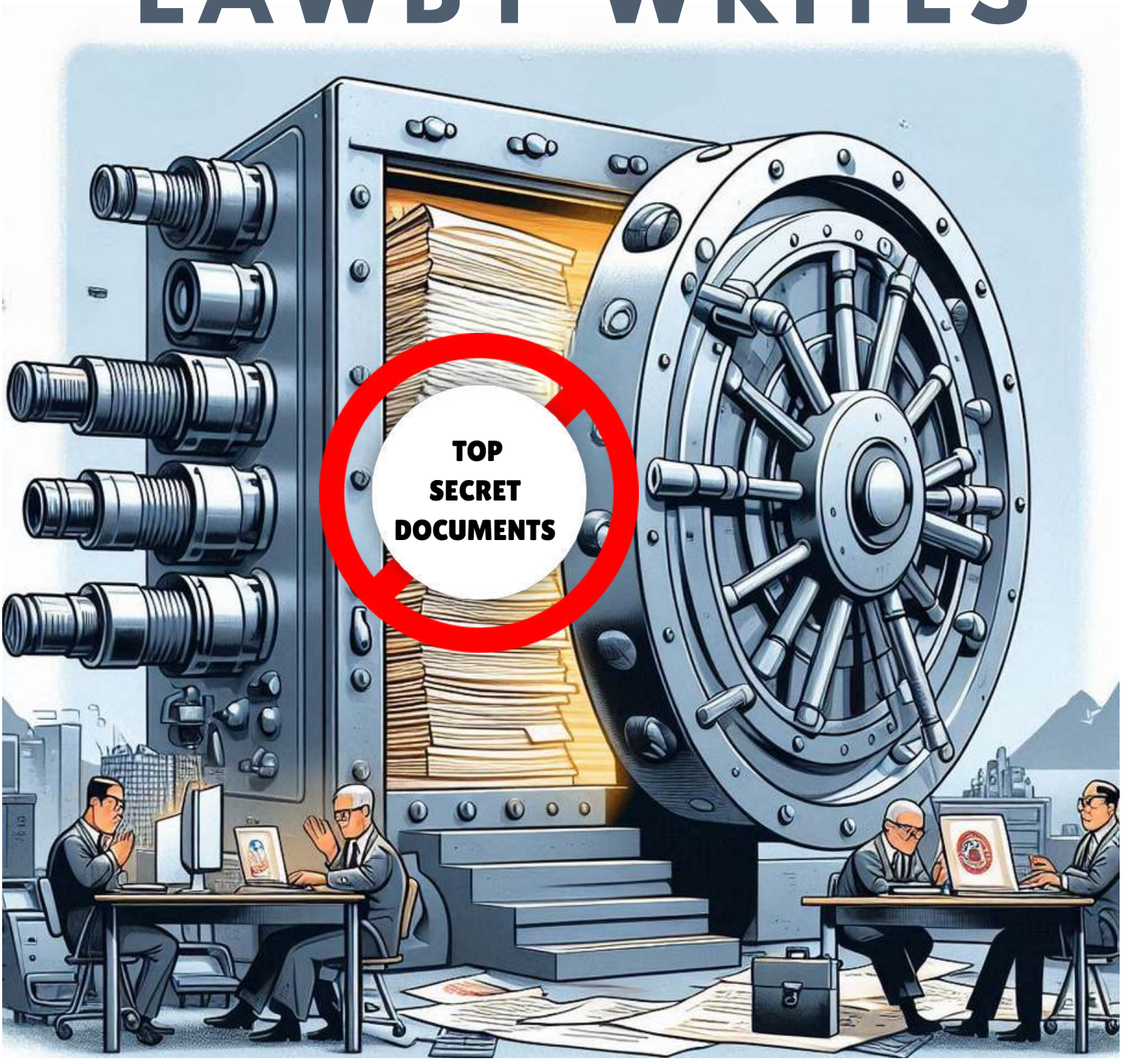

Legal Audit-The iron dome strategy to beat legal vulnerability for businesses

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EDITORIAL

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Legal audit-the iron dome strategy to beat legal vulnerability for businesses

Legal audits are yet to find their place in many institutions, as legal is not a place where new-age entrepreneurs want to burn cash. They would rather spend VC money on client acquisition and show a better Profit and Loss statement. **A legal audit is a process whereby qualified legal professionals analyse the various policies, contracts, and mandatory government compliances done by a business to flag compliance gaps, potential legal risks, and recommend corrective measures.**

The expected core outcome of the legal audit is to avoid unnecessary litigation and ensure that the business is run without unnecessary intervention from the regulatory authorities. **On August 26, 2024, the Dutch Data Protection Agency (AP) fined Uber 290 million euros for violation of General Data Protection Regulation (GDPR) norms where Uber had shared the personal data of Uber Eats drivers from the EU to the USA.** A regular legal audit could have flagged the error, and corrective action could have been taken before such a hefty fine was levied, leading to loss of revenue and reputation.

In a blog post titled "5 Reasons Why Compliance is a Big Challenge for Indian Organisations" authored by Rishi Agrawal (https://www.teamleaseregtech.com/blogs/9/5-reasons-why-compliance-is-a-big-challenge-for-indian-organisations/), the author stated that **in 2021, there were 3,577 regulatory changes, translating to roughly 10 regulatory changes per day. These regulatory changes are published on over 2,000 government websites. They often pertain to crucial changes in procedures, dates, penalties, calculations, and applicable duties, among others**. The complex regulatory environment and poor knowledge of compliances result in legal bottlenecks that cause hefty penalties and a potential lack of market trust for businesses.

A legal audit usually begins by understanding the business the company is involved in, outlining the law governing such entities, and looking into compliance metrics of the company. Further, the legal audit would include vetting of contracts concluded internally within the organization and externally between third parties and stakeholders to assess the vulnerabilities in them. It is advisable that businesses and entrepreneurs explore the legal audit route to avoid the costs and hazards of litigation and create an effective mechanism to ease the compliance burden.

Legal audit may soon become a much-needed staple in many organizations in India, looking at the pace at which entrepreneurship is growing. It would be best for entrepreneurs to note that a legal audit would save them more than the cost involved in conducting one.

LEGAL CRISPS

When can ignorance of the law serve as a Defence?

-Nithyaparvathy R G

Ignorantia juris non excusat (Latin for "ignorance of the law excuses not"), or ignorantia legis neminem excusat ("ignorance of law excuses no one"), is a legal principle that states that a person who is unaware of a law cannot avoid liability for violating that law simply because they are unaware of its contents. This principle requires persons to know and follow the law, regardless of whether they are aware of it or not. In other words, claiming ignorance of the law is not an excuse for avoiding liability. However, in the case of ***Just Rights for Children Alliance and Ors vs. S. Harish and Ors (MANU/SC/1041/2024)***, the Supreme Court clarified when ignorance of the law can be cited as a defence.

The court differentiates between ignorance of the law and a bona fide belief resulting from ignorance of the law. Mere ignorance of the law is not a valid defence. However, **ignorance of the law that leads to a bona fide belief in the existence of a right or claim may be an acceptable defence in certain situations.** The court also mentioned a **four-prong test** in which for a valid defence, there must exist (1) an ignorance or unawareness of any law, (2) such ignorance or unawareness must give rise to a corresponding reasonable and legitimate right or claim, (3) the existence of such right or claim must be believed bona fide, and (4) the purported act sought to be punished must take place on the strength of such right. The court also stated that only when all four of the preceding elements are met can a person use ignorance of the law as a defence to avoid guilt.

The court ruled that this defence is not statutory, but rather a result of the concept of equity. Each case's facts and circumstances determine the outcome. Equity cannot replace unambiguous and clear law. Wherever there is positive law, equity invariably conforms to it. Ignorance of the law regarding the possession of child pornography does not constitute a genuine right or claim. Even if unaware of the precise legislation(Section 15 of POCSO), the court held that this cannot result in a reasonable belief in a right to possess such material. **The defence of ignorance of the law fails in child pornography cases.**

CASE CHRONICLE

Can an arbitral tribunal compel the production of "Top Secret" documents?

-Seethala B

The Delhi High Court ruled that documents classified as "Top Secret" and "Protected" under the Official Secrets Act, 1923, cannot be compelled for production by an Arbitral Tribunal. This was established in the case of ***The Director General, Project Varsha Ministry Of Defence (Navy), Union Of India Versus M/S Navayuga-Van Oord JV [2024:DHC:738].*** Justice Manoj Jain allowed a plea by the Director General of "Project Varsha", Ministry of Defence, challenging an order directing the submission of documents related to "Project Varsha" to the Arbitral Tribunal in a sealed cover. The case arose from a 2017 contract between the Director General and M/S Navayuga-Van Oord JV (claimant) for constructing an outer harbour for "Project Varsha", where arbitration was invoked due to disputes.

The claimant sought the inspection and production of certain documents, which the Director General opposed, citing national security concerns and the Official Secrets Act, 1923. The Court stated that "Project Varsha is a classified project of the Indian Navy having national importance and the documents related to said project, as sought by the contractor through discovery, are highly classified in nature and disclosure of such documents is considered prejudicial to the public interest, the affairs of the state as also the national security."

Justice Manoj Jain asserted that while fair opportunity must be given to both sides in arbitration, national security concerns are paramount. He remarked that the insistence on producing such classified documents was unfounded and fanciful, given the sensitivity and critical nature of the project for India's defence.

The Court concluded that if a document is classified as "Top Secret" by the Government of India, it should be given due importance. **The Arbitral Tribunal should not insist on its production, even in a sealed cover**. It is "beyond its purview to open such sealed cover and to ponder over whether these were rightly labelled as "classified" or not."

BEYOND THE OBVIOUS

Types and tests to determine the arbitral bias

-Sri Sai Kamalini M S

Arbitration has become an important and effective alternative dispute resolution, which is being preferred due to the timely resolution and less complicated procedures than litigation. The principles of independence and impartiality are essential for effective arbitration. Arbitral bias is an issue that might affect the integrity of the process. **Section 12 of the Arbitration and Conciliation Act, 1996** provides the grounds for challenging the appointment of an arbitrator and necessary disclosures by the arbitrator if they have any direct or indirect relationship with the parties or subject matter of the arbitration. The **fifth schedule** of the Act provides a list of circumstances that lead to justifiable doubts about the arbitrators' independence.

There are three types of arbitral bias:

- **Apparent Bias**: This refers to a situation in which there is a reasonable apprehension that an arbitrator may not be impartial. It does not require proof of actual prejudice but rather focuses on the perception of bias from an objective standpoint.
- **Actual Bias:** This is when an arbitrator has a demonstrable partiality or prejudice that influences their decision-making process. Actual bias is more challenging to prove as it necessitates evidence showing that the arbitrator was influenced by personal interests or relationships.
- **Systemic Biases:** This type arises from institutional or legal frameworks that may favour one party over another, potentially undermining the arbitration process's neutrality.

Typically, two primary tests are used to determine arbitral bias: the "reasonable apprehension of bias" test and the "real danger of bias" test.

a) **Reasonable Apprehension of Bias Test:** This standard, commonly applied in many common law jurisdictions, asks whether a fair-minded and informed observer would conclude that there is a real possibility that the tribunal was biased. This test emphasizes the perspective of an objective observer rather than the subjective views of the parties involved.

b) **Real Danger of the Bias Test:** This stricter standard requires proof that there exists a real danger that an arbitrator may not be able to maintain impartiality. Courts applying this test frequently consider a variety of factors, including the nature of the relationship between the arbitrator and the parties involved, as well as any relevant contextual circumstances.

MEET THE TEAM

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