India Business Law Journal

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Dec 2015/Jan 2016

Volume 9, Issue 6

In the spotlight

PK Malhotra and Sudhanshu Pandey talk reform

India in 2016

2015 Deals of the Year

Dispute resolution reimagined

What foreign lawyers love and don't love in India

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Subscription information

India Business Law Journal is published 10 times a year and has a subscription price of US$790 for one year or US$1,264 for two years. Subscribe now to arm your organization with the best in legal intelligence.

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India Business Law Journal

Dec 2015/Jan 2016
Volume 9, Issue 6
ISSN: 1994-5841

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Printed in Hong Kong

Vantage Asia

Vantage Asia Publishing Limited

21/F Gold Shine Tower
346-348 Queen's Road Central
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Telephone: +852 3622 2673
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www.vantageasia.com

Out with the old, in with the new

From road congestion to courtroom backlogs, fresh ideas are afoot to get India moving

While 2015 was dominated by doubts over the abilities of India's policy makers to effect meaningful change, the new year comes with renewed hope that new ideas can take flight. The much lauded odd-even scheme that is being implemented to curb traffic on Delhi's bursting-at-the-seams roads has shown that policy makers can think out of the box and that politicians have the wherewithal to implement change, even in the face of public scepticism and powerful opposition.

Can such audacious thinking be repeated in other areas? The existing state of affairs – be it in the legal and regulatory realm or infrastructure or public health – cannot continue. India needs more success stories like that being scripted in Delhi.

This issue's **Cover story** (page 17) provides grounds for optimism that change may be afoot on several fronts. In an exclusive interview with *India Business Law Journal*'s editor, Vandana Chatlani, India's law secretary, PK Malhotra, says that the country's legal market will open as soon as safeguards that "everybody is looking for" are in place. Malhotra says the Bar Council of India is in consultation with the state bar councils regarding a suitable regulatory framework. Once this has been finalized and when the government believes it is "in line with constitutional and statutory provisions, we will give it the go-ahead," he says.

But when will this happen? Malhotra says that the government is "expecting this to happen very soon", but as the joint secretary for commerce, Sudhanshu Pandey, who was also interviewed, pointed out: "there are certain asymmetries which the Indian legal system suffers from and they need to be addressed before we open up".

India Business Law Journal's interview with Malhotra and Pandey also touched on the ever-present challenge of dispute resolution in India. This is an area where progress has been made with recent amendments to the Arbitration and Conciliation Act, 1996, in the form of the Arbitration and Conciliation (Amendment) Ordinance, 2015. Commenting on one of the key changes, the introduction of a strict time limit for arbitral awards, Malhotra said: "no country, to the best of my knowledge, has made a law where they can debar for a number of years an arbitrator who delays the disposal of a case". This is a remarkable development, and along with other amendments, it could be transformational for India's arbitration regime.

In *Back to the drawing board* (page 25) we investigate how such a transformation may trigger a rethink of overall dispute resolution strategies. For decades the threat of arbitration has been used as the first intimation of a dispute. But now, under the new regime, it marks the firing of the first bullet, an irreversible action that should be taken only as a last resort. This is a significant change that will require fresh thinking from all concerned.

Other changes that may be afoot in India are discussed in this issue's extended **Vantage point** (page 21), where four in-house counsel and the president of the Society of Indian Law Firms present their predictions on the developments that will shape India's business climate in 2016. Despite jitters over the health of the global economy and the slowdown in China, cautious optimism about India's prospects prevails. Yet our commentators also highlight danger areas and challenges that must be addressed. Vijayashyam Acharya, the director of legal and compliance at OnMobile, believes that the focus on legislative and structural reform has been disrupted by "the disproportionately high amount of time, attention and resources the prime minister is devoting to promote India's image overseas". Naveen Raju, the general counsel and senior vice president of group legal services at Mahindra & Mahindra, expresses concern over the lack of momentum for reform and says that "the government's investment in key infrastructure has not matched its announcements and policies".

While our five commentators highlight some of India's deficiencies, this issue's **What's the deal?** (page 29) celebrates many of its achievements with a round-up of the top 50 deals and dispute resolution cases of 2015. Following an extensive shortlisting process, the featured deals were chosen by our editors not only for their size in monetary terms, but also for their complexity, innovation and the precedents that were set. While analysing the significance of each deal, our coverage identifies the law firms and lawyers who guided it through its many twists and turns. This information will be particularly valuable to in-house counsel whose companies are contemplating similar transactions.

Finally in this issue of *India Business Law Journal*, in a flourish of festive fun we indulge in a light-hearted look at the non-curricular activities of foreign lawyers in India (*The India diaries*, page 59). While striking deals may be their primary objective on business trips, many also find time to enjoy the charms and chaos that India offers in abundance. So, while Jamie Benson, the head of Duane Morris & Selvam's India practice, looks forward to playing in the bankers versus lawyers charity cricket match, Pallavi Mehta Wahi, the co-head of the India practice at K&L Gates in Seattle, enjoys eating butter gravy and visiting Dilli Haat, an open-air food fair in Delhi.

Asked if he would change anything, Alasdair Steele, the head of the India group at Nabarro, said he would like free-flowing traffic. This may be possible, at least in Delhi, if the odd-even scheme is successful. And with that, we wish all our readers a successful and free-flowing new year! ■

PE INSURANCE

A matter of opinion

Dear Editor,

Regarding the article on professional indemnity (PE) insurance (*Scant cover*) in your November issue, whether coverage is woefully inadequate is relative and a matter of opinion and must be viewed in light of the intent of insurance protection. The policy is meant to cover professional negligence and not intentional or gross negligence or intentional wrongdoing.

In a situation where law firms engage advocates as independent contractors, even under a retainership agreement, cover under the policy can be extended to cover liability arising out of the professional negligence of such advocates. The policy will also provide cover for claims arising out of work in fast-track courts and special tribunals as long as the claims arise out of professional negligence.

The AOA [any one accident] cover need not be restricted to 25% of the AOY [any one year] limit. In fact the policy can be purchased with a single limit of indemnity. The excess under the policy need not be a percentage of the limit of indemnity but can be an absolute amount. A reasonable excess borne by the insured will indicate skin in the game – intent to manage risk prudently – and will be considered a positive risk feature.

To the author's point on obtaining the widest cover possible while trying to minimize insurance costs, the market is prevalently soft, however the insured must keep in mind the credibility of the insurer and its reputation and ability to handle and pay claims.

Please note that the views I've expressed in this letter are my personal views.

Farzan Khansaheb
Chief Underwriting Officer
Raheja QBE
Mumbai

Opinions? Observations? Feedback?

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Delhi High Court punishes pirates with record fine

Delhi High court has ordered the owners of digaaz.com to pay a record ₹10 million (US$150,000) in damages to the owners of a number of international luxury brands for selling counterfeit goods.

The plaintiffs are part of the Richemont group of companies, which includes leading players in the field of luxury goods such as watches, writing instruments, jewellery, leather, accessories and clothing.

They discovered in February 2014 that digaaz.com was selling counterfeit merchandise and issued cease and desist notices, to which they received no reply.

In his judgment, Justice Manmohan Singh stated that the volume of counterfeit goods sold by the defendants demonstrated that they were "seasoned infringers and counterfeiters with a regular supply of counterfeit goods".

He also acknowledged that the plaintiffs' trademarks – Cartier, Officine Panerai, Vacheron Constantin and Jaeger-LeCoultre – had acquired "a distinct and distinguished reputation" and were among "the most widely recognized luxury brands in the world".

The plaintiffs asked the court to consider the illegal and unfair profits earned by the defendants, the revenue the plaintiffs had lost, the damage to their reputation and goodwill, and legal fees when deciding what damages to award.

"This is India's largest grant of damages in an IP case," said Pravin Anand, the managing partner of Anand and Anand, who represented the plaintiffs. "This will send a very impactful signal against online pirates."

EXTERNAL RELATIONS

Ambitions outlined at Indo-UK summit

The Indian Corporate Counsel Association organized an Indo-UK summit in London at the end of 2015 to discuss opening India's legal market and the globalization of legal services. Featured speakers were India's law secretary, PK Malhotra, and the joint secretary for commerce, Sudhanshu Pandey, who shared their thoughts on improving India's dispute resolution machinery and opening up its legal market to foreign competition.

"The world economy is one," said Malhotra, speaking about liberalizing India's legal services. "You have to move with the moving world."

Pandey explained that while foreign lawyers could offer their clients advice on

foreign law issues through the "fly-in fly-out" model, opening the market to international firms would offer more comfort to both companies and their legal advisers. He added that this would only be possible following domestic reforms, which would put Indian law firms on an equal footing with their foreign counterparts. The reforms would include changes to the partner limit, incorporation structures and advertising restrictions.

Both officials also discussed India's efforts to improve its dispute resolution offerings through the arbitration ordinance of 2015 and the setting up of dedicated commercial courts. Debates about dispute resolution and entering India's legal market were followed by talks about managing risk in-house and the government's "Make in India" campaign.

Attendees at the conference included lawyers from firms such as Stephenson Harwood, Clifford Chance and DLA Piper, along with in-house counsel from companies such as Boeing, GMR, Reckitt Benckiser, DLF and GAIL (India).

See page 17 for an interview with Malhotra and Pandey and page 25 for an analysis of India's arbitration ordinance of 2015.

People moves

HSA partners head to IndusLaw

Navin Syiem and Avirup Nag, formerly partners at HSA Advocates, joined IndusLaw on 12 January 2016 along with five other team members.

Prior to HSA, Syiem had stints at Ajay Bahl & Co (now AZB & Partners), Trilegal, GE Capital, Afridi & Angell and Ashurst. Having spent almost six years at HSA, he said he "felt it was time for newer challenges".

Nag spent just over two years at HSA and before that was with Trilegal and Herbert Smith (prior to its merger with Freehills).

Syiem will focus on corporate and finance work while Nag will concentrate on projects, energy and infrastructure matters. The team that has joined them consists of principal associate Abhishek Bhalla, senior associate Shraddha Malhotra and associates Niyati Bhatt, Rohan Ghosh and Shruti Barua.

"IndusLaw is an exciting firm and both Avirup and I felt that it was the right fit where we would be able to add significant value … while also enhancing each other's practice capabilities," Syiem told *India Business Law Journal*. "We are greatly excited to be part of IndusLaw."


Avirup Nag


Navin Syiem

Juris Corp takes Trilegal talent

Juris Corp has appointed former Trilegal counsel Aninda Pal as a partner in Mumbai. Pal was hired to strengthen and head up the firm's M&A and private equity practice.

Pal spent almost nine years at Trilegal and prior to that worked at Gagrats. He has advised on inbound and outbound cross-border acquisitions, joint ventures, exits and restructuring, and private equity and venture capital investments.

"As part of our strategy, we are expanding our practices … adding the right kind of talent is one of the crucial elements to drive that growth process," said Juris Corp co-founder H Jayesh.

Law firms

Solomon adds associate partners

Solomon & Co has promoted three of its senior associates to associate partner positions. Anagha Subramaniam (finance and corporate), Germaine Pereira (real estate) and Soniya Putta (dispute resolution) will join the existing team of five partners and two associate partners to manage about 60 lawyers across three offices in Mumbai and one office in Pune.

"I am proud to announce these promotions which mark the contributions of Anagha, Germaine and Soniya to the firm," said managing partner Aaron Solomon. "By bringing the overall partner and associate partner strength to 10, we will be well placed to effectively manage our team of lawyers and continue to grow without compromising on the quality and efficiency of our service."

Nishith Desai opens in New York

Nishith Desai Associates has opened an office in New York to practise Indian law and serve its clients in North America. Mansi Seth, an international tax, funds and corporate lawyer qualified in India and admitted to the New York state bar, heads up the office.

This is the firm's second office in the US, after Silicon Valley. It also has international offices in Singapore and Munich.

Nisith Desai Associates specializes in international tax, corporate and M&A work, private equity and

venture capital, intellectual property and cross-border dispute resolution. It is also keen on innovation and delivering strategic advice relating to futuristic areas of law such as bitcoin, the internet of things, privatization of outer space, drones, robotics, virtual reality, medical technology, medical devices and nanotechnology.

The firm celebrated its silver anniversary recently. "This is a special year for us as it marks the 25th anniversary of our firm, 15th anniversary of our Silicon Valley office, 10th anniversary of our Singapore office and third anniversary of our Munich office," said managing partner Nishith Desai. "Truly, it has been a very enriching experience."

Outsourcing

InsightBee buzzes with MBA boost

Insight Bee, an online service of knowledge services provider Evalueserve, has entered into a partnership with MBA & Company.

Backed by Evalueserve's global network of 3,000 research consultants, InsightBee offers high-quality, personalized, cost-effective reports that are tailored to suit individual clients.

MBA & Company provides consultants on demand for a variety of tasks.

With over 20,000 independent consultants with experience in large consultancies and businesses, it offers clients the flexibility to choose the duration, sector and location in which the consultancy will take place.

The partnership with InsightBee will enable MBA & Company to easily order quick and customized business-to-business market research. InsightBee's research analysts will also have access to MBA & Company's network of consultants, to complement desk research with expert advice where necessary.

The transaction was handled by Evalueserve's general counsel Iqbal Tahir Syed, senior corporate counsel Kartikay Sharma and corporate counsel Trisha Bora.

MBA & Company was represented by its in-house team.

Deal digest

Alstom stake sale to GE completed

Alstom has completed the sale of its 51% stake in Alstom Bharat Forge Power to the General Electric group (GE) for approximately US$10.6 billion. The stake was part of Alstom's joint venture with Bharat Forge.

The deal – GE's largest industrial acquisition – required regulatory approval in over 20 jurisdictions including the EU, US, China, India, Japan and Brazil. Jeff Immelt, GE's chairman and CEO, said Alstom's complementary technology, global capability, installed base, and talent would further GE's core industrial growth and boost its technology offerings in the energy sector.

Having hived off its power and grid business to GE, Alstom will now focus on its transport business. In November, it signed two major contracts in India amounting to more than €3.7 billion (US$4 billion), to supply and maintain 800 electric locomotives for Indian Railways, and to work on the electrification, signalling and telecommunications system for part of the Eastern Dedicated Freight Corridor.

Shardul Amarchand Mangaldas & Co advised Alstom on Indian law issues associated with the sale. The team was led by partner Akila Agrawal with support from principal associate Mukul Sharma and associate Sumi Saikia. Hogan Lovells advised on the international elements of the deal.

The transaction was part of GE's global acquisition of Alstom's thermal and renewable power and grid business across various jurisdictions. In India, GE concluded the acquisition by gaining indirect control of two Alstom listed entities through the direct transfer of shares from Alstom Bharat Forge.

AZB & Partners advised GE on Indian law. The team comprised partners Ashwin Ramanathan and Vaidhyanadhan Iyer and senior associate Manan Mehta. Slaughter and May was GE's international legal adviser.

Russia's Ru-Net invests in Faasos

Ru-Net, a Russia-based internet and technology investment company, has led a US$20 million round of investment in Faasos, a technology-focused quick-service chain of food outlets specializing in Indian wraps.

Faasos was founded in Pune in 2003 by Jaydeep Barman, a former McKinsey & Co executive, with his former classmate Kallol Mukherjee. The two are engineers with MBAs from the Indian Institute of Management in Lucknow and INSEAD. Faasos now has over 75 outlets across 17 cities in India.

Ru-Net has previously injected funds in Indian companies such as Snapdeal, Pepper Tap and AppsDaily. Existing Fassos investors Sequoia Capital and Lightbox Ventures also invested in this round.

Link Legal India Law Services advised Ru-Net on the funding. The team was led by partner Manish Gupta with assistance from associates Sweta Rao and Ashish Ahluwalia.

BMR Legal partner Siddharth Nair advised Faasos with help from associate Hardik Bhatia.

Dheeraj Khanna, a senior associate at Themis Associates, advised Sequoia and Lightbox.

GMR raises cash from Kuwait fund

GMR Infrastructure has raised US$300 million through the issue and allotment of 7.5% subordinated convertible bonds due in 2075 to Kuwait Investment Authority (KIA), a sovereign wealth fund.

The foreign currency convertible bonds (FCCBs), which are worth US$50 million each, can be converted into fully paid-up equity shares after 18 months. The floor price for the conversion of the bonds has been fixed at ₹18 (US$0.27) per equity share (determined in accordance with applicable law).

According to Madhu Terdal, the CFO of the GMR group, an existing shareholder of GMR Infrastructure would see an equity dilution of 11-12% after full conversion.

This is the first transaction under the Reserve Bank of India's new regime for long-term external commercial borrowings, which came into effect on 3 December. It is also the first issue of long-term FCCBs by an Indian company.

Krishnamurthy & Co and Cyril Amarchand Mangaldas (CAM) advised GMR Infrastructure on the deal. The lead lawyers at Krishnamurthy & Co were partners Ajay Sawhney and Gautam Srinivas along with associate partner Milind Jha. The team at CAM was led by Mumbai-based capital markets partner Gaurav Gupte and projects partner Dhananjay Kumar.

Clifford Chance partner Rahul Guptan advised GMR Infrastructure on international law issues.

AZB & Partners advised KIA and Citigroup Global Markets India (as KIA's financial adviser) on the transaction. The team included partners Gautam Saha, Madhurima Mukherjee and Amrita Patnaik along with senior associates Pallavi Meena, Dushyant Bagga and Namita Das.

Naaptol nets new funds from Mitsui

Home-shopping television operator and e-commerce retailer Naaptol has raised ₹3.43 billion (US$51 million) through a new round of funding from Japanese conglomerate Mistui & Co.

The latest round of equity financing comes less than seven months after Naaptol raised ₹1.36 billion in an earlier round led by Mitsui in April 2015. The new funding brings Mitsui's stake in Naaptol to 20%.

Naaptol founder and CEO Manu Agarwal said the company would use the funds to expand its reach, build up an efficient supply chain, invest in technology and upgrade its capabilities to produce more content in multiple languages.

A team from Trilegal consisting of partner Kunal Chandra, senior associate Kabeer Mathur and associates Aditi Jain and Rahil Pereira advised Mitsui & Co. They conducted due diligence on Naaptol and drafted the transaction documents to balance Mitsui's interests as a stakeholder with the interests of Naaptol and its other investors.

Dua Associates advised Naaptol on the funding. The team comprised Mumbai-based partner Anish Ghoshal, senior associate Natasha Buhariwalla and associate Rajat Agarwal.

Nishith Desai Associates advised existing investors NEA FVCI, NEA FDI, CMDB II, ICP Holdings I and SVB India Capital 2006.

Videocon finalizes FCCB restructuring

Videocon Industries has completed the restructuring of US$194.4 million in 6.75% foreign currency convertible bonds (FCCBs) issued in December 2010 and due in December 2015.

The transaction involved a cash settlement of US$97.2 million (plus applicable interests and costs) and an exchange into US$97.2 million in 4.3% FCCBs due in December 2020. The exchange bonds are secured by certain Videocon Group entities pledging shares of Videocon Telecommunications, a subsidiary of the issuer, along with personal guarantees by two of the issuer's promoters.

The issuer's existing FCCBs and the exchange bonds are listed on the Singapore Stock Exchange, while the issuer's underlying equity shares are listed on the Bombay Stock Exchange and the National Stock Exchange of India.

Shardul Amarchand Mangaldas & Co was the Indian legal adviser to Videocon Industries. The team was led by partner and national practice head for capital markets Prashant Gupta and included partners Shilpa Mankar Ahluwalia and Monal Mukherjee, principal associate Shubhangi Garg,

senior associates Mathew Thomas and Mallika Chopra and associate Roochi Hatengdi.

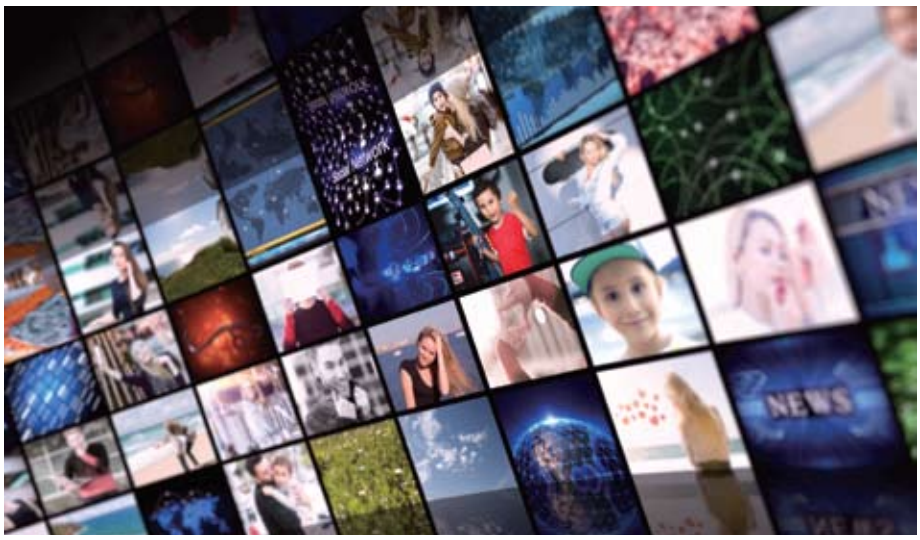
Baker & McKenzie.Wong & Leow advised the company on English law.

Linklaters and Cyril Amarchand Mangaldas advised Credit Suisse Singapore, the sole bookrunner, on English law and Indian law, respectively.

Allen & Overy advised DB Trustees Hong Kong on English law.

Duane Morris & Selvam advised the promoters on English law in relation to the promoter guarantee.

DLA Piper and Juris Corp advised certain bondholders on English law and Indian law, respectively.



Zydus expands animal health unit

Global healthcare provider Zydus Cadila has agreed to acquire select brands and the manufacturing operations in Haridwar of Zoetis, a global animal health company. The acquisition will be made through Zydus Animal Health, a division of Zydus Cadila. The financial details of the deal were not disclosed.

The manufacturing operations to be acquired have catered to both the Indian and global markets, while the brands cover a wide range of nutrition, therapeutic and livestock farm care products.

Zydus Animal Health's offerings in India include antibacterials, nonsteroidal anti-inflammatory drugs, antimastitis, tonics and poultry vaccines. It is the leader in "first-in-India" products in line with its mission to provide innovative solutions that improve animal health and farm productivity.

Zoetis India was represented by Veritas, while Zydus was advised by its in-house team.

Mushtaq, Carlson team up in Kashmir

The Mushtaq Group of Hotels is to open seven hotels in Jammu and Kashmir in partnership with the Carlson Rezidor Hotel Group. Currently, no international hotel brand has a major presence in the state.

Three of the hotels will be new while four existing Mushtaq hotels will be upgraded to Carlson Rezidor standards with a total investment of about ₹10 billion (US$150 million).The first hotel will open in Srinagar in the fourth quarter of 2016. The other six will be in Jammu, Sonmarg, Gulmarg, Tanmarg and Pahalgam. The Mushtaq Group will make the investments while Carlson Rezidor will lend its brand name, management practices, services and brand promotion.

Carlson Rezidor has more than 1,370 hotels in operation and under development across 110 countries. Its current brands are Quorvus Collection, Radisson Blu, Radisson, Radisson Red, Park Plaza, Park Inn by Radisson and Country Inns & Suites by Carlson.

New Delhi-based law firm Lex Favios advised the Mushtaq Group on the deal. Managing partner Sumesh Dewan and senior associate Yeshika Dublish advised on and negotiated the hotel management contracts and other contracts for the deal.

Carlson Rezidor's in-house team advised the company on the negotiations.

Business law digest

FOREIGN INVESTMENT

Foreign direct investment policy liberalized

The Department of Industrial Policy and Promotion issued Press Note 12 of 2015 on 24 November to liberalize the foreign direct investment (FDI) regime. The key changes are as follows:

Particulars	Earlier provision	Revised position
FDI in limited liability partnerships (LLPs)	(a) FDI in LLPs was permitted only under the approval route and only in limited sectors where 100% FDI was allowed under the automatic route. No FDI-linked performance conditions were prescribed. (b) An Indian company with FDI was permitted to make downstream investments in an LLP only if both the company and the LLP were operating in sectors where 100% FDI was allowed under automatic route and no FDI-linked performance conditions were prescribed. (d) LLPs with FDI were not eligible to make any downstream investments.	(a) FDI is permitted under the automatic route in LLPs only in sectors/activities where 100% FDI is allowed under the automatic route. No FDI-linked performance conditions are prescribed. (b) An Indian company or an LLP with foreign investment is now permitted to make downstream investments in another company or LLP in sectors in which 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions.
Definition of "control"	"Control" is defined as the right to appoint the majority of directors, or to control management or policy decisions including by virtue of their shareholding, management rights, shareholders agreements or voting agreements.	The scope of term "control" has been clarified with respect to LLPs: Control will mean the right to appoint the majority of designated partners, where such partners, with specific exclusion to others, have control over all policies of the LLP.

Definition of "owned"	A company is considered to be "owned" by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and/or Indian companies which are ultimately owned and controlled by resident Indian citizens.	The scope of term "owned" has been clarified with respect to LLPs: An LLP will be considered as owned by resident Indian citizens if more than 50% of the investment in the LLP is contributed by resident Indian citizens and/or entities which are ultimately "owned and controlled by resident Indian citizens" and if those resident Indian citizens and entities have a majority of the profit share.
Swap of shares	Foreign Investment Promotion Board (FIPB) approval was a prerequisite for investment by a swap of shares.	FIPB approval is not required for investment by way of a swap of shares in sectors which fall within the automatic route.
Investment by non-resident Indians (NRIs) on a non-repatriation basis	Investments by NRIs on a non-repatriation basis were considered as foreign investments and the conditions applicable to foreign investors were also applicable to NRIs.	Investments by NRIs or companies, trusts and partnership firms incorporated outside India owned and controlled by NRIs on a non-repatriation basis will be deemed to be domestic investments on par with investments made by residents. Hence, investments by NRIs will not be subject to the conditions prescribed for foreign investors.
Tea sector	100% FDI under the automatic route was allowed in the tea sector including tea plantations.	100% FDI under the automatic route is allowed in the tea sector including tea plantations and plantations growing coffee, rubber, cardamom, palm oil trees and olive oil trees.
Defence sector	Up to 49% FDI was permitted in the defence sector under the approval route. Investments beyond 49% were subject to approval from the Cabinet Committee on Security subject to conditions.	Up to 49% FDI is permitted in the defence sector under the automatic route. Investments beyond, 49% will be subject to government approval subject to compliance with certain conditions.
Air transport services	Up to 49% FDI was permitted in non-scheduled air transport services under the automatic route. FDI beyond 49% and up to 74% was allowed under the approval route.	100% FDI is permitted under the automatic route.
Wholesale/cash-and-carry trading	100% FDI was permitted under the automatic route in wholesale cash-and-carry activities. Wholesale/cash-and-carry traders could not open retail shops.	A single entity will be permitted to undertake both wholesale and single-brand retail trading (SBRT), with conditions applicable on both activities. Each business arm would have to comply with these conditions separately.
Single-brand retail trading	(a) Under SBRT products were required to be sold under the same brand internationally and the foreign investor was required to own the brand or have the right to use the brand name under a legally tenable agreement with the brand owner. (b) 30% of the value of goods purchased had to be sourced from India. This requirement was to be satisfied annually and applied as soon as the foreign investment was made. (c) Retail trading by means of e-commerce was not permissible.	(a) SBRT entities with foreign investment can sell products with an Indian brand name and in that case, the requirement of using the same brand name internationally and the foreign investor owning or having the right to use the brand name will not apply. (b) The 30% sourcing rule will only be triggered after the first store is set up and can be relaxed subject to certain conditions. (c) SBRT can be undertaken though e-commerce.

Press Note 12 has further liberalized investment conditions for FDI in the real estate sector. The key changes are as follows:

Particulars	Earlier provision	Revised position
Minimum area requirement	Real estate projects had to have a minimum floor area of 20,000 square metres.	This condition has been done away with.
Minimum capitalization requirement	A minimum of US$5 million had to be invested in a project within six months of the commencement of the project.	This condition has been done away with.
Lock-in restriction	Investors were permitted to exit from the investment upon: (i) the development of trunk infrastructure, or (ii) the completion of the project. Repatriation of FDI or transfer of stake by a non-resident investor to another non-resident investor required prior FIPB approval.	The investor is permitted to exit from the investment: (i) after three years from the date of each tranche of foreign investment; (ii) on the completion of the project; or (iii) on the completion/development of trunk infrastructure. Transfer of a stake by a non-resident investor to another non-resident investor, without any repatriation of investment, is not subject to any lock-in or prior FIPB approval.
Development of project in multiple phases	It was unclear whether a project included all phases of a project or a single phase.	It has been clarified that a phase of a project will be considered a separate project for the purposes of the FDI policy.
Completed assets	100% FDI was permitted under the automatic route into completed projects for operation and management of townships, malls, shopping complexes and business centres.	This provision remains the same. Earning of rent or income from the lease of the project would not amount to "real estate business". Transfer of control from residents to non-residents as a consequence of foreign investment is also permitted.

Regime simplified for alternative investment funds

In a bid to simplify and rationalize the regime for foreign investment in alternative investment funds (AIFs) and other investment vehicles and to promote the Indian investment management industry, the Reserve Bank of India (RBI) through a notification on 16 November has allowed foreign investments into AIFs and other investment vehicles under the automatic route. The RBI has done this by amending the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000. Consequently, prior FIPB approval will not be required for AIFs and other investment vehicles for receiving foreign investment, except where the sponsor or manager of the AIF and other investment vehicle is not Indian "owned and controlled".

*The business law digest is compiled by **Nishith Desai Associates (NDA)**. NDA is a research-based international law firm with offices in Mumbai, New Delhi, Bangalore, Singapore, Silicon Valley and Munich. It specializes in strategic legal, regulatory and tax advice coupled with industry expertise in an integrated manner.*

Dispute digest

COMPETITION LAW

Majority clears Jaypee Group of abusing dominance

In *Shri Sunil Bansal & Ors v M/s Jaiprakash Associates Ltd & Ors*, the Competition Commission of India (CCI) held that the question of examining abusive conduct as per section 4 of the Competition Act, 2002, did not arise as the companies in question – Jaiprakash Associates and its associate Jaypee Infratech (collectively the Jaypee Group) – were not dominant in the market for provision of services for the development and sale of residential apartments.

However the order, passed by a 3:2 majority, recommended that the Jaypee Group and other real estate players adopt appropriate voluntary measures to address the concerns of complainants.

Using a different definition of the relevant market, the two dissenting members found that the Jaypee Group enjoyed dominance in the relevant market and that it used practices that were frowned on and penalized by the CCI. If the dissenting members had not been overruled, the penalty imposed would have been the biggest imposed by the CCI on a real estate player.

The case was triggered by five separate complaints filed under section 19(1)(a) of the Competition Act against the Jaypee Group. The complainants alleged that the group had abused its dominant position by imposing arbitrary and unfair conditions in their allotment agreements. The CCI clubbed the complaints together for investigation by the Director General (DG).

The DG's initial report concluded that no case of abuse of dominance had been made as the Jaypee Group did not have a dominant position in the relevant market. However, the CCI directed the DG to investigate further and a supplementary report concluded that there exists a separate relevant product market of integrated townships, apart from standalone residential projects, and that the Jaypee Group was dominant in this market.

INTELLECTUAL PROPERTY

Trademark cannot be obtained for holy books' names

Dismissing an appeal in *Lal Babu Priyadarshi v Amritpal Singh*, the Supreme Court held that no person can claim the name of a holy or religious book as a trademark.

Priyadarshi, trading as M/s Om Perfumery, had applied to trademark the name Ramayan, with the device of a crown, in class 3 of the trademark classification. Amritpal Singh – a dealer in the products of M/s Om Perfumery and trading as M/s Badshah Industries – filed

a notice of opposition to the registration of Ramayan as a trademark, claiming that the mark cannot be the subject matter of the monopoly of an individual, as it is the name of a religious book.

The Assistant Registrar of Trade Marks dismissed Priyadarshi's application, holding that the proposed trademark was capable of distinguishing the goods and was not included in the list of marks not registrable under the Trade Marks Act, 1999. Priyadarshi appealed the order before the Intellectual Property Appellate Board, which held that holy books cannot be registered, and set aside the order of the Assistant Registrar of Trade Marks.

On appeal, the Supreme Court considered whether the registration of the word Ramayan as a trademark is prohibited under section 9(2) of the Trade Marks Act, as it the name of a Hindu holy book. The court held that the name Ramayan cannot be registered as a trademark for any commodity under the act. However, if another word precedes or follows the name Ramayan, and "the alphabets or design or length of the words are the same as of the word Ramayan", it may lose its significance as a religious book, and consequently may be considered for registration as a trademark.

Supreme Court finds no copyright in title of a work

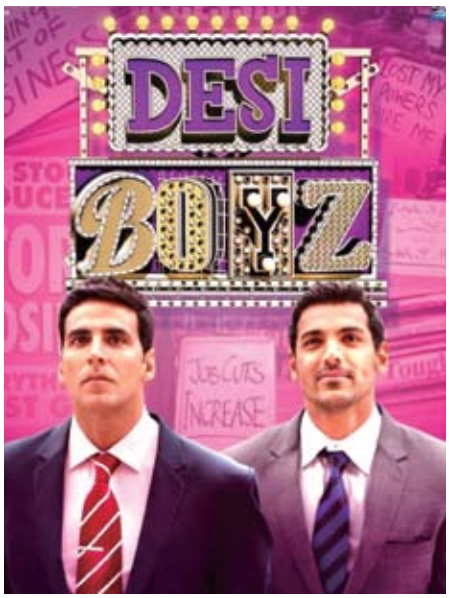
Allowing an appeal in *Krishika Lulla & Ors v Shyam Vithalrao Devkatta & Anr*, the Supreme Court held that there is no copyright in the title of a literary work and a plaintiff can obtain relief only on the basis of an action for passing off or for infringement in respect of a registered trademark that comprises the title.

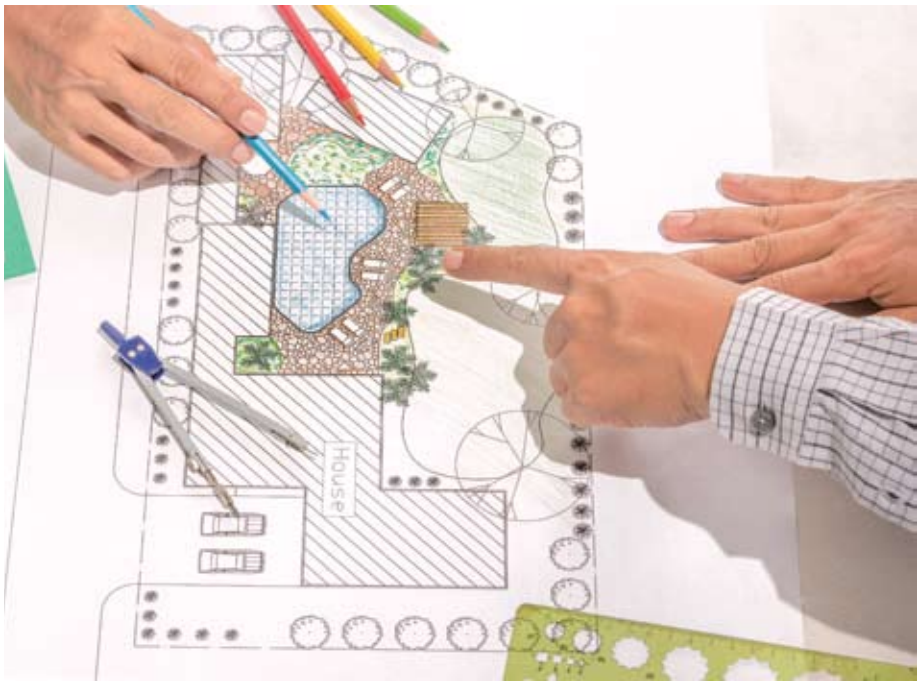
Lulla had appealed an order of Bombay High Court whereby the court had refused to quash a complaint and process issued under section 63 of the Copyright Act, 1957, read with sections 406 and 420 of the Indian Penal Code, 1860.

Devkatta had claimed copyright in the title of a film, *Desi Boys,* which according to him was "the soul" of a story he had written that bore the same title. Alleging copyright violation in using the title, Devkatta had filed a complaint against five persons including Lulla, who was the producer of the film. The four against whom process was issued applied to Bombay High Court under section 482 of the Code of Criminal Procedure, 1973, for quashing of the complaint. The high court's refusal to quash the complaint prompted Lulla to file an appeal to the Supreme Court.

Considering whether copyright can exist in a title, the Supreme Court held that a plain reading of section 13 of Copyright Act showed that an original literary work is one of the things that can be copyrighted. However, a title does not qualify as a work. It is incomplete in itself and refers to the work that follows.

Holding that prosecution based on allegations of infringement of copyright in a title is untenable, the Supreme Court quashed the criminal case pending against Lulla.





RIGHT TO INFORMATION

Building plans of private companies may be disclosed

In *Ferani Hotels Pvt Ltd v The State Information Commissioner Greater Mumbai & Ors*, Bombay High Court ruled that development plans of a real estate company can be disclosed by the municipal authorities, on an application under the Right to Information Act, 2005.

Ferani Hotels had entered into a contract with Nusli Wadia, the third respondent in the matter, to develop real estate in Mumbai. The development was terminated following a dispute between the parties and Wadia

filed a civil suit seeking a declaration that the termination was valid. In the course of the civil suit, Wadia's lawyers sought documents detailing the development of the real estate, but lawyers for Ferani Hotels refused to comply.

Wadia then unsuccessfully filed an application under the Right to Information Act to the Bombay Municipal Corporation seeking certified copies of the property card, building and development plans submitted by Ferani Hotels or its architects for the corporation's approval. On appeal by Wadia, the State Information Commissioner directed the corporation to comply.

Ferani Hotels argued before Bombay High Court that the information sought was exempted under section 8, as development plans were trade secrets and disclosure to a business rival would erode its competitive advantage in the market. Further, it asserted that the development plans were subject to copyright, and their unauthorized reproduction would amount to infringement.

The court held that development plans constituted information of a public nature, and withholding them would deprive the public of the opportunity to examine layout plans approved by the corporation, leading to a "total lack of transparency and accountability" in the manner in which the corporation granted approvals. The court also sought to draw the line between trade secrets protected by section 8 and public records capable of being disclosed under the act, holding that trade secrets became public records when a public authority approved them.

Taxation

Eye examination is personal expense and not deductible

Ruling in *Dhimant Hiralal Thakar v Commissioner of Income Tax BC II*, Bombay High Court held that expenditure for a pre-operation investigation of a lawyer's eyes in the US was not wholly and exclusively incurred for the purposes of a profession and a deduction could not be claimed as per section 37 of the Income Tax Act, 1961.

Thakar had sought a deduction of ₹43,600 under section 37 for the expenditure. The claim was disallowed by the assessing officer on the ground it was a personal expenditure and did not arise in the course of his professional work. An appeal before the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal (ITAT) had been unsuccessful. The commissioner said that going by Thakar's logic even expenditure incurred on food to preserve a person could be treated as an allowable deduction under section 37(1).

This prompted Thakar to file a reference application to the ITAT on the above question of law, under section 256(1) of the Income Tax Act. The ITAT in turn referred the application to Bombay High Court.

Thakar argued that the expenditure on his eyes related to his profession and but for the treatment he received he would not have been able to continue with his profession. Therefore the expenditure ought to have been allowed as a deduction.

The court held that while eyes are an important organ of the human body and essential for the efficient survival of a human being, they are essential not only for the purpose of business or profession but for purposes other than these. "If at all the expenses in this case is personal and the incidental benefit, if any, is to carrying on of profession."

*The dispute digest is compiled by **Bhasin & Co, Advocates**, a corporate law firm based in New Delhi. The authors can be contacted at lbhasin@bhasinco.in or lbhasin@gmail.com. Readers should not act on the basis of this information without seeking professional legal advice.*

In the spotlight

PK Malhotra and Sudhanshu Pandey speak to Vandana Chatlani about opening the legal market and making speedy dispute resolution a reality

Legal market liberalization was high on the agenda when India's law secretary, PK Malhotra, and the joint secretary for commerce, Sudhanshu Pandey, visited London recently. Reactions from lawyers in England were muted as overseas lawyers heard that India was to open its doors a decade ago. However, both Malhotra and Pandey say they mean business as India's economic progress requires "moving with the times" and adopting global best practices. In line with this vision, they explain how plans for commercial courts and changes to arbitration practices will transform dispute resolution in India and increase the country's attractiveness as an investment destination.

Liberalizing the legal market

IBLJ: Foreign law firms have been pushing to enter India for years. Promised moves towards liberalization in the past have failed to materialize. What has changed and where has your momentum come from?

PK Malhotra: There were certain apprehensions from members of the legal community in India that if foreign firms were to establish an office in India, the Indian legal community, as far as professional activities are concerned, would be adversely affected. In my personal view, this was a misplaced notion. Going by our past practice, in whatever sector the Indian economy has opened up, be it banking, financial or insurance, the Indian community and economy has benefited. Today we are living in a global village. No country can think of economic progress in isolation. Multinational companies are establishing offices in India and they obviously need in-house legal advice. If foreign law firms come in, these companies will get the kind of comfort they are looking for. Ultimately, it will accelerate India's economic growth.

Sudhanshu Pandey: I can entirely echo the sentiments the law secretary has expressed. I would add just one very classic example. Take the case of the introduction of IT in India. When the former prime minister Rajiv Gandhi backed IT development in India, there were severe apprehensions that it would lead to a loss of jobs. But what has it ultimately led to? Today, India has become synonymous with IT. This has happened with the medical profession too. India has nothing to worry about. We should be confident of our capabilities. Yes, there are certain asymmetries which the Indian legal system suffers from and they need to be addressed before we open up.

> I don't see any threat to the Indian legal fraternity … it will help to develop our own legal jurisprudence
>
> PK Malhotra
> Secretary
> Ministry of Law and Justice

IBLJ: The government has talked about the "phased sequential entry" of foreign law firms. How would you define this in concrete terms?

PK Malhotra: I can't say that there is a definite roadmap available. But whatever roadmap we are thinking of, it has to be in consultation with those in the legal profession. The Bar Council of India (BCI) must be taken into confidence so they don't have the discomfort that foreign law firms are coming in to encroach upon their jurisdiction. At the same time, the Society of Indian Law Firms also feels their interests need to be protected. We need to consider their interests too.

I personally feel that initially no foreign law firms which will come to India will advise on Indian law. The first stage will see them take on an advisory role to provide foreign law advice. Maybe in the next stage they can involve themselves in further areas such as discussing Indian law with their counterparts at Indian law firms and perhaps preparing documents. As far as their appearance in the Indian courts is concerned, I don't think any foreign firm will be interested in appearing in Indian courts at the lower level. At the apex level, if assistance is needed, maybe they could help the Indian lawyers who are arguing the matter. As such, I don't see any threat to the Indian legal fraternity. Instead, it will help to develop our own legal jurisprudence.

Sudhanshu Pandey: Essentially, the first phase should include some much-needed domestic reforms, which will put Indian law firms on an equal footing with their foreign counterparts. This could be regulatory reforms or something connected with the incorporation of law firms in India, relating for example to size, rights, obligations and other issues. Today, the fly-in-fly-out model is used, but incorporation of foreign law firms would be the next possible stage conceptually. Once this stage has evolved, then certainly a foreign counsel could help and advise on matters in the apex court. This happens even now, but the comfort level will be much higher.

IBLJ: You have spoken about a "fair deal" in relation to costs, visa issues and reciprocity relating to foreign firm entry. How do you plan to get a fair deal?

PK Malhotra: The BCI is already in touch with the Law Society of England and Wales and with their counterparts in the US, Australia, etc. I'm given to understand that in July 2015, they had an interaction with all these bodies and have drafted a regulatory framework in this regard. The BCI is also already in consultation with the state bar councils in India regarding this framework and once they clear it, they will come to the government. Ultimately, if we believe this framework is in line with constitutional and statutory provisions, we will give it the go-ahead. At the government level, we will incorporate whatever changes are needed. We are expecting this to happen very soon.

IBLJ: How soon is "very soon"? What timeframe are we talking about?

PK Malhotra: It will be very difficult to give a timeframe because the consultation process between the BCI and state bar councils is not in our hands. If a decision is to be taken at the government level, I could specify a roadmap and timeframe. But when an independent organization is involved, we can persuade them to expedite the process but we cannot direct them to deliver within a timeframe. I'm sure that it will be done expeditiously as right now, all of them are in agreement that we have to move fast in this direction.

IBLJ: The Advocates Act must be amended to allow foreign firms in. How much support is there in the Rajya Sabha to see this through? How much opposition is there to foreign firm entry?

PK Malhotra: Frankly speaking, there is no opposition. Everybody is looking for certain safeguards to be built in. The moment those safeguards are in place, I think the market is open. The apprehensions which were being expressed earlier are gone now.

IBLJ: What model of entry will be adopted?

PK Malhotra: At a forum recently, I said that comparing the Indian model either with the Singapore or Hong Kong models or any other model is not desirable because they all operate differently. India is large country with a large number of professionals working in different environments and at different levels. Singapore and Hong Kong may give us some guidance and the good practices prevalent there can be a guiding factor for us, but they can't be the last word. We operate under entirely different circumstances and our requirements are very different. Being a federal structure, we have to take care, not only at the central level, but at the state level too.

IBLJ: Will opening up present any threats to India's legal profession? Is the legal sector ready for it?

PK Malhotra: I think the Indian legal market will grow with foreign competition. That growth will be in the right direction. It will not only be growth in the legal field but will also contribute to the economic scenario. International companies setting up commercial establishments in India will have greater comfort to do business in India. This will help India to achieve its objective of "Make in India".

Sudhanshu Pandey: An immediate threat could be churning within the legal fraternity. You may see some of the smaller firms being acquired by the bigger ones, mergers, etc.

Dispute resolution

IBLJ: The arbitration ordinance of 2015 set timelines and imposed penalties for arbitrators who fail to adhere to them. You've also tried to reduce court interference. How have stakeholders responded to this?

PK Malhotra: We have been working in that direction for almost a decade now. We tried to amend the Arbitration Act in 2003 but unfortunately couldn't succeed. Thereafter, there has been wide-scale consultation. The Law Commission of India gave its report.

Although we adopted the UNCITRAL Model Law when we enacted the new law in 1996, replacing the 1940 act, we didn't achieve our objectives because the UNCITRAL Model Law was simply copied and some of its provisions did not suit the Indian arbitration scenario. But the kind of changes which we have now brought about after taking into consideration recommendations made by the Law Commission, as well as views expressed by other experts and stakeholders, are far-reaching. We have given timelines within which a dispute has to be decided. On the cost side, there were allegations over the high fees charged by arbitrators, so we've also tried to regulate that. The biggest allegation relates to excessive intervention by the courts when arbitrators are appointed, when granting interim relief, and even when an appeal is filed against an award given by an arbitrator. All these things have been taken care of in the amendment.

Arbitrators are now bound by certain disclosure norms, which ensure in advance that there is no conflict of interest, so this is one ground which can be eliminated when the award is challenged. The term "public policy", on which awards are generally challenged, has been given a very restrictive meaning, thereby reducing the scope of appeal against the arbitration. The idea is to promote this alternative dispute resolution mechanism in a way that it acquires finality as early as possible.

> There are certain asymmetries which the Indian legal system suffers from and they need to be addressed before we open up
>
> Sudhanshu Pandey
> Joint Secretary of Commerce
> Ministry of Commerce and Industry

IBLJ: The arbitration ordinance calls for the debarring of arbitrators who fail to complete their cases on time. What does this entail?

PK Malhotra: This is a unique amendment which we have brought in our Indian arbitration law. In most other cases, it is only with regards to institutional arbitration that the rules of the institution provide what action will be taken against an arbitrator. But no country, to the best of my knowledge, has made a law where they can debar for a number of years an arbitrator who delays the disposal of a case. We are providing an incentive that where arbitrators give awards before the time limit prescribed under the act, parties could agree and give additional incentive to the arbitrator. I think this is a very good incentive which will work in favour of quick redressal of disputes. Only if the court intervenes can an extension of time on a case be granted. If the courts find that an arbitrator is causing delays, they can debar the arbitrator from practising for three years.

IBLJ: The intentions of the arbitration ordinance are noble, but implementation is always an issue. How will you tackle this?

PK Malhotra: In addition to amending the Arbitration Act, the government has also sought to set up commercial courts to settle commercial disputes. These will be dedicated courts dealing with commercial disputes at the district and high court level, which will be manned by judges who are experts on commercial matters. In settling these disputes, we will not be following the normal procedure as laid down in the Code of Civil Procedure. Rather, a special procedure has been prescribed in the Commercial Courts Act itself where strict timelines are given. So once those timelines are followed by the courts, dispute resolution will probably be expeditious and the apprehension which has been expressed about implementation will be weeded out.

IBLJ: The effectiveness of the commercial courts will depend heavily on the quality of judges. India has a shortage of judges even for existing courts. How will you address this and other problems, such as low pay within the judiciary?

PK Malhotra: There is no doubt that the judges-to-population ratio in India is not on par with developed countries. But steps have already been taken to increase the strength of judges. The only thing is that it is taking some time to make appointments at the higher level. However, once the procedures are settled by the latest Supreme Court judgment, I think the process of appointing judges will be expedited. So far as commercial courts are concerned, the judges will be appointed from the existing pool of judges. The advantage is that they will be experts dealing with commercial matters and they won't be doing anything else. Once they concentrate only on commercial disputes, cases will hopefully be disposed of expeditiously.

IBLJ: The Eleventh Finance Commission recommended the creation of 1,734 fast-track courts in India in 2000 to dispose of pending cases in sessions and other courts. These courts have proved effective in disposing of cases. But only around 473 of them are estimated to be in operation. How will you save commercial courts from the same fate?

PK Malhotra: These fast-track courts were constituted for specific purposes. There was no special law as such at that time. For commercial courts, there is dedicated legislation dealing with commercial disputes alone. Each state government in consultation with the high court will constitute a commercial court specifically to deal with these issues. So I don't think that the commercial courts will encounter the difficulties which were faced by the fast-track courts.

IBLJ: The Supreme Court has struck down the proposal for the National Judicial Appointments Commission (NJAC). What are your thoughts on this and the executive's role in appointing judges?

PK Malhotra: The Supreme Court has already struck down the NJAC. We as a government respect this decision. Now the Supreme Court itself has invited other stakeholders, lawyers and even the general public to suggest how best the collegium system can be improved. Whatever suggestions come to the Supreme Court, they will be in the interest of the system. Ultimately, the common people will benefit because we will get better judges when compared to what we were getting earlier. Whatever appointments are being made, there should be transparency. People should know how judges are being appointed, why they have been appointed and why others have been ignored. If this kind of transparency can be created, it will instil in the common person, the kind of confidence he or she is expecting. Transparency is the only issue.

IBLJ: What is being done to improve India's ranking for enforcing contracts in the World Bank's ease of doing business rankings? It is currently ranked 178 out of 189 countries.

PK Malhotra: I'm not competent to comment on all the steps which have been taken but the Department of Industrial Policy and Promotion has coordinated with all the ministries and state governments, and the procedures which were required to do business in India have been reduced substantially. I'm told that in one area relating to the launch of a project, previously 75 clearances were required. Now only 15 are needed. Even with regard to the clearances that are to be obtained, nodal officers have been appointed. So instead of approaching five or six different departments, one need only approach the nodal officer. It is their responsibility to ensure the clearances are given in the timeframe that has been laid down. More importantly, the use of technology means the interface with individuals has been done away with. For example, to register a company, one can simply apply online, submit one's documents and registration will be granted.

Some of the measures taken by the government may not have trickled down to the ground level, therefore people are unaware of them. But now, with the kind of publicity such measures are receiving, I'm sure that these processes will definitely help improve the ease of doing business. Our overall ranking improved in the latest report. When they arrived at this number, they did not consider the commercial courts bill and arbitration ordinance. Once they are taken into consideration, the number will improve further.

IBLJ: Corruption is India's nemesis. What is being done to change this at the political, legal and corporate level?

Sudhanshu Pandey: One major step that is being taken is making applications available online and granting approvals online in a time-bound manner. Several interfaces have been removed. You have seen tremendous improvement in the civic bodies where online property tax filings have begun. The digital India programme is essentially targeting efficiency and reduced corruption. Plus in many states, a provision within the Public Service Guarantee Act means delivering particular services in a time-bound manner has become an obligation. The state is thus duty-bound to provide that service, whether it is utility-based or any other service. Online disposals of public requests will solve most of these issues.

IBLJ: The Make in India campaign envisions 100 smart cities, manufacturing hubs in remote areas and job creation. To achieve all of this, you have to deal with land acquisition and labour law issues, logistics, and the need for skilled workers. Is Make in India overly ambitious?

PK Malhotra: There is no question of being overly ambitious. As far as land issues are concerned, the government wanted to do it centrally, but there was resistance from certain quarters and an impression was created that the interests of farmers were being compromised. This was a misplaced apprehension. If in a particular state an industry wants to establish itself and the state government is willing to cooperate with them and help them, the state will do it. Many states which want industries to be established in their area are granting permission and helping industry acquire land. And farmers are being properly compensated. As far as labour laws are concerned, the government has already taken an initiative to simplify and codify labour laws.

IBLJ: In your meetings overseas and with overseas delegations, have you come across specific best practices that you would like to replicate or introduce in India?

PK Malhotra: There are many suggestions, but ultimately they are to be discussed with other stakeholders. We have to make sure those best practices are in sync with the Indian legal system.

IBLJ: The media and Twitter have been raising the issue of growing intolerance in India. What do you think of this? How will this impact economic growth and perceptions of India as an investment destination?

PK Malhotra: I think all these instances of intolerance which are being talked about are an aberration and not the rule. You have to see India from a larger perspective. It is a very big country. The problem is that a few people, maybe for their own interests, propagate and publicize intolerance. But if you look at the total scenario, I don't think that the situation is bad or not comfortable for promoting India as an investment destination.

IBLJ: Do you have a message for our readers?

Sudhanshu Pandey: Welcome to India. They will not regret coming in. This is the right time. They must have the early first advantage. ■

India in 2016

Four in-house counsel and the president of the Society of Indian Law Firms share their views on the developments that are likely to shape India's business and legal climate in the coming year

The international landscape for 2016 doesn't look substantially different to 2015. Bearish trends in crude oil and commodity markets, fluctuating currencies, a benign US economy and so on indicate that volatility, complexity and ambiguity may continue.

The domestic scenario is different. With a potential to achieve the world's highest economic growth rate coupled with expected cyclical recovery, investors, economists, brokerage houses and businesses around the world are bullish on India. However, there is a major roadblock: the disproportionately high amount of time, attention and resources the prime minister is devoting to promote India's image overseas. This has disrupted the focus on legislative and structural reforms.

If India can somehow overcome this, there is great hope for 2016. Demonstrated focus on ease of business can facilitate simplification of compliance norms for manufacturing, beginning with the overhaul of labour legislation. Industries may expect threshold-based exemptions from many labour laws. Goods and services tax may reduce costs and prices. Dedicated commercial courts, the National Company Law Tribunal and adjudicating authorities pursuant to a bankruptcy code will speed up justice. India may tighten its intellectual property rights framework to avoid a loss of investments. If practicable, land acquisition and utilization may also be addressed. All of this will contribute tremendously to foreign direct investment, which will reach new highs in 2016.

These reforms will make the role of in-house counsel visible and significant while also increasing the need for expert advice from law firms. The attempt to promote dedicated regulators under sector-specific laws may prompt in-house lawyers to fine-tune their specializations.

If a parliamentary logjam or perceptional issues derail structural reforms, 2016 may see only procedural enhancements. Initiatives such as the arbitration ordinance and FDI reforms are commendable, but will be insufficient to pump capital expenditure, mega infrastructure and large-scale jobs.

Legislation and agreements around anti-money laundering and anti-corruption, ultimate beneficiary identification, listing and disclosure regulations, etc., clearly indicate increased regulatory scrutiny aided by a clear shift from rule-based regimes to principle-based ones. In 2016, in-house counsel will have to spearhead major attitudinal shifts to set up frameworks to take care of these issues.

Vijayashyam Acharya, director of legal and compliance, OnMobile

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- **Financial Services Industry Legal and Compliance**
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While the macroeconomic situation shows signs of improvement, the situation on the ground is still challenging. Public spending is required to create higher demand. Demand among private companies that have reported flat top line and bottom line growth will follow once the government starts investing.

Although the government has demonstrated its commitment to attracting foreign investment by showcasing India abroad and further liberalizing foreign direct investment in various sectors, much more needs to be done. Interest rates will be closely watched and a lot of attention will be on the US Federal Reserve.

Recently, we have witnessed large railways projects and a number of defence contracts won by private players. The renewable energy sector, especially solar, is seeing plenty of activity and I feel this will continue in line with the government's huge targets for this sector. Likewise, I expect greater action on "smart cities". The prime minister's "Make in India" campaign too will get a greater fillip with revival in demand.

Here the biggest worry is the government's ability to pass legislation in the upper house of parliament. If the current stalemate with opposition parties continues, there is not much chance of that happening. We will be very lucky if the goods and services tax regime comes into effect in 2016. Other legislation in parliament such as the Arbitration and Conciliation Act amendment bill and the commercial courts bill if passed will help speed up the resolution of commercial disputes. They should also improve the enforcement of contracts and provide reassurance to investors.

In the 2016-17 budget the government must come out with another radical measure to revive demand. Despite a historic mandate and significant cushion offered by lower oil and commodity prices we have had two budgets which have failed to put India on a higher growth trajectory.

All in all, I welcome 2016 with cautious optimism and hope that corporates can finally enjoy "*achhe din*" (good days)!

Saugata Chakravarty, general counsel, Siemens India

I wonder sometimes why a government which comes to power attempts to sell new dreams by promoting visions of the future without reflecting on the present. The central government has promised to set up smart cities without acknowledging that basic infrastructure in every sector from supply chain to efficient, cost-effective manufacturing capabilities remains weak across India. The government has an ambitious programme of "making India digital", but do we have strong telecom infrastructure to support this speed of digitization and prevent call drops?

This puts a big question mark on India's policies. Which sectors of the economy are we focused on developing first? It is like making a pyramidal vision with squint eyes, without a strong foundation and with no clue of a structured and sustainable developmental programme. Is India really geared up to face economic challenges in 2016? Whether we have a significant budget to fund a turnaround strategy is questionable. However, we certainly have no idea how to speed up reforms to implement aligned state policies at the grassroots level.

India wants to be a manufacturing hub in Southeast Asia at a time when oil prices are falling and global consumption and demand are showing a downward trend. Will the "Make in India" campaign be achievable given that China has huge manufacturing capabilities to meet the demands of economies such as the US and Europe?

Achieving India's ambition of double-digit growth, competing with China, Taiwan, Japan and other players in the region, may be possible but not a reality by 2020. China's government is currently making every effort to push global trade at lower costs by announcing further reductions in import and export tariffs.

India's initiatives to sponsor infrastructure and defence projects are a self-propelled economic booster of demand for consumption. However, returns on these investments are a distant dream, considering the long gestation period of these projects.

Sanjay Gulati, vice president, corporate tax, indirect tax, GMR Group

We are witnessing the emergence of a new world order. Accordingly, there are opportunities to break new ground and strengthen existing infrastructure to grow India's business and economy.

At the same time there are challenges both for Indian and international businesses. Sectarian and regional conflicts remain in the limelight. Politics overrides economic considerations. Terrorism is being witnessed in its full fury.

Yet Indian business and the world economy will grow in 2016.

According to one view, India currently faces two important constraints – fixing public sector banks and dealing with the related but distinct problem of restarting stuck infrastructure investments that are critical for India. These should be and can be overcome if there is a strong will to do so. If India can resolve these issues, it will benefit both local and international businesses.

The present government in India is focusing on digital governance as announced by the prime minister in his Independence Day address to the nation. Yet the full scope of what is possible has not yet been seen. Some experts in India suggest that the combination of universal and ubiquitous connectivity, enormous computing power, unlimited and cheap storage and instant information, together with Aadhaar, present a new paradigm.

"What is needed is a move towards abolishing cash," says Janmejaya Sinha, the Boston Consulting Group's chairman for Asia Pacific.

One may not, as yet, go to the extent of banishing cash, but digitalization of governance ought to be promoted and strengthened. E-governance for India, according to the prime minister, would be easy, effective and economical.

2016 will be a new beginning in terms of opportunities and challenges. Much will, however, depend upon global stability, free from terrorism and regional conflicts.

Lalit Bhasin, president, Society of Indian Law Firms

The year 2016 has the potential of being an important year in India's growth story. The recent United Nations World Economic Situation and Prospects report has pegged India as the fastest growing economy in the world in 2016 and also in 2017. The Organization for Economic Cooperation and Development has forecast 8% growth for the Indian economy in 2016 amid a significant slowdown among other emerging economies including its main rival China (7%), Brazil (1.6%) and Russia (-0.4%).

Low commodity and crude prices are huge drivers for India's growth story. While low crude prices last, India receives a windfall by virtue of reduced government subsidies and all that saved money becomes available for investment in much needed infrastructure. India's growth will also be spurred on by an upswing in the US, which bodes well for Indian exports, especially the Indian IT sector.

The government has taken various steps to increase the ease of doing business. It has undertaken and proposed several legislative changes including recent amendments to the Companies Act, promulgation of the arbitration ordinance of 2015 and the proposed unified goods and services tax, bankruptcy code and direct tax code. These are all steps in the right direction with a significant upside if implemented well.

On the flip side, there is a sense that the reform momentum has been sluggish and that the government's investment in key infrastructure has not matched its announcements and policies. Further, there is concern for India's weakened rural economy, which has been stuck in the mid-to-low single digits compared to the 20%-plus rates clocked in 2011. This could weigh on private consumption and increase the number of non-performing assets in the agricultural sector.

While the government needs to take active steps to address some of these concerns, it safe to say that based on most indicators, India's economic growth through 2016 will likely be steady, stable and sustained.

Naveen Raju, general counsel and senior vice president, group legal services, Mahindra & Mahindra

The views expressed in this article are personal and do not reflect the official position of the contributors' organizations.

Back to the drawing board

Dispute resolution strategies for India need a rethink in the wake of changes to the arbitration regime

Naresh Thacker and Sumit Rai explain

Indian businesses have traditionally been trigger happy when it comes to commercial disputes. They could afford to be this way, as the time taken from initiation of a dispute to a final decision on it has typically been at least three years. A robust dispute resolution strategy has not been necessary and strategies could evolve as the dispute progressed.

Arbitration as a last resort?

This situation has been altered by two key changes to the Arbitration and Conciliation Act, 1996, brought in by the Arbitration and Conciliation (Amendment) Ordinance, 2015: (1) a strict timeline of 12 months (extendable by mutual agreement to 18 months) to make arbitral awards, introduced by way of a new provision, section 29A; and (2) the introduction of a cost-follows-event regime or loser pays principle, including a clarification that all related costs (including travel, lodging, etc.) may be recoverable. Costs recoverable are not only with respect to arbitrations but also all court applications arising out of an arbitration.

Over the years, it has become difficult to find a commercial contract without an arbitration clause. Arbitration is now the default choice for dispute resolution in India, not only for international commercial contracts but also domestic commercial contracts.

Yet many disputes need time to evolve and take shape before parties can effectively take a position before an adjudicating body such as an arbitral tribunal. In addition, in the life of a dispute parties often find ways to mutually halt an arbitration so as to explore a settlement.

Such flexibility may not be permitted by the tribunal as the arbitrators themselves have been put in the line of fire, and it will no longer be possible in light of the strict deadline at the end of which the mandate of a tribunal necessarily terminates. Under India's new arbitration regime, once an arbitral tribunal is constituted it will be like a bullet that has left a gun. It is important to ensure that the trigger is now pulled only as the last step in the life of a dispute and not used as the first intimation of a dispute – as is currently the practice in India.

Fresh thinking

If arbitration is to be the last step, what should be the first step or steps leading to it? This is where a traditional linear way of thinking about disputes needs to give way.

The last couple of decades have seen several alternative dispute resolution (ADR) mechanisms evolve and be used with success in advanced commercial jurisdictions. In India, however, these mechanisms have largely been received with scorn by the business community and leading disputes practitioners. For instance, while mediation today resolves more commercial disputes in the West than arbitration, in India the common perception is that mediation is meant solely for matrimonial or other family disputes.

The Indian business community, and lawyers advising Indian businesses, need to open their minds to understanding the dynamics of the various ADR mechanisms available

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and to structuring and building them into their contracts as a precursor to arbitration.

Even in situations where an ADR mechanism has not been built into a contract, a timely intervention to propose one of them before parties decide to draw their swords in arbitration can be useful. Most ADR mechanisms need little planning and can be initiated at any time the parties so desire. Since any solution arising out of an ADR mechanism is largely in the control of the parties and works on consent, parties rarely have anything to fear or lose.

Understanding the options

Nothing prevented the use of ADR even prior to the ordinance, but after these changes, it would be sheer negligence to not give it a closer look.

While doing so it should be kept in mind that ADR does not result in a binding decision that is enforceable, unless parties agree to accept the decision. In that sense, the end result in most cases is similar to that of a negotiated settlement. In addition, when a dispute is resolved through an ADR mechanism, the parties are often able to retain their business relationship because they are able to put an end to the dispute without entering an adversarial process such as arbitration or litigation. ADR mechanisms also give parties full flexibility to tailor the process according to the needs of their particular transaction or their particular dispute. For instance, parties can structure a mediation that will last only two days, or be held in three stages over one week in each of three consecutive months.

The most commonly used ADR mechanisms are mediation, conciliation, expert determination, and dispute review boards (DRBs). Although the terms mediation and conciliation are often used interchangeably, they are different processes. Both are a form of assisted negotiation, but the crucial difference is that in mediation the mediator plays a detached role in facilitating parties to talk through their dispute and is not expected to express an opinion on the positions taken by the parties. In conciliation, the conciliator gets involved in the dispute and is primarily concerned with actively drawing both parties towards a settlement on terms that the conciliator considers reasonable. However, in both cases, the settlement has to be mutually agreed and cannot be imposed.

An important distinction between mediation and conciliation is that by virtue of section 74 of the Arbitration and Conciliation Act, a settlement agreement reached in a conciliation and authenticated by the conciliator has the same legal status as that of an arbitral award. It can therefore be enforced directly if either party reneges on its obligations. This powerful provision has been hidden in the act and has not been used to its potential.

Expert determination does exactly what the name suggests – parties appoint an expert in the field that the dispute pertains to and present their views to the expert, who then gives an opinion on the points in dispute. The finality and binding nature of an expert determination will depend on the terms of the contract and the law applicable to the contract.

Under Indian law, a final and binding expert determination does not prevent the parties from raising the same issue before a court or arbitral tribunal, but the extent to which the court or tribunal can review such a determination is controversial and depends on several factors. An expert determination can often resolve an important technical deadlock between parties, and subsequently open avenues for the settlement of a larger set of disputes. It is often relevant in the context of valuation or issues relating to a difference of scientific opinion.

A DRB is a useful mechanism that was developed primarily for the resolution of disputes over construction contracts and large projects. A DRB will usually consist of one or three independent people appointed at the inception of works in a long-term construction or infrastructure project, who will familiarize themselves with the project documents and site from the start of the project itself. Typically in such projects, owing to the nature of works involved, small disputes or disagreements arise almost on a daily basis. These disputes cannot be allowed to create hurdles that jeopardize the project at large. A working interim solution is essential and a DRB achieves precisely that.

DRBs usually meet on a regular basis on the site of a project and help resolve simple issues through informal consultation. For disputes that cannot be resolved informally, a reference will be formally made to the DRB, which hears the parties and gives a reasoned recommendation. Although the recommendation made is usually accepted (a 97% success rate has been reported), parties retain the right to object to the recommendation and take the dispute to an adversarial process such as arbitration or litigation. Usually, the DRB recommendation will have to be acted on in the interim, on the principle of "pay now, argue later".

The precise manner in which a DRB works will depend on the terms in the contract. Many organizations provide rules and standard operating procedures for DRBs that parties can adopt in their contracts.

Multi-tiered disputes strategy

Despite their value in preventing and resolving disputes before they threaten relationships and businesses, ADR mechanisms are not legally enforceable. Therefore, it is important that they are used in conjunction with either litigation or arbitration, which becomes the final remedy when everything else fails. In order to obtain the maximum benefit, parties should structure a multi-tiered disputes process that begins with one or more ADR mechanisms and eventually leads to an arbitration to resolve all outstanding issues that parties are not able to resolve through other means.

For instance, in a sale of goods contract where disputes are most likely to flare up over technical specifications of the goods supplied, a time-bound short mediation could be provided as a first step, followed by an expert determination. If neither results in an acceptable solution, the parties can move to arbitration.

If a DRB is to be used during the construction of a project, the contract should specifically provide that if certain recommendations of the DRB are objected to within a certain time, both parties must act on the recommendation and raise the issues for final determination before an arbitral tribunal at the end of the project.

The many permutations and combinations possible for structuring dispute resolution strategies give parties complete flexibility to design a process specific to their transaction.

Conclusion

Arbitration clauses used to be called midnight clauses or champagne clauses, as they were added at the last minute and little attention was paid to their drafting

The specifics

What are the key changes to India's arbitration regime?

The Arbitration and Conciliation (Amendment) Ordinance, 2015, will alter the experience of users of the Arbitration and Conciliation Act, 1996. The ordinance is guided to a large extent by the 246th report of the Law Commission of India on amendments to the act.

Bonanza for international parties

All matters related to an international commercial arbitration – such as interim measures, challenge of award and enforcement of award – will now be heard by a high court. This will be a relief for international businesses, as many among their ranks have been dragged in the past to lower courts in remote corners of the country.

The ordinance allows for Indian courts to grant interim measures (as per section 9) and to provide assistance in taking evidence (as per section 27) in support of international arbitrations seated outside India. This had become a major concern with international parties, as protective injunctions, orders for summoning a third party witness, etc., could not be sought in India.

New directions

The ordinance also introduces a cost-follows-event regime, which is a first for an Indian statute. While the law had allowed arbitral tribunals the discretion to grant actual costs incurred in pursuing the arbitration to the winning party, this was rarely done. The ordinance introduces a new provision (section 31A) that explains the width of a tribunal's discretion and lays down a loser pays principle as the default position. This has been made applicable also to costs incurred in arbitration-related litigation.

The amendment further clarifies that public policy is to have a more limited scope than it has received in judicial precedents and no merits review is to be done – both in cases where an international arbitration award (rendered in India) is challenged and where foreign awards are brought to India for enforcement.

Changing course

A new provision (section 29A) introduces a strict time limit for arbitral awards to be made. Tribunals have to make awards within 12 months of the date of constitution of the tribunal. Even by mutual agreement, this can only be extended by six months.

The mandate of the tribunal would terminate by default at the end of the period unless before or after such time, on an application by either party, a court agrees to extend the deadline. While extending the deadline, the court will have the power to penalize the arbitrators if they are found to be responsible for the delay (by ordering a reduction in fees) or the party so responsible (by imposing costs). The courts can also replace the tribunal by appointing a new set of arbitrators and ask it to continue the proceedings.

Through a series of other small tweaks to certain provisions – for oral hearing on a day-to-day basis, no adjournments without sufficient cause, right to impose exemplary costs, forfeiture of right to file a defence statement if timeline not adhered to – arbitral tribunals have been given the corresponding powers to impose the strict timelines introduced.

Other important changes include capped arbitrator fees, direct enforceability in court of interim measures granted by tribunals, and introduction of a list of relationships that must be disclosed or in certain cases disqualify individuals from being appointed as arbitrators. Anyone accepting appointment as an arbitrator now needs to sign a declaration about such relationships and that they believe themselves capable of adhering to the timeline prescribed. An immediate impact of this will be on contracts where existing employees of certain large organizations are named as arbitrators. This will no longer be permissible.

Conclusion

From a strictly jurisprudential perspective, the changes with respect to timelines and arbitrator fees are unhealthy. They radically interfere with party autonomy and take away from the primary attraction of arbitration as a process that can be tailored by parties to their needs.

However, unique problems sometimes call for original solutions. We can only hope that the changes made through the ordinance will evolve as a positive influence on Indian arbitration.

or negotiation. Over time and with experience, parties and their lawyers became aware of the importance of drafting these clauses carefully. The recent changes in the law mandate that parties and transactional lawyers relook at their disputes clauses from a perspective much wider than arbitration, so as to provide for a process that adjudicates disputes, but also a means to either avoid them or resolve them without resorting to adversarial proceedings.

Many arguments can be made in favour of and against the timeline introduced in the ordinance, but the law has taken shape and little can be done to avoid it. Prudent businesses can choose to make the most of the changed situation by deploying innovative means and rethinking their dispute management strategy. As the saying goes: If you don't like something, change it. If you can't change it, change your attitude. ■

Naresh Thacker is a partner and Sumit Rai an associate partner at Economic Laws Practice. *The information provided in the article is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided above.*

Deals of the Year

***India Business Law Journal* showcases the most significant deals and disputes of 2015 and the legal advisers who guided them**

By Nandini Lakshman

India saw more market activity in 2015 than in 2014 but choppy global markets and heavy borrowing in earlier years impacted corporate India, which was hemmed in by heavy loans and defaults on foreign currency convertible bonds. With a foreign debt pile of over US$161 billion, the market regulator introduced new products and rationalized disclosure norms for public offerings, making it easier for companies to access funds. As a result, companies of all hues embarked on a domestic and global fundraising chase, with qualified institutional placements and offers for sale.

The market sentiment for initial public offerings was fragile, but that didn't stop a wide variety of companies from going public. While companies such as Prabhat Dairy and amusement park operator Adlabs were forced to slash their IPO price and extend their closing date, investors welcomed the chance to diversify their portfolio with big brands like Café Coffee Day and IndiGo Airlines.

The Narendra Modi government displayed a voracious appetite for capital. Typically in India, when there's a shortfall in the central budget, the government in power's predictable quick fix has been to strip state-owned entities to offset the fiscal deficit. And when that fails to breast the tape, another state-owned entity – the Life Insurance

Corporation of India – is summoned for a bailout. In 2015, the government sold off US$5 billion worth of shares in public sector undertakings.

On the positive side, private equity investments hit a record high of US$16.9 billion in 2015. E-commerce sites continued to be most coveted. SoftBank emerged as one of the lead investors in many companies. Ratan Tata, the chairman emeritus of the Tata Group, who made his investment debut in 2014, was much more active in 2015.

Retailers began rewriting the script, as Kishore Biyani's Future Group acquired Bharti Retail, while the Aditya Birla Group merged Pantaloons and Madura Garments. Notably, there was a rise in international disputes and arbitration cases in 2015, including Kirloskar Brothers versus Alstom in Zurich, and Serum Institute of India versus the Institute of Immunology, Croatia.

Following a lengthy period of research and consultation, *India Business Law Journal* has selected 50 landmark deals and disputes that were sealed between November 2014 and November 2015. These deals and cases, which are divided into six categories, have been chosen subjectively based on transactional data, submissions received from Indian and international law firms, and interviews with India-focused legal and corporate professionals.

In deciding the winning deals and cases, our editorial team evaluated the significance of all shortlisted contenders from a legal and regulatory standpoint. Deals were chosen not only for their size, but for the novelty and complexity of the transaction or case and for any precedents that may have been established.

May 2015 saw the break-up of leading law firm Amarchand & Mangaldas & Suresh A Shroff & Co, run by brothers Cyril and Shardul Shroff, in Mumbai and Delhi respectively. For deals involving the pre-split firm, we have identified whether the mandate was carried out by the firm's Delhi, Mumbai or Bangalore office. In the split, the Delhi office went to Shardul Amarchand Mangaldas & Co while the Mumbai and Bangalore offices went to Cyril Amarchand Mangaldas.

Banking & finance

1 Essar Group's term loan facilities

Value	Principal law firms
US$3.5 billion	Allen & Overy Amarchand Mangaldas (Mumbai) Chrysses Demetriades & Co TM&S Gujadhur Chambers Walkers

Essar Global, the holding company of debt-ridden Essar Group (run by the Ruia family), raised US$3.5 billion in secured term loan facilities from Standard Chartered Bank, Axis Bank and ICICI bank in early 2015, to fund its various projects. The company holds stakes in the group's assorted businesses including Essar Power, Essar Oil and Essar Steel. The group's model has been to invest in greenfield projects and monetize the investments at a later stage.

The financing structure involved complex security and inter-creditor arrangements cutting across jurisdictions such as England, Singapore, Cyprus, Mauritius, the UAE, BVI, Cayman Islands, Jersey and India.

Now, Essar's creditors, particularly Standard Chartered, are looking to sell a portion of the loans and are reported to have approached one of Essar's longstanding creditors – Russia's VTB Group.

Allen & Overy advised the banks in connection with the deal. The team was led by partner Kayal Sachi and senior associate Kunal Katre.

Amarchand Mangaldas (Mumbai), Chrysses Demetriades & Co in Cyprus, TM&S Gujadhur Chambers in Mauritius and Walkers (Jersey, BVI and Cayman Islands) also worked on the deal.

2 Advance payment financing for Alok Industries

Value	Principal law firms
US$1.6 billion	Allen & Overy Clifford Chance

Alok Industries, promoted by the Jiwarajka family, entered into a strategic alliance with Next Creations, a US-based company, to market its products in the US and globally. Next Creations then set up a wholly owned subsidiary in Singapore to exclusively market Alok's products. The subsidiary obtained a long-term advance on an export performance bank guarantee to pare debt and reduce interest for Alok Industries.

The deal's complexity was compounded by the sheer size of the transaction, recent changes in the Reserve Bank of India's regulations for financings of this kind, and the number of lenders involved, each with different concerns and requirements. This is a rare case of a company leveraging its alliance partner to pare debt.

Allen & Overy counselled the lenders with Hong Kong partner Roger Lui, UK senior associates Kunal Katre and Tim Harrop and associate Madison Kaur, and Singapore associates Carrie Chong and Katherine Signy.

Partner Andrew Brereton and counsel Yemi Tepe of Clifford Chance advised Next Creation Trading Singapore as borrower.

3 Armada Sterling II financing

Value	Principal law firms
US$290.4 million	Azmi & Associates Madun Gujadhur Chambers Norton Rose Fulbright Reeder & Simpson

Bumi Armada, a Malayasian offshore oil and gas services provider, entered into a joint venture with India's diversified Shapoorji Pallonji Group, to build a floating production, storage and offloading (FPSO) vessel to explore for oil and gas in the Arabian Sea. Branded Armada Sterling II, the FPSO will be used to produce, refine and store oil from deep-water fields, which then will be transferred to shuttle tankers or sent through pipelines as processed petroleum.

The limited recourse project financing facility was used for the acquisition of the vessel and its refurbishment and conversion to FPSO. The vessel – constructed for deployment in the C7 field in India – was designed to withstand

> The marketing plan [for the Coal India sale] was unique, envisaging a range of communication methods … to increase awareness of the offering among retail investors
>
> Siddhartha Sivaramakrishnan
> Partner
> Herbert Smith Freehills

the major challenges posed by the extreme monsoon weather off the coast of India. The financing was done by Axis Bank, Bank of India and Cathay United Bank.

Norton Rose Fulbright advised the lenders. Azmi & Associates acted as their Malaysian counsel. Madun Gujadhur Chambers was their Mauritian counsel and Reeder & Simpson was their Marshall Islands counsel.

Capital markets

1 Coal India's offer for sale

Value	Principal law firms
US$3.7 billion	Amarchand Mangaldas (Delhi) Cleary Gottlieb Steen & Hamilton Herbert Smith Freehills Khaitan & Co

In January 2015, the Modi government offloaded 10% of the state's 89.65% stake in the monopoly miner Coal India. This third round of divestment of Coal India was done through a US$3.7 billion offer for sale of shares, including a US private placement tranche. The sale initially raised barely half the budgeted sum, but the Life Insurance Corporation of India stepped in and the issue was proclaimed as oversubscribed.

Among the challenges facing the sale, first, the Coal India unions opposed the stake sale, as they felt it was tantamount to privatizing the miner. Secondly, the market conditions were volatile on global worries. And lastly, there were no enthusiastic takers for the offer, with investors citing low productivity, bloated salary bills and a declining return on equity as a few of their concerns.

In December 2015, when the government wanted to have another round of Coal India share divestment, foreign investors said they would not only abstain from subscribing to the new stake sale, but would also sell off their earlier investments in the company if the government proceeded.

Amarchand Mangaldas (Delhi) acted as the Indian counsel to the underwriters. The team was led by partner Prashant Gupta, principal associate Sayantan Dutta and principal associate-designate Manjari Tyagi.

Cleary Gottlieb Steen & Hamilton advised the brokers on international law.

Herbert Smith Freehills represented the Indian government on international law. The team was led by Singapore partner Siddhartha Sivaramakrishnan and London-based associate Yuji Huang. "The marketing plan was unique, envisaging a range of communication methods, including TV tickers, text messages and broker education meetings, to increase awareness of the offering among retail investors in India, which is an important investor class to target for liquid Indian ECM [equity capital market] offerings," Sivaramakrishnan told *India Business Law Journal*.

Khaitan & Co acted as counsel to the seller, led by executive director Sudhir Bassi, partner Sharad Vaid, associate partner Madhur Kohli and principal associate Shilpi Jain.

2 Daiichi Sankyo exits Sun Pharma

Value	Principal law firms
US$3.2 billion	Cyril Amarchand Mangaldas Davis Polk & Wardwell Freshfields Bruckhaus Deringer Luthra & Luthra

In April 2015, Japanese drug maker Daiichi Sankyo offloaded its stake in Sun Pharmaceutical Industries to a clutch of foreign institutional investors.

Daiichi had acquired Ranbaxy in 2008, betting on global demand for generic drugs, but was burdened with a company combating complaints and sanctions from the US Food and Drug Administration. Sun Pharma, India's largest drug maker by sales, had purchased Ranbaxy in 2014 from Daiichi Sankyo. The acquisition gave Daiichi an 8.9% stake in Sun Pharma in lieu of its ownership of Ranbaxy. Daiichi's exit from the business right after the amalgamation of Ranbaxy and Sun Pharma was completed took the industry by surprise.

Cyril Amarchand Mangaldas advised Daiichi Sankyo on the Indian law aspects of its exit. Partner Nivedita Rao led the team, which included principal associate Anand Jayachandran and associates Dibyojyoti Sarkar and Vinamrata Shrivastav.

Davis Polk & Wardwell was the international counsel to Daiichi Sankyo, with a team of lawyers from its New York and Menlo Park offices including partners David Caplan and Michael Davis, who provided corporate advice; and partner Ronan Harty and counsel Stephen Pepper, who provided antitrust and competition advice. Partner Rachel Kleinberg provided tax advice, partner Edmond FitzGerald and counsel Andrew Blau advised on executive compensation, and partner Frank Azzopardi advised on intellectual property matters.

Freshfields Bruckhaus Deringer was international counsel to broker Goldman Sachs.

Luthra & Luthra acted as the Indian counsel to Goldman Sachs. Its team comprised partner Manan Lahoty, managing associate Surya Bala and associate Rohan Sahai.

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"Deals of the Year"

— India Business Law Journal

Jaguar Land Rover's US$609 Million High Yield Bond offering and Tata Motors' US$1.2 Billion Global Rights Offering

Reliance Industries' Formosa Bond Offering

Reliance Industries' US$1 billion Investment Grade Bond Offering

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3 Jaguar Land Rover bond offering and Tata Motors global rights issue

Value	Principal law firms
US$590 million + US$1.2 billion	Allen & Overy AZB & Partners Cyril Amarchand Mangaldas Hogan Lovells K&L Gates Patterson Belknap Webb & Tyler Shearman & Sterling Sullivan & Cromwell

In February 2015, Jaguar Land Rover (JLR), a Tata Motors subsidiary, issued £400 million (US$590 million) in fixed-rate high-yield bonds due in 2023. The senior notes were unsecured and guaranteed by JLR and Jaguar Land Rover Holdings. The proceeds were used to repurchase some of the company's existing notes, with the balance deployed for general corporate purposes. Tata Motors had bought luxury car makers Jaguar and Land Rover in 2008.

This was JLR's seventh such offering. It was a further issuance, following an October 2014 offer, with investment grade-style covenants, and was launched simultaneously with a tender offer and consent solicitation. The notes were oversubscribed by European investors, highlighting JLR's status as a significant issuer in the international capital markets.

Then in May 2015, Tata Motors, India's largest car maker, raised US$1.2 billion with a global rights offering. This was the first rights offering by an Indian company which was registered both in India and overseas. The deal was led by nine Indian and foreign investment banks.

The proceeds will help fund a new plant and machinery, the launch of 100 new commercial vehicles over the next three years, and the production of passenger vehicles on a new modular platform by 2017. The company also plans to bolster the passenger vehicle segment by launching a couple of new products annually until the end of the decade, and to treble its network of showrooms to 1,500 over the next three years.

With vehicle sales in India dwindling, Tata Motors' consolidated debt stood at US$10.9 billion at the end of the third quarter. The fresh funds and new initiatives are expected to pare debt considerably.

On the JLR deal, Allen & Overy advised the trustee. Hogan Lovells represented the issuer and selling security holder. K&L Gates advised on Delaware law. Patterson Belknap Webb & Tyler was the US counsel to the depository. Sullivan & Cromwell partners George White, Vanessa Blackmore and Chris Beatty were the counsel to the underwriters.

Shearman & Sterling was counsel to JLR with teams in the firm's London and Washington DC offices. They included capital markets partner Apostolos Gkoutzinis and associates Kara Major, Randy Nahlé, Gordon Houseman, Rainer Adlhart and Elena Dzhurovan. Tax-related matters were handled by Washington partner Kristen Garry and London partner Sarah Priestly, counsel Simon Letherman, and associates Kammy Lai and Gabriel Ng. Counsel Mehran Massih advised on environmental aspects of the JLR transaction.

Shearman & Sterling also counselled the underwriters in connection with Tata Motors' global offering. The team was led by Hong Kong capital markets partner Matthew Bersani.

Cyril Amarchand Mangaldas' capital markets team, led by partner Gaurav Gupte, was the Indian counsel to Tata Motors.

AZB & Partners was the Indian counsel to the underwriters, led by partner Varoon Chandra and senior associate Lionel D'Almeida.

4 Infosys founders' divestment of stake

Value	Principal law firms
US$1.1 billion	Amarchand Mangaldas (Mumbai) AZB & Partners Herbert Smith Freehills

In December 2014, three founders of Infosys – NR Narayana Murthy, Nandan Nilekani and K Dinesh – and their family members, and the wife of a founder, SD Shibulal, sold part of their stake in the company as a block deal. It was the largest promoter sell-down to date in the technology sector.

Murthy and Nilekani said they had sold a minor part of their stake to pursue their personal philanthropic efforts. Murthy's family continues to be the largest retail shareholder in Infosys. The sale took place less than six months after Infosys appointed outsider Vishal Sikka as chief executive officer.

Partners Cyril Shroff, Yash Ashar and Gaurav Gupte, at the Mumbai office of Amarchand Mangaldas, acted as Indian counsel to the sellers.

Varoon Chandra, a partner at AZB & Partners, and senior associate Lionel D'Almeida advised the sole bookrunner, Deutsche Bank, on Indian law. "Given the volatile nature of the stock markets in India through most of 2014, such a large transaction would have given large shareholders, who were looking to undertake sell-downs, the confidence that as long as the fundamentals of the relevant company were sound, there would be demand at commercially reasonable prices," Chandra told *India Business Law Journal*.

Siddhartha Sivaramakrishnan, a Singapore-based partner at Herbert Smith Freehills, advised Deutsche Bank on international law.

5 Reliance Industries' investment grade bond offering

Value	Principal law firms
US$1 billion	AZB & Partners Davis Polk & Wardwell J Sagar Associates Shearman & Sterling

Reliance Industries (RIL), owned by billionaire Mukesh Ambani, raised funds through a US dollar bond issue in January 2015. The funds were to be used for ongoing capital expenditure, mainly in the refining and petrochemicals sector.

The issue, considered investment grade because of a low risk of default, was delayed by a month due to shaky global

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investor sentiment. Nonetheless, it was the largest private sector oil and gas deal out of Asia ex-Japan since the last RIL guaranteed bond in 2012.

AZB & Partners was the issuer's counsel on Indian law, led by partner Varoon Chandra and senior associate Manan Mehta.

Davis Polk & Wardwell acted as the issuer's counsel on international law. The team from the London and New York offices included partner Jeffrey O'Brien and associates Cherie Yang and Kennard Noyes. Partner John Paton and associate Sarah Joy provided tax advice. Partner Gregory Rowland and associate Elina Teboul advised on the US Investment Company Act.

J Sagar Associates was counsel to the underwriters.

Shearman & Sterling acted for the underwriters on international law. The team included capital markets partner Kyungwon Lee and associate Leo Wong in Hong Kong, partner Trevor Ingram in London and tax counsel Eileen O'Pray in Menlo Park.

6 Adani Ports & SEZ's senior unsecured loans

Value	Principal law firms
US$650 million	Cyril Amarchand Mangaldas Latham & Watkins Linklaters Singapore Luthra & Luthra Norton Rose Fulbright (Asia)

In early August 2015, Gautam Adani-controlled Adani Ports & Special Economic Zone made its debut US dollar bond market with an issue of 3.5% senior unsecured notes due 2020 under Regulation 144A/Regulation S. Bankers said it was the first issue of its kind to attract bids from over 100 global investors and that owing to the size of the group, the transaction involved extensive due diligence of the issuer entity as well as its subsidiaries.

The proceeds were to fund capital expenditure and retire foreign currency denominated debt. The company's total debt pile stood at around US$2.68 billion in early 2015.

The rating of the bonds as investment grade and the inclusion of high-yield type covenants is rare for India. Further, the demerger of the issuer entity from one of its wholly owned subsidiaries, the extensive debt facilities of the issuer and the various concession agreements entered into by the issuer and subsidiaries with port authorities posed challenges in terms of diligence, consent requirements and disclosures.

Cyril Amarchand Mangaldas acted for Adani, with a team led by partners Yash Ashar and Niloufer Lam.

Latham & Watkins was international counsel to the issuer as to English and US law. The team included Singapore partners Rajiv Gupta and Timothy Hia and associates Gemma Mootoo Rajah and Francesca Rothkell, Hong Kong counsel Louis Rabinowitz, New York partner William Lu, and London partner Lene Malthasen.

Linklaters Singapore was international counsel to the joint lead managers. Counsel Phillip Hall and partner Kevin Wong advised the initial purchasers on English and US law.

Luthra & Luthra acted as Indian legal counsel to the joint lead managers. Partners Manan Lahoty and Bikash Jhawar were assisted by managing associates Ravi Dubey and Mriga Solanki and associates Theresa Thomas, Satadru Goswami, Devangshu Nath and Sampada Bannurmath.

Norton Rose Fulbright (Asia) advised the Bank of New York Mellon in its role as a trustee for the issuer.

7 InterGlobe Aviation's IPO

Value	Principal law firms
US$460 million	AZB & Partners J Sagar Associates Juscontractus Khaitan & Co Latham & Watkins

InterGlobe Aviation's IPO in November 2015 got off to a flying start. The issuer company operates IndiGo, India's largest passenger airline with 34% of domestic passenger volume for fiscal 2015 and a 37.4% market share of the five months ended 31 August 2015, according to the Directorate General of Civil Aviation.

IndiGo is a low-cost carrier and focuses primarily on the domestic Indian air travel market. The Centre for Asia Pacific Aviation reports that IndiGo was the seventh-largest low-cost carrier globally in terms of seat capacity in fiscal 2015. It has 98 planes in service and InterGlobe bought 250 A320neo aircraft after filing its red herring prospectus with the Securities and Exchange Board of India (SEBI).

While retail response to the IPO was muted, bids were received from qualified institutional buyers, including foreign institutional investors. The company plans to use the IPO proceeds to retire some of its aircraft lease obligations, buy ground support equipment and for general corporate purposes.

AZB & Partners acted as Indian counsel to the underwriters, led by partner Madhurima Mukherjee, senior associates Agnik Bhattacharyya and Pallavi Meena and associate Namita Das.

J Sagar Associates represented the issuer and some selling shareholders. The team was led by partner Rohitashawa Prasad and included associates Kaustubh George and Anubhuti Sinha. "The two promoter groups of IndiGo have certain rights agreed in a shareholders agreement and enshrined in the articles of the company. Typically, SEBI is averse to allowing any shareholders any special rights. We were able to articulate these rights as being the mechanism by which the two promoter groups were to exercise control post listing, rather than these being special rights given to any particular group of investors disproportionate to their shareholding in the company, and that therefore, the mere existence of these rights did not detract from the *pari passu* ranking of the shares held by the promoter groups," Prasad told *India Business Law Journal*.

Khaitan & Co partner Abhimanyu Bhattacharya and managing associate Aditya Cherian were domestic legal counsel to certain selling shareholders, including Rakesh and Shobha Gangwal, Dr Asha Mukherjee and the Chinkerpoo Family Trust.

Juscontractus partner Payal Chawla acted as domestic legal counsel to other selling shareholders.

Latham & Watkins acted as international counsel to the underwriters and bookrunning lead managers. The team was led by partner Rajiv Gupta and included associates Scott Calver and Stacey Wong.

8 **Power Finance Corporation's offer for sale**

Value	Principal law firms
US$300 million	Crawford Bayley & Co DLA Piper Shardul Amarchand Mangaldas & Co Squire Patton Boggs

Power Finance Corporation (PFC), India's largest public sector finance company, was the government's first divestment issue after the Securities and Exchange Board of India implemented new offer for sale (OFS) norms, which allow companies to announce stake sales just two "banking" days prior to the issue. The government divested a 5% stake in the company, reducing its holding to 67.8%.

The structure for the sale was complex because US investors could only buy the shares if they were qualified purchasers under the US Investment Company Act.

Crawford Bayley & Co acted as domestic counsel to PFC. DLA Piper was PFC's international counsel.

Shardul Amarchand Mangaldas & Co acted as Indian counsel to the brokers. The team was led by capital markets national practice head Prashant Gupta, partner Sayantan Dutta, principal associate-designate Manjari Tyagi and associate Debarupa Agarwala. "The OFS mechanism was modified at the behest of the government, which did not want any trading days between the announcement and the stake-sale day to prevent volatile movements in the stock

> The OFS mechanism was modified at the behest of the government … to prevent volatile movements in the stock price
>
> Sayantan Dutta
> Partner
> Shardul Amarchand Mangaldas & Co

price. The modified OFS mechanism will definitely prove to be a shot in the arm for the government to realize its ambitious disinvestment target and also pave way for the orderly development of the stock markets," Dutta told *India Business Law Journal*.

Squire Patton Boggs, led by Biswajit Chatterjee, Mitch Thompson and James Gray, was international counsel to the underwriters.

9 **Delhi International Airport's high-yield issuance**

Value	Principal law firms
US$289 million	AZB & Partners Davis Polk & Wardwell Link Legal India Law Services Milbank Tweed Hadley & McCloy Norton Rose Fulbright

In January 2015, Delhi International Airport (Private) Limited, a venture of Bangalore-based GMR Infrastructure, raised funds through an oversubscribed bond issue.

This was the first Regulation S debt issuance by an Indian airport under a public-private partnership and GMR's first foray into the international bond markets. "This issuance has opened up new avenues for our group to tap a wide pool of investors for our ongoing and continuous financing requirements for our various projects," said GM Rao, chairman of the eponymous group.

AZB & Partners acted for the joint lead managers and the notes trustee. Partner Yashwant Mathur led the team with Sunil Agarwal and Abhinav Ashwin.

Davis Polk & Wardwell acted for GMR on international law, with lawyers based in the firm's Hong Kong, Beijing and London offices, including partner William Barron, counsel Ferish Patel, and associates Alejandro Vargas and Ryan Grimm. The tax team included partner John Paton, counsel Alon Gurfinkel, associate Dominic Foulkes and trainee solicitor Lara Singer.

Link Legal India Law Services partner Ajay Sawhney represented GMR on Indian law.

Milbank Tweed Hadley & McCloy advised the international underwriters, with a team led by Singapore-based securities partner Naomi Ishikawa. "This is the first bond offering by an infrastructure asset of this type in India, with a set of terms that accommodates the regulated nature of the air transport business," Ishikawa told *India Business Law Journal.*

Norton Rose Fulbright's Hong Kong associate attorney-at-law Grace Lo advised the notes trustee on New York law.

10 **Videocon d2H's ADR listing**

Value	Principal law firms
US$273.35 million	Amarchand Mangaldas (Delhi) Baker & McKenzie.Wong & Leow

When India's direct-to-home service provider Videocon d2h rang the opening bell at the Nasdaq stock exchange in April 2015, it marked the first direct overseas listing of an unlisted Indian company notified by the Ministry of Finance

> [Delhi International Airport's offering} is the first bond offering by an infrastructure asset of this type in India
> Naomi Ishikawa
> Partner
> Milbank Tweed Hadley & McCloy

under the Depository Receipts Scheme, 2014. The listing was done through an innovative process, following an investment agreement between Videocon d2h and Silver Eagle Acquisition Corporation, a US-listed special purpose vehicle set up by media executives Jeff Sagansky and Harry Sloan. Videocon d2h then issued American depository receipts (ADRs) to stockholders of Silver Eagle, and the ADRs are now listed and traded on the Nasdaq. Videocon d2h's experience showed that listing offshore can be a realistic option for unlisted Indian issuers.

Amarchand Mangaldas' Delhi office advised Videocon d2h on Indian law with a team led by partner Prashant Gupta. Partner Naval Chopra and Manika Brar advised on competition law and Amit Singhania acted on tax-related matters.

Baker & McKenzie.Wong & Leow was the international counsel to Videocon d2h on the transaction. The team was led by Ashok Lalwani, the Singapore-based head of Baker & McKenzie's capital markets group and its global India practice, assisted by senior associate Kyle Pilkington.

11 **Reliance Industries' US Exim Bank guaranteed notes**

Value	Principal law firms
US$225 million	Allen & Overy Juris Corp Milbank Tweed Hadley & McCloy Vedder Price

Reliance Industries issued bonds guaranteed by the US Export-Import Bank in August 2015. It was the first time that Exim Bank had guaranteed an issuance out of India and its first guarantee globally of a note issuance by a private sector energy company. It was also the longest tenor Exim Bank guaranteed note issuance globally by a non-aviation private sector company.

Reliance said that the notes would "bear a fixed interest rate of 2.512% per annum, with interest payable semi-

annually. The principal amount of the notes will be payable in consecutive semi-annual instalments commencing on July 15, 2016 up to maturity in January 2026".

Allen & Overy acted as a counsel to the initial purchaser, with a team that included Tom Maddison, Paul Nelson, John Hwang, Thomas Abbondante and Stefanie Duda.

Juris Corp advised the issuer on the Indian law aspects of the deal, including compliance with the regulations in respect to external commercial borrowings and the Companies Act, 2013. The team included H Jayesh, Shan Bottlewalla, Apurva Kanvinde and Saurabh Sharma. "The transaction was undertaken within the parameters of the ECB [external commercial borrowing] framework such that it required minimal engagement with the regulator for securing the necessary approvals," Jayesh told *India Business Law Journal.*

Milbank Tweed Hadley & McCloy was offshore counsel to the issuer, with Theodore Hart, Kevin MacLeod and E Robertson advising on the deal.

Vedder Price's J Gentner, T Callahan and Clay Thomas acted for the guarantor.

Partap Singh was the issuer's in-house counsel.

12 **Reliance Industries' Formosa bond offering**

Value	Principal law firms
US$200 million	AZB & Partners Davis Polk & Wardwell J Sagar Associates Lee and Li Shearman & Sterling

In June 2015, Reliance Industries (RIL) issued 20-year bonds in Taiwan. The notes were issued at par and bear a fixed interest rate of 5% a year. RIL said they would have an annual call option at par starting on 5 June 2020.

"These notes, denominated in US dollars, have been issued primarily to Taiwanese life insurance companies and are proposed to be listed on the Taipei Exchange (formerly known as GreTai Securities Market)," RIL said.

Notes issued in Taiwan but denominated in a currency other than the new Taiwan dollar are commonly known as Formosa bonds. This was the first Formosa bond issue out of India.

AZB & Partners acted as Indian counsel to the issuer. The team was led by partner Varoon Chandra and senior associates Manan Mehta and Ashwin Tiwari.

Davis Polk & Wardwell was counsel to the issuer on international law, with a corporate team from the London and New York offices, including partner Jeffrey O'Brien and associates Brandon Schubert and Kennard Noyes. Counsel Alon Gurfinkel and associate Nicholas Machen provided tax advice, while partner Gregory Rowland and associates Elina Teboul and Colleen Blanco provided advice on the US Investment Company Act.

J Sagar Associates advised the joint bookrunners. The team comprised joint managing partner Dina Wadia, partner Uttara Kolhatkar, senior associate Shaswata Dutta and associate Kartikeya Dar. "The issuance of the Formosa bonds by the issuer was against the backdrop of challenging and tough market conditions. The issuer capitalized on the short but opportune market window for the transaction. The issuer was tapping this new market for the first time to further diversify the company's investor pool," Wadia told *India Business Law Journal*.

> The issuance of the Formosa bonds by the issuer was against the backdrop of challenging and tough market conditions
> Dina Wadia
> Managing Partner
> J Sagar Associates

Taipei firm Lee and Li advised RIL on the bond issue.

Shearman & Sterling was international counsel for underwriters Deutsche Bank (Taipei branch) and HSBC Bank (Taiwan). The team was led by partner Kyungwon Lee with associates Leo Wong and David Wallace in Hong Kong, and tax counsel Eileen O'Pray in Menlo Park. "This is truly a landmark transaction, which has opened a new exciting funding market for Indian borrowers. The ability to lock in long tenor funding at attractive pricing levels makes this an interesting market for borrowers," said Randhir Singh, India head for financing, capital markets and treasury solutions at Deutsche Bank.

13 **Coffee Day's IPO**

Value	Principal law firms
US$177 million	AZB & Partners Baker & McKenzie.Wong & Leow Cyril Amarchand Mangaldas

The eagerly awaited IPO of Coffee Day Enterprises, backed by six leading merchant banks, lost its aroma when its shares tanked 18% on its November 2015 market debut.

The company, owner of the Café Coffee Day (CCD) brand, was a pioneer in the coffee chain segment in India. CCD has the largest café network in India, with 1,538 outlets spread across 219 cities, and a market share of around 46% at 30 June 2015. The company also has subsidiaries which are involved in building technology parks, logistics, financial services and hospitality.

AZB & Partners advised the underwriters on Indian law. The team was led by partners Madhurima Mukherjee and Srinath Dasari and senior associates Agnik Bhattacharyya and Namita Das.

Baker & McKenzie.Wong & Leow was international counsel to the bookrunning lead managers, led by partner Ashok Lalwani.

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Cyril Amarchand Mangaldas acted as counsel to Coffee Day Enterprises, led by partner Arjun Lall and principal associate Vijay Parthsarathy.

14 HDFC Bank's qualified institutional placement and ADRs

Value	Principal law firms
US$146.62 million	Amarchand Mangaldas (Mumbai) AZB & Partners Cravath Swaine & Moore Davis Polk & Wardwell

In February 2015, HDFC Bank, one of India's largest private sector banks, issued qualified institutional placement (QIP) and American depository receipt offerings together.

The ADR offering was the first such issuance under the Depository Receipts Scheme, 2014, which came into force on 15 December 2014. It was also the first simultaneous ADR and QIP offering in India, and the largest offering by a private sector bank.

The offerings required approvals from the Foreign Investment Promotion Board (FIPB), the Reserve Bank of India and the Securities and Exchange Board of India. A complicated post issue settlement mechanism was involved, due to the simultaneous offerings. Substantial coordination was required to ensure timely completion of the settlement process.

The pricing for the transaction's equity component was market price, as opposed to the typical QIP, which is at a discount to the market price. It was the first QIP of non-convertible debentures (NCDs) and warrants under the Companies Act, 2013, and the first QIP of NCDs and warrants undertaken as a stapled product (ratio of 7,300 warrants for 1 NCD). It was also one of the few QIPs placed solely to domestic investors, due to the 74% foreign investment limit in HDFC Bank, as approved by the FIPB.

Amarchand Mangaldas (Mumbai), led by partner Gaurav Gupte, acted as Indian counsel to the issuer, with partner SR Patnaik advising on tax-related issues.

AZB & Partners was domestic legal counsel to the book-running lead managers for the QIP and the underwriters for the ADR offering. The team was led by partner Varoon Chandra with senior associates Lionel D'Almeida and Richa Choudhary.

Cravath Swaine & Moore acted as international counsel to the issuer, with a team comprising Philip Boeckman, Gregory Baden and Yannick Adler.

Davis Polk & Wardwell's London and Hong Kong offices represented the lead managers and underwriters. The teams were led by partner John Banes and counsel Ferish Patel, assisted by associate Julia Danforth and law clerks Mea Lewis and Michael Arena. Partner John Paton and associate Omer Harel provided tax advice.

15 ITNL Offshore Two's yuan note offering

Value	Principal law firms
US$106 million	Herbert Smith Freehills Luthra & Luthra Rajah & Tann Singapore

With capital debt requirements soaring, corporate India is warming up to sourcing international debt in alternative currencies. In April 2015, IL&FS Transportation Networks (ITNL), the international arm of Infrastructure Leasing & Financial Services (IL&FS), raised RMB 690 million (US$106 million) from the Chinese debt market. The senior unsecured notes, due 2018, are listed on the Singapore Exchange.

This was the second Chinese debt for ITNL, after raising RMB 570 million in 2014.The company holds a 49% stake in a toll road project in China – Chongqing Yuhe Expressway.

Herbert Smith Freehills was international counsel for the joint lead managers. The team was led by Singapore partner Philip Lee, with associates Nupur Kant, Preeti Kamat, Jessica Loy and trainee solicitor Amy Stolberg.

Luthra & Luthra represented the guarantor as to Indian law.

Rajah & Tann Singapore acted for the joint lead managers as to Singapore law.

16 VRL Logistics IPO

Value	Principal law firms
US$72.5 million	AZB & Partners S&R Associates Squire Patton Boggs

Road logistics company VRL Logistics was third time lucky after poor market conditions and the global financial meltdown stalled its earlier listing plans, in 2008 and 2010.

This was the first IPO by a pure play road logistics company in India. The e-commerce boom fuelled a market demand in excess of US$6 billion. The offering was oversubscribed 74 times and the shares posted a 50% increase on the listing price in the first hour of trade.

The IPO, which offered an exit route to private equity player New Silk Route, involved complex diligence of the company's massive pan-India operations across more than 400 locations, and careful analysis of VRL's cash management system.

> As there was no comparable company in India focused on the parcels business, disclosure requirements were complex
>
> Biswajit Chatterjee
> Partner
> Squire Patton Boggs

AZB & Partners acted as domestic counsel to VRL Logistics, led by partner Varoon Chandra and senior associates Lionel D'Almeida and Richa Choudhary.

S&R Associates partner Bhakta Patnaik, with Vivek Kumar and Sarayu Pani, advised New Silk Route on its VRL exit.

Squire Patton Boggs was international counsel to the underwriters. The team was led by partners Biswajit Chatterjee, Mitch Thompson and James Gray. "As there was no comparable company in India focused on the parcels business, disclosure requirements were complex. In addition, with the introduction of the proposed new Motor Vehicles Act in India, the regulatory impact of the proposed regulatory framework needed to be carefully considered," Chatterjee told *India Business Law Journal*.

17 **Adlabs Entertainment's IPO**

Value	Principal law firms
US$60 million	Amarchand Mangaldas (Mumbai) Bharucha & Partners Jones Day SNG & Partners

The year 2015 saw smaller deal sizes for IPOs, as market volatility and uncertain valuations made investment bankers cautious about many companies making their market debut.

> [Adlabs Entertainment's IPO was] ground-breaking … in many aspects. It was a brand new and unusual industry [and] it happened at difficult times for IPOs in India
>
> Manoj Bhargava
> Partner
> Jones Day

In March theme park operator Adlabs Entertainment launched an IPO at an issue price band of ₹221 to ₹230 a share. The response was lukewarm, as retail investors

saw little value in an amusement park, and institutional investors subscribed at the lower end of the band. Adlabs had raised less than half of its US$60 million target at the time of its original 12 March closing. The company then slashed the offer price by 20%, extended the closing by three days, and sailed through on the final day with 10% oversubscription.

SNG & Partners was Adlabs' domestic counsel. Bharucha & Partners represented Adlabs as a special counsel.

The Mumbai office of Amarchand Mangaldas, led by capital markets partner Yash Ashar, acted as the domestic counsel to the lead managers.

Jones Day, led by Singapore-based partner Manoj Bhargava and Taipei-based lawyer Jeffrey Wang, acted as international counsel to the lead managers. "This was a ground-breaking IPO in many aspects," Bhargava told *India Business Law Journal*. "It was a brand new and unusual industry, it happened at difficult times for IPOs in India, and lastly, the short history of the issuer."

18 **Prabhat Dairy IPO**

Value	Principal law firms
US$54 million	Cyril Amarchand Mangaldas J Sagar Associates Squire Patton Boggs

This was the first dairy company to list in India. The transaction was complex, as there were no precedent deals in the country to follow in terms of disclosures related to the dairy farming cooperative system and the sourcing of milk, the valuation of milk and processed food products, and the analysis of such markets. The Indian food market is evolving and the industry is highly regulated, with frequent instances of food safety issues and tough regulatory action.

The IPO was challenging from a marketing perspective, as India follows a cooperative sourcing model for farm and milk products, which differs from the farming model followed by large global producers in countries such as China, Australia, New Zealand and the US. Also, given the food safety scandals that have hit Chinese milk suppliers in the past, and the recent food safety issues involving multinationals in India, this was a sensitive deal in terms of diligence, disclosure and marketing.

Poor demand for the issue forced Prabhat Dairy to slash its IPO price. With only 42% of the issue subscribed on the fifth day, the company's private equity investors – Proparco India and Rabo India PE – offloaded some of their shares through the IPO. The issue finally scraped through when the investors reduced their offer for sale shares.

Cyril Amarchand Mangaldas was Prabhat Dairy's domestic counsel. The team was led by partner Yash Asher, assisted by principal associate Kranti Mohan and associates Janhavi Seksaria and Oishika Dasgupta.

J Sagar Associates partner Arka Mookerjee was domestic counsel to the selling shareholders. "There were significant negotiations on the transaction agreements to protect the post-issue rights of private equity investors within the current regulatory framework," Mookerjee told *India Business Law Journal*.

Squire Patton Boggs acted as international counsel to the underwriters. The team was led by partners Biswajit Chatterjee, Mitch Thompson and James Gray.

Mergers & acquisitions

1 **GSK and Novartis three-part transaction**

Value	Principal law firms
US$21.25 billion	Cleary Gottlieb Steen & Hamilton Freshfields Bruckhaus Deringer Khaitan & Co Linklaters Niederer Kraft & Frey Shardul Amarchand Mangaldas & Co Slaughter and May Vinod Dhall & TTA

A challenging regulatory environment can force companies to think out of the box. That's what two global pharmaceutical heavyweights did to tidy up their portfolios. After months of negotiations, with nearly 500 lawyers involved globally, GlaxoSmithKline (GSK) and Novartis entered into a three-part transformational transaction, hailed as a game changer for M&A.

In the transaction, GSK acquired Novartis' global vaccines business (excluding flu vaccines) for an initial cash consideration of US$5.25 billion; divested its oncology business to Novartis for US$16 billion, and then created a world-leading consumer healthcare joint venture with Novartis, in which GSK will have majority control with a 63.5% equity interest. GSK said it would use £4 billion (US$5.9 billion) of its proceeds from the asset swap to fund a capital return to shareholders.

This was a landmark transaction in the global M&A arena, and could be a trendsetter for India's regulatory landscape, as previously unheard of foreign investment approvals were granted.

GSK and Novartis, both prominent players in India, also secured approvals before the Competition Commission of India. The deal involved complex pharmaceutical markets, which the CCI assessed for the first time, and posed several novel procedural issues.

Cleary Gottlieb Steen & Hamilton represented GSK on the global antitrust aspects of the three-part transaction.

Khaitan & Co advised GSK on Indian law. The firm's core corporate transaction team was led by partners Haigreve Khaitan and Sharad Vaid, and principal associates Atul Pandey and Sameer Shah. They were assisted by consultant Subramanian Ramaswamy and assoicates Aparna Bagree, Shreya Dua, Yashvi Singh and Natasha Kachalia.

Executive director Daksha Baxi and principal associate Ritu Shaktawat advised on direct tax aspects, while partner Anand Mehta and associate partner Anshul Prakash tackled employment law issues. Real estate partner Sudip Mullick and principal associate Amit Wadhwani were also involved.

Niederer Kraft & Frey advised GSK on Swiss law matters. The team comprised corporate and M&A lead partner Philipp Haas, corporate and employment partner Andreas Casutt, tax partner Markus Kronauer, real estate partner Andreas Voegeli, senior associates Laurence Uttinger, Bertrand Schott and Valerie Meyer-Bahar and associate René Fischer.

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cyril amarchand mangaldas

advocates & solicitors

> This was the first filing in the CCI related to oncology, and it was subjected to in-depth analysis
> Vinod Dhall
> Partner
> Vinod Dhall & TTA

GSK on Indian competition law aspects of the deal. The matter was led by partners Shweta Shroff Chopra and Harman Singh Sandhu with associates Yaman Verma and Aman Sethi.

Slaughter and May advised GSK on international law and supported GSK's internal team. The firm's team was led by corporate and commercial partners Simon Nicholls, Gavin Brown, Richard Smith and David Johnson. The team also included competition partner Bertrand Louveaux, intellectual property partner Susie Middlemiss, pensions and employment partner Sandeep Maudgil, real estate partner David Waterfield, and financing partner Guy O'Keefe.

Freshfields Bruckhaus Deringer acted for Novartis, led by partner Alvaro Iza and associates Rafael Piqueras Cuartero and Amaryllis Mueller.

Linklaters also acted for Novartis, led by partners Simon Pritchard and Annamaria Mangiaracina, managing associates Eram Khan and James Kerr, and associates Kirsten Donnelly, Mark Daniel and Jacob Macan.

Vinod Dhall & TTA acted as Indian counsel for Novartis on its merger filing before the CCI. The CCI approved the deal unconditionally within its phase I review period.

The team was led by partner Vinod Dhall, managing associates Ram Kumar and Sonam Mathur and associates Avinash Amarnath and Mansi Tewari.

"This was the first filing in the CCI related to oncology, and it was subjected to in-depth analysis. It was a challenge to navigate the filing and to convince the CCI that there was no likely anti-competitive effect," Dhall told *India Business Law Journal*.

2 Julius Baer acquires private wealth management business in India

Value	Principal law firms
US$6 billion	Cyril Amarchand Mangaldas Cleary Gottlieb Steen & Hamilton Khaitan & Co Linklaters

Banks, like other companies, shed assets in tough times. New York-based Bank of America, as part of its global strategy to move away from the loss-making international wealth management business outside the US, sold its private banking assets to the deal hungry Julius Baer Group, a Swiss private bank.

The Indian part of the deal closed in September 2015, when an affiliate of the Julius Baer Group acquired Bank of America's private wealth management business in India, known as Bank of America DSP Merrill Lynch. The asset transfer was valued at more than ₹404 billion (US$6 billion).

Cyril Amarchand Mangaldas acted as counsel to Bank of America. The team was led by managing partner Cyril Shroff, partners Ipsita Dutta, Radhika Gaggar and Rashmi Pradeep (employment law), Arun Prabhu (IT), Nisha Kaur Uberoi (competition law), Sandeep Dave (real estate) and SR Patnaik (taxation).

Cleary Gottlieb Steen & Hamilton was global counsel for Bank of America.

Khaitan & Co acted as Indian counsel for the Julius Baer Group. Partner Arindam Ghosh, associate partner Anuj Sah, principal associate Moin Ladha, senior associate Kaushalya Shetty and associate Shreya Dua advised on corporate and regulatory matters. Competition law was addressed by partner Avaantika Kakkar, senior associate Anshuman Sakle and associate Padmini Joshi. Partner Bijal Ajinkya dealt with direct tax while associate partner Anshul Prakash advised on employment law.

Linklaters partner Dominic Campos was global counsel for the Julius Baer Group.

3 Capgemini's acquisition of iGate

Value	Principal law firms
US$4.04 billion	Khaitan & Co Kirkland & Ellis Luthra & Luthra Pepper Hamilton Skadden Arps Slate Meagher & Flom

Capgemini, one of the world's leading providers of consulting, technology, outsourcing and local professional services, acquired New Jersey-based Indian technology company iGate in July 2015. According to deal tracker Dealogic, the deal was the tenth-largest acquisition of a US-based technology company by a European company. The acquisition strengthens some of Capgemini's key businesses and provides it with offshore capabilities to compete with the likes of IBM, Accenture and large Indian infotech services players.

As 75% of iGates' employees are employed in India by operating subsidiaries including Patni Computer Systems, with further downstream subsidiaries in several jurisdictions, the transaction gave rise to many critical India-specific issues.

Khaitan & Co advised iGate's private equity investor Apax Partners in relation to the sale. The team was led by corporate partners Haigreve Khaitan and Aakash Choubey, direct tax partner Bijal Ajinkya, competition law partner Avaantika Kakkar and senior associate Anshuman Sakle.

Kirkland & Ellis and Pepper Hamilton advised iGate on international aspects of the deal.

Luthra & Luthra advised Capgemini on Indian corporate and tax matters, in due diligence of the India part of the

deal and on negotiating the transaction documents to guard against the India-specific risks. The team was led by senior partner Mohit Saraf. Partners Vikas Srivastava and Lokesh Shah supported on tax structuring issues, while partner William Vivian John advised on corporate and due diligence issues. The team included managing associates Sumit Mangal and Kanika Chaudhary Nayar, senior associates Deepak Kumar, Mayank Aggarwal and Aditi Goyal and associates Sumithra Suresh and Rishabh Shah.

Skadden Arps Slate Meagher & Flom acted as international counsel to Capgemini.

4 Sale of Eagle Ford Shale Midstream business

Value	Principal law firms
US$2.15 billion	Latham & Watkins Locke Lord Thompson & Knight Vinson & Elkins

In July 2015, Reliance Holding USA and its shale joint venture partner, Pioneer Natural Resources, sold their Eagle Ford Shale Midstream (EFS Midstream) business to Enterprise Products Partners. Pioneer owned 50.1% of EFS Midstream and Reliance held the rest.

The EFS Midstream business was formed in 2010 to construct facilities to provide gathering and handling services for condensate and gas produced from wells in the Eagle Ford Shale rock formation in south Texas. The EFS system currently consists of 10 central gathering plants, some 740 kilometres of pipelines, 780 million cubic feet per day of natural gas treating capacity, and 119,000 barrels per day of condensate stabilization capacity.

Latham & Watkins advised Reliance on the purchase and sale agreement.

Locke Lord acted for Enterprise Products, with a team led by Terry Radney and including Joe Perillo, Dale Smith, Hunter Summerford and Walker Clarke.

Thompson & Knight advised Reliance on the midstream products agreements related to the transaction. The team was led by senior counsel Arthur Wright and included Gaye White, Timothy Samson, Thaddeus Chase Jr, David Cias, Claudia Duncan, Courtney Jamison Roane, Emily Semands and Kelli Sims. "On the midstream portion, regulatory issues were at a minimum due to the US regulatory structures. From a legal documentation standpoint, dealing with the various production streams with different characteristics and specifications as those products flowed through the Enterprise pipeline chain required considerable structuring and documentation," Wright told *India Business Law Journal*.

Vinson & Elkins advised Pioneer Natural Resources on the deal.

> Dealing with the various production streams with different characteristics and specifications … required considerable structuring and documentation
> Arthur Wright
> Senior Counsel
> Thompson & Knight

5 Birla's acquisition of LafargeHolcim's cement units

Value	Principal law firms
US$766 million	AZB & Partners Cyril Amarchand Mangaldas Nishith Desai Associates Shardul Amarchand Mangaldas & Co Vinod Dhall & TTA

Birla Corporation, a Kolkata-based conglomerate with interests in cotton yarn, jute, and cement, acquired two of LafargeHolcim's cement plants in India in August 2015, winning out against stiff competition from several private equity companies and other global majors. The plants, which have substantial raw material reserves, have a total annual capacity of around 5.15 million tonnes, and are situated in the eastern Indian states of Jharkhand and Chhattisgarh.

The acquisition came in the wake of the global merger of Lafarge and Holcim, which has created the world's biggest cement maker. The deal was the second to have been taken into detailed phase II investigation by the Competition Commission of India.

AZB & Partners represented LafargeHolcim, which became a single entity in July 2015. The team was led by managing partner Zia Mody, partner Alka Nalavadi and senior associate Qais Jamal on the corporate aspects of the transaction.

Shardul Amarchand Mangaldas & Co advised Holcim until July 2015, with partners Shweta Shroff Chopra and Harman Singh Sandhu and associate Toshit Shandilya.

Cyril Amarchand Mangaldas acted for Holcim after July 2015, with partners Nisha Kaur Oberoi and Ashwath Rau, senior associate Soumya Hariharan and associate Aishwarya Gopalakrishnan.

Nishith Desai Associates acted as counsel to Birla Corporation.

Vinod Dhall & TTA advised Lafarge in its filing before the Competition Commission of India in relation to the merger with Holcim. The team included managing associate Ram Kumar and associate Avinash.

In-house lawyers included Jean-Yves Trochon, the group deputy general counsel at Lafarge, and Juhani Kostka, head of antitrust at Holcim.

6 IndusInd Bank's acquisition of Royal Bank of Scotland's bullion

Value	Principal law firms
US$612 million	AZB & Partners Freshfields Bruckhaus Deringer Linklaters S&R Associates Talwar Thakore & Associates

In July 2015, the Hinduja Group-promoted IndusInd Bank wrapped up its acquisition of Royal Bank of Scotland's (RBS) diamond and jewellery financing business in India. The acquisition is expected to bolster IndusInd Bank's bullion portfolio. RBS acquired its bullion portfolio in 2007, when it purchased ABN AMRO's Asia Pacific business. However the economic benefits of the portfolio were housed with ABN AMRO.

RBS has been shedding assets over the years. It sold its retail banking business in India to HSBC in 2012 and a year later it offloaded its credit card, mortgage and commercial banking portfolio to Ratnakar Bank.

S&R Associates advised IndusInd Bank on Indian law. The team comprised partners Sandip Bhagat and Rajat Sethi, counsel Vivek Kumar and associates Sudip Mahapatra and Amy Bharucha. Sethi told *India Business Law Journal* that the deal involved issues related to banking law, data protection and privacy laws, creation and perfection of security interests and competition law. "The international experience of our deal team along with our understanding of Indian legal and regulatory issues enabled us to assist IndusInd in successfully completing the transaction," said Sethi.

Talwar Thakore & Associates acted for RBS on Indian law. The team included partner Feroz Dubash, managing associates Shruti Zota and Neville Golwalla and associates Mrinali Kaul and Srishti Goyal. Linklaters was the offshore adviser to RBS. Angus Davidson and India legal head Munish Nagpal were RBS' in-house counsel.

AZB & Partners advised ABN AMRO Bank on Indian law. The team was led by partner Debashree Dutta and senior associate Zubin Mehta. Freshfields Bruckhaus Deringer acted as the offshore adviser to ABN AMRO Bank.

7 Alibaba and affiliate buy into One97 Communications

Value	Principal law firms
US$575 million	Shardul Amarchand Mangaldas & Co Simpson Thacher & Bartlett Trilegal

The Chinese are increasingly waking up to India as an investment destination. In September 2015, Jack Ma's Alibaba and affiliate Ant Financial invested in One97 Communications,

Deals of the Year: practitioner's perspective

Landmark Vestas decision

Arbitral award significant for Indian legal jurisprudence, say Ranjit Prakash and Arun Mani at HSA Advocates

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Ranjit Prakash


Arun Mani

The dispute arose in the backdrop of a typical EPC (engineering, procurement and construction) and supply contract in which Vestas undertook to design the project and supply turbines, which included evaluation of wind data, designing, siting and erecting the turbines, and operation and maintenance thereafter. The technology and design was dictated by Vestas and Inox relied on its representations regarding efficiency and performance of the turbines, as well as the projected generation data furnished by Vestas. Consistent with usual practice, Vestas limited its liability through contractual caveats and exceptions. This was Inox's first wind energy project and Inox relied heavily on Vestas' representations, including generation estimates.

Upon commissioning the project, it was found that the actual generation was significantly lower than that projected by Vestas. However, Vestas disowned any liability. The dispute culminated in an arbitration initiated by Inox claiming damages on account of the underperforming turbines. The contract and arbitration proceedings were governed by Indian law.

Inox contended that Vestas had made fraudulent misrepresentations regarding performance of the turbines and their projected generation, inducing Inox to enter into the contract. Vestas disowned liability by taking recourse to contractual caveats, including lack of any guarantees and specific exclusion clauses contained in the contract, specifically the disclaimer that their generation estimates would not constitute a guarantee or warranty.

During the arbitral proceedings, parties used evidence from globally renowned experts to re-analyse the raw wind data that was used by Vestas.

Based on this evidence and the cross-examination of the experts, Inox argued that Vestas had made grossly reckless and negligent misrepresentations regarding the generation estimates with intent to induce Inox to enter into the contract, and that Vestas deliberately concealed the core material facts regarding its basis of arriving at the generation estimates.

Vestas represented itself as an expert and knew, or ought to have known, that Inox would act on its representations.

These representations were in the nature of a warranty, which was breached. As such, the generation estimates provided by Vestas suffered from serious infirmities. Inox relied on the legal proposition that: where a person professing to have special knowledge or skill makes a representation by virtue thereof to another with the intention of inducing him or her to enter into a contract, [that person] is under a duty to use reasonable care to ensure the representation is correct. If he or she negligently gives misleading information and thereby induces the other side into a contract, he or she is liable for damages.

Once it was demonstrated through evidence that deliberate misrepresentations had been made to Inox, the contractual defence of limitation of liability was no longer available to Vestas. The arbitral tribunal, comprising senior retired High Court judges, concluded that the methodology and assumptions that Vestas had adopted for estimating the energy generation were incorrect and the energy generation estimates provided by Vestas were inflated.

The majority of the arbitral tribunal comprising of senior retired high court judges, concluded that the methodology and assumptions that Vestas had originally adopted for estimating the energy generation were incorrect and the energy generation estimates originally provided by Vestas were inflated. The majority tribunal recognised that not only had Vestas not adopted the correct methodology for projecting generation, it had deliberately obfuscated the assumptions and variables required to assess the generation. The majority tribunal found that Vestas had made fraudulent and negligent misrepresentation under the Indian Contract Act, 1872 and held them liable to compensate Inox for its losses.

The majority tribunal was also persuaded to accept that the settled law on exclusion of liability, even on account of negligence or misrepresentation, requires it to be expressly stated in the contract, in the absence of which these exclusions would not be available as a defense. In the present case, without such specific exclusions in the contract, Vestas would need to carry the burden of its misrepresentations, which were grossly negligent and reckless at the least, but were also found to be deliberate and therefore, fraudulent.

This arbitral decision is a landmark in the context of commercial contracts, particularly relating to supply of equipment, as it is the only case in recent times where the principles of fraudulent misrepresentation have been applied and contractual caveats and exclusions were ignored. The arbitral award is also unique as it provides recourse to investors that have been hit by misrepresentations.

Unlike the UK, where separate legislation has been framed for dealing with commercial misrepresentations (the Misrepresentation Act, 1967) India does not have any statutory protection for such situations. This award is therefore a particularly significant development of Indian legal jurisprudence.

HSA Advocates represented Inox in the arbitration proceedings with a team led by senior partner Ranjit Prakash, along with associate partner Arun Mani.

which owns e-shopping website Paytm. The company's core business is mobile payments and recharge, but its e-commerce business is growing.

Analysts were quick to point out that the investment was tantamount to a conflict of interest, as Alibaba had invested in Paytm competitor Snapdeal just six weeks earlier. This was Ant Financial's first investment in India. "With over 1 billon people, India's payments market has vast untapped potential," said Ant Financial vice president Cyril Han. Alibaba and Ant Financial said in a joint statement that the partnership would "foster the growth of India's digital payment ecosystem".

Shardul Amarchand Mangaldas & Co, led by partner Raghubir Menon, acted for One97 and its existing investors in relation to the transaction.

Simpson Thacher & Bartlett was counsel to Ant Financial on international law. The team included partner Kathryn Sudol, counsel Ian Ho and Sandra Kister.

Trilegal advised Ant Financial on Indian law. The team was led by partners Nishant Parikh and Rohan Ghosh Roy, with associates Gaurav Dugar, Sanchit Agarwal, Anubhab Dasgupta and Sibani Saxena.

8 Snapdeal's acquisition of FreeCharge

Value	Principal law firms
US$450 million	AZB & Partners Khaitan & Co Olswang

Online marketplace Snapdeal, promoted by Jasper Infotech, has made several strategic acquisitions over the past five years. In April 2015, it acquired FreeCharge, an online recharge platform. This was Snapdeal's fifth acquisition over the past year and also one of the largest buyouts in the Indian consumer internet sector.

For Snapdeal, the merit of the acquisition lies in the valuable payment data that FreeCharge has on its estimated 10 million users. In addition, as buyers are transacting on mobile devices, FreeCharge users are potential customers for Snapdeal. Snapdeal's game plan also involves diversifying beyond products to include services such as education, financial services and utility payments. "The race is about mobile commerce. We want to add a number of related offerings around Snapdeal's core platform," said Kunal Bahl, Snapdeal's CEO.

AZB & Partners, led by partner Gautam Saha and senior associate Dushyant Bagga, advised FreeCharge and the selling shareholders. Khaitan & Co partner Abhilekh Verma and associate partner Vinay Joy advised Snapdeal on Indian law.

Olswang acted as the Singapore counsel to Jasper Infotech, with consultant Azmul Haque and associate Elizabeth Maynard. Haque is now the managing director of Collyer Law.

9 Infosys acquires Panaya and Kallidus

Value	Principal law firms
US$200 million + US$120 million	Amarchand Mangaldas (Bangalore) AZB & Partners Kirkland & Ellis

Infosys acquired US automation technology startup Panaya in March 2015. This was the company's first acquisition under its first non-founder CEO and managing director, Vishal Sikka, who is a former SAP technology chief and a believer in automation in the retail sectors. Soon after making the acquisition, Sikka, who wants Infosys to move up the value chain by becoming a next generation services provider, told market analysts: "We see great potential in their core technology. It will take us a couple of more months to see how we can bring the technology to other areas, and any investment in those processes can be funded from internal cash flows."

The purchase was followed in June 2015 by the acquisition of Kallidus, which does business as Skava Systems, a leading provider of digital experience solutions.

The Bangalore office of Amarchand Mangaldas advised Infosys on the Indian law aspects of its acquisition of Panaya. The firm's team was led by partners Ashwath Rau on the corporate side and Nisha Kaur Uberoi, for competition law-related matters. The firm also represented Infosys in buying Kallidus, with partners Rau and Nivedita Rao.

AZB & Partners advised Kallidus, with partner Srinath Dasari and senior associate Nanditha Gopal.

Kirkland & Ellis' New York partner Srinivas Kaushik acted for Infosys on international law in both acquisitions.

10 Sun Pharma promoter buys stake in Suzlon Energy

Value	Principal law firm
US$300 million	Cyril Amarchand Mangaldas

In May 2015, Dilip Shangvi, one of the richest Indians and promoter of Sun Pharmaceutical Industries, through Dilip Shanghvi Family and Associates (DSA), bought a 23% stake in Suzlon Energy, coming in as a white knight to bail out the beleaguered wind turbine maker, promoted by Tulsi Tanti. Shangvi told the media that "While we believe that Suzlon has the potential to emerge as a global leader in the renewable energy space from India, it will take substantial and sustained effort on part of the management team to achieve a significant operating performance improvement."

Despite Shanghvi's claim that his investments were purely financial, the Suzlon bailout was seen as part of his diversification strategy. In February 2015, he had applied for a licence to run a payment bank.

Cyril Amarchand Mangaldas acted as the legal counsel to Suzlon Energy. The team was led by managing partner Cyrl Shroff, and partners Yash Ashar and Nisha Kaur Uberoi.

Bathiya & Associates, chartered accountants, advised DSA, led by partners Umesh Lakhani and Anand Bhatiya.

11 Essar Telecom's sale of its Kenya business

Value	Principal law firms
US$120 million	Anjarwalla & Khanna Coulson Harney Walker Kontos

Essar Telecom Kenya sold its Kenyan mobile operator, yuMobile, to Airtel Kenya, a subsidiary of Bharti Airtel, and

to local player Safaricom in December 2014. Airtel Kenya acquired Essar's 2.55 million subscriber base, while its network, information technology and office infrastructure was bagged by Safaricom.

This deal marks the exit of Essar from all telecom ventures and has resulted in the consolidation of Kenya's mobile telecommunications sector, which now is down to three players. The transaction was challenging as it involved the transfer of frequency spectrum, subscribers and assets and threw up unanticipated regulatory issues.

A team from Anjarwalla & Khanna in Nairobi, led by founding partner Karim Anjarwalla and partners Anne Kiunuhe and Aisha Abdallah, represented Essar Telecom Kenya.

Coulson Harney in Nairobi advised Safaricom and Walker Kontos, also in Nairobi, advised Airtel Networks Kenya.

12 **Future Group acquires Bharti Retail**

Value	Principal law firms
US$113.5 million	AZB & Partners Vinod Dhall and TT&A

Marriages of convenience have become commonplace in the retail sector. In one of the largest deals in the sector to date, Kishore Biyani's Future Retail acquired Rajan Bharti Mittal's Bharti Retail in August 2015. The deal has created two companies – one for the retail businesses and one for the retail infrastructure businesses – both under the control of Future Group, making it the second-largest retailer in India behind Reliance Retail. Mittal has roughly 9% stakes in both Future Retail and the new entity and a seat on the board of Future Retail.

Biyani has cited scale and efficiency as the cornerstones of the retail union. The Future Group plans to expand the 571 outlets under the merged entity to 4,000 by the end of the decade. Reliance has over 2,600 outlets. The merger allows the Future Group to leverage Bharti Airtel's payment bank and mobile network to enable grocery payments to the combined entity. The retail sector, which has been plagued by high debt and exorbitant rents for urban space, is grappling with the fallout of the rise of online retail.

Partner Ratnadeep Roychowdhury at AZB & Partners advised Future Retail. The firm also advised Bharti Retail, with a team that included partners Vinati Kastia, Sachin Mehta and Daksh Trivedi and senior associate Ankit Tandon.

Vinod Dhall and TT&A represented Bharti Retail at the Competition Commission of India. The firm's team comprised executive chairman Vinod Dhall, managing associate Sonam Mathur and associate Kabyashree Chaharia.

13 **Twitter's acquisition of ZipDial**

Value	Principal law firms
US$30 million	AZB & Partners Bharucha & Partners

Online social networking service Twitter bought ZipDial, a Bangalore-based "missed call" marketing platform, for around US$30 million in January 2015. This relatively small deal made big waves, as it was Twitter's first acquisition in India. "This is a huge achievement for the entire ZipDial team," said California native Valerie Wagoner, ZipDial's founder and CEO.

ZipDial built a mobile platform which allows users to follow and engage with content across various interfaces, and to bridge from offline to online. The company's association with Twitter began over two years ago and they have collaborated on a host of campaigns, including India's national elections, Bollywood film publicity programmes and MTV promotions. "The acquisition significantly increases our investment in India, one of the countries where we're seeing great growth, and also brings us a new engineering office in Bangalore," Twitter said.

AZB & Partners advised ZipDial. The team was led by partners Srinath Dasari and Nanditha Gopal, along with associates Rutunjay Singh and Shantanu Singh.

Bharucha & Partners acted for Twitter, led by partner Alka Bharucha, with senior associate Siddharth Manchanda and associate Ayesha Bharucha.

"The main challenges centred on the several categories of sellers, each of which posed its own regulatory and tax challenges. Restructuring of the employee stock options and the continuation of the customer contracts also required careful attention," Alka Bharucha told *India Business Law Journal*.

> The main challenges centred on the several categories of sellers, each of which posed its own regulatory and tax challenges
> Alka Bharucha
> Partner
> Bharucha & Partners

14 **PropTiger's acquisition of Makaan.com**

Value	Principal law firms
US$13.5 million	Colin Ng & Partners IC Legal Rajah & Tann Shardul Amarchand Mangaldas & Co

India's property market is dotted with established real estate companies, and an increasing number of online brokers which are being lapped up by brick-and-mortar players.

In one such deal, which closed in May 2015, Singapore-based Elara Technologies, which owns online property broker PropTiger.com, backed by Rupert Murdoch's NewsCorp, acquired property search portal Makaan.com.

The buyout transaction was challenging for both the Indian and Singapore lawyers from the legal, regulatory and tax perspectives. The deal was structured by issuing employee stock options to the sellers, who were also the directors of Makaan, which became a wholly owned subsidiary of Elara.

India's exchange control regulations and Singapore law both posed challenges for the stock options. While some Makaan employees were issued options, some employees were retrenched. This created additional legal and cultural hurdles that had to be cleared before the deal finally closed.

Partner Pradeep Kumar Singh at Colin Ng & Partners acted for Makaan on Singapore law matters.

IC Legal represented the sellers – Anupam and Anand Mittal – who sold their entire stake in Makaan.com to Elara. The team was led by partners Sambhav Ranka and Indrajit Mishra and senior associate Souvik Roy.

Rajah & Tann partner Teo Yi Jing represented Elara on Singapore law matters.

Partner Saurav Kumar at Shardul Amarchand Mangaldas & Co acted for Elara.

15 Shandong Ruyi's move into Reliance Industries' Vimal business

Value	Principal law firms
Undisclosed	Amarchand Mangaldas (Mumbai) Norton Rose Fulbright Rajani Associates Vinod Dhall & TTA

For years, "Only Vimal" was the brand that epitomized Reliance Industries. In February 2015, five decades after Reliance Group founder Dhirubhai Ambani created the textile brand, his son Mukesh offloaded a 49% stake in the business to Chinese textile company Shandong Ruyi Science and Technology Group.

Over the years, Reliance has diversified beyond textiles into oil and gas exploration, refining, retail and telecoms. With scale and size driving the group's businesses now, the Vimal brand had lost its lustre. The deal unites Reliance's textile business and distribution network in India and Shandong Ruyi's state-of-the-art technology and global reach.

The Mumbai office of Amarchand Mangaldas advised Reliance.

Rajani Associates advised Shandong Ruyi on Indian law. The firm was represented by managing partner Prem Rajani, partner Reena Grover, counsel Tejasvini Shirodkar and associate Pearl Boga.

Edward Stafford, a Sydney-based senior associate at Norton Rose Fulbright, acted as counsel on international law for Shandong Ruyi.

Vinod Dhall & TT&A acted for Shandong Ruyi. The team was led by executive chairman Vinod Dhall and included managing associate Ram Kumar and associates Avinash Amarnath and Mansi Tewari.

Private equity & venture capital

1 ANI Technologies series G & H financing

Value	Principal law firms
US$400 million + US$500 million	AZB & Partners Goodwin Procter Gunderson Dettmer Stough Villeneuve Franklin & Hachigian IndusLaw Morrison Foerster

ANI Technologies, which runs Ola Cabs – one of India's taxi-hailing services and a direct competitor to Uber – raised US$400 million in its G-series round of funding, which closed in April 2015. This round was led by Russian billionaire Yuri Milner's DST Global. Falcon Edge Capital also participated, along with existing investors SIMI Pacific (a SoftBank arm), Tiger Global, Steadview Capital Mauritius, LTR Focus Fund, ABG Capital, Apoletto Asia, and Accel Growth III Holdings (Mauritius).

Then in November 2015, ANI raised US$500 million in its H funding round from new investors including JS Capital, Parkwood Bespin, Dan Neary, Lathe investment and Vanguard World Fund, and existing investors including SIMI Pacific, Tiger Global and ABG Capital.

Bangalore-based Ola had earlier acquired rival TaxiForSure, in a cash and stock deal to bolster its position in the segment and also foray into new businesses such as logistics. Ola's founder and CEO Bhavish Agarwal said the new funds would help the company double its reach to 200 cities by March 2016 and scale up its engineering team.

Goodwin Procter advised DST Global and Falcon Edge Capital on international law in both the G and H funding rounds. The firm's team was led by partner Yash Rana, with Abhishek Krishnan, Ananth Lakshman, Bill Weiss, Alexander Plaum, Paul Verbesey, Roy Smith, Steven Keller, Richard Matheny, JT Roy, and Jamie Hutchinson.

AZB & Partners advised DST Global and Falcon Edge on Indian law in the G series of funding, led by partner Anil Kasturi with associate Jaishree Tolani. In the H round, the firm advised investor FO Mauritius, an affiliate of Falcon Edge, on Indian law, with partner Darshika Kothari and senior associate Vijay Surekha.

Partner Steven Baglio and Melissa Marks of Gunderson Dettmer Stough Villeneuve Franklin & Hachigian advised Tiger Global's internet fund in both the G and H series.

IndusLaw represented Ola Cabs in both series, led by partner Gaurav Dani, with senior associate Divya Varghese and associates Nitin Gera and Vijeta Kanabar.

"The deal involved over 30 parties and it was important to find a balance that worked for the management and matched expectations of investors. It was necessary for them to agree to a structure, which in their opinion adequately protected their interests without compromising management's goals," Dani told *India Business Law Journal*.

Morrison Foerster of counsel James McCormick and associate Noah Carr acted for the SoftBank entities in both series.

Mitesh Shah was the in-house counsel for ANI Technologies.

2 **Flipkart's series G preferred share financing**

Value	Principal law firms
US$700 million	Allen & Gledhill Goodwin Procter Gunderson Dettmer Stough Villeneuve Franklin & Hachigian

Flipkart, India's leading e-commerce powerhouse, wrapped up 2014 with its seventh round of fresh financing.

Existing investors such as Tiger Global, GIC and Accel Partners participated, along with new investors including Qatar Investment Authority, Baillie Glifford and T Rowe Price. Flipkart had already garnered US$1.2 billion in two rounds earlier in the year.

Founded in 2007, Bangalore-based Flipkart was one of the first companies to make online shopping popular in India. In the last couple of years it has expanded its business by acquiring fashion e-retailers Letsbuy.com and Myntra.com.

"As with previous funds raised, these funds will be used towards long-term strategic investments in India and to build a world-class technology company, delivering superior customer experience," the company said.

Gunderson Dettmer Stough Villeneuve Franklin & Hachigian acted for Flipkart. Allen & Gledhill advised the company on Singapore law matters.

> The [ANI Technologies] deal involved over 30 parties and it was important to find a balance that worked for the management and matched expectations of investors
>
> Gaurav Dani
> Partner
> IndusLaw

Goodwin Procter was the investors' counsel, led by partner Yash Rana, with Ilan Nissan, Bill Weiss, James Lee and Michael Saarinen.

3 Snapdeal's I series funding

Value	Principal law firms
US$500 million	AZB & Partners Bingham McCutchen IndusLaw J Sagar Associates Kochhar & Co Morrison & Foerster Simpson Thacher & Bartlett Trilegal

Jasper Infotech's Snapdeal, founded in 2010 by Rohit Bansal and Kunal Bahl, is one of the most popular pure-play online marketplaces in India, with over 60,000 business sellers. It's little wonder that venture capitalists and private equity players continue to queue up for a share of the pie.

When the company sought US$500 million for growth and acquisitions in its ninth round of funding (after attracting US$1 billion in eight previous rounds), apart from follow-on investors, a clutch of other global players opened their wallets.

SoftBank which had pumped in US$627 million in 2014 added US$100 million in this round, through its SoftBank Internet & Media (SIMI) subsidiary. Other existing investors, including the Alibaba Group, Temasek, BlackRock, Myriad Opportunities funds, Premji Invest and Taiwan's Foxconn Technology, also invested in this round. "With our venture partners supporting us, our efforts to build an impactful digital commerce ecosystem will be propelled, enabling us to contribute to Digital India," Snapdeal co-founder and chief executive Bahl said.

IndusLaw represented Snapdeal. The team was led by Bangalore partner Srinivas Katta and included senior associate Winnie Shekhar and associates Piyush Bhawalpuria and Priyanka Chandrasekhar. Partner Avimukt Dar in Delhi handled competition law issues, along with senior associate Anubha Sital.

Partners Srinath Dasari and Nanditha Gopal at AZB & Partners' Bangalore office represented Nexus Venture Partners and the Kalaari group of funds, two of the new investors. AZB's Mumbai partner Vaidhyanadhan Iyer and senior associates Ashutosh Narang and Arvind Ramesh advised Temasek.

J Sagar Associates partner Vivek K Chandy and senior associate Archana Tewary advised eBay Singapore on Indian law. William Perkins and Dinesh K Melwani, who were partners at now-defunct Bingham McCutchen, acted for eBay Singapore on international law.

Kochhar & Co Bangalore partner Anjuli Sivaramakrishnan was the Indian counsel to SoftBank Group.

Morrison & Foerster's Amit Kataria, Noah Carr and Patrick Barrett acted as international counsel to SoftBank Group. Tokyo partners Ken Siegel and Randy Laxer, Singapore partner Adam Summerly, and North Virginia partner Greg Giammittorio also advised on SoftBank's follow-on investment in Snapdeal.

Ian Ho, Erik Wang and Sandra Kister of Simpson Thacher & Bartlett represented Alibaba Group on international law.

Trilegal Delhi partner Gautam Singh and Arun Anandaiah represented the BlackRock group of funds, while Mumbai partner Kunal Chandra and senior associate Kabeer Mathur represented the Myriad Opportunities funds.

4 Carlyle's acquisition of Destimoney Enterprises

Value	Principal law firms
US$250 million	AZB & Partners Economic Laws Practice Linklaters

In February 2015, US private equity firm Carlyle deflected competition to acquire Destimoney Enterprises, which was controlled by New Silk Route through a Mauritius incorporated vehicle. The deal resulted in Carlyle's indirect acquisition of a 49% stake in PNB Housing Finance, the mortgage finance arm of Punjab National Bank.

The deal was heartening news for public sector banks, as many of them have been grappling to divest their mortgage and other assorted businesses.

AZB & Partners advised Carlyle on Indian legal aspects of the deal.

Economic Laws Practice advised New Silk Route on the transaction and on obtaining the Competition Commission of India's approval. The team was led by partners Sujjain Talwar, Suhail Nathani and Aakanksha Joshi, with Ashlesha Galgale, Tarini Menezes and Gauri Chhabra.

"The seller was a fund in its winding up phase and providing comfort to the acquirer for the indemnities provided by the seller was a paramount concern. Insurance seemed a natural solution and giving comfort to insurers in relation to the risks involved and negotiating the terms thereof was challenging," Joshi told *India Business Law Journal.*

Linklaters advised Carlyle on international law.

5 KKR's investment in JBF Group

Value	Principal law firms
US$150 million	Cyril Amarchand Mangaldas Crawford Bayley & Co Davis Polk & Wardwell WongPartnership

Private equity funding in India has largely been in high-profile sectors such as technology, infrastructure, telecoms and healthcare.

Global private equity firm Kohlberg Kravis Roberts & Co (KKR) went against the grain when it invested US$150 million in JBF Group, which manufactures polyester products that are used in the fast-moving consumer goods, textile and packaging industries. JBF Group has six manufacturing facilities across India, Bahrain, Belgium and the UAE.

JBF's share price saw a 4% spurt after plans for the infusion were announced in August 2015.

The investment was made by the KKR Special Situations Fund II and was the first investment in India made from this fund.

"This type of investment into a world-class company such as JBF is a great example of how KKR can support Indian manufacturing companies providing value to global customers," said Sanjay Nayar, a member and the chief executive officer of KKR India.

KKR's funding was split into two parts. A portion was

> The seller was a fund in its winding up phase and providing comfort to the acquirer for the indemnities provided by the seller was a paramount concern
>
> Aakanksha Joshi
> Partner
> Economic Laws Practice

used by KKR to acquire a 20% stake in Mumbai-based JBF Industries, which is listed on the Bombay Stock Exchange and the National Stock Exchange of India. The balance was invested in compulsorily convertible preference shares with 14.5% voting rights in JBF Global, an unlisted Singapore subsidiary of JBF Industries.

"The funding will help JBF complete our ongoing projects. KKR's support will enable us to grow our international presence and support the 'Make in India' campaign," said Bhagirath Arya, the executive chairman of JBF Group.

Cyril Amarchand Mangaldas acted as legal counsel to KKR. The team was led by managing partner Cyril Shroff, Mumbai-based corporate partner Ravi Kumar, Bangalore-based corporate partner Nivedita Rao, and of counsel Usha Naryanan. Competition law partner Nisha Kaur Uberoi also advised on the deal.

Crawford Bayley & Co was legal counsel to JBF Group, led by partner Sanjay Asher.

Davis Polk & Wardwell partner Kirtee Kapoor and WongPartnership in Singapore represented KKR as international counsel.

6 **Investments in MobiKwik**

Value	Principal law firms
US$25 million	Amarchand Mangaldas (Delhi) AZB & Partners BMR Legal Sullivan & Cromwell Themis Associates

With low credit card usage in India, mobile wallets are emerging as the front runners for various payments. In April 2015, One MobiKwik Systems, one of India's largest mobile wallet companies, attracted US$25 million in funding from a clutch of strategic investors including American Express, Singapore-based hedge fund Treeline Asia, Sequoia Capital and Cisco.

MobiKwik is licensed by the Reserve Bank of India as a prepaid service provider under the Payment and Settlement Systems Act, 2007, and has applied for a payment banking permit. "Our strength is technology and innovation, which is where we want to focus," said Mrinal Sinha, the company's head of strategy. The announcement came days after rival Paytm evinced interest in a payment banking licence.

The Delhi office of Amarchand Mangaldas acted as counsel to American Express. Its team included Shilpa Mankar Ahluwalia, Ajit Warrier and Saanjh Purohit. Sullivan & Cromwell represented American Express as special overseas counsel.

AZB & Partners represented Treeline and Cisco, with partners Gautam Saha and Amrita Patnaik and senior associates Dushyant Bagga and Pallavi Meena.

Bangalore-based Themis Associates advised Sequoia Capital.

BMR Legal acted as a counsel for MobiKwik.

Real estate

1 **Warburg Pincus and Goldman Sachs buy into PRL Developers**

Value	Principal law firms
US$277 million + US$138 million	Cyril Amarchand Mangaldas Nishith Desai Associates Shardul Amarchand Mangaldas & Co

The realty sector has long been a favourite for private equity firms in India. While some players buy off completed high-rises, others invest in land parcels and monetize their investments once construction is done.

In July 2015, in one of the largest foreign direct investments in the Indian realty sector, private equity firm Warburg Pincus, through an affiliate, pumped US$277 million into PRL Developers, a member of the Piramal Group, a former pharmaceutical major. PRL has over 10 million square feet of residential and mixed-use projects in Mumbai and its suburbs. The funds were used to purchase land parcels across Mumbai, including abandoned mill land, to construct high-rise residential towers.

Then in August 2015, Goldman Sachs, through an affiliate, made a US$138 million strategic minority investment in PRL. Anand Piramal, executive director of the Piramal Group, said: "The investments give us an opportunity to build a potentially big company with two partners, who understand India and the real estate."

These investments were unusual in that both players invested in the company and not in any specific project. Such entity-level deals are a rarity in India today as investors have been playing safe by putting money into definite projects.

Cyril Amarchand Mangaldas advised Piramal Realty and PRL Developers, both members of Ajay Piramal's group of companies, led by partners Ravi Kumar and Vandana Sekhri.

Nishith Desai Associates acted for Goldman Sachs, with a team led by partner Vaibhav Parikh along with Ruchir Sinha.

Shardul Amarchand Mangaldas & Co represented Warburg Pincus, with managing partner Akshay Chudasama and partners Ashoo Gupta and Mithun V.

2 CPPIB-Shapoorji Pallonji JV acquires Chennai IT park

Value	Principal law firms
US$220 million	AZB & Partners Cyril Amarchand Mangaldas DSK Legal Economic Laws Practice

The Canada Pension Plan Investment Board (CPPIB) and the Shapoorji Pallonji Group entered into a strategic alliance to set up SPREP, a company incorporated in Singapaore in 2013. Two years later, in its maiden purchase, SPREP bought the SP Infocity IT Park in Chennai.

The joint venture acquired 100% of the securities of Faery Estates, the special purpose vehicle which owns, operates and maintains SP Infocity. "The IT park is a high-quality property and is an excellent first acquisition for SPREP," said Andrea Orlandi, CPPIB's managing director for real estate investments. The property has close to 2.7 million square feet of operational space, which is leased to companies such as HSBC, Amazon, Ford, Siemens, Citibank, AT&T and Hapag-Lloyd.

New Vernon, a private equity firm incorporated in Mauritius, along with Carton Infrastructure, had invested in Carwel Estates, which set up Faery Estates to develop SP Infocity. SPREP purchased all the shares of Faery Estates, including compulsorily convertible preference shares held by Hilson Estates, another company incorporated in Mauritius.

AZB & Partners advised Carton Infrastructure and Carwel Estates. The team was led by partner Sai Krishna Bharathan and senior associate Sugandha Asthana.

Cyril Amarchand Mangaldas acted for SPREP.

DSK Legal represented CPPIB.

Economic Laws Practice advised New Vernon and Hilson Estates, with partner Darshan Upadhyay, Bhavin Gada and Kanisha Vora.

3 Blackstone acquires 247 Park

Value	Principal law firms
US$177 million	AZB & Partners Cyril Amarchand Mangaldas Nishith Desai Associates Ropes & Gray Simpson Thacher & Bartlett

Private equity firm Blackstone bought out all the shareholders of 247 Park, a commercial IT park in Vikhroli, an eastern surburb of Mumbai. The sellers included cash-strapped Hindustan Construction Company (HCC), which held a 26% stake in the venture, Milestone Real Estate Fund, and Infrastructure Leasing & Financial Services.

According to Rajgopal Nogja, HCC Group CEO: "This transaction is an integral part of our plans to monetize our non-core assets to further reduce our debts. The funds will be used to pare our debts. Through more such initiatives, we are confident of bringing long term stability to our balance sheet."

The 1.1 million square foot property is nestled between two mass transit corridors and offers easy access. A roster of top notch corporate clients such as the Tata Group and Siemens have offices in its three 14-storey towers.

Blackstone has been prowling around for key real estate assets. It acquired the iconic Express Towers in South Mumbai in 2014.

Cyril Amarchand Mangaldas was Indian legal counsel to the Blackstone Group, with a team led by partners Reeba Chacko, Vandana Sekhri, Nagavalli G and Sandeep Dave.

Ropes & Gray, led by Kim Nemirow and Alyssa Bloom, and Simpson Thacher & Bartlett, with A King and N Hagerman, acted as international counsel to the Blackstone Group.

AZB & Partners was counsel for Milestone Capital and its affiliates. The team was led by managing partner Zia Mody, partner Sai Krishna Bharathan and senior associates Sugandha Asthana and Tulika Sinha.

Nishith Desai Associates' Karan Kalra and Tanya Pahwa acted as counsel for AIG, one of the sellers.

Disputes

1 Arbitration between Inox Renewables and Vestas India

Value	Principal law firms
US$44 million	HSA Advocates Satish Parasaran & Associates

Inox Renewables, a subsidiary of Gujarat Flurochemicals (GFL) and part of the Inox Group, had received a lucrative proposal from Vestas to set up a wind farm project in Maharashtra in western India. GFL invested in the project based on generation estimates and the consequent cash flow projections presented by Vestas. When operations began, the actual energy generation and cash flows were significantly lower than the generation estimate and projections.

GFL initially invoked arbitration against Vestas. GFL was substituted with Inox Renewables when the business was transferred. Before the arbitral tribunal, GLF contended that Vestas was guilty of fraudulent misrepresentation, and had induced GFL to make the investment by entering into an

> It was a mammoth task to make the arbitrators understand and appreciate the evidence and the technical aspects of the matter
>
> Arun Mani
> Associate Partner
> HSA Advocates

Deals of the Year: practitioner's perspective

A win worth the wait

Pravin Anand, Dhruv Anand and Udita M Patro examine a landmark patent case

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Pravin Anand

Dhruv Anand

A recent decision passed by Justice AK Pathak of Delhi High Court on 7 October 2015 in favour of the plaintiffs/patentee in *Merck Sharp & Dohme Corp & Anr v Glenmark Pharmaceuticals Ltd* not only vindicates India's patent law system but also offers a silver lining beyond dark clouds for innovators. The court upheld the validity and infringement of the plaintiff's patent, in a first-of-its-kind order since the enactment of the Patents Act, 1970.

Brief facts

i. Patent in question: Patent covering sitagliptin and its pharmaceutically acceptable salts.

ii. Drug in question: Sitagliptin phosphate monohydrate (a pharmaceutically acceptable salt of sitagliptin).

iii. Purpose of drug: To treat diabetes mellitus type II.

iv. Plaintiffs' products: Januvia/Janumet and Istavel/Istamet.

v. Defendant's infringing products: Zita/Zitamet.

The patentee, Merck Sharp & Dohme (Merck), along with its licensee, Sun Pharmaceuticals, filed a patent infringement suit against Glenmark Pharmaceuticals in April 2013 when the latter marketed competitor drug products that infringed Merck's patent for sitagliptin and its pharmaceutically acceptable salts.

When the matter initially came up before the judge, he disposed of the plaintiffs' application seeking an interim injunction. The plaintiffs preferred an appeal against the decision of the judge. The division bench of Delhi High Court (Ravindra Bhat and Najmi Waziri) reversed this decision through their order dated 20 March 2015 by way of a speaking order, which held the plaintiffs' patent to be *prima-facie* valid and infringed by the defendant's products.

The defendant challenged the order of the division bench before the Supreme Court, which through an order dated 15 May 2015 not only reinstated the interim injunction granted by Delhi High Court's division bench, but also took cognizance of the "commercial" nature of the matter and the delay already caused when it passed strict directions expediting the suit.

As a result of the landmark directions passed by the Supreme Court (Ranjan Gogoi and NV Ramana), evidence recorded in the matter, which involved the cross-examination of seven witnesses – three of whom were foreigners – was concluded in around one-and-a-half months.

Highlights and achievements

i. It is the first patent infringement lawsuit under the 1970 act decreed in favour of the plaintiffs.

ii. An expedited trial ordered by Delhi High Court resulted in disposal of the law suit within five months from the date of that order.

iii. The finding that the claim of a basic patent for a compound and its pharmaceutically acceptable salts constitutes infringement (even if a subsequent salt patent had been abandoned) if the claim of the basic patent could be construed as being broad enough to cover the commercial product or salt. In this case, Merck had a basic patent for sitagliptin and its pharmaceutically acceptable salts. It had also applied for a separate improvement patent application for the sitagliptin phosphate monohydrate salt, which it subsequently abandoned. The court found that the defendant's infringing product containing sitagliptin phosphate monohydrate was squarely covered by Merck's basic patent.

iv. The finding that biological activity was displayed by the sitagliptin moiety and not by the salt moiety, which only improved the physical or chemical properties to provide better carriage of sitagliptin to the binding site.

v. The finding that the defendant's contention that it did not use sitagliptin in the process of making sitagliptin phosphate monohydrate was misplaced, as this process was not disclosed by a company witness, but by an expert who had demonstrated huge contradictions in his evidence.

vi. The court placed substantial weight on expert testimony and opined that in highly technical matters (like the present case involving chemical compounds in the medical field) it had to trust the opinions of specialists in the field, supported by documents. The court stated that it should not impose its view over and above technical experts, particularly when the judges themselves lack such expertise.

vii. The court examined and found serious contradictions in the admissions made by the defendant. This was in contrast to earlier cases where courts had looked at the plaintiff's admissions.

This decision of Delhi High Court indicates that the Indian judiciary – and the Indian legislature, in view of the recently enacted Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 – is cognizant of the urgent need for a proper, effective and efficient system to safeguard all intellectual property. It is clear there is a will to foster a conducive, commercial environment in the country as current measures to provide for such a system illustrate.

Pravin Anand is the managing partner of Anand and Anand, where Dhruv Anand is a partner and Udita M Patro is a senior associate. Anand and Anand represented Merck in this case.

agreement. Vestas relied on an exclusion clause protecting it against any liability arising on account of the warranty of estimated generation.

In January 2015, the tribunal held Vestas liable for fraudulent misrepresentation and for inducing GFL to enter into the agreement and awarded damages to Inox Renewables. The arbitral tribunal also held that exclusion clauses should be read down as they would defeat the purpose of the agreement.

HSA Advocates acted for Inox Renewables. The team was led by partner Ranjit Prakash and associate partner Arun Mani. "The issue involved in the matter was highly complex as it pertained to the generation of electricity from wind power, which by its very nature is unpredictable. As energy generation estimates are based on complex technology, calculations and data analysis, it was a mammoth task to make the arbitrators understand and appreciate the evidence and the technical aspects of the matter and assist them to link the technical aspects with the legal principles," said Mani.

Satish Parasaran & Associates represented Vestas India.

(See page 48 for a practitioner's perspective on this deal.)

2 Royalty dispute between NHAI and Simplex Infrastructure

Value	Principal law firms
US$380,000	Kochhar & Co MV Kini & Co

This dispute was over royalty payable to the Bihar state mines department.

The contractor, Simplex Infrastructure, claimed that the royalty was imposed by the state government after the contract was executed, and was therefore liable to be borne by the National Highways Authority of India (NHAI), in terms of the subsequent legislation clause contained in the contract. NHAI claimed that the royalty was already paid to the contractor by way of price adjustments. The dispute involved the interpretation of standard clauses in NHAI's contracts.

Kochhar & Co represented Simplex before the disputes review board, the arbitral tribunal, the single judge and the division bench of Delhi High Court and the Supreme Court, and succeeded at every stage.

The Supreme Court dismissed NHAI's special leave petition on 1 May 2015 and NHAI's review petition in October 2015.

Senior partner Krishna Vijay Singh and principal associate Manish Dembla led Kochhar & Co's team.

"The matter sets a precedent in the sector which will benefit many NHAI contractors who have disputes regarding royalty pending with NHAI at various stages. It is significant from the perspective of law on interpretation of contractual provisions and section 34 of the Arbitration and Conciliation Act, 1996," Singh told *India Business Law Journal*.

MV Kini & Co acted for NHAI.

> The matter sets a precedent in the sector which will benefit many NHAI contractors who have disputes regarding royalty
> Krishna Vijay Singh
> Senior Partner
> Kochhar & Co

3 Merck Sharp & Dohme versus Glenmark Pharmaceuticals

Value	Principal law firms
N/A	Anand and Anand Singh & Singh Lall & Sethi

In October 2015, two years after US-based pharma company Merck Sharp & Dohme initiated an infringement action against Glenn Saldanha's Mumbai-based Glenmark Pharmaceuticals, Delhi High Court barred Glenmark from selling, distributing, marketing or exporting copies of Merck's anti-diabetes drug sitagliptin. The court, however, granted Glenmark's request to dispose of its inventory.

While earlier cases had focused on admissions of the plaintiff, in this case the court looked at admissions made by the defendant and found serious contradictions in them. On public interest, the court clarified that price difference was not a sufficient ground to decline an injunction against a competitor.This was the first patent infringement suit under the Patents Act, 1970, to be successfully concluded after trial in favour of the plaintiffs. Merck had earlier obtained an interim injunction against Aprica Pharma, another generic player.

Anand and Anand, led by managing partner Pravin Anand, represented Merck. The firm's team included senior partner Archana Shanker, partner Tusha Malhotra, Devender Rawat, Nupur Maithani and Udita M Patro. "This was a difficult case, not so much because of the merits but more on account of the fact that the defendants had explored a variety of arguments never before considered by an Indian court," said Anand.

Singh & Singh Lall & Sethi acted for Glenmark.

(See page 56 for a practitioner's perspective on this deal.)

4 Nestlé's Maggi noodles ban

Value	Principal law firm
N/A	Shardul Amarchand Mangaldas & Co

Days before India's festival of lights – Diwali – in November 2015, Swiss food major Nestlé brought back the smiles on children's faces. Just five months earlier, Nestlé's Maggi noodles were banned in several Indian states after government laboratories said they found noodle samples containing more than the permissible quantity of lead, and traces of monosodium glutamate, which the packaging did not mention. Given the ubiquity of Maggi noodles in India, the case in Bombay High Court drew enormous interest. Probing into the case

revealed that the testing had been done in laboratories that were not qualified to test for lead and were not even accredited by the National Accreditation Board for Testing and Calibrating Laboratories.

Shardul Amarchand Mangaldas & Co partner Pallavi Shroff, along with senior counsel Iqbal Chagla, represented Nestlé India before Bombay High Court in the writ petition challenging notices issued by the Food Safety and Standards Authority of India and the state of Maharashtra, banning the manufacture, storage and sale of nine variants of Maggi noodles.

In August 2015, the court ruled against the bans while ordering fresh tests on samples of the noodles. The ban was subsequently lifted and the brand was relaunched.

Senior counsel Anil Singh appeared for the state.

5 WTO dispute over US duties on certain Indian steel products

Value	Principal law firm
N/A	Lakshmikumaran & Sridharan

US countervailing duties on India's hot-rolled carbon steel flat products had reduced the value of such exports from US$270 million per year to nil. India challenged the determinations made by the US Department of Commerce and the US International Trade Commission before a World Trade Organization panel.

In December 2014, India and the US appealed various issues related to the panel's rulings to the WTO's Appellate Body (AB). India achieved a comprehensive victory at the WTO, as the AB ruled that the countervailing duties imposed by the US were inconsistent with various provisions of the Agreement on Subsidies and Countervailing Measures.

The AB endorsed India's position that a public sector undertaking (PSU) should be treated as a "public body" when it has governmental authority and discharges governmental functions. The AB also agreed with India that the methodology used by the US to calculate the benefit in the case of sale of iron ore by NMDC, which is a PSU, was unfounded.

The AB ruling provides significant relief to exporters who buy raw materials from PSUs and will promote transparency in the conduct of investigations by all WTO member nations. In the wake of the ruling, duties against seven other products from India could be challenged at the WTO.

Lakshmikumaran & Sridharan advised the Indian government on all aspects of the matter. The team was led by partner Atul Sharma and Adarsh Ramanujan in the firm's Geneva office, and principal partners R Parthasarathy and S Seetharaman, along with Atul Gupta, Sagnik Sinha and Bhargav Mansatta. The Indian government was represented by Tapan Mazumdar, director of the Trade Policy Division; and the former and current first secretary (legal) of India's permanent mission to the WTO in Geneva, Anant Swarup and MS Srikar respectively.

The US was represented by the Office of the US Trade Representative, the Office of General Counsel, the Office of Enforcement and Monitoring, and its Geneva mission. ■

The India diaries

India Business Law Journal **indulges in a little festive fun and asks 15 foreign lawyers to reveal what they love and and don't love about India and to recount their most memorable experiences in the country**

By Vandana Chatlani

India's legal market may not yet be open to foreign lawyers but many with practices focused on the country are no stranger to its charms, culture and chaos. While striking deals and resolving disputes in India may be their primary objectives, many have found time to enjoy the country's culinary delicacies, revisit their roots, forge new friendships and take roads less travelled. We share some of their experiences.

Joseph Tirado, partner, Winston & Strawn

Favourite places: I have spent a lot of time over the years in both New Delhi and Mumbai. Both are equally captivating cities. Delhi feels every bit the elegant political capital city, while Mumbai has the buzz of being India's and one of the world's main commercial hubs.

Must-do's: Masala chai and kulfi ice-cream. I can't get enough of them! Also, The Imperial Hotel in New Delhi is without doubt one of the best hotels in the world and a sea of tranquillity in a hot and hectic city.

On your to-do list: Lots! But Kerala and the Himalayas are high on the wish list.

Pet peeves: Unnecessary and slow bureaucracy. The horrendous carpet at New Delhi international airport.

A favourite anecdote: Having a whole glass of orange juice accidently (I think!) thrown over me at a first early morning breakfast meeting with a very grumpy well known Indian lawyer. Fortunately, we could all see the funny side and the rest of the meeting went well. It certainly broke the ice!

Most memorable experience: There have been many. The charm, warmth and generosity of India and its people never fail to impress. For example, at the end of an intense week of negotiations and meetings a client invited me to his home at the weekend for breakfast to meet his family and then spent the entire day with me acting as a personal tour guide. It was a wonderful way to say thank you for having worked so hard together and to show me the things of which he was most proud.

> [One of my pet peeves is] the horrendous carpet at New Delhi international airport
> Joseph Tirado
> Partner
> Winston & Strawn

Roy Montague-Jones, co-head, India group, Reed Smith

Favourite places: My favourite city has to be Mumbai for all its energy and full-on, can do attitude. In total contrast, I love the more laid back, easy vibe of Cochin and the calm of rural Kerala.

Must-do's: I love a visit to the Sea Lounge at the Taj in Colaba and the black pepper prawns at Trishna. The Sassy Spoon in south Mumbai is also a treat. A peg of Amrut whisky also goes down well!

On your to-do list: Among the many things I still want to do are visit Srinagar and Ladakh. Also, in 15 years of coming to India, I have still not seen the Taj Mahal, so a trip to Agra is definitely on the cards.

A favourite anecdote: Not an anecdote, but something that amuses me – the sign on the revolving doors into the entrance to the tower lobby at the Taj Palace in Colaba, which indicates that playing football inside the revolving doors is not allowed!

Roy Montague-Jones, Gautam Bhattacharyya and Paul Dillon play Holi

Alasdair Steele, partner, Nabarro

Favourite places: Mumbai; there's nowhere quite like it for the buzz, the busy-ness and it's always a happy place. Hyderabad; rolling hills and relaxed after Mumbai. Then Delhi, a big city but with open spaces and parks.

Favourite things to do: Enjoying the range of properly cooked Indian food and wandering round the gardens at Humayun's Tomb in Delhi.

Must-do's: A visit to the AER bar at the Four Seasons and dinner at Trishna in Mumbai. Biryani in Hyderabad.

Pet peeves: Bureaucracy, bureaucracy, bureaucracy.

Changes you'd introduce? In a perfect (and non-business) world, free-flowing traffic and efficient bureaucracy. Everything else makes India what it is!

A favourite anecdote: I am still struggling to explain (as was my driver on the day), the "toll hut" which

Humayun's Tomb

suddenly appeared on a road out of Gurgaon back to Delhi where a chit was issued at the toll-booth (in return for payment) only to be "collected" again by a very insistent man sitting on a chair in the middle of the road 20 metres further on.

Asheesh Goel, managing partner, Ropes & Gray (Chicago)

Favourite places: I love Punjab because that is where my family lives. Patiala, where I was born, is a fun and interesting place. Most of my family is now in Chandigarh, which is fascinating and has a very interesting business climate.

Favourite things to do: I am always trying to find the perfect street food. I love Mumbai street food, but my all-time favourite is gol gappas from Patiala.

Must-do's: I absolutely love Indian hospitality. The Oberoi in Shimla is one of my favourite places to vacation. I also love Indian classical music and street theatre so I try to find that whenever I can. One of my best memories as a kid was seeing a street performance of the Ramayana in Mohali under tents with monsoon rains pouring down around us.

Delicious street food

On your to-do list: I would love to see Kerala. I would also love to make it to Kanyakumari.

The best curry? My mom's! North Indian curry with pakoras simply can't be beat.

Pet peeves: The air pollution is tough. I also think that the pace of India has dramatically changed in the last 10 years – it's hard to find time to catch up with old friends who are much busier than I am.

Three changes you'd bring about: (1) Improve physical infrastructure through investments in roads and renewable energy; (2) preserve cultural heritage; (3) continue to invest in education.

Most memorable experience: Being six years old and touring my home town with my 85-year-old grandfather. Hearing and seeing India from his perspective will be with me forever and I hope to impart that to my children.

> I am always trying to find the perfect street food … my all-time favourite is gol gappas from Patiala
>
> Asheesh Goel
> Managing Partner
> Ropes & Gray (Chicago)

Jamie Benson, head, India practice, Duane Morris & Selvam

Favourite place: Delhi. The traffic is a lot better than in Mumbai and there is a lot more history to the city.

Favourite thing to do: I really enjoy playing in the bankers versus lawyers charity cricket match I organize in Mumbai each year.

Must-do's: The Imperial Hotel in Delhi – it is a beautiful oasis of style and fantastic food. Other favourites are the Sofitel in Bandra Kurla Complex, AER at the Four Seasons hotel and Dome at the InterContinental – all in Mumbai.

The best curry? Jayran at the Sofitel in Bandra Kurla Complex, Mumbai.

Pet peeves: The traffic. The other day it took me 30 minutes by car to get from the Indiabulls Finance Centre to One Indiabulls, which is about 300 metres away!

A favourite anecdote: I was on a flight from Mumbai to Delhi to go to the kick-off meeting for PVR Cinemas' IPO in 2005. I started chatting with the passenger sitting next to me and it turned out he was the CFO of PVR Cinemas and also on the way to the kick-off meeting!

Most memorable experience: My most memorable experience in India is also my worst one. I was caught in the Mumbai terrorist attacks in 2008 and was holed up in the Trident Hotel with four other guys for 38 hours before the army came to the room and told us it was safe to leave. It was a frightening experience but it did not put me off going back to India or staying at the Trident.

A lawyers v bankers cricket match

Rolling green in Kerala

> [A memorable experience was] swimming backwards into [Bollywood actor] Akshay Kumar at the pool in the JW Marriott and him saying sorry to me!
>
> Kamal Shah
> Head of Africa and India Groups
> Stephenson Harwood

Kamal Shah, head, Africa and India groups, Stephenson Harwood

Favourite places: Mumbai for its amazing vibe, Marine Drive, great restaurants and even better bars; Varanasi for its surreal and peaceful atmosphere; Kerala for lush green rolling land and superb backwaters; Munnar for amazing tea countryside; and Nainital, a magical hill station.

Favourite things to do: Eating pani puri at Elco Market in Bandra, drinks at Dome at the InterContinental Marine Drive, visiting Chor Bazaar in Mumbai for trinkets and old posters, an early morning walk along Marine Drive, quick sightseeing in between meetings and sneaking in a Hindi film when time permits.

Must-do's: Vaishala Restaurant in Ahmedabad is my favourite Gujarati thali place and Indian Accent restaurant in Delhi is a must-do as it's the Fat Duck of India.

On your to-do list: A night visit of the Taj Mahal and a Palace on Wheels train journey.

The best curry? Vaishala in Ahmedabad where they serve it on banana leaves and you eat sitting on the floor.

Three changes you'd bring about: Ban the class system, more poverty reduction, reduce delay in the courts.

Most memorable experience: Swimming backwards into [Bollywood actor] Akshay Kumar at the pool in the JW Marriott and him saying sorry to me! Paying a very frail looking rickshaw driver in Ahmedabad an extra ₹50, and him giving it to a beggar nearby instead.

Gautam Bhattacharyya, co-head, India group, Reed Smith

Favourite places: Calcutta and Siliguri – the wonderful rivers of Bengal run deep in my veins, and because of all my family and friends there; Mumbai, an amazing, vibrant, turbo-charged, powerhouse, super jumbo of a city; Udaipur – staying at the Lake Palace is a delight and delectation.

Favourite things to do: Face-to-face time and building relationships with our clients; seeing family when time permits; browsing the many wonderful bookshops – there are so many hidden gems; visiting the CSR [corporate social responsibility] initiatives we are involved in.

Must-do's: Trishna restaurant – an iconic jewel of a Mumbai eatery that always puts a smile on my face; Bukhara and Peshawri – indulgent and mouth watering food and I always wear the aprons even though not necessary; stocking up on things at Fab India and Good Earth for my family, our home and for friends; Rhythm House – an absolute institution, but much to my shock and horror it's closing in February 2016; drinking Indian wine, which I think is so underrated; eating Bengali sweets and Bengali sweet yoghurt.

On your to-do list: I would love to play cricket at Eden Gardens. How about a foreign lawyers versus Indian lawyers match for charity? I'd like to visit Ladakh and Leh, Dharamshala and Nagaland. And as I used to DJ in my long-gone student days, how about DJ'ing at a Goa beach party?

Pet peeves: The very liberal use of horns on the roads. Sometimes "Horn is not OK please".

[At the wedding of someone close to me during a Bollywood-style sangeet, I] managed to throw a bouquet of flowers into Narendra Modi's lap!

Gautam Bhattacharyya
Co-Head, India Group
Reed Smith

Three changes you'd bring about: Better living conditions for many and less entrenched inequality; a wider and concerted commitment to CSR and pro bono work by the legal community; the restoration of so many lovely old buildings.

Most memorable experience: Two weddings in Jaipur and Goa of individuals very dear to me and the Bollywood-style sangeet performances that two of my closest lawyer friends and I inflicted upon the unsuspecting guests. At one of them, I also managed to throw a bouquet of flowers into Narendra Modi's lap! I'm just grateful that we were not escorted off the premises!

Gautam Bhattacharyya, Alison Montague-Jones and Karthik Mahalingam at a wedding celebration

Rajiv Gupta, partner, Latham & Watkins

Favourite places: I grew up in Delhi and it remains my most favourite city in India. I also love Kerala – beautiful, relaxing with amazing beaches and great food.

Favourite things to do: Food – my most favourite pastime in India! Also, visiting the local art scene, crafts, and historical sites are fascinating.

Must-do's: Bukhara in Delhi is a must! Indian art galleries and bookstores are also always very interesting to visit.

The best curry: Kerala has the best curries.

Pet peeves: Long queues at airports, traffic delays and a lack of good mobile networks.

A favourite anecdote: I was recently invited to speak at the Tata Annual Global Meet 2015 in Goa. Not only was it a great experience, learning about how India's premier organization works so well as a unit, but I was also able to sample the great Goan beaches, curries and amazing Portuguese churches that have been declared a world heritage site.

Goa

Ryo Kotoura, partner, Anderson Mori & Tomotsune

Favourite things to do: Having an ayurvedic massage at a hotel.

Must-do's: I like the Trident hotel at Bandra Kurla Complex in Mumbai and Trishna restaurant.

On your to-do list: I'd love to visit Jaipur.

Pet peeves: The air pollution and traffic jams.

A favourite anecdote: When a taxi driver once asked, "Sir, turn left?", I replied "right", meaning "correct". Of course, he misunderstood me and turned right.

Most memorable experience: A trip to the Ellora and Ajanta Caves. They were fantastic.

Kolkata's streets

Deepa Deb-Rattray, head, India group, Berwin Leighton Paisner

Favourite places: Kolkata, probably because it is where my origins are … it is rich in culture (Bengal gave us Tagore), theatre, poetry and history.

Favourite things to do: Enjoying a traditional Indian breakfast. Nothing can beat an Indian masala omelette accompanied by a paratha and authentic spicy chai. You cannot beat the quality of good Indian food combined with traditional Indian hospitality. I tend to steer clear of upmarket places, my favourites are the unexpected finds.

Must do's: Touring Rajasthan is a favourite. The abundance of palaces that have been converted into hotels means one can truly experience living like a queen. The beautiful Pink City of Jaipur, the abundance of temples and natural reserves … you can never get bored.

The best curry: At my mama's house in Kolkata made by my aunty!

A favourite anecdote: I remember our annual family trips to India when I was growing up. I recall dreading them because of having to be surrounded by endless cousins, aunts and uncles. Our English manners and accents when speaking either Hindi or Bengali were always dead giveaways when trying to bargain. I also remember feeling an acute sense of sadness whenever we returned to England, as if a part of me had been left behind. I missed waking up to the morning bhajans [devotional songs], the sounds of temple bells and cows mooing.

Most memorable experience: Staying at the Lake Palace in Udaipur. Truly special and memorable, especially since one of my favourite Bond films, *Octopussy*, was filmed there.

> Kolkata [is my favourite place] … it is rich in culture (Bengal gave us Tagore), theatre, poetry and history
>
> Deepa Deb-Rattray
> Head, India Group
> Berwin Leighton Paisner

Pallavi Mehta Wahi, administrative partner, K&L Gates (Seattle)

Favourite place: It has to be Delhi University's campus. I grew up on the St Stephen's grounds eating samosas and mince and drinking nimbu paani [lemon water] with my classmates who are now spread all over the world doing grand and lofty things.

Must-do's: Eat butter gravy, visit Dilli Haat, see new cultural changes, and drive around India Gate.

On your to-do list: Visit the backwaters of Kerala.

The best curry: Moti Mahal in Defence Colony, Delhi.

Three changes you'd bring about: No more queues; less traffic; and more festivals to celebrate.

Most memorable experience: Growing up in India meant a series of celebrations all year round. The celebration of lights and life that is Diwali remains a fond memory as it means friends and family gathering together to usher in a new year with lights and laughter. That sense of community and spirit of commonality you feel the day before and after Diwali remain some of my favourite memories.

> [My favourite place] has to be Delhi University's campus. I grew up on the St Stephen's grounds eating samosas and mince and drinking nimbu paani
> Pallavi Mehta Wahi
> Administrative Partner
> K&L Gates (Seattle)

Nilufer von Bismarck, partner, Slaughter and May

Favourite places: Mumbai – for its pace of life, vibrance and spirit.

Favourite things to do: In Mumbai, a walk around Chowpatty or an evening drive around Marine Drive; in Delhi a visit to the Nizamuddin Dargah [shrine] for Thursday and Friday qawwalis [devotional music].

Must do's: In Delhi, the Olive Bar & Kitchen has an unforgettable setting. The food at Bukhara is legendary, especially dal Bukhara! Sagar has great south Indian food, and SodaBottleOpenerWala is great for something more casual. For shopping, Dilli Haat is fantastic, but Janpath and the Cottage Industries Emporium are great places to browse and buy, as are the various state emporia on Baba Kharak Singh Marg. In Mumbai, Tote on the Turf and the adjoining Neel restaurant have an amazing setting with design that echoes its setting in a mangrove canopy, with fantastic food and drink to match. Gadda da Vida has a great setting, and of course AER has an amazing view, although I am told that the reopened Asilo is even better. Trishna restaurant in Kala Ghoda is a must-visit, as are Masala Kraft and Shamiana at the Taj. Any Gujarati thali place should be on this list. For shopping, walking around Colaba can't be beaten.

Mumbai's Chowpatty Beach

On your to-do list: Sailing in the backwaters of Kerala and taking the Nilgiri Mountain Railway to Udhagamandalam.

The best curry: Karim's in Delhi, of course!

Most memorable experience: Travelling in Mumbai and Delhi with 11 partners from across our European "best friend" firms – from France, the Netherlands, Spain, Italy and Germany.

> In Delhi, [I enjoy visiting] the Nizamuddin Dargah [shrine] for Thursday and Friday qawwalis
> Nilufer von Bismarck
> Partner
> Slaughter and May

A view from Jodhpur

Chris Parsons, chair, India practice, Herbert Smith Freehills

Favourite places: India is full of fascinating cities, but I have a particular soft spot for Jodhpur. My idea of heaven is sitting in the outdoor restaurant at the Raas hotel, nestled under the fort, and preparing for a lecture series we are running at the National Law School in Jodhpur – which is in fact what I will be doing next March with professor Timothy Endicott from Oxford Law School.

Favourite things to do: I really enjoy running and whenever I get the chance between meetings I go for a run around streets or local parks. I love the sun, so the hotter the better.

> My idea of heaven is sitting in the outdoor restaurant at the Raas hotel [in Jodhpur] nestled under the fort, and preparing for a lecture series
>
> Chris Parsons
> Chair, India Practice
> Herbert Smith Freehills

Must-do's: The hotels in India are some of the best in the world, so I try and vary where I stay to experience the variety on offer. That said, I tend to return to the Imperial in Delhi time and time again – I can unpack with my eyes closed!

On your to-do list: While I have travelled around India extensively, there are endless places I still want to visit including the stunning north, which I have heard so much about. My aim is to do some road trips by Royal Enfield.

Most memorable experience: I could fill your journal with my experiences in India but it would be hard to beat my 30 marathon walks in 30 days down the west coast of India from Mumbai to Bangalore. I did this to mark 30 years at Herbert Smith Freehills and to raise money for widows and their children in India via the Loomba Foundation.

Chris Parsons walks from Mumbai to Bangalore

The Taj Mahal Palace Hotel

Shreya Lal Damodaran, senior attorney, Cleary Gottlieb Steen & Hamilton

Favourite places: Bangalore is my favourite city of all time, being the place that I grew up in. Bombay is another city that is a favourite. It has a very positive vibe to it – across office workers, taxi drivers, shop assistants and others – and I experience that each time I visit. All of them reflect a "can do" attitude, which is fantastic. It is also such a melting pot of different communities, and has an ability to welcome migrants with dreams of a better life perhaps like no other city in India.

Must-do's: I miss "Indian Chinese" food. I always get my fill of it when I'm in India (including at the Golden Dragon in the Taj Mahal, Colaba). I also make it a point to visit some small but legendary authentic dosa joints in Bangalore (such as MTR and Janardhan). I've even tried (in vain) to convince them to open branches in London!

> [Mumbai is] such a melting pot of different communities, and has an ability to welcome migrants with dreams of a better life perhaps like no other city in India
>
> Shreya Lal Damodaran
> Senior Attorney
> Cleary Gottlieb Steen & Hamilton

On your to-do list: I would love to head to the Sahyadris to trek in the hills as I used to do when I lived in Mumbai. I would also like to travel a bit further, maybe Himachal or eastern India.

Pet peeves: In Bangalore particularly, the reduction in tree cover is startling. The boom in IT businesses and the related strain on Bangalore's infrastructure means that the "Silicon Valley" tag now seems more apt than "Garden City".

Erik Richer La Flèche with his wife Carolina in Ladakh

Erik Richer La Flèche, partner, Stikeman Elliott

Favourite places: New Delhi, Rajasthan, Uttar Pradesh, Kerala, Puducherry, Himachal Pradesh and Ladakh.

Favourite things to do: Walk in small towns and drive through the countryside (especially at or near harvest time).

On your to-do list: Sail around India.

A favourite anecdote: Mid-nineties: I fly from Montreal to the south of India via Frankfurt. I arrive in the morning and proceed to meet the client for the first time. I am led into a room with a round table and five men. A fan is slowly rotating above. The men are the top four executives and an IAS [Indian Administrative Service] officer immaculately dressed in white. After the usual entreaties, we sit down and I open by saying that I realize that everyone in the room is probably brighter than I am. Everyone acquiesces. I continue by stating that they are probably better educated than I am. Again they acquiesce. Seeing that conversation would be difficult, I then ask why they would want someone from Canada to fly in to assist. After a very long pause, the IAS officer simply says, "because we do not trust each other". Little else needed to be said. My instructions were clear!

> I have had many [memorable experiences in India] but the most recent was an eight-day trek in Ladakh's beautiful Markha Valley
>
> Erik Richer La Flèche
> Partner
> Stikeman Elliott

Most memorable experience: I have had many but the most recent was an eight-day trek in Ladakh's beautiful Markha Valley.

Court denies assignee bank benefit of SARFAESI Act

By Babu Sivaprakasam, Deep Roy and Megha Agarwal, Economic Laws Practice

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The assignment of debt by banks and other financial institutions has become quite common. Bombay High Court recently adjudicated upon an interesting aspect of law in relation to one such assignment in the case of *Kotak Mahindra Bank Ltd v Trupti Sanjay Mehta and Others*.

Facts of the case

In this case, a non-banking financial company (NBFC) had sanctioned a loan to an entity that defaulted in meeting its payment obligations in relation to the loan. Upon the default, the NBFC invoked the arbitration clause in the financing document and the arbitral tribunal ordered the borrower to repay the loan to the NBFC in accordance with the terms stipulated. The NBFC subsequently assigned the debt to a bank via a deed of assignment. The assignee invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), to recover the outstanding amount and took possession of the flat which was provided as security for the loan.

The borrower filed an application before the Debt Recovery Tribunal, claiming that since the original lender (i.e. the NBFC) was not entitled to invoke the provisions of the SARFAESI Act, the assignee bank was also not entitled to take action under the act. The tribunal allowed the application and directed the bank to hand over possession of the flat. The bank filed an application before the Debt Recovery Appellate Tribunal, which was dismissed. Accordingly, the bank filed a writ petition before Bombay High Court.

Court's findings

While considering the issue, the court delved deeply into the circumstances in which the SARFAESI Act was passed and the problem that it sought to remedy. The court observed that the statement of objects and reasons of the SARFAESI Act clearly disclose that the mechanism under the act is designed only for the benefit of banks, and financial institutions (as notified under the act), to enable faster recovery of non-performing assets.

Interpreting the definitions of "debt" and "borrower" under the SARFAESI Act, the court observed that the definition of "borrower" only includes debts assigned from banks to financial institutions or vice versa and specifically excludes entities such as NBFCs. It was contended before the court that the term "debt" would mean any debt assigned to a bank or financial institution, regardless of the nature of the assignor.

The court held that the term "assigned" in the definition of "debt" would be restricted to assignments of debt between entities to which the SARFAESI Act applies. Further, the court observed that only acquisitions by securitization or reconstruction companies of the rights or interest of a bank or financial institution are covered under the term "borrower". In light of the scheme and provisions of the SARFAESI Act considered by the court, the court took the view that a debt assigned by an NBFC to a bank or financial institution is not covered within the definition of the term "borrower". The court held that the assignee bank could not enforce such a debt under section 13 of the SARFAESI Act.

Analysis

The Bombay High Court division bench has interpreted the definition of the term "borrower" strictly in this judgment. Not only are NBFCs denied the benefit of the SARFAESI Act, even banks purchasing loan accounts from NBFCs, by virtue of this judgment, cannot enforce under the SARFAESI Act. It's a rare scenario of a judgment in favour of the borrower, which has not only defaulted in meeting its payment obligations under the loan but has also not adhered to the arbitral order passed against it.

The impact of the judgment may be short-lived if NBFCs are permitted access to the provisions of the SARFAESI Act, as was proposed by the finance minister in his budget speech for this financial year.

In the event that NBFCs with a certain asset size are notified as "financial institutions" under the SARFAESI Act by the government, as was proposed in the speech, the judgment may not pose a challenge. However, any other way of making the SARFAESI Act available to NBFCs would have to be carefully worded, keeping in mind the scenario of this case.

The intent of the SARFAESI Act was to aid banks and financial institutions in recovery of loans, thereby reducing non-performing assets. In order to achieve the desired intent, it would be ideal if banks which have been assigned a debt from an NBFC are permitted to resort to action under the SARFAESI Act.

In the interim, banks, financial institutions and NBFCs will have to keep this decision of Bombay High Court in mind while considering transactions regarding assignment of debt.

Babu Sivaprakasam is a partner, Deep Roy is an associate partner and Megha Agarwal is an associate at Economic Laws Practice. This article is intended for informational purposes and does not constitute a legal opinion or advice.

Personal data transfer opportunities in Canada

By Molly Reynolds, Torys LLP

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European Union data protection laws prohibit the transfer of personal information to non-member countries unless they provide adequate protection for that information. Canada is deemed to be a country that provides adequate privacy protection, based on its Personal Information Protection and Electronic Documents Act (PIPEDA).

The US does not have federal legislation comparable to PIPEDA or EU laws, so the US government and the European Commission negotiated a safe-harbour framework of principles to permit US-based organizations subject to Federal Trade Commission or Department of Transportation jurisdiction to self-certify that they provided such protection for information transferred from the EU. In 2000, the European Commission declared that organizations that adhered to the safe-harbour principles adequately protected personal information and the framework has since been widely used to facilitate transfers from EU countries to the US.

In early October 2015, the EU Court of Justice struck down the European Commission's decision. The court found that the decision did not find that the US as a country ensures an adequate level of protection for personal information and that the safe-harbour principles apply only to certain organizations that choose to adhere to them. Governmental authorities could override the protections by operation of national security laws, without sufficient oversight to ensure the protection of the privacy rights of EU citizens under EU laws.

The safe-harbour principles largely mirror the principles set out in the National Standard of Canada Model Code for the Protection of Personal Information, which is incorporated into schedule 1 of PIPEDA. Those principles include requirements to provide individuals with notice of the purpose of collecting personal information and the option to decline collection and disclosure of information, and obligations to safeguard the information, to ensure information is only disclosed to third parties with adequate safeguards in place, and to allow individuals to access and correct their information. However, Canada differs from the US in that PIPEDA is a law of general application to all organizations engaged in commercial activity and the act contains narrow, precise exceptions for disclosure of personal information without individuals' consent to governmental agencies or other third parties.

Multinational corporations with operations in Canada may find in-house solutions to the uncertainty created by the safe-harbour ruling by using their Canadian locations and employees for the use, processing and storage of personal information of EU residents. Similarly, service providers based in Canada may capitalize on the growth opportunities that come with the ruling by offering data storage, processing, e-discovery services for litigation, and marketing solutions from within Canada.

Although the safe-harbour ruling has increased the risk of regulatory sanction in connection with transfers of data from the EU to the US, data protection authorities in EU member states will need time to assess the scope of the ruling, determine a regulatory response appropriate to their laws, authority and regulatory resources, and prioritize their enforcement obligations. Privacy law enforcement continues to be largely complaint-driven, requiring investigations of the specific facts surrounding the impugned transfer and determination of the subject parties' compliance. In other words, the court's decision has removed the safe-harbour path to defensible transfers, but has not constructed a firewall in its place.

As much as data protection authorities will need to assess interim and permanent approaches to enforcement, US-based organizations should examine their existing data transfer arrangements and prioritize a response plan for those most likely to be affected by the safe-harbour ruling. Some initial questions to ask include: What types of personal information are being transferred? How sensitive is the information? From whom is the information being collected – customers, employees, suppliers – and what is the likelihood of complaints from those constituencies? For what purpose is the information being transferred – marketing, sharing with partners, customer service, processing/storage? Does the information need to be transferred to the US? Are there alternative solutions that allow the use of personal information within the country of origin or transfer to a third country deemed adequate such as Canada? Do the company's third-party service providers have alternative locations or interim solutions ready to deploy? Can impending transfers be delayed until an interim solution is developed without disrupting the business objective?

As businesses, data protection authorities and practitioners further digest the ruling and consequences for industries under Federal Trade Commission and Department of Transportation jurisdiction, interim measures will be crafted, tried and revisited. And while it may take time, a longer term solution is already on the horizon: the US Department of Commerce and the European Commission have indicated their willingness to negotiate a new framework that is compliant with EU data protection and privacy laws.

Torys LLP is an international business law firm that works with clients who expect the best advice and service. Molly Reynolds is an associate at the firm with expertise in privacy issues..

RBI held to be subject to Right to Information Act

By Vivek Vashi and Krishnendu Sayta, Bharucha & Partners

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The Supreme Court recently decided several transferred matters on the issue of whether the Reserve Bank of India (RBI) can deny information sought by third parties under the guise that divulging of information would violate its fiduciary relationship with banks or be prejudicial to the "economic interest" of the country. The RBI had invoked the exemptions under section 8(1)(a), (d) and (e) of the Right to Information Act, 2005 (RTI Act), to refuse disclosure of even basic information such as details of wilful defaulters.

In *RBI v Jayantilal N Mistry*, the RBI argued that the RTI Act (being a general act) could not supersede the special statute under which the relevant banks had shared information. Moreover, the RBI should be permitted to refuse disclosure of information which it believed would prejudice the economic interests of the state.

The Supreme Court observed that section 22 of the RTI Act clearly stated that the RTI Act superseded all acts, including the Official Secrets Act. In any event, since the RTI Act was a later statute for a specific purpose, it would override earlier general statutes.

The court held that the test under section 8 of the RTI Act was whether giving information to the public would be detrimental to the economic interests of the country. Applying the test, the court found that information in relation to currency, foreign investment and proposed expenditure may not be released but information in relation to errant bankers and wilful defaulters ought to be made available.

Upholding the RBI's statutory duty to act in consonance with the larger public interest, the court held that RBI was duty bound to disclose information sought by the applicants. The court also came down heavily on the RBI for trying to cover up disreputable business practices of the banks, and stated that it was the RBI's duty to take stringent action against such banks. The court expressed surprise that despite being a watchdog, the RBI was not more dedicated to disclosing information to the general public under the RTI Act. However, in the same breath, the court also recognized that the RBI cannot be required to account for its every act.

Retired central information commissioners lauded the judgment on the basis that if it is effectively implemented it may offer relief to the Indian economy, which is presently bleeding due to the large burden of non-performing assets.

States can permit liquor service in 5-star hotels only

In *Kerala Bar Hotels Association & Anr v State of Kerala & Ors*, the Supreme Court upheld the controversial "Liquor-Free Kerala" policy, which sought to restrict the serving of liquor to 5-star hotels in the state of Kerala. The ban was upheld on the ground that it is aimed at curtailing public consumption of alcohol, so as to protect public health and nutrition. The court also noted that Kerala was facing an acute social problem because of widespread and excessive consumption of alcohol in the state.

The hotel owners' first argument was that in cancelling their liquor licences, the state violated their rights under article 19 of the constitution.

The court, while rejecting this argument, held that the state could use every weapon in its arsenal to regulate trade where, in the words of a 1978 judgment, the profits came from "tempting the customer to take reeling roiling trips into the realm of the jocose, bellicose, lachrymose and comatose". Moreover, the court noted that the consumption of tobacco products as well as liquor is undeniably deleterious to human health. "Vulnerable persons, either because of age or proclivity towards intoxication or as a feature of peer pressure, more often than not, succumb to this temptation." The court also observed that the social stigma around alcohol is still prevalent in families.

The second argument presented by the hotel owners was that the distinction between 5-star and 3-star hotels was unreasonable and therefore in violation of article 14 of the constitution.

Upholding the exemption granted to 5-star hotels, the court noted that there was a reasonable nexus as the tariff of alcohol in 5-star hotels is usually prohibitively high, which acts as a deterrent to individuals going on a binge. Further, the consumption in these hotels was only 0.8% of the state's consumption. The court also clarified that, were it not for tourism, it would have struck down this exemption as well. Accordingly, the court concluded that the ban did not violate article 14 of the constitution.

Observing that courts must exercise restraint and avoid venturing into an evaluation of state policy, the court also noted that if a policy proves to be unwise, oppressive or mindless, the electorate has been quick to make the government aware of its folly.

This judgment has reignited historic arguments over the effectiveness of a prohibition and the consequent loss of revenue. It has also set a precedent legitimizing the ban on the sale of liquor for states such as Bihar.

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Alternative fund rules and the push to 'Make in India'

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The government's flagship "Make in India" project is aimed at reviving economic growth and making India a manufacturing hub, with the cascading effect of job creation at all levels across urban and rural India. A key driver of the Make in India initiative is increased investment activity in small and medium enterprises (SMEs) and infrastructure. In addition to increased spending by banks and financial institutions, wider participation is required from all sources, particularly private equity investors.

In India private equity capital has long been recognized as an alternative asset class by the government, yet accessing foreign capital by domestic investment funds has not been seamless owing to restrictions under the extant Foreign Direct Investment Policy (FDI Policy) read with the Foreign Exchange and Management Act, 1999 (FEMA), and the regulations issued under FEMA.

Acknowledging the need to remove the impediments, the finance minister during his 2015-16 budget speech proposed allowing foreign investment in domestic investment funds, which are registered with the Securities and Exchange Board of India (SEBI) as alternative investment funds (AIFs) under the SEBI (Alternative Investment Funds) Regulations, 2012 (AIF Regulations). On 16 November 2015, the government notified amendments to FEMA permitting foreign investment in AIFs under the automatic route.

The AIF Regulations, which repealed and replaced the SEBI (Venture Capital Funds) Regulations, 1996, seek to regulate all types of privately pooled domestic investment vehicles, which hitherto were unregulated. AIFs can be registered under category I (AIFs that have a positive spillover effect on the economy such as venture capital, social venture, SMEs and infrastructure funds), category II (private equity and debt funds) or category III (hedge funds). The AIF Regulations permit AIFs to be set up as a company, trust or limited liability partnership (LLP). AIFs often are set up as trusts due to tax and operational reasons.

While the AIF Regulations permit AIFs to collect funds from domestic as well as foreign investors, the FDI Policy took no specific cognizance of AIFs. The FDI Policy thus became incongruous when it came to the ability of AIFs to accept foreign investment and thus the Foreign Investment Promotion Board was approving proposals relating to foreign investment in AIFs on a case-to-case basis. The government has removed this roadblock by providing for a comprehensive framework pertaining to investment and dealing in units or partnership interest of AIFs by foreign investors.

The amendment defines "unit", as beneficial interest in an "investment vehicle", including shares or partnership interest. "Investment vehicle" means AIFs, real estate investment trusts (REITs) and infrastructure investment trusts (InvIts) registered with SEBI, thus paving the way for foreign investment in the units of AIFs, REITs and InvIts.

The amendment, apart from permitting foreign investors to acquire, purchase, hold, sell or transfer the units of an investment vehicle under the automatic route, also permits foreign investors to pledge the units to secure credit facilities. Recognizing the uniqueness of the asset class, the lock-in restrictions applicable to securities of an Indian company containing optionality clause do not apply to units held by foreign investors.

The amendment's highlight is that it settles that downstream investment by AIFs will be regarded as foreign investment if neither the sponsor nor the investment manager of the AIF is Indian "owned and controlled". The amendment further clarifies that the extent of foreign investment in the corpus of the AIF will not be considered when determining foreign investment in the investee companies, thus settling the debate regarding foreign investors' exercise of fiduciary decision making as an influencing factor.

"Ownership and control" of the sponsor or investment manager organized as a company will be determined as provided in the FDI Policy. SEBI will determine the classification in respect of sponsors or investment managers organized in forms other than companies. Further, LLPs cannot act as sponsor or investment manager of AIFs, as ownership and control in LLPs cannot be determined under the extant FDI Policy.

As regards foreign investment in AIFs organized as LLPs, recently the government issued a press note removing the requirement of prior approval. Further, LLPs having FDI have now been permitted to invest in another company or LLP in sectors where foreign investment up to 100% is permitted under automatic route and there are no FDI-linked performance conditions.

The amendment has brought cheer to the foreign investor community, particularly the non-resident Indian community for which AIFs have been opened as a new asset class for investment. At the same time, the amendment is likely to reignite the level playing field demand of category III AIFs, which unlike category I and category II AIFs do not offer pass through tax benefits to investors.

The amendment is consistent with the government's theme of "minimum government, maximum governance" and will help "Make in India" become a reality.

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Tweet twitter tweeted: Can copyright protect tweets?

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We live in a world where people find it imperative to share their thoughts, even if inane. The success of social networking websites such as Twitter is a clear testament to this need. However with the arrival of Twitter – one of the largest social networking websites, with some 320 million users – new intellectual property issues were bound to rise.

Twitter boasts of extreme intolerance towards copyright infringement; the terms of service clearly state that ownership of the content vests with the respective user and in case of copyright infringement, the content suspected to be infringing will be removed. Twitter also has the authority to terminate the account of a user who is held to be a repeated infringer. Though Twitter allows users to "retweet", i.e. to repost a tweet which belongs to another user, while crediting the tweet to the latter, the question that arises is whether a person can copy the tweets of others without crediting them.

Although the initiative shown by Twitter to protect its users' IP rights is commendable, the question of whether tweets are capable of being protected by copyright law has plagued the world since the website came into existence. This discussion took on new life when Mark Cuban, the owner of Dallas Mavericks, tweeted about an NBA game and his tweet was picked up and republished by ESPN without his permission.

Recently, Twitter was in the news for deleting jokes on the ground of copyright infringement. Olga Lexell, a freelance writer based in Los Angeles, found one of her tweeted jokes to have been posted by others without due credit being given to her. She argued that writing jokes is her bread and butter.

Twitter deleted the infringing tweets after she filed a takedown request.

On the Indian front, Vasuki Sunkavalli, Miss India Universe 2011, was accused of copying tweets belonging to writer and journalist Sadanand Dhume. Though the matter was settled amicably, the question of copyrightability of tweets was once again brought to the fore.

The question of whether tweets can be protected by copyright is complex; certain characteristics of tweets may serve as obstacles to such protection.

Since a tweet, exclusive of embedded media, can be only 140 characters, its size is an impediment. Short phrases, titles, etc., are usually not protected under copyright law because most of them fail to reach the level of originality required for copyright protection. They are generally seen as lacking in originality and creativity.

Another factor that may work against tweets getting copyright protection is that the content of most tweets cannot be protected under copyright law, for instance, "Had some yummy pasta" is neither original nor creative and is therefore not copyrightable.

The concept of *scènes à faire* also serves as an impediment. According to this, certain works cannot be given copyright protection since the elements used to describe a scene are necessary and that scene cannot be described but through those elements. It is likely that if a group of people witness an incident and then tweet about it, they will more or less come up with the same description.

Despite the above impediments, most legal experts are of the opinion that a decisive yes or no cannot be given with respect to the question of copyrightability of tweets. The answer varies from tweet to tweet. While most tweets cannot obtain copyright protection, certain tweets may fulfil the requirement of originality and creativity, just as haiku, which are short Japanese poems, may be accorded copyright protection.

The issue of copyrightability of photographs embedded as tweets came up for consideration before a US court in *Agence France Presse v Morel*. The facts of this case date back to the Haiti earthquake of 2010 when Daniel Morel took some photos of the devastation following the earthquake and uploaded the photos on Twitter via his Twitpic account. The photos were then copied by Lisandro Suero without Morel's consent and ended up being distributed by Agence France Presse (AFP) and Getty Images to customers around the world, with the photos credited to Suero.

AFP and Getty Images took the defence that they were allowed to appropriate the photos under Twitter's terms of service. However, the court rejected this defence and held that by appropriating the photos, both AFP and Getty Images had infringed Morel's copyright in the photographs. The court held that with the exception of the licence granted to Twitter and its partners under their terms of service, Twitter users' retain their rights to the content they post, and that Twitter did not give a licence to AFP to sell Morel's photos. Morel was awarded US$1.2 million in statutory damages.

Among future generations, the 21st century will be remembered for many things, a major one being the advent of social media websites.

The issue of tweets being protected under copyright law has not yet come before the Indian judiciary. It will be interesting to see the stance taken by the courts when confronted with this issue in the future.

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'Single window clearance': Reality or a misnomer?

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An important issue that often arises in a restructuring exercise is the choice between a court approved scheme of arrangement and a private contractual slump sale. A scheme of arrangement has to be prepared and filed before the relevant high court, after obtaining approval of the shareholders and creditors, as applicable. A slump sale entails transfer of an undertaking as a going concern, on an "as is where is" basis, for a lump-sum consideration without assigning individual values to the business and assets.

Usually, a court approved scheme of arrangement is assumed to act as a "single window clearance", where all operational licences and approvals and contracts of the transferor company are deemed to be transferred to the transferee company by operation of law. In a contractual slump sale, the parties have to individually approach the licensing authorities and the contracting parties and seek their approval. Court restructuring is typically preferred by a company engaged in a highly regulated sector holding several approvals and licences as it is perceived to have the benefit of a single window clearance.

Indian courts have dealt at length with the position of law in relation to transferability of approvals and licences and contracts pursuant to a court approved scheme of arrangement.

The Supreme Court in *General Radio & Appliances Co Ltd v MA Khader (Deceased)* (1986) held that "a scheme of arrangement cannot be used to bypass other statutes". In this case, the transferor company entered into a rent agreement which was governed by laws which prohibited transfer of the right of the landlord under the lease without the written consent of the landlord. Under the scheme of amalgamation, all assets of the transferor company including the tenancy passed to the transferee company. As the written consent of the landlord was not obtained, the transferee company was held liable to be evicted from the premises.

In *Idea Cellular Limited v Union of India, Department of Telecommunications* (2012), Delhi High Court held that high court approval to a scheme is a single window clearance for the matters covered in the Companies Act. However, that does not mean that if some permission is required under any separate statute or licence, that permission should not be obtained.

In sanctioning a scheme, the high court's jurisdiction is peripheral and supervisory and not appellate. The court's role includes ensuring that statutory provisions have been complied with, relevant material was presented at the meetings for the shareholders/creditors to take an informed decision, and the scheme is fair and not contrary to public policy. The court is not empowered to order the transfer of licences and approvals held by the transferor entity under other laws, or of contracts entered into with third parties.

Upon sanction of a scheme of amalgamation, the corporate identity of the transferor entity ceases to exist and the business licences of the transferor company are deemed to belong to the transferee company. However, the transferee company still has to follow necessary procedures prescribed under applicable laws for transfer of the transferor company's licences so that it can lawfully continue to carry on the business of the transferor company that it has acquired under the scheme.

The position is similar for third party contracts. If, as per the terms of a contract, the transferor company is permitted to transfer the contract pursuant to a scheme, the transferor company may do so without having to seek approval from the counterparty. If the transferor company is required to seek consent of the counterparty for transferring the contract pursuant to a scheme of arrangement, such consent will need to be sought.

In *Re PMP Auto Industries Ltd, Re S S Miranda Ltd, Re Morarjee Goculdas Spinning & Weaving Co Ltd* (1994), Bombay High Court held that the approval of schemes under sections 391 to 395 of the Companies Act, 1956, should be granted in the manner of a single window clearance. When various proposals are envisaged as an integral part of the scheme, the procedures prescribed under the Companies Act need not be separately undertaken. For example, an increase in the authorized share capital of a company or a reduction of share capital can be undertaken as a part of the same scheme of arrangement, without the transferee company having to duplicate steps and effort. Thus, the court approved scheme acts a complete code for all requirements under the Companies Act that need to be complied with.

To summarize, a court approved scheme acts as a single window clearance only in terms of requirements under the Companies Act. For transfer of operational licences and third party contracts, the transferee company has to approach the licensing authorities and contracting parties to seek their consent after the high court sanctions the scheme. The position, therefore, is similar to a contractual slump sale. Nonetheless, practically, a court approved scheme that provides for transfer of licences and contracts carries a persuasive value for seeking approval of government authorities for transfer of the operational licences to the transferee company.

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Intellectual property rights: What startups should know

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Branding, customer data, technology such as software, mobile applications, etc., form an integral part of the intellectual property (IP) portfolio of any start-up company. Protection of IP is crucial for startups in view of the value it brings to the business right from attracting investors and making financing easier to leveraging against competition, generating revenue from licensing, assignment or transfer arrangements, and contributing to the company's branding and marketing strategy. Given the above, startups need to invest and take as many measures as they can to protect their IP.

Perils of infringement

In addition to protecting their IP from third party infringement, startups should be aware of others' IP rights to ensure that someone else's rights will not limit them or prevent them from operating their business. There have been various cases where prominent brand names or logos have been infringed and the courts have passed restraining orders or injunctions in relation to the infringements.

In December 2014, Delhi High Court in *Make My Trip (India) Pvt Ltd v Make My Tours Pvt Ltd* held that the defendant (Make My Tours) had infringed the mark and logo of the plaintiff (Make My Trip) on the grounds that use of the mark and logo by the defendant was likely to cause confusion and deception and was bound to mislead the public to believe that the plaintiff was the source of the defendant's services. Hence the court ordered an injunction to prevent the defendant from using the same mark and logo.

In another case, Tata Sons moved the World Intellectual Property Organization's WIPO Arbitration and Mediation Center demanding the transfer of the domain name "oktatabyebye.com" from the owners of the name on the grounds that "tata" in oktatabyebye was similar to Tata. The court held in favour of Tata Sons and the domain name oktatabyebye.com was transferred in favour of Tata Sons.

Thus, IP infringement not only affects brand value but may result in companies closing shop or having to rebrand themselves. Therefore, depending on the nature of service/product, it is extremely important to seek IP protection.

Danger of theft

Many startups have an in-house research and development team of employees who create works that carry IP rights. Early stage startups outsource branding and marketing work to third party consultants. Thus a lot of sensitive, proprietary, confidential client data, dealer data, etc., are handled by employees and consultants and may be stolen by them.

Another aspect that founders of startups tend to overlook is that when they start their own business, they may unintentionally use the trade secrets of their previous employer and this may invite action from the employer on grounds of violation of confidentiality obligations imposed under their contract with their previous employer. It is therefore important that founders make sure that using any information from prior employers does not amount to illegal use of the prior employer's IP.

Safeguarding one's rights

In light of the above, the first step to secure IP is through registration. Depending on the nature of service/product, startups can register their services and products as: (a) trademarks, to protect word signature, name, device, label, or combination of colors; (b) copyrights, to protect original literary, musical and artistic works and cinematographic films and sound recordings (e.g. website design, graphics); (c) patents, to protect any invention which is novel, non-obvious and has utility (e.g. software development); and (d) designs, to protect original designs created for particular articles to be manufactured by industrial process or means.

Another step in seeking IP protection against theft is executing comprehensive employment agreements and non-disclosure and IP assignment agreements with clauses on non-compete, confidentiality, non-solicitation, IP protection, assignment of inventions/IP, work for hire, etc. Also, when licensing any IP to a third party, a detailed licensing/sub-licensing agreement must be executed.

Issues pertaining to IP protection may sometimes get brushed aside during the early stages of a business as it seems an expensive a proposition for a startup to act on. However, it is important to do a cost/benefit analysis to determine which IP protection is best suited for the business and put in place an IP strategy to obtain and sustain benefits for the business in long run as for most startups IP is the only business asset.

Also, a lot of startups prefer to vest and register their IP rights in their offshore company incorporated in a developed country and license the rights to its wholly owned Indian subsidiary as the IP laws in developed countries are more robust and stringent. Slightly older companies may also consider conducting an IP audit for a systematic review of the IP rights owned or acquired by the company to accurately gauge and assess its IP portfolio.

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Real Estate (Regulation and Development) Bill: Outline

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The Real Estate (Regulation and Development) Bill was introduced by the previous government to protect the interest of consumers, promote fair play in real estate transactions and ensure timely execution of projects. In April 2015, the current government had proposed certain changes that diluted some of the bill's more stringent provisions. Based on the recommendations in a report of a select committee of the Rajya Sabha, further amendments were approved by the cabinet on 9 December for better protection of the rights of consumers as well as speedy and effective dispute resolution. The revised bill will be considered by the parliament. Key features and issues are outlined below.

Scope: The original bill sought to cover only residential projects. An amendment proposed in April 2015 extended the scope to commercial projects as well. Further, the bill covers both new projects and those in which sales are in progress.

Registration and disclosure requirements: Mandatory registration of real estate projects and real estate agents is one of the largest systemic changes that this bill seeks to bring. For registration promoters and real estate agents are required to disclose material information including details of the promoters, project, layout plan, development plan, land status, carpet area, number of apartments booked, status of statutory approvals, pro forma agreements, names and addresses of the real estate agents, contractors, architects, structural engineer, etc. Based on recommendations of the Rajya Sabha select committee, residential projects covering an area of even 500 (down from 1,000) square metres or eight apartments would need to be registered. Further, misrepresentation in advertisements issued by a promoter would entitle the buyer to compensation or refund of all amounts paid along with prescribed interest.

Deposit of amounts realized: Promoters are required to deposit 70% of amounts realized from allottees in a separate bank account to finance construction of the project. The April 2015 amendments sought to reduce this figure to 50% but following stiff resistance, it has reverted to 70%. Given that land cost is a major component of a promoter's investment, promoters may be hamstrung by such a requirement.

Regulatory framework and dispute resolution: The bill proposes the establishment of a real estate regulatory authority (RERA) in each state and union territory for the regulation and development of the real estate sector. The powers of the RERA include registering projects and agents, investigating offences and adjudicating certain issues. Appeals from decisions of the RERA may be made to an appellate tribunal.

The provision of an alternate forum for resolution of real estate disputes is a welcome move given the prolonged judicial process that has thus far discouraged consumers from proceeding against errant builders. Although the jurisdiction of civil courts is barred, a recent amendment permits consumers to approach consumer forums. The Consumer Protection Act, 1986, however excludes persons who acquire goods or services for any commercial purpose. Therefore, the recourse for purchasers of commercial real estate may be more limited.

Change of plans: Promoters will not be permitted to change plans and designs of a real estate project without the consent of consumers. This is a condition that was previously relaxed but reinstated following severe criticism. Plans often require change due to constantly changing local norms and, depending on the size of the project, complying with this consent requirement could get unwieldy.

Refunds and penalties: If the promoter fails to complete or to give possession in line with the terms of the sale agreement, the buyer is entitled to a full refund with interest. Promoters may be liable for a monetary penalty or imprisonment of up to three years while real estate agents and buyers may be imprisoned for up to one year for violations of orders issued under the legislation.

Legislative framework: Under the state list of India's constitution, states are entitled to make laws related to land, or rights in or over land. However, contracts between buyers and promoters and transfer of property fall within the concurrent list, creating a possibility of overlap.

Several states have already enacted laws for setting up regulatory authorities based on the Model Real Estate Act, 2009, which also forms the basis for the bill. The bill clearly provides that in case of any inconsistencies between the bill and any state law, the bill will prevail. However, where there is no inconsistency, but separate authorities and requirements, administrative and compliance difficulties are inevitable. Multiple registrations and disclosure requirements under both central and state laws would make compliance cumbersome and confusing, leading to project delays and increased regulatory risk.

The bill seems like a step in the right direction, given the justified anxiety of consumers in the real estate sector. By boosting transparency and accountability, a consequent increase in consumer confidence could lead to a revival of the now sluggish real estate market. However, the increase in restrictions and liabilities of the promoters may leave them unenthused.

Aakanksha Joshi is an associate partner and Tarini Menezes is an associate at Economic Laws Practice. This article is intended for informational purposes and does not constitute a legal opinion or advice.

Revised ECB framework: Simpler or more complex?

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As part of easing capital account controls on the Indian economy, the Reserve Bank of India (RBI) has gradually been liberalizing regulations on external commercial borrowings (ECBs) from overseas lenders. A report of the Committee to Review the Framework of Access to Domestic and Overseas Capital Markets in February 2015 noted that: (a) ECBs are susceptible to currency fluctuation risk which in turn could affect "systemic stability"; (b) the regulatory framework for ECBs must be consistent and the approach must be predictable; (c) any regulations must be principle-based and not prescriptive; and (d) the ECB framework must be sector and participant neutral in that it should not discriminate among types and categories of borrowers and end-uses.

In view of the above, the report presented what must be described as radical recommendations: (i) removing all restrictions on borrowers, lenders, end-use, amount, maturity, and all-in cost ceilings; (ii) aligning the negative list in the ECB framework with that of the foreign direct investment policy; (iii) permitting all lenders from a Financial Action Task Force compliant jurisdiction; and (iv) requiring borrowers to demonstrate hedging prior to obtaining ECBs. Notably, the committee also recommended disallowing overseas branches of Indian banks from extending ECBs to Indian borrowers. While the government and the RBI reportedly disagreed with the recommendations, concerned that they would open the proverbial floodgates and risk economic instability, both appeared willing to engage in consultations to reform the ECB framework.

With this background, the RBI's release of the draft framework on ECBs on 23 September for public comments came as a pleasant surprise to market participants. Taking the form of a simplified list of "dos" and "don'ts" for raising ECBs, the draft framework proposed easing the prevailing requirements around eligible borrowers and end-uses, and also proposed expanding the scope of recognized lenders to include pension funds, sovereign wealth funds, insurance funds, and other "long term investors". The draft framework also emphasized shifting the currency risk to overseas lenders and further proposed introducing a "small negative list" for rupee denominated borrowings.

On 30 November (without any prior indication) the RBI issued the revised ECB framework, with a cover note saying that it reflects a "more liberal" approach with fewer restrictions on end-use and all-in-cost, and places the currency risk on the lender in case of rupee denominated ECBs. The revised framework retains the expanded scope of recognized lenders to include insurance companies and pension funds, and also retains the concept of a smaller negative list for end-uses for long-term ECBs and rupee denominated ECBs.

The revised framework divides ECBs into three tracks: track I for medium-term foreign currency denominated ECBs with a "minimum average maturity" (MAM) of three to five years; track II for long-term foreign currency denominated ECBs with a MAM of 10 years; and track III for rupee denominated ECBs with a MAM of three to five years. While the revised framework states that lending by overseas branches of Indian banks is subject to prudential guidelines, it also says that these branches are not eligible lenders for the purposes of tracks II and III.

While the procedural framework such as obtaining a loan registration number and periodic reporting to the RBI in the prescribed form remains unchanged, the revised framework significantly reduces the complexity of the previous ECB framework around eligible borrowers, recognized lenders, etc. The list of eligible borrowers under track II also includes real estate investment trusts and infrastructure investment trusts.

The revised framework further confirms that overseas long-term investors such as prudentially regulated financial entities, pension funds and insurance companies will be considered as eligible lenders, and also includes financial institutions in international financial services centres in India, thereby tying in with the government's initiative of establishing such centres in India. For rupee denominated ECBs, the revised framework does not prescribe any all-in-cost and instead states that this should be in line with market conditions.

The revised framework reflects the progressive movement of regulatory practice to a mix of principle and prescription-based regulation. However, due to some lacunae in the framework it is a non-starter for the moment. For instance, while the previous framework contained a detailed MS Excel-based methodology for determining "average maturity period", the revised framework does not prescribe how to determine MAM. Further, the revised framework notes that it will be effective from the date of publication of the relevant regulations under the Foreign Exchange Management Act, 1999, in the official gazette. As such regulations have not yet been published, the date of commencement of the revised framework is unknown.

Some think that the ECB framework could have done with another round of public discussions in view of the seminal changes it has introduced.

Overall, while the issuance of the revised framework is a welcome initiative, its implementation could have been smoother and better planned.

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Proposed solutions to legal issues raised by SPV model

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Implementing smart cities through special purpose vehicles (SPVs), as proposed by the Smart City Mission Statement & Guidelines issued by the Ministry of Urban Development, raises several fundamental legal issues. In this column, we examine the feasibility of this model and propose nuanced alternative mechanisms that the states and urban local bodies (ULBs) can adopt to implement their smart city proposals.

The guidelines mandate the creation of an SPV, incorporated under the Companies Act, 2013, to implement each smart city proposal. SPVs so created will be responsible for all phases of smart city development projects. Each SPV will be promoted by the state or union territory (UT) government and ULB concerned, with equal shareholding between the two at all times. Private sector entities and financial institutions can take an equity stake in the SPV, provided that the state/UT government and the ULB together maintain a majority and equal shareholding and control of the SPV. Because of these requirements, the SPV – a 50:50 joint venture between the state/UT government and the ULB – will not fall within the definition of a "government company' under the Companies Act.

Given the proposed implementation structure and existing regulatory framework governing the powers and functions of ULBs, issues that states/ULBs will need to address in implementing a smart city proposal are outlined below.

The guidelines encourage empowering the SPVs by delegating various rights and obligations of the ULB, in relation to the smart city project, to the SPV. The wide delegation contemplated raises various issues, including the constitutionality of the elected ULBs abdicating their functions. While the delegation by a state government of the powers and functions of a ULB to an SPV is constitutionally permitted, such delegation cannot be unfettered resulting in the delegator abdicating its role entirely.

The extent to which a ULB can delegate its powers and functions to the SPV will depend on the specific laws of the relevant state governing ULBs. Therefore, before a ULB delegates any powers to the SPV, the state government will need to analyse extant legislation and map the powers and functions that ULBs can legally delegate to the SPV, alternatively, amend the laws that create and govern the ULBs. The analysis of the existing legislation should be carried out from the perspective of understanding both the permitted process of delegation, and the principles which are to guide the SPV in its exercise of powers delegated to it, so that the delegation cannot be challenged as excessive or arbitrary.

Further, as a ULB's power depends on enabling legislation passed by the relevant state, ULBs may have powers which vary from state to state. State governments often have delegated the powers and functions of ULBs to various parastatals, such as development authorities, housing boards, etc. There is a danger of an additional administrative entity being introduced into an already complicated network of administrative and regulatory authorities.

The guidelines contemplate that the state government and the ULB will exercise rights and powers and undertake several obligations in relation to smart city projects. It is not clear whether the SPV structure is to be adopted in perpetuity or whether after the smart city proposal is executed, the SPV will hand its functions back to the ULB. Therefore, unless the rights and obligations of the stakeholders are demarcated and recorded, the stakeholders may not own up to their commitments to the project, and delays, conflicts and disputes may arise.

Even though the SPV will be entrusted with significant government funds, it may not fall under the oversight of the Comptroller and Auditor General of India, unless the state governor or UT administrator specifically requires such an audit.

The functions and responsibilities of the SPV, as envisaged in the guidelines, may not require the wide delegation of powers recommended in the guidelines. Instead, the state/UT government and the ULB may consider empowering the SPV to execute the functions and responsibilities envisaged in the guidelines by entering into a master developer agreement (MDA) with the SPV. The SPV (as the master developer) could fulfil the functions of appraising, approving and sanctioning projects comprising the smart city proposal by entering into agreements with private parties under the terms of the MDA.

In relation to the role of parastatals, the MDA can specify and delineate the roles and responsibilities of the SPV and the parastatals (and other stakeholders), thus ensuring that there is no overlap or conflict in their roles and responsibilities. In respect of any deliverables, audits, funding or other functions of the parastatals, the MDA can include specific provisions. The obligations and the responsibilities of the various stakeholders can also be specified under the MDA and thus each stakeholder will have a contractual obligation to perform its duties and responsibilities, and the right to enforce specific provisions of the MDA against others, if required.

HSA is currently working with multilateral agencies and government authorities to design and craft the MDA structure.

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GST model law: Long way to go to meet expectations

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A sub-committee of the Empowered Committee of State Finance Ministers has released a model law for the goods and services tax (GST) and the integrated goods and services tax. This model law would form the basis for the central government to levy and administer central GST and for states to levy and administer state GST.

Perfecting the model law is just one of many challenges facing the central government, which is striving to have the GST constitutional amendment bill passed by the parliament. Other challenges are finalizing a revenue neutral rate and building IT infrastructure that is robust enough to support the new tax system.

The model law appears to be a creation of umpteen minds with different expertise and domain knowledge resulting in a hotchpotch of varied provisions. It seems to be a case of "too many cooks spoiling the broth".

The cluttered state of the model law released ahead of the pending amendment of the constitution deserves a sincere review if it is to be legislated by the parliament and states and become the basis for India's ambitious game changing tax reforms of GST.

Definitions

The model law lacks conceptual clarity and is replete with lacunae. To point out a few blunders, the terms "composite supply" and "declared services" have been defined, but neither of these has been used in the provisions other than the definition clause, effectively rendering these definitions useless.

Notably, the term "input" has not been defined, while "capital goods" has been defined to include all forms of plant, machinery and equipment. Another gap can be found in the definition of "goods", which does not exclude "securities", unlike in the present value-added tax (VAT)/sales tax laws. This will have unnerving import for many, in a various ways.

The term "zero rated supply" covers "export" transactions within its folds but no clarity is provided as to whether the supplies to export oriented and special economic zone units would also qualify as "zero rated supply". This is a crucial omission, given the "Make in India" initiative of the government.

Valuation norms

The term "related person" has been defined to cover persons who are associated in the business of one another in that one is the "sole agent", "sole distributor" or "sole concessionaire". While the definition appears to be sourced from prevailing customs valuation rules, its coverage is sought to be widened. This will lead to greater focus on such transactions, at an unknown cost to the exchequer.

Similarly, the term "associated enterprises" is defined with reference to the income tax legislation. However, there is no clarity as to why this term has been independently defined when the law does not refer to it and when a definition for related person has been incorporated.

The model law has retained the "transaction value" based approach to valuation, but introduced the concept of "market value" as a comparative parameter to monitor valuation and as a potent tool in the hands of authorities to validate/reject the transaction value.

The valuation norms proposed allow for deduction of discounts from the transaction value, provided that the discount is specified on the face of the invoice. That is to say, discounts and supply-related incentives will not be eligible for deductions if not recorded on the invoice. Industry will have to plan discounts/incentives around this condition.

Cascading effect

The credit system envisaged under the law provides for a detailed negative list, enumerating the transactions where credit of the duties/taxes paid is not available to buyers of goods/services. Such restriction on credit admissibility appears to emerge from the present regime and will lead to cascading effect, much against the philosophy of GST/VAT. The expectation of complete credit without cascading has therefore taken a backseat.

A new aspect of the credit mechanism is regular verification (by the relevant officer) of input tax credit claimed by the buyer vis-à-vis the tax paid by the supplier. This practice appears to have been borrowed from some current VAT laws and the income tax legislation. This implies that admissibility of credit at the hands of the purchaser will be subject to sufficient compliance by the supplier. This approach is indicative of diluting the "self assessment" mechanism and will create a compliance burden and unavoidable hardship for assessees.

To conclude, the model law appears to be a first working draft and is not the final word on the GST model law. That said, fixing the model law to accommodate the expectations of all stakeholders is going to be an uphill task and will pose a major challenge, similar to that surrounding the constitutional amendment bill.

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