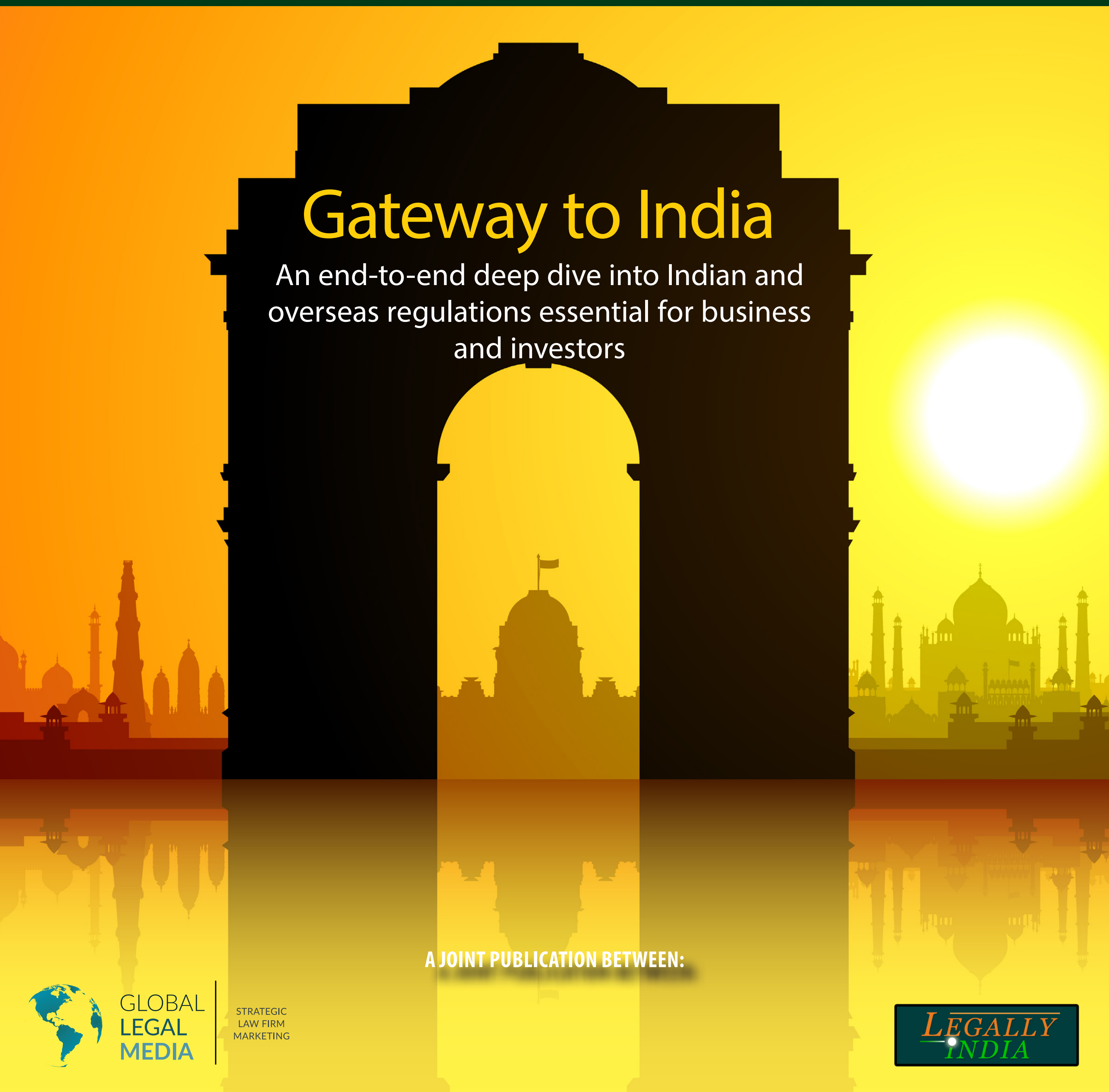
INDIA UNLEASHED

2017 LEGAL AND INVESTMENT GUIDE



Gateway to India

An end-to-end deep dive into Indian and overseas regulations essential for business and investors

A JOINT PUBLICATION BETWEEN:

GLOBAL LEGAL MEDIA
STRATEGIC LAW FIRM MARKETING

LEGALLY INDIA

COUNTRY-BY-COUNTRY INSIGHTS FROM LEADING LAW FIRMS AROUND THE WORLD

Contents

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Welcome

Dear Colleagues,

We are delighted to introduce the inaugural issue of *India Unleashed*, an annual guide which takes a deep dive into Indian inbound and outbound investment and examines India's emerging role in the global economy and the legal and regulatory issues arising from this dynamic.

The guide is brought to you by Global Legal Media in association with Legally India.

Global Legal Media is a strategic legal publishing company whose founders have over 40 years' combined experience working at the world's leading legal media organisations and the most respected legal publications in the U.S., UK and Asia.

Legally India is the first and most popular and respected news website for corporate lawyers in India. Started in 2009 by Kian Ganz, a former lawyer at a Magic Circle firm in London and Europe, it publishes news, expert analysis and opinions daily from many of India's top corporate law firms.

India Unleashed 2017 will be read at law firms and in-house legal departments throughout India and across the U.S., UK, Europe, Asia, Latin America and the Middle East. In September '17 we will be launching a quarterly magazine with commentary and extended features from leading GCs and private practitioners, focusing on different practice areas of law, different sectors and with in-depth market analysis from jurisdictions around the world.

For more information please feel free to contact me at dc@globallegalmedia.com

We hope you enjoy the publication.

Danny Collins
Director / Global Legal Media

Reading Between the Lines: How India's Lawyers are the Key to Unleashing India

We have gradually been getting there, but ensuring the Indian legal system is ready for the world stage will require a group effort. Kian Ganz, Publishing Editor at Legally India, reports.

India makes it really difficult to maintain perspective sometimes when gung-ho headlines, government statements and statistics only ever tell part of its story. Yes, at give-or-take around 7%, India's GDP is growing faster than most other countries and this is predicted to continue increasing next year . But is this enough? And, importantly, are India's lawyers ready to keep pace?

Global companies are keen to slice pieces off the fast-growing pie of Indian consumers. FDI hit a record $60.1bn in 2016-17.

At the end of the day, there are few who'll bet against India in the long term: its demographic capital remains huge and the ceiling to India's potential economic and global ambitions should and does remain sky high. Yet it is exactly that long-unfulfilled potential and its demographics that also create India's greatest challenges, both from a business and a human perspective.

Average education levels, qualifications and skills remain woefully low with 10 to 15 million young Indians entering the workforce every year, while only 155,000 and 231,000 jobs were created in 2015 and 2016 respectively, according to government metrics (both record lows as against 2009, when 1 million new jobs were created). The obvious question therefore is: what will the masses of potentially unemployable youth do? Government initiatives, such as Prime Minister Narendra Modi's Skill India initiative, are a step in the right direction, alongside similar government initiatives that at least sound the right notes.

And foreign direct investment (FDI) will, no doubt, also form part of the answer, as global companies are keen to slice pieces off the fast-growing pie of Indian consumers. But while FDI has hit a record $60.1bn in 2016-17, according to government figures, trickle-down economics won't work miracles and can seem like a bitter joke when wealth inequality in India remains one of the highest globally (the news that a record 70 out of India's 101 billionaires in 2017 were self-made rather than having inherited their wealth, according to Forbes, showcases the opportunities available, although critically those remain constrained mostly to the elites).

Furthermore, beyond a few homegrown exceptions and niche areas, India has not yet really given many major global industries, such as high-tech manufacturing or internet-related businesses, much to worry about in terms of competition, with India's brain drain diaspora having instead enriched Silicon Valley and other countries more than India itself. That said, some in that diaspora – also amongst lawyers – are returning home and innovation, often with a uniquely Indian twist, is taking place here and a handful of Indian companies are beginning to make global impacts.

And while some industries, such as Indian healthcare, are flourishing, largely off the back of innovations in low-cost production and a boom in generics, others, such as India's global technology outsourcing miracle, have begun showing cracks in their shining armour in the last few years.

The spectre and reality of corruption, of course, remains sand in the gears of the India machine, and largely ineffective government policy, such as the so-called surprise 'demonetisation' of high value notes, despite proving surprisingly popular, had temporarily undone economic gains and might have few long-term effects other than a possible widening of the tax net. And even much-lauded and awaited initiatives such as India's goods and services tax (GST), widely predicted to result in a bump to GDP growth figures due to simplifying the inter-state tax regimes, are unlikely to be smooth sailing in practice or do much to curtail the near-dictatorial powers of tax inspectors to harass businesses.

For better and for worse, investors and businesses often draw some comfort from the fact that India remains a huge ship, where course corrections will take years, if not decades. And while it is hard to foresee an iceberg big enough to sink India, the ride is likely to be a bumpy one.

In such choppy waters, the role that lawyers will play in India's future and the way the legal profession evolves and deals with the huge challenges it faces, will be pivotal.

KIAN GANZ

ADVOCATING FOR CHANGE

It is fair to say that lawyers have been at the forefront and centre of India's economic boom since economic liberalisation in the 90s, often being the class of professionals who could best help domestic entrepreneurs and foreign investors navigate the complex Indian regulatory and business minefields.

But beyond the valuable role played, services rendered and fees billed, India's legal industry has been fortunate on other fronts for the last two decades or so.

The role that lawyers will play in India's future and the way the legal profession evolves will be pivotal.

Corporate law firms have been spared most attention and restrictions by its regulator, the Bar Council of India (BCI). While Indian law firms have had to grow while nominally shackled in the way they do business, most have managed dealing with restrictions that exist primarily in the black letter of the law rather well.

For example, the continuing confusion about the most tax-efficient and least risky business structures that large law firm partnerships should adopt, has not stood in the way of most firms' growth, with partnerships having found creative ways to make things work. And although restrictions still exist on paper about advocates marketing themselves, with some firms still preferring not even to have a website, many younger firms (and a few older ones with sufficient strategic nous and ambition) have managed to completely displace the more conservative old guard of the profession, by being more competitive, client-driven and aggressive on all fronts. Indeed, in the last decade, India's legal industry has prospered, grown and innovated on its home turf, and the legal ecosystem is now mature enough to where things must fundamentally change in order to keep up with India's ambitions.

In the last decade, India's legal industry has prospered, grown and innovated on its home turf, and the legal ecosystem is now mature enough.

While massive legal talent exists at the top of legal market, both domestically and abroad as evidenced by the contributions to this book, this by itself will not be enough to allow India to take the next leaps forward that it must.

India's second-tier cities, for instance, remain massively under-served by quality legal advisers, and even in the economic power centres there is significant room for growth.

A toothless regulator that barely understands corporate law firms may have been beneficial to helping the profession grow freely and rapidly, but in the long term it is neither in the interests of lawyers, clients nor the country.

For instance, there is practically still no realistic recourse for clients who receive bad service or advice from their lawyers: the regulator has neither interest nor capacity to deal with complaints, litigation is an ineffective remedy for wronged clients for a variety of reasons, and professional liability insurance is still basically a formality that is occasionally asked about by clients but, in practice, never invoked.

The reform plans mooted by the Law Commission therefore comprised of cautious steps in the right direction. The draft Advocates Act amendments proposed formally recognising law firms and beefing up disciplinary panels by including non-lawyer professionals as well non-elected lawyers in the process (on its face, especially the latter would have been a good move, since bar council elections are little more than exercises in populism, which usually put in power bar council members who want to do little to upset their electorate).

The Law Commission also proposed outlawing advocates going on strikes (in any case, this occupies a legal grey-to-black area after the Supreme Court of India basically ruled lawyers' strikes unlawful in all but the most exceptional of circumstances).

Ironically, however, the Law Commission's unborn baby was thrown out with the bathwater, after the BCI and state bar councils called for mass strikes earlier this year. The government eventually made the minor concession to the BCI that it would not pass the amendments without discussing them with advocates and bar councils first.

For now, any reform is certainly on hold but that is not to say that the government has lost the battle and won't yet institute reforms of the legal profession, though it could mean that the government has lost some appetite to take on the legal profession. If so, it wouldn't be the first regime to have faltered and decided that there is little to gain in the short term by regulating lawyers. But in light of the current government's legislative strength, it would be a major missed opportunity and a huge mistake.

If India is to be unleashed, it will need a world-class legal profession and legal system but those changes will not come from within. For true change to happen, the government must take the initiative and be bolder and more forward-looking than what is currently on the table.

THE LONG GAME

No discussion of the inadequacies of India's legal system is complete without raising the growing mountain of pending cases and the glacial speed of the justice system, which have been clichés for far too long now, sadly.

Unfortunately, no government has done much on that front other than making empty promises, which now occur primarily by rote in all election manifestos. But fixing the backlogs and judicial system is not going to happen overnight; it will require huge investment and taking a very long view, rather than the single-minded obsession governments have had on making judicial appointments more transparent (important as that may be, in isolation).

Much like India's demographic time bomb of unskilled labour hitting the market, making the Indian legal profession future-proof requires taking a holistic look at fixing Indian legal education, which has continued sliding deeper into a morass where many law degrees are not even worth the paper they are issued on. With states falling over each other to create (and then abandon) national law schools, a few state-funded and private institutions have cropped up to give the mistaken illusion that overall, the landscape is improving.

The unfortunate reality is that out of the more than 1,300 law colleges that are open for business in India, only a small handful provide the level of education that India requires, with tens of thousands of law students graduating every year. The knock-on effects of that are many. For one, the vast majority of lawyers practising in the courts, especially the ones outside the big cities, act more as fixers than advocates with their talents often primarily extending to seeking repeated adjournments. Second, and even more worryingly, this means that the talent pool of educated jurists to enter the judiciary remains tiny, with many judges lacking the understanding required to fix the legal system from the ground-up. I believe that cadres of well-trained, confident and efficient judges would go a long way to raising the standards at the bar by standing up to bad lawyers, curtailing unnecessary adjournments, and generally improving the quality of arguments made and justice that is delivered, which reduces the likelihood of pointless appeals.

But in order to entice India's brightest and best legal talent to opt for a career at the bench, it needs to be a much more attractive proposition; right now, it is frankly not lucrative enough and the money on offer is insufficient to make corruption as a judge an entirely irrational proposition.

The government could fairly easily fix at least that part of it by significantly increasing judges' remuneration; the greater challenge will lie in ensuring that the next generations of Indian law graduates as a whole are adequately trained and prepared for the realities of the economic and social environment.

The only way to do that is to reform regulation of legal education from the ground up. For too long the regulators have not just been asleep at the wheel, but in some cases even jailed outright for corruption in overseeing law colleges, which has created the crisis we find ourselves in.

Again, the fight to take away regulation of law colleges from the bar councils would not be easy (and it is one that the previous government had also failed at after lawyers' strikes), but whichever way you look at it, I don't think there is any way around it: we need to start planning and pushing for a better future for the profession now.

India will need many more good lawyers who can and will get involved in assisting companies, citizens, foreigners, the government, bureaucrats and the courts to unleash India's unrealised potential and its many dividends. ■

Notes:

1. *Hindustan Times* UN revises downward India's GDP growth to 7.3% for 2017 http://www.hindustantimes.com/business-news/un-revises-downward-india-s-gdp-growth-for-2017/story-ke2oABDUFRCugZqeykzQPN.html
2. *The Telegraph India*: Employment growth at 8-year low, tough times ahead for the young https://www.telegraphindia.com/1170518/jsp/frontpage/story_152234.jsp

A View from In-House

By Jigar Shah, India General Counsel, JP Morgan

I would like to congratulate *Legally India* for having established itself as a progressive, galvanizing force for the Indian legal fraternity, against many odds. This publication represents an incremental step in *Legally India*'s journey and a timely reminder of India's economic potential. These days, I am more confident (but not complacent) that India will not simply fritter away its demographic dividend as the narrative shifts from that of a tiger caged to a tiger on the tail of a dragon.

It is clear to seasoned observers – both looking in from out and looking out from within - that India has embarked on a journey that will lead to profound economic and political changes. The creative energies being unleashed and capitalized by the annuity of a unique demographic dividend over the next 30 years or so, are likely to make India a magnet for in-bound and out-bound trade and investment flows that will generate enormous opportunities.

Even as late as 10 years ago, as India was opening up to the world, it was tough for someone like me on the buy side of legal services to be assured of quality consistency based on a law firm brand.

All around us there is profound change going on: the impending introduction of a revolutionary goods and services tax (GST) has required constitutional changes at the federal level and a huge understanding and compromise on the part of all stakeholders propelled by a vision to create a single market across India for the first time; a quantum leap in financial inclusion is taking place through applications collectively known as the 'India Stack', anchored by the Aadhaar citizen identification number scheme; the goal is set to reduce use of fossil fuels and increase capacity of renewables through the national solar mission, which dramatically upgraded solar power generation target from 22 gigawatts (GW) to 100 GW by 2022; or India's space programme that marries the pursuit of science and technological advancement with economic and commercial benefits to the whole country, underpinned by age-old frugalism, which has culminated in India's Mars mission and a more recent launch of 100+ satellites from a single rocket. The list of forces shaping the new India goes on and on.

In this context, it is apt to think about how the legal fraternity can harness the progressive forces to facilitate its own transformation. I believe that we should be willing to adopt a blue sky approach to how we want to position the legal profession, so that it is progressive, well organised, well run, visionary, strategic and selfless. I am confident that everyone sees the need for urgent reforms to modernise the legal profession which seems to be trapped in an outdated regulatory bind that is resistant to change. Only then can we hope to attract, train and retain top talent in the legal profession, which should count in-house lawyers as its own. It's not rocket science.

The largest law firms of the pre-1991 era have pretty much given way to a new breed of law firms that were established from scratch or grew substantially in the last 20 years. Even as late as 10 years ago, as India was incrementally opening up to the world, it was tough for someone like me on the buy side of legal services to be assured of quality consistency based on a law firm brand.

It was always a case of horses for courses when it came to choosing a lawyer. You were always choosing a lawyer, not a particular law firm. I have spent more time than I should have had to do in hand-holding or shaping the output of a work product that might be issued on the letterhead of a law firm but for which I am also accountable internally.

More than a decade ago, the legal profession had already started to attract the brightest talent in India but one of the problems was that the fast growing Indian law firm just did not have the organizational wherewithal to train its talent.

Fortunately, that problem is less acute due to a fair amount of talent that has gone abroad to work and returned to practice and share what they have figured out, whether in terms of drafting, producing business user friendly advice or acquiring soft skills to manage a client relationship. Also, there is clearly a lot more focus on professional development in larger law firms.

Over the last decade, at the top end of the spectrum, I have witnessed an emergence of lawyers that are well-rounded business advisors: in this respect too, placement of lawyers from private practice to in-house on temporary assignments has helped, as those lawyers return with a much clearer understanding of legal risk management and other client drivers. While I am happy to report this improvement, I must also caution that any Indian law firm that takes its eyes off grooming its talent will do so at its own peril in a highly competitive marketplace, even if not all buyers of legal services are as discerning and demanding in terms of quality. Talent development and retention needs to be at the core of a law firm's plans, and in this respect, among other things, we need to start attending to an agenda that is inclusive of our diverse talent and start to address issues such as gender balance at all levels of hierarchy, particularly at the senior levels, as well as in removing conscious and

JIGAR SHAH

unconscious biases that people carry with them.

Equally, top class legal talent resides in-house and I have full faith that in-house lawyers will lead the discourse on the development of a robust corporate governance framework for risk and control and will be valued for their ability to exercise judgment holistically beyond their silos as they claim their rightful place at the corporate high table.

In terms of blue sky thinking for the legal profession, apart from the need to modernise itself, we also need to shape many other reforms: we need to reform the administration of justice to speed up delivery and to clear a crippling backlog of cases; we need to create an effective and working environment to make India a viable centre for alternative dispute resolution; we need to emerge as a service industry in its own right since the potential to provide legal services to the rest of the English-speaking world is immense, and this opportunity to create huge employment should not be sniggered at; and we need to play a constructive role in advocating for policy changes and coordinate better with the bureaucracy to avoid regulatory ambiguities that abound rulemaking in India. Lawyers have played a huge role in facilitating India's economic transformation post-1991; now that the winds of change are blowing in our direction, I am confident that we will no longer remain passive to change because it is time to envision India being uncorked and unleashed like never before. ■

Cutting Through the Clutter: India Takes First Steps to Unleash More Effective Commercial Litigation

The numbers may seem overwhelming but some solutions are gaining traction. By Alok Prasanna Kumar, Advocate.

THE LINK BETWEEN INVESTMENT AND SPEEDY AND EFFECTIVE DISPUTE RESOLUTION

No country can attract foreign trade and investment without a modicum of rule of law and stability in governance. Rule of law requires not only a set of easily understood norms and procedures, but also independent institutions where such norms are enforced without fear or favour. It is no coincidence that Shakespeare's Merchant of Venice features a trial scene: Venice's wealth as a trading nation was built on its institutions' ability to impartially and rigorously enforce contracts in accordance with the law. Hubs of commerce in the modern world such as London, Singapore, Hong Kong and Dubai all boast of excellent institutions designed to resolve commercial disputes in an impartial, effective, and efficient manner.

Efficient and effective resolution of disputes reduces transaction costs and the friction of doing business. Impartiality ensures that precedents are created in a stable manner, and all parties have faith in the system's working. The link between investment and economic growth, and the rule of law has been well established in multiple studies across the world. As India looks to take sustainable economic growth to the next level, inviting greater levels of investment and engaging in international trade and commerce, the strength of its institutions and constitutional governance will be put to test.

THE PROBLEMS WITH COMMERCIAL LITIGATION IN INDIA

Unfortunately, over the last few decades, India's institutions have not been able to respond to the challenges of a growing Indian economy and the fundamental changes taking place. The present judicial system is a descendant of the courts set up under colonial rule. While they were independent in their own way[1], they followed (then) modern rules of procedure and evidence that made them attractive to litigants. These courts were still too few given the size of the economy and perhaps the vast bulk of disputes were still resolved informally and outside these formal judicial institutions.

Today, the Indian judicial system is a gargantuan beast; as per latest figures available, there are more than 17,200 judges in India at all three tiers of the judiciary,[2] more than 20 million cases, civil and criminal, are instituted in a year,[3] and some 32 mil-

lion cases are pending as of 2016.[4] These figures though don't tell us too much about how the system itself is working and the problems become apparent once we start examining them in some depth.

A chronic problem of the Indian judicial system is that of delay. The latest figures on the government's "National Judicial Data Grid", recently set up for statistical access online, suggest that 55% of cases have been pending for more than 2 years in the trial courts. Of the cases pending for more than two years, nearly half or 25% of all cases pending, have been in the system for more than five years, and a shocking 9% of all cases have been pending for more than ten years. Though there is no official time frame prescribed for the completion of a case in any law, a general rule of thumb that has been adopted in the last few years is that a case would be delayed if it takes more than two years to be disposed of. By that metric, 55% of the pending cases in India are already delayed.

The delay can be attributed to a variety of causes; the 266th Report of the Law Commission of India presented some shocking data on the number of working days in trial courts, lost to strikes by lawyers India. In some districts, no work took place in almost half the scheduled days in a five-year period in the district as lawyers struck work for one reason or the other, some utterly bizarre. Snap strikes called by lawyers is clearly one reason why the courts have been unable to dispose of cases quickly enough.[5]

The absence of sufficient numbers of judges is another possible cause. Across high courts, as per the latest data, 482 out of 1,079 positions of judges are unfilled. The situation is slightly better in the trial courts – as of September 2016, 4,846 of 21,374 positions were unfilled.[6] Even without dramatic improvements in efficiency, filling the posts and having them work at the same disposal rate as other judges could see a dramatic improvement in disposal rates. Of course, in some high courts, the number of pending cases is so large, and the efficiency is so low, that it may not be possible to real-

FIGURE 1: BREAK UP OF PENDING CASES BY AGE

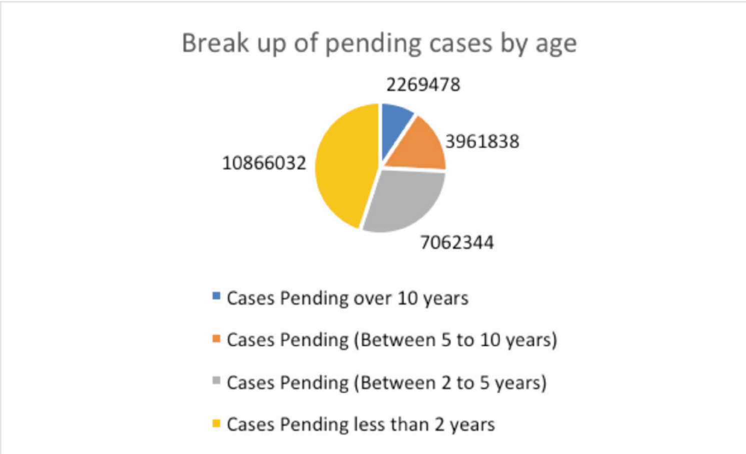
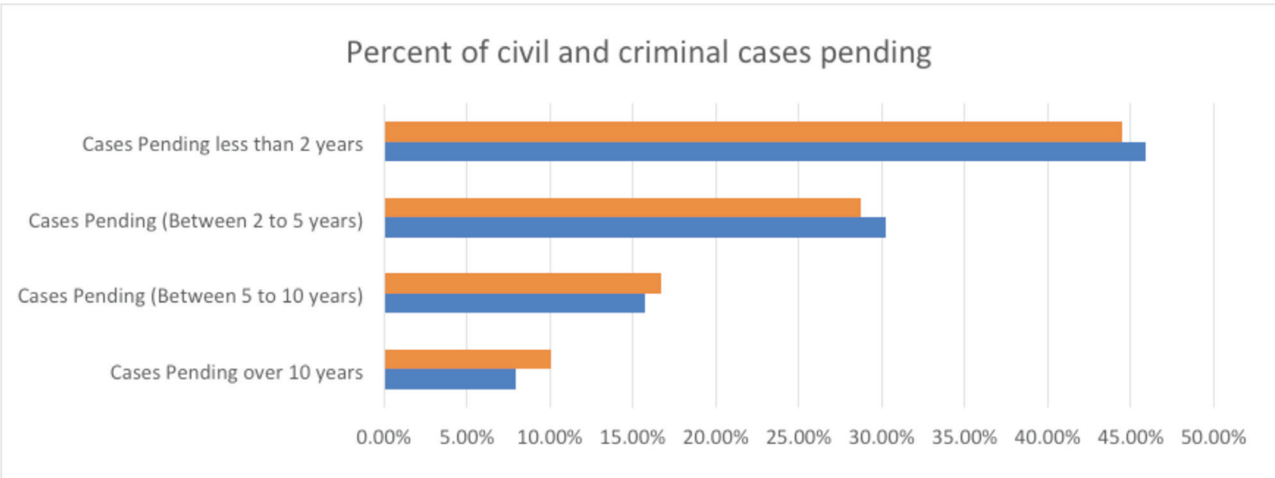


FIGURE 2: BREAK UP OF CIVIL AND CRIMINAL CASES BY AGE



istically address the issue by adding more judges.

Another possible cause for delays was recently unearthed in a study by the Vidhi Centre for Legal Policy. Examining the data related to cases filed in the Delhi High Court in the years 2011-2015, Vidhi found that adjournments were sought by the lawyers was a leading cause for delay – occurring in over 90% of delayed cases.[7] This is not to suggest that this is exclusively the fault of the lawyers – rather the system, the judges, the lawyers, and the rules allow for this kind of laxity to persist and pervade making speedy and effective disposal of cases that much more difficult.

The most significant change relates to the way in which the judge has now been empowered under the procedural laws to take charge of the litigation and ensure that it is brought to a swift and logical conclusion.

THE LAW COMMISSION'S INVOLVEMENT

Even though some of the specifics of the problems of commercial litigation in India have only come to light recently, the general contour of the problems have been known for a while. It was for this reason that the Law Commission addressed the problem of commercial litigation in its 188th Report in 2003 recommending the creation of "commercial divisions" in high courts across the country. This was followed by a Bill presented in Parliament in 2009. However, there were flaws in the way the Bill was drafted and when pointed out, the Government of the day withdrew it and referred it back to the Law Commission to address the flaws pointed out in Parliament.

This ultimately resulted in the 253rd Report of the Law Commission of India on Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Bill, 2015. The Law Commission re-drafted the Bill, making it clearer while expanding the scope of changes to procedural laws to make disposal of commercial cases quicker. The Law Commission drew upon the experience of the United Kingdom, following the reforms suggested by Lord Woolf in the Access to Justice Report, 1996 and also the rules of procedure laid down by the High Court of Singapore. Both these countries being hubs of commercial litigation, not just for their own residents and businesses, but from those around the world.

The Law Commission also drew on extensive data to try and pinpoint the exact source of the problem with commercial litigation in India. Examining the pendency of civil suits in the high courts with original jurisdiction, the Law Commission found that 75% of civil suits had been pending for more than two years and thus delayed. The data contained in the Law Commission report is presented below:

The most significant change recommended by the Law Commission relates to the way in which the judge has now been empowered under the procedural laws to take charge of the litigation and ensure that it is brought to a swift and logical conclusion. This gives less leeway for parties to use the litigation process as the punishment itself and avoids needlessly prolonging the matter.

A CLEAN SLATE: THE COMMERCIAL COURTS ACT

The Government of the day has adopted the recommendations of the Law Commission and eventually, the Commercial Division and Commercial Appellate Division of High Courts and the Commercial Courts Act, 2016 was passed by the Parliament. The key features of the law are as follows:

a. High courts with the jurisdiction to hear suits, namely the Bombay, Calcutta, Delhi, Himachal and Madras high courts will be empowered to set up "Commercial Division" benches in the high court to exclusively hear commercial cases where the amount at stake is more than one crore Rupees

(approximately GBP 120,000 or USD 155,000)

b. In other areas where a district court is empowered to hear civil suits, "commercial courts" can be set up by the Chief Justice of the high court in consultation with the State Government.

c. Wherever a commercial division or a commercial court is set up, a "commercial appellate division" – a two judge bench – will be constituted in the high court to hear appeals from the orders of commercial divisions and commercial courts.

d. Commercial divisions and commercial courts will exclusively hear only commercial cases assigned to them.

e. Commercial divisions and commercial courts will follow the rules of civil procedure as modified under the Commercial Courts Act.

Keeping in mind the need to reduce delays in the proceedings, the Commercial Courts Act amends the Code of Civil Procedure, 1908 in so far as it applies to commercial cases. Some of the important changes are:

a. Mandatory award of costs to the successful party in a litigation.

b. Easier procedure to obtain summary judgment in a summary suit.

c. Case management hearing to ensure that proper timelines are fixed for completion of trial

d. Detailed rules for discovery for discovery of documents

e. Improved procedure for producing and leading evidence

What's happened so far? The Delhi and Bombay HC experience

It is only last year that Commercial Divisions have been set up in the Bombay High Court and the Delhi High Court, and a year is too little time to properly assess the functioning of the commercial divisions. Nonetheless, there are some encouraging trends which merit comment.

Courts are taking the time limits laid down in the act seriously. The Delhi High Court in Saurabh Agrotech v Radhey Shyam Agencies[8] has made it clear that there is no discretion vested in the court to extend time in cases where the parties have failed to file documents in time.

Courts are also being strict about the imposition of costs. Unlike the CPC, the Commercial Courts Act makes the impositions of costs mandatory in each case, and failure to do so has to be explained by the judges. This principle has been rigorously followed by the courts which are implementing it so far.[9]

Likewise, the limitation on the number of appeals and when they may be applied has also be interpreted in accordance with the spirit and the goals of the Commercial Courts Act.[10]

While a detailed assessment of the efficacy of this law is still waited, there is no reason why it can't be extended, on a trial basis to other cities in India as well. While Mumbai and Delhi account for much of the commercial litigation in India, Ahmedabad, Bangalore, Chennai, Hyderabad and Kolkata also account for a fairly large number of commercial cases in the country. These cities being the hubs of investment and economic activity.

Should the commercial courts prove successful in the reduction in time taken to dispose of complex commercial cases in India's courts, there is no reason why the procedural rules cannot be adopted for the disposal of all civil cases, irrespective of value or subject matter. ■

NOTES

1 See Abhinav Chandrachud, "An Independent, Colonial Judiciary", Oxford 2015, Oxford University Press.
2 According to figures available on the national judicial data grid and the Department of Justice as of 29 April 2017.
3 Alok Prasanna Kumar, "Are people losing faith in the courts?", Economic and Political Weekly, Vol. 52, Issue No. 16, 22 Apr, 2017.
4 Supreme Court of India, "Court News", Vol XI Issue No 3, available at http://sci.nic.in/courtnews/2016_issue_3.pdf.
5 Law Commission of India, "The Advocates Act, 1961 (Regulation of Legal Profession)", Report No. 266 March 2017, available at http://lawcommissionofindia.nic.in/reports/Report266.pdf.
6 Court News, n 4.
7 Nitika Khaitan, Shalini Seetharam, Sumathi Chandrashekharan, "Inefficiency and Judicial Delay", Vidhi Centre for Legal Policy, March 2017 available here: https://vidhilegalpolicy.in/reports-1/2017/3/29/inefficiency-and-judicial-delay-new-insights-from-the-delhi-high-court
8 2016 SCC OnLine Del 6134.
9 See for instance Dashrath B Rathod v Fox Star Studios India Pvt Ltd 2017 SCC OnLine Bom 345.
10 See Sushila Singhania v Bharat Hari Singhania 2017 SCC OnLine Bom 360.

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Legal Market Liberalisation: Another Two years Off, Forever? Possibly Not...

A perennial favourite topic of lawyers' discussions, one side has never really been asked for what would work for them. By Kian Ganz.

One of the oldest jokes told by foreign law firm lawyers who often visit India begins with a question about when they think the market will liberalise. "Two years," the answer will be. "It's always been two years."

The joke is funny because it reveals several deeper truths: first, in India, nearly anything can happen within two years; and second, this game of will-it-won't-it, with respect to liberalisation, has been going on for a long time now.

As we have seen with demonetisation and GST, this government is strong and confident enough to push through difficult measures that it believes in.

But I believe things are different this time, although no less complicated.

As we have seen, in cases such as demonetisation and the goods and services tax (GST) for example, this government is strong and confident enough to push through difficult measures that it believes in. And, for a variety of reasons, prime minister Narendra Modi – and finance minister Arun Jaitley, according to several sources – are said to believe strongly that allowing foreign law firms in would encourage foreign investment and foreign investors into India to be more confident, particularly in the infrastructure space where there is a lot of work to be done.

And in the bureaucracy too, the ministry of commerce (and to a lesser extent the law ministry), are keen for reform to take place and are more aware of the issues and roadblocks than previously. At an event in August 2016[1], a top commerce ministry official rightly said that the government had so far failed to communicate properly with the (possibly) more than 1 million advocates practising in courts: "They feel it is their job that is likely to be threatened. Nobody is competing with their job [or] even looking at that option of competing in the sub courts, municipal courts." He also mentioned that engagement with the law firm stakeholders was necessary, but stressed that encouraging competi-

tion was key to a healthy ecosystem, and floated the idea of a legal ombudsman modelled on other jurisdictions, to improve regulation of the profession.

The hurdles in the government's path to liberalisation remain real, although domestic groups such as the Society of Indian Law Firms (Silf) – representing a group of law firms that has long resisted liberalisation – has softened in its position last year and is now openly in favour of a staged entry of foreign law firms over the next few years (although it is still possible that this position is primarily a delaying tactic).

It is the Bar Council of India (BCI), that has recently been most publicly opposed to the entry of foreign law firms. But strangely, some of the most important stakeholders in this have never really been asked about what they want. Because what point is liberalisation if no one wants to come?

WHAT DO FOREIGN FIRMS WANT?

According to a survey we sent out to foreign firms late last year, the debate surrounding their entry has long been swirling around the wrong issues, particularly in the case of the resistance of the BCI, which is mainly representing litigating lawyers.

Out of around 60 foreign law firms contacted, we received 16 responses of India practice heads who gave answers to a number of questions, with ratings between 1 and 5 about their interest levels (respectively from "not at all interested" to "highly interested"). Three quarters of respondents were from firms with more than 500 fee-earners, with 63% having more than 11 offices globally. Around 19% of responses came from firms with between 100 and 500 fee-earners. Half were US-headquartered law firms, while two each described themselves as UK/US and European firms.

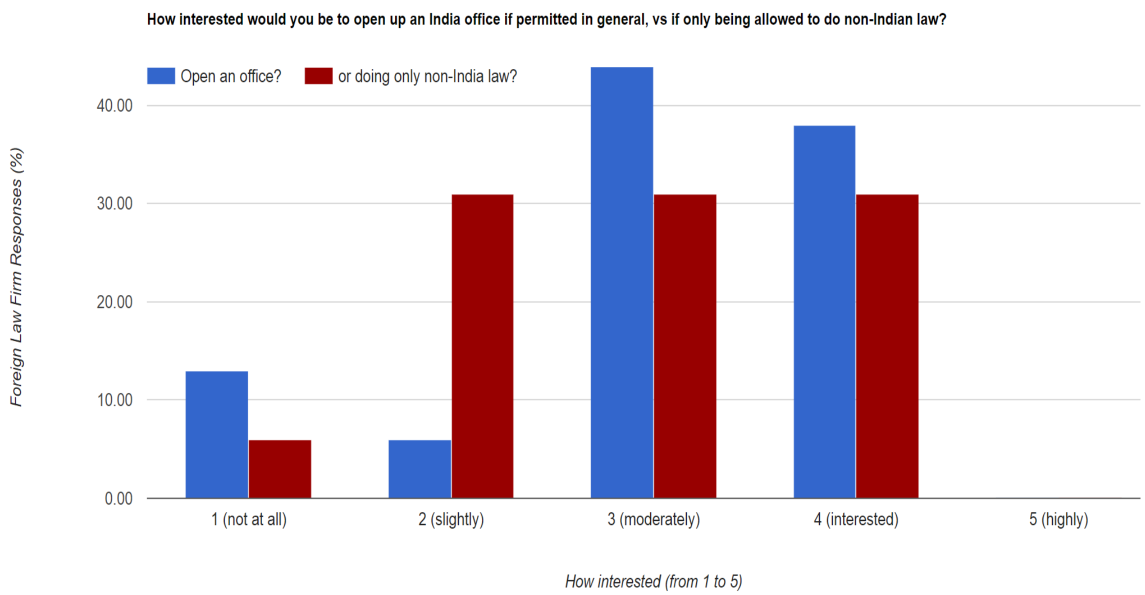
According to this survey, most foreign law firms have not lost their appetite for opening up in India (see chart below).

At the same time, the results in respect of whether they would be interested in practising litigation in India were unequivocal: every response gave their interest level at between 1 or 2 on a scale of 5, with 75% responding that they were not at all interested in litigation in India.

That is not surprising: litigating in India is slow and messy, and most foreign law firms' global clients' disputes are generally settled through arbitration. That is reflected in the survey results surrounding arbitration, where nearly 70% were interested (see the chart on the next page).

HOW DO THEY WANT IT?

While several different proposals are on the table



as to how to eventually regulate foreign law firms, the Law Commission proposals that caused the BCI to call a national strike was mostly silent on this issue, instead leaving it up to the BCI to iron out the details while suggesting largely mechanical amendments to the Advocates Act to change the definition of 'advocate' to include foreign lawyers, suitably regulated by the BCI.

As it stands, that would be a bad idea, and having discussions surrounding their entry without a proper roadmap in place will just result in confusion and, considering the BCI's past track record, in unworkable proposals.

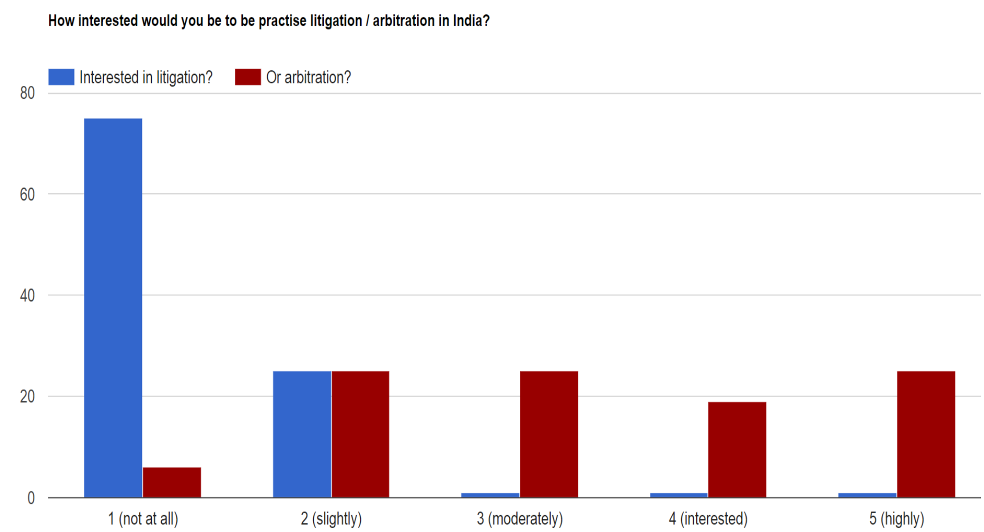
The vast majority of foreign law firm respondents to our survey suggested that they would prefer a Singapore-style model of allowing in foreign law firms.

The vast majority of foreign law firm respondents to our survey suggested that they would prefer a Singapore-style model of regulating foreign law firms, with several also voting for the Chinese model. One foreign lawyer said that what was required was a "new regulator with different people" because the "BCI and Indian judges would not be suitable".

That puts before the government a major challenge. But interestingly, the BCI in its agitation against the Law Commission's proposals did not mention the issue of foreign law firms as a cause for their grievance, instead mostly focusing on the Law Commission's suggestion to more strictly impose discipline on the profession (which had literally been the Supreme Court's primary brief to the Commission), to curtail strikes of lawyers, and to allow non-lawyers and non-bar council members a say in the BCI's operations.

The BCI's lack of resistance to the foreign law firms part of the Commision's draft seems most likely to stem from the fact that the draft envisages the BCI as the key player in the entry of foreign law firms (the BCI's suspicion that it was being sidelined, had caused it to walk out of liberalisation talks only months before). The draft would create significant opportunity and power for the BCI, but if it is not reformed at all, it might make foreign law firms shudder about being subject to the whims of what has historically been a non-accountable and opaque body.

The alternative would be to create a blank slate



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with a new body that would sign off on each foreign law firm's entry and ensure that it complies with restrictions and the local rules, perhaps subject to oversight by the BCI. The big risk in that approach would be that it could alienate the BCI (possibly resulting in new strikes) and risk splitting the regulation of the profession. Though a more effective and strict regulator for foreign lawyers than for domestic lawyers would make sense and be attractive to the domestic market, since domestic regulation is all but defunct.

WHERE DO THEY WANT IT?

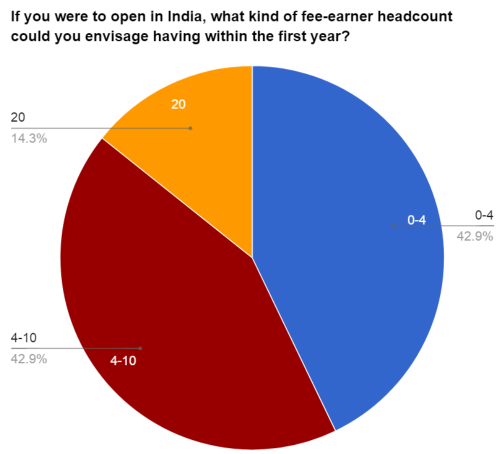
If foreign law firms were to open an office here, 87% of our surveyed sample would first want to do so in Mumbai. Only two foreign firms (13%) out of 15 that responded to the question, put down Delhi as their first choice, and only one opted for Bangalore as a second choice.

All that should be seen in light of a recent piece of news that, albeit overplayed a tad in the national media, amounts at present to the government tweaking its special economic zones (SEZ) rules to allow legal services firms to be hosted inside them. SEZ's are semi-autonomous free trade zones that have a lot of local leeway to make regulations, possibly even being able to side-step restrictions in the Advocates Act. It is therefore possible that the government intends to soft-launch foreign law firms with a base in SEZs, such as in Gujarat's GIFT[2], for instance, which is a place dear to Modi's heart (and his former constituency in his previous job as chief minister of Gujarat), having the added benefit of encouraging the growth of SEZs.

However, while our survey had been conducted before the SEZ reforms had been announced, being relegated to opening an office in a free trade zone on the outskirts of a city may not be high on foreign law firms' list of preferences.

WHAT WOULD THEIR STRATEGY BE?

Another interesting question is what foreign law firms' strategy would be, with respect to setting up their India operations. While several of the big firms have so-called 'best friend' relationships with Indian law firms already, which could presumably be converted fairly quickly requiring little more than the printing of new business cards



and a partnership vote.

But that may also be easier said than done at many firms. The top challenges of opening in India selected by our respondents, included "securing of continued buy-in from global partnerships for India operations", alongside a host of other factors. The two top concerns selected by 60% of respondents was that billing rates in India would be too low and that an India operation would likely have lower profitability that the global partnership.

Around half of respondents agreed that the following would be other major challenges:

- risk of litigation and other regulatory hurdles, such as taxation;
- stiff competition from local firms;
- competition from other foreign firms already entrenched in the market;
- continued global buy-in from partnership; and
- maintaining global quality standards.

The good news is, that "scarcity of local talent to hire" was bottom of the list, with only one firm selecting that as a challenge in India, and only a third thought that the costs and overheads of an India operation could be too high.

It is therefore unsurprising that most foreign law firms may start slowly and cautiously in India, looking at very conservative headcounts of 10 or fewer fee-earners within the first year (see chart).

Law students, many of whom are hoping that the entry of foreign law firms will suddenly flood the market with lots of new jobs, may be disap-

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Not Registered as a Foreign Lawyer

pointed: the majority of firms surveyed were predicting that they could annually hire one, two and in rare cases perhaps three graduates for their India operations, with only two firms surveyed predicting they might hire five fresh graduates.

Similarly, partners at Indian law firms who might be expecting a gold rush for talent by foreign firms on entry should consider the following: the majority of respondents, 67%, said that for their greenfield operations in India they would transfer partner-level resources from abroad (many foreign firms have been making Indian-origin partners in their India practices for years now, especially in places such as London, Singapore and Hong Kong), while 40% said they would also hire partners from local law firms in greenfield set-ups. With the headcounts indicated, that would translate to no more than two partners in their India offices in the early years. Only 20% of respondents answered that they would look at merging with one or more local law firms.

And when asked whether they were aware of any Indian law firms they could conceivably merge with or take over, 60% responded that they were not aware of any suitable acquisition targets in India at present. Nevertheless, one-third said there were at least several Indian law firms that would be suitable targets.

From the responses, it appears unlikely that the effects of foreign firms' entry will effect tectonic shifts overnight but that doesn't mean that their entry won't be disruptive. While most of the established Indian law firms would be able to easily handle one or two of their high-performing second-rung partners being poached by foreign law firms, it is still likely to hurt their bottom line. And in the longer term, that market will get more competitive, though billing rates will likely inch towards global standards.

And the challenge goes both ways: for foreign law firms to prosper they will have to adapt and crack one of the most complex legal and business environments in Asia, and will need to work closely with domestic firms.

WHEN WILL IT HAPPEN?

Several partners who responded were pessimistic, with one predicting five years and some even saying that it would not happen in this lifetime, due to resistance from the entrenched Indian law firms.

But sentiments and pressure has increased to greater levels than ever before. In a recent survey of 87 Indian general counsel (GCs), an overwhelming 89% said they would like to see relaxation of regulations to allow the entry of foreign law firms, and 87% said it would be good for the Indian market as a whole[3]. And although the GC community has historically not been very vocal at a policy level about the issue, that too is changing.

The Indian Corporate Counsel Association (ICCA) - a representative body of Indian GCs - had been closely involved in the ministry-led talks with stakeholders on liberalisation. In collaboration with a legal industry consultant, the body submitted a very thorough and quite workable roadmap for staggered foreign direct investment (FDI) into the legal profession, ratcheting up gradually from 26% in the first years, while also making provision for continuing legal education, liability insurance and other vital reforms[4].

Notwithstanding all the above complexities and the web of competing demands, whenever asked for my personal opinion, I will stick to the traditional, safe and slightly amusing answer: anything is possible in India in two years. ■

Notes:

1. *Legally India:* LIVE BLOG • JGLS liberalisation talks: Commerce ministry talks plainly, discusses with Lalit Bhasin, R Luthra and more... http://www.legallyindia.com/law-firms/jgls-liberalisation-talks-live-blog-today-we-ll-take-your-questions-to-bci-s-mk-mishra-commerce-ministry-lalit-bhasin-r-luthra-and-more-20160811-7902
2. *Legally India*: Will foreign law firms open first in SEZs (and GIFT)? Not yet, but gov't paves a way with rule change http://www.legallyindia.com/law-firms/will-foreign-law-firms-open-first-in-sezs-and-gift-not-yet-but-gov-t-paves-a-way-with-rule-change-20170114-8221
3. *Legally India*: Survey: 9 out of 10 GCs want foreign law firms to enter, and most think foreign lawyers are better than domestic ones http://www.legallyindia.com/home/idex-legal-survey-indian-firms-need-to-polish-their-game-foreign-firms-need-to-entersay-87-gcs-20170512-8505
4. *Legally India*: ICCA draft liberalisation bill is most thorough yet: Proposes 26-49% legal FDI within 2-5 years, ad rules, CLE, insurance, more http://www.legallyindia.com/law-firms/icca-draft-liberalisation-bill-is-most-thorough-yet-proposes-26-49-legal-fdi-within-2-5-years-ad-rules-cle-insurance-more-20160929-8006

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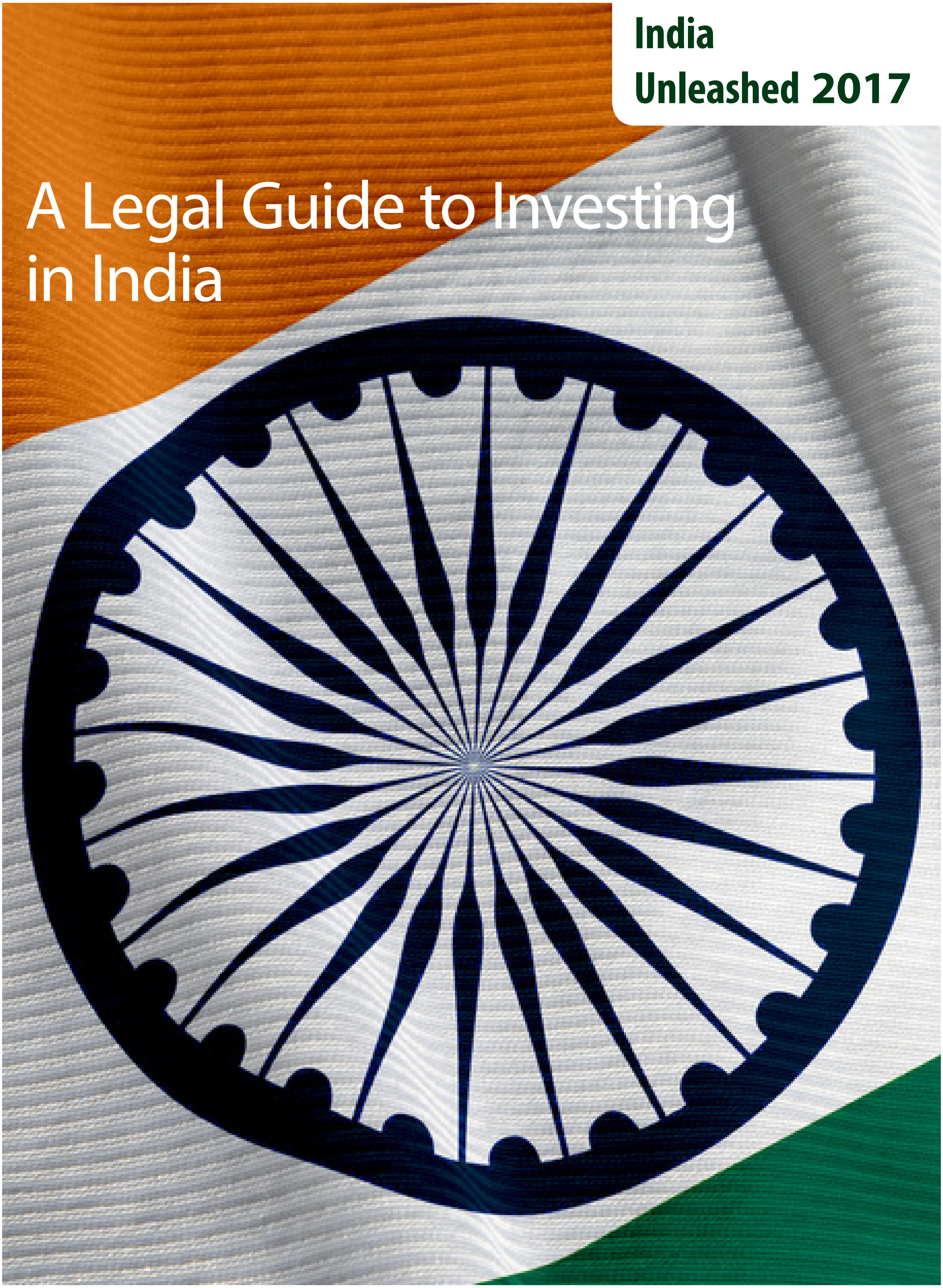
A Legal Guide to Investing in India



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Overview of the Funds Regimes in India

Brief analysis of the Indian funds regimes that play a vital role in bridging the gap between the capital seekers and capital providers.

The mandate of Securities and Exchange Board of India (**SEBI)** in the asset management space, has translated into various regulations, through which SEBI regulates funds (domestic and offshore) as well as certain managers/advisers.

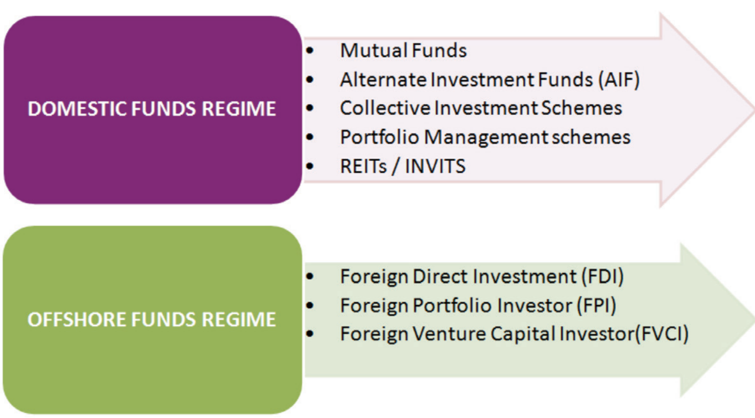
The domestic funds (investment funds set up in India) are regulated as mutual funds under the SEBI (Mutual Funds) Regulations, 1996 (**MF Regulations**), alternative investment funds (**AIFs**) under the SEBI (AIF) Regulations, 2012 (**AIF Regulations**), real estate investment trusts (**REITs**) under the SEBI (REIT) Regulations, 2014 (**REIT Regulations**), infrastructure investment trusts (**INVITs**) under the SEBI (INVIT) Regulations, 2014 (**INVIT Regulations**) and collective investment schemes (**CIS**) under the SEBI (CIS) Regulations, 1999 (**CIS Regulations)**.

Offshore funds (investment funds set up outside India that invest in Indian securities or domestic funds) are regulated under SEBI (Foreign Portfolio Investors) Regulations, 2014 (**FPI Regulations**), SEBI (Foreign Venture Capital Investor) Regulations, 2000 (**FVCI Regulations**). The Reserve Bank of India also regulates offshore funds through the exchange control regulations, viz. FEMA (Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (**FEMA 20**).

Portfolio Managers who manage funds or securities of their clients are regulated under the SEBI (Portfolio Managers) Regulations, 1993 (**PMS Regulations**). Investment advisors (**IA**) are regulated under the SEBI (Investment Advisers) Regulations, 2013 (**IA Regulations**) and research analysts under SEBI (Research Analysts) Regulations, 2014 (**RA Regulations**).

With the above background, below is a brief write up on each of the regimes.

TABLE 1: OVERVIEW OF FUNDS REGIME



AIFS

India has witnessed a steady growth in the number of AIFs being registered with SEBI and the commitments raised by such funds growing year on year. As on January 31, 2017, SEBI had 288[1] AIFs registered across categories. As on December 31, 2016, AIFs across all categories, raised commitments of

~ INR 700,000 million out of which ~INR 280,000 million has been invested[2].

AIFs are investment funds that mobilise pools of capital from sophisticated investors with minimum investment ticket size of INR 10 million. AIFs can be registered under any of the following three categories:

- Category I includes social venture funds, small and medium-sized enterprises (SME) funds, infrastructure funds, venture capital funds and angel funds;
- Category II includes those AIFs that do not fall in Category I or III – these include private equity and debt funds; and
- Category III includes those AIFs that employ diverse or complex trading strategies and may employ leverage – these are primarily for hedge funds. However, Indian funds proposing to use fund level leverage or invest primarily in listed equity investments (including long only funds) also need to seek registration as Category III AIFs.

AIFs are becoming the vehicles of choice in the alternate assets space as the structure can be customised to suit diverse investment strategies, sector exposure or target asset classes. AIFs also enjoy a special taxation regime thereby adding a sense of certainty and clarity for the tax implications for AIF investors, albeit, several tax issues remain to be addressed.

SEBI's commitment to support the AIF industry in its growth strategy led to constitution of the Alternative Investment Policy Advisory Committee (**AIPAC**) under the chairmanship of Mr. N.R. Narayana Murthy. AIPAC has submitted its reports in January 2016 and December 2016. The recommendations made under the AIPAC reports can be classified under the following themes:

Unlocking domestic pools of capital: The AIPAC seeks reforms to permit wider participation by domestic banks, insurance companies, pension funds and high networth individuals.

Promoting onshore management: The AIPAC recommends amendments to the domestic regulatory and tax regime to encourage onshoring of management of offshore funds and thereby deepening the domestic fund management industry.

Tax recommendations: The key tax recommendation of AIPAC include: losses on investments to be available to investors for set off, allowing proportionate exemption for service tax on management fees in unified structures, extending pass-through status to Category III AIFs, exempting foreign investors investing directly into an AIF from the rigors of obtaining a permanent account number and making tax filings, permitting AIF investors to capitalize the management fee as a cost of improvement thereby enhancing their post tax returns; to name a few.

SHAGOOFA
RASHID KHAN
PARTNER

MUTUAL FUNDS

Mutual funds operate in the retail segment (with limited exceptions for private placement for specified types of schemes) by raising monies from the public through the sale of units under schemes set up from time to time. Such solicitation is required to be conducted through the issue of an offer document, which is scrutinised by SEBI. As would be expected from a retail product, the offer document is required to be detailed with extensive disclosures. All mutual funds are required to be established as trusts. The MF Regulations set out the eligibility criteria and also codify the rights and obligations of the sponsor, trustee (in addition to trust law), manager and custodian, including as to the contents of the trust deed and the investment management agreement. The MF Regulations stipulate broad basing requirement at each scheme level as well as prescribe the investment conditions, including cap on exposure to investee companies for investments by way of equity and debt. The MF Regulations also govern the economics of a mutual fund, including payment of dividends, redemptions and valuation, and mandate norms and caps on fees, expenses and commissions payable to intermediaries.

REITS AND INVITS

REITS and INVITs are regulated by the REIT Regulations and the INVIT Regulations respectively and the two regulations, barring a few exceptions, are similar. REITs / INVITS are required to invest primarily in completed, revenue generating real estate assets and distribute ninety percent of the earnings to investors.

Units of REITs / INVITs are to be issued by way of a public offer through an offer document which is scrutinised by SEBI. INVIT Regulations do envisage private placement, subject to certain conditions. REITs and INVITs are not permitted to have multiple classes of units or schemes. The units of the trust (including where privately placed) mandatorily need to be listed on a stock exchange in India, with a minimum trading lot of INR 0.1 million for REITs and for INVITs it is INR 10 million (private placement); and INR 0.5 million otherwise. The regulations also specify minimum offer size, minimum public shareholding and minimum number of investors. Detailed investment conditions and restrictions have also been prescribed in the regulations.

AIFs can be registered under its different categories, and include infrastructure funds, social venture funds, venture capital funds, SME funds, private equity funds, debt funds and hedge funds.

Both regulations specify minimum standards of net worth, qualifications and experience for, and rights and responsibilities of sponsors, manager and trustee, as well as rights and responsibilities of valuers and auditors. Additionally, INVIT Regulations require a project manager to be appointed who will undertake operations and management of the INVIT's assets.

Thus far, SEBI has granted registration to three INVITs, viz. IRB INVIT Fund, GMR Infrastructure Investment Trust, MEP Infrastructure Investment Trust, Reliance Infrastructure Investment Trust, India Grid Trust, and IL&FS Transportation Investment Trust. No REIT has been registered with the SEBI yet, thought there are newspaper reports of a few players considering a REITs structure.

CIS

Pursuant to recommendations of Dr S.A. Dave Committee, regulatory regime for CIS was introduced. CIS are regulated under the CIS Regulations read with Section 11AA of the SEBI Act. A CIS is a pooling arrangement for making investments in assets other than securities and units of a CIS have to be mandatorily listed on a stock exchange. Through 1990s several agricultural / plantations schemes mushroomed and investors lost their monies on account of ponzi schemes or vanishing promoters thereby leading to clamp down on unregulated private schemes. Given the stringent norms under the CIS Regulations and its history, there is only one CIS manager registered under the CIS Regulations.

PORTFOLIO MANAGERS

Portfolio Managers are permitted to engage in the management (whether on discretionary or non-discretionary basis) or administration of a portfolio of securities or funds of the client. As of December 2016, portfolio managers had 72,477 clients and Rs. 11.7 trillion of assets under management across discretionary, non-discretionary and advisory services[3].

The PMS Regulations prescribe qualification, experience and capital adequacy conditions for registration as a portfolio manager. They also provide for a code of conduct, including in respect of avoidance of conflicts and disclosures, general responsibilities, reporting and compliance items. To minimum investment amount for an investor under the PMS Regulations is INR 2.5 million.

In January 2017, SEBI amended the PMS Regulations laying down an enabling framework for the registration of Eligible Fund Managers (EFM) to manage Eligible Investment Funds (EIF) pursuant to Safe Harbour Regime under Section 9A in the Income Tax Act, 1961 (IT Act (read with applicable rules)) whereby an EIF would not be liable to tax in India merely on account of having an EFM in India, subject to satisfaction of several conditions, a few of them being:

- the EIF shall be a resident of a country notified by the central government;
- the aggregate participation or investment in an EIF, directly or indirectly, by persons resident in India shall not exceed 5 per cent of the corpus of the EIF;
- the EIF shall have a minimum of 25 members who are, directly or indirectly, not connected persons (look-through permitted only for the direct investor);
- the EIF shall not invest more than 25 per cent of its corpus in any entity;
- the EIF shall not carry on or control and manage, directly or indirectly, any business in India.

TABLE 2: SNAPSHOT OF INVESTMENT VEHICLE, FPI, FVCI, FDI REGULATORY REQUIREMENTS AND TAX CONSIDERATIONS

#	Foreign Direct Investment (FDI) Scheme	FPI	FVCI	Investment Vehicle
Entry Route	As per automatic route or as per approval route	No approval required, once registered	No approval required, once registered	Automatic route
Registration	Not required	Investor to apply to a to a Designated Depository Participant to seek registration	Investor to apply to SEBI to seek registration	Investment Vehicle has to be registered with SEBI
Instruments	Equity shares and fully and compulsorily convertible securities	Listed or to be listed equity shares and other securities, securitised debt, etc. FPIs can invest in unlisted debentures, subject to conditions	Equity, equity linked securities, convertibles and units	Units of the Investment Vehicle
Pricing	Subject to pricing norms	As per prevailing market price	No pricing restrictions	Subject to pricing norms, in limited situations
Tax implications	No special tax regime	Concessional tax regime	No special tax regime	Investment Vehicles are tax pass through. Investors pay tax on pro-rata share of income

INVESTMENT ADVISORS

The IA Regulations seek to regulate entities providing investment advice to specific clients. Registration with SEBI is not mandatory for entities regulated under other regulations or those who provide advice incidental to their main activity or for AIF managers. The IA Regulations stipulate capital adequacy norms and other eligibility criteria, including qualification and certification requirements from the National Institute of Securities Market (NISM).

RESEARCH ANALYSTS

To regulate dissemination of research analysis and reports (and recommendations) relating to listed or to-be-listed securities, SEBI introduced regulations for governing RAs in September 2014, thus closing the loop on all forms of investment management and advisory activities in India. Notably, the obligations under the RA Regulations are applicable to proxy advisers as well. The RA Regulations also stipulate eligibility criteria, including qualification and certification requirements such as NISM certification.

OFFSHORE FUNDS

Foreign investment in India is required to comply with the Foreign Exchange Management Act, 1999 and the subordinate regulations, including FEMA 20. Below table encapsulates key routes for investing into Indian funds / Indian securities as per FEMA 20:

India's tax treaty amendments play a vital role in structuring, documentation and implementation of fund structures.

In addition to the above, non-resident Indians (NRIs), or entities owned and controlled by NRIs are permitted to invest on a non-repatriation basis which investments are treated at par with residents. NRIs can also invest in Indian securities on a repatriation basis.

The typical jurisdictions for setting up the offshore fund/investment SPV for making investments into India are Mauritius, Singapore, Cyprus, Luxembourg, Netherlands, Ireland. In 2016, India has amended its tax treaties with Mauritius, Singapore and Cyprus and moved to source based taxation for capital gains on sale of shares. Recent tax treaty amendments together with coming in force of general anti avoidance rules (GAAR), place of effective management (POEM) rules, limited thin capitalisation (thin-cap) norms and other tax implications under domestic law for funds and downstream investments play a vital role in structuring, documentation and implementation of fund structures.

CONCLUSION

As India moves steadfastly on its growth trajectory, funding requirements for core and key sectors continue to rise. The Finance Minister of India has estimated that funding requirement for infrastructure sector to be over US$1.5 trillion. Government of India has, by making a commitment of Rs 200,000 million for 49% stake, set up the National Investment and Infrastructure Fund (NIIF), under the AIF regime, as a fund for enhancing infrastructure financing in India. Further, the total stressed assets in the Indian banking sector is estimated to be US$130 billion. There is renewed interest amongst offshore and domestic investors in debt funds and debt investments – be it mezzanine debt, mid-market lending, structured credit, participation in stressed or distressed opportunities through an asset reconstruction company (ARC) route, non-banking finance company (NBFC) route or combination structures. A buoyant stock market, strong FDI inflows, significant participation by funds industry and structural reforms backed by a progressive and collaborative government makes India an appealing investment destination. ■

NOTES

1 http://www.sebi.gov.in/cms/sebi_data/attachdocs/1486465257854.pdf

2 http://www.sebi.gov.in/cms/sebi_data/attachdocs/1485169430146.html

3 http://www.sebi.gov.in/portfolio/assetmanagement-archive.html

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About Cyril Amarchand Mangaldas

Cyril Amarchand Mangaldas ("The Firm") was founded on May, 2015 and takes forward the legacy of the erstwhile 100-year old Amarchand & Mangaldas & Suresh A. Shroff & Co., whose pre-eminence, experience and reputation of almost a century has been unparalleled in the Indian legal fraternity. Tracing its professional lineage to 1917, the Firm of Cyril Amarchand Mangaldas is the largest full-service law firm in India, with over 625 lawyers, including 100 partners, and offices in India's key business centres at Mumbai, New Delhi, Bengaluru, Hyderabad, Chennai and Ahmedabad. The Firm advises a large and varied client base that includes domestic and foreign commercial enterprises, financial institutions, private equity funds, venture capital funds, start-ups and governmental and regulatory bodies.

The Firm prides itself in having a strong value system that keeps its clients as the central focus. Building on the strength of this value system, the Firm has fostered a collaborative work culture and adopts a pragmatic and solution-oriented approach to problem solving. Today, the Firm is recognised globally as a trusted adviser which consistently delivers quality, capability and commitment to its clients.

The firm was recently awarded "National Law Firm of the Year" by IFLR Asia Awards 2017 & "India Deal Firm of the Year" by ALB SE Asia Law Awards, 2016 & 2015. Ranked no. 1 amongst India's top 40 law firms in 2015 as per RSG India report as well as ALB on Asia's Top 50 Largest Law Firm report in 2015 and topped recent league tables namely Bloomberg, Merger Market, Dealogic, Thomson Reuters.

Several of our lawyers are cited as leading practitioners by global publications like Chambers and Partners, International Financial Law Review, Asia Legal 500 and Euromoney.

Our partners routinely advise and collaborate with governments and regulators on policy matters. Many partners of the Firm are also members of various government committees on legal and regulatory reform.

OUR PRACTICE GROUPS

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Through its "Best Friends' Networks", the Firm has established relationships with leading international law firms including those in the USA, UK, Japan, South Korea, Singapore, Hong Kong, China, Germany, and France. These cross-border relationships allow the Firm to provide local advice to its clients with a global outlook.

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Taking Control: Shifting Trends in Private Equity Deals

Control deals by PE investors are on the rise in India. This article explores the drivers behind this trend and the practical complexities involved in control deals.

Traditionally, Indian companies have been a family run affair, with the promoter (founder) shareholders hesitant to lose control over the family business. As a corollary, private equity investments were also conventionally minority investments. But the growth of the Indian economy has given birth to a new generation of entrepreneurs - the executive-turned-entrepreneur as well as those joining the start-up band wagon. This new class of promoters (or founders) is receptive to ceding control for both growth and expansion of the business. Further, many family businesses are being run by the second or third generation of promoter shareholders and some are also facing succession issues, and these promoters are often open to the idea of selling out. Coinciding with this development is the fact that PE players in India are at a stage where they have gained significant experience in India and have the wherewithal to deal with governance and regulatory risks and exposure, which in some instances may be unique to India. This has placed PE funds in a favourable position, where they are able to apply their expertise from running businesses globally to the Indian context. This is a phenomenon which could be beneficial to new age Indian promoters as well as PE funds. As a cumulative result, control deals have been on the rise in India. A recent survey conducted by Alvarez and Marsal[1] shows that over the last three years, control deals constituted nearly 30% of the overall deal value for over 20 PE firms as compared to only about 8% in 2014. Some of the notable control deals in 2016 were Blackstone Group's acquisition in Mphasis; Kedaara Capital and Partners Group acquisition in AU Housing Finance and Abraaj Group's acquisition in Care Hospitals.

The primary advantage of control deals is the ability of investors to drive their exit from the investment.

ABILITY TO EXIT

Easier exits: The primary advantage, amongst various others, that make control deals attractive to PE investors is the ability to drive their exit from the investment. In a typical minority investment, PE investors look to exit by selling their stake to the promoters by way of a put option, creating liquidity through an IPO, or by a sale to third parties. Each of these actions requires the promoter's participation and willingness to abide by the promises made at the time of the investment, with the only recourse in the event of any default by the promoter being a long-drawn dispute resolution process. Conversely, in majority control situations, exit lies solely in the control of the PE firms and they can exit at an opportune time, without being subject to or even requiring the promoter to act. The year 2016 saw several exits by controlling investors. An example is the exit by share sale at a substantial return by CX Partners and Capital Square Partners from Minacs Ltd. to US-based Synnex Corp. The acquisition of a majority stake in Care Hospitals by Advent International and subsequent sale to the Abraaj Group at a significant premium is also a notable success story.

Challenges to controlled exits: The ability to control exit, however, is not without its pitfalls. Though a PE investor may have the ability to drive the exit and set the terms for the exit, where the exit is by way of an IPO on the Indian stock exchanges, the controlling investor is likely to be classified as a 'promoter' under applicable regulations. This will lead to the investor being subject to the obligations and restrictions traditionally imposed on a promoter in a public offering (including post-IPO lock in), as well as obligations applicable to 'promoters' on an ongoing basis. Recent SEBI regulations[2] have, for the first time, formulated provisions for re-classification and declassification of promoters, which may come to the aid of existing investors to declassify themselves as promoters, but this option will be available only after the public offering. Interestingly, despite the higher obligations imposed in case of listed companies, control deals are also happening in the listed space.

Even where the exit is by way of a secondary sale to a financial or strategic investor, the potential purchaser is likely to seek business warranties and indemnities from the controlling investor. While in some cases, a strategic investor may agree to a sale on an 'as is where is' basis, financial investors are more likely to insist on business warranties and indemnities. If the original promoters remain in a minority position, they would be reluctant to take on these obligations and the burden would fall on the investor. Investors should discuss this upfront with the promoters at the time of the investment, and also consider indemnity insurance, which is offered in 'buy side' and 'sell side' formats. However, these come with their own set of limitations, and India being considered a high risk jurisdiction, there are a limited number of insurers who offer indemnity insurance.

Promoters holding a minority stake may also seek exit rights from the controlling investor. Investors need to carefully evaluate whether they can take on the obligation to provide an exit to the promoters, or merely offer them an opportunity to participate in exit along with the investors.

MANAGEMENT AND GOVERNANCE

Ability to control management: Another attraction of control transactions is that the investor has a greater say in the governance of the company. The investor can bring in professional management, implement new ideas based on its global experience, and ensure that the company is run in the best possible manner. Irrespective of whether the investor brings in new management or retains the promoter, in a control transaction, the investor will be able to link the tenure of the management of the company to the performance standards laid down by the investor.

A balance must be struck between the investor's role as the majority stakeholder and operational freedom to the minority promoters.

Another factor aiding the growing comfort between promoters who wish to stay on in their company, and investors who plan on acquiring majority stakes, is the fact that both parties are aware of the limited lifespan of their relationship. A financial investor typically has a definitive exit horizon, and consequently has no option but to chart an aggressive growth course to achieve the expected returns, including by bringing in the best possible strategic, operational and execution expertise into the investee company. A failure to do so would negatively impact its investment. Therefore, in any control transaction, a financial investor arguably has a greater interest at stake than a promoter, allowing the promoter to take reassurance in the fact that the best possible decisions will be taken for his company.

Challenges of being in the driver's seat: In control transactions, the investor will either require strong operational ability and market expertise to run the business, or must bring in a new management team with appropriate expertise or rely on the promoters for this purpose. The dual facts of being in a controlling position without deep operational / management involvement and the investor's dependence on professionals or promoters to run the business, could give rise to their own set of challenges. To address this, the investor should involve its operation teams fairly early during the investment negotiations. Identification of the right management team, charting a transition plan and aligning the objectives of the investor with the management team are critical. Formulating an initial 100 day plan and organizing training sessions with the management may also help in aligning the goals and vision of the management and the investor.

A key concern is also ensuring that the management team has skin in the game and contributes to the growth of the company. Stock options are a good tool to ensure this, but where the promoters of a company continue to play a key role, alternative incentive structures will have to be formulated owing to legal restrictions on issuance of stock options to promoters. These could include good leaver / bad leaver provisions and other retention structures to offset limited ownership interests. Further, where promoters are not bought out and will continue in their management role in the target company after investment, a balance will need to be struck between the investor's role as the majority stakeholder and operational freedom to the minority promoters for day to day activities. In some cases, such minority promoters may also seek affirmative rights and this may involve protracted negotiations.

Another issue for PE investors to watch out for is the liability of their nominee directors, who will no longer be mere non-executive directors representing a minority interest. A key concern is classification as 'officer in default', 'employer' or 'person in charge' under various laws, leading to liabilities. Fiduciary duty versus allegiance to the investor is a recurring concern for nominee directors and contractual remedies will need to be found for this. While these concerns are to some extent applicable to all transactions, the issue is more pronounced in a control transaction.

OTHER CONSIDERATIONS

Co-invest to diversify risk: In minority investments, diligence, affirmative rights and board representation are the key constituents of the arsenal for protection of investor rights, with the investor being, for the large part, an onlooker. However, control deals demand greater participation and involvement of the investor, even in situations where the promoters continue to hold shares in the company. Control deals require a greater investment in pure monetary terms, which in turn increases the risk associated with each investment. In this background, in addition to a high level of due diligence as well as business expertise which are prerequisites for any control deal, it may also be prudent for PE firms to diversify their risk in such transactions. One option available to PE firms is to co-invest with another financial investor or strategic investor, especially in the case of high value transactions. The advantage of such co-investment is that both monetary and management risk would be shared; and a strategic investor may also bring in sufficient business expertise to run the operations of the company and provide the financial investor with an exit in the future. However, a co-investment structure would imply dilution of governance and exit rights as between the co-investors as these rights will have to be shared with each other. Co-investment structures also need to be approached carefully as multiple co-investors may end up tipping de facto control and de facto majority in favour of the promoters, as the promoters may be the only shareholders with a significant

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PARTNER

consolidated stake.

Synergies: An added advantage of control transactions is that they give investors the option to use the controlled entities to make further acquisitions in India, or enhance efficiencies by having one or more investee companies work with each other or consolidate. In this connection, it may be noted that minority investment documentation typically provides a right to an investor to conduct its business and invest in other entities without any restrictions. However, in a control transaction, if any investor group entity is engaged in the same or similar business as a portfolio company in which there are shareholders apart from the investor, the investors and promoters / other shareholders should consider formulating basic conflict avoidance principles in the interests of good governance.

CONCLUSION

Recent years have seen a significant portion of the total PE investments in India being directed towards acquiring controlling stakes in companies. Some large PE exits from control deals have also been struck. Based on current evidence, the landscape for such transactions is maturing and it appears that control deals are here to stay. The volume of these deals is also likely to increase on account of stressed asset sales by banks. If the challenges posed by such investments are tackled effectively, and good governance approaches to management are adopted, control deals by PE firms may well spike in the near future. ■

NOTES

The authors would like to acknowledge the contribution of Trayosha Darapuneni, Senior Associate at Cyril Amarchand Mangaldas.

1 "The Operating Paradigm : Indian Private Equity Changes Gears"; available at https://www.alvarezandmarsal.com/sites/default/files/am_peops_operatingparadigmshift.pdf; last visited on April 11, 2017

2 SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (in force since December 2015)

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Partner Profiles

REEBA CHACKO

Partner and Head – General Corporate

Reeba specializes in private equity and venture capital investments, mergers & acquisitions, joint ventures and corporate restructuring.

She brings to the table her vast experience of working with foreign clients as well as international counsel in structuring complex private equity deals, mergers and acquisitions spanning several jurisdictions, and in advising clients on Indian acquisition strategies, foreign exchange control regulations, structured investments and other regulatory aspects. She has represented several leading global private equity funds, as well as large Indian corporates in connection with private equity investments. She advices both buy side and sell side in strategic sale transactions in India as well as financial investor stake sales and exit transactions. Her experience ranges across various sectors including pharmaceuticals & healthcare, real estate and infrastructure, technology, retail and ecommerce, financial services and education.

Reeba was ranked in Band I for Corporate M&A, Bangalore by *Chambers Asia* 2011 and *Chambers Asia* 2012. She was named for corporate M&A in *Chambers Asia* 2013 and 2014; and was recommended PE lawyer by *Chambers Asia* 2012, 2013 & 2014 for Private Equity. *Chambers Asia* 2015 has named her in the Corporate/M&A – India practice and says Reeba Chacko is praised for her sound expertise and *"exceptional client management skills"* and has also named her in the Private Equity – India practice and says she "*is exceptional at client management and making sure that the resources of the firm are involved in the deal."* Reeba was recently also recognised for Corporate M&A, Bangalore by *Chambers Asia* 2016, for her experience advising international private equity groups and venture capital firms in large-scale, complex transactions, and her peers have endorsed that she *"handles impressive transactions for clients."* Reeba has also been named in "Who's Who Legal – The International Who's Who of Business Lawyers - Mergers & Acquisitions 2012" as one of the thirteen named lawyers from India and continues to be named in the Who's Who Legal directory for India including in their latest edition in 2016.

She has graduated from National Law School of India University, Bangalore and has completed her LL.M from London School of Economics & Political Science (LSE).

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MAHESHWARI SUNDARESH

Partner

Maheshwari Sundaresh is part of the general corporate practice of the firm. Her advisory and transaction experience extends to foreign and domestic private equity and venture capital investments, inbound and outbound mergers and acquisitions, joint ventures and corporate restructuring. She also has extensive experience advising on securities market laws. Her sectors of expertise include e-commerce, consumer healthcare and technology enabled services.

In the private equity and venture capital fields, Maheshwari has been involved in a wide range of transactions, including early-stage to mid-stage investments, PIPE transactions and exits from investments, and has advised both investee companies as well as funds.

She has also advised prominent business houses in India on the restructuring of their Indian and overseas assets, and has advised established businesses as well as mid-stage companies and start-

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ups on fund-raising initiatives and general corporate matters, including business model analyses for foreign investment eligibility and compliance.

Having graduated from NALSAR University of Law, Hyderabad in 2007, Maheshwari joined the firm in July, 2007. She also has an LL.M. from Columbia University.

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Shagoofa Rashid Khan has 18 years of post-qualification experience across structuring funds, managed accounts, fund documentation, acquisitions / exits / restructuring / joint ventures and strategic initiatives, international taxation and planning, corporate and commercial laws, business advisory, compliance and ethics advisory, audit and finance.

She has extensively worked as an in-house counsel of leading players in the Indian financial services industry. She was Senior Vice President & Head – Legal at Kotak Investment Advisors Limited, a subsidiary of Kotak Bank, which is the investment manager and advisor for alternate assets across real estate, private equity and infrastructure verticals, and was part of the core team that built the alternate assets management platform of Kotak Group. Prior to joining Cyril Amarchand Mangaldas, Shagoofa was Senior Director and Head of Legal & Compliance with IDFC Alternatives Limited, alternate assets manager of IDFC group.

She is also experienced in corporate law & transactional advisory on account of her role as Vice President – Group Legal Team where she reported into the Group General Counsel of Tata Sons and advised Tata companies from diverse industrial sectors.

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ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

Competition Law in India

By Suhail Nathani and Ravisekhar Nair

SUHAIL NATHANI
MANAGING PARTNER

RAVISEKHAR NAIR
PARTNER

HAS THE COMPETITION COMMISSION OF INDIA (CCI) BEEN AN EFFECTIVE REGULATOR?

The CCI has established itself as an efficient and effective regulator. We were counsel to the CCI in its early days. That was the time when we were able to get a positive outcome for the CCI before the Supreme Court in its judgment in CCI vs. SAIL, limiting the powers of the Competition Appellate Tribunal (COMPAT) over the CCI. That judgment still holds in the matter of competition law. But a lot has changed since then.

In the first 2 years after notification of Sections 3 and 4 of the Competition Act, 2002 (Act) there were no penalty orders. The first penalty order came in the FICCI Multiplex Association case where the CCI imposed a penalty of Rs. 1 lac each on film producers/ distributers. Since then we have seen orders of wide import impacting various sectors and industries and the manner in which they do business.

With the notification of the merger control regime in 2011, the CCI came into its own with the requirement to seek its approval being a part of many corporate deals. Very recently the Government of India has greatly relaxed merger control norms. A March 2017 notification recognized the value of assets and turnover of business divisions as constituting the relevant assets and turnover for the purposes of Section 5 of the Act. This will go a long way in ensuring ease of doing business in India. The long awaited clarification on whether mergers and amalgamations also benefit from the de-minimis exemption is also a welcome step. It will reduce the burden on the CCI and be a welcome reprieve for companies who will now not need to take CCI approvals for these transactions.

SECTOR SPECIFIC IMPACT OF THE CCI AND SIGNIFICANT RULINGS

The CCI has seen some very significant rulings since the notification of Sections 3 and 4 of the Competition Act in May, 2009 in several sectors. Practitioners and critics can agree to disagree on the performance of the CCI – particularly in terms of appellate authority intervention and the amount of penalty realised into the consolidated fund – (a meagre .01% of a total penalty of approximately 1500 crore (around $230m) levied in 2015-16 was realised). But what is important is that the number of filings before the CCI is rising gradually showing that parties are increasingly reposing faith in the regulator.

Real estate sector:

The CCI's annual report of 2015-2016 shows that after nearly 8 years of enforcement of the provisions of Sections 3 and 4 of the Act, the sector that has seen the highest number of complaints and orders has been real estate. In the absence of a sector regulator, people were drawn to the CCI – the DLF case set the stage for many complaints against other Real Estate Developers. However, now with the enactment of the Real Estate (Regulation and Development) Act 2016, this trend will likely change.

Let us consider the DLF case which is pending in the Supreme Court. The Consumer Protection Act, 1986 addresses consumer disputes against traders directly, while the Competition Act addresses consumer welfare indirectly by ensuring that efficiencies are promoted and more choices are available to consumers.

But in practice we see that this distinction is often very blurred. The DLF case is a significant example of direct regulation in favour of the consumer. It involved a complaint by an association of apartment owners assailing certain terms and conditions in property developer DLF's standard form Apartment Buyer's Agreement and alleging abuse of dominance by DLF. These terms included DLF's discretion to change the layout and nature of use of the apartment complex without the consent of apartment allottees, its right to change the super area of the complex without consulting allottees and other clauses including additional payments. Additionally, the complaint charged DLF with imposing unfair terms in its conduct against apartment allottees. In a final order penalizing DLF with a penalty of 6.3 billion rupees, the CCI directed DLF to cease and desist from 'formulating' and 'imposing' 'unfair' terms in its agreements with buyers in Gurgaon. The CCI also directed DLF to modify its agreements with buyers. The order characterised the abuse practiced by DLF as 'unfair' and 'even exploitative.'

The DLF case presents an interesting example of how the lines between competition and consumer law are often blurred. The CCI held that DLF's real estate malpractices distorted competition in the market for high end residential apartments in Gurgaon - a narrow geographic coverage of a satellite town in the National Capital Region of Delhi. The CCI held that such practices reduced the ease of moving between services or offerings. It therefore suggested that for those consumers who had exercised an option to purchase an apartment from DLF, the incremental cost of switching to another real estate developer and absence of adequate information to the consumer to understand the value and cost of his investment, distorted competition for other real estate players.

While arguably the CCI did identify a theory of harm in the competition space, whether these measures resulted in increased choice, quality and price competition in the real estate space for consumers is debatable. The CCI answers these questions in part where it considers the effects of DLF's conduct on other players in the real estate space and particularly in the real estate market: it said that other players are likely to imitate the terms and conditions employed by DLF: a consequence that would impede consumer welfare.

While affirming the CCI's decision in appeal, the COMPAT noted in appeal that "the order of CCI as well as this judgment is expected to go a long way to ameliorate all the conditions of the customers." To date DLF remains the only case in the real estate sector that has passed two levels of antitrust scrutiny. If the flurry of cases that were brought before the CCI on real estate malpractices following the CCI verdict is anything to go by, the consumer remedies granted in DLF would not benefit consumers who are dealing with smaller real estate developers. The CCI's recommendations to the Government of India in the DLF case on the prevalence of 'unfair trade practices' in the real estate sector are perhaps a testament to the regulator's laudable attempt to balance equities in a first of its kind direct consumer harm case.

Financial and Media sectors:

The Financial Sector and Media and Entertainment followed in close second to Real Estate with an almost equal number of cases. One of the most significant rulings in the Financial sector is in the National Stock Exchange (NSE) case. Here too the CCI saw some success with the adoption of its decision by the COMPAT- but not before some remarks by the COMPAT on the CCI's market definition. The case is now pending before the Supreme Court and rival stock exchange MCX has moved a compensation application before the COMPAT. The CCI's decision in NSE again looked at market dynamics in a single paradigm. It maintained that conduct that even a single competitor finds objectionable is conduct that can be assailed under the Competition Act. Surely that cannot be the intent of the Act. One can argue, that in the case of NSE and MCX there was really only one competitor who traded in currency derivates- but that cannot be the basis for laying down a precedent on unfair pricing. The term 'unfair' cannot be construed so narrowly so as to assail conduct that a single competitor finds objectionable. That term must necessarily relate to whether conduct is harmful to competition in general. Perhaps this is a question that will be answered in later decisions and with more CCI decisions being challenged in appeal.

The media and entertainment sector also recently saw the CCI look at television rating measurement in the Prasar Bharti case – a case that the CCI subsequently closed. The film distribution cases also occupied the field with the CCI looking into agreements between film producers, distributors and exhibitors for anti-competitive conduct.

Pharmaceutical sector:

In third place is the pharmaceutical sector on account of the CCI's many interventions in the practice of issuing No Objection Certificates (NOCs) for the appointment of stockists and distributors for pharmaceutical drugs and the fixing of trade margins. Its orders were upset by the COMPAT including in *AIOCD vs. CCI and Ors.* where the COMPAT noted that there were clear indications from third parties that an NOC was not mandatory and these statements were clearly ignored by the DG and the CCI. COMPAT held that the system of NOC was approved by the Mashelkar Committee, a committee consisting of expert and distinguished members, and its recommendation should not have been ignored. It also found that display of drug prices was a mandatory requirement under the Drug (Price Control) Order, 1995 and the mechanism of facilitating the advertising of the drug prices could not be considered as anti-competitive on the premise that the mechanism limits or controls supply, or production of the product.

With the Government of India recently indicating that it is inclined towards introducing a law so that doctors prescribe generic drugs to reduce healthcare costs, greater inclusion in the list of essential drugs and the 2014 notification of a wider Drug Price Control Order, the decisions will raise new questions of quality control and pricing, entry and quality control of generic medicine. And it remains to be seen how the CCI will respond.

Petroleum/ Gas sector:

The CCI has had the occasion to look into the business practices of oil marketing companies on several occasions. One of the ongoing cases is looking into an alleged ethanol cartel for supply of ethanol to oil marketing companies under the ethanol blending programme. This case also alleged that the oil marketing companies had formed a buyer's cartel to procure preferential price and quantities of ethanol from suppliers. On this point of law - buyer cartels - the CCI is yet to make a mark. No singular decision of the CCI looks at buyer cartels definitively. Indeed, the CCI has already ruled that oil marketing companies cannot be accused of having formed a buyer's cartel in the First Indian Glycols case (the subsequent case is still being looked into). The CCI has in the past expressed its reservation in looking at the purchasing activities of enterprises. In Pandrol Rahee, the CCI noted that "the decision making process of a consumer or exercise of consumer's choice in purchasing activity of a consumer is not a matter of Section 3 ..."

Buyer cartels are a matter of significant antitrust interest. Joint procurement agreements/arrangements may give rise to competition concerns in the capacity of the relative bargaining power of the buyer and the existence of a monopsony and may be subject to the following, amongst other, competitive impact assessment:

(i) In a market with a dominant buyer, the possibility that such a buyer restricts its purchase requirement to lower prices cannot be excluded.

(ii) A large buyer with a stable buying requirement may also not incentivize the supplier to innovate or improve its service because the supplier knows that there is a ready buyer. A stronger buyer can also eat into the supplier's profits.

(iii) If you are a big buyer and are able to get product feed for cheap, it is easy to undercut your rivals in the buyer's market. It can also lead to a situation in which the other buyers (with smaller requirements) have to pay a greater price for the product fee. They pass on the increased price onto their customers, while the big buyer's products are cheaper and more attractive.

But we are yet to see a CCI decision looking at or laying down the law on competition scrutiny of buyer cartels.

Miscellaneous:

Another intervention worthy of note is the COMPAT's direction of an investigation into the practices of Uber- an order that was subsequently stayed by the Supreme Court. It saw the COMPAT revisiting a CCI order declining to initiate an investigation against Uber. But what is important is that we see the COMPAT revisiting the CCI's order on merits. And especially where the COMPAT looks at Uber's business model network effects (the displayed value of the use of a product or service by a person on others - the greater the number of subscribers, the more valuable the business). Look at it this way, if you used the Uber application on your mobile and didn't find a single driver- would you use it? No. The COMPAT's assessment of network effects in this case to be a guiding factor in its dominance analysis is laudable and we hope to see more of such intuitive decisions in the future.

TIMELINESS OF REGULATORY PRACTICES

The CCI is doing exceedingly well in the timely disposal of merger control cases. CCI's Annual Report for the year 2015-2016 shows the trends in disposal of merger control cases. It reflects both efficiency and timeliness. For example, the average number of days for disposal of merger control cases has ranged between 16.5 days in the year 2011-2012 with 47 cases to 26.4 days in the year 2015-16 with 127 cases. These are very impressive figures. The annual report also reveals that out of the 113 notices received during 2015-16, 97 were in Form-I (the short form) and 16 were in Form-II (the long form). A sector-wise break-up of the 113 notices (along with their respective shares in total notices filed) includes: Finance and Markets (22%); Pharmaceuticals & Health Care (11%); Information Technology and Services (11%); PVC & Chemicals (10%); Auto & Auto Components (4%); Mining & Metals (2%); Power & Power Generation (1%); Media & Entertainment (2%); Food & Refined Oil (4%); and Miscellaneous (35%).

But what is most impressive is the individual number of days taken to dispose of Form I and Form II cases. The annual report reveals that in the year 2015-16, of the 107 notices decided by the CCI, 79.43% notices (85 notices) were decided within 30 days, another 18.69% notices (20 notices) were decided within 60 days, less than 1% of notices (1 notice) were decided within 120 days and, again, only 1 notice was decided within 210 days.

The same cannot be said for behavioural cases under Sections 3 and 4 of the Act. While the regulations require the Director General to complete an investigation within 60 days, that is rarely the case. In cases that did not involve any supervisory court intervention, stays on investigation and other intervening events, it is seen that the investigation has lasted for more than six months. Naturally more complex cases require longer periods to investigate and adjudicate. These cases include cases shown in the table on the next page.

EMERGING TRENDS AND POLICY ISSUES

(i) Commitments and plea bargaining in behavioural cases.

In a change of trend, the CCI is increasingly looking to invite parties for a hearing before passing an initiation order. Pre-initiation hearings have increased by 50% percent in the year 2016 as compared to 2015. But more importantly, closure orders after providing this hearing have increased. This shows that the CCI is productively using this opportunity to filter out cases that do not raise competition concerns.

A new trend has emerged in the last few months regarding closure of a case pursuant to commitments offered by parties. We saw this happening in *Prem Prakash vs. Principal Secretary* where the CCI noted that the Central Public Works Department had modified its Works Manual to make it competition law compliant. It closed the case by observing that no further action was required to be taken. This is a welcome step both in terms of time and cost saving and efficient regulation. It remains to be seen whether the CCI will treat commitments offered by private enterprises on a similar footing.

(ii) Traditional vs. forward looking approach in merger control cases.

Merger control cases have seen an increased tolerance for behaviour versus structural remedies. For instance, PVR saw a split verdict on the acceptability of behavioural remedies with three Members of the CCI dissenting to say that price caps on tickets and food and beverage prices were acceptable means to avoid an anti-competitive outcome. This decision was of course led by the majority view which imposed structural remedies along with some behavioural remedies. But the world over

Case	Date of 26(1) order	Date DG report filed	Date of final order by CCI	No. of days in investigation	No. of days for final order by CCI
Atos Worldline India vs. VeriFone India Sales	21.12.2012	20.03.2014	04.06.2015	1 year 3 months	1 year 2 months
Prasar Bharti vs. TAM Media Research	05.03.2013	19.12.2014	25.02.2016	1 year 9 months	1 year 2 months
Indian Exhibition Industry Association vs. Ministry of Commerce and Industry	06.05.2013	14.02.2014	03.04.2014	9 months	2.5 months
Bio-Med Private vs. Union of India	03.09.2013	21.11.2014	04.06.2015	1 year 2 months	6.5 months
Vijay Bishnoi vs. Responsive Industries	24.03.2015	19.10.2015	21.09.2016	7 months	11 months

the trend seems to be to prefer structural over behavioural remedies. Very recently the European Commission has blocked the big LSE and Deutsche Börse merger since "[those] parties were, however, only prepared to offer a complex set of behavioural measures but not the divestiture of [LSE's] fixed income trading platform." That is the trend in merger control cases where regulators tend to prefer structural remedies over behavioural ones. Behavioural remedies, in their opinion, are difficult to monitor.

The Indian situation may call for a different approach. The regulator or its monitoring agency doesn't really have to monitor this process. We live in a country where in the Supreme Court's own words, a lot of litigation is proxy litigation. Increasingly the COMPAT has also been directing the CCI to look into the authenticity of complaints filed before it – including in the Hiranandani Hospital case. It doesn't take a moment for a motivated or misguided informant to reach out to the CCI and say that there was non-compliance of behavioural remedies. That is enough to initiate an inquiry into non-compliance. Like the minority order in PVR notes, behavioural remedies impose a higher administrative burden on the regulator - but that cannot be a ground to reject an otherwise appropriate remedy, especially one that benefits consumers and competition.

(iii) 'Sandbox Approach' in handling tech cases.
The United Kingdom floated the idea of a 'regulatory sandbox' for financial services in 2015. A regulatory sandbox is a 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in the activity in question.

This is an interesting model to follow for technology cases. Those cases involve reviewing any competition harm that may arise from implementation of a new technology. A sandbox approach allows the innovator to test the technology for a period of time before it can come under regulatory scrutiny.

Technology cases present their own unique challenges before the regulator. Technology cases present a 'constant development' challenge that regulators have to deal with. Can you take a forward looking approach in technology cases? Would it be helpful to wait and test for technology to proliferate in a 'sandbox' before you start regulating it? Such models should be viewed favourably since that would reduce the burden on the regulator and also give technology some breathing space so it can develop and benefit both consumers and the market.

Another challenge that regulators are seized with is whether technology development that has discernable consumer and competition benefit outweighs any abstract competition concerns raised by self-interested competitors. We often see that competitors who do not innovate raise fictitious and abstract complaints against companies who do. The motive is to stifle competition and innovation by inviting antitrust scrutiny. Should such bona fide product innovations not be insulated from competition law scrutiny? And where there is credible evidence that no anti-competition effect exists, would the CCI not be precluded from scrutinising such innovations? Technology cases call for a net-benefit approach. Where technology is useful for the consumer and the market, self-interested competition claims should be summarily rejected by the CCI.

(iv) The role of the Appellate Tribunal-developing jurisprudence while also applying rules of natural justice.

Increasingly we are seeing a lot of the orders of the Competition Appellate Tribunal setting aside CCI decisions on procedural and natural justice grounds. This leaves a lot to be said about development of the law. While appellate review rightly instructs the CCI to look into issues of procedure, the development of the law cannot wait endlessly for the odd procedurally perfect case. A closer look at the CCI's procedural regulations also leaves much to be desired and much to be circumspect about. The Competition Commission of India (General) Regulations, 2009 (General Regulations) recognise evidence in the form of unsworn statements of individuals or signed responses to written questionnaires or interviews. But when such evidence is taken by the Director General, parties argue, and rightly so – that there is no way to check the authenticity of the evidence. The evidence is liable to be excluded when viewed in the context of general rules of evidence applicable to all quasi-judicial processes (the Evidence Act is inapplicable to the CCI), but look then at the General Regulations which expressly allow such evidence! There is no right or wrong approach here.

Ideally it is up to the CCI to look into the evidence and see if it inspires confidence. In the GSK/ Sanofi case for example, the DG while investigating found that representatives of GSK and Sanofi signed a register with the same black pen. The COMPAT set aside this decision noting that this cannot by any stretch of imagination lend an inference of collusion. The probative value of evidence is really a subjective examination. If the regulator finds that a piece of evidence is probative based on sound principles, such decisions will withstand appellate scrutiny.

But the development of the law cannot be left on the back seat. We see many matters being remanded by the COMPAT to the CCI on natural justice grounds. Equally many CCI decisions do not apply the law laid down by COMPAT. This back and forth leaves the development of the law in a lurch.

We have recently seen the Supreme Court intervening in a COMPAT order and upholding the original decision of the *CCI in CCI vs. Co-ordination Committee of Artists and Technicians of W.B. Film and Television and Ors.* That decision did lay down the law holding that trade associations who act collusively at the behest of their constituent members cannot avoid competition law scrutiny on the basis of Article 19 of the Constitution – their right to lodge protests (boycotts). Hopefully the coming years will see more decisions by the Supreme Court as that will clear the air on issues that are still being debated between the COMPAT and the CCI.

(v) Some perspectives on how the shifting of competition appeals to the NCLAT will work.

This is a regressive move as competition law is very different from company law. They both occupy different fields even as they are both under the same ministerial control of the Ministry of Corporate Affairs. Theoretically, competition law looks at curbing anti-competition practices of companies while company law looks at the rights and liabilities of companies and their members. These are completely different fields. While the finance bill has introduced this move, there is still some uncertainty on how the shift will happen between the COMPAT and the NCLAT.

The inconspicuous absence of appeals against orders under Section 26(8) of the Competition Act in the Finance Act is yet another aspect that could have been improved in the Act. Currently there is no appeal provision available to an aggrieved party where the CCI reverses a report of a Director General that recommends violation of the Competition Act. This should have been considered in the amending act as its absence denies an appellate remedy to a party who won in terms of the Director General's report but lost before the CCI. ■

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

India Prepares to Open New Chapter on Taxing Histories

Taxes in India have long been a very scary topic, particularly for foreign investors. Now, this current government had promised to eradicate so-called tax terrorism.

SO, HAS THE GOVERNMENT MANAGED TO ERADICATE TAX TERRORISM?

Yes, the Indian tax structure has all along been very complex and unpredictable owing to a host of factors, such as a multiplicity of taxes, divergent interpretations, the absence of a coherent administrative set-up coupled with unrealistic revenue targets, and a propensity to resort to amendments (including retrospective amendments), by successive governments. In this decade, for foreign investors, the "indirect transfer" of shares case of Vodafone symbolizes all that has been wrong with the Indian tax system. Despite winning at the Supreme Court, the Government in 2012 retrospectively amended the Income Tax Act, 1961 ("IT Act") to overcome the Supreme Court ruling and to tax indirect transfers involving foreign companies/investors.

The Finance Ministry refused permission to the IT department to appeal against the Bombay HC order in Vodafone and Shell cases involving Rs 8000 crore demand.

In 2014, when the NDA government took over, it promised "ease of doing business" as well as "predictability" in the Indian tax regime. To assuage foreign investors, one of the early key announcements of this Government was that they would not resort to retrospective amendments to create past tax liabilities.[1] Accordingly, a high level Committee within the Central Board of Direct Taxes ("CBDT") was set up in 2014 to scrutinize all "indirect transfer" cases prior to 1 April 2012, and where no action has been initiated by 28 August 2014, the Tax Authority would need to make a reference to and obtain prior approval of the Committee before issuing notice for scrutiny.

Further, in 2015, offering major relief to Foreign Institutional Investors ("FIIs"), the Government also announced exemptions to FIIs from the applicability of the controversial Minimum Alternate Tax ("MAT") on capital gains arising out of their investments – both for the period prior to

ROHIT JAIN
PARTNER

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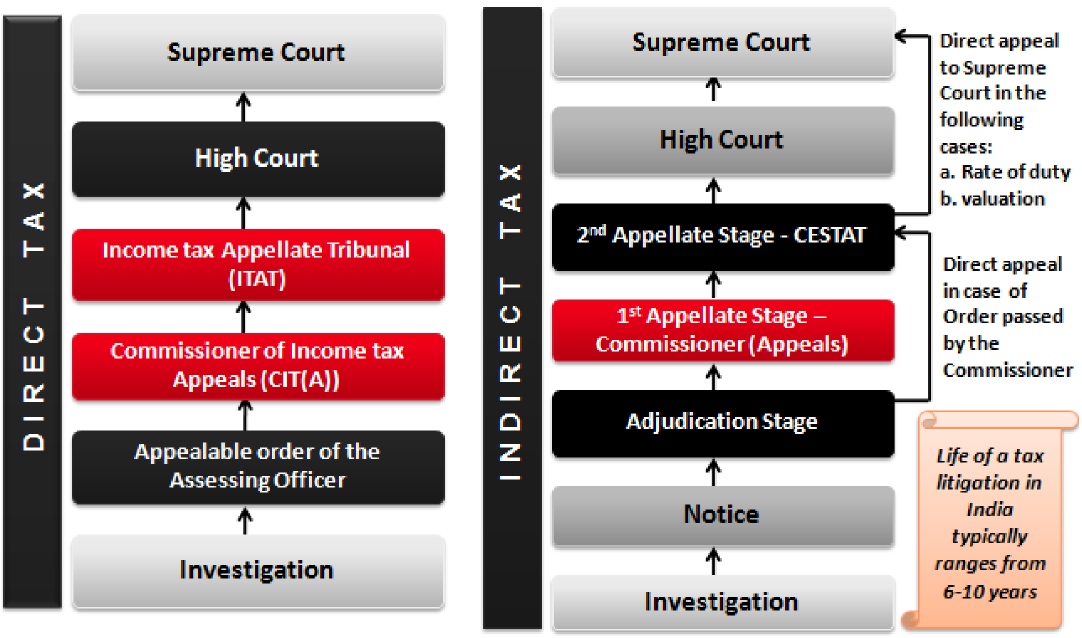
PARTNER

KUMAR VISALAKSH
PARTNER

April 1, 2015[2] as well as for the period thereafter. In order to boost FII confidence, in January 2015 the Government by a Cabinet decision decided not to appeal to the Supreme Court in the transfer pricing cases involving taxing the sale of shares of relevant provisions of the IT Act[3] to specify that provisions relating to indirect transfers will not be applicable to any asset or capital asset being held by a non-resident, directly or indirectly, in FIIs or FPIs.



Vodafone and Shell in offshore transactions, which it lost in the Bombay High Court. In fact, by the Finance Act, 2017 the Government amended the

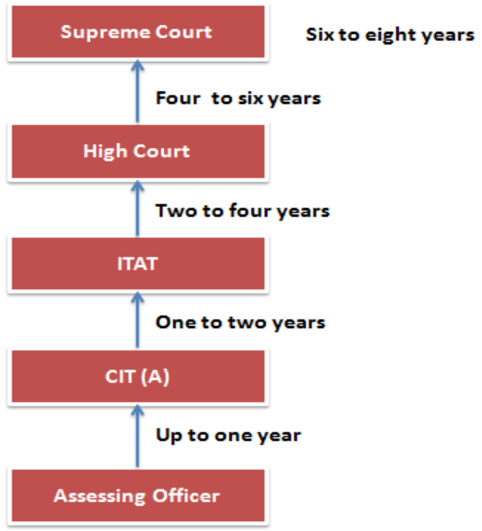
On the tax treaty front, in the past three years, the Government has re-negotiated tax avoidance treaties with Mauritius, Cyprus and Singapore primarily to bring certainty on various aspects of taxation (such as capital gains) and to curb tax evasion. In its commitment to tackle the threat of black money, besides the sudden demonetization in November 2016, the Government has already signed tax information exchange agreements ("TIEA") with seven jurisdictions such as Switzerland and the United States, and has also completed negotiating 17 new TIEAs, which will be signed in the days to come[4].

Further, the Tax Administrative Reforms Commission ("TARC")[5] headed by Mr Parthasarthi Shome, proposed in its report[6] a comprehensive overhaul of the current Indian tax system – both on the legal as well as administrative aspects. Amongst the recommendations are suggestions to ensure clarity and simplicity of tax provisions, as well as separation of investigation and adjudication for a credible dispute resolution mechanism - a must for a stable and predictable tax regime. According to the Government, "these recommendations are at various stages of examination/acceptance/implementation"[7]. If fully implemented, it will change the Indian tax landscape. It is undeniable that the Government has indeed taken serious efforts towards bringing stability to the Indian tax system, although reforms on the tax administration side are yet to be pursued vigorously. A structural reform on the administrative side would ensure greater stability and predictability.

WHAT IS THE POTENTIAL LIFECYCLE OF TAX LITIGATION IN INDIA?

India broadly follows a four-tier tax dispute resolution mechanism. Usually, an initiation of a possible tax dispute starts with issuance of a show cause notice on the tax payer. In case the taxpayer is not satisfied with the assessment, he can approach the Commissioner by way of an appeal, followed by a second appeal to the Tribunal (CESTAT/ITAT) then to a High Court, if substantial questions of law are involved, followed by the final appeal to the Supreme Court. A diagrammatic representation of hierarchy of the forums in tax litigation in India has been set out on the previous page.

This complex and multilayered hierarchy of tax forums in itself adds to the longevity of a tax dispute, as the Indian judicial system is already reeling with "docket explosion". Further, the problem is compounded by multiple and varied interpretations adopted by various forums (Commissioners, Tribunals, High Courts) on identical issues, which takes time for resolution by the Supreme Court. In the current hierarchical structure, the lifecycle of a tax dispute (from investigation up to the Supreme Court) is usually in the range of 6 – 10 years.



HAS THE SITUATION WITH RESPECT TO PENDENCY OF TAX DISPUTES AT DIFFERENT COURTS IMPROVED AT ALL?

It is well known that in India, the Government is the biggest litigator. However, it may be interesting to know that within this, the highest litigation is on the revenue side[8]. According to a report[9], the total number of tax cases pending at different fora is over 4 lakhs (400,000) involving 6.5 Lakhs crores (more than $100bn). See the table for a summary of the data.

The statistics are also reflective of the tendency of the revenue authorities to resort to indiscriminate appeals, irrespective of the merits of the case, which is appropriately reflected in the relatively low success rates on appeals filed by the Revenue Department (estimated to be between 15 per cent[10]). This is primarily driven by ignorance of law and procedures, and the unrealistic target pressures of revenue collection.

TOTAL PENDENCY OF TAX CASES IN INDIA					
DIRECT TAX			INDIRECT TAX		
Authority	**No. of cases**	**Amount involved**	**Authority**	**No. Of cases**	**Amount involved**
Com. (A)	232126	383797	Com. (A)	29293	6927
ITAT	37506	145534	CESTAT	61429	120145
High Court	34281	37684	High Court	10985	19437
Supreme Court	5661	46545	Supreme Court	2569	6927
TOTAL	**309574**	**613560**		**104276**	**34994**

The NDA Government at the policy level has taken various initiatives towards reducing the backlog. One of the key initiatives has been to increase the strength of tax benches across the country. For instance, in the last two years, the Government has notified 11 new benches to deal exclusively with indirect tax matters. Further, various dispute resolution schemes such as the Income Declaration Scheme, 2016 and the Direct Tax Dispute Resolution Scheme, 2016 have also been announced as steps to contain litigation. Two new benches of the Authority for Advance Rulings ("AAR") have been set up in Delhi and Mumbai respectively. In a record of sorts, India has signed 88 Advanced Pricing Agreements (APA) in the financial year 2016-17, which is probably amongst the highest number signed by any jurisdiction in the world.

NJRS Enabled Department:

- Can monitor appeals' progress.
- Undertake policy analysis for issues leading to rising litigation.
- Research to strengthen cases by tax officials by taking reference from previous orders made by the courts.

In fact, TARC in its report has identified unrealistic revenue target as one of the primary reasons for frivolous litigation and has suggested that the CBDT and the Central Board of Excise and Customs ("CBEC") should move towards 'dispute prevention' rather than 'dispute resolution'.

The NDA Government has been conscious of the heavy pendency of tax litigation at various forums and has taken early steps towards litigation management and dispute resolution by fixing threshold limits for filing appeals by revenue authorities, as well as making pre-show-cause notice discussion mandatory in few instances.

The CBEC/CBDT have also undertaken review of litigation at higher forums (Tribunals, High Courts and Supreme Court) and have issued instructions for withdrawals of cases. For instance, in the last year, as per the new threshold monetary limits, the

Litigation Management Reforms:

- Fixing threshold for department for filing appeals to CESTAT & HC.
- Withdraw cases in HC & CESTAT having precedented by SC decision. CC/ Pr. C to review cases fit for withdrawal.

Dispute Resolution:

- Pre-Show Cause notice consultation with assessee Pr. Com./ Com. made mandatory for cases involving duty above Rs. 50 Lakhs.
- Instructions issued regarding manner of issuing SCN, adjudication orders and giving personal hearings. CC to verify records of proceedings periodically.
- Training/Workshops for officers for issuing quality SCNs, judicious adjudication orders, advocacy.

CBEC filed for withdrawal in 980 and 2,174 cases in High Courts and CESTAT respectively[11].

With a view to improve the litigation management system relating to direct tax cases in various courts, the CBDT has also launched a portal in March 2015 called the "National Judicial Reference System" (NJRS)[12]. It is a computerized repository of all judgments and pending appeals related to Direct Tax cases at Income Tax Appellate Tribunals (ITATs), High Courts and the Supreme Court. It has intelligent search facilities and work flows to enable the officers at the department engaged in litigation work to closely monitor appeals as well as carry out research and analysis on various issues. It also helps the department in streamlining the huge backlog of litigation in Courts and Tribunals.

While a host of measures have been taken by the Government towards mitigating tax disputes and reducing the pendency of cases, more needs to be done to clear the backlog. A complete revamp of: (a) the tax administrative set up in line with the recommendation in the TARC report, and (b) the current tax provisions with simple and clear tax provisions in line with the global standards, would greatly help in curbing future litigation. On both these counts, the Government needs to work hard.

HOW WILL GST, WHICH HAS BEEN BREWING FOR YEARS, AFFECT FOREIGN INVESTORS AND INDIAN COMPANIES?

The idea of "one nation one tax" under the Goods and Services Tax ("GST"), which was first mooted in 2000 by the NDA Government of the then-Prime Minister Mr. Atal Bihari Vajpayee, now seems to be becoming a reality during the term of this NDA Government. With the Government clear on rolling out GST on July 1, one can say that the wait is finally over, but there have been concerns on how it will affect foreign investors and Indian businesses.

If studies and surveys are to be believed, rollout of GST will attract foreign investments and improve investors' sentiments, who had been discouraged by multiple taxes with differential rates in different states, cascading of taxes, compliances under various Acts and differential regulatory requirements. Implementation of GST will bring an end to all these problems. The Government has been betting high on the introduction of GST as one of the major contributors to the policy initiative of improving the "ease of doing business in India". Seamless flow of credit, an integrated national market, reduced logistics costs and reduced product costs will not only benefit domestic but also international segments of Indian businesses. Economists project a rise of 1%-2% in GDP post the GST rollout.

On the other hand, critics have been pointing out flaws in the new tax regime, like increased compliances, rise in compliance costs and hardships to SMEs. There is also speculation of inflation in the early days of implementation of GST, based on the experiences of countries that started a GST. Despite criticism, the fact remains that GST is definitely an improvement over the current system.

WHAT STILL NEEDS TO BE IRONED OUT IN THE GST SMALL PRINT?

With the Government all prepared to roll out GST on July 1, 2017, one should weigh on the possibility of passing an imperfect GST. Even though the achievements of the GST council in such a short time are commendable, there are some flaws that need to be highlighted.

In the GST Council meet in Srinagar held on 18-20th May, 2017, the GST Council formulated the classification and rate schedules of the goods and services. All goods and services have been classified in 4 slabs of 5%, 12%, 18% and 24%. Little time is left for the industry to analyze the impact of the rate change and streamline its operations if July 1st remains the roll out date.

Another area of concern has been how input tax credit would be availed of goods held in stock on rollout day. Though the act contains provisions for the same, industry is confused as the provisions are subject to multiple interpretations. As a consequence, there is a fear that retailers and dealers of FMCG, medicines, etc. would start cutting stocks so that a minimum stock is maintained on rollout date. This may create shortages in the coming months. Another challenge qua GST lies with respect to obtaining multiple registrations in the states, particularly by the service industry, which has been governed by Central Laws until now and usually held only one registration. An additional burden on businesses would be in relation to uploading each and every invoice to the GSTN system: just imagine the number of invoices raised by a big supermarket in one day selling FMCG products.

Further, the current concept of 'open market value' under the Valuation Rules, apportionment of services provided at multiple locations, etc. may lead to potential litigation.

WHAT PART OF GST HAS NOT SEEN ENOUGH ATTENTION YET?

Passing of four GST bills namely: the CGST bill, the IGST bill, the UTGST bill and the Goods and Services Tax (compensation to states) bill by parliament on April 6, 2017 marked a decade-long achievement in meeting the July 1, 2017 deadline to roll out the biggest tax reform in India post independence.

However, in the melee to meet the "deadline" some features of GST have been overlooked. These are:

(a) Multiple tax structure- When the Government announced adoption of multiple tax rate regime it was not taken well by the industry. It hampered the essence of one tax rate for all products, which was widely propagated when GST was first conceived.

(b) Anti-profiteering measure- The CGST bill allows the government to set up an anti-profiteering authority. The authority will be responsible for ensuring that reduction of tax rates on implementation of GST results in reduction of prices. The industry is of the view that this will allow the Government to monitor and control prices. This is against the idea that prices should be market determined and no Government authority should have any business in deciding the price of goods or services. The idea of setting up such committee has not been taken well by industry.

(c) Retention of concepts like Cess and E-way bills- The Government proposed an introduction of cess on demerit items, which would be used for compensating states for any revenue loss. Similarly, later the Government has published E-way bill Rules, which are nothing but a makeover of way-bills used at state check posts used by transporters. Retaining such concepts, even when the rate of tax imposed on inter-state or intra-state sale of goods is the same, takes us away from the essence of the GST in its true sense.

WHERE DO YOU FORESEE SOME OF THE BIGGEST GST COMPLICATIONS TO ARISE?

While the industry is lauding the benefits of the new tax regime, it may be noted that for all its benefits, GST is something of a double-edged sword. With numerous advantages, GST also brings several complications and disadvantages to the table, particularly for businesses, such as:

(a) GST will eradicate the concept of centralised registration. GST requires businesses to register in all states they are operating in. This will increase the burden of compliance on the businesses. Particularly it would prove a challenge for the service industry, which, for the first time, would deal with State Authorities.

(b) When GST was first conceived it was supposed to be a single uniform rate, but what we have now is a four tier tax structure - 5%, 12%, 18% and 28% and a cess of 15% for some demerit goods. With the increase in rates of tax there is a possibility of increase in the prices of some goods or services. This will affect revenue of businesses.

(c) In the present scenario, businesses are using software or ERPs which have the utility of filing Excise, Service Tax and VAT returns. The rollout of GST would require them to change their ERPs too.

Change is never easy. The complications in GST need to be overlooked for the greater good. Once GST is implemented, all complications will become a story of the past. Industry will benefit from the new tax regime and so will the customers. ■

NOTES

1 http://www.business-standard.com/article/economy-policy/india-won-t-resort-to-burden-of-retrospective-tax-jaitley-114071800659_1.html
2 Undertaken on the recommendation of the Justice AP Shah Committee formed to look into the applicability of MAT on Capital gains arising to FIIs from investments into India for the past as well as future period.
3 Section 9 of the IT Act was amended to provide for the same.
4 http://www.incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx
5 TARC was established vide the Government of India Notification dated 21 August 2013 by the then UPA government
6 http://www.dor.gov.in/sites/upload_files/revenue/files/Accepted_Recommendations_TARC.pdf
7 http://pib.nic.in/newsite/PrintRelease.aspx?relid=137486
8 http://www.thehindubusinessline.com/opinion/just-too-much-tax-litigation/article6173710.ece
9 http://www.businesstoday.in/magazine/corporate/corporate-tax-disputes-continue-to-rise/story/235876.html
10 Ibid
11 Office memorandum F. No.296/07/2016-CX.9 dated 25.04.2016
12 https://en.wikipedia.org/wiki/National_Judicial_Reference_System

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Suhail Nathani is the Managing Partner of ELP and co-heads the Competition Law & Policy practice of the firm.

"Suhail is extremely responsive [and] very realistic, which is critical in India", one client says. "Suhail is particularly good at advising us both on the likelihood of securing our rights, and the best, most practical methods for doing so. He is both an excellent lawyer and an excellent counsellor."

IFLR1000 2014

With over 24 years of experience, Suhail is considered one of the leading lawyers in the field of competition law. Having extensive experience in handling competition related matters before the CCI and COMPAT, he is regularly consulted by the CCI for his legal expertise on substantive issues of law. He has also represented various regulatory agencies, including the CCI and the Securities and Exchange Board of India at the Supreme Court and various other courts in India and is admired for providing innovative solution oriented approach in complex matters. Suhail handles a full range of competition related matters, including merger control, anti-competitive agreements (including cartel enforcement), abuse of dominance, competition advisory, competition audit and compliance.

Suhail has been part of the "Law Firm Working Group" formed by the Ministry of Corporate Affairs to give a final shape to the merger regulations of the country and has worked very closely with the Department for International Development to re-write the competition and consumer laws in the Islamic Republic of Afghanistan. Suhail has authored several publications on various legal topics, including competition law, cartel enforcement and merger control and regularly speaks in various forums on competition law.

Suhail has been recognised ***amongst the top 30 International Trade practitioners in the world*** by the ***Best of the Best Expert Guides 2016***. He has been ranked by the ***Chambers Asia-Pacific 2012*** to ***2017*** for his expertise in for his expertise in Competition/Antitrust, Corporate M&A and International Trade and has been recommended as a **Leading Lawyer** by ***The Legal500 Asia-Pacific for the past 8 years.*** He has been recognised for his expertise in the ***Who's Who Legal 2013*** to ***2017***; and has also been identified as a **Leading Lawyer** by ***Asialaw Leading Lawyers 2014*** to ***2017.*** He has also featured as a **Leading Lawyer** in ***IFLR1000 Financial & Corporate 2015*** to ***2017.*** He has been on the jury for ***BW Businessworld-PwC I-bank 2016 Awards.*** He has featured in the ***India Business Law Journal's A List*** as one of ***India's Top 100 Lawyers.***

Suhail also heads the International Trade & Customs, Corporate & Commercial, Private Equity

& Venture Capital and Capital Markets & Securities Laws practices of the firm. He has recently been appointed as a member of IBA's India Contact Group and is also a part of the Host Committee which organised the 5th Asia Pacific Regional Forum Biennial Conference for the IBA Asia Pacific Regional Forum. He is an Honorary Adjunct Professor at the Jindal Global Law School in India; and also serves as an independent director on three listed companies in India, including a scheduled bank.

Suhail earned his Master's Degree at Cambridge University, England and has also received an LL.M. from Duke University, USA. Apart from India, he is also admitted to the State Bar of New York. Prior to ELP, he was the General Counsel in a start-up FCC licensed telecommunications carrier in Washington, DC that went public.

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Rohit Jain is a Partner in the Tax practice of ELP focusing on indirect taxes, direct tax and transfer pricing. He is a law graduate from the University of Mumbai and a fellow member of the Institute of Chartered Accountants of India (ICAI). His areas of expertise include customs, excise, service tax, central sales tax, state VAT laws and foreign trade policy.

Rohit has been with the firm since its inception and has over a decade of experience in handling matters related to tax, in both advisory and litigation matters. He has advised various Fortune 500 Companies and Indian Conglomerates in sectors like financial services, manufacturing, telecommunication, oil and gas, petroleum and infrastructure projects in order to ensure smooth transitions from sales tax to the VAT regime. He has also been involved in making representations to the Ministry of Finance and the Ministry of Commerce in relation to various tax policy matters on behalf of numerous industry associations.

Rohit has been recognised for his expertise in Tax by *Chambers Asia-Pacific* 2014 to 2017, has been recommended by the *Tax Director's Handbook 2012* and has also featured in *World Transfer Pricing 2015*. Prior to ELP, Rohit was part of the Tax team at RSM & Co.

Clients noted Rohit's "excellent technical skills" stating that he is "commercially very savvy and he takes time to understand [their] business."

RSG INDIA REPORT 2015

He is described as "very knowledgeable and well qualified," and is complimented on his logical thinking and analytical capability.

CHAMBERS ASIA-PACIFIC 2014

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Ravisekhar Nair is a Partner at ELP and a part of the Competition Law & Policy practice of the firm.

"He is becoming increasingly prominent in the market, having advised in a range of significant investigations before the CCI and COMPAT. He is warmly praised by interviewees, one noting he is "incredibly energetic, mature, sensible and extremely responsive." ".

CHAMBERS ASIA-PACIFIC 2016

He also works closely with the Corporate & Commercial team. With over 10 years of experience, he is currently involved in some of the most contentious cases pending before the Competition Commission of India. He earned his LL.M. from the University of Queensland, Australia.

Ravi has successfully represented clients in various investigations and inquiries before the CCI, the DG and in appeals before the COMPAT, various High Courts in India and the Supreme Court of India. He renders competition compliance services for clients, which include Competition Compliance Audits, the design and roll-out of Competition Compliance Training Programmes for staff and managerial level officials, and the design and implementation of Competition Compliance Manuals.

Ravi was part of the "Law Firm Working Group" formed by the Ministry of Corporate Affairs to give a final shape to the merger regulations governing combinations in India and has closely worked with the CCI to get various processes and procedures in place apart from providing assistance on the substantive issues of law. Ravi has assisted the CCI on framing the draft Regulations of 2008 and 2009, the 2007 amendments to the Competition Act, 2002.

Ravi has various publications on competition law to his credit and regularly speaks at various forums on competition law. Ravi has been Highly Recommended for his expertise in Competition/Antitrust by the *Chambers Asia-Pacific 2016 & 2017*. Prior to ELP, Ravi was working as a Managing Associate with Luthra & Luthra Law Offices, New Delhi.

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Nishant Shah is a Partner in the Tax practice of ELP, focusing on indirect taxes. He is a qualified lawyer and a Chartered Accountant. His areas of expertise include excise, customs, service tax, central sales tax, state levies as well as regulations under the Foreign Trade Policy.

Nishant has worked extensively with the State Governments of Rajasthan and Punjab during the introduction of the Value Added Tax (VAT) regime

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in India. He has worked extensively with various Industry Associations and assisted them in successfully representing before the Central Government or State Governments for grant of reliefs

Nishant Shah "understands the [clients] business needs" as well as their challenges.

RSG INDIA REPORT 2015

from concerns faced by these associations. He has tremendous experience and expertise on matters relating to Special Economic Zones.

As part of a new initiative, Nishant has been working on developing expertise in relation to the anti-money laundering, anti-corruption and allied laws recently introduced in India, including its implications for various industries.

Nishant has been recommended for his expertise in Tax by *The Legal500 Asia-Pacific 2016.*

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Kumar Visalaksh is a Partner in the Tax practice at ELP and is based in Delhi. Kumar has over 10 years experience in rendering tax advisory, transactional and litigation services. He regularly advises clients on Customs, Excise, Service Tax, Value Added Tax/Central Service Tax, Foreign Trade Policy and Export Control related matters.

He has been extensively associated with both advisory and litigation services for various Fortune 500 companies on Indirect Tax issues. Kumar writes regularly on issues related to taxation for leading newspapers/magazines such as *The Economic Times, Financial Express, Economic and Political Weekly, Indirect Taxation Review* etc. He is also a regular speaker at various tax conferences. Kumar is a graduate (BA. LLB) from the National Academy of Legal Studies and Research (NALSAR), University of Law, Hyderabad.

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

ELP Firm Profile

Economic Laws Practice (ELP) is a leading full-service law firm, headquartered in Mumbai, India. The firm was established in the year 2001 by highly eminent lawyers from diverse fields who envisioned a firm that would bring to the table a unique blend of professionals, ranging from lawyers, chartered accountants, cost accountants, economists to company secretaries. The partners at ELP are not only knowledge leaders but thought leaders as well; enabling the firm to offer seamless cross-practice legal services, through top-of-the-line expertise to clients.

ELP's vision is people centric and this is primarily reflected in the firm's focus to develop and nurture long-term relationships with our clients by providing optimal solutions in a practical, qualitative and cost efficient manner.

With 6 offices across India (Mumbai, New Delhi, Pune, Ahmedabad, Bangalore and Chennai), ELP has a team of over 170 qualified professionals. Working closely with leading national and international law firms in the UK, U.S., Middle East and the Asia Pacific region, gives ELP the ability to provide an extensive pan India and global service offering to our clients adding to the seamless service that the firm prides itself on.

ELP has a unique positioning amongst law firms in India from the perspective of offering comprehensive services across the entire spectrum of transactional, advisory, litigation, regulatory, and tax matters. The firm's areas of expertise include Banking & Finance; Competition Law & Policy; Corporate & Commercial; Hospitality; Infrastructure (includes energy, oil & gas, mining and construction); International Trade & Customs; Litigation & Dispute Resolution; Private Equity & Venture Capital; Securities Laws & Capital Markets; Tax; and Telecommunication, Media & Technology.

ELP's vision is people centric and this is primarily reflected in the firm's focus to develop and nurture long-term relationships with our clients by providing optimal solutions in a practical, qualitative and cost efficient manner. The firm's in-depth expertise, immediate availability, geographic reach, transparent approach and the involvement of senior partners in all assignments has made ELP the firm of choice for our clients.

ELP is firm of choice for clients due to our commitment to deliver excellence and has been ranked amongst the Top 10 firms in the country; with the highest Client Satisfaction score of 9/10 amongst the Top 10 firms as per *RSG India Report 2015*. The firm has also recently been recognised as Top Tier firm in India for Dispute Resolution, Antitrust & Competition, Project & Energy, Tax, WTO and International Trade by the *Legal 500 Asia-Pacific 2017*. "Highly Recommended" in 6 practice areas by *IFLR1000 Financial & Corporate Guide 2017* and recognised by *Asialaw Profiles 2017* as "Outstanding Firm for Tax". Ranked in *Chambers & Partners Asia-Pacific Guide 2017* for 9 practice areas.

PRACTICE AREAS

- Infrastructure & Hospitality
- Corporate & Commercial
- Competition Law and Policy
- Litigation & Dispute Resolution
- Direct Tax, Indirect Tax, Tax Advisory & GST
- International Trade & Customs
- Banking & Finance
- Security Laws & Capital Markets
- Private Equity & Venture Capital
- Policy & Regulation

HAMMURABI & SOLOMON
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The Emerging Landscape of Arbitration in India : 2017 and Beyond...

Over the past couple of years, India has registered rapid economic growth, with the GDP growing 7.6% in the last fiscal year. The country's economic profile has also witnessed a dramatic shift over a long period from rural –based agricultural production to urban economic activities, and from low-value manufacturing to high-value services. Indeed, the economy is on track to maintain its current growth rate for the rest of this year too. Though economic activity is buoyant, the country still has a long way to go. The Modi government must capitalize on the current economic momentum and use it to accelerate its reform agenda.

In today's interconnected global economy, efforts to liberalize legal policies will help drive the expansion of world trade and help countries to integrate into an increasingly globalized production system, rather than being left on the margins of world trade. Commerce in a country thrives with the support of a legal framework that provides for the swift resolution of commercial disputes. Experts have stated that one of the key ingredients in any recipe for successful international trade and investment is the legal security of commercial transactions. Stakeholders across the spectrum of international trade and business are demanding an open, responsive and receptive dispensation mechanism for legal services in India. The growth of international services has become increasingly relevant to the development of the Indian legal sector and the national economy.

A relevant area of concern for Indian policymakers is how to efficiently utilize international agreements to foster Foreign Direct Investment (FDI). Research suggests that multilateral arbitration conventions are much more effective that bilateral treaties to promote FDI. These results, though still tentative, allow us to draw an important preliminary conclusion for policy. After enforcing a Multilateral Arbitration Agreement (MAC) a host country joins an investor club of many countries. This signal seems to be stronger than one-to-one investment agreements. Further, studies have found a positive correlation between access to quality arbitration and boosts to Foreign Direct Investment (FDI). According to Wagle, an increase in arbitration quality generally leads to an increase in FDI flows.[1] Overall, the increase in FDI is the result of an increase in the size of FDI investments (the intensive margin) rather than an increase in the number of FDI investments (the extensive margin). This is consistent with a view that the benefit of an effective arbitration regime is that it reduces the variance in the expected return on investment, and so increases capital constrained investors incentive to take "larger bets". Regarding sectorial differences, an interesting implication is that the quality of the arbitration matters more for industries where transaction cost is more important. Liberalization of legal services plays a key role in bolstering the indigenous arbitration regime and securing foreign investment. The entry of foreign lawyers encourages economic growth by catalyzing investments, fostering the growth of the Indian legal regime by raising standards and increasing employment opportunities and granting businesses the access they need to global legal services. The move also helps India fulfill its obligations under the General Agreement on Trade in Services, of which it is a member.

While arbitration is firmly established in countries or territories with highly developed and effective legal systems and may co-exist happily with litigation and other forms of dispute resolution, litigation before local courts in developing countries like India does not always provide a sufficient assurance of legal security for investors, whether they are local or foreign. Investors may face a number of issues such as unfamiliarity with local procedures, corruption in the judiciary, risk of partiality, and a threat of delays and appeals.

If India wishes to be an economic heavyweight in the global arena, it must have a robust framework in place to ensure the growth of international arbitration within its borders. As the global economic power shifts towards India, liberalization of the legal services sector is essential for attracting Foreign Direct Investment (FDI) and promoting the growth of the knowledge economy. The expansion of borderless markets and cross-border trade has changed the scope and character of legal services to an international scale. Institutional connectivity, of which services liberalization is a key driver, is necessary to facilitate any successful development and execution of transactions by the private sector.

WHY WOULD A ROBUST ARBITRATION REGIME MAKE A COUNTRY AN ATTRACTIVE PROSPECT FOR POTENTIAL INVESTORS?

According to officials of the Netherlands Arbitration Institute, more than 80 percent of private international contracts have clauses providing that disputes will be decided by arbitration. In the legal literature, all scholars seem to agree that international arbitration is regarded by the international business community as the normal means of settling disputes arising from international transactions. Arbitration owes its popularity amongst investors primarily because it holds four distinct advantages over other dispute redressal mechanisms.

First, international arbitration is seen as a way of securing a high degree of neutrality in the dispute resolution process. It does away with the traditional perception (and ensuing insecurity) the courts of a contract breacher's home country are likely to favor that party in any international dispute. Arbitrators can, if the parties so wish, be chosen so that they are of different nationalities from any of the parties, or they can be chosen in a way that gives a balance between the nationalities of the parties. Likewise, the legal seat of the arbitration can be chosen, if the parties require, so that it is in a neutral location.

Second, parties have relative control over the outcome of a dispute as (in most cases) they choose the arbitrators. The right of party nomination is supplicated by the notion that those appointed are well suited to their task, and indeed more suited to the task than a judge in a national court would be. It is often possible to find well qualified and experienced arbitrators who will combine commercial knowledge with their legal skills and adopt a more international and pro-business outlook. As international arbitration has continued to grow, there has been a corresponding growth in the number of potential arbitrators, and while there remains a need to build further capability as well as diversify the range of those available to sit as arbitrators, there is nowadays a wealth of choice.

Third, arbitration offers parties a great deal of confidentiality and privacy. Whether or not arbitral rules provide for confidentiality in the arbitral process, it is normally open to the parties to reach agreement that the process is private and confidential. Confidentiality, is a significant issue for many parties with respect to their business dealings and it is more likely to be preserved through arbitral proceedings.

Four, international arbitration provides finality in the decision-making process. One of the disadvantages of the court process is that judgments can sometimes be subject to one or more appeals, and these can take years to be resolved. As already discussed above, there has been some movement towards a new style of court specifically targeting international dispute work, and towards a restriction on the ability to appeal, but this remains the exception rather than the norm.

Understanding the centrality of swift dispute resolution and contract enforcement to facilitating the growth of commerce, the Modi Government has taken a number of measures to modernize indigenous dispute resolution mechanisms. Most recently, the Government has put together a committee to create and review the institutional framework for arbitration in India. Though the Indian arbitration regime enjoyed significant amelioration with the amendment of the Arbitration and Conciliation Act of 1996, there is still a long way to go.

AMENDMENTS TO THE ARBITRATION ACT

The Arbitration and Conciliation (Amendment) Act, 2015 was introduced in Lok Sabha on December 3, 2015 by the Minister for Law and Justice, Mr. D.V. Sadananda Gowda as The Arbitration and Conciliation (Amendment) Bill, 2015. The Bill amended the Arbitration and Conciliation Act, 1996. The Bill was passed by Parliament on December 23, 2015. Some of the relevant amendments to the Act are as follows:

- **Relevant court for domestic and international arbitration matters:** Under the old Act, the relevant court for all arbitration matters was a principal civil court or a high court with original jurisdiction. The Amendment Act modified this to state that in the case of international arbitration, the relevant court is only the relevant high court.
- **Applicability of certain provisions to international commercial arbitration:** Part I of the old Act included provisions related to interim orders by a court, order of the arbitral tribunal, appealable orders etc. only applied to matters where the place of arbitration was India. Under the Amendment Act, these provisions also apply to international commercial arbitrations even if the place of arbitration is outside India. This would apply unless the parties agreed otherwise.
- **Powers of Court to refer a party to arbitration if agreement exists:** Under the old Act, if any matter that is brought before a court is the subject of an arbitration agreement, parties will be referred to arbitration. The Amendment Act states that this power of referral is to be exercised by a court even if there is a previous court judgment to the contrary. The Court must refer the parties to arbitration unless it thinks that a valid arbitration agreement does not exist.
- **Interim order by a Court:** The old Act stated that a party to arbitration may apply to a court for interim relief before the arbitration is complete. For example, a party may have sought interim protection of goods, amounts, property, etc. that is the subject matter of the arbitration before a court. The Amendment Act amended this provision to specify that if the Court passes such an interim order before the commencement of arbitral proceedings, the proceedings must commence within 90 days from the making of the order, or within a time specified by the Court. Further, the Court must not accept such an application, unless it thinks that the arbitral tribunal will not be able to provide a similar remedy.
- **Public Policy as grounds for challenging an award:** The old Act permitted the court to set aside an arbitral award if it is in conflict with the public policy of India. This included awards affected by (i) fraud or corruption, and (ii) those in violation of confidentiality and admissibility of evidence provisions in the Act. The Amendment modified this provision to also include those awards that are (i) in contravention with the fundamental policy of Indian Law or (ii) conflict with the notions of morality or justice, in addition to the grounds already specified in the Act.
- **Appointment of arbitrators:** The old Act permitted parties to appoint arbitrators. If they were unable to appoint arbitrators within 30 days, the matter is referred to the court to make such appointments. The Amendment Act states that, at this stage, the Court must confine itself to the examination of the existence of a valid arbitration agreement.
- **Time period for arbitral awards:** The Amendment Act introduced a provision that requires an arbitral tribunal to make its award within 12 months. This may be extended by a six-month period. If an award is made within six months, the arbitral tribunal will receive additional fees. If it is delayed beyond the specified time because of the arbitral tribunal, the fees of the arbitrator will be reduced, up to 5%, for each month of delay.
- **Time period for disposal of cases by a**

Court: The Amendment Act states that any challenge to an arbitral award that is made before a Court, must be disposed of within a period of one year.

- **Fast track procedure for arbitration:** The Amendment Act permits parties to choose to conduct arbitration proceedings in a fast track manner. The award would be granted within six months.

Though the impact from these reforms has been significant there is always room for improvement. A glaring issue with arbitration proceedings in India is that there is no consistency in procedure. The Act does not set out a procedure but leaves it to the parties to decide which procedures they wish to follow. Though a handful of arbitration centers have surfaced across the country, there is a fair amount of disparity in their core infrastructure and procedural framework. Additionally, many arbitrations are simply conducted in the home or the office of the arbitrators, which lends yet another note of uncertainty to the conduct of proceedings. Most arbitrators in India are retired judges who are more comfortable following tedious court procedures when overseeing proceedings. Another corollary emerging from this point is that while retired judges may have an excellent grasp on the law, they rarely have the industrial expertise and pro-business outlook required to handle delicate commercial disagreements.

India needs a robust arbitration framework to resolve the issues inundating the current system. The creation of a strong arbitration institution, replete with its own rules, guidelines and facilities, would allow for consistency in procedure and keep the mainstream judiciary out of arbitration disputes. A provision for the conduct of arbitration proceedings in the Arbitration Act would lend a note of consistency to arbitration proceedings carried out anywhere in the country. An overarching arbitration council could deploy its own agencies to oversee matters such as arbitrator appointments and could do so with a lot more celerity than the mainstream judicial system. This system is followed in both London and Singapore. Measures should be introduced to restrict appeals from awards to the national courts. This would help unload some of the burden on an already encumbered judiciary.

Another important move in the way of reform is to allow foreign lawyers to arbitrate in India[2]. Though the Arbitration Act does provide that an arbitrator may be of any nationality, foreign lawyers are only allowed to operate in India on a fly in fly out basis. The liberalization of legal services in India is central to the growth of the indigenous arbitration regime. As the global economic power shifts towards India, liberalization of the legal services sector is essential for attracting Foreign Direct Investment (FDI) and promoting the growth of the knowledge economy. The expansion of borderless markets and cross-border trade has changed the scope and character of legal services to an international scale. Institutional connectivity, of which services liberalization is a key driver, is necessary to facilitate any successful development and execution of transactions by the private sector. The influx of foreign lawyers will also translate into better job opportunities for many Indian lawyers. Allowing foreign lawyers to arbitrate freely in India will also help securing a high-degree of seat neutrality. As stated earlier, this is a vital component to a successful arbitration setup. Allowing foreign lawyers in will also help fill the vacuum of availability of competent arbitrators in India.

An interesting reform could be to allow third parties to fund arbitrations. This practice is followed in London, Paris and, most recently, Singapore. Third-party funding entails the funding of an arbitration proceeding by a party that is not party to the dispute in question. The availability of this facility offers businesses an additional financial and risk management tool when engaging in arbitration proceedings

Recognizing the need for further reform, the Central Government, on December 29, 2016 set up a High Level Committee to recommend ways to make arbitration more efficient. The committee will be headed by retired Supreme Court Justice B. N. Srikrishna. It will submit its report in 90 days. The mandate of the panel will be to analyze and review effectiveness of present arbitration mechanism, the facilities, resources, funding and manpower of existing ADR (Alternate Dispute Resolution) institutions. It will also examine the institutions funded by the Centre for arbitration purposes and assess skill gaps in ADR and allied institutions for both national and international arbitration. The committee will also evaluate information outreach and efficacy of existing legal framework for arbitration. Further, it will focus on the role of arbitrations in matters involving the Union of India, including bilateral investment treaties (BIT) arbitrations and make recommendations where necessary. The high level panel will suggest measures for institutionalization of arbitration mechanism so as to make India a hub of international commercial arbitration and identify amendments in other laws that are needed to encourage International Commercial Arbitration (ICA). The committee will also devise an action plan for implementation of the law to ensure speedier arbitrations, recommend revision in institutional rules and regulations and advice empanelment of national and international arbitrators for time bound arbitral proceedings. It will also recommend measures to make arbitration more widely available in curricula and study materials.

Suggestions for Improving the Extant Arbitration Framework in India to make India the hub for International Arbitration:[3]

- Greater transparency and insight into institutional decision-making
- The system should be flexible
- It should allow parties the freedom to choose their arbitrators by allowing foreign lawyers to arbitrate in India
- It should be cheaper than currently is
- Sanctions should be more effective during the arbitral process
- Simplified procedure should be provided for claims under a certain amount
- Emergency arbitration services
- The conduct of arbitrators should be regulated more closely
- Institutions may allow for the third-party funding of arbitrations by providing loans to those who cannot afford arbitration
- If an arbitration and mediation are held in conjunction with one another, there should be minimal overlap between the two processes so as to avoid obfuscation
- Limit appeals from arbitrations
- Procedural innovations to control time and cost, publication of awards, electronic case management, and soft law regulation
- Institutions should provide feedback mechanisms for arbitrators
- Setup training centres for arbitrators in National Law Universities
- Incubate a think-tank to work solely on ameliorating arbitration issues within the country
- Look to popular arbitration seats such as Paris, London and Singapore to see why parties flock to them to handle their arbitrations

This move will go a long way in ensuring the success of arbitration in India and securing further foreign investment for the country.

ABOUT THE AUTHOR

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After graduating in Law from the prestigious National Law School of India, Bangalore, Dr. Manoj Kumar has witnessed and led the transformation of Law, Regulation & Policy Practice over the past 22 years. Dr. Kumar is a Harvard Business School Alumni having done the BGEI Programme in 2010. As founder of Hammurabi & Solomon (and before), Dr. Kumar is well known for his immense expertise in providing cutting edge solutions to often complex regulatory or legal issues faced by valued clients. Dr. Kumar is a member associated with various global orgnaizations including the World bank, International Finance Corporation, International Bar Association, International Indian Bar Association, Indian national bar Association, Indo-American Chamber of Commerce, Bar Association of India, Delhi Bar Association, Supreme Court Bar Association, Delhi High Court Bar Association, Doctors For You, Society of Indian Law Firms, Potter Prize – India, Institute for Competitiveness, Thinkers50 – India, Advocates for International Development, Observer Reseach Foundation, India Strategy Group and Global Science & Technology Forum, to name a few.

NOTES

1 Wagle, S. (2011). Investing across borders with heterogeneous firms: do FDI-specific regulations matter? World Bank Policy Research Working Paper 5914.

2 Report on Draft BCI Rules For Registration & Regulation of Foreign Lawyers in India : 2016 (http://www.hammurabi-solomon.in/BCI rules report 2016/mobile/index.html)

3 Report on Steps to Make India Hub For International Arbitration : 2017 (http://www.hammurabisolomon.in/Hammurabi-and-Solomon-arbitration-report-2017/)

DR. MANOJ KUMAR, FOUNDER

Dr. Kumar is the founder of Hammurabi & Solomon (H&S), India Strategy Group (ISG), International Legal Advisory Network (ILAN) a network of law firms across the globe and the India Unites Foundation (India Unites) a social responsibility initiative. Dr. Kumar is an alum of Harvard Business School and NLS Bangalore and Co-founded Hammurabi Solomon Sand Legal Compliance Services Pvt. Ltd.

Honoured with a Doctorate of Excellence (honoris causa) by the KEISIE International University of South Korea, and recognised as one of the '100 legal luminaries' by Lexis Nexis, Dr. Kumar has led the Corporate, M&A, Law, Regulation & Public Policy practice at H&S and has been awarded by IBLJ as the Best Indian Law Firm for last 3 years consecutively.

Dr. Kumar's thought leadership on a wide range of critical issues i.e. Media Regulation, Fast Track Commercial Courts, India as a hub of International Arbitration, Practice of Law by Foreign Lawyers in India, Bhagwat Gita Controversy in Russia, bringing of Russian Orthodox Church to India, to name a few are globally recognised. The Government of India, the World Bank (WB), the International Finance Corporation (IFC) and the Institute for Competitiveness have leaned on Dr. Kumar for his thought leadership.

Dr. Kumar is a visiting fellow with Observer Research Foundation (ORF) and is regularly leaned on by law and policy making government and non-government bodies and think tanks for thought leadership in challenging areas of law, regulation & public policy. Dr. Kumar has recently been recognized as the most highly acclaimed legal experts in Corporate M&A in India by AsiaLaw Leading Lawyers.

PRACTICE AREAS

- Company Laws and Transaction Support
- Mergers and Acquisitions
- Law, Regulation, Public Policy and Strategy
- Capital Markets and Securities
- Legal Due Diligence, Anti-Bribery and Anti-Corruption
- Banking & Financial Laws and Advisory Documentation
- Antitrust and Competition
- Commercial Agreement
- Consumer Right and Product
- Dispute Resolution
- Environment & Pollution Control
- FDI & RBI Advisory
- General Corporate Advisory
- Hospitality & Leisure Practice
- Intellectual Property Support
- International Trade & Anti Dumping
- Legal Audit
- Litigation
- Project Finance
- Telecommunications

LANDMARK PUBLICATIONS

- Submitted a report to the Ministry of Law & Justice pertaining to the recent trends in liberalization of the legal industry, allowing the entry of foreign firms in the country in a phased and regulated manner.
- Submitted a report along with recommendations on making India a hub of International Arbitration to the Ministry of Law & Justice
- Assisted the Select Committee of the Upper House of Parliament of India in drafting the Fast Track Commercial Court Bill.
- Submitted recommendation along with Observer Research Foundation to Justice J.S Verma Committee on Criminal laws relating to safety & security of Women'.

AWARDS

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Real Estate Laws in India

WHAT STRUCTURES DO INVESTORS CONSIDER WHILE INVESTING IN REAL ESTATE IN INDIA?

The most popular structure is a joint development through the creation of a special purpose vehicle, joint venture or through a development management contract.

The joint venture may be equity based or purely contractual through creation of various rights and obligations. In an equity based joint venture, the investor invests directly by subscribing to, or acquiring, equity in the company holding the real estate, whereas a contractual joint venture is usually through the 'development agreement' model which is typically between the land owner(s) and the real estate developer, where the owner provides the land and the developer takes on the responsibility of developing the land and promoting the project, which results in cost and risk sharing.

An investor can also invest in units of a real estate investment trust (REIT), which is required to be registered with the Securities and Exchange Board of India (SEBI) and publicly traded on stock exchanges in India. A REIT, which owns and supervises a pool of income-generating real estate assets in India, is governed by the SEBI (Real Estate Investment Trusts) Regulations, 2014 (REIT Regulations) and is similar to a mutual fund, giving the investor the opportunity to acquire beneficial interest in the assets managed by the REIT.

INDIA APPEARS TO HAVE SEVERAL CONFUSING LAND AND DEVELOPMENT LAWS, CAN YOU PROVIDE SOME LIGHT ON THESE?

Yes, India has several land related laws but this is the case with so many countries and here each has a separate function in protecting rights to land. We have the Transfer of Property Act, which deals with both movable and immovable property, and the Indian Easements Act, both effective from 1882; the Registration Act, again which is old from 1908; the Slum Areas (Improvement and Clearance) Act which was passed in 1956, and the not so old Environment (Protection) Act 1986 and the Forest (Conservation) Act of 1980; and then the very recent Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013, and last year's Real Estate (Regulation and Development) Act and the Benami Transactions (Prohibition) Amendment Act, which came into effect on 1st November 2016; and the Indian Stamp Act 1899 which is also old but has been amended several times by various States; and the Special Economic Zones Act of 2005. And of course there are other municipal and local laws.

CAN FOREIGN ENTITIES ACQUIRE OR TRANSFER INTEREST IN IMMOVABLE PROPERTY IN INDIA? ALSO, HOW DOES THE GOVERNMENT REGULATE FOREIGN INVESTMENT IN THE REAL ESTATE SECTOR?

In India, ownership of real estate can be either freehold or leasehold. Most industrial zones are owned by State Governments and land is allotted on a leasehold basis (mostly through perpetual leases which are usually for 99 years). In the metropolitan cities there are residential complexes which are leasehold though options to convert to freehold have been provided by local governments if the required conversion charges and stamp duties are paid. Residential and commercial premises are also given on a leave and license basis, where the licensee only has the right to use and occupy the premises with no interest in the premises.

The Foreign Exchange Management Act, 1999 and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 govern the purchase/sale of immovable property in India by foreign entities. A foreign corporate which has a branch office in India is permitted to acquire immovable property in India so long as this is essential for carrying out its business in India.

Under the Consolidated Foreign Direct Investment Policy (FDI Policy), foreign investment in the real estate sector in India is permitted under the Automatic route under which no Reserve Bank of India (RBI) or government approval is required for the investment, subject to compliance with the prescribed parameters and the FDI Policy or the Government route which requires a prior permission of the RBI or the government for the investment.

However, in order to promote foreign direct investment in India, the Foreign Investment Promotion Board (FIPB) is in the process of being abolished and a new framework is expected to be announced shortly.

No foreign direct investment is permitted in 'Real Estate Business' i.e. dealing in land and immovable property with a view to earning profit from such business. This does not include development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships and REITs as 100% foreign direct investment is permitted in construction development projects under the Automatic route, and the government has also eased the exit norms for foreign investors in this sector.

The FDI Policy stipulates that each phase of the construction development project would be considered as a separate project for the purposes of the FDI Policy and thus, an investor can exit before completion of the entire project subject to a lock in period of 'three years', calculated with reference to each phase of the project, having been completed. Also, the government has proposed to give infrastructure status, effective from the financial year 2017-2018 to affordable housing, which would be followed by government incentives and tax benefits for developers of such affordable housing projects.

WHAT ARE THE LEGAL REQUIREMENTS IN RELATION TO PAYMENT OF STAMP DUTY AND REGISTRATION CHARGES ON AN INSTRUMENT OF TRANSFER OF IMMOVEABLE PROPERTY?

An instrument of transfer of immoveable property is required to be stamped prior to execution and the rate of stamp duty varies from State to State, depending on the nature of the transfer. Typically, the stamp duty ranges between 4% to 7% of the market value of the property in case of a sale in the metropolitan cities like Delhi, Mumbai, Bangalore and Chennai.

Also, instruments of transfer of immoveable property are compulsorily registrable, unless the property is given on rent for a period of less than 1 year and in case of a sale, the registration fee is typically 1% of the total value of the sale deed.

KANIKA PREMNARAYEN

PARTNER

WHAT ARE SOME KEY FEATURES OF REITS?

REITs need to be set up as trusts and must be registered with SEBI. A REIT must have a trustee, sponsor(s) and a manager. The REIT Regulations specify that the trustee must be a SEBI registered debenture trustee and must not be an associate of the sponsor/manager. REITs are permitted to invest in commercial real estate assets, either directly or through special purpose vehicles and can raise capital through an initial public offering subject to the condition that the value of all commercial real estate assets owned by the REIT is not less than INR 5 billion.

It is mandatory for a REIT to list its units on a recognized stock exchange within 12 working days from the date of closure of the initial offer and mutual funds are permitted to invest in REITs, subject to the condition that a mutual fund scheme cannot invest more than 10% of its net asset value in the units of REITs.

WHAT IS THE TAX LIABILITY ON OWNERSHIP AND OPERATION OF REAL ESTATE?

An owner of real estate in India has to pay statutory taxes and levies under local State laws. However, in practice, if a commercial property is given on lease or license, the taxes are contractually passed on to the lessee or licensee.

Property tax in India varies from State to State and differs for freehold and leasehold property. It is generally calculated on the rateable value which is usually based on the rent that can be realized from the property or the capital value which is determined as per designated zones of the property e.g. in Mumbai, property tax is calculated on the basis of the capital value of the property whereas in Bangalore, property tax is calculated on the basis of rateable value of the property.

Income tax is payable on capital gains arising from the sale of immovable property. Long term capital assets (i.e. real estate held for more than 24 months) are taxed at concessionary rates compared to short term capital assets (i.e. real estate held for less than 24 months).

Service tax at the rate of 14% is also payable on rent or license fee, along with Swachh Bharat Cess at the rate of 0.5% and Krishi Kalyan Cess at the rate of 0.5%. All indirect taxes including service tax are proposed to be substituted by goods and services tax expected to be effective July 1, 2017.

HOW ARE REAL ESTATE PROPERTIES DISTINGUISHED AND DEMARCATED BY THE GOVERNMENT?

The authorities divide areas of land into different zones through "zoning", based on land use i.e. residential zone, commercial zone, industrial zone etc. Additionally, certain areas are demarcated as Special Economic Zones (SEZs), which provide various incentives and concessions to the units operating from within these zones.

WHAT IS THE MOST SIGNIFICANT RECENT LEGAL AND REGULATORY DEVELOPMENT IN REGULATION OF REAL ESTATE IN INDIA?

The Real Estate (Regulation and Development) Act, 2016 (RERA) has been recently enacted to regulate and promote the sale of real estate in India in an efficient and transparent manner and to protect the interest of purchasers.

Some of the key features of RERA are: **(i)** (a) every real estate project proposed to be developed which exceeds 500 sq. mtrs.; (b) or where the number of apartments proposed to be developed exceeds 8; (c) projects that have not received a completion certificate as on 1 May 2016; and/or (d) projects for redevelopment that would involve selling and marketing, have to be mandatorily registered with the Real Estate Regulatory Authority (Authority) established under RERA and failure to do so would attract a penalty of upto 10% of the estimated cost of the real estate project.

(ii) 70% of the amount received from a real estate project is required to be kept separately in an escrow account which is to be utilised for that project only. Therefore, a promoter or developer can no longer divert funds from one real estate project to another project. **(iii)** Also the promoter or developer, as the case may be, is responsible for all obligations, responsibilities and functions specified under RERA, till conveyance of all the apartments, plots or buildings to the purchasers has been completed. In case the promoter or developer fails to do so, then such promoter or developer has to return the amount invested by the purchaser and also compensate any loss suffered by the purchaser.

(iv) Per the RERA a promoter or developer cannot transfer majority rights and liabilities in a real estate project to a third party without obtaining the prior written consent from two-third of the purchasers and written approval from the Authority. **(v)** If a promoter or developer, as the case may be, does not comply with the orders of the Authority, a penalty can be levied on the promote or developer for every day during which such default continues, which may cumulatively extend up to 5% cent of the estimated cost of the real estate project. **(vi)** Failure to make timely payments would invite payment of interest from the buyer to the developer. **(vii)** The jurisdiction of courts has also been barred in relation to suits or proceedings for any matters which statutory authorities under the RERA have the power to adjudicate. Further, no injunctions may be granted by any court for any action taken or which may be taken by statutory authorities under the RERA.

So we can see that the Government has been taking several measures to protect the interests of purchasers as several violations of consumer rights in the real estate sector had been seen in the past.

HOW CAN ONE EXPLAIN THE CONCEPT OF 'LAND POOLING' IN REAL ESTATE DEVELOPMENT?

In the midst of agitation by farmers against land acquisition by governments in various States in India, land pooling is emerging as a way forward towards peaceful and smooth acquisition of land for development of infrastructure projects. Instead of monetary compensation, the government provides compensation to the landowners in the form of a reconstituted plot or land, which reduces the financial burden on the government.

Typically, in land pooling schemes land owned by individuals or a group is legally consolidated by transfer of ownership rights to the designated land pooling agency, which later transfers the ownership of the part of the land back to the land owners for undertaking development of such areas. It is an effective way of integrating farmers as partners in land development projects.

Amaravati, in the State of Andhra Pradesh is an example where a land pooling scheme has been successfully implemented. We have seen news reports which indicate that over 20,000 farmers have given up land under a land pooling scheme notified under the provisions of the Andhra Pradesh Capital Region Development Authority Act, 2014 for the development of the new capital city for the State of Andhra Pradesh. The Finance Bill, 2017, proposes to amend the Income Tax Act, 1961 in order to provide exemption to capital gains tax arising from the transfer of land under a land pooling scheme.

HOW IS RENT PAYABLE?

Rent is payable in Rupees per sq. ft. per month (generally in advance, on or before the 10th day of the relevant English calendar month) and is typically exclusive of 14% service tax plus Swachh Bharat Cess at the rate of 0.5% and Krishi Kalyan Cess at the rate of 0.5% (all indirect taxes including service tax are proposed to be substituted by goods and services tax expected to be effective July 1, 2017).

VINEET GUPTA

COUNSEL

WHAT ARE THE TYPICAL PERIODS OF A LEASE, SECURITY DEPOSIT PAYABLE, LOCK-IN PERIOD AND PERCENTAGE OF RENT INCREASE?

Typically the lease term for commercial leases varies between 5 to 9 years (it is either a 5+4 year term or a 3+3+3 year term) and for residential leases between 2 to 3 years. The tenure is usually determined keeping in mind stamp law charges as there are States which charge stamp duty up to a 5 year lease term and then the stamp charges are enhanced or stamp duty is paid on a 3 year tenure before being enhanced and so on. The security deposit is interest free and refundable and varies across cities, and the general practice in Tier I cities is to take 3 to 6 months of the monthly rent as a security deposit while in Tier II cities, it is 6 to 12 months of the monthly rent. There is usually a 'lock-in' period based on the commercial agreement of the parties. Most lease agreements have a fixed increment in the monthly rent which typically varies between 5% to 8% every year.

WHAT IS THE GENERAL PRACTICE IN RELATION TO PAYMENT OF SERVICE CHARGES, OPERATING COST, REPAIRS AND INSURANCE IN RELATION TO LEASE AGREEMENTS IN TIER I AND TIER II CITIES?

In both Tier I and Tier II cities, service/maintenance charges usually form part of the monthly rent and all utilities such as electricity and water are metered separately and payable by the lessee at actuals. The lessee is responsible to undertake minor internal repairs while major structural repairs and repairs to the common facilities such as elevators, stairs etc., along with insurance, is undertaken by the lessor.

WHAT ARE THE LESSEE'S RIGHTS IN RELATION TO SUBLEASING AND ASSIGNMENT, EARLY TERMINATION AND REINSTATEMENT RESPONSIBILITIES IN RELATION TO THE PREMISES AT THE LEASE END?

A lessee is generally not permitted to sub-lease or assign rights in the property, without the prior approval of the lessor. A lessee can terminate a lease prior to its expiry in the event of a breach by the lessor of the lease terms. On expiry or early termination of the lease, the lessee is required to reinstate the property back to its original condition subject to normal wear and tear and hand over possession of the property to the lessor, subject to receipt of the security deposit. ■

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Kanika's experience includes assisting and advising KIA Motor Corporation on setting up its proposed greenfield automotive cluster in India; Nippon Paper (Japan) with regard to its acquisition of India's largest maker of paper beverage cups Plus Paper Foodpac; BlueScope Steel Limited (Australia) with regard to matters relating to its joint venture with Tata Steel Limited; Mitsui (Japan) with regard to its proposed investment in steel manufacturing in India; Partners Group (Mauritius), a private equity investor, with regard to its investment in Eurokids International Limited; STADA Arzneimittel AG (Germany) with regard to its investment in an Indian pharmaceutical company; U-SHIN Ltd (Japan) in relation to its joint venture in India; Oxford Instruments Plc (UK) and Oxford Instruments India Private Limited, in relation to their business operations in India; Developers Group Pte Ltd (Singapore) with regard to real estate investments in India; Diligent Corporation (USA) in relation to its operations in India; Soktas (Turkey) in relation to its business operations in India; and Kuwait Petroleum in its proposed investments in Indian companies engaged in the petrochemical sector.

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Vineet has significant experience advising on diverse corporate and regulatory issues and in Indian corporate and commercial laws, including joint ventures, business alliances, cross border transactions, establishing and servicing wholly owned subsidiaries for foreign clients, private equity investments and exits, mergers and acquisitions, and employment law.

Vineet's experience includes assisting and advising Japan Bank for International Cooperation (JBIC) in its equity investment in the Delhi Mumbai Industrial Corridor Development Corporation (DMIC); JBIC in its ongoing and proposed investments in India; KIA Motor Corporation on setting up its proposed greenfield automotive cluster in India; BlueScope Steel in its joint venture with Tata

Steel Limited; Mitsui, Japan in its proposed investment in steel manufacturing in India; Toshiba in its investment in a water treatment company in India; Nippon Paper Industries, Japan in its acquisition of Plus Paper Foodpac, India's largest paper beverage cup manufacturing company; Blueair Sweden in acquisition of its Indian subsidiary by Unilever; U-Shin Ltd, Japan in its joint venture in India; New Silk Route in its investment in and exit from Café Coffee Day; Kuwait Petroleum in its proposed investments in Indian companies engaged in the petrochemical sector; Haitong Bank; and L'Occitane.

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Employment Law Issues in India

India's Labour Ministry has proposed reforms that are aimed to significantly improve India's labour compliance. Khaitan & Co examines the issues.

WHAT ARE THE COMMON EMPLOYMENT LAW ISSUES THAT CROP UP IN INDIA?

Common employment laws issues in India can be divided into two areas: the issues faced by employers and the ones faced by employees, though some of these issues are common to both. We have summarized key employment laws issues which are most common below.

Issues faced by employer:

(i) Employees joining competing organisations is a common problem faced by employers. As per the Indian Contract Act 1872 ("Contract Act"), non-competition restrictions are deemed restraint in trade and therefore unenforceable post termination of employment irrespective of the covenants contained in the employment agreements. Further, the Contract Act does not recognize the concept of 'reasonable restrictions'. As a result, even reasonable non-competition covenants are unenforceable post termination of the employment.

(ii) Under the Industrial Disputes Act 1947 ("ID Act"), in case of termination of workmen by organisations, the organisations are required to follow the last-in first out ("LIFO") rule. It is important to note that unless an employee is actually performing managerial or supervisory duties, such employee will be deemed a workman under the ID Act. Therefore, organisations are required to record the reasons in writing in case they wish to deviate from the LIFO rule. While the intention behind the LIFO rule is justifiable, it may be difficult for modern businesses to follow this rule where employment is purely merit-based.

(iii) Other issues commonly faced by employers include challenges in enforcing recovery of training costs and garden leave clauses post termination of employment, as such clauses are again deemed as restraint in trade under the Contract Act.

(iv) At present, labour laws like the Factories Act 1948 ("Factories Act") and the shop and establishment laws of different states prescribe working hours, number of overtime hours, etc. This becomes a challenge for employers, where employers have very limited flexibility in managing their workforce to achieve greater efficiency.

Issues faced by employees:

(i) It is common for employees to join similar sector industries which may be competing with their previous employer. As mentioned above, although the non-compete clauses are unenforceable post termination of employment, employees usually receive legal notices from their previous employers regarding alleged violation of non-compete clauses and therefore, need to spend their resources in such legal battles.

(ii) It is common for employees to receive legal notices from their past employers regarding alleged breach of provisions regarding confidential information. Employees should be extremely care-

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ful and ensure that they possess no confidential information of the previous employer and ensure to keep such information highly confidential. Also, necessary confirmations from the employer should be obtained in this regard.

Other issues:
Other issues include multiple laws and regulations governing labour matters. Under the Constitution of India, labour falls in the Concurrent List giving power to both the Central and the respective State Government to legislate on such items, with the residual law-making powers vesting with the Centre. This has resulted in a plethora of Central and State laws related to wages, employment, industrial relations, social security, etc. Moreover, certain labour laws are industry specific (for example - the Sales Promotion Employees (Condition of Service) Act 1976). This results in several compliances and regulatory requirements for the employers. As far as employees are concerned, they need to keep themselves abreast of reporting and other requirements prescribed for employees under various labour laws.

WHAT SECTORS IN PARTICULAR FACE EMPLOYMENT LAW CHALLENGES?

Sectors like IT and projects are prone to various challenges under Indian labour laws, particularly in more difficult times where such companies may need to reduce their excess workforce. However, under the abovementioned LIFO rule, the requirement of paying retrenchment compensation may become a bottleneck in such a process.

Manufacturing concerns and large corporates usually have trade unions, which are usually backed by political parties and are seldom interested in protection of interests of workers.

Companies that have a presence in several states have the herculean task of complying with several central laws as well as laws of respective states.

WHAT ARE THE MOST IMPORTANT RECENT CHANGES IN LABOUR LAW REGULATIONS?

The Central Government has been pursuing a pro-reform agenda since they took over three years ago and the overall trend has been to simplify labour regulations. The Ministry of Labour and Employment of the Government of India ("Ministry of Labour") has recently conveyed that the aim is to first concentrate on reforms that are focused on employee welfare and benefits. We have summarized key amendments/proposals for labour law reforms at the central level, below.

(i) Maternity Benefit (Amendment) Act 2017 ("MB Amendment Act"): This amends the Maternity Benefits Act 1961 ("MB Act") and became effective from 1 April 2017. Salient features of the MB Amendment Act include increased maternity leave from 12 weeks to 26 weeks, availability of maternity leave of 12 weeks to adoptive and commissioning mothers, introduction of work from home options and requirement to provide crèche facilities in case of organisations employing 50 or more employees.

(ii) Special Benefits to Start-ups: The Ministry of Labour vide its notification dated 12 July 2016 has exempted all eligible start-up companies from labour inspections under 9 central legislations, namely, the ID Act, Trade Unions Act 1926 ("TU Act"), Building and Other Constructions Workers' (Regulation of Employment and Conditions of Service) Act 1996 ("BOCW Act"), Industrial Employment (Standing Orders) Act 1946 ("IESO Act"), Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979 ("ISMW Act"), Payment of Gratuity Act 1972, Contract Labour (Regulation and Abolition) Act 1970 ("CLRA Act"), Employees' Provident Funds and Miscellaneous Provisions Act 1952 and the Employees' State Insurance Act 1948. This exemption has been granted for a period of 3 years and will be conditional upon the organisations providing self-compliance reports. Inspections under the specified legislations will be conducted only in case of credible and verifiable complaints against the organisation.

(iii) Combined Registers under various labour laws: On 21 February 2017, the Ministry of Labour notified the Ease of Compliance to Maintain Registers under various Specified Labour Laws Rules 2017 ("Ease of Compliance Rules"). The Ease of Compliance Rules enable an employer to maintain 5 types of combined registers under the following labour laws: (i) BOCW Act; (ii) CLRA Act; (iii) Equal Remuneration Act 1976; (iv) ISMW Act; (v) Mines Act 1952; (vi) Minimum Wages Act 1948; (vii) Payment of Wages Act 1936; (viii) Sales Promotion Employees (Conditions of Service) Act 1976; and (ix) Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act 1955 (collectively "Specified Labour Laws"). The 5 types of combined registers required to be maintained under the Specified Labour Laws, include: (i) Employee Register; (ii) Wage Register; (iii) Register of Loan / Recoveries; (iv) Attendance Register; and (v) Register of Rest Days / Leave account of employees / Leave with Wages.

(iv) Payment of Bonus Amendment Act: The Payment of Bonus Act 1965 ("Bonus Act") which aims at ensuring a payment of bonus based on profit or productivity to workers in certain establishments. The Payment of Bonus (Amendment) Act 2015 ("Bonus Amendment Act") sought to amend bonus entitlements prescribed under the Bonus Act. The provisions of the Bonus Amendment Act were made applicable retrospectively with effect from 1 April 2014 and a few High Courts have passed *ad interim* orders staying the retrospective operation of Bonus Amendment Act. Salient features of the Bonus Amendment Act, include increase in eligibility limit for the statutory bonus from INR 10,000 per month to INR 21,000 per month, increase in the calculation limit for the purposes of bonus to INR 7,000 or the minimum wage for the employment, whichever is higher.

(v) Child Labour (Prohibition and Regulation) Act 1986 ("CL Act"): This is intended to regulate the employment of workers below a certain age in industrial establishments. The Child Labour (Prohibition and Regulation) Amendment Act 2016 ("CL Amendment Act") received Presidential assent on 29 July 2016 and was thereafter published in the Official Gazette. The CL Amendment Act amended the CL Act that prohibited the employment of children below the age of 14 years in certain hazardous jobs. Salient features of the CL Amendment Act include prohibition on employment of children below the age of 14 years in certain other professions such as bidi-making, mines, domestic work and power loom industries. In other professions, child labour is prohibited unless the child is involved in the family profession or trade after his/her school hours. Also, a new category 'adolescent' has been added defined as persons between the ages of 14 years to 18 years. Adolescents are prohibited from employment in hazardous industries as listed out in the CL Amendment Act. The penalties have also been increased to imprisonment ranging from 6 months to 2 years and fine in the range of INR 20,000 to INR 50,000.

Additionally, various states have also made some amendments to their respective labour laws. For example –

(i) The Government of Maharashtra vide its notification published in the Maharashtra Government Gazette on 5 January 2017 has announced that the CLRA Act will now be applicable to every establishment or contractor in the State of Maharashtra in which 50 or more workmen are employed or were employed on any day in the preceding 12 months. Prior to this, the limit for applicability of the CLRA Act in the State of Maharashtra was limited to 20 or more workmen.

(j) The Madhya Pradesh Labour Laws (Amendment) and Miscellaneous Provisions Act 2015 also carried out a number of amendments to the existing labour law framework. This amendment included provisions to allow women to work at night as well as a more beneficial retrenchment compensation equal to at least 3 months' remuneration. This was probably one of the most controversial state amendments opposed fiercely by the opposition parties and a large section of workers. It is seen as 'anti-worker' and 'pro-industry' due to provisions such as allowing compounding of disputes by payment of a fine as well as change in the nature of an employee's job without prior notice.

IN RESPECT OF THE RECENT REFORMS IN MATERNITY BENEFITS, WHAT ARE THE PRACTICAL IMPLICATIONS?

The MB Amendment Act is one of the landmark amendments in the recent past. With the MB Amendment Act, India has become the third highest provider of paid maternity leave to women employees in the private sector after Canada (50 weeks) and Norway (44 weeks). This is a step in the right direction. As per clarifications issued by the Ministry of Labour on 12 April 2017, women employees who are presently undergoing maternity leave will also be entitled to additional leave as provided in MB Amendment Act. Moreover, as an option, the MB Amendment Act now recognises the facility to 'work from home'.

Provisions regarding crèche facilities will be effective from 1 July 2017 and we expect the Ministry of Labour to come out with rules around crèche facilities like period up to which the crèche facility could be extended to concerned women as well as the aspect of availability, whether arrangements can be made with third party service providers for crèche facilities, distance from workplace, safety issues, third party liability and so on.

While the MB Act applies to all categories of women employees and this has also been clarified by the Ministry of Labour vide clarifications dated 12 April 2017, there are several aspects which need clarity. For example – being welfare legislation, whether the benefits under the MB Act will apply to long term interns.

WHAT KIND OF REFORMS DO YOU THINK ARE LIKELY IN THE COMING YEAR IN THE INDIAN LABOUR LAW SPACE?

(i) The Factories Amendment Bill 2016 ("Factories Bill"): The Factories Act is intended to ensure that workers in factories enjoy a safe and healthy work environment. The Factories Bill to amend the Factories Act was passed in the Lok Sabha on 10 August 2016. The amendments sought in the Factories Bill are reformative and seek to unlock latent productivity in the manufacturing sector. Salient features of the Factories Bill include: (i) Overtime: It has been proposed to increase the existing limit of overtime hours for factory workers from 50 hours to 100 hours per quarter. The Factories Bill also proposes to increase the permissible overtime working hours in case of exceptional workload from 75 hours to 115 hours per quarter. It also allows further increase of up to 125 hours per hour by the Central/ State Government in view of the public interest. (ii) Empowering Central Government and State Governments: The Factories Bill seeks to empower the Central Government to make rules and orders in relation to employees who are currently exempted from the provisions of Chapter V (working hours for adults) of the Factories Act. These powers are presently vested only with the respective State Governments.

(ii) Labour Code on Industrial Relations Bill 2015 ("IR Code"): The Union Cabinet has taken up for consideration the "IR Code" which envisages a simplification and amalgamation of the ID Act, TU Act and IESO Act into one legislation. It envisages certain changes aimed to relax norms and increase the ease of doing business in the country. This includes increasing the minimum limit of employees for regulation by the IR Code from 100 to 300. In a move to benefit workers, it also increases the amount of retrenchment benefit to 3 months.

(iii) Other Code Bills: In addition to the IR Bill, the Ministry of Labour has proposed 3 Labour Codes viz. Code on Wages, Code on Social Security & Welfare, and Code on Occupational Safety,

The EC Bill makes it mandatory for employers to make their employees aware of their right to compensation. They are liable to a fine in case they fail to inform their employees of this right.

Health & Working Conditions with aim to consolidate major labour laws governing these aspects. The Labour Code on Wage Bill 2015, which aims to amend the law relating to wages and bonuses has already been drafted. Further, the draft Code on Social Security & Welfare which amalgamates the provisions of 15 central labour laws relating to social security has been placed in the public domain on 16 March 2017 for public comments.

(iv) The Employees Compensation Act 1923 ("EC Act") was meant to provide compensation to workers in cases where they cannot continue work due to industrial accidents or to their kin on death. The Employees Compensation (Amendment) Bill 2016 ("EC Bill") was introduced and passed in the Lok Sabha on 9 August 2016. The EC Bill makes it mandatory for employers to make their employees aware of their right to compensation. Employers are liable to a fine of up to INR 100,000 in case they fail to inform their employees of this right to compensation. This is an important initiative as many workers fail to claim the benefit available under the EC Act due to lack of awareness. Further, the minimum amount of compensation required to file an appeal against any order of compensation has been increased from INR 300 to INR 10,000 subject to the power of the Central Government to further increase this limit.

(v) The Model Shops and Establishments (Regulation of Employment and Conditions of Service) Bill 2016 ("MS Bill") has been prepared by the Ministry of Labour to increase employment and productivity in the country. The MS Bill also aims to harmonise the state laws governing general welfare provisions in various states. The MS Bill is applicable to all establishments employing 10 or more workers but exempts manufacturing units. The salient features of the MS Bill are:

- General welfare provisions: The MS Bill requires employers to make suitable arrangements for clean drinking water, latrine facilities, first aid facilities and, in some cases, canteen facilities too. It allows groups of employers to operate common facilities in case there is a paucity of space in the area.
- Work hours and facilities for women: The MS Bill provides that a workplace must provide access to a night crèche facilities, ladies toilets and rest rooms. The consent of the woman worker must also be taken before assigning her to night duty.
- Leave provisions: The MS Bill provides 45 days of earned leave, 8 days of casual leave and 5 festival leaves every calendar year. Additionally, an employee would also be entitled to leave on all national holidays.
- The MS Bill also allows shops to remain open 24 hours a day, 7 days a week in an attempt to boost employment and consumption. ■

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A record year for M&A transactions in India reflects strong foreign investment as well as domestic consolidation. Khaitan & Co explores the landscape.

HOW ARE M&A TRANSACTIONS IN INDIA DIFFERENT TODAY FROM, SAY 2-3 YEARS AGO? WHAT HAS IMPROVED THE MOST AND WHAT HAS GOTTEN WORSE?

As India continues to be one of the more attractive investment destinations, M&A activity has progressed significantly over the last 2-3 years. A stable central government with a strong political will - demonstrated by the policy changes and regulatory liberalisation - has given the impetus for steady growth in M&A activity across sectors. On the policy front, several schemes like 'Make in India', 'Skill India', 'Digital India', 'Start Up India' and 'Stand Up India' have provided a favourable outlook for inbound investments into the country. At the same time, provisions to allow Indian companies to merge into foreign companies is expected to provide some traction to outbound mergers. There are also efforts being made to overhaul dated regulations and the central government has given a major thrust to its agenda of 'Ease of Doing Business in India'. That M&A activity in India reached a record high of $64 billion in 2016 is proof that domestic and foreign investors are bullish on the Indian market.

From a deal mechanics perspective, there is a greater degree of deal sophistication associated with Indian markets, while processes and structures common in M&A transactions abroad are now being implemented in India too. Use of auction processes for sales have been on the rise. Post-closing escrows for working capital and other adjustments are becoming routine. Indemnity and warranty insurance is gaining traction. Acquisitions through stock have become common, especially in the e-commerce sector. With promoters being more proactive and mindful of their rights and obligations, negotiations have become more balanced. Investors, on the other hand, have accepted the policy framework on no guaranteed return and are looking at other means for a smoother and fruitful exit. In fact, it is the promoters who are seeking more rights including guaranteed returns in the form of upside sharing. Cases involving assured returns to investors are decreasing and there are fewer instances of the negotiations being lopsided in favour of investors.

Despite the progress, there are still quite a few structures which, though common abroad, are difficult to implement in India. A traditional leverage buy-out, which might otherwise seem fairly straightforward, is not permissible under the Indian legal regime. To make a leverage buy-out work, acquirers need to demonstrate an appetite for innovative structures.

Although the policy initiatives are laudable, the letter of the law in some instances deters the spirit which makes deal making difficult. For instance, while the liberalisation of requirements for setting-up an escrow post-closing was a step welcomed by industry, the multiple views and interpretations on what is permissible and what is not has limited its positive impact to a large extent. There is also an urgent need for the Reserve Bank of India

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("RBI") and Foreign Investment Promotion Board ("FIPB") to clear their stand on internationally accepted structures like post-closing adjustments and share swaps. Other instances are reforms to the merger process and the setting-up of a National Company Law Tribunal which will approve mergers: in reality, as the tribunal is in its nascent stages, it has meant that the approvals seem to be taking longer than the erstwhile approval process through the High Courts. It is imperative that multiple nodal agencies like the RBI, FIPB, Competition Commission of India ("CCI"), Department of Industrial Policy & Promotion ("DIPP") and Securities and Exchange Board of India ("SEBI") are in consonance on their views, thereby obviating any divergence in regulatory oversight.

HOW HAS THE STRESS IN THE INDIAN BANKING SYSTEM AFFECTED CROSS-BORDER AND DOMESTIC M&A TRANSACTIONS IN RECENT TIMES?

Banks in India are facing challenges of moderate loan growth, slow trading gains, surplus liquidity and mounting bad loans. India's restrictive policies in relation to full capital account convertibility and institutional inefficiencies in enforcement of security, do not make India a natural destination for debt capital. However, with regulatory liberalisation on this front, there is increased interest from raising capital through debt instruments.

Extant exchange control regulations permit investment by foreign portfolio investors in listed non-convertible debentures ("NCDs") issued by a private company. Using listed NCDs has become a popular tool to raise capital for investors looking for an investment cycle of at least 3 years. Further, using listed NCDs has been commercially preferred if promoters are not willing to part with their equity stake and if the investor is looking for a fixed

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return on the investment. Creation of security and limited end-use restrictions are some of the key advantages of using listed NCDs. The costs for compliance and listing are also not very steep. As a recent development, investment in unlisted NCDs by FPIs has been permitted. However, certain end-use restrictions have been imposed - such debt cannot be used for purchasing shares of another company. Unlisted NCDs may serve as useful funding tools for capital intensive sectors such as real estate.

Further, international debt funds have shown keen interest in India. Structures have evolved to facilitate their investment in certain debt products and in 2015, the RBI allowed Indian companies to issue rupee denominated bonds overseas (so-called "Masala Bonds"), which has created another avenue for international debt capital to be channelled into Indian companies. Although the initial market reaction to these instruments was mixed, market interest renewed after HDFC listed its Masala Bonds on the London Stock Exchanges in July 2016. NCDs and Masala Bonds are giving greater downstream protection to foreign investors. From a promoter perspective, it is an attractive instrument for borrowers as it neutralises any exchange currency conversion risks.

Foreign investors need to rethink their strategies and principles to cater to the Indian mindset. It is important that investors do not impose their global practices.

Investors have been willing to invest funds in distressed assets. Recently, there have been significant enabling changes facilitating wider access to the distressed market in India. By way of background, in the past, some international debt investors have sought to invest in the equity of "asset reconstruction companies" (ARCs), by partnering with Indian groups. Such companies benefit from access to a wider pool of debt and enhanced enforcement proceedings and this is the route through which most distressed investments are undertaken in India. The changes announced in the 2016 union budget, supported by legislative amendments in relation to certain debt recovery legislation, allow international investors to acquire 100% of the shares of an asset reconstruction company and also acquire 100% of any tranche of security receipts issued by such company (although the RBI requires 15% cash consideration on the acquisition of loans). This has been welcomed by the market as an enabling change. One expects this market to mature significantly in the near future, which will help in deleveraging the balance sheets of public lending institutions.

WHAT ARE THE TYPICAL TIMELINES FOR AN INDIAN OR CROSS-BORDER M&A DEAL, AND WHICH PARTS TYPICALLY TAKE THE LONGEST?

Typically, an M&A deal would take anywhere between 3 to 6 months. The timelines depend on various factors, including the nature of the transaction, the sector of investment, private market or public market instrument, regulatory interface required, structuring and tax considerations, and the number of sellers and buyers. For instance, a majority acquisition by a foreign investor of a privately held company, in the IT sector, can be easily completed in a couple of months as opposed to a majority acquisition by a foreign investor of a public listed company in the telecom sector, which may stretch beyond six months. In the first example, as regulatory approvals are not required, there are no hurdles perceived that will adversely impact deal timelines. For the acquisition of the public listed company, the deal timeline would be significantly longer, including approvals from various regulators such as the Department of Telecommunication, FIPB (or its successor), CCI (if the specified thresholds are breached), and implementation of the open offer process as per the takeover regulations.

Generally, obtaining regulatory approvals is what stretches the deal timelines the longest. While there has been lot of emphasis on ease of doing business in recent times, the reality is that the time taken for obtaining regulatory approvals is often a bottle neck for swift deal making. For instance, although a 30 day timeline is prescribed under law for a CCI approval from the date of application, in fact, such approval takes much longer. The regulator, just to buy more time, seeks additional clarifications from parties even in relation to routine filings.

WHAT ARE THE MAIN CULTURAL ASPECTS OF AN INDIAN M&A THAT FOREIGN INVESTORS ARE MOST OFTEN SURPRISED BY? ARE THERE ANY TIPS YOU CAN GIVE

TO BRIDGING ANY CULTURAL OR OTHER GAPS THERE?

India's growth story attracts investment but that comes with its own qualms! We all know how Uber had to mend one of its core principles of not using cash as a payment method only for the Indian market - M&A deals are no different.

Most Indian corporates are tightly held by the promoters and their family members. This leads to a merged identity of the promoter family and the corporate entity. It is common to find promoters and their extended family members occupying key positions, directly or indirectly, in the management of the business and taking important business decisions. Therefore, it is very pertinent for foreign investors to understand the distinct role of the promoters in day-to-day operations of the company. This gains more importance in a scenario where the investor will be running the business alongside the promoters.

Foreign investors need to rethink their strategies and principles to cater to the Indian mindset. It is important that investors do not impose their global practices, rather focus on striking the right balance to ensure they culturally fit.

ANY TIPS ON HOW TO DEAL WITH INDIAN PROMOTERS OR PROMOTER-DRIVEN COMPANIES FOR FOREIGN LEGAL ADVISERS?

Corporate governance practices of Indian promoter-driven companies may not always be in sync with the practices followed internationally. As mentioned above, most Indian companies are operated as family enterprises and may not have implemented the best corporate governance practices.

Accordingly, from a diligence perspective, there should be additional focus on related party transactions, compensation and any other incentive payouts to promoters, as such payments and transactions may not be documented. Emphasis must also be made on good housekeeping and sanity checks on the general regulatory compliances that are required. Investors must check if relationships of the target with customer/vendors are in a documented form. Intellectual property protection is another area that requires protection - there have been instances, where IPs are registered in the name of the promoters rather than the company. To avoid surprises later on, it is important to have a conversation in advance with the promoters on how they deal with issues relating to corruption and graft and what measures they have put in place for dealing with such instances, if any. Further, a focus should also be on understanding the policies put in place for dealing with sensitive issues such as sexual harassment in the work place, whistle blower protection, etc.

In relation to documentation and structuring investor exits, it is important that the relationship with promoters are cordial, and that such amiability is reflected in day-to-day management. Exit mechanisms will remain mere contractual rights without teeth if the promoter is not facilitating an investor's exit. To this end, as a structuring tool, upside sharing arrangements may be agreed upon to incentivise promoters to facilitate an exit. However, such an arrangement would require additional corporate governance requirements in case of a public listed company.

A general advice to foreign advisers would be to understand the promoters and determine their experience in deal-making. It may be the case that the Indian promoter is dealing with foreign investors for the first time, and the complexities involved in the deal process may get a bit overwhelming for him. The foreign legal advisers may be required to put in extra hours to hand-hold such promoters through the deal process. It is also recommended that foreign advisers conduct adequate background due diligence to cull out deal-breaker issues.

IN YOUR OPINION, WHICH ARE (OR HAVE MORE RECENTLY BECOME) THE MOST IMPORTANT ASPECTS OF INDIAN CROSS-BORDER M&A DEALS, FROM A REGULATORY AND LEGAL PERSPECTIVE?

India has become a hotspot of M&A for the past few years. The rapidly-changing legal and regulatory landscape is testament to India's pro-business approach. Some of the key changes which will impact M&A deals are:

- **Deferred consideration, escrow and indemnities:** The payment of warranty and indemnity claims historically required RBI approval (although the RBI is unlikely to refuse permission if the claim is supported by a judicial or arbitral award). There were also previous restrictions on the payment of deferred consideration without RBI approval. These restrictions have affected retention mechanisms, earn-outs and even purchase price adjustments. Structural approaches have evolved to work around some of these restrictions, but they all involve complexity. However, recent changes permit deferred consideration and escrows for an 18-month period after the date of the agreement and indemnities with a value of no more

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than 25% of the purchase price without the need for RBI approval. Although this does not go as far as dismantling the entire regime and the changes do have their quirks (for example, the 18 month period is tied to the date of the agreement rather than closing), it does create some room for the use of routine M&A features in transactions without the need for complex and creative structuring.

- **Foreign investment in Limited Liability Partnerships:** Limited Liability Partnerships ("LLPs") that operate in sectors where foreign investment is otherwise freely permitted have been recently categorised as entities eligible to receive foreign investments. This change is significant as LLPs currently offer certain tax and corporate compliance advantages. However, there are also some downsides to the use of LLPs. For instance, the debt funding options available to LLPs are limited and it is not currently possible for LLPs to be subsequently re-registered as companies. It would be worth considering the use of LLPs in relation to joint ventures (we have advised on such structures recently). However, the tax laws in India may change and clients opting to use the LLP form should do so bearing in mind the "change of law" risk.

- **Sectoral liberalisation:** The foreign exchange regime has been liberalised to a great extent by permitting foreign direct investments ("FDI") under the automatic route in many sectors, which earlier required approval of the government and increasing the limit of foreign investments in various sectors. A number of sectors, such as defence, pharmaceuticals, real estate and single-brand retail, have all seen helpful changes. Additionally, 100% FDI under automatic route is allowed in 'regulated' financial services. Requirements of minimum capitalisation have been done away with.

- **Phasing out FIPB:** An important development has been the Indian government's announcement in the 2017-18 Union Budget to phase out the FIPB in the 2017-18 financial year and further liberalise exchange control regulations relating to foreign direct investment in India. While this is an important development for all foreign investors, the government is yet to give clarity as to how sectors with an approval route will be handled. If investors will have to take the nod of individual ministries for sectors, for instance, approaching the department of pharmaceuticals for an investment in the pharmaceutical sector, this move may end up being a bane rather than a boon.

- **Exemptions to small targets:** In case of a proposed investment in a target company whose assets are less than INR 1000 crores, the Ministry of Corporate Affairs of the Government of India has introduced a notification dated 27 March 2017 that has expanded the scope of the 'small target exemption' to include mergers and amalgamations, and has clarified that only the "true target" in case of asset/business acquisitions will now be considered for the purposes of determining the applicability of the asset and turnover thresholds under the Competition Act, 2002.

- **Regulating Mergers:** India has promulgated new regulations and tweaked existing laws to give a thrust to cross-border M&A activities. The most important development has been on the cross-border mergers front, which will unlock the potential of inbound mergers in India M&A. Whereas the old regime permitted only the merger of an Indian company into a foreign company, the new regime provides for a foreign company to merge into an Indian company. Additionally, SEBI has issued new guidelines to regulate mergers between listed and unlisted companies. Earlier, unlisted companies merged with listed companies as an easy route to listing by circumventing the requirement of detailed disclosures. To curb this practice, the new guidelines envisage a host of disclosure requirements for the unlisted companies as well.

- **Insolvency Code:** The insolvency and bankruptcy law will make it easier for foreign investors to wind up their investments in India. The Insolvency and Bankruptcy Code, 2016 ("Insolvency Code") has been operationalised with effect from 1 December 2016. Broadly, the Insolvency Code provides for a UK-style approach to insolvency. It provides for an administration-like process called the insolvency resolution process, which can be initiated upon a default of INR 100,000. The resolution plan needs to be adopted in a time-bound period of 180 days (one time extendable to 270 days). Failure of the corporate insolvency results in liquidation of the corporate debtor. It also introduces UK-style claw-back provisions (for preferences, transactions at an undervalue and extortionate credit transactions) and provides for a clear waterfall of distributions in liquidation. This is a welcome legal development as it seeks to implement insolvency in a time bound manner with greater power in the hands of creditors, but much depends on the development of the institutions and professions that are required to make its functioning a success.

- **Dispute resolution:** A significant and welcome change has been the amendment to the Arbitration & Conciliation Act, 1996 ("A&C Act"), that has clarified the anomalies that had been created by various judicial pronouncements especially in cases involving a foreign seat of arbitration. The intention behind the amendment is to make arbitration a preferred mode for settlement of commercial disputes by making it more user-friendly and cost effective and leading to expeditious disposal of cases. Separately, a law to set up commercial courts at district courts and commercial divisions at High Courts to exclusively try commercial disputes has also been promulgated, but it is yet to be implemented.

WHICH AREAS ARE MOST LIKELY TO DERAIL A DEAL OR END UP RAISING RED FLAGS, IN YOUR EXPERIENCE?

Deal breakers are usually on commercial points and it is unlikely for a deal to be called off purely on legal reasons. Typical red flags associated with legal diligence are on account of regulatory consents and approvals that may be required. The timelines taken for approvals from CCI, SEBI or FIPB are hard to predict with certainty and in many cases, may take longer than expected. A deal involving simultaneous approvals from multiple regulators may get entangled if regulators take contrary views on the same subject matter. For instance, RBI and DIPP (government department that formulates FDI policy) have not always been on the same page on a few foreign exchange control issues. Further, there have been instances where the CCI has asked parties to make a re-submission on account of submission of insufficient information.

While dealing with promoters of family driven companies, foreign investors may come across intra-group transactions that may not be in strict compliance with corporate governance norms. Foreign investors, who are indoctrinated with the idea of separate management and ownership in a company, may become sceptical to such family-driven companies.

Use of holding companies for making further investments, has historically triggered regulatory intervention by way of an approval of the FIPB (the government agency responsible for regulating foreign investment). While there has been a change in policy permitting investment into companies which do not have any operations and intend to carry on business in sectors where foreign investment would not otherwise need government approval (and where there are no regulatory investment conditions), the concerns around regulatory capital requirements for "core-investment companies" and the potential categorisation of these entities "non-banking financial companies" still remain.

WHAT ARE THE BEST MEASURES ONE CAN TAKE (AHEAD OF TIME OR AT THE TIME OF THE TRANSACTION) TO AVOID SUCH RED FLAGS FROM RUINING A DEAL?

Prior to entering into commercial negotiations, parties must have a wholesome understanding of the sector they are dealing in. Parties must sit together at the drawing board and chalk out the best strategy to minimize the deal's exposure to regulators. Estimate of time taken in obtaining regulatory approvals and third-party consents must be factored into the proposed timelines of the transactions. To prevent deals getting entangled in regulatory cross-wires, deal makers must be proactive in their dealings with the regulators. If the deal envisages simultaneous applications to multiple regulators, parties may minimize the risks by timing their responses strategically before the respective regulators. Applications getting returned by regulators owing to a lack of supporting documents may be averted if parties are careful in ensuring that their submissions are in the format prescribed by the regulator and that it contains adequate disclosures.

The best way to avoid hiccups in a deal involving family-driven companies is to undertake thorough due diligence on the financial and legal aspects. This will considerably bring down the chances of unwelcome red-flags springing up at the closing or post-closing stage.

WHAT DO YOU THINK IS THE FUTURE OF CERTAIN OFFSHORE STRUCTURES, IN LIGHT OF THE RECENT TREATIES AND GENERAL ANTI-AVOIDANCE RULES THAT KICKED IN ON 1 APRIL?

1 April 2017 is a historic date as far as the tax regime in India is concerned. The tax exemptions available to investments from Mauritius and Singapore have been withdrawn and the general anti-avoidance rules have also been operationalised. Essentially, for claiming any tax exemptions, the investors will need to establish the "substance" test on a qualitative basis to avail tax exemptions.

By way of background, investment into India was, in the past, often routed through Mauritius because equity investments structured in this manner historically benefited favourable tax treaty provisions with regard to capital gains (upon an exit, capital gains tax was not imposed in either India or Mauritius). However, a number of recent amendments have been made to the Indo-Mauritian tax treaty. These changes are unhelpful as far as equity investments are concerned, but positive in relation to debt investments. Further, these changes have been replicated for the tax treaty with Singapore as well.

The changes will mean that this favourable tax treatment will only continue for investments made prior to 1 April 2017 (regardless of when the exit occurs). After this, capital gains arising from the sale of shares acquired in two-year transitional period (1 April 2017 to 31 March 2019) will be taxed at 50% of the applicable Indian capital gains rate and any shares acquired in Mauritius after the expiry of this period will be taxed at the full Indian rate on an exit.

As far as debt is concerned, interest income arising to a Mauritian resident will be taxed at a withholding rate of 7.5% in India. This will make Mauritius attractive for the routing of debt investment into India, provided that "substance" can be established in Mauritius.

WHAT ARE SOME OF THE SIGNIFICANT COURT DECISIONS OVER THE LAST 12 MONTHS THAT HAVE AFFECTED INDIAN M&A?

We have set out below a few cases that have affected Indian M&A significantly:

- **Cruz City - Unitech (11 April 2017):** The Delhi Court, while determining the enforceability of an arbitration award that required the Indian counterparty to honour the clauses on a put option with assured return and guarantee (which were alleged to be in violation of foreign exchange laws of India), held that a contravention of specific provisions of foreign exchange laws, even if established, was insufficient to invoke the defence of 'public policy' against enforcement of the award.
- **Clearwater Capital - Kamat Hotels (20 March 2017):** In this order, SEBI held that 'negative control', or protective rights should not be construed as 'control'. SEBI analysed a shareholders agreement wherein certain protectionist rights

were granted to Clearwater including (i) right to appoint a nominee director on board of the target company; (ii) right to restrain the promoters from entering into any agreement which would restrict or conflict with rights of Clearwater; and (iii) veto rights on matters such as alteration of share capital, creation of new subsidiaries, merger, disposing of or acquiring any material assets, winding up etc. SEBI held that the abovementioned rights enable the foreign investor to exercise certain checks on the existing management for the purpose of protecting its interest as an investor rather than formulating policies to run the target company and therefore should not be construed as 'control'.

- **Imax Corporation - E-City Entertainment (10 March 2017):** The Supreme Court, while determining the enforceability of an arbitration award, held that as the parties had decided to have the agreement governed by the laws of Singapore and have the disputes in connection with the agreement to be settled in accordance with ICC Rules of Arbitration without specifying any seat of arbitration, the parties had agreed to exclude the applicability of Part 1 of the Arbitration and Conciliation Act, 1996 and accordingly the foreign arbitral award passed in accordance with the ICC Rules of Arbitration could not be challenged before the courts of India.

- **Essar Projects - MCL Global Steel (6 March 2017); One Coat Plaster - Ambience (1 March 2017):** Two benches of the National Company Law Tribunal gave divergent orders in relation to its jurisdiction to entertain insolvency petitions filed under the Insolvency Code. In both the cases, the corporate debtors, in reply to the demand notice, disputed the amount claimed by the operational creditors. The Mumbai bench in the Essar Projects case held that merely denying a claim in reply to a demand notice (without a dispute before a court of law), could not be treated as 'dispute in existence' for the purposes of rejecting an application under the Insolvency Code, and accordingly, the application for insolvency had to be allowed. The Principal Bench in One Coat Plaster, however, held that the word "dispute" was an inclusive definition under the Insolvency Code and taking into consideration that the debt sought to be fastened on the corporate debtor was vehemently disputed (despite not being before a court of law), the application for insolvency could not be allowed.

- **Shakti Nath - Alpha Tiger Cyprus Investments (9 February 2017):** The Delhi High Court, while analysing a shareholders' agreement which provided a put option in favour of non-residents with assured return and damages for breach of contract, held that the non-resident can claim damages for breach of contract (containing such non-enforceable put option) and that claiming damages for breach cannot be deemed to be an exercise of a put option. This is a welcome step as far as investors are concerned since under the applicable foreign investment laws, assured return in favour of a non-resident is not permitted.

- **IDBI Trusteeship - Hubtown (15 November 2016):** The Supreme Court has given clarity to the enforcement of structured private equity transactions involving foreign investors. In this case, a foreign investor had subscribed to equity securities in a holding company. The holding company had subscribed to optionally convertible debentures of its subsidiaries (which are not permissible FDI instruments), and the redemption was guaranteed by the Indian sponsor. Upon failure of the subsidiaries to redeem the debentures, the trustee invoked the guarantee on behalf of the foreign investor. The Supreme Court upheld invocation of the guarantee confirming that, regardless of a foreign investor and structuring involved, guarantee between two Indian entities is permissible and subscription of optionally convertible debentures is permissible by an Indian-owned and -controlled company. ■

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Cloud Computing – Legal and Policy Perspectives

By Krishnayan Sen and Ankit Jain

One of the fundamentals of a good law is that it must lead to adequate compliance by the target citizenry that it seeks to govern. The prerequisite for such compliance includes, but is not limited to, the temporal relevance that it holds in the society. Unless the discourse of law adjusts itself organically to the ever increasing and changing needs of the society, it would be relegated as an anachronism. This holds much more relevance in a dynamic information technology driven society that we are a part of today. The advent of modern technologies and services has brought to us comforts of life that most would not have dreamt of even a decade ago. It has also brought alongside accompanying issues which transcend the traditional notions of social institutions such as property, rights and so on that we have taken for granted until now. Unless the discourse of law restates and readjusts itself, the risk of losing the relevance always lingers above it. In a country with one of the fastest growing, consumption driven, economies like India the need to take adequate care of such regulatory requirements needs no specific emphasis. One such modern day development that requires this regulatory readjustment is 'cloud computing'.

Juxtaposed in the Indian context, being at the forefront of much technological advancement, cloud computing is poised for a leap.

Cloud computing refers to internet based computing that allows organizations to access a pool or network of computing resources that are owned and maintained by a third party via the internet, on a use-and-pay basis. In other words, it is a model enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. Enabled by information technologies and riding on the back of telecommunications network, the cloud can herald a myriad of solutions ranging from enabling telemedicine, setting up remote-classrooms, creating national citizen health and skills databases and creating a new cloud based services industry for generating employment.

Juxtaposed in the Indian context, being one of the fastest growing economies of the world and being at the helm/ forefront of much technological advancement, cloud computing is no exception and is poised for a leap. Cloud based services, characterized by their fundamentally flexible nature, can be leveraged by the Government to launch new

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e-Governance initiatives quicker and with lower overhead costs. A common cloud platform can further enable local governments and it's instrumentalities to adopt e-Governance for rendering better citizen services, without requiring the setting up of significant IT infrastructure. The Cloud also presents an opportunity for India's Information Technology (IT) & IT Enabled Services sector by opening up a new avenue of providing Cloud based services to global organizations ranging from Software as a Service (SaaS) based application services, providing remote testing and prototyping services in addition to remote application hosting services such as Infrastructure as a Service (IaaS) and Platform as a Service (PaaS).

However, on one hand where Cloud promises to change the way Indian businesses and Government leverage technology to their benefit, on the other hand owing to its global architecture and reliance on cross-border data hosting and outsourcing, cloud services have attracted multiple issues in myriad unexplored grey areas and present significant challenges relating to security and privacy of information.

CHALLENGES AND LEGAL ISSUES INVOLVED IN CLOUD COMPUTING

1. Cross border transfer of data

One of the foremost and fundamental concerns faced by an organization while migrating to cloud services is with respect to the security and privacy of its data. The global nature of cloud architecture coupled with the diversity of legal mechanisms, their application, and in some cases the absence thereof raises pertinent question with respect to the effective transmission and storage of data in cloud services. Although some progress in this respect has been made in the development of bi- and multi-lateral privacy frameworks, such as the Safe Harbor Framework developed by the European Union and the United States which governs the transfer and storage of data between them in compliance with the 1995 Data Protection Directive of the European Union on the protection of personal data. As per the said framework, only those entities in the US which receive an adequacy status from the EU are eligible for cross border transfer of data of users in EU. The Framework has recently been revised to what is now know to be the Privacy Shield and which has become a major compliance standard for company privacy policies in the United States and elsewhere. Notably, Privacy Shield lays down seven privacy principles which are worth mentioning and which should comprise the yardstick to which any cross border transfer of data should be subjected to:

a) Notice: Information to an end user/ consumer that their data is being collected and how it will be used;

b) Choice: Individual's right to opt out of collection and forward transfer of data to third parties;

c) Safety: Safeguards to prevent loss of collected information;

d) Data Integrity and purpose limitation: Data must be relevant and reliable for the purpose it was collected;

e) Access: Individual's right to access information held about him and to correct or delete it, if inaccurate;

f) Enforcement & Liability: Effective means to enforce these rules.

India currently lacks a comprehensive and overarching legal framework which can effectively tackle the issues pertaining to and offer adequate safeguards for efficient and secure cross border transfer of data while balancing the privacy and choice of the user.

2. Lawful interception or information requests

Regulators and agencies round the globe, for law enforcement and investigation purposes, might every now and then seek access to information stored on the cloud. Much of the efficacy of such requests depends on the location of the provider and the authority and bargaining power enjoyed by local enforcement. While content for many applications providing platforms for public sharing of documents and social networking sites, remains largely unencrypted and available for immediate inspection, greater assistance is required in cases of data stored by usage of encryption technologies. In cases of encrypted data, the Government/ law enforcement agency can either seek access to the encryption key or in the alternative force a service provider to build in vulnerability in their programming code (known as a 'back door') that allows government authorities to access the information—regardless of encryption—on demand. Further, the inherent nature of cloud architecture where data is frequently in transit gives an additional avenue to the law enforcement agencies to intercept data or to put pressure on intermediaries who transfer the said information. Although in theory, such options are to be resorted to and utilized only after obtaining proper legal sanction, privacy advocates round the globe have been skeptical about such policies owing to their potential for abuse by government agencies and their vulnerability to exploitation by hackers. Much of these concerns stood re-affirmed in the light of recent instances of mass data surveillance that surfaced in the United States- a country with maximum concentration of data centers and through which most of the world's internet traffic is routed through. In U.S, invasive access to data stored on company servers is provided by the Patriot Act of 2001 wherein the law enforcement agencies can compel production of information through National Security Letters. The letters are further accompanies by a 'gag rule' barring supply of information to the customers about any such wiretap or disclosure.

In India, the IT Act authorizes law enforcement to intercept, monitor and decrypt data across domestic networks.

In India, the IT Act authorizes the law enforcement agencies to intercept, monitor and decrypt data travelling over domestic Internet networks. Section 69 and 69B of the Act and the allied rules mandates a person in-charge of a computer resource to extend all possible assistance to the law enforcement agencies when called upon to do so. Such lawful interception extends to 'any information stored on a computer resource' regardless of the attributes of the computer resource. However, law enforcement agencies may still face some practical difficulties in respect of retrieving data from overseas cloud service operators owing to the absence of binding obligations on them to submit to Indian jurisdiction.

3. Encryption and data security

Encryption is one of the key tools employed by an organization to ensure security and privacy of its data in a cloud architecture where the data is frequently in transit and in cases of a multi-tenant environment- where data is stored on a physical hardware that is often shared with third parties. However, despite the gains in encryption security, vulnerabilities still exists. One such vulnerability is the presence of a government- mandated 'back door' which can fall in the hands of hackers who are on the look-out for a weak link in the encryption key. Other sources comprise of the more traditional means, namely by gaining unauthorized access to encryption key through vulnerabilities in web browsers, personal computers, etc. at the user's end.

4. Data Subject and jurisdiction

Service providers and regulators round the globe have been at loggerheads and have time and again locked horns on issues pertaining to sovereignty and jurisdiction over data in the cloud. The dynamic nature of cloud computing with fragmented data storage and processing spread across multiple jurisdictions often results in multi-jurisdictional claims on the same information.

Although the norm has been for the local law of the place of data storage to apply, governments may still be able to exert pressure, via licensing restrictions or operational restrictions, on the intermediate service providers. Some countries like Russia have in fact put in place, strict data localization laws to exercise greater control over their citizens' data wherein the operators are obligated to collect, store and process Russian citizen's personal data using databases located within Russia. Although such restrictions may seem to be in the interests of security and legal compliance, it has been argued by certain service providers that such mandatory localization of data might in fact prove to be counter-productive as it may affect competition and deter innovation and economic growth.

In India, although the IT Act provides for extraterritorial jurisdiction whereby the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality insofar as the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India, it does not look to offer a comprehensive solution.

5. Ownership of Data

In the absence of a comprehensive regulatory framework minutely dealing with the issues pertaining to data propriety and ownership, the same are largely left to be governed by the contractual provisions contained in the cloud-provider's service level agreement (SLA) and which renders the situation quite disquieting for numerous reasons. Barring sophisticated parties who have the ability and the means to negotiate more favorable terms, most SLAs limit user's control over sensitive data by embodying provisions with respect to the right of service providers to disclose and use information and by limiting users' ability to bring proprietary-based claims against the cloud provider. The SLA's further, in most of the cases, fail to differentiate or sufficiently define non-personal, personal, sensitive, and proprietary information thereby unjustifiably subjecting them to the same ownership standards.

Therefore it is the need of the hour to put in place a regulation sufficiently addressing such issues pertaining to data propriety and ownership in cloud computing as well as for a closer scrutiny of the standard contractual provisions comprising these SLAs. Furthermore, the existing data ownership and privacy laws also need to be revisited and reinterpreted so as to sufficiently reflect the realities of modern computing.

6. Data Privacy

The inherent fluid nature of a cloud architecture and its vulnerabilities expose user's to myriad risks with respect to breach of data privacy. These vulnerabilities are further compounded by issues pertaining to data ownership, lacking regulatory frameworks coupled with mismatches in privacy laws in force in various jurisdictions and the overarching potential threat of access by government authorities due to the potentially dispersed nature of cloud services. Users, however, often tend to be ignorant of these risks which is further augmented by the service provider's reluctance to disclose their policies and the routes taken.

Under the IT Act, a corporate entity in possession of sensitive personal information has the obligation to maintain a privacy policy and make available to the provider such privacy policy on its website. Further it is obligated to protect the sensitive personal information of the user through 'reasonable security practices and procedures' as specified under the Rules. In the event the parties do not contractually agree to reasonable security practices and procedures, then the minimum standard to be followed for protection would be IS/ ISO /IEC / 27001. Further, the body corporate is obligated not to disclose the sensitive personal information without the prior approval of the provider of the information unless otherwise agreed under a contract. It should also be noted, while transferring the information to a third party, the body corporate needs to ensure that the transferee is maintaining the same level of 'reasonable security practices' as maintained by the body corporate.

The Act further makes Internet Intermediaries liable for breach of security practices or a breach of contract barring cases where an intermediary can show that it was merely acting as a conduit and was not in a position to exercise control over any material or information and that it had duly exercised due diligence as prescribed by the Government.

7. Content Regulation

Another pertinent issue which surfaces with respect to cloud computing services and which raises interesting questions is one pertaining to content regulation. Governments, albeit to varying degrees, have put in place regulations to regulate the content on the internet to some extent and for holding companies and individuals liable for any violations thereof. However, this might pose several challenges in respect of a cloud computing service. The challenge posed by the Cloud relates to the dispersion of data and the possibility that a regulator may take the view that content regulation may be applicable to Cloud-hosted VPN clients, which can hide the location of the computer and make enforcement more difficult. Furthermore, questions pertaining to the extent to which a Cloud provider, client and end user shall be individually liable for data transferred to and from the Cloud and classification of a cloud provider, whether as an intermediary or otherwise, are questions that need to be addressed.

India currently lacks an overarching law on data protection and privacy to effectively deal with the Cloud.

WAY FORWARD

Cloud computing owing to its fluid nature and multi-jurisdictional character poses a unique mix of challenges and opportunities. Regulators around the globe are grappling with regulatory implications of cloud computing and the flexibility, geographic dispersion and the loss of governance that it entails. Even the international governance in this respect is a mishmash of governmental and industry research groups, bilateral standards and agreements between the private MNCs and sovereign governments. Given the wide disparity in regulatory schemes and competing national interests, it is the need of the hour to come up with an international treaty or policy that sufficiently addresses the issues pertaining to cloud computing, particularly aspects pertaining to sovereignty and jurisdiction over regulatory violations and crimes and lays down the model standards for the nations to uniformly align their cloud computing policies with the said norms. Alternatively, in the absence of such an international code, nations can come together to agree on a bi or multi-lateral framework on the lines of the safe harbour framework between the EU and the US to effectively combat issues arising out of cloud computing. Another viable option which would curtail the frequent instances of conflict on issues pertaining to data ownership, security, privacy etc. is the possibility of private-public MOUs between large data centre operators and national governments.

However, despite the lack of clarity, most developed countries including EU, UK and the United States are at different stages of creating a legal framework for cloud-based services. The UK's Cloud Industry Forum has formulated a code of practice for Cloud service providers. Similarly, New Zealand has a Cloud Computing code of practice. In the US there is proposal to enact a Cloud Computing Act. In the EU, a Cloud Computing Information Assurance Framework has been proposed. This is a set of assurance criteria designed to assess the risk of adopting cloud services, compare different Cloud based service providers, obtain assurance from the selected cloud providers, and also reduce the assurance burden on cloud providers.

Coming to India, it currently lacks an overarching law on data protection and privacy to effectively deal with issues pertaining to cloud computing. Although the IT Act seeks to govern certain aspect pertaining to data security and privacy, its limited scope of application to cloud computing services leaves much to be desired. With the government rolling out initiatives like Digital India to promote digital culture and its proliferation in the country, the digital footprint of every user in rural and urban areas is expanding substantially thereby accentuating the need of an overarching regulatory framework on privacy and data protection to avoid unwanted disputes and business losses and to adequately govern service conformity, loss of services, data tampering, data theft, infrastructure failures etc. which are the typical areas of dispute that could arise. In this respect, two areas which particularly need focus are privacy, especially owing to public's relative unfamiliarity with the mechanics of Cloud computing, and the obligations imposed on cloud service providers. The latter shall necessarily entail a review of existing laws and regulations to determine if the current categories of service providers and information reflect the realities of Cloud computing. To the extent that they do not, regulations can either attempt to force providers to shift their services or practices (similar to mandating back doors in encryption) or change or develop new categories to accommodate the unique characteristics of Cloud providers and services. One foremost consideration for the government while formulating any such policy should be to try and balance the need to regulate in the public interest with the freedom necessary for technological innovation and economic growth.

With the efforts towards drafting a privacy legislation being underway, the Government will have to play a pivotal role in ensuring that Indian entities can take advantage of the cloud revolution for economic growth without being encumbered by the challenges and risks arising from the cloud by effectively addressing the aspects pertaining to right of the users with respect to their data, security and encryption protocols, responsibility of data handlers and suitable transparency and accountability measures. ■

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VERUS is a mid-sized full-service law firm established in 2011 which provides legal services to leading Indian and multi-national corporates, banks, financial institutions, government undertakings and emerging companies. Driven by a strong conviction that quality must be manifest in each work product that we deliver, and with a combination of young and experienced lawyers, VERUS offers the highest quality of services and timelines in delivery. It focuses on client's business in a holistic manner rather than providing compartmentalized practice based solution. The firm offers practical and commercially relevant solutions, tailored to meet client objectives and does not prioritize mandate by its underlying value.

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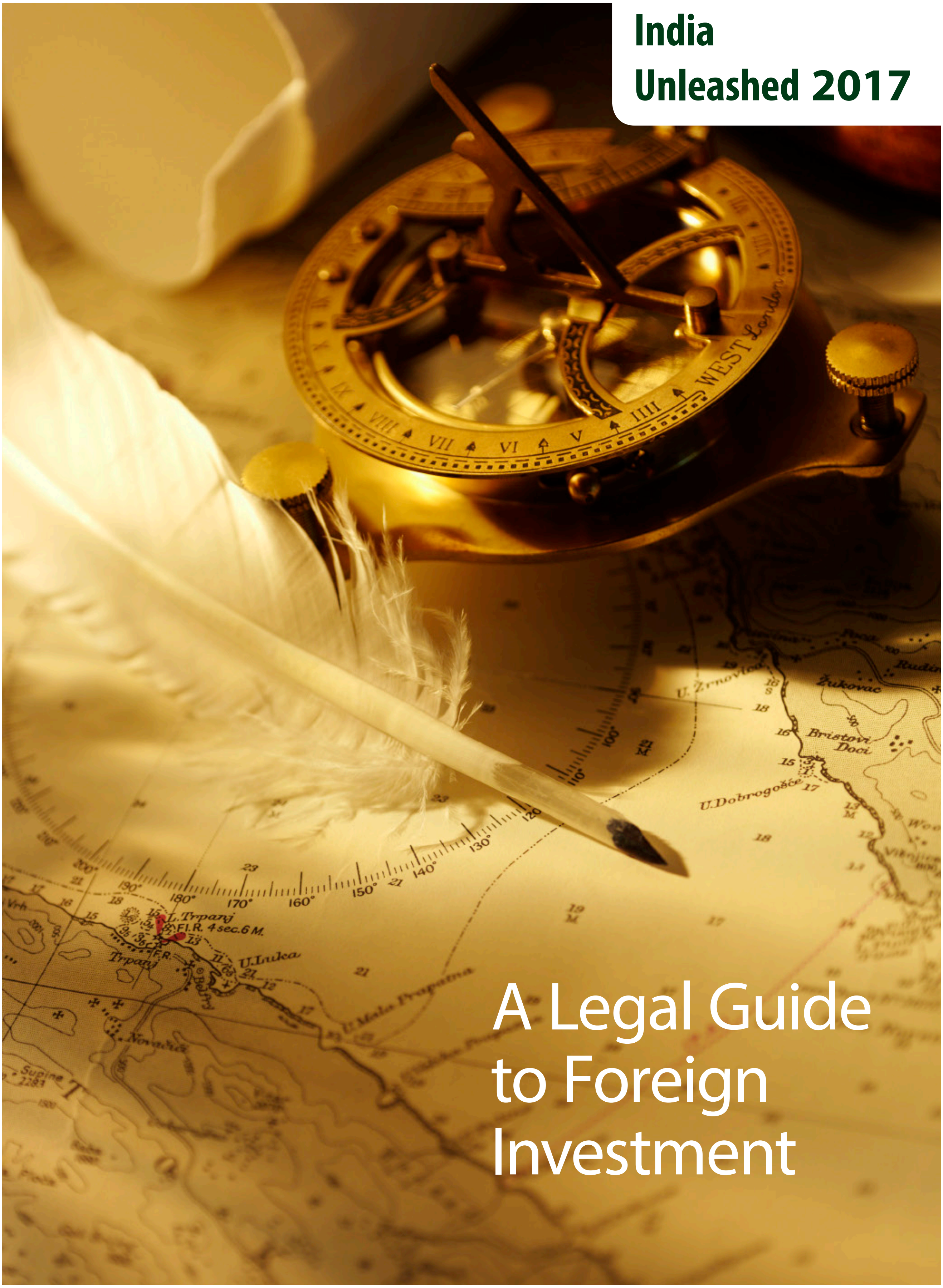

A Legal Guide to Foreign Investment

Time to be Bullish to Buy Brazilian Businesses?

Foreigners looking to invest in Brazil need to take into account a number of economic and other factors, including the peculiarities of Brazilian law, custom and culture.

On April 12, 2017, the Brazilian Central Bank cut the SELIC benchmark interest rate by 1% as inflation for the twelve months ended March 2017 slowed to 4.57% from a high of 10.71% for the twelve month period ended January 2016. Although GDP declined by almost 3.5% in 2016 over the prior year, foreign direct investment into Brazil increased by 6 per cent over the same period to 78.9 billion dollars. Anectodal evidence suggests that M&A activity has increased in Brazil as Brazil`s third largest airline Azul successfully sold 645 million dollars of shares in an initial public offering listing its shares on the New York Stock Exchange and the Sao Paulo BM&F Bovespa.

Brazil`s ability to attract foreign investment is still dogged by Brazil's "ease of doing business" ranking of 123 out of 190 countries by the World Bank and the International Finance Corporation—a ranking that can make the M&A process particularly challenging. Getting rid of the added cost of doing business in Brazil, or the "Custo Brasil," will require more than economic recovery. Foreigners looking to invest in Brazil need to take into account a number of economic and other factors, including the peculiarities of Brazilian law, custom, and culture.

The Brazilian Clean Companies Act imposes requirements comparable to the U.S. Foreign Corrupt Practices Act and the UK Bribery Act.

TRANSPARENCY

Corruption is an important element of the Custo Brasil that can make the M&A process formidable. The due diligence process, especially involving privately held companies, may uncover inappropriate payments made by the target to governmental authorities, frequently in connection with tax, labor, governmental permitting, or customs matters. In light of the mandates of the U.S. Foreign Corrupt Practices Act and other similar relevant laws, before entering into any transaction, an investor needs to identify such practices and implement the necessary controls and training systems to ensure that these practices do not continue post-acquisition. In addition to hiring an auditing firm to examine accounting records, retaining a private investigator to do background checks on the target company and its executives and shareholders is common.

The Brazilian Clean Companies Act, which went into force in January 2014, imposes requirements comparable to those of the U.S. Foreign Corrupt Practices Act and the UK Bribery Act. In the case of an entity acquired through merger, the law makes the successor entity liable for restitution and fines of up to the value of the assets transferred in the transaction. In addition to the decrease in illicit practices as a result of the new law, investors can take some comfort that Brazilian executives, unlike many of their counterparts in other parts of the world (and unlike some Brazilian politicians!), when queried often will come clean and admit to their past questionable practices.

The lack of transparency also affects trust in judicial authorities. Because of concerns about transparency (whether perceived or actual) and inordinate delays in Brazilian courts, arbitration is the preferred dispute resolution mechanism in M&A agreements. If arbitration decisions will have to be enforced in Brazil (because a party's principal assets are in Brazil), the arbitration should be conducted on Brazilian soil; those rendered outside of Brazil must be "homologated" before Brazilian courts will enforce them. Arbitration in Brazil can be in the English language using international rules.

LABOR LAWS

Another key part of the Custo Brasil is Brazil's complicated labor laws. They dictate the provision of various fringe benefits and terms of employment, including severance obligations upon termination. At-will employment is a concept that does not exist in Brazil.

Most employees in Brazilian companies are automatically members of the union that represents their industry or profession; the employer must comply with the requirements of the relevant collective bargaining agreements. Most companies have a large number of pending labor lawsuits (for example, a well-known international company with 18,000 employees in Brazil has 2,000 pending labor litigation matters).

Salaries for qualified executives can often be higher in Brazil than those for comparably situated executives in the United States, given the high cost of living and relative scarcity of educated professionals. If key executives are to be retained in management roles (particularly in the administrator role of a limitada, or limited liability company), some Brazilian lawyers suggest that "pro-labore agreements" might provide more flexibility than what would otherwise be required by employment agreements under Brazilian labor laws. Post-employment noncompetition obligations, however, are difficult to enforce and require payment of compensation during the noncompete period (noncompetition obligations imposed upon sellers of a business, in contrast, do not require payment of separate consideration).

SANJIV K. KAPUR
PARTNER

Many companies seek to avoid labor law mandates by using independent contractors and sales representatives, who may later challenge their status in employee-friendly labor courts. Moreover, the Brazilian sales agency law requires payments upon termination equal to one-twelfth of all consideration paid to the sales representative during the lifetime of the relationship.

TAXATION

A third contributor to the Custo Brasil is the convoluted tax regime, with myriad taxes imposed at the national, state, and local levels. The difficulty in complying with the complicated tax system is compounded by aggressive tax planning. Many of these tax positions may be challenged years later, and they can be subject to high interest and penalty charges. Even if the likelihood of discovery and challenge of the tax position is remote, FIN 48 of the U.S. GAAP accounting standards requires U.S. companies to prepare financial statements where tax contingencies are accrued based on the assumption that all tax positions will in fact be examined by the appropriate taxing authority.

Tax planning is an important part of the Brazilian M&A process. To obtain partnership ("check the box") tax treatment for U.S. income tax purposes, the Brazilian entity acquired should be a limitada and not a sociedade anônima (corporation). Brazilian tax lawyers often recommend that acquisitions be structured by creating a Brazilian entity that acquires the shares of a target company, which merges into the target company at some point after the acquisition to secure certain tax advantages as part of the transaction.

CIVIL LAW MANDATES

The civil law tradition of Brazil may also limit flexibility in structuring transactions. Buying the assets of a business as opposed to the equity interest of the company does not avoid successor liability for labor, tax, and other contingent liabilities. In fact, the acquiring company can be ensnared with group-wide liability for tax, labor, and environmental matters. As such, there is a heightened focus on applicable statutes of limitations. For tax contingencies, there is generally a statute of limitations that covers tax liabilities for five full tax years, and for labor contingencies, the statute of limitations is generally five years for a current employee and two years from the date of termination for a former employee.

Buyers need to take into account that there is greater scrutiny of anticompetitive behavior, including price fixing.

To guarantee repatriation of the original investment and dividends, an investment should be made with funds that are brought into Brazil and duly registered with the Brazilian Central Bank. Licensing transactions that result in payment of royalties on trademarks, patents, and know-how outside of Brazil must be registered with the INPI, the Brazilian patent and trademark office. Royalties between related parties on trademarks and other rights are often limited by the INPI. Under Brazilian law, know-how is not licensed, but rather deemed to be transferred by the party possessing the know-how.

ANTITRUST CONSIDERATIONS

Brazil now requires prior approval by CADE, the Brazilian antitrust authority, of acquisitions surpassing certain statutory thresholds. Transactions in which the combined operations will result in a market share of more than 20 percent in the relevant market require the filing of a laborious "long form statement" that allows the authority more time to review the filing. From an operational and due diligence perspective, buyers need to take into account that there is greater scrutiny of anticompetitive behavior, including price fixing.

PUBLIC COMPANY ISSUES

Investment in publicly traded companies is affected by the rules of the CVM, the Brazilian securities and exchange commission, and the listing rules of the BM&F Bovespa. Acquisition of a controlling interest can trigger a mandatory tender offer for the free float of the publicly traded company. The bylaws of publicly traded companies can contain what is termed by Brazilian lawyers as "poison pill" provisions that extend such tender offer requirements to where only a 10 or 20 percent interest is acquired. In acquisitions where the target will remain publicly traded, the transfer agent of a publicly traded company may require certain information or other actions in order to register the shares in the name of the purchasing entity. Transfer agents sometimes also impose limitations and restrictions upon future transfers of shares.

M&A CUSTOMS AND PRACTICES

The customs and practices surrounding Brazilian M&A agreements can be helpful to buyers. For example, asset or stock purchase agreements, unlike in the United States, often contain pro-buyer provisions indemnifying for all preclosing liabilities, with no cap or one equal to the purchase price, with baskets of less than one percent of the purchase price, and with indemnification time periods that typically range from three to five years. Escrows of between 15 and 30 percent of the purchase price for the indemnification term are not uncommon. The limited caps and time periods for indemnification and baskets that one sees in U.S. acquisition agreements, however, are gaining favor in Brazil. In addition, in cross-border M&A transactions where the target is Brazilian, New York, Delaware, or other U.S. state law may be used as the governing law of the transaction documents (as is often the case in other Latin American countries).

Brazilian law generally requires that contracts governed by Brazilian law specify payments in Brazilian Reais. In cross-border transactions governed by laws other than those of Brazil, to avoid some of the complications that might result from fluctuating exchange rates, it may still be advisable to fix the purchase price in Brazilian currency. Fixing the price in local currency is consistent with a valuation that is based on revenues and costs in local currency and simplifies the process of introducing the correct amount of funds for Central Bank registration purposes.

A final important matter that cannot be ignored is that negotiating transactions in Brazil often becomes a process where the counterparties get to know each other. As such, the process generally is longer than one would see in the United States or Europe. Getting down to business immediately or aggressive negotiating tactics with "take it or leave it" stances are usually counterproductive and do not facilitate getting the deal done. ■

In cross-border M&A transactions where the target is Brazilian, U.S. state law may be used.

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Selected representations include: Enjoy S.A.'s acquisition of a 45 percent interest in the Conrad Punta del Este Resort and Casino in Uruguay; Harris Corporation's sale of its worldwide Broadcast Communications Group to the Gores Group; Monier Group's sale of a 51 percent interest in the Brazilian solar thermal systems manufacturer Heliotek to Bosch Thermotechnology; Bayer CropScience's acquisition of the biological pest management company AgraQuest, Inc. and its Mexican subsidiary; RPM International's acquisition of Viapol Limitada, a Brazilian manufacturer of building materials; Bunge's joint venture with Solazyme, Inc. to build renewable oils production facility in Brazil; Cliffs Natural Resources' acquisition of Minera Cerro Juncal S.A., a company with concessions in Argentina; Cliffs Natural Resources' acquisition of a 51 percent interest in a joint venture for the exploration of iron-oxide/copper/gold deposits in Chile; Harris Corporation's purchase of Tyco Electronics' worldwide private mobile radio business; and Bayer Pharmaceuticals' strategic alliance in the primary care pharmaceutical business (Cipro, Avelox, and Levitra) with Schering Corporation.

HEUKING KÜHN LÜER WOJTEK

Cross Border Mergers and Acquisitions in Germany

A Transaction Guide for Indian Investors

WELCOME TO GERMANY

India is one of the world's fastest-growing economies. The growth of the Indian economy has enabled an increasing number of Indian companies to invest in Europe for purposes of their own diversification and sustainable growth. Germany is one of India's most important EU trading partners and an attractive target country. Indian investors are warmly welcomed in Germany. Indian investors can benefit from the same privileges as national businesses without discrimination and are subject to the same rules as local investors. Investments in German businesses currently enjoy high popularity among Indian investors. Germany is not only a gateway to Europe, but serves a pioneer role in Europe, being one of its strongest economic drivers. Germany is the world's fourth largest economy and a highly developed country in a stable political, financial, economic and legal environment. "Made in Germany" has become more and more attractive for Indian investments.

FOREIGN INVESTMENT RULES

Generally, there are no restrictions on foreign investors establishing companies in Germany or acquiring an interest in German companies. However, the articles of association of a company may individually restrict the transfer of shares in that company.

Further, a few exceptions exist when dealing with sensitive business areas such as military productions, arms or crypto system manufacturers or high-grade satellite systems. Further restrictions exist in the field of air transport and financial services.

Transactions on the acquisition of direct or indirect interest of 25 % or more of the voting rights in a German company can be reviewed by the Federal Ministry of Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie) if the acquirer is resident outside the European Free Trade Association (EFTA). Acquisitions by investors from within the EFTA can likewise be subject to such a review if the investor has a shareholder resident outside the EFTA who holds 25 % or more of the acquirer's voting rights. If the Federal Ministry is of the view that the acquisition constitutes a sufficiently serious threat to public order or security, it can either prohibit or restrict the investment within a three months period. The Federal Ministry has only the right but not the duty to do so. In practise, interference by the government is only seen in exceptional cases, particularly if the sale of sensitive technology is concerned.

CHOOSING THE MOST SUITABLE LEGAL FORM FOR INDIAN INVESTMENTS IN GERMANY

In Germany, a liberal attitude towards investors from other countries prevails. Indian investors have almost no disadvantage in comparison to domestic investors. They can find a wide range of company forms for conducting business in Germany. As a first step, they may choose between establishing an independent German entity or relying on a branch or representative office of the Indian entity.

1. Relevant Legal Forms

A branch office can be used to establish a first footprint on the German market. As to independent German entities, German law distinguishes between two types of corporate structures, namely corporations and partnerships.

What legal form to choose will depend primarily on the investor's intended operations and needs. In establishing a corporation, there are several common types, e.g. the limited liability company (Gesellschaft mit beschränkter Haftung – GmbH), the stock corporation (Aktiengesellschaft – AG) and the partnership limited by shares (Kommanditgesellschaft auf Aktien – KGaA), as well as the European company (Europäische Gesellschaft or Societas Europaea – SE), a more recent type.

2. "GmbH" – the Most Suitable Legal Form

The most common and appropriate investment vehicle for Indian investors is the "GmbH", a limited liability company designed to function as a closely held or private corporation whose shareholders' liability is limited to their share contribution in the company. It is a corporate form well-suited for a subsidiary which is part of a group of companies, as well as for all types of business. Investors will encounter restrictions neither on incorporation or acquisition of the GmbH nor on its activities. The GmbH is easy to establish and manage. It must be provided with a minimum share capital of EUR 25,000, of which a minimum of EUR 12,500 must be contributed at the stage of formation. The investor is allowed to declare an administrative seat in India, even though the statutory business seat must be located in Germany.

The GmbH comprises two compulsory corporate bodies: the shareholder's assembly and a management board. The implementation of an additional advisory or supervisory board is voluntary. As instructions given by the shareholders to the managing director(s) are binding, the shareholders can exert a direct influence on the GmbH's management.

Managing directors do not necessarily have to be chosen from among the shareholders. There are no restrictions on the managing directors' nationality either. Managing directors need not be German residents, nor do residents of other countries need government approval for the position. The managing director position however does entail statutory duties, some of which require the director's presence in Germany, as a managing director must at all times be able to represent the company in legal transactions and be available when conducting the GmbH's day-to-day business. Indian managing directors should therefore apply for a visa. It is advisable to always have at least one managing director on site, as he may be authorised to act on behalf of the company alone.

The GmbH's managing directors are liable for breaches of duties of care to the company. Formal approval of the actions of the managing directors by shareholders' resolution generally relieves them from known liability. It is common practise in Germany for companies to take out "Directors and Officers Liability Insurance" ("D&O"), protecting managing directors against personal liability.

BREXIT AND ITS CONSEQUENCES

In the wake of Brexit, using an English acquisition vehicle and structuring Indian investments to Germany through a UK company may become less popular than it was before the Brexit era. As the legal repercussions of Brexit for companies will only become clear during the exit process, it is currently advisable not to use an English acquisition vehicle, in order to ensure that your business maintains its access to the European Single Market. It is very likely that investments through the UK will become subject to restrictions and hurdles.

SOURCES OF INFORMATION FOR ACQUISITIONS

The initial source for information on a target company is the commercial register kept with the local (municipal) court at the company's statutory seat. The register is open to the public and available at the registry court or online (www.handelsregister.de). The commercial register provides fundamental information on the particular company, i. e. the company's name, its legal form, headquarters' address, existing branches, purpose of business, the share capital, the persons with representation authority, the composition of supervisory boards, the articles of association and whether insolvency proceedings have been initiated. However, there is no German public register confirming the seller's legal ownership of the shares the investor wishes to acquire in a share deal. It is therefore advisable to verify the correctness of the ownership. Furthermore publications from the Federal Gazette (Bundesanzeiger)

Successfully carrying out an M&A transaction in Germany will require tailor-made legal advice.

e.g. certain balance sheets; company-relevant messages from securities issuers and disclosures of the bankruptcy courts are available online. Further information can be attained through credit agencies or discreet banking channels. In Germany, bank enquiries play a significant role.

M&A IN GERMANY

1. Deal Structure

The acquisition of a German target company in whole or in part can be structured as a share deal or as an asset deal, depending on the parties' intentions. Transferring ownership in shares is simpler from a legal perspective than the transfer of individual assets is. In general, less documentation is needed. In case of an asset deal, as a general principal, German law requires that the individual assets and liabilities must be specified and that they transfer individually. A simple reference to the balance sheet will not suffice.

2. Transaction Process

All in all, the transaction process follows international standards. Typically, the purchaser will be given the opportunity to carry out a due diligence review. Often only the most important documents will be translated into English during the due diligence process. It should further be noted that break-up fee agreements are not common in Germany and that a party will not be liable for breaking off negotiations.

3. Transfer of Contracts; Change of Control

In the course of asset deals, agreements already in place between the target and third parties, e.g. suppliers, clients and licensors, will not automatically transfer to the purchaser; rather, the third party must consent to the transfer. When signing a share deal, it is advisable to check whether agreements with third parties contain a change-of-control clause giving the third party the right to terminate the agreement extraordinarily.

4. Precautions Regarding Intellectual Property Rights

Special steps should also be taken with regard to existing intellectual property rights. The purchaser should ensure that every relevant intellectual property right is precisely defined in the agreement in order to make sure that it will transfer properly. The purchaser should pay special attention to any warranties and indemnities the seller should be required to give regarding intellectual property. Such provisions should include the seller warranting that it owns the intellectual property rights and that it has paid all registration costs and renewal or maintenance fees.

5. Transfer of Employees

In the case of an asset deal, the employers before and after the transaction are different legal entities. All employment contracts pertaining to the business acquired normally transfer to the purchaser as a matter of law (Section 613a of the German Civil Code). Each employee has however the right to object to the transfer of his/her employment. If objecting, the employment remains with the seller as is. Also, the purchaser may not terminate an existing employment contract on the grounds of the acquisition, although the right to terminate due to other reasons remains in force.

ANTI-TRUST AND MERGER CONTROL

Both German and European anti-trust regulations may apply. On a national level, the Act Against Restraints of Competition, as well as several guidelines and notices for the interpretation and practice of merger control in Germany, issued by the Federal Cartel Office (FCO), must be taken into account. A merger control notification must be filed if the transaction is considered a "concentration" under the aforementioned sets of rules or if the company's turnover exceeds certain thresholds. If these conditions are met, filing of the acquisition with the Federal Cartel Office is mandatory and is subject to penalties if not filed. In addition, the investor runs the risk that the transaction may be deemed void. Parties may submit a pre-notification at a time when the merger has become sufficiently specified but a purchase agreement has not yet been signed. In general, the FCO has one month from the time it receives a notification to exert its control on the merger. After the merger, there is a duty to notify the FCO that the concentration has been carried out in accordance with the FCO's decision.

Parties to an M&A deal should also pay attention to the competency of the European Commission, which has exclusive jurisdiction within the EU to control concentrations that have a Community dimension. In such a case, this EU competency replaces that of Germany, so that additional merger control in Germany is not required.

GERMANY-SPECIFIC LEGAL FEATURES

Business acquisitions in Germany are governed not only by German legislation, but also by laws of the European Union which may apply. This is why successfully carrying out an M&A transaction in Germany will require tailor-made legal advice.

1. Abstraction Principle

The applicable articles of the German Civil Code set out a principle not widely known outside Germany, the so-called principle of abstraction, according to which the seller of a business enters into two legal acts at once. This principle differentiates between the contractual obligation which the seller enters into to transfer ownership in the assets or shares and the actual transfer of title. In practise, this means that the M&A agreement will usually set out two specific dates, one being the date the contractual obligation to transfer the assets or shares becomes effective, which typically is the date of signing, and the other being the date the actual transfer of the ownership in the shares takes place.

2. Data-Protection and Anti-Trust

Due to German anti-trust laws, the purchaser and the target company must act separately until regulatory approval is granted. Only after merger control clearance has been given are they permitted to share competitively sensitive information, such as pricing data and customer lists. Due to data-protection requirements, also the disclosure of employee related data is restricted before completion of the transaction. This particularly restricts the seller to disclose sensitive information of its workforce during the due diligence process. It may be advisable to employ clean teams to gather and analyse information prior to completion, allowing the management to review analyses without violating these laws.

3. Labour Law

German labour law is very protectionist and there are specific thresholds an employer should bear in mind when examining the target business's employment structure, in order not to expose itself to employee participation rights impetuously.

The employment relationship is established by an employment contract. Numerous mandatory laws on the protection of employees apply to an employment relationship and cannot be contracted out.

There are essentially two levels at which employees and, to some extent, trade unions may exercise their influence on the employers, namely, at the shop-floor and the board level.

TAXES AND COSTS

The German tax system is very complex and subject to frequent change. As a rule, the seller must pay taxes on the gains received on the occasion of the business transfer. Germany signed a double taxation treaty with India on 6 May 1996, which avoids double taxation on income and capital.

In Germany, in particular acquisition of shares in a GmbH requires notarisation before a German notary public to be valid. If the purchase agreement contains a transfer of real estate, of shares or of the title in the shares, the obligation must be notarised. As a consequence, additional costs may arise. ■

HEUKING KÜHN LÜER WOJTEK

Partner Profile

Dr. Martin Imhof is an Equity Partner and Head of India Desk at the German law firm Heuking Kühn Lüer Wojtek. He regularly represents strategic and private equity investors in domestic and cross-border M&A transactions and investments, buyouts, divestitures, and the formation and structuring of international Joint Ventures. He advises Indian enterprises investing in Germany and coordinates outbound work for German clients going abroad.

Additionally, Martin advises companies and shareholders regarding general corporate matters, the incorporation and (re)organisation of companies including outsourcing projects, shareholder disputes and shareholder protection.

Clients appreciate Martin's hands-on and proactive approach. The combination of his legal excellence with a good understanding of the various commercial, cultural and legal challenges faced by Indians entering the German market makes his advice extremely valuable.

Martin is recommended as attorney in the fields of M&A by the renowned German business journal WirtschaftsWoche (Top Kanzlei 2016). Chambers Global 2016 recognised him as one of the 'Leaders in their Field' in Corporate/M&A, Experts Based Abroad, India.

The Dusseldorf Bar Association awarded Martin the title of a Certified Specialist Lawyer in Commercial and Corporate Law (Fachanwalt für Handels- und Gesellschaftsrecht).

EXPERTISE

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- Mergers and Acquisitions
- Corporate Law
- Joint Ventures
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Firm Profile

ABOUT US

Heuking Kühn Lüer Wojtek is one of the major commercial law firms in Germany rendering full multi-disciplinary legal services to German and international businesses. About 350 specialized lawyers, tax advisors and notaries practice within the firm's eight offices in Germany (Berlin, Chemnitz, Cologne, Düsseldorf, Frankfurt, Hamburg, Munich and Stuttgart), a Belgium office in Brussels and a Switzerland office in Zurich.

As an independent national commercial law firm Heuking Kühn Lüer Wojtek is embedded in an international network of law firms without being tied to exclusivity. The firm's lawyers are known for their pragmatic approaches, in-depth expertise in cross-border transactions and solutions tailored to the needs of their clients. The spectrum of our legal advice ranges from German and foreign midsized companies to international (including listed) large corporations in all matters of commercial law.

INDIA PRACTICE WITH CUSTOMIZED ADVICE

The increased need for advice on inbound and outbound transactions related to India is bundled in Heuking Kühn Lüer Wojtek's India Practice. We advise our clients in collaboration with a small group of high-profile Indian commercial law firms. Since we are not bound by exclusivity agreements, we can offer our clients the best advice on an individual basis, custom-tailored to our clients' needs. Our lawyers are familiar with the culture and circumstances in the country as a result of their many business trips to India. As we successfully support investment projects, we are continually exchanging professional and personal ideas with our Indian colleagues and hold joint client seminars. In addition, we are in close contact with the Indo-German Chamber of Commerce.

ENTREPRENEURIAL SOLUTIONS FOR THE COMMITMENT IN GERMANY

Indian clients value our sound knowledge of the cultural and legal obstacles they face when doing business in Germany. We offer pragmatic business solutions for their interactions in Germany. Our advice ranges from legal and tax structuring of transactions and direct investments to individual questions on daily business, including matters of employment and residency law. As a full-service law firm, we are your contact for all legal matters. Upon request, we are also able to connect clients with tax advisors and auditors who can provide services in bookkeeping and payroll accounting.

PROFESSIONAL AND INDIVIDUAL SUPPORT FOR YOUR INVESTMENT IN INDIA

We provide the utmost support to our German clients during their market launch in India, whether this involves establishing subsidiaries or entering into strategic partnerships and investments. In addition, we advise German clients on negotiating and concluding transactions with Indian business partners on an individual and professional basis.

The Indian trade magazine 'India Business Law Journal' recognized Heuking Kühn Lüer Wojtek as "Top Law Firm for India Work" in 2016 for the fourth consecutive year in the field of "Regional and Specialist Firms for India Related Business." In addition the international handbook "Chambers Global 2016" has ranked the law firm in the field of Corporate/M&A - India: Expertise Based Abroad and members of the India Desk as "Leaders in their Field" in Corporate/M&A, Experts Based Abroad, India.

FBC & Co

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פישר בכר חן וול אוריון ושות׳

Israel: Startup Nation Open to India and the World

FBC & Co examine the business and legal aspects of investing in one of the world's most technologically advanced economies.

OVERVIEW

Established in 1948, Israel is the world's only Jewish state, and the sole democracy in its vicinity. Israel has a diverse open market economy. Being a relatively young state, Israel is recognized as a developed market by many major indices. Israel has been a member of the high-income sector of the OECD since 2010.

Israel's current economy is diversified, with technology-based industries (such as software and manufacturing of technology based products, TMT, life science, and agriculture technologies) at the frontline, followed by medium and lower tech industries, such as chemicals, plastics and agriculture.

Israel's skilled workforce and concentration of venture capital allow the country to lead in industries such as high-tech and life sciences.

The development of the Israeli economy over the country's short history was accompanied by dramatic events and evolutionary changes. But as breakthroughs were witnessed and crises were overcome, the features of stability, resilience and solvency were always present, as well as the values encouraged by the Israeli government of entrepreneurship, innovation and liberalization. Over the years the Israeli economy has established itself as stable and yielding, providing a solid investing environment for both local and international investors.

While the traditional business thrust in diamonds, agriculture, chemicals, information & communication technology, and pharmaceuticals remains strong, there is a growing interest from Israeli companies in clean energy, water technologies, biotech, nanotech, homeland security, real estate, infrastructure, e-commerce, and financial services.

Israel has one of the most resilient and technologically advanced market economies in the world, and is home to many international high-tech companies. Its skilled workforce and concentration of venture capital allow the country to lead in innovative industries such as high-tech and life sciences. The Israeli economy also showed great resilience during the latest global economic crisis and in 2010, Israel was ranked 1st in the 'Resilience of the Economy' Index, as part of the World Economic Forum's Global Competitiveness Report.

In 2015, Israeli exports totalled $53.4 billion, an increase compared to $47.9 billion in 2014. Hi-tech exports accounted for $22.5 billion, compared to $19.9 billion in 2014. Imports totalled $61.3 billion in 2015, compared to $62.5 billion in 2014. Exports to Asia peaked in 2015, reaching $11.6 billion, compared to $9.8 billion in 2014. Import levels from Asia remained stable, with $13.3 billion in 2015, compared to $13.8 billion in 2014.

ISRAEL AND INDIA

Relations between Jerusalem and New Delhi were not always warm. Although both countries gained their independence from the United Kingdom within months of each other, they found themselves headed in pointedly different directions for nearly four decades - India as a leader in the Non-Aligned Movement that maintained close relations to the Arab world and the Soviet Union; Israel, which linked its future to close ties with the United States and Western Europe.

Since the establishment of diplomatic relations between India and Israel in 1992, bilateral trade and economic relations have progressed rapidly and both countries have benefited immensely. According to the Foreign Trade Administration at the Ministry of Economy and Industry of the Government of Israel, from a base of US$ 200 million in 1992 (comprised primarily of diamonds), trade between India and Israel has been steadily growing, with business between the two countries adding up to over $6 billion in 2013.

Major exports from India to Israel include diamonds and precious stones, chemical products, textile, plants and vegetable products, mineral products, rubber and plastic products, base metals and machinery. Major exports from Israel to India include defence products and technology, diamonds and precious stones, chemical and mineral products, agriculture products and technology, and hi-tech.

In recent years, India has become one of Israel's largest trading partners, and many of the world's leading high-tech companies in Israel and India are forging joint ventures that are successfully competing in the tough international marketplace. Trade and cooperation between the countries now centers primarily on security-related deals, hi-tech, and in areas such as agriculture and water desalination.

Israel, known as the Startup Nation, and India, one of the largest bases for startups in the world, each in its way is leading the global tech world. With a population of eight million people, Israel has over 6,000 startups, attracts more venture capital per person than any other country in the world, and has more companies listed on the NASDAQ than any country outside the USA, except China. With a population of over 1.3 billion, India has over 3,000 startups and is looking to have more than 10,000 by 2020. The positioning of India as a startup country is thought of in the light of other famous startup scenes such as the US, Israel, and Singapore.

MARKET ACCESS

The State of Israel supports its investment initiatives by developing and granting a wide range of incentives and benefits in order to achieve a favourable balance of trade, improve revenues, maximize productivity in designated industrial sectors, ensure healthy competition in the relevant markets and facilitate overall growth. To attain these goals, Israel offers substantial benefits and concessions through a number of laws and regulations. Special emphasis is laid on high-tech companies and R&D activities, as considerable importance is attached to these fields.

Many of the world's leading high-tech companies in Israel and India are forging joint ventures that are successfully competing in the international marketplace.

The State of Israel welcomes foreign investments particularly in projects related to technology and R&D. Most benefits available to Israelis are also available for foreign investors, and in some cases foreign investors enjoy even broader support than domestic investors. Investment incentives are outlined in different laws and regulations, and are managed by the Israel Investment Center (IIC). Two main laws governing these benefits are as follows:

The Law on the Encouragement of Capital Investment: The law was originally introduced in 1959, in order to boost the Israeli economy by attracting local and foreign investors to contribute capital investments to the Israeli industry. The law's main goal is to amplify the attractiveness of the Israeli economy in the international competition over local and foreign capital for investment and development. The law grants various incentives for foreign and domestic investors. Companies that meet the criteria are entitled to preferential tax treatments and various grants related to land development, constructions and capital equipment. Increased grants and benefits are offered to investors who invest in certain priority areas determined by governmental policies from time to time. As Israel is a small country, a priority area may be located just one to two hours away from Israel's international airport and Metro Tel Aviv.

The Law on the Encouragement of Capital Investment grants various incentives for foreign and domestic investors, including preferential tax treatments and various grants.

The Law on the Encouragement of Industrial Research and Development: The main objective of the law is the development of science-intensive industry. The law provides grants, loans, exemptions and reduction in taxes.

The Israel Innovation Authority (formerly known as the Office of the Chief Scientist (OCS)) of the Ministry of the Economy and Industry is responsible for implementing government policy regarding the support and encouragement of industrial research and development in Israel. The variety of support programs provided by the Israel Innovation Authority have played a major role in enabling Israel to become one of the most important global centers for high-tech entrepreneurship.

On the international level, the executive agency of the Israel Innovation Authority, MATIMOP, offers international programs carried out in cooperation with foreign governments and institutions. The international support programs provide support through bi-national funds, and enable joint R&D ventures with foreign counterparts. MATIMOP collaborates with Indian counterparts at the federal and state level, as well as with stakeholders in the private sector, to facilitate and implement access to funding schemes dedicated to the development of R&D-driven partnerships between Israeli and Indian companies. These programs provide access to the OCS funding schemes in Israel and to similar, parallel funds in India, as well as provide companies with assistance in identifying potential R&D partners. Through these programs, funding support is provided to joint industrial R&D projects in all technology fields, aimed at the development of products or processes leading to commercialization in the global market.

Israel has entered into several trade agreements in order to strengthen its position in the international markets. The most significant agreements are the Free Trade Area with the European Union, Free Trade Area with the United States and Free Trade Area with the European Free Trade Association States (EFTA). The agreements with the European Union, the United States and the EFTA countries place Israel in the unique position of being a Free Trade Area partner with the world's main economic regions.

While a free trade agreement between the countries has been in discussion for several years but is yet to be entered into, Israel and India are party to several cooperation agreements in agriculture, medicine and health, telecommunication, and research and development, among other areas.

The India-Israel Initiative for Industrial R&D (i4RD) provides partner matching assistance and access to funding for Israeli companies and companies based anywhere in India. This federal level program is based on the bilateral agreement signed in 2005 between the Ministry of Science and Technology, Department of Science and Technology (DST), the Government of India and the Ministry of Economy of the State of Israel. The bilateral framework is jointly implemented by the Global Innovation and Technology Alliance (GITA) in India and MATIMOP.

The Karnataka-Israel Industrial R&D (KIRD) Program provides partner matching assistance and access to funding for Israeli companies and Indian companies based in the state of Karnataka. This program – the first on the state-level in India – is based on a Memorandum of Understanding signed in 2013 between MATIMOP and the Karnataka Science and Technology Promotion Society (KSTePS) and the Karnataka State Council for Science and Technology (KSCST). This bilateral framework is jointly implemented and promoted by KSTePS, KSCST, and MATIMOP.

In addition to access to national and state-level funding schemes, the i4RD and KIRD programs offer Israeli and Indian companies assistance in identifying potential partners for R&D projects in the target country/state.

Israel is a party to many tax treaties with various countries including India, which are meant to avoid double taxation. According to the tax treaty between Israel and India, companies involved in trading between the two countries are entitled to a substantial tax reduction related to dividends and royalties.

BUSINESS ENTITIES

Israeli business entities include companies, partnerships, cooperatives, and non-profit organizations. Individuals may conduct business without establishing any legal entity.

The most common form of business entity in Israel is a limited liability company with capital stock (share capital). The Israeli Companies Law defines a company as a corporation formed and registered in Israel, in accordance with the Israeli law. No requirements exist regarding the nationality or residency of stock holders and company directors. There are no restrictions regarding non-residents holding shares in Israeli companies. However, there are certain restrictions on the ownership by non-Israeli entities or persons of interests in Israeli companies in certain sensitive industries (e.g., banks or bank holding companies, insurance companies, telecommunications companies, companies managing pension funds, and companies controlling natural resources or essential services).

A company may be registered as a "Private Company" or a "Public Company", with securities registered on a Stock Exchange. Both types of companies must present annual reports, including audited financial statements to their shareholders. A private company may not offer or sell debentures or shares to the public. A public company may offer stock or debentures to the public, but only after issuing a prospectus in accordance with the requirements of applicable laws, and is obliged to publish an annual report that includes the audited financial statements and directors' report.

The Partnership Ordinance defines a partnership as an entity that consists of persons who contracted to form a partnership. Personal liability of the partners is not limited unless they are limited partners of limited partnerships. A foreign partnership is also permitted to do business in Israel.

Foreign (i.e., non-Israeli) companies ("Foreign Company") operating in Israel generally do so in one of two ways – by incorporating an Israeli corporate subsidiary of the Foreign Company ("Subsidiary"), or by the Foreign Company registering a branch in Israel ("Branch").

Under Israeli law, a Foreign Company may maintain a place of business in Israel only if it is registered as a 'foreign company' under the Companies Law.

An Israeli company is similar to a US corporation or an English company. The liability of its shareholders is limited, it has one or more class of shares, it is owned by its shareholders, it has a board of directors, and may have, if active, a chief executive officer. The company's capital structure and the authority and rights of the shareholders, the board and the chief executive officer are set by the company's Articles of Association, except for those matters that are regulated by the main law governing Israeli companies, the Israeli Companies Law.

A Subsidiary is a separate legal entity whose shareholder is the Foreign Company. The liability of the Foreign Company is limited to the amount of its investment in the Subsidiary, subject to piercing the corporate veil considerations. As a separate legal entity, a Subsidiary may take any legal action in its own name, including all of the following: (i) hold all appropriate local licenses, (ii) enter into agreements (including with local vendors, suppliers and services providers), (iii) hold local bank accounts and (iv) hold a subcontract or service level agreement with its parent company to perform services under various customer contracts.

Large transactions involving Asian acquirers which took place in recent years include the acquisition of controlling stakes in some of Israel's largest corporations.

Under Israeli law, a Foreign Company may maintain a place of business in Israel only if it is registered as a 'foreign company' under the Companies Law. A Branch (a registered Foreign Company) is not a separate legal entity from the Foreign Company, even if their commercial and financial activities are separate. There is no corporate veil separating the Foreign Company from the Branch and, as a result, the Foreign Company is deemed to have legal presence in Israel, generally making the Foreign Company directly responsible for liabilities of the Branch (to creditors, tax authorities, etc.). As a Branch is not a separate legal entity, the following would need be done by and in the name of the Foreign Company: (i) hold all appropriate local licenses, (ii) enter into agreements (including with local vendors, suppliers and services providers), (iii) hold local bank accounts; the Branch's authorized representative in Israel may act on behalf of the Foreign Company in connection with such matters. Further, as a Branch is not a separate legal entity from the Foreign Company, there will be no subcontract or service level agreement with the Foreign Company to perform services under various customer contracts.

From a pure corporate structure and liability protection perspective, foreign companies tend to prefer to operate in Israel through an Israeli corporate subsidiary rather than by way of a local branch. Tax considerations should be taken into account as well.

M&A

Recent years proved to be remarkably prosperous years for merger and acquisition activity in Israel. A notable trend which increased substantially in the last few years is the interest of Asian companies in Israeli companies. Large transactions involving Asian acquirers which took place in recent years include the acquisition of controlling stakes in some of Israel's largest corporations, such as food conglomerate Tnuva by China's Bright Food Group. Other notable transactions are the acquisition of Leadcom Integrated Solutions (telecommunications) by India's Tech Mahindra, the acquisition of Panaya (cloud tech) by India's Infosys, the acquisition of Viber (communication application) by Japan's Rakuten, of Servotronix (automation company) by China's Midea Group, of Tambour (paint company) by Singapore's Kusto group, and of Lumenis (minimally-invasive clinical solutions) by China's Xio Group.

The purchase of an Israeli company may be effected through acquisition of its shares or by a purchase of its assets. In addition, the Companies Law allows for a merger or consolidation of two or more companies, subject to certain conditions.

The Companies Law does not impose restrictions on the transfer of shares in a private company, but such restrictions may be included in a company charter documents. An Israeli company cannot merge with or into a foreign (non-Israeli) company and, therefore, acquisitions by foreign companies are commonly done by way of stock acquisitions or reverse triangular mergers (whereby the foreign entity incorporates an Israeli subsidiary that merges into the Israeli target).

The tax aspects of each of such transactions differ and each has certain advantages and disadvantages. In some cases the transaction requires also the approval of Israeli regulatory agencies, such as the antitrust authority. Moreover, if the Israeli target company benefits from certain governmental funding (such as grants from the Israel Innovation Authority or tax benefits (under Approved Enterprise or Benefitted Enterprise programs)), then approval of the relevant government agency may be required for the acquisition of the Israeli company by a non-Israeli resident.

The rules of the Companies Law generally apply equally to private and public companies, although the internal approval processes in public companies are subject to special rules. Where a public company is involved in the transaction, certain disclosure requirements are triggered. For the most part, the acquisition of an Israeli public company will be structured and implemented in the same manner regardless of whether the company is listed solely on the TASE, listed on an exchange outside of Israel, or dual listed.

There are three primary procedures to gain 100% of the shares of a public company: (1) a reverse triangular merger, (2) a tender offer, and (3) a court approved merger (pursuant to Sections 350 and 351 of the Companies Law). There are no rules that dictate minimum offer price or other deal terms. With respect to tender offers and reverse triangular mergers, the offer must be on equal terms for all target shareholders holding the same type of security. Even where a tender is approved by the requisite majority of shareholders, in the case of a "full" tender offer, a shareholder who did not positively accept the offer may still appeal to the court to determine that the terms of the offer are less than fair value.

Although not legally required, it is often desirable to obtain pre-rulings from the Israel Tax Authority with respect to two matters: (1) clarifying the withholding obligation imposed on the acquirer in connection with payments made to the target shareholders, and (2) providing that the assumption of employees' options by the acquirer would not result in an immediate tax event for target option holders.

For companies belonging to specific industrial sectors, the acquisition of a certain ownership percentage or of control requires special regulatory approvals. For example: (1) the acquisition of 5% or more of the shares of a bank or a bank holding company requires a permit issued by the Governor of the Bank of Israel after consultation with the Bank of Israel's Licensing Committee, (2) the acquisition of 5% or more of the shares of an insurance company requires a permit from the Superintendent of Insurance Businesses, (3) the acquisition of certain percentages in companies providing telecommunications services may require a license from the Ministry of Communications, and (4) in certain cases regarding the acquisition (primarily by means of privatization of government companies) of companies controlling natural resources or essential services, the State of Israel will retain certain veto rights and other powers.

The Israeli economy is a vibrant place for transactions. The local culture in Israel plays a significant role in the thriving marketplace and the soaring number of record deals. Israelis tend to be straight, to the point and determined. Transactions and interpersonal relations during the span of a transaction in Israel are less formal than in other parts of the world, providing ease to the deals. Nonetheless, carrying out deals in Israel resembles the basics of deals in the United States, whether it is in the style of drafting transaction documents, in the standard terms and conditions which are applied, or the common way of doing business. ■

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Atsumi & Sakai

Doing Business in India – A Perspective from Japan

By Ashish Jejurkar & Hiroyuki Sanbe

ASHISH JEJURKAR

HIROYUKI SANBE

India and Japan share a long history. Buddhism, which was born in India, travelled to Japan around the 6th century. The first major interaction between Japan and India seems to have been Japanese assistance to Shri Subhash Chandra Bose in the fight for Indian independence (1943-45). Post WWII, Japan and India signed a peace treaty and established diplomatic relations on 28th April, 1952. Since then, there have been interactions between Japan and India at various levels, which have increased in the last couple of decades.

JAPANESE INVESTMENT INTO INDIA

For the third consecutive year, India has been ranked as the most attractive investment destination in the latest survey of Japanese manufacturing companies, conducted by Japan Bank for International Cooperation ("**JBIC**"). The top response for India being considered as promising was "Future growth potential of local market"[2].

According to information available on the web page of the Embassy of India, Tokyo, Japan, Japanese FDI in India has increased in recent years. In terms

BILATERAL ECONOMIC RELATIONS[1]

The following data provides an idea of the volume of economic relations between the two countries.

Japan-India Trade (Japanese Yen: billion)

Year	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Trade from India to Japan	352	472	491	544	348	499	543	559	690	739	589
Trade from Japan to India	388	518	723	819	591	792	882	845	839	861	981

(source: Japanese government documents)

Direct Investment from Japan (Japanese Yen: billion)

Year	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Direct Investment from Japan	29.8	59.7	178	543	344	241	181	223	210	219	289

(source: Japanese government documents)

of cumulative FDI inflows into India, Japan is India's fourth largest source of FDI. Japanese FDI in India grew exponentially from US$139 million in 2004 to an all time high of US$5,551 million in 2008 due to mega deals, particularly the acquisition of Ranbaxy by Daiichi Sankyo. In the last two years, Japanese FDI into India increased from US$ 1.72 billion in 2013-14 to US$2.61 billion in 2015-16. The amount of Japan's cumulative investment in India since April 2000 to March 2016 has been US$ 20.966 billion, which is nearly 7 per cent of India's overall FDI during this period. Japanese FDI into India has mainly been in the automobile, electrical equipment, telecommunications, chemical and pharmaceutical sectors.[3]

Year	Japanese FDI in India (million US$)	% Change
2008	5,551	268.6
2009	3,664	(-) 34.0
2010-11	2,864	(-) 21.8
2011-12	2,326	(-) 18.8
2012-13	2,786	19.8
2013-14	1,718	(-) 38.36
2014-15	2,084	21.3
2015-16	2,614	25.4

According to information available on the web page of the Embassy of India, Tokyo, Japan, the number of Japanese affiliated companies in India has grown significantly in recent years. As of March 2016, there were 1,209 Japanese companies that are registered in India, an increase of 137 companies (13%) compared to 2013. These companies had 3,961 business establishments that are operating in India, which is an increase of 1,419 establishments (56%) compared to 2013[4].

According to JETRO's press release:[5] the total number of Japanese companies registered in India, as of October 2016, is 1,305; the total number of Japanese business establishments in India, as of October 2016, is 4,590; over the last one year, the number of companies has increased by 76 (6% growth) as compared to 1,229, as of October 2015; and, similarly, the number of establishments has increased by 173 (3% growth) as compared to 4,417, as of October 2015.

INDIA AN ATTRACTIVE DESTINATION

India is one of the most attractive investment destinations because of various reasons including stable government, rule of law (albeit slow), big consumer class coupled with a rapidly growing middle income class, and a large literate young population. There could not be a better source to confirm this than the United Nations Commission on Trade and Development ("**UNCTAD**") World Investment Report 2016[6], wherein India ranks as the 3rd most prospective top destination (after the United States of America and China) by multinational corporations. Thus, the attractiveness of India is beyond doubt.

The interaction between Japan and India on the social-political as well as the economic front is, one may say, recent, unlike India's long interaction with Russia, UK (and other parts of Europe) and the United States. However, the amiable relationship between the two countries and the past economic and cultural association are strong points in the Japan-India relationship. Both countries complement and supplement each other. Japan is a technology rich country with superior management and other techniques, but is concerned about the issues of availability of manpower and is facing a population decline. Japan needs to invest outside in order to maintain its growth momentum. India is rich with natural resources but short of technology, management techniques and lastly, capital. This presents a unique opportunity for both countries to come together for mutual benefit not only in the economic field but also for geo-political reasons.

JAPANESE INVESTMENTS INTO INDIA

If one were to consider the sectors where Japanese investment has happened in India it is apparent that investment is spread across traditional brick and mortar businesses to new age industries comprising IT based and E-commerce. Not only have Suzuki and SoftBank made investments into India, but there have been other successful Japanese investments such as those by Honda, Hitachi, Nissan, Toyota, Daikin, Eisai, Meiji Seika Pharma, Nippon Life, Sompo Japan Nipponkoa, Bank of Tokyo Mitsubishi UFJ, Mizuho, Sumitomo Mitsui, Mitsui & Co., Sumitomo Chemicals, Zuken Inc. and BANDAI NAMCO, to name a few.

The share of Japan in overall foreign investment in India is 7% as per the Government of India statistics for the period April 2013 to March 2016[7]. According to the same statistics,[8] Mauritius is the front runner with a 33% share. Much of the investment from the United States of America is routed through Mauritius for tax efficiency. Consider this with the fact that Japanese investors are allocating more capital to Southeast Asia. FDI flows to the ASEAN-6 countries (Singapore, Thailand, Malaysia, Indonesia, Philippines and Vietnam) have averaged US$20 billion per year for the past five years (except for 2012 when investment in Thailand fell sharply after severe floods)[9]. Compare this with the US$2.61 billion that Japan invested in India in 2015-16. This means that there is still a huge potential for increasing Japan's investments in India, which needs to be utilized fully.

CAN INDIA ATTRACT MORE JAPANESE INVESTMENT AND WHAT NEEDS TO BE DONE?

India can attract a sizeable Japanese investment. An individual Japanese investment is more sizeable compared to other country investments. Further, the investment outlook tends to be more long term. Apart from technology, investment by Japanese companies brings the famous Japanese work culture, way of living and other aspects of Japanese culture. In a nutshell, it is a win-win situation for India.

The question one often hears back in India is what can be done to increase the flow of Japanese investment into India.

The question one often hears back in India is what can be done to increase the flow of Japanese investment into India. It is a difficult question and the authors feel that there is no one answer. Before attempting to answer the question, it would be useful to have a broad understanding of Japan and how it compares with India. Unlike Europe and the United States of America, Indian interaction has been less with Japan.

A brief comparison of the Indian and Japanese environment follows (see chart on next page.) (Some may feel that the following chart is, to some extent, very broad. We believe that, for the purpose of comparison, the chart would be useful – however, at the same time, please bear in mind that this chart may not always be applicable to any and all cases.)

Thus, there is wide diversity in India. India is a diverse nation in many respects. When compared to this, Japan is not diverse.

It would be useful to understand some of the key focus areas for Indian parties to work upon to attract an even higher number of Japanese investments. The readers may note that the following is a high-level summary and may not necessarily apply to every case.

1. Time management

Two aspects immediately come to mind, first the unrealistic business expectations of Indian promoters, and second is lack of detailed planning and lengthy negotiations. The general view outside India is that a lot of time is spent on avoidable negotiations. To provide an example to help people back in India to understand the Japanese sensitivity one can consider the fact that the annual average delay for the Shinkansen (bullet train) is 0.9 minutes per operational train (FY2013, including delays due to uncontrollable causes such as natural disasters)[13]. Thus, time is money and not understanding the way business is done in matured markets like Japan can be a serious hindrance to business growth. At the same time, readers may note that the players from matured markets like Japan are understanding of the difficulties/bottlenecks faced by an emerging market player like India. Therefore, a realistic and fair understanding about the entire process provided to the Japanese counterparty in the initial stage would help the counterparty to anticipate and plan for it.

2. Predictable regulatory framework and time bound approval mechanism

The Indian regulatory framework is evolving and at times has been a bit ambivalent. Be it the constant

A BRIEF COMPARISON OF THE INDIAN AND JAPANESE ENVIRONMENT

INDIA	JAPAN
India is a subcontinent.	Japan is an archipelago, an island nation.
The Indian subcontinent has been subject to repeated invasion and foreign rule.	Japan has never been under foreign rule except the Allied occupation during 1945-1952.
The current population of India is approximately 1.33 billion based on the latest United Nations estimates. This population is equivalent to 17.86% of the total world population. 32.8 % of the population is urban. The median age in India is 26.9 years[10].	The current population of Japan is approximately 126 million based on the latest United Nations estimates. It is equivalent to 1.68% of the total world population. The median age in Japan is 46.9 years[11].
Adult literacy rate is 74.04% with male literacy at 82.14% and female literacy at 65.46% as per the 2011 Census[12].	Adult literacy rate is almost 100%.
India is a federal union comprising 29 states and 7 union territories. The states and union territories are further subdivided into districts and further into smaller administrative divisions. There is a parliament at the Centre in Delhi and similar parliaments for each state, which are further sub-divided in to smaller administrative structures called Districts. Each District has their administrative capital. As of 2016 there are a total of 707 districts in India. Distributed and decentralized administration.	There is no concept of states in Japan, and therefore there are only the central Japanese government and local or municipal governments (such as Tokyo metropolitan governments and other prefectures, and cities, wards, towns and villages). Some of the local and municipal governments such as Tokyo metropolitan government are important, and local or municipal governments have their governors/mayors and Assembly or council; however, the central Japanese government and the Diet are quite important. Although local governments' autonomy has been paid attention to, relatively, there is unified administrative structure.
The Indian Constitution lists 22 languages with numerous dialects.	The Japanese Constitution is described in Japanese only.
The Indian subcontinent has different climate and topography depending upon the region, ranging from desert, snow, tropical and dry climate.	Japan has four seasons which are relatively uniform.
Indian business culture (and to an extent social culture) is relatively informal. The business culture, recently, is developing to be much closer to the American business culture. Leadership or top driven.	Relatively formal and hierarchical culture, both social as well as business; however, depending on the time and place, this may be informal. Formality is observed by persons in Japan according to the relevant situation. Said to be consensus driven; however, depending on the place or situation, leadership or top driven.

clarifications to the Consolidated Foreign Direct Investment Policy (some of which are retrospective in effect) by both the Government of India and the Reserve Bank of India, or the amendments/clarifications to the Income Tax Act, these make the international sophisticated investor like the Japanese investor uncomfortable. From an administration of policy perspective, if something has not been included or is not clear, then the risk should not be passed on to the business community by making the clarifications effective retrospectively. Also, there is a general perception that the administration of the regulatory and legal framework by various governmental authorities has not been uniform. We would like to add here that recently there have been lot of efforts by the Central and State Governments for addressing this issue, which is a good development and hope that the efforts are accelerated.

3. Predictable tax system

The Indian direct and indirect tax system needs overhaul. Aggressive tax policing by the authorities have led to delays and litigation. The enforcement of the GST (replacing the Central and State Sales Tax and Value Added Tax) later this year would alleviate the concerns to an extent. But without a proper and efficient administration of the laws the exercise would not be complete.

4. Fast and effective dispute redressal mechanism

The courts and alternative dispute redressal mechanism also needs overhaul. Making massive investment in the soft and hard infrastructure by the Central and State Governments coupled with initiating stringent action against parties or their advisors who cause delays (like imposing exemplary costs) would be required.

5. Ease of obtaining and maintaining business licenses

The Central and State Governments need to have a re-look at the laws and the rules with a view to ensuring that there is clarity on the documentation process whilst applying for licenses as well as expedite the approval process. During the tenure of the license compliance requirements and processes need to be made business friendly. Recently, there have been some measures by the central government followed by some State Governments; however, we feel that this process needs to be accelerated.

6. Awareness about India in Japan

Lastly, the authors would like to suggest a massive initiative from the Central Government (with active participation from the State Governments) to make people in India aware of Japan, its culture, ways of doing business, climate and the general way of life in Japan. Simultaneously, they should also initiate programs with the Japanese Government to increase awareness in Japan of India and the Indian way of life. Some of the developing countries like China do have such awareness programs for their citizens, which have proven to be quite helpful.

We feel that this article would be incomplete if we were not to acknowledge the various good aspects about India like the English speaking literate population, hunger amongst the youngsters to excel and imbibe good foreign values, various inherent soft skills and many others, which have led to India being ranked as the 3rd most prospective top destination (after the United States of America and China) by multinational corporations[14.]

On the eve of the 70th anniversary since India became independent on 15th August 1947, there is a huge opportunity for India to lead and become the engine of growth in the world. Japan and the business community in Japan would be extremely happy to partner India in this progress. ■

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NOTES

1 Sourced from: Ministry of Foreign Affairs of Japan, "Japan-India Relation" (http://www.mofa.go.jp/region/asia-paci/india/data.html)
2 JBIC, "FY2016 Survey (the 28th) Report on Overseas Business Operations by Japanese Manufacturing Companies" (http://www.jbic.go.jp/en/information/press/press-2016/1212-52058)
3 Source: Embassy of India, Tokyo, Japan, "India - Japan Economic Relations" (https://www.indembassy-tokyo.gov.in/india_japan_economic_relations.html)
4 Ibid.
5 JETRO, Press Release "Japanese Business Establishments in India /press- (http://www.in.emb-japan.go.jp/PDF/2016_co_list_en_pr.pdf) at page 1.
6 UNCTAD, World Investment Report 2016 (http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf), at pages 27 and 28
7 Department of Industrial Policy & Promotion, "Quarterly Fact Sheet - Fact Sheet on Foreign Direct Investment (FDI) From APRIL, 2000 to MARCH, 2016" (http://dipp.nic.in/English/Publications/FDI_Statistics/2016/FDI_FactSheet_January-FebruaryMarch2016.pdf) at Table E at page 2.
8 Ibid.
9 DBS Bank Ltd, "Japan: rising direct investment in Southeast Asia" (https://www.dbs.com/aics/pdfController.page?pdfpath=/content/article/pdf/AIO/160318_insights_japan_looks_to_southeast_asia_for_growth.pdf).
10 Worldometers, India Population (http://www.worldometers.info/world-population/india-population/). Data was shown at this website as of 30 March 2017.
11 Worldometers, Japan Population (http://www.worldometers.info/world-population/japan-population/). Data was shown at this website as of 30 March 2017.
12 Office of the Registrar General & Census Commissioner, "Provisional Population Totals : India : Census 2011" (http://www.censusindia.gov.in/2011-prov-results/indiaatglance.html).
13 http://english.jr-central.co.jp/about/punctuality.html
14 UNCTAD, World Investment Report 2016 (http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf), at pages 27 and 28

FIRM PROFILE

Atsumi & Sakai is a multi-award-winning, full-service Tokyo law firm, and is the only independent Japanese law firm with overseas offices in both London and Frankfurt. The firm operates as a foreign law joint venture, which enables it to admit foreign partners and so offer its clients the quality of service that the modern international business community demands. Expanding from its highly regarded finance practice, the firm now acts for a wide range of international and domestic companies, banks, financial institutions and other businesses, offering a comprehensive range of legal expertise.

AN INTERNATIONAL PRACTICE

Atsumi & Sakai has an outward-looking approach to its international practice, and has several foreign lawyers and consultants with extensive experience from leading international law firms, so providing its clients with the benefit of both Japanese law expertise and real international experience.

As a member of a number of global legal networks, and having had many years' experience in working with international law firms, the firm is able to assist clients in the selection of overseas counsel and to work on cross-border transactions with foreign lawyers it is familiar with.

INNOVATION & VALUE

The firm constantly seeks to anticipate its clients' needs for new legal services, most recently by bringing together lawyers from various areas of expertise across the firm as a practice group to address issues arising from the rapid technological developments in the financial services industry, the Internet of Things (IoT), big data, artificial intelligence (AI) and cloud computing.

We are also conscious that, in a very commercially-focused business environment, clients look to their legal advisers not only for expertise, but also for value-for-money, and we are happy to discuss both constructive fee arrangements and added-value services, such as secondments, helplines and legal updates.

Debevoise & Plimpton

M&A in Russia: Opportunities and Risks in the Current Environment

As the economy in Russia is returning to growth, foreign investors are taking a fresh look at the opportunities in the Russian market.

CURRENT MACROECONOMIC ENVIRONMENT IN RUSSIA

Russia is a vast, resource-rich country with immense diversity and a lot of potential. After the turbulent 90s, Russia experienced over a decade of high economic growth. In the last few years, however, economic growth has stagnated: mainly due to the dramatic drop in the world market price for oil, sanctions imposed against Russia following the onset of the conflict with Ukraine and lack of structural reforms in the economy. According to the International Monetary Fund (IMF), Russia's GDP decreased 2.8% in 2015 and 0.2% in 2016. Beginning this year, a gradual economic recovery is expected: IMF projects that the Russian economy will expand by 1.4% in each of 2017 and 2018. As the economy in Russia is returning to growth, foreign investors are taking a fresh look at the opportunities in the Russian market.

OVERVIEW OF RUSSIAN M&A MARKET

The Russian M&A market is recovering. According to Mergermarket, the aggregate deal value of Russian M&A equaled USD35 billion in 2016: there were 172 deals and the average deal size was USD203.5 million. The largest M&A deals involving foreign investors were:

- USD10.8 billion privatization of Rosneft by Glencore Plc (Switzerland) and Qatar Investment Authority (Qatar); and
- USD2 billion acquisition of a minority stake in Vankorneft by Indian Oil Corporation Ltd, Oil India Ltd and Bharat Petroleum Corp Ltd (all – India).

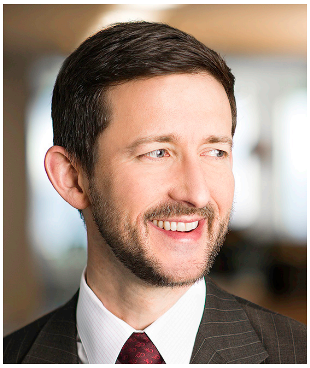
Russia's energy, mining and utilities sectors were the dominant sectors in Russian M&A over the last few years. Other sectors that exhibited strong investor interest included consumer, TMT, pharma, Internet, industrials and chemicals.

INDIA – RUSSIA M&A

Over the recent years, there has been an increase of inbound M&A deals with India:

- India has become one of the most notable investors in Russia: ONGC Videsh, a subsidiary of India's NOC, paid Rosneft USD1.3 billion for a 15% stake in Vankorneft, owner of the Vankor oil and gas deposit in eastern-Siberia, and Lupin, an Indian pharmaceutical company, acquired the Russian generic drug manufacturer Biocom for an undisclosed amount;
- In 2016, India was the 2nd largest foreign bidder on the Russian M&A market.

ALAN KARTASHKIN
PARTNER



GEOFFREY BURGESS
PARTNER

OVERVIEW OF BUSINESS RELATIONS BETWEEN RUSSIA AND INDIA

Russia has always enjoyed a special relationship with India, with close ties going back to the 1950s. The Russian Government is interested today in closer cooperation with India as one of its most prospective business partners in the Asia-Pacific region.

Potential for bilateral trade and investment is not fully unlocked: in 2016 the bilateral trade was USD7.7 billion. In a way to re-establish "the special and privileged nature" of the strategic partnership, Russia and India have set the goal of boosting bilateral trade to USD30 billion by 2025.

OVERVIEW OF FOREIGN INVESTMENT REGIME IN RUSSIA

Over the recent years, the Russian Government has taken a number of measures aimed at the liberalization of the business environment, in particular: implementation of fundamental legal reform and introduction of greater transparency of Russian business.

Selected key legal developments

Recent legal developments have been primarily aimed at modernizing the legal system, improving corporate governance and strengthening compliance:

- introduction of explicit general obligation to act in good faith (applicable to all civil law relations, including corporate governance);
- introduction of new legal concepts into Russian civil law (e.g., representations, indemnities, option agreements, conditions precedent, guarantees, framework agreements, break fees, and rules for conducting negotiations);
- acknowledgement and regulation of shareholders' agreements, which may provide for, inter alia, concerted voting by shareholders, put/call options, transfer restrictions, etc.;
- more flexible corporate governance in non-public joint stock companies: corporate charters may now expand the authority of shareholders' meetings, delegate matters from shareholders to the supervisory board or executive bodies;
- amendments to 'interested party transaction' regulation: introduction of the concept of 'controlling person', elimination of mandatory preliminary approval, and expansion of the list of transactions exempted from the approval requirement;
- improvement of anticorruption and antitrust compliance: requirement that all companies operating in Russia adopt measures aimed at preventing corruption; antitrust compliance is promoted by the Russian antitrust authorities;
- improvement of commercial ('arbitraj') court system: increase of accountability of judges, measures to improve transparency of court hearings and decisions, random assignment of cases, focus on quality of the written decisions and an aggressive anticorruption campaign.

STRUCTURING AND EVALUATING ACQUISITION OF A RUSSIAN PRIVATE COMPANY

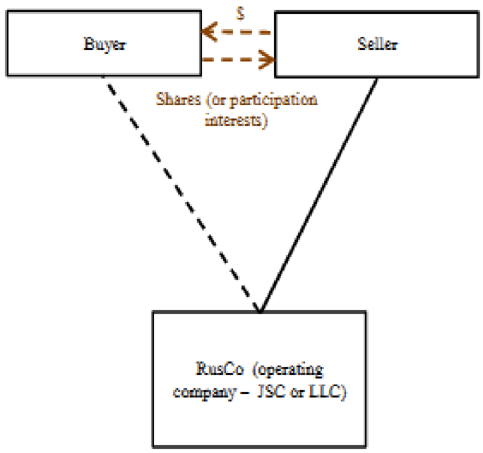
A Russian private company is formed either as:

- Joint Stock Company (JSC), which issues shares; or
- Limited Liability Company (LLC), which has participation interests.

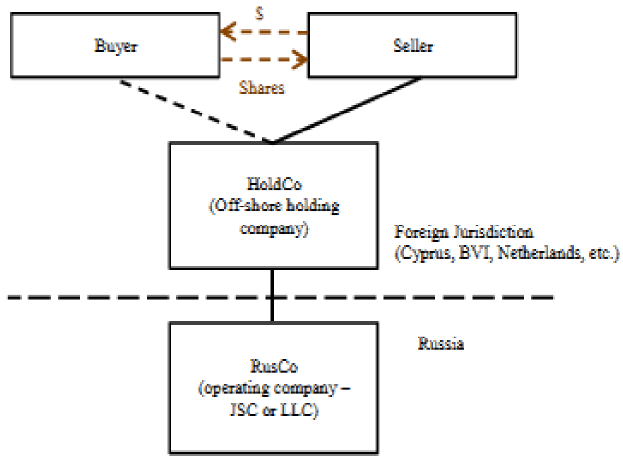
A Russian private company may be acquired directly, as an acquisition of shares (or participation interests), or indirectly, via acquisition of an offshore holding company (see diagram on next page).

Statutory reorganization (combination or merger) is also possible, but is rarely used.

Direct Acquisition



Off-Shore Acquisition



Due Diligence

Due diligence is one of the key ways to identify risks and past violations and ensure compliance with laws after the closing of the acquisition. General legal due diligence review of a Russian target company must be tailored to:

- industry-specific issues: licensing, industry regulations and market restrictions, environmental, workers' safety, etc.; and
- specifics of the target company: legal form of the company, history of privatization or reorganization, shareholding structure, subsidiaries and intra-group relations, market position and governmental relations.

Foreign investors should assess whether the target and its shareholders are subject to any sanctions imposed by U.S. and E.U. and many other countries following hostilities in Ukraine.

Due diligence review of a Russian company requires a thorough assessment of the company's compliance with anti-corruption laws: Russian anti-corruption laws, and if applicable, U.S. Foreign Corrupt Practices Act ("FCPA") or U.K. Bribery Act ("UKBA").

It may be prudent to conduct background checks of shareholders, affiliates, managers and service providers. Foreign investors should also assess whether the target and its shareholders are subject to any sanctions imposed by U.S. and E.U. and many other countries following the emergence of hostilities in Ukraine, and whether the target is conducting any business in violations of such sanctions or is involved in transactions that may expose it to such sanctions.

Ownership and control

The success of a business in Russia is often directly related to the owner/founder, and established relationships, the value of which could be lost in any sale of a controlling stake. In such circumstances, a foreign investor may acquire a non-controlling stake, perhaps with an option to acquire control later. Alternatively, the investor may acquire majority control but require the seller to retain a minority interest in the company.

Certain regulatory restrictions on foreign ownership may apply, particularly if the target company operates in one of several "strategic" sectors.

Anticorruption compliance
Despite efforts to strengthen anticorruption legislation and enforcement in Russia, the country still receives low rankings in global corruption surveys. Foreign investors should implement robust compliance programs post-closing to ensure full compliance with FCPA, UKBA (as applicable) and Russian legislation. Russian anti-corruption laws currently provide for substantial liability for companies and there is increased drive to prosecute corruption cases in all types of Russian companies.

KEY DEAL TERMS IN RUSSIAN PRIVATE M&A

Preliminary non-binding documentation
Before starting negotiation of definitive agreements, the parties may want to set out their preliminary understanding of the proposed deal in a non-binding letter of intent ("LOI") or memorandum of understanding ("MOU").

Even if the LOI or MOU is described as non-binding, to avoid dispute it should also specify the governing law (usually the same as the definitive agreements). Under Russian law, a purportedly non-binding LOI or MOU may be deemed a "preliminary agreement". To the extent the terms are sufficiently specific to be legally actionable, a Russian court may hold the parties bound by such preliminary agreement.

Choice of law
English law is common for Russian private M&A deals involving foreign investors for the following reasons:

- better availability of buyer protections (representations and warranties, indemnities, etc.);
- familiar to most foreign investors;
- a long history of judicial interpretation; and
- large pool of quality English law arbitrators.

However, Russian law is mandatory in certain transactions, such as the acquisition of Russian real estate or any interest in a Russian LLC (which requires a notarized agreement). Where necessary, the parties may use both Russian and English law by entering into Russian law-governed transfer agreements and separate English law-governed off-shore "transaction agreements" or other arrangements.

If an M&A transaction contains a "foreign element", such as an off-shore holding company and/or guarantor, parties may choose a foreign governing law.

Dispute resolution
Foreign arbitration is common for Russian private M&A deals with foreign investors:

Foreign investors often prefer to establish an offshore company to hold shares in the Russian company and enter into a shareholders' agreement under foreign law subject to arbitration outside Russia.

- typical venues: London Court of International Arbitration (LCIA); International Commercial Court (ICC) and Arbitration Court of the Stockholm Chamber of Commerce; recent trends suggest a growing preference for Asian arbitration centers (e.g., HKIAC, SIAC);
- preferred seats: London, Paris, Geneva, Zurich, Vienna, and Stockholm.

Significant changes to the Russian arbitration rules came into force on September 1, 2016, which clarified that share purchase agreements related to acquisition of shares or interests in Russian companies can be subject to foreign arbitration, while shareholders agreement with respect to shares or interests in Russian companies must be subject to arbitration (to the extent such disputes are arbitreable under Russian law) or litigation in Russia.

Agreements to submit disputes to foreign courts are generally recognized by Russian courts, but it may be difficult to enforce foreign court judgments in Russia if no international treaty applies and judicial reciprocity is unlikely. Foreign arbitral awards are generally enforceable in Russia in accordance and subject to the terms of the 1958 New York Convention.

Closing conditions

In Russian private M&A, it is common to have relatively few closing conditions, but the extent of conditionality can vary greatly from one deal to another, depending on the parties' respective concerns and relative negotiating strengths. Regulatory approval is almost always included as a closing condition:

- may be limited to Russian antimonopoly approval (necessitating prior determination of applicable regulatory requirements);
- the buyer may be required to give specific undertakings to obtain approval in a timely manner.

Financing conditions are rare, even if the deal will be financed. Material adverse effect conditions, if included, are usually heavily negotiated. Longstop dates are common, reflecting the parties' mutual interests in certainty and closing the deal as soon as practicable. Reverse termination fees may apply, if negotiated as part of the deal.

Representations and warranties

Determining appropriate representations and warranties is best accomplished as part of the due diligence process.

In Russian private M&A, it is advisable to get coverage of anti-corruption, sanctions and other compliance issues, but these can be contentious.

Shareholders' agreements in respect of Russian private companies tend to contain provisions similar to those found in a typical international M&A deal.

Buyer should scrutinize the seller's authority to execute the transaction documents and perform their obligations in relation to the transaction and demand detailed representations and warranties to back this up.

Post-closing

Specific indemnities are relatively common, although determining the scope can be a particularly challenging aspect of negotiations. Whilst in a 100% sale it is typically appropriate for the seller to provide some indemnity coverage, this is less apparent in a minority investment.

Purchase price adjustments are a more straightforward way of sharing valuation risk. In Russian private M&A, escrow arrangements are not common, as they are difficult to set up on acceptable terms, and agreeing those terms can delay or disrupt the deal. It is more common to have holdback amounts, but this depends on the type of deal and the parties' relative negotiating strengths.

Shareholders' agreements

Shareholders' agreements in respect of Russian private companies tend to contain provisions similar to those found in a typical international M&A deal:

- governance, both in terms of governance bodies and management appointments, as well as veto rights and dead-lock resolution provisions;
- accounting and other reporting requirements and information access rights;
- non-compete / non-solicit provisions;
- share transfer restrictions: preemptive rights, tag-along rights and drag-along rights;
- put/call options; and
- exit arrangements, particularly in shareholders' agreements with private equity investors.

While agreements among shareholders of a Russian company may be subject to foreign law, depending on the scope of rights covered by such agreement, Russian law may require that disputes under such agreements are resolved in Russian courts or arbitral tribunals in Russia. Foreign investors often prefer to establish an offshore company to hold shares in the Russian company and enter into a shareholders' agreement under foreign law subject to arbitration outside Russia.

RUSSIAN REGULATORY REGIME

A transaction involving a direct or indirect acquisition of a Russian company may require the following regulatory approvals:

- competition clearance for most acquisitions of more than 25% interest in a Russian company;

- strategic investment clearance for acquisition of control if the target is engaged in any "strategic activity", with lower threshold (more than 25% interest) if the target is a "strategic subsoil user", and even lower threshold (more than 5% interest) where the acquirer of "strategic subsoil user" is controlled by a foreign government or international organization; and/or
- other industry specific M&A regulatory approvals depending on the industry sector of the target (e.g., banking).

FAS is responsible for issuing competition clearance: it must issue its decision within 30 days but it can extend the review period by up to 2 months.

The Governmental Commission for Control over Foreign Investments in the Russian Federation is responsible for issuing strategic approvals; applications are submitted via FAS. It typically takes from 3 to 6 months to obtain approval.

TYPICAL DEAL TIMELINE

Typical deal timeline in Russian M&A looks as below:

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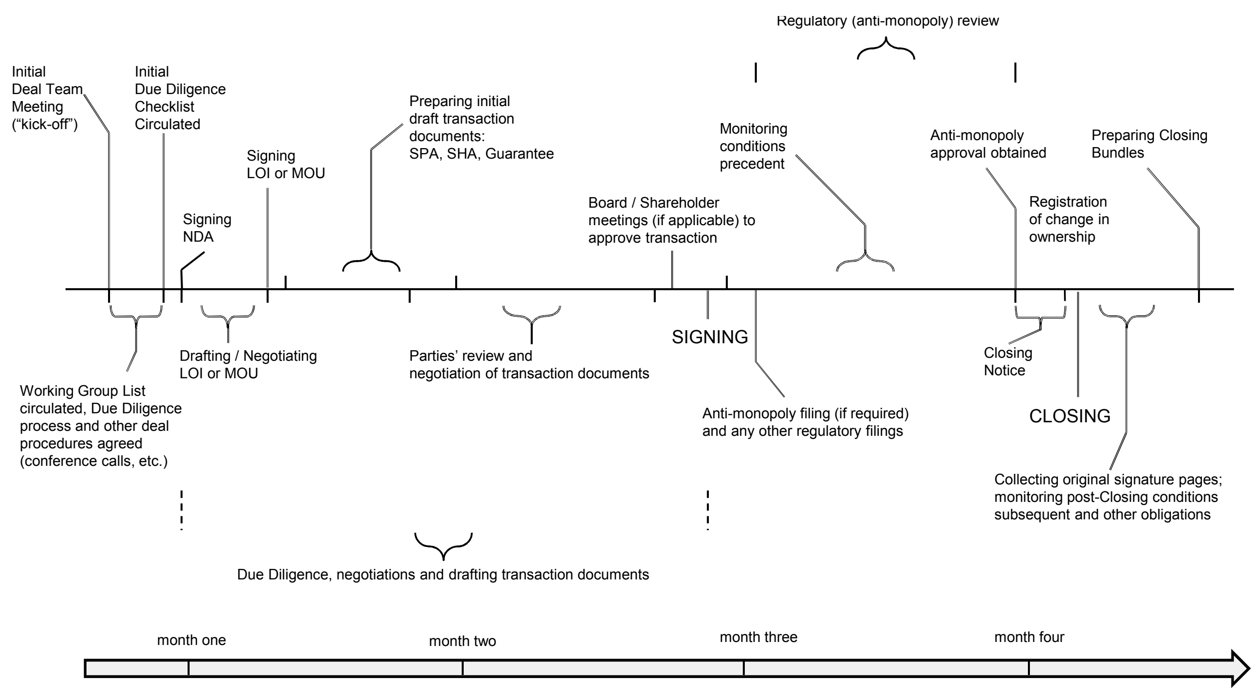
TYPICAL DEAL TIMELINE



LATHAM & WATKINS LLP

The Singapore-India Joint Venture: Truly Symbiotic

Latham & Watkins reviews the special business relationship.

HOW DO YOU EXPLAIN INDIA'S INCREASINGLY CLOSE BUSINESS RELATIONSHIP WITH SINGAPORE?

Singapore has proved to be the destination of choice for many Indian corporates doing business overseas, though historically other markets such as London and New York have also had close ties with India. With its highly developed and successful free market economy, low taxation, proximity to the Indian subcontinent, numerous direct flights and sizable Indian population, Singapore's trade ties with India have flourished.

Foreign investors investing in India, particularly in the technology industry, prefer to invest via Singapore holding companies holding Indian assets.

In addition, Singapore has become the South East Asian hub for many law firms, banks, financial institutions and private equity funds, allowing relatively easy access to capital raising and investment.

In 2012, India introduced its general anti-avoidance rules (GAAR) in a bid to tax offshore transaction structures, followed by a revised double-taxation avoidance agreement (DTAA) between Singapore and India in late 2016, which provided greater certainty regarding tax treatment of funds flowing into India through Singapore and vice versa. These changes have further helped Singapore to become a destination of choice for several Indian multinationals.

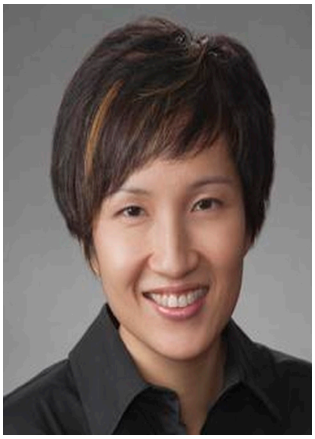
WHAT IS THE EFFECT OF THE SINGAPORE-INDIAN DTAA?

The agreement puts Singapore on par with India's other favourite offshore tax jurisdiction – Mauritius – which has a similar treaty to address the tax on fund flows between India and Mauritius.

In addition to the certainty provided by the tax treaty, Singapore also has a top-class regulatory framework and support from managers, service providers and initiatives by the government.

To set up in Singapore a business can't just put up a name plate: there are substantive requires. For example they need to have people on the ground and they need to have the requisite regulatory approvals. This has had the benefit of creating greater certainty with respect to how Indian tax authorities may view Singapore-centred transactions.

RAJIV GUPTA



SHARON LAU

NICK BENSON

WHAT HAS SINGAPORE DONE TO HAVE BECOME A PREFERRED HOME FOR INVESTMENT FUNDS FOCUSING ON INDIA?

Two core factors driving the funds industry in Singapore are:

1. Due to the DTAA, Singapore has become an increasingly viable, and in some cases more attractive, jurisdiction for funds vehicles investing in India. Singapore is not perceived to be a tax haven and investors consider a Singapore presence to be able to meet the "substance" test that is likely to be requiredunder GAAR by the tax authorities in India.

2. Singapore introduced the Limited Partnership ('LP') business structure in 2009. This structure is based on the Anglo-Saxon limited partnership model, which is the vehicle of choice for many investors and is used in places such as the UK, the Channel Islands and the Cayman Islands.

These key factors have propelled a significant amount of M&A into India via Singapore, and expanded other related ecosystems, such as banking, capital markets and arbitration. It has also helped attract a pool of available to various industries, advisors, professionals and busi-ness services in Singapore, further contributing to attracting investment.

WHY DOES SINGAPORE WIN AS AN ARBITRATION VENUE FOR INDIANS?

The Singapore International Arbitration Centre (SIAC) has done an excellent job of marketing itself to international companies, particularly in India, as the forum of choice for arbitrations.

Singapore is perceived as a 'neutral' dispute resolution forum for India – both by Indian companies as well as foreign investors. Singapore's cultural and geographic proximity to India is attractive to Indian companies and its stellar reputation as an arbitration centre, on par with locations such as Hong Kong or London, offers foreign investors a "neutral" forum for arbitration to avoid any local bias.

WHY HAS SINGAPORE BECOME INDIA'S START-UP HUB?

When companies are looking at forming a holding company structure, Singapore has become a jurisdiction of choice. Foreign investors investing in India, particularly in the technology industry, prefer to invest via Singapore holding companies holding Indian assets. Accordingly, many top companies in India have a Singapore holding company structure.

Other than the reasons highlighted above, the following reasons have also contributed to Singapore being the jurisdiction of choice for companies in India:

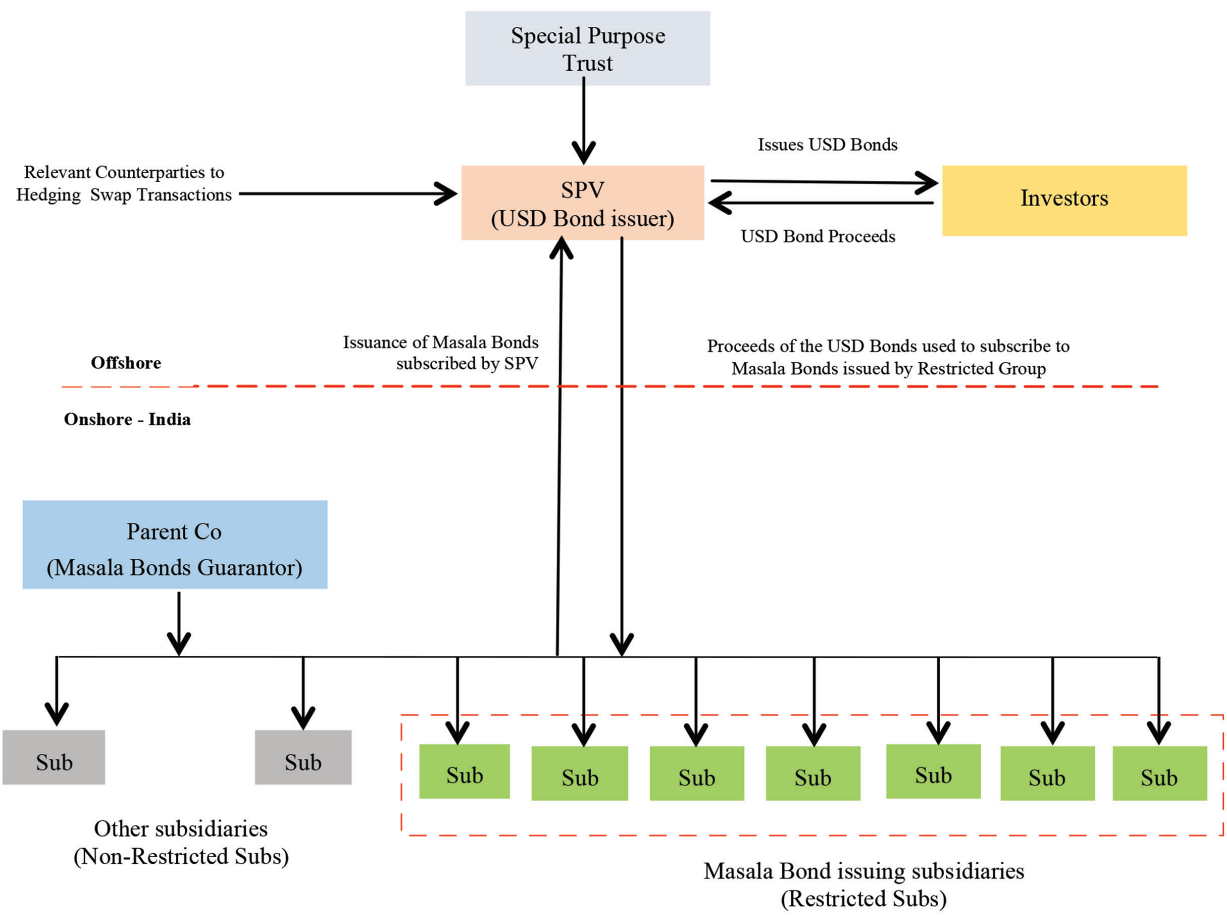
1. The ease of investment and fund flow movement permitted in Singapore; and

2. Indian rules do not permit direct listing of an Indian company outside India. The ADR scheme India has proposed has still not been enforced in full, awaiting further regulatory action.

WITH INDIA'S BIGGEST START-UPS OPERATING VIA SINGAPORE HOLDING STRUCTURES, ARE THE TWO COUNTRIES COMPETING ON SOME LEVEL, AND COULD SINGAPORE LOSE OUT IF INDIA FIXES ITS DOMESTIC DISPUTE RESOLUTION OR STREAMLINES ITS CORPORATE REGULATIONS?

India and Singapore have developed a mutually beneficial relationship in select areas. Generally speaking, India and Singapore have a symbiotic relationship. India gets significant amount of foreign direct

Back-to-Back Masala Bond Transaction



investment (FDI) from Singapore, which the Indian government is very focused on. It is also beneficial for India, since Singapore is a regulated jurisdiction, where the funds are subject to disclosure and regulation, offering comfort to the Indian government.

While a number of funds are beginning to register themselves as an AIF (alternative investment fund) in India, which gives them access to onshore funding from Indian investors, however, as most funds have a pan-Asia focus, a significant number of funds invest in India through their Singapore entities.

This approach is unlikely to change significantly in the short to medium term. While there have been a number of reforms in India, many aspects in India still remain regulated. In contrast, Singapore permits easier flow of capital and exchange controls, making it a favourable environment for doing business.

Singapore is also a lower tax jurisdiction than India.

In addition, Singapore has been an attractive place for listing of business trusts, such as infrastructure investment trusts (InvITs) and real estate investment trusts (REITs). However, India has now permitted InvITs and REITs to list in India.

HAVE THERE BEEN ANY MAJOR CHANGES IN SINGAPORE COMPANY LAWS RECENTLY?

Singapore is a stable and mature jurisdiction. With respect to its company laws and regulations, there have been recent changes, aimed at creating a positive investment environment. None of these have been adverse to Indian companies.

Singapore has also finally amended its companies law to permit dual class shares, and this seems to have gained traction with the Singapore Stock Exchange (SGX), which has launched a public consultation to seek feedback on such structures.

WHAT ABOUT THE FUTURE OF INDIAN COMPANIES USING SINGAPORE TO ACCESS THE CAPITAL MARKETS?

The Indian government has introduced significant reforms in capital markets in recent years to persuade more companies to raise capital domestically in India and not look internationally. The Singapore Stock Exchange (SGX) does, however, still remain the default choice for a very significant percentage of offshore bonds from India.

The Singapore Stock Exchange (SGX) still remains the default choice for a very significant percentage of offshore bonds from India.

There has been a big push by the Indian government for companies to consider issuing masala bonds, but because of issues such as Rupee convertibility and high hedging costs, an alternative structure of USD bonds issued by a Singapore or Mauritius SPV with back-to-back masala bonds or non-convertible debentures (see transaction structure chart on previous page) seems to be becoming popular.

The Singapore government introduced a bond grant scheme in January 2017, pursuant to which it would provide a grant to an issuer from any ASEAN country and certain other countries, including India, considering listing of their bonds on the SGX, and reimburse expenses related to their bond offering of up to S$400,000.

From 1 June 2017 onwards, another incentive will be made available to potential issuers in the bond market in Singapore. The Monetary Authority of Singapore (MAS) has announced the implementation of the green bonds grant scheme, which is applicable to offerings of qualified green bonds - offerings that comply with international green bond standards – on the Singapore Stock Exchange. First time and repeat issuers will be eligible for a grant of up to S$100,000.

In India, real estate developers could be eligible for green bonds by having green buildings, and many renewable energy companies could benefit if they can qualify for green standards. ■

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- Joint ventures and other private investments
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- Fund Formation
- Bespoke Investment Mandates
- Co-Investments
- Secondaries
- Management Team Spin-outs and Start-ups
- Investment Advisor Structuring and Operations

FIRM PROFILE

Latham & Watkins combines deep industry knowledge and technical expertise to provide clients with innovative solutions to their most complex legal and business challenges. From a global platform, more than 2,400 Latham lawyers work as an integrated partnership focused on providing excellent client service with a collaborative approach.

Latham offers clients:

- Deep experience in successful enterprise-transforming transactions and in defending bet-the-company disputes
- A solutions-based approach, providing innovative and sound commercial advice
- Optimally sized teams supported by a long-standing culture geared toward establishing and nurturing long-term client relationships

SINGAPORE OFFICE

For more than 20 years, Latham lawyers in Singapore have advised clients on complex corporate, finance and regulatory matters. The Singapore office has developed a breadth of experience across many industries, including: financial services, oil and gas, power, mining and metals, communications, internet and digital media, information technology, hospitality, gaming and leisure, as well as entertainment, sports and media. Awarded “Most Innovative Firm in Asia-Pacific” by the *Financial Times,* Latham takes pride in providing innovative advice to corporations, financial institutions, government agencies and other significant players.

With extensive experience in South and Southeast Asia, Latham lawyers in Singapore represent Asian, US, European and Middle Eastern companies conducting business across the region, and act for Asian companies in their direct investment activities and capital markets transactions globally.

Latham’s key practice areas in Singapore include:

- Banking
- Capital Markets
- Entertainment, Sports & Media
- Mergers & Acquisitions
- Outsourcing
- Private Equity
- Project Development & Finance
- Public Company Representation
- Restructuring, Insolvency & Workouts
- Structured Finance
- Technology Transactions
- Venture Capital & Investment Funds

INDIA PRACTICE

Latham is one of the largest and most experienced international law firms advising both domestic and international clients on their transactions in India and globally. The firm boasts more than 50 India focused lawyers based in Latham’s offices in Asia, Europe, the Middle East and the US, representing clients on ground-breaking transactions in India. Latham’s India Practice provides clients market-leading advice across a number of practices, including:

- Banking
- Capital Markets
- Litigation
- Mergers & Acquisitions
- Private Equity
- Project Development & Finance
- Public Company Representation
- Technology Transactions

With more than two decades of experience in the country, Latham lawyers have advised on more than 200 transactions in India, with a combined value of more than US$150 billion. Clients benefit from Latham’s longstanding history working alongside leading law firms in India, delivering top quality local and international legal advice on many of the country’s landmark transactions.

Members of Latham’s India Practice routinely handle transactions governed under both English and US law, and the firm includes lawyers who are proficient in Hindi, Gujarati, Malayalam, Punjabi, Tamil and Kannada.

Latham is one of the largest and most experienced international law firms advising both domestic and international clients on their transactions in India and globally.

India Business Law Journal has named Latham a leading foreign law firm for India transactions and Latham’s India Practice is top ranked in C*hambers Asia-Pacific.*

Practice head Rajiv Gupta was named as a Band 1 Lawyer for capital markets in India in *Chambers Asia-Pacific 2017,* acknowledged for his “experience across a broad range of capital markets transactions” and cited for being “the most prominent US Capital Markets lawyer for India work.” Mr. Gupta was also named Capital Markets Lawyer of the Year by *The American Lawyer* at the ‘Asian Lawyer Emerging Markets Awards’ in 2015.

LENZ & STAEHELIN

Public M&A in Switzerland

Switzerland is an attractive jurisdiction for cross-border M&A due to an investor-friendly, open and reliable legal environment.

RECENT SWISS PUBLIC M&A TRANSACTIONS

The Swiss M&A market has seen significant activity in 2016. Last year's high deal value was driven by a few large transactions, including the all-cash public tender offer by China National Chemical Corporation (ChemChina) for Syngenta for a staggering USD 43 billion. The transaction constitutes the largest M&A deal a Chinese company has undertaken so far. Compared to the preceding year, 2016 has seen a significant increase in public tender offers. The majority of public offers were conducted by foreign bidders. 2017 has started at a similar pace. Until end of February, three public tender offers have been announced. Particularly noteworthy is the USD 30 billion tender offer by Johnson & Johnson for Actelion, Europe's biggest biotech company. This all-cash offer is of particular interest as, prior to the completion of the takeover, Actelion will spin off its R&D business to the public shareholders.

Cross-border transactions make up the majority of Swiss M&A transactions. Besides the above mentioned mega deals, recent cross-border transactions included Lonza's USD 5.5 billion acquisition of US-based Capsugel, the acquisition of a 20% stake in Russia-based Rosneft by a consortium led by Glencore and the Qatar Investment Authority for USD 11 billion as well as the takeover by HNA Group of gategroup (USD 2 billion) and private equity fund EQT Partners' takeover of travel company Kuoni (USD 1.4 billion).

DEAL STRUCTURES AND REGULATORY FRAMEWORK

What are the main alternative structures to acquire a Swiss public company?

The two main structure alternatives to acquire a public company in Switzerland are the public tender offer and the statutory merger.

However, in a cross-border set-up, the public tender offer is the predominant acquisition form (combined with a subsequent statutory squeeze-out or squeeze-out merger to gain full control over the target). Statutory mergers are rarely seen in a multi-jurisdictional transaction, unless structured as a triangular merger with the two merging entities being incorporated in the same jurisdiction. This article will focus on the Swiss public tender offer regime.

What are the key rules regulating public tender offers?

The rules governing public tender offers for a company listed on a Swiss stock exchange are contained in articles 125 et seqq. of the Swiss Financial Market Infrastructure Act (FMIA) and its implementing ordinances.

The ruling body on public tender offers is the Swiss Takeover Board. The Takeover Board has enacted the Takeover Ordinance (TO) containing detailed provisions on the conduct of a public tender offer and the content of the offer documents. The Takeover Board issues binding orders in connection with all public tender offers. These orders can be challenged by the bidder, the target company and any qualified shareholder (see below for more details) before the Swiss Financial Market Supervisory Authority (FINMA) and in a second instance before the Federal Administrative Court. The Takeover Board's orders as well as the offer documents for all public tender offers are available under www.takeover.ch.

Can minority shareholders participate in the proceedings before the Takeover Board?

Shareholders holding at least 3% of the voting rights of the target (so-called qualified shareholders) have the right to request party status in the proceedings before the Takeover Board. As a party in those proceedings, a qualified shareholder enjoys basically the same party rights as the bidder and the target, including the right to be heard and the right to inspect the files (subject to confidentiality restrictions, in particular concerning business secrets). A qualified shareholder may object to and challenge orders of the Takeover Board. Despite the introduction of this (minority) shareholder right in 2009, there has not been a significant rise in transaction-related shareholder activism in Switzerland.

Do special rules apply to foreign bidders?

Swiss takeover rules apply equally to Swiss and foreign bidders making a public tender offer. Except for certain very limited areas (e.g. Radio/TV broadcasting or professional transport for passengers or goods), Switzerland does not impose any foreign investment limitations. Further, Switzerland does not apply any foreign exchange controls. It should be noted that in principle a cash tender offer will have to be made in Swiss francs, the official currency of Switzerland.

STAKE-BUILDING BY A POTENTIAL BIDDER

Is a bidder required to disclose the purchase of shares?

A bidder may consider building up a minority stake in the target company before approaching the board and launching a tender offer. Any purchase of shares or derivative instruments by the bidder (or persons acting in concert with the bidder) must be disclosed to the target company and the SIX Swiss Exchange (SIX) if any of the thresholds of 3, 5, 10, 15, 25, 33.33, 50 or 66.66% of the voting rights of the target company is reached or exceeded (irrespective of whether such voting rights can be exercised or not). Thus, a bidder can acquire up to 2.99% of a target's voting rights without having to disclose its participation. The "hidden" buildup of a larger stake prior to launching a takeover is not possible.

Do Swiss insider rules limit the bidder's ability to build up a participation?

Swiss law provides for detailed insider rules applicable to any market participant. An intended merger or takeover of a Swiss target usually qualifies as insider information (i.e. non-public, price-sensitive information) and would therefore restrict an insider from trading in the target's shares. Notwithstanding this, based on a safe harbor in the law, the potential bidder is allowed to purchase target shares prior to the announcement of its tender offer provided that the bidder does not have any other, additional non-public, price-sensitive information on the target (e.g. deriving from the due diligence).

Can a bidder ensure confidentiality of its takeover plans if it starts discussions with the target?

In a friendly scenario the bidder will typically approach the target's board well in advance of the intended tender offer. Under the listing rules of SIX, the target must in principle make a public disclosure if it enters into substantive discussions or negotiations with the bidder as such information is deemed to be price-sensitive (so-called ad hoc publicity rule). However, if the disclosure of such information jeopardizes the target's plan (which will usually be the case in a takeover scenario), the target may postpone the disclosure provided that confidentiality of the information is ensured. Thus, the target can usually delay the disclosure of its discussions and negotiations with the bidder until a transaction agreement has been signed and the offer is published by the bidder. However, in case of a leak an immediate public statement will be required.

Can a bidder publicly discuss that he is considering launching a takeover for a particular company?

A potential bidder is not entirely free to publicly discuss (for example in a newspaper interview) its intention to acquire a specific public company. In case of such statements, the Takeover Board may set a deadline by which the bidder must either launch a voluntary offer or publicly confirm that it will not launch a tender offer for at least six months (so-called put up or shut up or PUSU rule). Considering these potential restrictions, public statements by a potential bidder will have to be carefully assessed in advance.

CERTAIN KEY ELEMENTS OF A PUBLIC TENDER OFFER

What are the key steps in a public tender offer?

The timeline (see diagram) illustrates the key steps and documents required for a public tender offer.

What is the purpose of the pre-announcement?

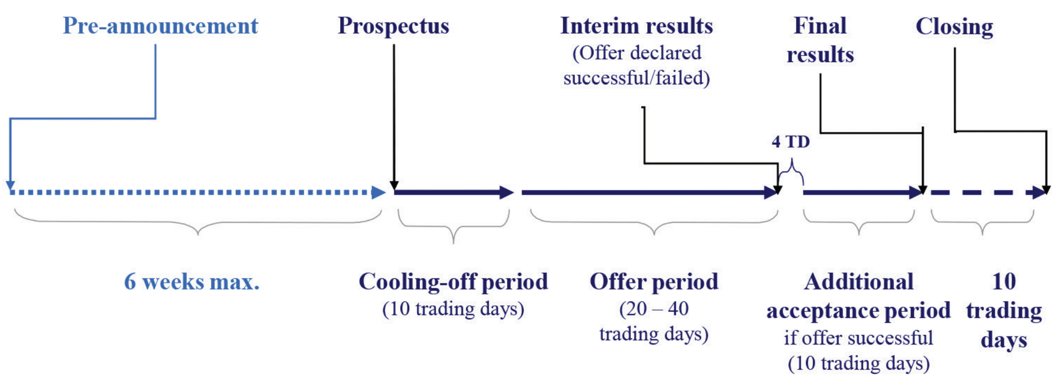
The pre-announcement is a short document containing the key terms of the public tender offer (namely the offer consideration, the offer conditions and the offer restrictions). The pre-announcement has several legal effects:

- *Obligation to make an offer.* Once a pre-announcement has been published, the bidder is locked in and can no longer step back from the announced transaction. The offer prospectus must be published within six weeks from the date of the pre-announcement.
- *Impact on offer price*. The publication date of the pre-announcement is relevant for the determination of the minimum price the bidder is required to offer to shareholders. In addition, from the pre-announcement until six months after the additional acceptance period the best price rule applies.
- *Defensive measures.* With the publication of the pre-announcement by the bidder, the ability of the target's board to take defensive measures is significantly reduced. Defensive measures in principle will require shareholder approval and need to be pre-notified to the Takeover Board.
- *Notification of trades*. Upon publication of the pre-announcement, any trades in target shares (or derivatives) by the bidder, the target and persons acting in concert as well as qualified shareholders must be disclosed to the Takeover Board and published on a daily basis.

While it is not required to publish a pre-announcement (the bidder may directly publish the offer prospectus, see below), it is common that a tender offer is initiated by a pre-announcement which also eliminates the risk of a leak.

What is the main content of the offer prospectus?

The offer prospectus is the key offer document. It contains the offer terms, including offer price, offer conditions, information on the bidder, the target, the financing of the offer, the bidder's plan in relation to the target as well as information on the securities to be offered in an exchange offer. The offer prospectus must also describe any agreements between the bidder and the target, its governing



bodies and shareholders. In a friendly tender offer, the target board's report on the takeover would typically be included in the offer prospectus. The prospectus must be kept up to date throughout the entire offer.

Prior to its publication, the offer prospectus must be reviewed by the review body and the Takeover Board. The review body must be independent from the bidder and the target, which means that the financial advisors of the bidder and the target may not act as review body. The review body issues a report in which it confirms accuracy and completeness of the offer documents and compliance with Swiss takeover law. A key task of the review body is to assess and confirm that the necessary funds to pay the offer consideration will be available at closing (certainty of funds).

Can a public tender offer be made subject to conditions?

Voluntary offers may be subject to a number of conditions, including:

- *Minimum acceptance threshold*. An offer may be subject to a minimum acceptance threshold. Pursuant to the Takeover Board's practice, an acceptance threshold of 66.66% of the voting rights is permissible even if the bidder does not own any shares at the launch of the offer. The permissible acceptance threshold may be higher if the bidder already owns shares when launching the offer or has obtained tender commitments (so-called "irrevocables") from individual shareholders.
- *Regulatory approvals*. The offer may be subject to the condition that the required regulatory approvals, including merger clearance, have been obtained.
- *Removal of transfer or voting right restrictions*. The lifting of share transfer or voting right restrictions in the articles of incorporation is a permissible condition. The same holds true for the board's approval of the registration of the bidder in the share register of the target.
- *Exchange of the board of directors*. The offer may include a condition pursuant to which the members of the board of directors of the target resign from office and are replaced by the bidder's representatives effective as of closing.
- *No MAC*. MAC conditions are in principle permissible provided that the relevant thresholds qualifying as a MAC are clearly defined in the offer prospectus. These thresholds are typically linked to a change in sales, EBIT, or the equity of the target.
- *Restructurings*. It is also permissible to make an offer subject to the completion of a restructuring of the target, e.g. the spin-off of a division of the target to the shareholders prior to the completion of the takeover.
- *Issuance and listing of consideration shares.* In an exchange offer, the offer may be subject to the condition that the general meeting of shareholders of the bidder approves the capital increase required for the issuance of the consideration shares and the listing of such shares on a stock exchange.

In a mandatory offer, conditions are only permitted for important reasons (e.g., merger clearance and other regulatory approvals, no judgment). A minimum tender threshold would not be permissible in a mandatory offer.

What triggers a mandatory tender offer? Are there any exemptions?

A bidder is required to make a mandatory tender offer if it acquires equity securities in the target (be it directly, indirectly or acting in concert with other parties) and thereby exceeds 33.33% of the voting rights in the target company.

A company may choose to increase the threshold triggering the launch of a mandatory offer to up to 49% of the voting rights (so-called opting-up). Such increase must be contained in the articles of incorporation of the target. A company may also waive the requirement to make a mandatory offer in its entirety by including a so-called opting-out in its articles.

In case of an opting-out, the acquisition of a controlling stake in the target will not trigger a mandatory offer duty. An opting-out may also be introduced for a particular transaction only (so-called selective opting-out), provided that the public shareholders are transparently informed of the planned transaction and the majority of the not involved shareholders approve the opting-out (majority of the minority principle).

What are the legal consequences of a competing offer?

A competing offer may be launched until the last day of the main offer period of the first offer. If a competing offer is made, the timetable of the first offer and the competing offer will be aligned in order to create a level-playing field and allow shareholders to compare and decide between the two offers. Any shareholder who has already tendered his shares into the first offer is entitled to revoke his acceptance and can tender into the competing offer. The target company must treat competing bidders equally. This means that any information provided to one bidder must also be disclosed to the other. There have been only few competing tender offers in Switzerland during the last ten years.

How can the bidder obtain full control over the target?

If the bidder, after completion of its public tender offer, holds more than 98% of the voting rights of the target, the bidder can apply for a court decision cancelling the remaining equity securities of the target in exchange for the same consideration as offered in the tender offer (statutory squeeze-out procedure). The request must be made within three months after the expiration of the offer's additional acceptance period. Apart from the statutory squeeze-out procedure, the Swiss Merger Act allows the bidder to complete a squeeze-out merger if it holds 90% or more of the voting rights of the target.

Subject to appraisal rights, minority shareholders can be forced to accept cash or any other kind of assets in exchange for their shares of the target company. The squeeze-out threshold of 90% or even 98% may seem high. However, experience shows that the thresholds have been reached in virtually all friendly, successful transactions in the past. There are only very few exceptional cases where the bidder had to declare its offer successful without having reached the necessary squeeze-out level.

OFFER CONSIDERATION

Is there a minimum offer price that the bidder must offer?

In case of a mandatory tender offer or a voluntary tender offer that extends to more than 33.33% of the voting rights of the target, the bidder needs to comply with the minimum price rule. Under the minimum price rule the minimum price to be paid must be equal to the higher of (i) the market price (defined as the 60 trading days volume weighted average price (60-day VWAP)) and (ii) the highest price paid by the bidder (or any person acting in concert with the bidder) for target shares during the twelve months preceding the offer. The minimum price rule is not applicable in case the target company has validly introduced an opting-out. In addition to the minimum price rule and in any event, if the target company has different share categories, the offer price for the different categories must be in an adequate relation to each other.

Under the best price rule the bidder must increase the offer price if, from the pre-announcement until six months after the expiration of the additional acceptance period, the bidder or any person acting in concert with the bidder (incl. the target if it has entered into a transaction agreement with the bidder) acquires any target shares (or derivatives) at a price higher than the offer price. In practice the best price rule is important because the acquisition of a single target share above the offer price is in principle sufficient to oblige the bidder to raise the offer price payable to all shareholders. The best price rule may also give rise to complex questions if stock option plans are amended or stock options redeemed in connection with the planned takeover.

Can a bidder offer a consideration other than cash?

In principle, the bidder is free to offer cash, shares or a combination thereof as offer consideration. In case of an exchange offer, the offered shares do not even have to be listed. Target shareholders must in principle be treated equally which means that they should receive the same consideration. If in an exchange offer (or in a mixed offer) the bidder acquires shares for cash during the offer (from the pre-announcement until settlement), a cash alternative must be offered to all shareholders.

In a mandatory tender offer, the bidder is always required to offer a cash alternative. The same holds true if during the twelve months prior to the publication of the offer the bidder has acquired 10% or more of the target's share capital against cash.

DEAL PROTECTION

Can the target company agree to a "no shop" obligation? What about other frustrating measures?

In a friendly deal, it is customary for the bidder and the target to enter into a transaction agreement. In the transaction agreement the target typically agrees to recommend the offer. The target can agree to a "no shop" obligation (i.e. a duty to refrain from soliciting third party offers in competition to the recommended bid). Notwithstanding this, the board of the target should retain the right to respond to unsolicited proposals to the extent required by its fiduciary duties (so-called "fiduciary out").

The target board cannot agree with the bidder to frustrate potential or actual competing offers without shareholder approval. Undertakings of the target to issue shares or sell crown jewels to the first bidder in case of a competing offer would therefore not be binding, and are hardly ever seen in practice.

Are break fees permitted?

The bidder and the target can agree on a break fee payable by the target in case the offer fails, typically as a result of a competing offer. The parties are however not completely free to set the amount of the break fee. Generally speaking, a break fee must be proportionate and not higher than the costs expected to be incurred by the bidder in connection with the public tender offer. Otherwise, the parties risk that the Takeover Board objects and requests a reduction of the break fee. No limitations apply to reverse break fees payable by the bidder to the target should the offer fail for reason attributable to the bidder (e.g. missing regulatory or governmental approvals).

Can shareholders enter into an irrevocable undertaking to tender their shares?

Prior to publishing its offer, the bidder may seek so-called "irrevocables" from individual shareholders pursuant to which such shareholders undertake to tender their shares into the bidder's offer. The description "irrevocable" may be misleading. In accordance with the practice of the Takeover Board, a shareholder who has entered into an "irrevocable undertaking" has still the right to revoke his undertaking in case of a competing tender offer. The purpose of this revocation right is to foster competition and to create a level-playing field between competing bidders. The revocation right cannot be waived. Thus, if a bidder wants to build up a firm and fixed stake in the target prior to launching the offer, it will have to firmly purchase the shareholder's participation. ■

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HANS-JAKOB DIEM

A Gateway into the GCC

The United Arab Emirates is one of the most stable political and economic regimes in the entire region. DK Singh outlines the legal environment for Indian and other foreign investors.

UNITED ARAB EMIRATES

United Arab Emirates ("UAE") is a federation of seven Emirates, which were formed on 2 December 1971. The country has emerged as a global trading hub and as a gateway to the Gulf Co-operation Council countries ("GCC") with which it enjoys legal and commercial agreements and treaties. It also leads the GCC countries in providing access to one of the leading financial markets in the region based out of the Dubai International Financial Center ("DIFC").

The UAE has a population of approximately 9.5 million people and 80% of them being expatriates. As compared to anywhere in the world, this is a unique model of economic development whereby the economic contribution of expatriates is a significant factor in the growth of UAE.

It is critical that the investor obtains legal advice on how to structure and protect its investment.

Whilst UAE has traditionally been a oil and gas reliant economy but it has diversified significantly over the years and now has a thriving trading hub in commodities, a fast growing financial services market and tourism. The major corporate entities in the UAE are government owned and have expanded both domestically and globally, examples being Dubai Ports and Emirates Airlines.

Some of the key elements to be kept in mind are that UAE has been a tax-free economy, however it has recently embarked on introducing a value added tax to come into effect from January 2018 and there are proposals to bring corporate income tax in due course. There are no foreign exchange control rules in the UAE though the dirham is pegged to the dollar at a fixed rate. The country happens to be one of the most stable political and economic regimes in the entire region and therefore attracts a considerable interest and investment from within the GCC countries and the MENA region, being Middle East and North Africa.

LEGAL AND INVESTMENT REGIME

The UAE is a federation with a written constitution that regulates the relationship of the seven emirates. There are however significant differences between the Emirates in terms of how federal and local laws are applied, the nature and system of the Courts and additionally there are Free Zones within each Emirates and some of them have independent laws and regulations and even Courts. For instance the Dubai International Financial Center ("DIFC") has its own common law led courts and similarly the Abu Dhabi Global Markets ("ADGM") have also established a similar common law regime with its own Courts.

The UAE is generally a civil law jurisdiction and the laws are based on the French Civil law and only the Arabic version is considered the authoritative text of the law. This is of course distinct from legal regimes, which operate in Free Zones like the DIFC and ADGM.

Whilst there are no extensive regulations in relation to foreign investment in the country as compared to the more comprehensive regulations such as in countries like India and other developing countries, but there are certain restrictions on foreign investment, particularly in relation to ownership and participation in the profits of the business. The key purpose of the restrictions is to ensure that there is local participation in the business that over a period of time is intended to empower the local entrepreneurs in business methods and being independent.

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CORPORATE STRUCTURES

The country has a dual investment regime that caters to the Free Zones set up across the country to invite investments with attractive tax holidays and the onshore market where much of the retail, manufacturing and trading activity happens. Depending on the nature and purpose of the business an entrant into the UAE can opt or elect to operate out of a Free Zone or on an Onshore basis.

In order to set up a company in the UAE (onshore limited liability company) the investor must have a sponsor. The sponsor must be a UAE national or a company wholly owned by UAE nationals. The UAE Company must be at least 51% owned by UAE nationals. However certain sole proprietorships and professional partnerships can be wholly foreign-owned.

It is critical that the investor obtains legal advice on how to structure the investment and to protect its investment. The Memorandum of Association ("MoA") of an onshore limited liability company in UAE is very different from the Memorandum of Association of a company registered in India. The MoA here is very specific to the licensed business activity and does not include ancillary and supplemental business activities like most MOAs of Indian companies.

The Department of Economic Development which is the key body for registering companies in the UAE, with its counterparts in various Emirates maintains a list of trading activities which will be the basis of the license issued to the newly incorporated company. It is open to the company to have multiple trading activities, however outside of the trading activities the company is prohibited from doing business anywhere in the UAE.

Alternatively, an investor may incorporate a company in a Free Zone. A foreign investor may own 100% of the shares in the free zone company and no UAE national agent or UAE partner or shareholder is required. The UAE has about 45 free zones, including the Jebel Ali Free Zone, Dubai Multi Commodities Centre, Dubai Airport Free Zone, Dubai South and the Dubai International Financial Centre. There are similarly Free Zones established in other Emirates such ADGM, KIZAD, RAKICC and Fujairah among others. In general, the free zones focus on different business areas and therefore the investor has to carefully consider its proposed business activities and evaluate whether a particular free zone is suitable for its business requirements.

The majority stake in many UAE companies are controlled by the government or families that are often reluctant to sell their stakes or give voting rights or representation on their board to foreign shareholders. These family-owned businesses are privately held and the family members maintain their operational control. Therefore, the majority of foreign M&A activity into the United Arab Emirates mainland jurisdiction tends to take the form of minority stakes by way of joint venture.

The UAE has a relatively small stock market and the number of listed entities is modest. This means that there is no secondary market of any significance and there is no liquidity in shares as such. As a consequence the M&A laws and takeover regulations are yet to mature as compared to the United States, Europe and certain countries in Asia. The regulator, Securities and Commodities Authority, ("SCA") has not been tested in any significant basis in relation to the merger control regime, unlike the more mature regimes in the United States or the United Kingdom, or even countries like India and Singapore. Therefore there is a lack of market precedents in this regard. Business and asset transfers often require specific approvals of local government and regulatory authorities.

Acquisitions in the UAE usually take the form of a share transfer rather than an asset transfer. This reflects the legal challenges of transferring assets and employees in the UAE.

The rules issued by the SCA shall be applicable in the case of mergers of public joint stock companies. In addition to the SCA, certain industry-based regulatory bodies such as UAE Central Bank may have a role to play in certain M&A transactions based on the industry in which the parties to the transaction operate.

The statutory pre-emption rights on local partner shareholding apply to an onshore LLC for transfer of shares. The notary public will not notarize a clause contrary to the statutory pre-emption rights in the Memorandum of Association of the company. The statutory pre-emption rights do not apply to a free zone company. However, the company has to notify the relevant free zone authority for any transfer of shares.

DUBAI INTERNATIONAL FINANCIAL CENTER ("DIFC")

A free zone company based in the DIFC and regulated by the Dubai Financial Services Authority ("DFSA") will have to obtain approval from the DFSA for a change in its controller(s). The DFSA regulated company must notify the DFSA when a person (as defined in the DFSA regulations) becomes or ceases to be a controller (as defined in the DFSA regulations) or when a person's holding in the relevant DFSA regulated company increases or decreases by a set percentage as set out in the DFSA regulations. Depending on the percentage of change in shareholding, prior approval is required from the DFSA for the change in control.

Acquisitions in the UAE usually take the form of a share transfer rather than an asset transfer. This reflects the legal challenges of transferring assets and, particularly, employees in the UAE.

The implementing regulations of most of these free zones contain very basic regulations on the merger or amalgamation of two companies, an exception being the Takeover Rules Module (TKO), which applies specifically in the DIFC. M&A transactions in the DIFC involving public companies are principally regulated by the TKO that is part of the DFSA Rulebook.

THE CHALLENGE OF RESTRICTED OWNERSHIP

The restrictions imposed on foreign ownership under UAE law presents an unacceptable loss of control for many potential foreign investors. It attracts criticism as it does not allow foreigners to have sufficient control and there have been discussions in the past to relax these restrictions in order to attract and encourage foreign investment.

While perhaps not unique to the UAE, many mid-market deals are often complex due to the family-owned business mentality that exists in the region. This mentality makes it more challenging to do deals and UAE companies have difficulty splitting management from ownership. Many owners are also emotionally attached to their business, which cuts across and can hinder M&A activity and the disposal of assets.

The UAE does not have robust M&A laws and takeover regulations compared to the United States, Europe and certain countries in Asia, a primary reason being the ownership of business in the UAE – approximately 80 per cent of non-oil GDP within the Middle Eastern region is owned by family-owned business groups. Additionally, the lack of mandatory tax filing requirements in the UAE often poses as a deterrent to robust M&A activity due to unavailability of information for assessment of risks of the target's business as well as valuation of assets of the target.

However notwithstanding these challenges and need for certainty in relation to the rights qua the local partner, there have been very few instances where the ownership and economic benefits have been matters of a dispute. The Courts of UAE have been generally supportive of the arrangements both legal and informal in relation to economic and shareholder rights as between the expatriate investor and the local participant.

NEW DEVELOPMENTS

As for significant new developments in the UAE legal regime, the UAE proposes to introduce Value Added Tax ("VAT") at a rate of 5%, with some limited exceptions, with effect from 1 January 2018. The Government of Saudi Arabia recently issued the unified agreement for VAT. The agreement sets out the framework under which VAT may be implemented in the Gulf Cooperation Council ('GCC") member states.

Also the UAE government has recently issued a new bankruptcy law. Law 9 of 2016 came into force on 29 December 2016. Under the new bankruptcy law a financial restructuring committee is proposed to be appointed. The new law applies more widely and covers companies governed by the Commercial Companies Law, most free zone companies and sole establishments.

The UAE remains at the top of investors' lists of target markets given its ability to provide strong infrastructure and investor friendly tax regime. India is considered as a large and fast-growing emerging market economy that offers a broad range of investment opportunities for UAE investors, including but not limited to infrastructure and energy, consumer goods and real estate. Private investors from the UAE are also looking at investing in India in a significant way.

The bilateral cooperation and collaborations between India and the UAE is likely to see an increase in investments in the infrastructure, logistics and defense industries sector.

The two countries recently signed 14 wide-ranging agreements including a strategic comprehensive partnership and deals on defense and maritime cooperation. The bilateral cooperation and collaborations between India and the UAE is likely to see an increase in investments in the infrastructure, logistics and defense industries sector.

In my view there is likely to be a surge in deals between the two countries as the UAE and India recently signed various agreements to increase strategic partnerships and to promote cooperation between the two countries in sectors such as; technology development in cyberspace, defense, oil storage and management, maritime transport, infrastructure, small and medium industries and innovation and agriculture. Therefore we are likely to see an increase in deal flow in these sectors especially in infrastructure and energy. ■

ABOUT THE AUTHOR

DK Singh is the Managing Partner of KBH Kaanuun. He has over 25 years of experience in top tier multinational firms and leads KBH's Dispute Resolution, Corporate and Commercial teams.

He has extensive experience of working in the United Kingdom, India and the Middle East and has a reputable client led practice focusing on cross border business ventures and international dispute resolution. He has assisted clients in arbitration centres including London, USA, Singapore, Paris and Dubai. He is also actively engaged in advising companies in the financial services, hospitality, retail, upstream and downstream petrochemical sectors throughout the Middle East, North Africa and CIS countries.

DK Singh regularly contributes articles on arbitration law, mergers and acquisitions and dispute resolution in UAE and India. His articles have been published in reputable journals like *Law Business Research* and *PLC Corporate Magazine.*

DK is often relied upon by the clients as a legal and commercial advisor and regularly negotiates contracts and commercial deals on their behalf.

Practice areas

- Banking and Finance
- Corporate Commercial
- Dispute Resolution and Arbitration
- Regulatory Compliance

Qualification

- LLM London School of Economics (1991)
- MA University of Delhi India (Economics) (1982)
- LLB University of Delhi (1979)

Membership

- Registered as Lawyer with Legal Affairs Department Dubai, UAE
- Solicitor, Law Society England and Wales
- Advocate, Bar Council of India

FIRM PROFILE

Achievements

KBH is set apart from its competitors by offering both case management and advocacy services and many local and international law firms based in the region instruct KBH as an advisor in their own matters to carry out the advocacy, advise on strategy and finalise pleadings. KBH clients benefit from a cost-efficient litigation service, and in-house counsel who is able to provide input from the inception of the case, which contributes to higher success rates in all of KBH's matters.

The firm relies on its reputation for winning business and all of its team members contribute to the success of the firm in winning new clients. The firm has carved a reputation for itself in financial services, employment, private client and property related matters.

In the financial services space, KBH wins business across the entire spectrum of services:

- Entry strategy and incorporation in the DIFC for both regulated and nonregulated entities;
- Advising new startup financial services business in conducting business in accordance with DFSA rules;
- Assisting companies in relation to DFSA imposed liquidations and DFSA led investigations; and
- Assisting clients in relation to disputes arising out of mis-selling of financial services.

The firm has won significant high profile mandates including:

- Appointment on the Liquidation Committee of a high profile European financial institution representing several clients.
- Advising Saudi Arabian and Singaporean wealth management firms in setting up in DIFC;
- Advising a high profile financial services firm in relation to a DFSA investigation; and
- Initiating multi-million dollar claims on behalf of a liquidator and separately for a High Net Worth individual.

Further, KBH has been instructed in a number of property disputes involving DIFC LCIA arbitration including the most high profile financial misselling case backed by litigation-funding in the entire GCC region.

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Bird & Bird

Key Issues Facing Anglo-Indian Businesses

India is the third largest source of FDI in the UK. The impact of Brexit will mean Indian businesses need to plan carefully for the legal challenges ahead. James Mullock, Partner at international law firm Bird & Bird, looks at the issues.

BREXIT

In March this year, the UK government served formal notice under Article 50 of The Treaty on European Union ('EU') to terminate the UK's membership of the EU. This starts a two year notice period, which means the UK's exit (or 'Brexit') will most take effect in March 2019. In the meantime, the UK will seek to negotiate the terms of exit and future trading relationships.

So what impact does the UK leaving the EU have on Indian businesses that have operations in the UK or EU, or do business with companies in those regions? Some of the immediate challenges for businesses will arise from the impact of Brexit on the free movement of goods, services and workers and a number of areas covered by the single market, including the protection of IP rights. Forward planning is, therefore, key.

UK as a gateway to Europe?

At present, Indian businesses that wish to trade or invest in the EU often establish operations in the UK as a stepping stone to trading with other EU countries. Will they still do so if the UK's trade agreements with India and the EU are less enabling or in a state of flux?

Trade implications

UK Prime Minister Theresa May has indicated that the UK will be leaving the EU's Single Market, and as such, will be open to establish new trade agreements with nations outside the EU free from the constraints placed by other EU countries. India was one of the first countries to which the UK sent a trade delegation following its service of Article 50 notice, so it is clearly evident that nourishing and growing existing trading links between India and the UK is high on the UK government's priority list.

The Brexit vote has already caused a significant fall in the value of Sterling against certain key currencies, including the Indian Rupee. This has reduced the cost of UK business and property acquisitions by Indian companies and other overseas buyers. The fall in the value of Sterling may also impact on the number of UK visitors to India, with trips becoming more expensive for them.

Contracts

Existing commercial contracts Indian companies have with UK parties may be affected by the terms of future trade agreements (including any new trade barriers or tariffs), continuing currency fluctuations and the ability of the UK nationals to work in the EU and of other EU nationals to work in the UK (see Employment implications below).

Whether Brexit provides grounds for termination of an existing contract to which Indian businesses may be a party will depend very much on the particular terms and specific facts. Parties could seek to rely on material adverse change or force majeure clauses as grounds for termination following Brexit but their success will come down to the interpretation of the particular clause and the particular facts of the case. Changes in a party's economic circumstances have generally not been held to qualify as force majeure events under English law. It is also possible that parties could seek to argue that a contract has become frustrated as a result of Brexit but again, such an argument will depend on the facts of the particular case.

Existing disputes with UK/EU elements are unlikely to be affected in the short to medium term as existing EU laws will continue to apply. In the longer term, Brexit may affect claims based on EU laws and impact on the rules on service of legal process and the rights of enforcement of judgments between the UK and other EU Member States.

The drafting of new contracts is also likely to be affected by potential new terms of trade – for example, to confirm which party will be responsible for the payment of any additional duties or tariffs.

Employment implications

For Indian companies with nationals from other EU member states working in the UK, the rights of those individuals to continue to live and work in the UK following Brexit are unclear. The UK's Prime Minister has said that she would like to guarantee the rights of the 3 million EU citizens settled in the UK before the referendum, including their right to remain in the UK. However, this is dependent on other EU nations agreeing an equivalent deal for British nationals living in other EU member states. As a result, the position remains one for negotiation, albeit as an "important priority" for the UK. Indian businesses which employ EU nationals in the UK and/or UK nationals in mainland Europe will need to monitor the Article 50 negotiations on this point.

Likewise, the end to the free movement of EU nationals to the UK, given as an objective in negotiations by the UK Prime Minister, may also make it more difficult for Indian companies with operations throughout the EU to relocate employees from other EU member states to the UK and vice versa.

We are recommending that clients undertake an audit of their current and projected 2019

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PARTNER

workforce to help identify individuals who may be affected by post Brexit changes in immigration law, including those who may be able to apply for citizenship or permanent residence and to target communications to employees who may be most affected. The circumstances of the families of those Indian staff posted to Europe who may also be affected should also be considered. In short, plans for recruitment and secondment of staff may be impacted.

Other implications

Other implications for Indian businesses will depend on the sector in which they operate and will remain uncertain until the UK's trade negotiations with the EU and US are finally concluded.

DATA PROTECTION – THE INTRODUCTION OF THE GDPR

The European Union has had laws governing the processing of information about living individuals for more than 30 years. In May 2018, the General Data Protection Regulation ('GDPR') will come into effect, providing a significant refresh to these existing laws.

The changes which are to be ushered in by the GDPR are substantial and ambitious. It is one of the most wide ranging pieces of legislation passed by the EU in recent years, and concepts to be introduced such as the 'right to be forgotten', data portability, data breach notification and accountability will take some getting used to. As will the maximum fines for failing to achieve compliance – the greater of 4% of world wide turnover or €20 million.

Indian companies who aren't already aware of the GDPR should take note, as the regulation won't just apply to companies incorporated within the EU, but also to any company that processes the data of EU citizens, as staff or customers. The UK government has also stated that the UK will retain the GDPR after it has exited the EU so Indian companies with UK operations will remain equally affected by the new laws' provisions.

Indian companies with operations in the UK or elsewhere in the EU will be affected by the GDPR.

In a world that is so dependent on the internet, and so many companies relying on digital business, it's going to have a very significant effect on operations from a range of sectors and industries. Everyone should be aware of the obligations that are coming, and the consequences of getting it wrong.

What is the GDPR?

The GDPR is EU law that will regulate the use of personal data by organisations of both their staff and their customers. Interestingly, a company's staff are often the first to complain if data isn't used correctly, in particular in countries such as Germany, Spain and France where expectations are highest given cultural attitudes to privacy and historical events.

There is a huge difference between the current data protection laws (which were written in 1995) and the latest refresh which will take effect in May 2018. There are similarities between the approach taken by the GDPR and the US Sarbanes-Oxley Act introduced in 2002 to regulate accounting practices following various corporate financial scandals in the late 1990s – in particular the introduction of provisions relating to internal governance controls, severe penalties for improper performance and a greater emphasis on internal auditing and reporting. Companies which operate in Europe or which process European citizen's data will effectively have to implement new data governance measures. Fines will be greatest where little or no such accountability measures can be pointed to.

There are a number of challenges the law will introduce that Indian companies should be made aware of.

What are the main challenges?

1) Data breach notification: If an organisation suffers a cyber-attack or if an employee loses or misuses personal data, organisations must proactively confess details of the breach to regulatory bodies and possibly also to affected individuals. This could be extremely uncomfortable for a lot of companies, as they risk negative stories in the press and loss of trust in their brand. Increased notification and publication of data breaches will also likely lead to more data litigation. This obligation is much more onerous than those imposed currently by laws in India. Indian companies must therefore be more prepared and have good reporting structures in place in relation to their European operations if a data breach was to occur after May 2018.
2) Accountability: Similar to Sarbanes-Oxley, the new law requires companies to have implemented and to maintain new governance measures. This includes updating policies and procedures, introducing training and conducting privacy impact assessments (PIA's). More budget and manpower for compliance initiatives will be necessary to upgrade processes.
3) Penalties: If a company fails to duly notify the regulators of a breach, they must pay a penalty of either €20 million or 4% of their worldwide turnover, whichever is higher. This would be quite a significant blow to any company.

Why does the GDPR matter to Indian companies?

Indian companies with operations in the UK or elsewhere in the EU will be affected by the new regulation. The GDPR's many obligations will apply to organisations located anywhere in the world which process EU citizen's personal data in connection with their offer of goods or services, or their "monitoring" activities (defined to pick up many online behavioural marketing activities).

Over 100 countries around the world now have data protection laws. Historically, a number of countries have replicated the data protection laws of the EU and developed their own domestic laws. It is possible the GDPR could be replicated in other such jurisdictions, for example Japan, Hong Kong, Israel, Singapore, Switzerland, Australia and Argentina and effect Indian companies with operations there.

Legal developments in all jurisdictions with data protection laws should be tracked as the legal landscape is not just changing in Europe. For instance, Australia will introduce a new data breach notification law with effect from February 2018. This legislation, like the GDPR, will not only affect companies in Australia but international companies with Australian operations. The law means that companies will need to investigate any data breach they have suffered within 30 days and if data was lost as a result of unauthorised access, the breach must be reported to the authorities and the affected individuals

Traditionally, the data protection laws in India have imposed lighter obligations than those implemented in the 100 world wide countries referenced above.

What should Indian companies do to prepare?

Well organised businesses would be looking to run a gap analysis now to work out where they need to concentrate their efforts and what to prioritise. It's essential to have a good project plan of actions that are going to need to be taken. Where will policies need to be upgraded? Where will companies need to appoint a data protection officer? Where will new training programs need to be introduced? All those organisational changes that are going to be required in your company should be addressed. And secondly, who will you assign for responsibility for this area? For a lot of businesses this isn't an area of compliance they've dealt with with just a single appointment. Who and what budget will be used are important parts of planning.

Whether India adopts laws similar to the GDPR is yet to be seen, but what is certain, is that any Indian business that has dealings with the EU or UK will be impacted by the GDPR. It's important businesses prepare now to avoid non-compliance in future.

INDO-ANGLO M&A

The relationship between India and the UK

The UK is the single largest G20 investor in India and has been since 2000. In fact, UK companies currently employ 788,000 people across India – representing one in 20 of private sector jobs in the country.

India's investment in the UK is similarly significant, with India being the third-largest investor behind the US and France. Indian companies invest more in the UK than the rest of the EU combined. There are currently more than 800 Indian companies operating in the UK, employing over 110,000 people.

Economic sectors that see the greatest India-UK commercial activity:

- Healthcare/pharmaceuticals
- Energy
- Technology & communications
- Life sciences

What are the current Indo-Anglo M&A trends?

There has been a lot of M&A activity in the last 12 months, especially in Britain as businesses plan for the uncertain times ahead post-Brexit. One of the main trends we have seen when advising our clients in India is the increase in financing of Indian companies outside of the UK.

The primary reason for this is India's unique economy. Where countries like China and Russia rely heavily on a few key sectors like manufacturing or oil, the highly diversified Indian economy has both very strong service and manufacturing sectors – an unusual combination that makes for a resilient market.

The Rupee has been less volatile than most currencies in developed countries during the recent period of high volatility caused by political and economic pressures. The buoyant Indian economy compared to that of other jurisdictions means it is an interesting time for M&A by Indian companies. If Indian companies are able to raise finances, they can easily enter other, weaker jurisdictions and acquire assets.

Bird & Bird works for various Indian clients and advises them on their overseas corporate M&A acquisitions and financing advisory work. We've recently seen a lot of appetite for this type of work, particularly in the life sciences and renewable energy sectors.

By way of example, our corporate team recently completed a US acquisition by ERBA Diagnostics UK Ltd of Lumora Ltd, a Cambridge based diagnostics business. This transaction involved detailed advice around the availability of patent box tax regime and potential tax benefits of entering into such a tax regime. ERBA Diagnostics UK Ltd is a part of the ERBA Mannheim GmbH Group (Germany) which is a lead player in the In-vitro diagnostic segment. Transasia Bio-Medicals Ltd, which is the foundation of the ERBA Group, is one of India's leading diagnostics companies.

Our corporate team also completed an acquisition of Western Thermal Limited by IGL Holdings Ltd (IGL). IGL is a member of the Mumbai based Indsur Group, which has operations in four countries with diverse interests, including iron and steel castings, auto gears, oil and gas pipe, steel products, thermal engineering and boutique investments. WTL is a leading UK company that provides end-to-end solution and is a one stop, multi-discipline solution provider and specializes in supplying, contracting, and manufacturing of insulation to a wide spectrum of industries that includes power plants, refineries and building services.

Common challenges in a cross-border Indo-Anglo deal

India and the UK have different legal frameworks and governing laws which causes some significant challenges with mergers and acquisitions. The differing regulations and approvals for both countries means there is restricted flexibility and often time delays. This also translates into issues involving the accounting and tax regimes.

Another challenge in a cross-border deal with the UK and India is the cultural differences, particularly the differing approaches to the M&A process. The Indian approach is very sophisticated which means that the process is generally very time consuming, particularly in the healthcare sector.

In terms of market practice, there is a divergence between international deals and the deals that happen in India. For instance, unlike the UK, India has inherited the buyer-friendly approach,

Different Indian and UK legal frameworks cause significant challenges with M&A.

common in US M&A transactions, where all warranties (contractual assurances displaying any liabilities within the business) are given on an indemnity basis. The UK practice is for sellers to only give indemnity for specifically identified risks. This not only causes more divergence between the two companies but it also means that the time to complete the approval process is doubled.

What should Indian companies do to avoid these challenges?

In essence, there is no one way of negating all complications, but there are certainly ways to alleviate the damage. Firstly, clients are persistently trying to be more cost effective so it helps if you have a strong local advisory team. It is also wise to shop around for the right advisory team in order to get an accurate overview of the marketplace.

Make sure a mutual business objective is established from the start. It's key to have in-depth conversations from the outset and ensure there is an effective deal management process in place. Conversation and clarity are key players in this scenario so make sure these discussions take place well before the transaction kicks off.

Ensure the differing legal and regulatory requirements and issues are duly considered in advance. It's important that everyone is aware of the time constraints and the potential issues that could arise. ■

US-India Dealmaking: A Look Ahead

The world's largest economy and the world's fastest growing economy are set to enjoy a period of explosive growth in bilateral trade

FDI – INDIA AND USA: MOSTLY, BUT NOT ONLY, A ONE-WAY STREET

Since the Modi Government took power, Foreign Direct Investment (FDI) from the USA to India rose about 500%. Indian FDI into the USA grew at a lesser rate, but was also sharply up. India became the fourth fastest growing source of FDI into the USA, including in sectors beyond IT where major FDI into the States began. Much of this was not from acquisitions, but through a steady increase in parent company investing and expanding into foreign markets.

This remarkable dual expansion of capital flows was accompanied in 2016 by a decrease in India in-bound M&A transactions and an uptick in out-bound global Indian M&A transactions, including in the USA. Most notable was the acquisition of U.S.-based HealthPlan Services by India's Wipro Limited for USD 460 million.

Formal trade figures are inherently incomplete and misleading. Mauritius and Singapore appear as the vastly dominant investors in India, but this is due to their holding company advantages, with underlying capital sources being from elsewhere. Indian investors remain relatively inactive in USA M&A. The principal factor is most likely valuations. Many mid-market Indian companies we advise seek acquisition of distribution channels and manufacturing at prices reasonable from an Indian perspective but much less than USA owners would consider adequate for a sale.

Continuing Indian annual restrictions on outbound capital by individuals block a surge in global outbound investment. As residents of the world's fastest growing economy, Indian companies have enormous room to grow within India, making it a challenge to risk capital in unchartered markets. The USA is perceived as distant and competitively challenging compared to closer less developed locations. And yet, Indian companies correctly perceive the USA as the world's largest, most sophisticated consumer market and a reliable place to do business, so reciprocal growth in FDI continues.

M&A OVERVIEW

What is US' investors' common perception of India?

Despite these positive signals, India suffers from a legacy perception of the license Raj. Investors face a host of legal and regulatory risks, including foreign exchange, foreign investment restrictions, and corruption. Foreign investments into India are subject to the FDI Policy of the Government of India and the provisions of the Foreign Exchange Management Act (FEMA).

JOE DEHNER

MATT SCHANTZ

MATT WAGNER

FADIL BAYYARI

US FDI INTO INDIA: GETTING INCREASINGLY ATTRACTIVE

India's dramatic rise as a destination for USA FDI continued through India's fiscal 2016. While the reform spirit in India is a major reason for this, the diminishing attractiveness of China as an FDI destination for American businesses, the expansion of USA businesses into South Asia, the rising wealth of Indian consumers and other factors (e.g., the ready use of English, a growing talent base with USA university backgrounds) have led American business to increase its investment into India, in recognition of India's explosive economic growth and expanding base of 1.3 billion consumers. The USA was India's most active inbound M&A investor in 2015, which included the acquisition of 78 Indian targets, followed by Japan and the United Kingdom. This trend continued in 2016, though Japan and UK invested more than the USA from April-December 2016, with a small decline in targets, amounting to 50 for that calendar year.

The BJP-led government has initiated pro-foreign-investment reforms under the "Make in India" program, removal of retrospective taxes, lowering of restrictions on foreign ownership (increasing foreign equity cap to 100% in most sectors), and most recently the GST reform. With more reforms on the horizon, which could include continuing lessening of restrictions in what foreign owners can do in India, USA participation in Indian M&A is expected to increase through the remainder of 2017 and into 2018.

Whereas a USA business can be formed digitally within minutes at minimal cost, starting an Indian company and conforming to banking and tax regimens appear a daunting, time-consuming and costly obstacle course to American investors. In most cases, FDI is permitted without prior governmental approval of the Government, but uncertainty remains as to what is automatically permitted and what is not. FEMA prohibits most foreign exchange transactions entered into by Indian companies, whether foreign or local, unless such transactions are approved by the Reserve Bank of India.

Business in both countries will benefit from efforts to streamline and ensure cross-border business on fair and reciprocal terms that provide certainty and simplicity in enabling the two largest democracies in the world to benefit their populations.

What would you say are the great differences between US and India deal-making? Can things be lost in translation? If so, what are some simple things to consider for Indian companies and lawyers with US advisers?

A big difference is due diligence. USA M&A practice virtually takes for granted the reliability of financial statements, with audited results and footnotes about unusual matters. Reliance on an Indian company's financials is insufficient to understand a target's true financial picture. Indian states lack uniform laws and consistent enforcement, and there is inadequate publicly available information. Most companies in India are family owned or run. Many lack control systems common in the USA and have not adopted auditing standards in line with USA practice.

Prospective Indian investors should understand the USA's heavy regulatory regime underpinning due diligence efforts, including cybersecurity, data protection, CFIUS, FCPA compliance and other rules. Indian investors should seek qualified tax advice and work with their Indian counsel and USA counsel familiar with cross-border acquisitions.

Which sectors do you see as most promising for US-India deals in the coming years?

Beyond IT and BPO services, manufacturing, chemicals, consumer products, healthcare, financial services, energy and infrastructure are promising sectors for US-India deals.

India has a strong and immediate need for improved housing, healthcare, and access to sanitary facilities, which will drive demand for domestic manufacturing of petrochemicals, plastics, equipment and construction materials.

The country's increasing middle class will demand an increasing array of consumer products. India has an underdeveloped credit market. Many households are unbanked, presenting a significant opportunity for the financial services sector. Indian opportunities in the USA mirror such reciprocal needs, as India can both penetrate a much larger market for products and services while globalizing and upgrading its technology and business methods.

What are the biggest recent regulatory changes to U.S. cross-border M&A, and do these impact India?

The Political Climate:

The Trump Presidency presents prospective challenges and opportunities for Indian business. In early 2017 as this is written, it is too early to know if election rhetoric will stifle or loosen cross-border business. One can predict an increasing need to be present in each country's markets. Both the Modi Government and the Trump Administration aim to boost in-country production of goods and services. With globalization an inexorable force, we predict a growth in localization of production and market presence.

Trade may decline, but business expansion across borders and into new territories will increase. This augurs well for cross-border investment. If USA proposals for a "border adjustment tax" become tax law, there will be a push for in-country production of goods and services – in both India and in the USA. Businesses should watch carefully as India and the USA conduct bilateral trade talks that could unleash rather than stifle cross-border investment and M&A activity. Lower business taxes in the USA, virtually a certainty in some ultimate form in 2016, will make USA acquisitions more attractive, but could also increase sale prices.

While not an immediate issue, Trump's protectionist and national security policies could present challenges for Indian investors in the U.S. Most controversial rhetoric has focused on China and Mexico, and India's trade surplus with the USA is substantially less than for many other countries. India's off-shore labour force could threaten Trump's plan to create more jobs for U.S. citizens, through a reduction in visas permitted for Indian residents to move to the USA for work. If so, this means acquisitions will increase in popularity as a means of establishing home footprints in each place.

LABOUR LAW

US TALENT: COMING & GOING

What are the first questions you ask from a labour law perspective in a US-India / India-US deal?

The first questions to consider are who are the key personnel and what kind of deal is this? If the acquiring company and the target company will be closely integrated, or if the deal involves a parent setting a new subsidiary operation in a foreign country, then often key management personnel will travel or relocate to the other country to facilitate the deal and manage operations. Relocation of key personnel involves many considerations, including immigration, tax, compensation and benefits.

Another key question is who will handle personnel matters and labour compliance in the foreign country. This is critical when establishing new operations in a foreign jurisdiction, or acquiring a relatively small or less sophisticated foreign entity. There are vast differences in the labour laws and customs of the US and India, and you must have experienced Human Resources personnel and legal guidance. Larger more sophisticated target entities can be expected to have robust personnel departments familiar with local laws, but you still must perform due diligence during the acquisition.

What kind of US labour laws apply to staff in India?

Few US labour laws reach outside of the USA. Anti-discrimination laws may apply to American citizens working abroad, but only if they are employed by a USA company abroad or work for a foreign company “controlled by” a USA company. Control does not simply mean that the foreign company is a subsidiary of the USA company, but requires a more direct connection between the business of the two companies.

Under certain circumstances the USA’s anti-bribery laws can apply to non-American citizen staff in India, but this would be generally limited to situations where a foreign company acted as an agent in furtherance of the interests of USA persons or a USA company. This would require a significantly closer relationship than a simple parent-subsidiary relationship.

What are some of the biggest recent developments in USA labour laws that have an impact on India businesses?

USA labour law is constantly evolving. There have been significant developments in recent years in wage and anti-discrimination laws. The USA came close to significantly raising the required minimum salaries for millions of low level “white collar” administrative workers and managers, but those changes were halted by courts and may not come into effect.

Anti-discrimination laws have seen expansion by court decisions in recent years, with more coverage for gay and transgender persons, though the law is still in flux. But core features of the US labour regime, including at-will employment and a lack of written employee contracts, remain in place.

What are some of the most important considerations when sending personnel to work abroad?

The employment relationship becomes much more complex when an employee is sent to work abroad.

You first need to tackle immigration and work authorization in the new country—how easy or complex will the visa application be? How long will it take and what will the costs be? You should consider whether the employee will continue to be directly employed by your company or will be employed by the entity abroad, and how to structure the relationship. There may be organizational or personal tax consequences to this decision.

Consider which country’s law will apply to the employment relationship, although understand that most countries’ labour laws have mandatory application to anyone performing work in that country. You need to consider the personal income tax consequences to the employee, and if the company will give additional compensation to normalize the employee’s salary regardless of tax consequences. You must think about the employee’s pension or social security contributions, and whether they must now pay into the foreign system or if that can be avoided. You should think about healthcare and other benefits and how those are provided in the foreign country. You may also consider overall compensation, including allowances for return travel home, for housing in the foreign country, etc. You should memorialize expat arrangements in writing, so that the company and the employee moving abroad understand and confirm the details of the arrangement.

BRINGING TALENT TO THE US: THE VISA REGIME

Indian companies typically have three immigration options to bring key personnel and talent to the USA:

B-1 Business Visitor: This category is for short-term business travel, where the individual will not perform any work in the States. This is appropriate for business meetings, sales meetings, attending industry conferences, performing preparatory work to establishing a new business in the USA.

H-1B Professional Employee: This most commonly used visa has come under greater scrutiny recently. This visa type is very flexible, and permits a USA company to sponsor a qualified foreign worker for a job requiring specific knowledge equivalent to at least a four-year university degree in some specific field. Only 85,000 new H-1B visas are available every year, and demand vastly exceeds supply. All petitions should be filed on 1st April of any given year, and a randomized lottery process determines who gets to proceed.

The USA is considering changes to the H-1B program because of allegations that H-1B has frequently been used to replace domestic workers with lower-paid foreign workers.

L-1 Intracompany Transferee: This category is specifically designed to transfer foreign talent to a USA company. The individual must have worked for at least one year for a foreign company, and now be transferring to a related USA company. The foreign company and USA company must be related, for example as a parent-subsidiary or by having a common parent company or common individual owner. The individual must have worked abroad, and be coming to the States to work as a manager or in a position requiring specialized knowledge. There are additional criteria to determine who qualifies as a manager, and what qualifies as specialized knowledge. Although the Government heavily scrutinizes these kinds of applications, this can be a strong option for a multinational company needing to transfer talent from one place to another.

LABOUR LAW RED FLAGS - WHAT ARE USUALLY THE MOST VITAL AREAS IN US-INDIA LABOUR LAW?

Employment lawsuits can be a costly distraction to any American business, and robust labour law compliance efforts go a long way towards mitigating liability. Indian acquirers need to do due diligence in discrimination and harassment law compliance, wage and hour compliance, worker's compensation (industrial accidents), I-9 work authorization verification, and the use of independent contractors.

These topics are some of the largest potential legal landmines for any USA employer, and potential sources of liability that should be explored in due diligence. The USA is comprised of 51 different legal systems. There are broad anti-discrimination and wage laws at the federal level, but many more specific laws and regulations for each state. Some states, such as California, regulate personnel matters much more than others.

US INTELLECTUAL PROPERTY PROTECTION AND PITFALLS

INTELLECTUAL PROPERTY - WHY FILE PATENTS IN THE US?

A patent gives the owner the right to stop others from making, using, selling, offering for sale, and importing the patented article or any implementation of the patented method, all generally coextensive with the USA's borders. These rights might protect one's market share, give one an alternative revenue stream (from royalties), or even block a competitor from improving its product in a commercially useful way.

AND WHY NOT FILE IN THE USA?

Preparing, filing, and prosecuting a patent application through the US Patent and Trademark Office is typically a several-thousand-dollar proposition.

If there is not enough making/using/selling of the patented product or device in the USA, or the prospective applicant is not sufficiently present in the American marketplace (or the related manufacturing space) to determine whether a competitor is using the invention, or is insufficiently capitalized to enforce a patent were they to discover infringement, then investing in an attempt to patent the invention in the USA may be unwise.

HOW DOES GLOBAL ENFORCEMENT OF US PATENTS WORK?

USA patents are enforced in the federal courts on a countrywide basis. In addition to usual adjustments those from other jurisdictions have to make when they litigate in the USA, patent litigation involves substantial discovery and technical issues that drive up the costs of litigation as high as $2 million or more per party. These fees are shifted to the losing party only in exceptional cases.

When a US company acquires an IP-rich Indian target, what are some of the most important deal-breaking legal issues that crop up?

USA patent law has changed in important ways over the last several years, and those who speak American English are likely to be the final arbiters of the meaning of any given patent. Indian companies that invest heavily in IP should ensure that they receive counsel from patent attorneys well-versed in recent USA case law of patentable subject matter and expedited examination procedures, as well as modern American usage.

TIME PERIODS, COSTS & PRACTICALITIES

Cost structures of filing in the USA: If a small company has not filed a patent application on an invention, a "provisional patent application" can typically be prepared and filed for US$3-8,000 of attorney work (depending on the complexity and volume of the disclosure) and a $130 filing fee. Up to one year later, a USA-only "nonprovisional patent application" can be prepared and filed for another $3-10,000 of attorney time and a $730 filing fee, or nearly the same document could instead be filed as an international patent application under the Patent Cooperation Treaty (PCT) for a filing fee just under $4000. Post-filing costs may be as little as $1000 or as high as an additional $10,000 or more, and the amounts reach even higher if the applicant has to appeal rejections or extend their correspondence with the examiner.

Time periods & amounts of protection offered: During the one-year life of a provisional patent application, any invention described in the application can be called "patent pending" in the applicant's materials. The moniker can remain after the nonprovisional and/or PCT application is filed as long as the claims presented in the application cover the device or method. One cannot bring an infringement lawsuit on an invention until the patent is granted, which usually occurs 2-3 years later, though the patent owner can then collect "provisional damages" from any party who (1) had notice of the officially published application (which occurs about 18 months after the earliest filing date) but (2) practiced the invention claimed in the application so long as (3) the claims in the application do not substantially change between that publication and grant of the patent.

Potential costs of patent litigation in the USA: A 2015 survey found a median cost of USA patent litigation (where $1-10 million was at risk) to each party was $950,000 through the end of discovery and $2 million through final disposition.

Frost Brown Todd welcomes Indian companies to explore the USA market. For a guide to doing business in the USA, see www.fbtglobal.com .

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India Unleashed 2017

Professional Services to the Legal Industry

Legally Rising – the Changing Face of Legal Talent in India

By Rishabh Chopra and Nakul Bhatnagar

The Indian legal talent market remains buoyant as we move through 2017 and we see strong hiring activity continuing across both private practice firms and in-house legal teams. This positivity can be attributed to the fact that Indian industry has witnessed a steady rise over the past few years in terms of productivity, expansion and revenue. The Modi regime has brought about many positive changes (like the Make in India campaign) to help promote India as a global player and to attract inward investment, and we have seen the macro level rise of the legal industry in consonance with the economy as a whole. It is estimated that Indian GDP will grow around 7.1% and India will remain one of the most attractive destinations for investment and other economic activities. India has been one of the most sought-after places to do business since 2009/10; FDI inflows into India in 2016 jumped 18% to USD46.4 billion at a time when Global FDI fell. New liberalization steps by the government contributed to attracting FDI in all quarters last year and India was the 10th largest recipient. This is a clear indication of the bullish market sentiment towards investing, thus increasing the need for lawyers and legal professionals on both the in-house as well as private practice side. Legal talent requirements have expanded and the market, albeit being a little saturated per global cues, remains open for strong and proactive talent.

IN-HOUSE LEGAL

From being an internal support function, the in-house counsel of today has transformed to being an important business partner. We have been witnessing in-house legal teams expanding their scope of work to backing and sometimes spearheading growing business needs. With more and more MNCs setting up shop in India, there is a clear and obvious need for legal professionals who can assist these corporations in the day-to-day running of their operations and hence, there is demand for lawyers with good pedigree and experience.

Some of these MNCs are strategically moving on to have diverse teams and this year we saw demand for women lawyers increase for specific roles at companies in the FMCG and financial services space. Business strategies call for lean resourcing so most hiring has been at senior (GC) and mid-levels. From being 'one of the many employees', GCs are now being viewed as a key employee and are considered part of leadership teams at most corporate houses. Companies are also realizing the importance of having separate legal and compliance functions, especially in circumstances where companies are in a highly regulated sector such as financial services, insurance, telecom, and pharmaceuticals such as lifesciences, healthcare and medical devices. We are also progressively seeing mid and senior level private practice lawyers wanting to move in-house to avoid increasing pressures like book building, client generation and business development.

Until now, the usual protocol has been to delegate work to law firms that are involved in high profile advisory and transaction related work, however, we are seeing a shift to get most of the work done in-house. Whilst the role of law firms can never be ruled out, it is essential that there is a strong base within an organization's own structure. As a result productivity has increased, efforts are streamlined and costs have been reduced, which was the original purpose in the first place.

MAJOR SECTORS IN THE MARKET

The major players in the market have been investing in various sectors across the country. Whilst working independently, they form an integral part of this ecosystem. Here, we take a closer look at what seem to be the most dominant sectors in the market and how their growth has impacted the economy.

RISHABH CHOPRA
HEAD OF INDIA

NAKUL BHATNAGAR
SENIOR CONSULTANT

PHARMACEUTICALS & HEALTHCARE

The pharmaceuticals sector is expected to continue its growth phase with the government allowing 100% FDI under the automatic route for greenfield projects and unveiling the Pharma Vision 2020, which seeks to make India a global leader in the production of end-to-end drug manufacturing. The healthcare sector is also seeing impressive growth and was valued at USD 37 Billion in 2016. Once again, the need for legal talent has been diverse in this sector. In addition to demand for commercial lawyers and contract specialists, the pharmaceutical and healthcare industries also have a regular demand for experts in IPR laws, especially Trademark and Patent specialists.

IT

As a hub of all things IT, India is one of the big players in this sector. With initiatives like Startup India, the government has been encouraging more investment in IT projects. As we move towards building and sustaining a digital economy, there is a dire need for constant growth in this already flourishing industry which is presently estimated at a total worth of USD 155 Billion. Whilst the growth rate is predicted to be around 5%, less than previous years, the sector continues to command confidence year on year. The IT industry has always been looking at IT / IPR based contracts specialists and contract managers at the junior and mid level. At the senior level, the industry still prefers professionals who have a well-rounded corporate commercial experience with sectoral knowledge.

MANUFACTURING

The Modi government has ambitious plans to boost India's image as a global manufacturing hub through the Make-In-India campaign. Its objective is to ensure that the manufacturing sector which currently contributes around 15% of India's GDP is increased to 25% in the next few years. The lower cost of production means more and more organizations are choosing to start their ventures in India. The hunt for quality legal talent has been diverse, spread over multiple practice areas. Along with corporate lawyers, we have also seen an increased demand for disputes lawyers and labor law specialists. The general trend in this sector is a preference for professionals with a similar industry background, rather than those from private practice.

INFRASTRUCTURE/ENERGY

Infrastructure has been one of the top priorities for the government to build and maintain and hence, the government announced a target of around INR 25 trillion for investment in the sector over the next 3 years. With India coming up to 35th place in global rankings of the World Bank's Logistics performance index, we can be confident that the infrastructure sector will continue to grow at an encouraging pace for years to come. Given the same, more and more companies are investing in quality legal talent who have been well versed with the industry. Private practice lawyers who have worked on infrastructure based transactions and even dispute matters, have been able to build a sizeable and dedicated clientele and are making the transition to in-house to help companies build a stable structure.

E-COMMERCE

The past few years have seen some very interesting moves (including some large acquisitions) in this market. One of the prime reasons being that this is a consumer-based industry and there has been a significant shift of the market towards online consumption. This trend was highlighted further during the demonetisation days and more and more people took to the internet for their purchases. However, the flipside showed that due to the failure of a few prominent startups, the investment in the sector slowed down by a slight margin over the last year. Interestingly, given the number of investments, mergers and acquisitions in this industry, we have seen an increase in demand for corporate / M&A lawyers. After a lacklustre 2016, we are seeing comparatively positive movement and are expecting the sector to be revived this year.

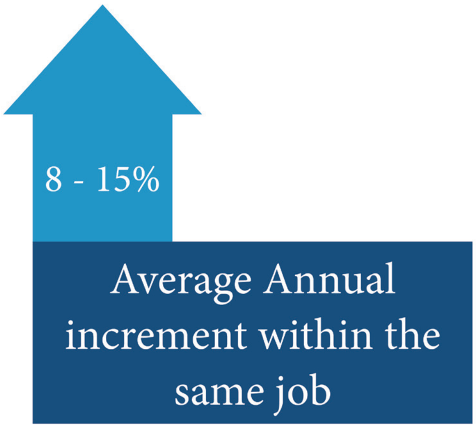
FINANCIAL INSTITUTIONS

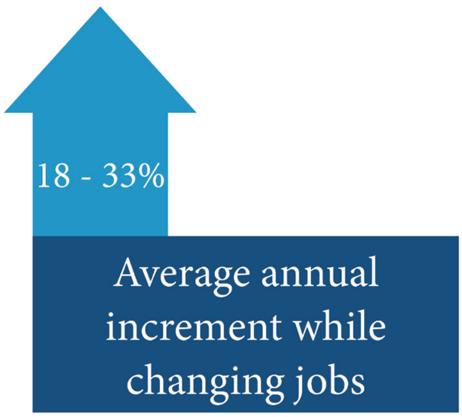
In the day and age of startups, we have seen more and more financing happen in all areas of business. Not restricted to new-age corporations, the financial sector is an ever-growing part and what can easily be defined as the backbone of this economy. Hefty investments are coming through day by day to support organizations in their growth. A definite increase in PE / VC funds operating in the country and their level of interest in India has been a significant factor of growth. With notable growth in avenues like Investment Funds, AMCs and ARCs, the industry has seen several banking & finance lawyers make lateral moves or the transition from private practice firms. Also, with newer and heavier public investment coming through, we have seen a rise in demand for strong capital markets lawyers to help regulate the business.

SALARY SCALES

We have given salaries below in terms of PQE for

In-House Legal	
PQE	Annual Compensation Range (INR)
Entry level to 5 years	3,60,000 - 24,00,000
5 to 8 years	15,00,000 - 37,00,000
8 to 10 years	28,00,000 - 65,00,000
10 to 15 years	52,00,000 - 1,25,00,000
15 to 20 years	88,00,000 - 1,65,00,000
20+ years	1,10,00,000 - 2,50,00,000
Legal head salaries vary between INR 60,00,000 to INR 1,20,00,000 and General Counsel salaries range between INR 1,10,00,000 to INR 2,50,00,000	





different levels of experience at prominent corporate houses that have legal teams in Delhi NCR and Mumbai. Compensation at financial institutions may differ widely depending on the role and organization.

Key determinants of compensation:

- Nature of the company: Multinational companies (especially if they are listed) tend to offer better salaries and benefits than their Indian counterparts.
- Location: Salaries offered in Mumbai are generally higher than Delhi NCR and Bangalore.
- The reporting matrix and size of the legal team.
- Market reputation of the organization.
- Pedigree of the professional and additional qualifications (LLM/CS).

Key highlights:

- Businesses and regional counsel have realized that they need more sophisticated in-house legal teams in India and thus, we have been witnessing stricter interviewing processes that range anywhere between 4 to 8 rounds at the senior level.
- In light of becoming more efficient internally and coupled with tightening of the external counsel budget, in-house legal teams are expanding and we are seeing more specialized roles such as disputes counsel, transactions counsel, regulatory and government affairs counsel emerge.
- To attract and retain legal talent internally, structural changes are being brought in where clear progression paths are being laid down for in-house legal teams and competence models are being developed. There has been emphasis on continuous learning and development and we have seen initiatives like executive/refresher courses, soft skills training and internal training being willingly adopted.
- Average annual increments have remained in the general range of 8-15% so far this year and are between 18-33% when moving jobs.

PRIVATE PRACTICE FIRMS

The legal talent market has become extremely competitive in the last few years and candidates are more informed about their options. Candidates don't just rely on a firm's reputation, they delve deeper to understand the reputation of the partner concerned, internal and external branding of a specific practice, compensation levels, growth path, learning and development or mentorship programs and flexibility to work remotely. The market has become candidate-driven and the hiring mantra has evolved from 'selecting' the best lawyers to 'attracting' the best lawyers in the market. Candidates are considering firms in terms of the wider benefits and future progression and not just base salary. They are also concerned with the level of mentoring they are likely to receive, and are looking for an open door culture with senior management so they can understand and participate in wider business issues.

The Indian private practice market has had an extremely exciting year. In terms of personnel moves there have been surprises, but the fundamental dynamics have remained stable. With the market considerably open, there is an environment for increased competition and candidates will likely benefit.

A brief overview of the key practice areas:

MERGERS & ACQUISITIONS / PRIVATE EQUITY

The constant flow of work on both the transaction and advisory side has ensured demand for proficient lawyers who can deliver in these sectors. With

In the first quarter of 2017, many transactions have seen multiple firms now act and advise on a single deal rather than just one, as a wide range of skills are needed to consider the complexities involved.

the inflow of FDI and major M&A deals happening in the country, lawyers with specific corporate and transactional skill sets have been kept busy. In the first quarter of 2017, many transactions have seen multiple firms now act and advise on a single deal rather than just one, as a wide range of skills are needed to consider the complexities involved.

SECURITIES AND CAPITAL MARKETS

Hiring and demand for Indian capital markets lawyers has increased not only within India, but also in other jurisdictions where transactions happen with Indian companies, especially with international private practice firms based in Singapore and Hong Kong. Many professionals have returned to India to work in the capital markets practice area. Indian companies raised almost $3 billion through initial public offerings (IPOs) in the first nine months of 2016, the most since 2007 and hence, the demand for capital market lawyers went up last year and the sentiment this year remains positive.

COMPETITION LAW

As the economic forecast has brightened there have been more and more competition cases (on the behavioral and structural side) giving an equal number of opportunities to legal professionals. A testimony to the rising importance of the sector is the fact that in 2016 close to 1,000 cases were filed before the Competition Commission of India (CCI) out of which they had disposed of more than 80% of the matters. There has been a trend for many litigation lawyers to solely concentrate on the behavioral side while corporate lawyers lend their expertise to matters of merger control as well. The role of the CCI in ensuring proper surveillance and effective implementation has ensured that demand for specialized lawyers will remain.

INFRASTRUCTURE, PROJECTS & ENERGY

As new government policies have come into place, the need for subject expert lawyers who can deliver real time results in the sector has been relatively high. Boutique and mid-size firms, specialising in infrastructure and projects, have been doing brisk business and attracting talent from large-size firms.

DISPUTE RESOLUTION

India is famed for its litigatious nature and with the courts being burdened more than ever before, it is not surprising that the country will continue to see more and more disputes being taken to courts or arbitrations. A shot in the arm has been recent judicial pronouncements by the apex court in India that have validated the cross-border arbitration clauses and narrowed the scope of interference in execution of arbitral awards coming from foreign seated arbitrations. Disputes in sectors like tax, construction, energy and the regulatory sector are snowballing and becoming more and more complicated. There has been an increase in demand for lawyers with experience in regulatory disputes, tax and compliance. The prominence of the sector is second to none and in a developing economy like India, disputes will always go hand in hand with the function of the law. The well-known disparity in the pay scales of disputes lawyers and corporate lawyers has lessened significantly as firms are starting to adopt similar pay structures.

BANKING & FINANCE

As a complete practice area, banking & finance has risen to become a force in the past decade considering the post-recession hits on financial institutions across the globe. Due to the banking & finance sector being relatively stable in India and increase in the financing deals last year, specialist banking and finance lawyers have been in greater demand.

IP AND TMT

As in previous years, Indian legal industry witnessed good growth in the field of IP, technology, data storage, analytics and data security. As data mining leads to targeted advertising, product development and the ability to provide products and services that are closely tailored to customer's needs, sectors like financial services, e-health and retail have invested in this field over the last year. Disputes in relation to trademarks, copyrights, patents, trade dress and domain name issues have set new precedents with the Indian courts adopting international principles and ruling to protect IP rights to deter infringers. This has led to the need for specialist TMT and IP lawyers, creating opportunities for law firms to increase their legal expertise in these areas. The full-service law firms are now no longer looking at IP teams as a support function, but are rather focusing on this specialisation as one of their core areas of expertise.

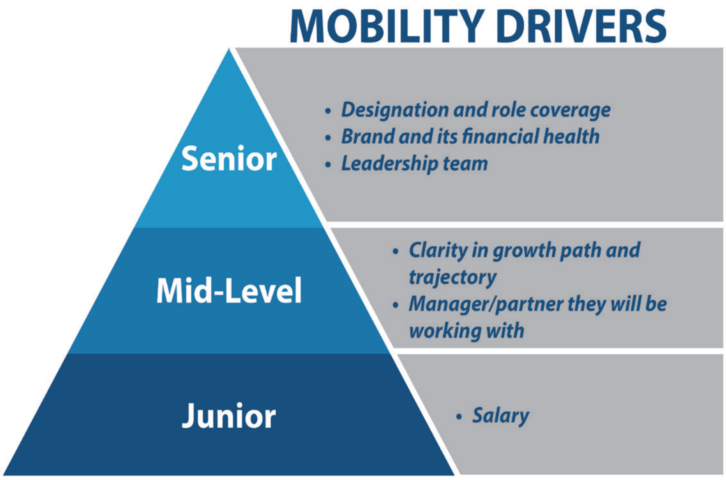
SALARY SCALES

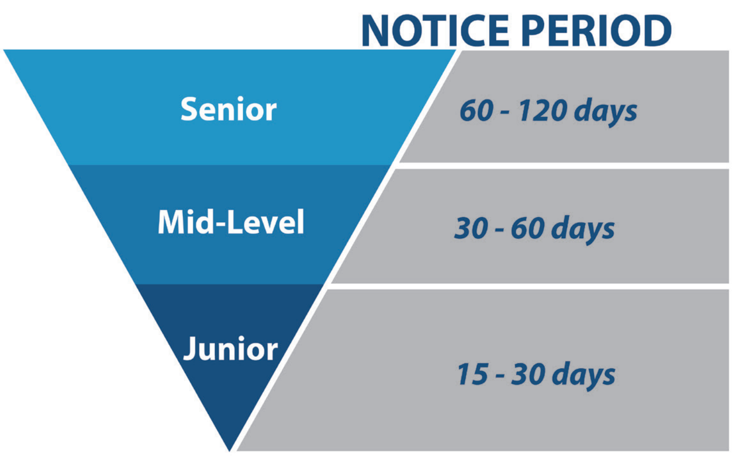
We have given salary figures below in terms of seniority and PQE at reputable law firms across Delhi NCR and Mumbai.

Key Notes:

- We saw some disparity between a couple of prominent law firms on the compensation ranges for corporate and litigation lawyers and hence, the litigation compensation numbers (where different from their corporate counterparts) have not been considered.
- The figures include variable components which could range from 10 - 50% of the total compensation depending on the level of the professional or 1 – 3 months of the fixed monthly retainer at the junior and mid-levels and/or percentage of receipts.
- These numbers do highly depend on the background / pedigree of the professional. Apart from the reputation within the ecosystem of a professional (especially at a senior level), law school, previous firm and years of experience are the major defining factors.
- At the mid and senior level, figures are usually 10 - 15% higher in Mumbai than Delhi.
- Most firms start the process of reviews in the month of January and announce their respective increments with effect from April of the new financial year. Some firms are yet to announce the increments for the current financial year.
- The average increments this year so far have been in the range of 7% - 12% at the top and prominent private practice firms. Some exceptional super performers have been able to attract an increment close to 20% and above as well.

Legal Private Practice	
Role and PQE	**Annual Compensation Range (INR)**
Associate (till 4 years)	11,20,000 - 35,00,000
Senior Associate (4 to 6 years)	29,60,000 - 53,00,000
Principal/Managing Associate/ Counsel (6 to 8 years)	48,00,000 - 82,00,000
Salaried/Retained/Associate Partner (8 to 12 years)	70,00,000 - 2,00,00,000





OTHER INTERESTING TRENDS

A. Mobility drivers:

When looking for the next career move, the motivating factors for prospective candidates can be multifold: better salary and benefits, designation, job security, work culture, brand of the organization and its financial health, manager or leadership team.

– At the junior level, we typically see better salary as a key motivator to take up the new role.
– Professionals at mid-level are more concerned about (a) clarity in the growth path and trajectory and (b) the manager/partner they would be working with.
– For senior level professionals, (a) designation and role coverage, (b) brand and its financial health and (c) leadership team, are the key motivators.

B. Key barriers to acceptance and onboarding:

Apart from compensation, competing/multiple offers and long notice periods have been common hurdles in onboarding the right legal talent.

– Multiple offers: Clients that move quickly and confidently throughout the recruitment process without any delays are the most successful. A fast (even if it's strict) process helps in sending out the right message about the seriousness of the organization in respecting the time of every individual involved in the process which in turn has made candidates take up the offer over others more often.
– Long notice periods: Organizations are becoming increasingly cognizant of the fact that getting the right talent on board is not magic *per se* - candidates are bound by their professional commitments and employment/ retainer agreements and hence, can have varying notice periods.
  - Junior level: typically 15-30 days on an average.
  - Mid level: varies between 30-60 days on an average.
  - Senior level: varies between 60-120 days on an average.
  - As mentioned above, these are heavily dependent on the candidate's employment/ retainer agreements and the organization's ability to buy-out the notice period.

C. Demand for Indian private practice lawyers overseas:

As with previous years, there has been demand for Indian qualified lawyers in foreign firms too as firms in Singapore, Hong Kong, Dubai and Tokyo have been ramping up their India-related business. In capital markets, banking & finance and disputes we are seeing the rising need for Indian lawyers, especially those with a New York / California Bar qualification. ■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The Automation Game

Meet the man behind the marketing technology that's turning BIG data into BIGGER money for law firms.

Cast your mind back to 2006. You'd be forgiven for framing it as some quaint alternate reality, tame in comparison to the turbulent times we now live in.

Pottering around a New York high-rise, Donald Trump had no idea what a Twitter was. While outside of the USA, most of the world didn't know what a Donald Trump was.

If one were to compile a list of that year's most shocking events, it would probably include a Frenchman's headbutt into an Italian's chest and a PowerPoint presentation by Al Gore.

(Reminder: It was he who rammed home the disastrous effects of global warming to anyone who'd listen. For the most part, they didn't. So not everything's changed.)

A VISION OF THE FUTURE

In a secluded(-ish) corner of London, meanwhile, four intrepid associates quietly launched Vuture – a marketing technology platform aimed at professional services that has, over the past decade, grown to become a leader in marketing automation and a stalwart of the legal sphere.

Vuture now powers many of the world's top 100 consultancy, accounting and legal firms, enabling users to create and manage every aspect of their marketing communication programmes, digital and print.

CEO David Brady has led the company since its inception and remains at the helm to this day, guiding Vuture clients along their automation journey. With over 25 years' experience as a marketer, Brady has seen the profession go through major disruption, including the ongoing effects of the two disruptors currently shaking up the legal marketing landscape: automation and big data.

Fresh off an enthusiastically received presentation on their interconnectivity at this year's Legal Marketing Association Annual Conference in Las Vegas, David talked about how such technological advancements are impacting law firms.

Data is like a language: without interpretation, it's meaningless.

Automation is a word we're hearing more of across various industries and sectors. How is marketing automation specifically affecting law firms?

Like many industries, legal is now utilising automation to deal with inefficiencies in operations that take a lot of time and are very manual.

In an industry based on relationships, the danger was always that by automating certain processes, something gets lost. The challenge for the provider of automation services, and for the law firms receiving them, is being able to create and

nurture those relationships at scale without losing intimacy.

Many law firms are fearful that the more they automate, the less able they are to provide a high degree of personalisation as part of their service. As it happens, automation has given firms the ability to communicate with clients, remain front-of-mind and deliver the information that clients want, when they want it and how they want it, adding value to their general package of services. This personalisation is what conveys the feeling of intimacy and uniqueness that is so coveted.

With more channels than ever through which marketers can communicate with, discover and track clients and prospects, what key advantages do marketers using automation software have?

Going back five or ten years, it would have been difficult to predict the type of everyday channels that are available to marketers today.

The problem with this increasing number of channels is that it's very difficult to manage them all. It's almost impossible for even the best-equipped firms to do so in a meaningful way that delivers value to lawyers and partners without introducing some form of automation.

Due to its ability to deal with the inefficiencies of manual processes, automation is becoming an essential ingredient for any department handling a typical range of activities like events, campaigns, branding, etc. These departments are also doing a thousand other tasks, often far beyond their resources, and in such circumstances automation can be a lifesaver.

Big data, much like automation, is becoming increasingly impossible to ignore. How are the two connected?

More channels means more data, which is giving some marketers a big headache, particularly when they've already got a million other things to do. The internal client, on the other hand, quite rightly wants to know what's going on and wants to see tangible results.

Where automation and data go together is in taking away manual processes involving the extrapolation and distillation of information. The issue is that having it is one thing, understanding it is another. Not all data is created equal; it's only as good as the questions that are being asked of it.

What's required is some understanding of the automation that can help to make better quality decisions. That means working out what the questions are to start with and then channelling the data in such a way as to make it valuable to the firm. That's the important bit – finding valuable data that provides valuable insights.

If you put the wrong fuel into a luxury car, it still won't go; it's the same relationship between data and automation in terms of the outcomes and the results that a firm can expect to achieve. Once those insights have been unearthed, the data can be used to change assumptions or processes and build new types of campaigns that help deliver outcomes.

You've described data as being capable of uncovering "the story beneath the story" with regards to a customer's journey unfolding over time and in context. How can law firms benefit from this?

Law firms today are consistently under pressure. Changes to company structure, globalisation, mergers and acquisitions, the huge downward pressure on price and the transformation of pricing models all require ever-increasing degrees of flexibility from law firms.

This means that significant competitive advantages can be gained from accurately understanding the behaviours of clients; something data can help with if you know what the data means.

Firms that are effectively set-up to gather data from clients or prospects engaging with them can create a picture, which in turn can reveal a story. What the firm needs is someone who can interpret that story. It's like a language: without interpretation, it's meaningless.

In the next few years, we'll see an increase in the number of employees whose roles are specifically designed to interpret the data from marketing and other activities. These data scientists will have the ability and insight to see and understand what's going on, tell you what it means and advise on what to do next. That level of intelligence will result in an enormous competitive advantage for the firms that get it right and use it wisely.

As automation becomes more prevalent, how do you convince marketers to embrace it and allay any fears they may have about the 'Rise of the Machines'?

It's difficult to not be exposed to this idea that all jobs are about to be overtaken by computers or robots. There's a lot of overstated fear around the subject, just as there was a century ago when people were convinced that the mass adoption of motorised vehicles would ruin thousands of lives dependant on the horse and carriage.

It's progress; that's the nature of it. Our environments move on. Roles change. A recent PwC report suggested that while millions of jobs will be replaced by AI and robots over the next 15 years, millions more will be created thanks to technological innovations.

Automation, which is only a small part of the advancement in technology, will have an impact, but all it will do is make manual processes less manual – primarily affecting sectors such as transport and manufacturing.

Ultimately, anyone with talent as a marketer shouldn't be worried, as they'll end up doing higher value, higher quality work, and that can only be good for them and their careers. It will also give them the ability to deliver measurable results and prove their effectiveness and true value, something that's often difficult for legal marketers.

What are the benefits of automation for CMOs and partners, who may not be involved in the minutiae of day-to-day marketing activities?

There'll be an obvious budgetary one as automation drives down costs. There'll also be significant efficiencies in the amount of budget that's wasted on bad processes due to the ability to measure outcomes and drive activities based on those outcomes, which is a huge benefit.

The old adage of 'knowing half of your advertising works, but not which half' should increasingly become a thing of the past, which is good news for CMOs and great news for partners, on a P&L basis.

Another key advantage is the ability to ascertain previously unavailable intelligence and insight on both a global/macro level and in relation to the finer details of how clients and prospects are engaging on an ongoing basis.

Automation makes fee earners more efficient at building higher quality relationships at scale, with the same intimacy as a handshake.

You've spoken in the past about data having an expiration date, and that data not processed quickly can become useless. How does marketing automation prevent this becoming an issue?

Data expiration is always going to be a challenge at law firms, where fee earners and partners have more pressing things to do than manage their data and records.

It's a constant struggle for marketers, who are expected to produce high quality content and

DAVID BRADY
CEO, VUTURE

engaging campaigns but are also reliant upon the veracity of the data they work with to deliver the results they expect.

The combination of CRM automation with email automation helps with this by limiting the amount of manual processes involved in keeping data updated and ensuring client preferences are always current.

How do privacy laws fit into it?

New legislation such as next year's GDPR will make a marketer's life much easier, providing the motivation to clean out databases to ensure they only contain people who are genuinely interested in engaging with their firm. It will also guarantee that the firms doing the engaging are only delivering relevant information.

Marketers will have a much more refined audience to work with, making their campaigns more targeted. Adding in automation to take care of the ground work and backend processes leaves marketers free to get on with some of the more rewarding parts of the job.

Vuture's journey began a little over 10 years ago. Has automation evolved in the way you anticipated?

Creating efficiencies was at Vuture's core when we began.

We started out with the thought that it would be great if the client could create, edit and manage their full range of campaigns without needing to use agencies, and that thought developed into a suite of marketing products with automation at the centre.

Could we have envisaged the huge rise in artificial intelligence and machine learning that's taking place now? Probably not, but the idea of increasing marketing efficiency was at the heart of what we were doing. We felt that we were giving a view of the future of marketing to our clients, which remains a constant for us to this day.

Where do you see automation taking the legal industry in the next few years and beyond?

As business models evolve, so will the sophistication of the automated capabilities that legal marketers employ. The ultimate beneficiary of that will be the end client.

Through technology, fee earners are becoming increasingly more efficient at building high quality, personalised relationships at scale and offering a service that is cost-effective, extremely value driven and streamlined. ■

ABOUT THE CEO

David Brady is the CEO of Vuture – pioneers in advanced marketing technology that helps firms in the professional services industries achieve success and increase revenue.

Leading Vuture's strategic centres in London, New York and Sydney, David is focused on creating exceptional client experiences and uniting a global team of talent within a culture based on creativity, daring and collaboration.

In recent years, David has seen a growing number of law firms adopt marketing technology to refine the way in which they communicate with prospects and build intimate, long-lasting client relationships.

With non-adopters facing the very real risk of being left behind, isn't it time you viewed the future of legal marketing?

Visit **www.vutu.re/explore** to find out more.