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Dear Colleagues,

In this second issue of Legally India, co-published with the team at Global Legal Media, we take a closer look at the world of disputes. In what can be the most exciting (as well as the most nerve-wracking) part of the job, we examine disputes of all shapes, colours and sizes and provide Indian lawyers, foreign lawyers and multinational companies with a closer understanding of Indian dispute resolution in a global context.

Our editorial explores the various disputes issues and challenges faced by Indian in-house counsel, while our friends at Bird & Bird take a step back to examine the dos and don’ts of managing global disputes. Meanwhile our editor, Kian Ganz, looks towards the future and investigates the growing influence of artificial intelligence (AI) and what machine learning can bring to the Indian legal ecosystem.

Our issue also features cutting-edge updates from six of the most important practice areas in India, provided by leading law firms, as well as reports from over a dozen countries examining their respective jurisdictions vis-à-vis India and providing practical advice for clients.

In our next issue, publishing September, we will turn to the transactional markets as well as covering the ongoing liberalisation saga. For more information, ideas and feedback, please feel free to contact me at: dc@globallegalmedia.com

We hope you enjoy the publication.

Danny Collins
Director / Global Legal Media
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For over 20 years, Latham & Watkins has been a trusted legal advisor to domestic and international clients on their transactions in India and globally. Latham combines deep industry knowledge and technical expertise to provide clients with innovative solutions to their most complex legal and business challenges.
Legally India – February 2018

Litigious Masochism in India, Quantified

While the government and pretty much everyone is aware of what’s wrong, we now need bigger and bolder moves to fix disputes in India, argues Legally India editor Kian Ganz.

No one wants to litigate in India, unless you are a masochist or a litigator, most of whom will agree that they must be in possession of a pronounced streak thereof.

But that’s not really news anymore. Everyone is and has been aware of the problem in nearly forever. It’s gone so far now that even the Ministry of Finance’s Economic Survey for 2017-18, in the section about the legal system, released in late January, begins by reciting the most infamous line from the classic 1993 Bollywood courtroom drama: Tarikh-par-Tarikh, Tarikh-par-Tarikh (“dates followed by dates followed by dates”).

It is too late to make incremental improvements, and in fact, things at the courts have been getting worse rather than better, year-by-year, on nearly all fronts ranging from pendency to judicial vacancies.

Economic cases, despite making only a fraction of cases, take nearly the longest on average, with durations exceeding four years at five major high courts, with tax cases taking even longer at six years, according to the Survey.

That’s never been an easy problem to solve, but one thing the survey notes needs to happen, is to bury the hatchet between judiciary and government.

Indeed, far too much judicial time and mindspace over the past years has been wasted by endless arguments between bench and government about judicial appointments, which should have been predicted and avoided in the first place. On this, the Economic Survey suggests: “The point is not which side is right, but that the legitimacy and effectiveness of each depend on the lack thereof of the other.

“According to public perception, there is some Law of Constant Overall Legitimacy and Effectiveness, with one side’s loss being the other’s gain.”

Even while respecting the “separation of powers” between state and bench, to “preserve independence and legitimacy... it should be possible and desirable for these branches to come together to ensure speedier justice to help overall economic activity,” speculates the survey.

That is easier said than done and also besides the point. An inefficient legal system is not caused by judges fighting a war against the executive; instead, political parties and parliamentarians have long looked to kneecap the judiciary. Judges, especially since the Emergency, predictably responded with a powerful jerk in the opposite direction, with, most publicly, the recent public rebellion of four senior judges against the Chief Justice of India (CJI), hinting that something was rotten within the institution and possibly even in the border separating the two organs of state.

A DEEPER MALAISE

It’s too easy to criticise a history of bad judicial decisions and strategy in dealing with reform.

Judges have long willingly straitjacketed themselves into the role of ultimate keepers of the constitution and of the national conscience, which was thrust upon them by citizens and the media as other institutions crumbled. In the process, most judges have begun to near-pride themselves over the necessity for unfettered opacity, by using contempt laws as a sword against and a shield from most attempts at scrutiny or modernisation,
always sitting judgment in their own causes.

But those factors by themselves cannot be blamed for the lack of efficiency of the institution: judges will and should be wilful.

How they act as a collective with its own insular culture, is a product of decades of under-investment in the legal sector, from the judiciary to legal education. When the vast majority of a handful of well-trained graduates see no perspective in public service on the bench, how do you expect to create a robust judiciary with enough foresight and creativity to ensure more than just its own survival? If the government and successive law ministries had actually nurtured the legal system rather than treating it as a necessary evil that is more trouble than it’s worth, we would not be in this situation.

It’s therefore welcome that the survey also makes some more practical suggestions for the government to look at:

- Moving even more cases out of the high courts to lower courts, coupled with capacity building for lower courts to deal with economic cases.
- Appointing the full roster of judges, rather than, as is currently the case, leaving 392 positions vacant out of 1079 positions available in the judiciary.
- Reining in the tax department that keeps pointlessly entangling companies in court proceedings, which it ends up losing anyway (see box ‘Indian courts in numbers’)
- Automating case management.

Nevertheless, without actually acknowledging the state’s blame in all this, I have great concern that such statements and plans will continue being mere recurrent platitudes, *Tarikh-par-Tarikh*. The first step to the recovery of India’s legal system, will lie in politicians and bureaucrats accepting the role they have played and will need to play.

**THE ISSUE AND ISSUES**

Despite all that macro-economic doom and gloom, occasional good disputes-related news does come out of India, though it’s easy to miss.

From our interviews with top GCs in this issue beginning at page 14, it is clear that institutional arbitration is a cornerstone to making disputes more palatable for companies.

Fortunately, the courts have been doing better and better at recognising the necessity of arbitration and other alternatives to courts, as explained from page 58. This can translate to a major confidence boost especially for foreign companies, though enforcement of arbitration is

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**INDIAN COURTS IN NUMBERS**

1958: The year that the oldest case still pending in a high court was filed
10: The number of cases per judge, per day, in the Bombay high court
117: The number of cases listed per judge, per day, in the Hyderabad high court
1,523: The average number of days that cases are pending across all Indian high courts
1,415: The average number of days cases are pending at the Supreme Court
8.1: The value, in billions of US dollars, of government projects that have currently been stayed by Indian courts
65: The percentage of cases the tax department “unambiguously loses”
11: The percentage of indirect tax appeals by the tax department in the Supreme Court that are successful

(1: data sources: Daksh; 2: 2017-18 Economic Survey)
not quite automatic yet in India. For instance, on 31 January, the Delhi high court upheld settled law and refused to interfere with the quantum of damages awarded in a Singapore-based ICC arbitration to Japanese pharma company Daiichi Sankyo for over $401m, which had been challenged by the counterparty in the Delhi high court in August 2016. In enforcing an arbitration, the high court upheld settled law that it does not act as a court of appeal. All this took 'only' one-and-a-half years. Still, that's not bad for a jurisdiction that less than a decade ago had a reputation of courts happily riding roughshod over any and all arbitral decrees.

And on 5 January 2018, the New Delhi International Arbitration Centre (NDIAC) Bill 2018, was quietly tabled, to very limited acclaim or news. It aims to set up an “autonomous and independent institution for better management of arbitration in India”, which would be an “institution of national importance”, correspondingly with government funding.

The passage of the Bill will not likely be controversial and it underscores the government’s commitment to arbitration and wanting to finally begin competing with Singapore, Hong Kong and London arbitration centres.

The other subtext is that it appears strongly linked to allowing foreign law firms in: what point is an international arbitration centre in Delhi, if international lawyers won’t be appearing before it?

In tandem, the Supreme Court on 1 February finally concluded hearings in the challenge against foreign lawyers in India, and I am happy to cautiously predict that their Lordships won’t be throwing out the baby with the bath water in their judgment: they might even rule that foreign lawyers should be allowed to come to India to act in arbitrations, which can only be a boon to making arbitration here more attractive in decades to come, rather than companies happily farming it out to overseas.

And even if the entire foreign law firms case turns out to be another damp squib on all accounts, it is at least pretty clear that the government has the full intention of stepping in and resolving some of the uncertainties once and for all (with a big question mark around the shape that the regulations will take).

There are also positive developments coming in a variety of other sectors. As examined from page 52 of this issue, the folding of the Competition Appellate Tribunal (Compat) into the National Company Law Appellate Tribunal (NCLAT) has mostly been a smooth process, with the NCLAT actually dealing with appeals faster than before. The Competition Commission of India (CCI) has also (mostly) led the way in merger control, clarifying existing rules and keeping turnaround times realistic.

India’s introduction of a robust Insolvency and Bankruptcy Code (IBC), has been much overdue and mostly successful so far, with courts having done their job well in the first round of tests (see from page 40 of our issue). The finance world too has benefited from the IBC, creating a much more vibrant market for Indian distressed debt than ever before (from pages 46), with non-banking financial institutions (NBFCs) and foreign investors also having played greater roles than ever before.

Finally, the 31 January salary increase of more than 100% for high court and Supreme Court judges is long overdue and fundamental, if judicial service is to become an even moderately attractive career path for young lawyers.

To truly change things, even more money will need to be thrown in the direction of infrastructure across the board and also at the judges of the lower judiciary.
Economic Laws Practice (ELP) is a leading full-service Indian law firm, headquartered in Mumbai, India. The firm was established in the year 2001 and today has six (6) offices pan India. ELP has a team of over 180 qualified professionals. Working closely with leading national and international law firms in the UK, U.S., Middle East and Asia Pacific region, gives ELP the ability to provide an extensive pan India and global service offering to clients adding to the seamless service that the firm prides itself on.

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The Data Protection & Privacy team at ELP, headed by Suhail Nathani, comprises of leading experts from the domain of technology, finance and law. The law and regulation surrounding data protection and privacy in India is currently undergoing major reformation. Recognising the importance of having a measured approach to regulation whereby the balance between the right of individual and the commercial interests of firms operating in the ecosystem is maintained; ELP has been constantly interfacing with both legislators and firms though its advocacy drive – as a result of which ELP is considered a thought leader in the domain of data protection and privacy in India. ELP works closely with clients to inculcate a culture of compliance across their line of services, and has represented various clients before judicial bodies on issues of data breach and responsibility.

ELP is firm of choice for clients due to our commitment to deliver excellence and has been recognized as Top Tier firm in India for Dispute Resolution, Antitrust & Competition, Projects & Energy, Tax, WTO and International Trade by the Legal 500 Asia-Pacific 2018. “Highly Recommended” in six (6) practice areas by IFLR1000 Financial & Corporate Guide 2018 and recognized by Asialaw Profiles 2018 as “Outstanding Firm for Tax”. Ranked in Chambers & Partners Asia-Pacific Guide 2018 for 9 practice areas. While these are practice area recognitions, our lawyers too have been highly rated and recognised across all guides.

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Disputes in Global Business: Managing Risk, Expectations and the Future

Bird & Bird London-based dispute resolution partner Jonathan Speed relates his experiences with international disputes, how best to avoid them and how to manage them once you are faced with one.

LEGALLY INDIA: WHAT WOULD YOU DEFINE AS A GLOBAL DISPUTE?
In my view a global dispute involves various parties, from a number of different countries, litigating or arbitrating issues that frequently span multiple jurisdictions. This could range from parallel proceedings going on in different jurisdictions or substantive proceedings in one jurisdiction with interim relief applications in other jurisdictions or, as is common in international arbitration, where the parties are from different jurisdictions and have chosen a neutral seat and neutral governing law.

LEGALLY INDIA: HOW IS CROSS-BORDER LITIGATION SUCH AS THIS GENERALLY HANDLED WITHIN EUROPE?
The EU has developed a sophisticated legal system that allows cross border disputes between parties in more than one member state to be dealt with in a co-ordinated and relatively seamless way. This legal system deals with jurisdiction and enforcement, applicable and governing law of contracts and non-contractual disputes and also the service of documents and the taking of evidence. By way of example, if you’re looking at court litigation in the EU, the Brussels I Regulation of 2001 and the Recast Brussels I Regulation that came into force in 2015, make it far easier to determine which jurisdiction will fit a particular dispute.

A good illustration of how this operates in practice is the position in relation to parallel proceedings. Before the Recast Brussels I Regulation, there had always been a problem with a concept known as an ‘Italian torpedo’. This was a situation, where for example, the parties had provided in the contract between them for the exclusive jurisdiction of the English courts but one party decided to issue proceedings in Italy in contravention of that agreement. Prior to the Recast Brussels Regulation, the English court would have to stay the subsequent proceedings until the Italian court decided it did not have jurisdiction and this often resulted in a tactical rush to be the first to issue proceedings and significant delays. But since the Recast, the Italian proceedings, although issued first, would actually have to be stayed in favour of the English court, so this revision to the Regulation has been useful.

In non-EU international disputes, usually where the Defendant is not based in an EU Member State, the European rules will not apply and an English court will apply its common law rules – it will be necessary to show that England is the more appropriate forum for the dispute. This can result in more jurisdictional challenges. The question of which forum is the more appropriate does not arise where the Recast Brussels Regulation applies.

LEGALLY INDIA: WHAT IS THE GREATEST FEAR WHEN DEALING WITH A DISPUTE THAT COULD POTENTIALLY BECOME A GLOBAL ONE?
First and foremost, you need to get all your ducks in a row: in some cases you will have a fairly clear jurisdiction clause and governing law provisions
providing a clear road map of where proceedings should be issued and the law governing the dispute, but of course there are a lot of disputes that are non-contractual, where you need to do a very quick analysis of where the appropriate forums are. You may also need to decide where would be the best jurisdiction to seek injunctive relief, if that is appropriate. Often, especially in fraud cases, you will want to obtain freezing relief and you will need to consider where you want to obtain that. In some jurisdictions, including England, you can obtain worldwide freezing orders and this will often be critical to a successful outcome. You need to be in a position to advise your client on the appropriate forms of action it can take.

Each jurisdiction has its own rules governing not just procedure but also substantive law and this needs to be explained to a client and advice given as to which jurisdiction and law may best serve a client’s interests, especially if they are the ones bringing the claim. This will often depend on what procedural mechanisms are available in each jurisdiction, the speed of the process and how easy it is to enforce the judgments of a particular country overseas. One area where there is often a large discrepancy in civil procedure is disclosure; disclosure in common law countries such as England and the US is generally wider than in civil law countries where often the parties only need to disclose documents that they rely on with a very limited right to seek further very specific documents.

A difficult scenario, in a non-EU context, would be if you allow another party to issue proceedings first as you may then face a dispute in a different jurisdiction to the one your client may have preferred and at the same time have to persuade the court to stay those proceedings, by convincing the court of your preference for another jurisdiction or seek anti-suit relief. This can result in expensive satellite litigation around jurisdiction.

LEGALLY INDIA: AND WHICH ARE THE RISKIEST JURISDICTIONS TO DEAL WITH?
It really depends on how you define ‘riskiest’. In order to mitigate jurisdictional risk due diligence should be carried out on your contract prior to, and after, signing it. The client should understand its risk management processes, the political context and wider issues in the jurisdictions within which it operates, like anti-bribery and corruption, as these can affect ability to litigate under a contract.

In the beginning when you’re entering into a contract, consider very carefully what the jurisdiction clauses and the governing law clauses are, to maximise your opportunity to enforce your contract in a jurisdiction that you want. You of course need to consider at the outset where your counterparty has assets against which you can enforce in the event of a dispute and whether the judgments of your preferred jurisdiction will be readily enforceable in those jurisdictions.

However, opting to arbitrate in a different jurisdiction may not present as many potential problems. For example, an Indian and US party may choose arbitration in England or some other mutually acceptable neutral venue. Each could enforce their award in the other’s jurisdiction under the New York Convention. The Indian courts are currently far more favourable to arbitration, so that international arbitration awards can be more readily enforced in India than was previously the case, although the timescales can still remain fairly lengthy.

LEGALLY INDIA: WHAT GOVERNING LAW CLAUSES ARE GENERALLY MOST POPULAR?
Surveys suggest that English governing law is still the most popular with international parties and was chosen as the governing law in 40% of all global corporate arbitrations in 2017. In 2016, 27% of claims commenced in the Commercial Court related to arbitration. In the year to end of September 2017, this rose to 30%, clearly illustrating the value of the English courts in underpinning arbitration enforcement. This is primarily because England is viewed as one of the most commercially friendly legal systems, its courts support and value arbitration and in terms of substantive law, the purpose behind the English law of contract is to give effect to the common intention of parties under the contract.

However, it is also quite common to see US law and Hong Kong law and if there are European parties, a neutral civil law approach: for example, I have seen arbitrations agreements for Swedish law, French law, and German law. This will often depend on whether the parties (or their lawyers) come from a common or civil law background.

**LEGALLY INDIA: WHAT ARE THE TOP THINGS ONE CAN DO TO AVOID GLOBAL DISPUTE RISK?**

Auditing your contracts is very important. This is not just because it will help to identify whether the terms are being complied with but will also help you understand at a glance, what your options are if a dispute arises; what is the governing law of the contract, and if specified, in which jurisdiction will proceedings have to be issued, and if not specified, in which jurisdiction could proceedings be issued and any risks associated with that jurisdiction. Finally, is there a dispute escalation process? Are the parties required to engage in some form of ADR prior to litigation or do they precede straight to arbitration?

Another very important factor is document management and how you manage your internal documentation. Thought needs to be given to how you manage your information flows during a project and in the early stages of a dispute. It is often useful to have a central repository of e-mail which is broken down into structured folders rather than relying on e-mails stored locally. The better this is organised the easier it will be for the client and therefore the legal team to identify relevant documents at the outset. Consideration also needs to be given to how privileged documents are retained – they should generally be separated out from the main body of documentation. When a dispute arises the business should be advised on the preservation and generation of documents – the idea being to limit the amount of information that is generated which discusses the issues in the dispute and to limit the risk of any damaging statements being made that may become disclosable in the litigation.

Jurisdictions also have different pre-action requirements that parties should abide by before resorting to the courts. At the outset the purpose of these requirements is to save time and cost, at least in English litigation. For example, when litigating in the English courts the parties must carry out some pre-action correspondence with the other side before issuing proceedings. This involves drafting an often lengthy letter of claim, the claimant needs to give the respondent time to respond to it, and the court actively wants lawyers to advise their clients to discuss settlement at an early stage.

**LEGALLY INDIA:  WHAT KIND OF TIMEFRAMES ARE WE TALKING ABOUT IN GLOBAL DISPUTES?**

It is difficult to give specific timelines as it really depends on what action you need to take and the nature of the dispute. For example, if you need to get urgent injunctive relief, such as a freezing injunction, in the English courts you can do that in a few days, or even a few hours, if very urgent. However, if you did get an injunction, you need to issue proceedings in a fairly short timeline, so you need to understand what the basis of your action is and the claims you are making need to be supported.
Other factors that also determine the speed at which matters can proceed include deciding where proceedings are going to be issued. This can be problematic in situations where you haven’t got a clear contract – in a situation where parties are acting on the basis of the exchange of drafts – or the jurisdiction is not provided for in the contract. One party may challenge the jurisdiction chosen by another and this can lead to ‘satellite’ litigation determining this issue before the primary issues in dispute are even considered.

Another factor which may influence the time frame may be the dispute escalation process set out in the contract. If the contract provides for different dispute resolution mechanisms for different elements of the contract then resolution of the dispute can take some time as each stage is carried out and it may often not be possible to issue proceedings without going through those stages.

We would generally expect a dispute to go through the English courts in 12 to 18 months although this can be considerably longer if jurisdictional issues need to be resolved. You also need to bear in mind the time for enforcement of your judgment. If the other side does not pay then enforcement could take a few months to a few years depending on the jurisdiction.

**LEGALLY INDIA: WHICH GLOBAL ARBITRATION VENUES ARE MOST ATTRACTIVE?**

London remains a very popular seat for international arbitrations. The prominence of London was evidenced by a Queen Mary University of London survey from 2015, which listed London, Paris, Hong Kong, Singapore and Geneva as the top five seats of respondents’ choice, with London leading the way with 47% of preferences. Often when we are acting for international clients, the choice of venue is made on the basis of neutrality depending on the nationality of parties.

But increasingly for Asian parties, and also for Indian parties, Singapore is viewed as an important venue. For Middle-East disputes, Dubai is an increasingly important venue and there seems to be particular interest in disputes under DIFC-LCIA rules. These are supported by the DIFC courts which are populated by experienced judges and lawyers with backgrounds in common law systems such as England, Singapore and Australia.

**LEGALLY INDIA: WHAT ARE THE BIGGEST CHANGES YOU PREDICT IN DISPUTES GOING FORWARD?**

The big change at EU and UK level is the introduction of online dispute resolution, mainly for consumer disputes. In the UK there has been a move driven by Lord Justice Briggs towards online dispute resolution, parties and their legal advisers are starting to use rules that allow for expedited dispute resolution.

**In terms of a quick settlement of disputes, parties and their legal advisers are starting to use rules that allow for expedited dispute resolution.**

In terms of a quick settlement of disputes, parties and their legal advisers are starting to use rules that allow for expedited dispute resolution: a number of the arbitral institutions rules now do that. The International Chamber of Commerce (ICC) has an expedited settlement procedure, and the Singapore International Arbitration Centre (SIAC) has also introduced one, as has the Stockholm Chamber of Commerce (SCC) in Sweden, and the Hong Kong International Arbitration Centre (HKIAC) is considering this as well. Those solutions will be popular where you have a smaller dispute below a certain monetary threshold.
resolution with the development of tools to deal with smaller scale commercial disputes. And the EU has developed the Online Dispute Resolution (ODR) platform, which puts consumers and traders in touch with a view to resolving disputes by ADR.

One of the things that will need some focus in the future is how these technological platforms can be developed for more complex international disputes. It is a big challenge to get these to work for bigger disputes, especially from a common law perspective where proceedings are dependent on witness and expert evidence delivered in court, but there may be some scope for case management aspects to be dealt with in a more mechanised way, for example by using artificial intelligence (AI).

**Lord Chief Justice Thomas has envisaged commercial courts in different jurisdictions working together under a single procedural code.**

AI will also be much more important in terms of document production and disclosure, and in the coming years those processes will become more efficient, cheaper and accepted readily by the courts.

The English courts have already made some strides towards this. In 2016 the English court accepted the use of predictive coding and sophisticated software document review by keywords in litigation disclosure. This followed a trend started in the US courts.

What is interesting too is how global commercial disputes can be managed in the future. Last year, Lord Chief Justice Thomas spoke in Beijing about the idea of introducing an international dispute procedure, and he envisaged commercial courts in different jurisdictions working together under a single procedural code that could operate on a transnational basis.

The UK has been an active proponent of closer co-operation between countries’ commercial courts and in April 2017 hosted the inaugural Standing International Forum of Commercial Courts, with judges of various commercial courts from different countries discussing how judgments of commercial courts could most effectively be enforced abroad, and best practices for the running of hearings in the commercial law context. It also considered how best to interact with arbitral bodies in situations where parties cannot agree on which dispute resolution mechanism to use.

For such initiatives to succeed, in a lot of cases there will need to be political consensus: some governments may not necessarily be overly keen to have a system driven by a Common Law or a Western or English perspective. But equally, from the perspective of trade, some countries may see it as more attractive for internal and external investment to have a system aligned with that of their overseas markets.

**LEGALLY INDIA: WHAT INROADS HAS LITIGATION FUNDING MADE?**

Litigation funding – where a third party funder agrees to cover the costs of litigation in return for a cut of potential damages – is now increasingly commonplace in UK court proceedings and arbitrations. In particular it has improved the ability of individual claimants or a number of them to bring group litigation claims.

There’s also been an interesting development – especially from an arbitration perspective – in the English Commercial Court case of Essar Oilfields vs Norscot Rig Management, where the arbitrator awarded costs, including litigation funding costs to the successful party. The Commercial Court turned down Essar’s appeal against the costs awarded in the arbitration, deciding that the litigation funding costs could be recovered.

So, in arbitration, even if you’re paying your damages away to third party funders, in principle you may get that back from the other side, though this may be challenged in future.

Litigation funding is also catching on internationally and in particular in two important jurisdictions: Singapore, since the middle of last year, and Hong Kong have passed laws permitting third party funding of arbitrations which in turn is incentivising parties to choose these forums for their arbitrations.
Bird & Bird is an international law firm with a longstanding reputation for helping clients achieve success through our innovative and creative solutions.

We have been providing a seamless service from our 28 offices across Europe, the Middle East and Asia-Pacific for Indian companies in relation to their international operations outside of India for many years. Our lawyers are experts in their fields - across the world we have more than 80 Band 1 rankings in the major directories.

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Our expertise includes not only commercial, corporate and financing transactions, but also disputes, intellectual property, employment, commercial and data protection matters, across numerous sectors including automotive, aviation, communications, electronics, energy and utilities, financial services, hospitality, industrials, information technology, life science, media, sports and trade and customs.

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Our India Strategy Group, headed by James Mullock, Partner, and its lawyers has helped clients acquire multi-million dollar businesses. The team has been praised for its “tenacity” and “willingness to go that extra mile”.

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Most lawyers on the buy-side of the profession hope to minimise the amount they deal with disputes and litigation work: management generally abhors litigation more than nature abhors a vacuum, and when a company is inevitably dragged into a contentious quagmire, general counsels (GCs) are usually left to face the consequences of uncertain, inefficient, arbitrary and mismanaged dispute management systems around them.

As Intel South Asia general counsel Mekhla Basu puts it: “New-age general counsels don’t believe in litigation.”

“We are not pro-litigation,” agrees Future Group GC Pankaj Patel. “There is a litigation policy in our organisation. We don’t file litigations – or even send a legal notice – without approval of the managing director and the directors’ office.

“We always believe that things can be sorted through personal relationships rather than litigation.”

But in India especially, litigation still remains an immutable fact of life even at the most professionally and well-run companies. So when disputes do happen, we have asked 10 GCs at India’s top companies for their wishlists, biggest grievances and bugbears.

**DISPUTES ROADMAPS LONGER THAN HUMAN MEMORIES**

It is a truth universally acknowledged that a company beyond a certain size will face significant attrition. This often presents the challenge of haphazard dispute management because ‘document ownership’ keeps changing.

**Huawei GC Gaurav Arora** explains that a great challenge when people move between organisations is to establish “complete and accurate collection of background information and facts”, which is often one of the most important parts in a litigation. “If those people are not in the system as of the date, then the level of energy put in by the legal team gets raised,” he notes.

**Bharti Enterprises director legal Vidyut Gulati** comments: “When you’re setting legal strategy internally, then setting a litigation roadmap helps in effective execution for achieving the end objective. Documentation and its ownership should be result-oriented. Execution and data retention are internal areas that can be improved.”

**SPEEDIER AND MORE PROCEDURAL EFFICIENCY IN THE JUDICIARY**

This, not surprisingly, was a no-brainer for every GC
we spoke to about their wish lists.

"India lacks a speedy judiciary," says former Snapdeal GC Ashish Chandra, and reiterates: "Speed is what they have to pick up."

Taj Hotels GC Rajendra Misra comments: "Court processes need to be made more efficient, delivery of justice should be better and faster – more judges, shorter dates, less adjournments, shorter arguments, curtail court vacations."

Huawei GC Arora even suggests that companies would probably be willing to pay a little extra for the creation of exclusive and more efficient courts: "If India can come up with a kind of mechanism in place wherein commercial courts are made into separate courts, that would be a big boost for the multi national companies to consider India as a preferred place of business, since otherwise our existing system in disposal of the matters is very slow due to various reasons."

In his understanding most companies would willingly pay the higher fees for proceedings in such commercial courts, as they currently in any case pay in international arbitration.

If the government can come up with a kind of mechanism in place wherein commercial courts are made into separate courts, even if [the government] is charging some kind of fees from the companies [to maintain these separate commercial courts], the companies will be amply willing to give such fees. Because otherwise [presently the companies] have to travel to [the arbitration hubs of] Singapore and Hong Kong because there [the companies] know that the time period [of resolution] is certain.

"So let those separate courts charge those fees," he notes.

Arora gives the example of the The Customs, Excise and Service Tax Appellate Tribunal (CESTAT), which hears tax matters, but most of the time lacks a full quorum to hear matters. Delays of two to three years are becoming almost a trend now, he says, so companies that cannot keep their businesses idle for that long have to resort to the mainstream courts and try to skip the CESTAT instead (though the possibility of even then being sent back to CESTAT can not be ruled out).

While he applauds the Narendra Modi government for having fixed “very good timelines” under the Insolvency Code, he wishes commercial courts in India would have their own apex courts because “if a matter goes to the Supreme Court, one never knows if it will take one month, two months or 20 years”.

Taj’s Misra thinks the answer lies primarily in arbitration. "India needs more institutional arbitration to decrease load on courts," he says. "We need arbitral tribunals with all-India presence. And government litigation needs to reduce. Government is the single largest litigator."

Arora echoes the sentiment, and notes that "arbitration may not be the only solution, especially when the counter party is some governmental body". Besides, domestic arbitration also has to
meet the high yardsticks set by many international bodies for arbitration abroad. Therefore, more often than not, one has to knock on the doors of court or travel abroad for arbitration anyway.

**UNIFORMITY, CLARITY AND CERTAINTY IN IMPLEMENTATION OF LAWS**

The current investor sentiment in India is that more often than not, implementation authorities, ranging from Reserve Bank of India (RBI) to the customs authority, cannot be trusted. They may come back and point out illegalities in practices that the business had been following legally for several years, several GCs pointed out.

Ex-Snapdeal GC Chandra explains: “I think uniformity should be there in the ways laws have been implemented. There are a lot of conflicting judgments – even Supreme Court judgments – so it is quite difficult to gain confidence that once a judgment comes out of a bench it will not get conflicted by a concurrent bench.

“That is not good for an investor environment if you rely on an interpretation of a high court judgment but the other party challenges it after five years in the Supreme Court, and the Supreme Court overrules it. So those five years for [the business] will have a strategic impact.”

One GC points out that there are several “grey areas in the law for which there is no clarity”, and if you go before the concerned regulators and ask them for a clear position in written form, they will only rarely give it to you in writing, or at the most they may state a vague position based on a plain reading of the existing rules.

He recommends that in order to deal with such grey areas it would help having an advance ruling authority for indirect taxes, for instance, in the same way that there is an advance ruling authority for direct taxes. That said, he cautions that companies also “fear” filing before the advance ruling authority because there is no provision for appeal from its decisions – a “baseless” rule.

One GC says he also wished that “timelines were fixed” for the application of rules, and within those fixed timelines a new interpretation of an existing rule should not affect businesses which have been following the old interpretation.

**COURT-MANDATED TIMELINES FOR DISPOSAL OF CASES**

“A big reform is required from the perspective of putting timelines,” comments **Airtel GC Sameer Chugh**. “Various steps [of the litigation] should be completed in fixed periods, such as, for example arbitrations already need to be [disposed of] in 1.5 years under the law. So to eliminate that entire delay tactic that people adopt [similar rules on timelines should apply to litigation].”

“We need to set timelines for disposal to avoid protracted litigation and courts should strictly enforce them – one year time period to dispose cases at the first forum, 6 months deadline for appeals, time bound action plan to clear backlog,” agrees Taj GC Misra.

**GCs’ GREATER AUTONOMY**

But all is not down to the legal system. One element that often results in time wasted is that interference by top management can lead to inertia in resolving a dispute in the early stages, particularly when top management does not have a legal background.

One GC explains: “You need the approval of the management for major litigations. If your managing director is meeting with different kinds of people – and, you know, today there are too many lawyers for everything – it results in a delay.

“As a GC you should be very cautious in choosing a law firm – everyone’s got experience but will they really devote time to your matter? So whether I need to have a big law firm by name just for my protection or some firm who can really work for me – sometimes you have to play such gamble. By
now the company has left this decision completely to the legal department but only after a long time of earning goodwill.”

Another choice that the company has to make is whether to take the judicial route or to first attempt resolution through lobbying, personal negotiations or other strategies, which can sometimes be counterproductive.

“[Public relations (PR)] agencies or some PR departments dealing with government may come into play [and tell the management] ‘No we can handle this issue in some other manner [outside of the judicial route].’ All that does is delay litigation and affect the quality of litigation. [Without such diversions the dispute] could be [resolved] in a timely manner. Someone or the other will come and say: ‘I know this minister, I know that guy’ – but it does not help.”

“[The company] only ends up splurging money and at the end of the day you have to go to court only. Some companies learn over a period of time and stop relying on lobbyists etc,” a GC remarks.

**GREATER JUDICIAL ACCOUNTABILITY AND ADMINISTRATIVE EFFICIENCY**

However, some of the blame needs to be firmly placed at the judiciary’s feet. Judges’ manner of functioning leaves something to be desired, note several GCs.

*Inox Group* legal advisor Shilpa Sharma applauds the Delhi high court’s September 2017 audit of lower courts in which it issued show cause notices to 24 Rohini district court judges who were not sitting on time.

“That was something which was interesting [and] something which needs to be done more often and widely,” she says. Sharma also points out that the registry needs to have better systems in place to avoid unexpected adjournments and other frustrating situations. “When you travel for an out-of-station matter and its adjourned that’s quite frustrating. Or that the judges sit late or that the senior counsel you’ve hired can’t appear when your matter comes up because they’re in the another court [arguing a matter clashing in time]. So somewhere we need to have some kind of systems in terms of administration to cure these teething problems.”

Airtel’s Chugh notes: “Indulgence that the courts give should not be allowed depending on the counsel [appearing before them]; the rules should be the same for all.”

**THE QUALITY OF LEGAL ADVICE ON HIRE**

And finally, law firms too need to step up. All too often for many companies, particularly the smaller ones, litigation is still managed by individual advocates or even chartered accountants, which can add to delays and complications later down the line.

And even when a big law firm is instructed, another choice is whether to take the judicial route or to first attempt resolution through lobbying, personal negotiations or other strategies.

quality of litigation advice can be patchy and highly dependent on the location of the dispute or on the specific partner managing it.

Bharti Enterprises’ Gulati notes that she would like the help from the law firms she hires to be more customised to the specific requirements of each matter, for instance.

But at the end of the day, such criticisms also cut across practice areas and are a common challenge for law firms across the globe.
Has India Legal Inc. Missed the Bus on Artificial Intelligence, or is it Just the Right Time to Get on Board?

Nearly every industry is trying to predict the impact of Artificial Intelligence, with some bracing themselves for wholesale reinvention. Legal will not be immune, reports Kian Ganz.

Artificial intelligence (AI) and machine learning (ML) have been making inroads into nearly all walks of life. Much of what’s visible in the mainstream has been restricted to headline-dominating stunts such as Google’s DeepMind systems beating humans at ultra-complex board games like Go or Chess or the IBM Watson system besting champions of the TV game show Jeopardy (way back in 2011). There have been rapid improvements in self-driving car technology by several companies. And on the consumer software side, facial and photo recognition, real-time text, voice and image translation and other useful tools from the major tech giants often seem like magic, or at least eerily, almost-humanly intelligent.

AI can theoretically be applied to many problems that seem intractable for human beings to handle, either by virtue of complexity (such as beating the average human at Go) or because of the volumes involved (such as automatically recognising every person or object in all photos uploaded to the internet).

In the medical profession, AI has huge potential, with some ML algorithms touted to outperform trained doctors in diagnosing certain diseases or conditions purely from patient data or scans. It is unlikely that this will ever make obsolete the human touch and expertise required in medicine, but a computer may at the very least assist doctors both quantitatively and qualitatively – even catching patterns and correlations between symptoms that human doctors may miss.

Nearly every industry is trying to predict the impact of AI, with some bracing themselves for paradigm shifts that could require the reinvention of their businesses wholesale. Legal will not be immune.

In Europe and the US, in particular, there are now more of the major law firms that have dabbled in AI and ML than not, with some systems churning out parts of due-diligence reports near-automatically, replacing hundreds of associate hours.

As is so often the case, however, India’s story is its own.

AI USE CASES

Dibyojyoti Mainak, the GC at technology and news content start-up InShorts, notes that most of the applications and potential in AI for lawyers have so far been in several areas. “There’s due diligence, which can be easily handled by that type of tech and can be completely eliminated [one day in future]. Most of it is a very mechanical job: if you
feed in a set of parameters and set of documents, any reasonably good natural language processing will be able to figure that out.

A corollary to that are smarter document management solutions, that can automatically classify, categorise, connect to each other and help you find the documents sitting on a law firm’s or company’s servers. And in jurisdictions where discovery or pre-litigation disclosure is a big thing, so-called “predictive coding” has made inroads: human lawyers review and categorise, for example, a 1% sample of documents by hand, with the computer then learning from that to identify the remaining 99% of documents as relevant to the case or not, which can be further improved by interaction between lawyer and machine.

The other big use cases is in legal research. “There’s a lot of opportunity for sure,” predicts one India-based CEO of a legal research company. “I’ve had a lot of interaction is with judges and all very clearly portray the fact that the future is very much there for AI and technology to be used in a big way in the judiciary.

“What does a judge do? He spends a lot of time in analysing the case and analysing similar cases that have happened in the past, and can not end up giving a judgment that is contrary to another judge... They spend a lot of time worrying about all that. However, if there were tools that did all that and gives a judge three option to consider, it will make their job a lot easier.”

Along similar lines, Mainak adds: “There is some talk around the idea that you will help out judges or potentially replace them with sort of like AI, in smaller or clear-cut cases where it’s a simple question of calculating exact amount of damages or things like that.”

“Globally there’s a lot of news around use of AI and the fraternity,” notes technology lawyer and policy advisor Amlan Mohanty from PLR Chambers. ML could for instance assist the judiciary in handing down consistent sentences that reduce human biases, to ensure two defendants in similar situations do not get different jail terms depending on their

WHAT IS THE DIFFERENCE BETWEEN AI AND MACHINE LEARNING?

Artificial intelligence (AI) and machine learning (ML) are often used interchangeably, though AI is a slightly broader term that could as much be applied to a chess playing computer programme as to a science-fiction killer robot enslaving humanity.

ML generally refer to a set of techniques of creating artificially intelligent computer systems by having a computer create a virtual map (or a so-called neural network) of a lot of information, and then predicting and classifying unknown information on the basis of probabilities.

For example, if you train an ML algorithm by feeding it very selective data: i.e., a million cat pictures, and then a million dog pictures, and then a million pictures that are neither of dogs nor of cats, in theory you could show the computer a wholly new picture and it may be able to tell you if there is a dog or a cat in the picture. Similarly, you might feed an ML system a thousand love letters, followed by a thousand pieces of hate mail, and the computer may then be able to tell you whether the author of a new piece of text is angry at or in love with you.

These might seem like a simple task for humans, but reliable and flexible automatic image or language recognition is something that has until more recently eluded even the most powerful and clever computers.

But ML is not magic. For one, it can fail in surprising ways: for every 99 times that they correctly identify a cat in a photo, there will be that one time that it will think a cat is actually a potato, and you will have no real idea why it thought so. Also, the systems generally live and die by the amount and the quality of data they eat. Therefore, if you feed garbage into an ML algorithm, you are still likely to get garbage out.

Garbage in this case includes data that is not categorised or classified in any way, though even there, sometimes ML may find surprising patterns in what humans thought was random data.
“I’ve seen simulations of some of these things and I’ve seen the claim being made that it’ll make interns to A1 and A0 level associates redundant in a couple of use cases.”

background or in what part of a country they’re in. That is “definitely something we need to look at in the Indian context” – and discussion of the shape of possible future applications, as well as the ethics surrounding it, would be helpful at this point, he says.

At heart, something like sentencing where lots of hard data and numbers are potentially available lends itself well to the kinds of big pattern recognition that computers and especially ML is famously good at. But much of legal work is less numerical and more linguistic, which has traditionally made it tougher for computers to be helpful, until ML came along, which can increasingly begin to understand the de facto meaning of words and nuance of language.

BIG DATA DILIGENCE
In law firm-related legal work, the hopes are high.

“I’ve seen simulations of some of these things and I’ve seen the claim being made that it’ll make interns to A1 and A0 level associates redundant in a couple of use cases, such as finding a precedent or due diligence,” says Mohanty.

The current reality is not quite there yet, though. Mohanty adds: “In terms of specific apps and services, I have reviewed a couple of them and my sense is that they don’t actually go beyond what rudimentary services do right now do. I think it’s quite a misnomer to call them machine learning or AI: it is often just [traditional approaches] packaged together.”

Oberoi Hotels & Resorts general counsel (GC) Dharmesh Srivastava notes that while AI entering the Indian legal industry would be a “very positive development”, he has also not seen much of it in use by law firms, though a Big Four chartered accountancy firm has been pitching something at the contract management end.

They are both right. One of the biggest problems with AI and ML, not just in the legal industry, lies less in what it can do right now but more often in figuring out what it can actually be used for.
One big law firm partner with a technology company background says: “In India you have very limited analytics and almost zero artificial intelligence right now. We see it happening as almost inevitable, but even three to five years is a fairly aggressive estimate in it becoming mainstream.” Instead, even many big Indian law firms were still at the stage of implementing better timesheet management, performance management and e-learning software and databases.

“As a client I haven’t even seen one law firm using AI,” agrees an India-based general counsel (GC) of a VC fund, expressing scepticism about the current state of the technology. “They may be able to automate some very basic tasks, and it might be in a law firm’s interest to reduce its cost but I don’t know if clients necessarily will see that benefit.”

“From what I understand, [AI] is dealing with pretty basic stuff right now,” he adds.

THE FIRST STEPS

Law firm Cyril Amarchand Mangaldas made headlines a year ago, also in the mainstream press, when it announced that it had been the first in India to sign up to software from Canada-based legal AI company Kira.

At heart, while the technology certainly appears like a powerful invention of machine learning, Kira acts as a tool to assist lawyers to quickly identify clauses in contracts, sort of acting like an old-fashioned Microsoft Word text search but on steroids: rather than simply finding the phrases “change of control” in a document, for instance, Kira bills its software as understanding what a “change of control” provision actually looks like, even if that exact phrase does not appear.

“It’s not providing legal advice, it is making the process of the repetitive and more monotonous work much more efficient and much faster, for big teams and groups of lawyers to review the information,” says Toronto-based Kira spokesperson Sondra Rebenchuk. “And it often finds things that a young and experienced lawyer has missed.”

In-house, particularly globally, has also seen companies look at more adoption of AI in legal departments, though not much has made it to India yet. One India GC of an international bank says: “While we don’t have it in our Mumbai office, we are looking to implement [AI] in our international offices.” She adds that AI was still in its infancy on the legal side, but a committee had been set up in the bank’s global HQ to look at how and where it can be implemented.

A MATTER OF DISTRIBUTION

But arguably, the future has already arrived in India legal, it’s just not evenly distributed yet and in all sectors. Venture fund Sequoia Capital’s India director legal Sandeep Kapoor, based in Bangalore, says that legal technology and AI has been a major passion of his for around five years now and has already begun revolutionising the provision of corporate legal services, from compliance down to automatic contract and term sheet creation. “It’s just a matter of time before it reaches tipping point,” he says.

Kapoor explains that Sequoia has developed several internal tools for Sequoia Capital India that rely heavily on ML to assist its portfolio companies. One of these is capable of automatically generating large parts of term sheets for potential investments, that get automatically turned into checklists for founders and can generate standard subscription agreements at the click of a button.

Much of this is work that has traditionally been done by law firms. “If the community hears the results, they will stop sitting on the fence,” he
exhorts the legal profession. “You guys are losing something if you think you are protecting your relevance and practices by not implementing it, and you will have already missed the bus.”

Tech-led corporate compliance plays have been prevalent in India for a while now. One such provider, Lexplosion, which was founded by group of corporate and in-house lawyers 11 years ago, has begun investing into “very rudimentary forms” of ML around 18 months ago, says CEO Indranil Choudhury.

With each state having myriad rules and regulations that can intersect and affect businesses in unpredictable ways, compliance is tricky and expensive work. “Law firms have historically avoided compliance, they see it as more mundane work which is not exciting for their associates and lawyers,” notes Choudhury.

Likewise, smaller companies, which may avoid compliance advice due to high costs of lakhs of Rupees in advisor fees, can potentially now afford to become compliant at a fraction of the cost, increasingly assisted by ML. Lexplosion and other start-ups in the space such as OneDelta, have begun to offer services where a series of simple questions answered by a company are theoretically enough to produce compliance checklists and more. Big Four consultancies too have been pitching automatic compliance technologies, some with an ML bent.

Choudhury says that the company has been working hard on further enhancing its ML products, to enable the system to further predict and guide small and medium-sized businesses at the kinds of compliance requirements that would crop up in future, even before a company would consider thinking about them. “There is a fair amount to be done with compliance [and ML] itself,” he says. “It requires all aspects of Indian law, whether Companies Act or GST Act – everything gets covered through the compliance tool – what is critical is to be able to predict what would be the next set of compliances that would come up if you are in a certain line of business.”

THE PROBLEM THAT IS INDIAN DIGITAL DATA
In part, rather than availability of technologies, a bigger problem in India – both on the litigation and corporate side – often lies with the availability of good enough data to train ML properly (see box on AI and ML on p.19).

A start-up hoping to solve the problem of India’s vast quantity of non-digital commercial documentation is called Leegality, which is in the process of rolling out a legal documentation platform to let anyone with an Aadhaar biometric ID card sign a legally binding contract electronically (as opposed to the current more complex process that requires application for a digital signature). They had even solved the tricky problem of how to pay stamp duty on digital contracts, said Leegality’s founder, Shivam Singla.

Once a majority of a company’s documentation is digital, Singla says he expects that AI can really come into its own. “Implementation of all these advanced technologies, for them to be able to affect the process as a whole is going to take at least two or three years. Five years down the line we’ll begin to see some of the processes becoming optimal.”

“The larger issue of course is the whole idea of digitisation of documents in India, we haven’t moved the needle far enough on that,” says Mohanty. “Just look at basic issue of looking at Supreme Court judgments [on the Supreme Court website]. It’s really hard [for a layperson]...

“Indian Kanoon took a leap of faith and managed to pull it off, but it’s hard to find access to court records. But [court] submissions, written submissions, pleadings: none of that is available from India. A lot of these materials don’t exist that are being used for other countries.”

Indian Kanoon – kanoon meaning law in Hindi –
is a well-known website not just in legal circles, and it usually turns up as one of the top Google results for the name of any Indian judgment. It was set up in 2008 as a part-time passion project by former Yahoo engineer Sushant Sinha, which has now turned into a full-time occupation for him.

Sinha has near-perfected the craft and art of laboriously automating the scraping of the latest court judgments and orders from India's Supreme Court, all high courts, two district courts and 11 tribunals, most of which operate utterly incompatible websites, systems and databases. Sinha has downloaded all those and made them freely accessible and searchable on a single portal.

**LANGUAGE BARRIERS**

The government took a huge step in 2016 by launching the eCourt website, which provides access to all district court orders and judgments across India on a single portal, but much of that data is not actually easily consumable by machines.

Sinha explains that the eCourt website makes documents available in PDF format, rather than text or HTML, which presents an additional hurdle. On top of that, some bizarre technical decisions made by the government in building eCourt, means that even converting those PDFs to data is exceedingly difficult, particularly when talking about vernacular Indian languages such as Gujarati.

"If it was Unicode," says Sinha, referring to a standard way of storing non-Latin alphabet text to be universally readable by computers, "I would have had no problem integrating all the district courts."

Instead, eCourt non-English data is often embedded in PDFs or images with proprietary fonts where several characters may make up a Hindi or Gujarati glyph, which need to be laboriously reverse engineered into Unicode in order to stand a chance of a computer actually reading the content. "I did that with the Gujarati parliamentary debates," Sinha recounts. "It took me like three months to do the font engineering."

As it stands, said Sinha, he had managed to digitise around 80% of the English-language judgments available on eCourt from the Bangalore and Delhi district courts, but he was focusing his efforts elsewhere for now.

That problem of inaccessible data goes even deeper: what is available digitally in India, is not nearly enough for ML to really begin to automate some of the most basic tasks lawyers have to perform in their day-to-day work or in a due diligence.

"Here the problem holding up many AI solutions is that records are tied up [in government or private databases], and none of that is customised to include searches for government of Rajasthan land records," says the law firm partner, giving an example of the barriers you quickly run into.

"Say you're doing a due diligence of a data room and you run it through: [the ML] is only able to do contracts. When you separate the fancy branding, 80% of the efforts have gone into contracts, but it can't go into litigation searching or environmental clearances or real estate. None of that is online."

However, predicts Leegality's Singla, AI can also potentially come to the rescue of documents and records trapped in bad PDFs in vernacular languages, via optical character recognition (OCR). "Google and all are coming out with advanced language services," he says, adding that a few companies in India too are developing and offering sophisticated OCR for companies to digitise old documents.

**INSTITUTIONAL BARRIERS**

Trying to get the Indian government to improve its websites or data access is nearly impossible,
except as a top-down initiative, with individual requests or submissions usually getting mired in the bureaucracy.

Likewise, the implementation of AI in the judicial system could be as much of a human challenge as a technological one.

“The irony is that not too many of the judges are tech savvy,” the CEO of the legal research company says. While most judges profess to have an interest in reducing the overall pendency levels, understand that they need to become more efficient, and understand that more technology such as AI will be needed in the near future, internal decision making remains very very slow-moving. “They were looking at intelligent tools they can use,” relates the CEO about his experience. “but all of these tools would need to be passed by a committee, and the committee may not have tech savvy folks, so they may not necessarily approve it.”

LOCAL SOLUTIONS

In part because of the challenges, there has not been a lot of innovation yet in India in legal tech and AI, compared to abroad.

Mainak regularly conducts technology patent searches in India and says that not a single patent relating to legal AI has been filed in India to his knowledge: “I am not sure there are any big companies right now which are spending good R&D money in developing AI in the legal field... but it’s possible some is happening and are using it as trade secrets [without filing patents].”

Mainak primarily attributes that lack of investment to several factors: unlike in the US, there is a lack of big companies on the software side targeting legal as a potential market, in part because the Indian corporate legal market is still so small, in India. “Law firms would be the only one willing to side with new technology but if you look at it, the sector is quite small: 2,000 or maybe 3,000 corporate lawyers worth their name. That’s why nobody is looking at this in India.”

“Unless IITians [graduates from the elite Indian engineering colleges] start taking a serious interest in law, or some part of law, etc becomes part of their courses, people are not going to know how to apply their software know-how to the law. I think that’s a major problem.”

SEARCHING FOR LOW HANGING FRUIT

That said, there is some early activity taking place. Some of the largest repositories of Indian legal data is held by research providers, including major multinationals and domestic players.

Indian legal research platform Manupatra has begun taking early steps to integrate some AI into some of its existing services, by learning from users’ previous searches on the platform to improve its ranking for relevant results.

Manupatra chief technical officer (CTO) Sj Sudhakar explains: “I really have to use [the right] keywords for a good [traditional] search. AI is a great step forward in that direction.” He says that could even help laypersons get a better idea of laws, without being as hamstrung by their understand of technical legal issues.

Search and natural language search (or natural language research) is the first area where AI and ML can theoretically step in to aid lawyers. Much like major web search engines now rely heavily on machine learning to present the best results to a user, there is scope too in legal research though the hurdles are more complicated than simple text search.

After all, while a judgment consists of text, interpreting the meaning of what a judge said is the most important and most tricky work of a lawyer.

MACHINES DON’T COME FOR FREE (OR A MANUAL)

Sinha says that currently Indian Kanoon did not use a machine learning model in its searches, although he adds that potentially there was certainly utility in the process. But “machine learning is not a free task”, he adds. “First, someone [human] has to tap [and categorise] that data first.”

“How do you derive the relevance of a paragraph in a judgment?” he asks. Sure, you could find out which paragraphs are quoted most in other judgments, but to find out if a paragraph is still good law, or binding precedent, or whether it has been overruled by another judgment requires human lawyer’s interaction and involvement first, at which point ML could conceivably help to identify similar paragraphs and parameters in other judgments.

And while Manupatra has been toying with this idea in one of its products dubbed “authority
check”, as an “automated system that identifies later-citing cases”, it comes with a big disclaimer in a demonstration video that “it is not a citator, and does not include editorial information telling you whether your case is still good law”.

“Whether it’s good law, bad law or overruled – it’s not something that we have tried, or rather not something we are willing to rely on currently,” notes Sudhakar, as Manupatra chief operating officer Priyanka adds: “I don’t know whether I’d be willing to let a machine decide whether it’s good law or bad law, but it seems a possibility in future.”

In combination with that, the company has also rolled out several visualisation tools, that can graphically display what case has been cited by which other judges at which times, and a “judge analytics” tool in which ML aims to “draw an inference” as to the leanings of a judge in particular types of cases, explains Priyanka. That is similar in approach to the tool by Lexis Nexis, which is not yet available in India: Lex Machina has mined US case law to aggregates what kind of cases a judge has handled and makes predictions on that basis.

But indeed, as pointed out by Sinha, neither Manupatra’s AI efforts nor features such as Kira’s super-powered clause search and identification came for free without human interaction: Kira, for instance, has a team of in-house lawyers who manually train the AI in the first place, by identifying clauses in pre-existing agreements so the AI can spot similar ones in future; at Manupatra, cases in the database were first manually categorised under various heads, with algorithms then derived from those databases.

The second problem with AI, says Sinha, is that you require good features and use-cases that would actually be helpful and required by end users, i.e. lawyers. “If you don’t have good features, machine learning is pretty useless – you can not automatically derive features from machine learning.”

And that is part of the problem with some of the early technology: it can seem as though AI engineers are looking for problems that lawyers don’t necessarily require solutions to right now or that are fairly workable without AI tech.

Finding that killer application that would revolutionise the industry is also part of the allure, however. Priyanka agrees: “We have to stay invested in it. It’s more like scratching the surface and there’s so much more one can do. The objective is to reduce the research time of the user and make it more exhaustive and smarter. You gotta be working on it.”

**THE FUTURE: LAW WITHOUT HUMANS**

So, where could it all go? Mohanty explains a time after a class of law students he was teaching had heard a presentation on IBM’s Ross AI system, and the big question was whether they felt threatened by it. “A lot of my students said, is this going to cause job displacement and at what level? Will we have to re-acquire skills and reskill?”

Kira’s Rebchuk notes, reassuringly: “We don’t think that Kira in any way is a replacement for lawyers. What it does is free up time so professionals can devote more of their expertise and brainpower to do more difficult challenging parts of their jobs.”

And perhaps in India, more than most places, that will remain the role of AI for longer. “Unless associates become very expensive, no law firm will introduce AI processes,” muses one India GC, who works for a US multinational bank.

Perhaps. Although often technology has a tendency to surprise, especially those within industries who don’t see it coming. Survival as a lawyer in this century, may very well be predicated on recognising that.
Privacy as a Fundamental Right: The Possible Shapes of India’s Data Protection Landscape

From the Aadhaar ID database to reforms of Indian privacy regulations, data privacy in India is a burning issue. Economic Laws Practice lays out the data protection landscape.

Data privacy is a burning issue, from the Aadhaar ID database to a series of recent government and judicial reports laying the groundwork for a much-overdue reform of Indian privacy regulations, which will affect a plethora of businesses.

Impact will be felt by a wide range of industries, in particular internet companies, the data that the Internet of Things will collect, global IT services players based in India and sectors such as pharmaceuticals, where generation and storage of personal data is at the heart of paid-for clinical trials in India, potentially going right down to someone’s DNA. The question of where the lines of consent will be drawn will be fundamental.

And while some of the implications of technology on privacy are nearly impossible to foresee today, the concerns of national security are also likely to cast a major shadow on the legislation.

On 24 August 2017, the Supreme Court in the Puttaswamy case (see box) said that privacy was a fundamental right protected under the constitution; meanwhile on 31 July 2017, the Ministry of Electronics and Information Technology, Government of India framed the terms of reference for a committee under the chairmanship of Justice B.N. Srikrishna: (a) to study various issues relating

**RIGHT TO PRIVACY: SUPREME COURT IN PUTTASWAMY**

On 24 August, 2017, a nine-judge bench of the Supreme Court of India in the landmark decision in *Puttaswamy*¹ unanimously ruled that the right to privacy is intrinsic to life and liberty and hence is a fundamental right grounded in both Article 21 and Article 19 of the Constitution, encompassing freedom of the body as well as the mind. The major highlights of the decision were:

- Privacy is intrinsic to and inseparable from human element in human being.
- Right to Privacy is not just a common law right but a fundamental right guaranteed by Part III of the Constitution.
- Privacy is not an absolute right, subject to permissible restrictions.
- Action must be sanctioned by law, it must be necessary to fulfil a legitimate aim of the State and the interference must be ‘proportionate to the need for such interference’.
- Recognition and enforcement of claims for breach qua non-state actors will require legislative intervention by the State.
to data protection in India; and (b) to make specific suggestions for consideration of the Central Government on principles to be considered for data protection in India and suggest a draft data protection bill.

The Justice Srikrishna Committee’s White Paper of the Committee of Experts on a Data Protection Framework for India (the “White Paper”) was delivered in November 2017, and raises several critical issues for consideration.

HISTORICAL BLIND SPOT
While privacy and data protection has seen far less attention in India than in Europe or the US, for instance, in 2012, the erstwhile Planning Commission of India had constituted a committee under the chairmanship of Justice AP Shah to deliberate and analyse the national privacy principles in light of emerging issues both in India and globally.

Justice Shah's report floated a framework highlighting the following that Indian data protection regulations required:
1. Technological neutrality and interoperability with international standards;
2. Multi-Dimensional privacy;
3. Horizontal applicability to state and non-state entities;
4. Conformity with privacy principles; and
5. A co-regulatory enforcement regime.

But it was not until the Aadhaar national identity database was challenged in court by nonagenarian retired Karnataka high court judge Justice KS Puttaswamy and others, that a more substantive debate began taking place.

On 9 August 2017, the Telecom Regulatory Authority of India (“TRAI”) released a consultation Paper on Privacy, Security and Ownership of the Data in the Telecom Sector for stakeholders’ comments. The aim of the paper was to identify the key issues pertaining to data protection in relation to the delivery of digital services. TRAI, in its consultancy paper, had sought comments from the public on twelve separate questions – they range from the definition and ownership of the personal data to regulation and audit of data controllers to balancing of rights of each stakeholder to the issue of cross-border flow of information.

To date TRAI has received 53 comments and 12 counter-comments from different stakeholders in the value chain. Though the consultation was open to the public at large, most comments were received from the Telecom Service Providers (“TSP”), over-the-top (“OTT”) content providers and the industry associations. We have referred to the comments whenever relevant.

Today the main enactment that deals with protection of data is the Information Technology Act, 2000 (“IT Act”) and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011 (the “IT Rules”). Personal information is defined under Rule 2(i) of the IT Rules to mean “any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person”.

It is noteworthy that, at present, only sensitive personal data (a sub-set of personal data) is protected under the IT Act and the IT Rules. Rules 5 of the IT Rules prescribes that no body corporate shall collect sensitive personal data or information unless (a) the information is collected for a lawful purpose connected with a function or activity of the body corporate; and (b) the collection of such information is considered necessary for that purpose. Rule 6 of the IT Rules prescribes that no body corporate can disclose sensitive personal information to any third party without permission from the provider of such information.

THE JUSTICE SRIKRISHNA WHITE PAPER
The White Paper that Justice Srikrishna and 8 other experts on data and privacy laws from different domains produced, proposed that data protection laws should provide protection to the entire gamut of personal data with a higher level of protection to sensitive personal information than personal data and a more stringent penalty be imposed for harm/breach of privacy law involving sensitive personal data. The White Paper has proposed an expanded list of personal data to be categorised as sensitive (see graphic overleaf).

The 243-page White Paper addressed seven main themes:
1. Technology agnosticism – The law must be technology agnostic. It must be flexible to take into account changing technologies and standards of compliance.
2. **Holistic application** – The law must apply to both private sector entities and government. Differential obligations may be carved out in the law for certain legitimate state aims.

3. **Informed consent** – Consent is an expression of human autonomy. For such expression to be genuine, it must be informed and meaningful. The law must ensure that consent meets the aforementioned criteria.

4. **Data minimisation** – Data that is processed ought to be minimal and necessary for the purposes for which such data is sought and other compatible purposes beneficial for the data subject.

5. **Controller accountability** – The data controller shall be held accountable for any processing of data, whether by itself or entities with whom it may have shared the data for processing.

6. **Structured enforcement** – Enforcement of the data protection framework must be by a high-powered statutory authority with sufficient capacity. This must coexist with appropriately decentralised enforcement mechanisms.

7. **Deterrent penalties** – Penalties on wrongful processing must be adequate to ensure deterrence.

**EXEMPTIONS FROM DATA PROTECTION LAWS**

The IT Rules currently in force only allow sensitive personal data to be collected by companies if:

1. the information collected for a lawful purpose
2. the collection of such information is necessary for that purpose.

The White Paper proposes to increase the scope of the categories of information that deserves exemption from data protection laws to include household purposes (i.e. information collected for an individual's own use), journalistic/artistic, literary, academic research, statistics and historical purposes.

Out of the TRAI stakeholders commenting on its consultation, the Broadband India Forum suggested that private data should only be shared without consent for academics or other researchers for public value.

**WHAT IS A DATA CONTROLLER OR DATA PROCESSOR, AND WHO IS RESPONSIBLE?**

Stakeholders consulted by TRAI have said that distinguishing between who is a data controller and data processor is important, in order to identify who is responsible for any data breach. Some believe that data controllers should primarily be responsible for complying with the law, though likewise, data processors should be responsible to take the necessary technical and organizational measures to secure the data they process on behalf of the controller. TRAI stakeholders felt that the ‘controller-processor’ relationships are governed through contractual means and the law should not unreasonably intervene in these relationships.

Basing it approach in lines with the EU Model, the White Paper proposes that the data controller should be primarily responsible for compliance with data protection norms; while the data processor...
may be provided with some level of responsibility. Obligation for each should depend on what kind of processing activities are undertaken by data processors.

However, currently, the concepts of data controllers and data processors are not provided clearly under the IT Act or the IT Rules. The words "originator"\(^4\) and "intermediary"\(^5\) as defined under the IT Act are insufficient for the purpose of data protection law, and various major stakeholders have told TRAI in consultation that much stronger and more lucid definitions of these terms are required in law.

According to the White Paper, the competence to determine the purpose and means of processing may be the test for determining who is a 'data controller'. On the other hand, a data processor is an entity that is closely involved with processing, which however, acts under the authority of the data controller.

THE TRICKY SUBJECT OF CONSENT

Consent in data protection and privacy – in effect whether you can contractually waive you right to privacy – is a tricky subject. The US approach is very much consent-based, whereas the European Union (whose citizens’ data is more often than not stored by US companies) has gone for an approach more in line with privacy as a fundamental right that can not be signed away and the state can regulate it.

India’s Supreme Court in Puttaswamy held that privacy is a fundamental right, which includes informational privacy, recognising that an individual should have control over the use and dissemination of information that is personal. Since any unauthorised use of personal information would lead to an infringement of this right, consent must be taken for collection or processing of this information.

However, there are certain issues with collection of information even with consent, four of which are discussed by the White Paper:

1. **Lack of Meaningful and Informed Consent**
   
The most popular means of seeking consent is through notice to the user by the organisation informing the user of the potential use and dissemination of such personal information. Quite naturally it is expected that the notice would provide a fair and truthful information of the potential use of the consent. However, quite often we do not see that in practice.

2. **Standards of consent**
   
   According to the White Paper there is a need to have different standards of consent (and information in the notice) based on the sensitivity the personal data.

3. **Consent Fatigue**
   
   With the rise of computing power data processing has become routine work and as a result of this the users are flooded with consent notices.

4. **Lack of Bargaining Power**
   
   According to the White Paper, at present most of the online services come with only “take it or leave it” option. There is no provision for negotiation and the user has to forego the services offered.

   The White Paper notes that there is a necessity to provide additional protection to children; but opines that the age of consent for data protection law need not be that of 18 years. The TRAI stakeholders have proposed an age of 16 years for providing consent.

   The White Paper recommends the mandatory use of notice for privacy management and seeking consent of the users. It envisages that a Data Protection Authority\(^6\) would provide detailed guidelines and code of practices to regulate form and substance of the notice.

   Also, to combat consent fatigue, the White Paper has suggested that no consent is required in performance of contract, compliance with law, collection of information in situations of emergency, or other “legitimate interest”, as designated and guided by the Data Protection Authority.

   TRAI stakeholders agree that user’s consent for use of its personal/sensitive information is absolutely necessary. However, the method of obtaining consent could vary. According to most Industry Associations and OTT players (viz: Internet Service Providers Association of India, zeotab, Citibank, etc) the user must be given a choice of either “opt-in” or “opt-out”.

   According to the GSM Association, collection of consent is not always easy (and sometimes redundant because the consumers generally always agree to online consent forms) and companies can give a consumer certain control (without the need for consent) like dashboard or tools to “opt-in” or “opt-out”. However, most consumer associations (such as the Consumer Protection Association) believe that if sensitive information is involved then there should be explicit consent of the user.
THE INDIVIDUAL’S RIGHT OVER DATA
The White Paper recognises the right of individuals to have access to personal data stored by a third party, and to have the ability to correct such data, though reasonable fees may be charged for it. The right to be forgotten and the right to erasure – i.e., to require the deletion of old data about individuals on request – may be incorporated within the data protection framework, though it must have clear parameters provided by the regulator.

Additionally, the White Paper proposes that all the above rights should also be provided to the data already collected before the implementation of the prospective data protection law.

‘PSEUDONYMISED’ VS ‘ANONYMISED’ DATA
Anonymisation seeks to remove the identity of the individual from the data, while pseudonymisation seeks to disguise the identity of the individual from data. Anonymization irreversibly destroys any way of identifying the data subject. Pseudonymisation substitutes the identity of the data subject in such a way that additional information is required to re-identify the data subject.

Globally, in most jurisdictions, anonymised data falls outside the scope of personal data while pseudonymised data continues to be personal data. The White Paper has reserved its views on this and has sought stakeholder’s comments.

DATA PROTECTION AND THE GOVERNMENT
According to the White Paper, the law should apply horizontally to data about natural persons processed both by public and private entities. However, limited exemptions may be considered for well-defined categories of public or private sector entities.

The Supreme Court in Puttaswamy has laid down a threefold requirement for State’s interference with fundamental rights. While the State may intervene to protect legitimate state interests:
(a) there must be a law in existence to justify an encroachment on privacy, which is an express requirement of Article 21 of the Constitution,
(b) the nature and content of the law which imposes the restriction must fall within the zone of reasonableness mandated by Article 14, and
(c) the means which are adopted by the legislature must be proportional to the object and needs sought to be fulfilled by the law.

The White Paper has taken this into consideration and has proposed exemptions for the following information:
1. Information necessary for the purpose of investigation of a crime, and apprehension or prosecution of offenders;
2. Information necessary for the purpose of maintaining national security and public order.
In addition, the White Paper proposes a review mechanism to ensure that this exemption is not granted unreasonably.

ENFORCEMENT FRAMEWORKS: CO-REGULATION
The White Paper proposes a co-regulation model of enforcement. Co-regulation form of enforcement may be described as initiatives in which government and industry share responsibility for drafting and enforcing regulatory standards. Basic features of co-regulation model of enforcement are:
1. Formation of a general data protection statutes with broad provisions (eg: Industry Codes of Conduct)
2. Compliance with the detailed provisions of the Codes of Conduct would be indication of compliance with general provisions of the statutes
Since the issues pertaining to data protection is highly specialised the White Paper proposes to setup a separate and independent data protection authority at the national level with powers to (i) monitor, enforce & investigate; (ii) generate awareness; and (iii) setting of standards. The interface between the Industry and Government in a co-regulation model along with the role of the Industry and the Government is presented in a schematic format on the opposite page.

The White Paper has provided some detailed observations with respect to the adjudication process and has noted that the present adjudication framework is inadequate. The main feature of the proposed framework is that the aggrieved individual should approach the data controller first before approaching the Data Protection Authority with a complaint. Appeals could be made to the appellate tribunal formed under the IT Act. The White Paper also suggests that some actions would incur criminal liability; and where the investigation would be undertaken at a decentralised level (i.e. by a police officer not below the rank of Inspector).
While discussing the principles of harm and liability the White Paper identifies three types of harm to the user. Harm could be classified by loss of reputation, financial choice or limiting individuals’ choices. Liability in turn could either be triggered on i) proof of failure to take appropriate measures, ii) if the processing is inherently risky, the data controller is strictly liable, or iii) compulsory insurance to cover certain types of harm.

INFORMATION FLOWS ACROSS BORDER

The ease at which data can flow across jurisdictional border is both a matter of advantage and disadvantage. The fact that foreign entities need not establish local office for its operations would mean substantial lowering of operational cost which could then passed on to the consumers. On the other hand, it might be difficult to implement sanctions on these foreign firms because they are outside the jurisdictions of Indian laws. In the absence of any treaty or agreement cross-border implementation or enforcement of sanctions in most matters is generally guided by the principles of comity. However, that does not provide legal certainty.

The White Paper proposes that all entities, even those which do not have a presence in India, that offers a good or service to Indian residents over the Internet, or carries on business in India may be covered under the law. Additionally, in lines with EU GDPR, the White Paper proposes that any entity (no matter where they are located) that processes the personal data of Indian citizen or resident should be covered under the data protection law.

Enforcement of sanctions cross-border is an issue. The White Paper has suggested enforcement techniques such as mutual legal assistance treaties, restriction of access to the market, adopting penalties based on global turnover, and mandatory establishment of a representative office, holding Indian subsidiary/related entities liable for damages.

Data localisation would mandate companies to store and process data on servers physically located in national borders. The White Paper is of the view that only a few countries have adopted data localisation in some form or the other. It is of the opinion that while data localisation may be considered in certain sensitive sectors, it may not be advisable to prescribe it across the board.

INDUSTRY AND GOVERNMENT INTERFACE IN A CO-REGULATION MODEL
ABOUT THE FIRM

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.

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’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 Guide 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.

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NOTES
1 Justice K.S. Puttaswamy (Retd.) v. Union of India & Ors. 2017 (10)
2 SCALE 1.
4 In the EU the applicable regulation is General Data Protection Regulations ("GDPR"); approved and adopted by European Parliament ("EU") in April 2016 and will come into force on 25 May 2018. Section 2(1)(za) of the IT Act states: “originator” means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary.
5 Section 2(1)(w) of the IT Act states: “intermediary” with respect to any particular electronic message means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.
6 A regulator proposed to be formed under the data protection laws for enforcement (discussed later).
7 Black’s Law Dictionary 2004 (8th Edition) defines comity as “A practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts. “Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” Hilton v. Guyot, 159 U.S. 113, 163–64, 16 S.Ct. 139, 143 (1895).
Private Equity in India: The Legal Perspective

A number of laws, policies and regulations come into play where private equity in India is concerned. Legasis partner Apurv Sardeshmukh analyses the legal complexities.

The economic, commercial and industrial scenario today is that which is dependent upon investment or what we may also categorize as fund raising. Investment, which is a driver for growth for a number of industries, may flow into an organization in a number of ways such as private equity funding, angel investments, seed money investments, etc. These investments may vary in nature and in amounts and are regulated as per the applicable laws and regulations.

PRIVATE EQUITY:
In relation to Private Equity, a fund may be established which pools in funds raised by individuals or organizations and further invests them in a wide range of businesses. Investment by way of Private Equity differs from venture capital investment wherein money is generally invested for a stake in the business. The difference is generally in relation to the amount which is invested as well as the stage at which the investment is made. A private equity investment also differs from an angel investment which is an investment which is generally done in start ups.

There exist a number of laws, policies and regulations formulated by the Government and the Legislature which come into play wherein a private equity fund chooses to make an investment or during the course of a private equity transaction. The liability of adhering to these laws fall both upon the Company in which the investment is made and the Private Equity Fund which makes the investment. The laws governing both are discussed below.

REGULATORY FRAMEWORK GOVERNING PRIVATE EQUITY FUNDS AND TRANSACTIONS:

The Company Accountability:

1) Companies Act, 2013:
Where an investor knocks on the doors of the Company, questions related to how and by what way can the investment be made and in what manner rights can be granted to the investor come to surface. Depending on the manner as mutually agreed upon between the Company and the Investor, the Private Equity Investment is made in a company and accordingly statutory compliances that the companies need to be in line with are ascertained. These statutory compliances can further be sub divided into those which relate to a) the transaction related to the investment and b) other conditions precedents to the investment.

a) Section 42 and Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014: Private Placement of Securities other than public issue: Where a Company is willing to raise funds through private placement of securities, the provisions of Section 42 need to be complied with. Private Placement means any offer of securities or invitation to subscribe to
securities made to a group of persons selected by the company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in section 42. The process of issuing securities by way of private placement is enumerated below.

**Certain condition precedents for Private Placement:**

- The offer or invitation cannot be made to more than 200 persons excluding Qualified Institution Buyer’s and employees offered securities under Employee Stock Option Plan in a financial year.
- No fresh offer or invitation under this section shall be made unless the allotments with respect to any offer or invitation made earlier have been completed or the invitation/offer has been abandoned by the company.
- The value of such offer/invitation per person shall be with an investment size of not less than twenty thousand rupees of face value of the securities.
- Private placement offer/invitation shall only be made to such persons whose names are recorded by the company prior to invitation to subscribe the securities.
- Money payable towards subscription of securities be paid through cheque/DD or other banking channels and the application money received shall be kept in a separate bank account in a scheduled bank and shall not be utilized for any purpose.

**FLOWCHART: ISSUING SECURITIES BY WAY OF PRIVATE PLACEMENT**

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Offer/invitations needs to be previously approved by the shareholders by a special resolution

Filing of MGT-14 with the ROC i.e. copy of special resolution along with explanatory system

Offer/Invitation to subscribe to securities through private placement made through offer letter in PAS 4

Filing of Form PAS 3 with ROC within 30 days of allotment of securities

Filing of Form PAS 3 with ROC within 30 days from the date of circulation of the private placement offer

Maintenance of Register of holders of securities in compliance with the provisions of Section 88
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**INDIA: PRIVATE EQUITY**

- Allotment of securities to be made within 60 days from the date of receipt of application money and if the company fails to do the same the application money needs to be repaid within 15 days with an interest of 12% p.a.

**b) Section 62 and Companies (Share Capital and Debentures) Rules, 2014:** Further issue of Share Capital: Section 61(1)(a) confers certain pre-emptive rights on the existing shareholders. However, Section 62(1)(b) and (c) allow issuance of further shares to employees and other persons subject to certain conditions prescribed in the Section and the Rules mentioned above. Allotment can be made on preferential basis and any other manner subject to certain conditions such as:

- **Approvals:** The issue shall be authorized by a special resolution and in the articles of association of the company. Further, certain disclosures shall be made in explanatory statement to the notice of the meeting.

- **Valuation:** Price of such shares, except for listed companies, shall be determined by the valuation report of a registered valuer. Where convertible securities are offered with the option to convert them into equity shares, the price of the resultant shares has to be determined beforehand on the basis of valuation report. Further, in case of allotment of shares or other securities for consideration other than cash, the valuation of such consideration shall also be done by a registered valuer.

- **Allotment:** Securities allotted shall be made fully paid up at the time of their allotment and the allotment shall be complete within 12 months of passing the special resolution. In case the process of allotment is not completed, another special resolution has to be passed.

- **The issue of shares on preferential basis should also comply with the conditions enumerated in Section 42 of the Act i.e. Private Placement.**

- **All conditions prescribed in the Companies (Share Capital and Debentures) Rules, 2014 shall be complied with.** Further, if the issue is that of a listed company, SEBI regulations such as SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 and SEBI Issue of Capital and Disclosure Requirements) Regulations 2009 shall be complied with.

**c) Issue of debentures:** For the issue of debentures, the provisions of Section 42 and Section 62 (in case they are issued through preferential allotment) need to be complied with. Further, all other conditions such as creation of a debenture redemption reserve, appointment of a debenture trustee and those which are mentioned in Section 71 of the Companies Act, 2013 need to be complied with.

**d) Issue of Preference Shares:** Private equity investments may also be made by way of issue of preference shares. Section 55 of the Act governs the rules related to issue preference shares. Earlier, the investors preferred investing in a company by way of acquiring preference shares. However, now given the requirement that issuance of preference shares would need to be authorized by a special resolution and also that for issuance of preference shares a company would be required to have not defaulted in repayment of dividend on or redemption of any preference share, the same is discouraged.

- **Further, companies are restricted from making investments through more than 2 layers of investment subsidiaries and the Articles of Association of a Company need to be amended to ensure that conditions of the transactions and investment made in the company are incorporated in them.**

**Foreign Direct Investment Policy regulates the inflow of FDI in India and further imposes general conditions and sector specific conditions on these investments.**

- **Valuation:** Price of such shares, except for listed companies, shall be determined by the valuation report of a registered valuer. Where convertible securities are offered with the option to convert them into equity shares, the price of the resultant shares has to be determined beforehand on the basis of valuation report. Further, in case of allotment of shares or other securities for consideration other than cash, the valuation of such consideration shall also be done by a registered valuer.
1) **Foreign Direct Investment Policy:**

Foreign Direct Investment ("FDI") Policy is issued by the Department of Industrial Policy and Promotion every year. The Policy regulates the inflow of FDI in India and further imposes general conditions and sector specific conditions on these investments. The FDI Policy also puts caps on investments and enlists the sectors in which the same can be made. The two types of routes for FDI as enumerated in the Policy are the Automatic Route and the Government Approval Route. In case the investment falls under the automatic route, no permissions and approvals need to be taken by the investor, however, if the same falls under the government/approval route due permissions need to be in place. Earlier, these permissions were to be taken by the Foreign Investment Promotion Board. However, the same was abolished in May, 2017. The FDI Policy 2017 lays down the authorities who are empowered to provide permission for investments which fall under the government route.

2) **Reserve Bank of India Regulations on Transfer or Issue of Security by a Person Resident outside India and Regulations under the Foreign Exchange Management Act, 1999:**

Reserve Bank of India ("RBI") in November, 2017 issued Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017. These regulations regulate investments made in Indian companies and the issue of equity shares, debentures, preference shares and share warrants which are classified as "Capital Instruments" under the Regulations. The Regulations also impose restriction on receiving and making investments. Provisions in relation to permission to be given for making investment by a person resident outside India and the entry routes, sectoral caps and the investment limits are also enumerated in the Regulation and the same are in line with the FDI Policy. Further, the Regulation also enumerates the provisions related to the transfer of capital instruments of an Indian company by or to a person resident outside India, pricing guidelines, taxes, remittance of sale proceeds and mandate certain reporting requirements.

3) **SEBI (Alternative Investment Funds) Regulations, 2012:**

The investment in various organizations is now routed from the “Alternate Investment Funds” which are established for the purpose of making investments. These funds need to be complaint with the SEBI (Alternative Investment Funds) Regulations, 2012. The Regulations provide a legal framework for the pool investment funds in India such as real estate, private equity, hedge funds etc. The regulations mandate registration of all Alternative Investment Funds and restrict any person or entity from acting as an AIF unless registration from SEBI has been procured. The Regulation bifurcates the registration in Category I/Ii/Ii and enumerates the eligibility criteria for the same. Category II includes private equity funds within their ambit. Private Equity Fund means an AIF which invests primarily in equity or equity linked instruments or partnership interests of investee companies according to the stated objective of the fund. It also imposes certain restrictions in terms of number of investors and amount of investments. The regulation restricts any scheme from having more than 1000 investors and further accepting a deposit of less than 1 Crore. The investment transactions shall be in line with the restrictions and conditions imposed by the regulations.

4) **SEBI (Foreign Venture Capital Investor) Regulations, 2000:**

Reserve Bank of India regulations regulate investments made in Indian companies and the issue of equity shares, debentures, preference shares and share warrants.
The SEBI (Foreign Venture Capital Investor) Regulations, 2000 regulates investments by the Foreign Venture Capital Investors ("FVCI") which are investors incorporated or established outside India and propose to make investments in venture capital funds or venture capital undertakings in India. Even though the registration under the Regulations are not mandatory, SEBI and the RBI have extended certain benefits to SEBI registered FVCIs. The regulations also mandate the appointment of a domestic custodian for the purpose of the custody of the securities. SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009 ("ICDR Regulations") prescribes one-year post Initial Public Offering ("IPO") lock-in period for the promoters. The same proved to be a hindrance for the investors. The FCVI regulation however, provides an exemption from the same.

5) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011:
SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 provide an exit option to public shareholders in case any person acquires shares or voting rights which entitles him to 25% or more voting rights. These regulations come into force wherein the investment is of such a nature that the same delists the company or one may call as a complete buy-out of a company. Certain conditions and restrictions on those who already own shares in a company from making further investments are also imposed. Where such an investment as that which delists the company is made, the SEBI (Delisting of Equity Shares) Regulations, 2009 also come in play.

6) Income Tax Act, 1961:
The Income from the sale of shares is classified as Capital Gains. Hence, the investment transactions are regulated by the provisions of the Income Tax Act, 1961. The Income Tax Act, 1961 provides for certain exemptions for investments made in companies. Further, in order to get tax benefits it may be possible that the investors route their investments from more favorable jurisdictions. In such scenarios, Double Taxation Avoidance Agreement, Place of Effective Management and General Anti-Avoidance Rules are to be considered.

Conclusion:
With the increased need of dependence on investments, there exists a need for a robust legal environment which encourages foreign investors to step foot in India. A liberalized economy wherein domestic and international investors are protected by a well guarded legal framework is the need of the hour.

NOTES
1 Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014

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Evolution of the Corporate Insolvency Resolution Regime in India

India’s Insolvency and Bankruptcy Code has promised to completely transform the country’s insolvency resolution regime. Jyoti Singh analyses the key judicial decisions under the Code.

As far as the introduction of new laws in India is concerned, the Insolvency and Bankruptcy Code, 2016 (Code) is second to none in the discussion, excitement and media interest that it has generated since the time it has been legislated. Its framers professed that it would radically alter the debt restructuring and debt recovery landscape of the country, and bring the framework of insolvency resolution on par with developed countries. While it may be too early to gauge whether the Code lives up to its "objects and reasons", this chapter analyses the backdrop that necessitated the introduction of the Code and the key judicial decisions under the Code, which paint a picture of hope and promise to completely transform the insolvency resolution regime in India in a time bound manner.

Prior to the Code, India did not have a consolidated statute governing incidents of insolvency and bankruptcy of various entities. The drawbacks to having multiple statutes were that on one hand, there was an overlap/contradiction in some provisions and on the other hand, the legal proceedings initiated thereunder would sometimes run in parallel before several different forums, which often led to multiple and contradictory orders in respect of the same entity. To further aggravate the situation, the entire process of recovery, debt restructuring and liquidation remained extremely susceptible to dilatory tactics to the extent that on an average, debt restructuring and liquidation took almost 4.3
years in India\(^1\). In fact, under laws like SICA, it was possible for a corporate debtor to avoid recovery proceedings/liquidation indefinitely by seeking protection under its provisions prohibiting claims against sick companies\(^2\). As Mr. Arun Jaitley, the Minister of Finance, expounded in his address before the Parliament when the Code (then a Bill) was tabled:

“Now, the object behind SICA was revival of sick companies. But not too many revivals took place. But what happened in the process was that a protective wall was created under SICA that once you enter the BIFR, nobody can recover money from you. So that non-performing investment became more non-performing because the companies were not being revived and the banks were also unable to pursue any demand as far as those sick companies were concerned, and therefore, SICA runs contrary to this whole concept of exit that if a particular management is not in a position to run a company, then instead of the company closing down under this management, a more liquid and a professional management must come and then save this company. That is the whole object. And if nobody can save it, rather than allowing it to be squandered, the assets must be distributed - as the Joint Committee has decided - in accordance with the waterfall mechanism which they have created. (emphasis supplied)”

It was widely felt that the previous framework for insolvency and bankruptcy in India was inadequate, ineffective and resulted in undue delays in resolution\(^3\). One of the objects of bringing in the Code therefore was to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner\(^4\).

To overcome the infirmities of the previous insolvency resolution framework, the Banking Law Reforms Committee (BLRC) was constituted in October, 2014 under the chairmanship of Mr. T.K. Viswanathan. In November 2015, the BLRC came out with its report recommending drastic changes to the law relating to insolvency and bankruptcy (BLRC Report). The BLRC Report recommended a complete institutional overhaul, inter alia, proposing the constitution of a regulator (which eventually became the Insolvency and Bankruptcy Board of India), information utilities, insolvency professional agencies and insolvency professionals. Most importantly, taking into account the need of the times as well as the statutory framework in place in other developed countries, the BLRC proposed that India shift from a debtor-in-possession to a creditor-in-control model.

Although the complete overhaul of the system and the implementation of the recommendations of the BLRC Report appeared to be a tall order, the government’s commitment to the cause can be gauged from the fact that the Code was brought
into effect expeditiously, and its provisions were notified from time-to-time, and it was implemented in December 2016. Since its implementation, India has dedicated tribunals, the National Company Law Tribunals (Adjudicating Authority) with twelve benches across the country, the National Company Law Appellate Tribunal (Appellate Authority), a fully functional regulator (viz., the Insolvency and Bankruptcy Board of India (IBBI)), insolvency professional agencies and several highly-qualified insolvency professionals. Quite recently, India's first information utility also became functional. IBBI as a watch dog is keeping a close watch on the roadblocks in the successful implementation of the Code and from time to time, based on feedback from its research team and in consultation with the stakeholders, comes out with guidelines, regulations, circulars, clarifications and the like.

A study of the orders passed by the various benches of the Adjudicating Authority under the Code suggests that they have on an average disposed of insolvency petitions within 24 days of their filing. The same study also suggests that the Code largely dispenses with the pro-debtor bias exhibited by judicial bodies under the previous regime. While it must be acknowledged that the data set used in the study is limited as it only takes into account orders passed by various benches until August 2017, one can infer that the Code marks the onset of a remarkable change in insolvency resolution in India, and that giving effect to the Code was one of the important factors in India's over all jump by 30 places in the Index of Ease of Doing Business in 2017 released by the World Bank (and the bump by 33 points as far as resolving insolvency is concerned).6

The expeditiousness with which the Indian government has introduced these systemic changes and the joint effort make by the judiciary and other stakeholders is indicative of the fact that the state remains committed to putting in place a robust insolvency resolution system that is creditor-friendly and maximizes the asset value in a time bound manner.

B. JUDICIAL PRONOUNCEMENTS

As the Code nears its one-year anniversary, and with the best way of assessing implementation of anylaw is by assessing the judicial pronouncements, it is very heartening to note that the Adjudicating Authorities, Appellate Authority along with various high courts and the Supreme Court of India are giving timely judgments, thereby illuminating various aspects of the Code. This section seeks to examine some of the most notable and landmark court decisions, which have brought a lot of clarity to the provisions of the Code, thereby further boosting the confidence of all the stakeholders.

**Innoventive v. ICICI**

The very first case under the Code by a financial creditor was filed by ICICI Bank Limited (ICICI) by way of an insolvency application under Section 7 of the Code against its borrower, Innoventive Industries Ltd. (Innoventive) before the Adjudicating Authority, Mumbai Bench. Innoventive sought to defend itself by arguing that the claim amount was not due, as it was protected under the Maharashtra Relief Undertakings Act, 1958 (MRU Act), under which its liabilities and remedies for enforcement thereof were suspended for a period of one year.

By an order dated January 17, 2017, the Mumbai Bench admitted the insolvency petition filed by ICICI and held that the Code prevailed over the MRU Act by virtue of the Code’s Section 238 non-obstante clause, which states that the Code shall have effect
notwithstanding anything contrary contained in any other law. Innovative appealed against the said order before the Appellate Authority, which also rejected Innovative's argument of MRU Act prevailing over the Code. Ultimately, the Supreme Court, while dismissing Innovative's appeal, passed a very detailed order laying down the background and framework of the Code.

This being the first case where the Supreme Court had an opportunity to pronounce a conclusive judgment on the interpretation of the Code, the Supreme Court dealt extensively with the nature of insolvency applications filed under Section 7 of the Code and also with the issue of repugnancy between the Code and the MRU Act. The judgment of the Supreme Court also touches upon other key aspects of the Code, thereby boosting the confidence of all the stakeholders.

**Mobilox v. Kirusa**

In this case, the Supreme Court interpreted the term "dispute" for the purposes of Section 8(2) of the Code. This decision came against the backdrop of multiple contradictory decisions interpreting "disputes" by various benches of the Adjudicating Authority: the Delhi Bench took the view that the definition of "disputes" was inclusive and not restricted to merely pending suits and arbitrations, while the Mumbai Bench, interpreting the concerned provision strictly, interpreted a dispute to mean only pending suits and arbitrations.

Pronouncing on the interpretation of "dispute", the Supreme Court held that keeping in mind the legislative intent of the Code, the "and" in Section 8(2) of the Code ought to be read as 'or' and therefore the definition of dispute therein was inclusive and could not be restricted to only pending suits and arbitrations. The Supreme Court further observed that in an insolvency application, the Adjudicating Authority is only to inquire whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence.

**Surendra Trading Company v. Juggilal Kamlapat Jute Mills Company Limited & Ors.**

In this decision, the Supreme Court examined the decision of the Appellate Authority with respect to the mandatory/directory nature of various time periods laid down by the Code. The Appellate Authority held that the time period prescribed for operational creditors to rectify the defects in their insolvency applications in seven days in the proviso to Section 9(5) of the Code is mandatory in nature, while holding that the time period for the Adjudicating Authority to admit or reject an insolvency application in fourteen days in Section 9(5) of the Code is directory in nature.

On appeal, the Supreme Court in particular examined whether the prescription to remove defects within seven days in an insolvency application was a mandatory requirement, failure to adhere to which would result in the dismissal of the application.

The Supreme Court took the view that there could be *weighty, valid and justifiable* reasons for not being able to remove the defects within seven days and the said stipulation was directory in

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**In an insolvency application, the Adjudicating Authority is only to inquire whether there is a plausible contention which requires further investigation.**

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nature, and that an insolvency application could be entertained even when the applicant had overshot the seven day period prescription, provided that the petitioner was able to show sufficient cause for the delay.

**Essar Steel India Limited v. Reserve Bank of India**

Essar Steel India Limited (Essar) had challenged a directive by the Reserve Bank of India (RBI) to banks to initiate insolvency proceedings against twelve entities, one of which was Essar. The RBI directive was issued pursuant to the amendment of the Banking Regulation Act, 1949 (BRA) as
a result of which the Central Government could authorize the RBI to direct banks to initiate insolvency proceedings against loan defaulters under the Code. The move was an attempt by the Central Government to address the very serious and lingering issue of NPAs in the country.

Essar sought to challenge the said directive before the Gujarat High Court by claiming that the twelve entities mentioned in the RBI directive had been chosen arbitrarily and further that it was in discussions with its lenders for restructuring of its debts, which had come to a standstill as a result of the RBI directive.

RBI on the other hand argued that the directive to initiate insolvency proceedings against the aforementioned twelve entities was not arbitrary and that it had in fact, used the twin criteria of the largest and longest standing non-performing assets to arrive at the list of the said twelve entities. The Gujarat High Court refused to interfere with the RBI directive and held that the said RBI directive was not arbitrary. It further directed Essar to raise its concerns before the NCLT.

The aforesaid amendment to the BRA, the RBI directive and the Gujarat High Court’s verdict in the instant case wherein it refused to intervene and stay the proceedings against Essar, eventually paved the way for the initiation of insolvency resolutions against other large companies, the most notable of which are Jaypee Infratech Limited and Amrapali Infrastructure Limited.

C. CONCLUSION

While Indian courts have sometimes drawn criticism for judgments that appear to defeat the legislative intent behind certain statutes (a case in point being several Supreme Court decisions in the early years of enactment of the Arbitration and Conciliation Act, 1996), the first round of case law suggests an approach that is conscious of the legislative intent behind the Code, and an intention to not allow debtors to scuttle or delay the insolvency resolution process. Understanding the time-bound nature in which the Code functions, courts have shown great restraint and have ensured that proceedings before them do not become susceptible to dilatory litigation tactics that are the curse of Indian courts. Even in cases where the corporate debtors have approached the courts for relief that would result in stalling insolvency proceedings, as in Innoventive v. ICICI (see above) and Essar v. RBI (see above), the courts have rightly refused to intervene and stay insolvency proceedings.

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NOTES

2. Section 22 of the SICA.
7. 2017 SCC Online SC 1025.
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If you were to look at the Indian finance landscape around the last five to seven years, you would find a very traditional bank-dominated market, where the Indian state banks and the public sector undertaking (PSU) banks were giving the majority of financing, including a lot of project financing.

But since then, banks have faced a series of difficulties, which has changed market dynamics. Meanwhile, the financial market has opened up and from a more traditional bank-led market, a lot of new avenues for raising finance have come up. The entire bond market has diversified, as non-convertible debentures (NCDs) have come up as a finance tool, as the Reserve Bank of India (RBI) has introduced Rupee ECBs (external commercial borrowing) and Masala Bonds. And only three or four years ago, high-yield bonds, which were barely relevant from an Indian issuer perspective have become a fairly attractive source of fund raising for certain companies.

In short, the Indian finance markets have been growing in various directions and are going through some very interesting times, with new participants and a general shake-up caused by activity in areas such as distressed debt. All of this will help a more mature market to evolve.

LEGALLY INDIA: WHAT ROLE HAVE THE REGULATORS PLAYED IN ALL THIS?

The government and RBI have always had an intent that the Indian rupee bond market should be deeper. The change there has generally been more market-led in terms of limitations on bank lending as well as new investor classes emerging. Regulation has generally been supportive, but in certain cases has imposed restrictions as well. By way of example, the RBI introduced a minimum maturity requirement of 3 years for FPIs investing in NCDs, which was based on their evaluation of the macro economic scenario and a desire to control cross currency flows.

On the other hand, some changes, such as Masala Bonds, have been led by regulation: the RBI had pushed for Rupee debt to be raised from offshore, because they wanted Indian companies to be protected from exchange rate fluctuations, yet have access to international investors. And while Masala Bonds didn't take off across the spectrum, it has come through for certain sectors and certain types of issuers. The RBI approach
on Masala Bonds has been cautious for the most part: initially it was opened up widely but then it reverted to requiring approvals.

**LEGALLY INDIA:** AND WHAT ROLE HAVE PSUs PLAYED IN THIS CHANGING LANDSCAPE?

PSU banks have obviously had the non-performing assets (NPA) problem, which has constrained their ability to lend more, and because it was such a bank-led market, many of them have reached their exposure limits. So Indian borrowers have had to look to alternative sources, which has been the primary reason for growth of the bond market and alternative sources of finance.

While PSU banks remain a very important tool to raise finance and do form the backbone of the system, in relative terms, the volumes of lending they do has decreased.

**LEGALLY INDIA:** HAVE NON-BANKING FINANCIAL COMPANIES (NBFCS) STEPPED INTO THE SPACE?

NBFCS have definitely had a greater role of in the Indian financing market over the last few years. We have seen that NBFCS are effectively competing for a lot of the work that the banks used to do and we are seeing them execute a lot more deals. Some of them may be focused on particular sectors such as real estate, but many others will do work across all sectors. We are also increasingly seeing financing platforms structured as alternative investment funds (AIFs).

In addition there is now a lot of attention on the distressed vertical, with some financing pools looking to exclusively focus on distressed debt.

**LEGALLY INDIA:** HOW HAS THE MARKET FOR DISTRESSED ASSETS CHANGED?

It was very clear that the government had decided that some pretty major steps needed to be taken to deal with the distressed debt problem, and to that end, the Insolvency and Bankruptcy Code (IBC) is being seen as a real game changer. Whereas before the IBC there was no realistic road out of distress – a company in financial difficulties was either expected to remain stuck there, with no way out, or for a series of reschedulings to take place.

The IBC has been the first real glimmer of hope that things can actually change, and that's why there's been a lot of interest from people, who are asking: can we get a piece of this distressed debt?

The main target of interest has always been the assets themselves, of course, though even the credit piece of the equation is seeing a lot of attention from credit funds abroad and funds that look at distressed debt. It would be fair to say that this interest is at a preliminary stage at the moment, and is subject to considerations on both what form the investment should take, given India’s exchange control regulations, and also on how much control the funds can have in terms of a voice on the creditor committee and implementation of
People are waiting and watching with interest how sensibly and how soon the IBC and government handles test cases such as those of the so-called "dirty dozen".

The other alternative is to buy distressed companies outright, with a large number of companies now up for sale as part of the resolution process of the IBC. There has been interest both from strategic bidders and from financial investors, and I think different people hold different views on this. Some people see it as a great opportunity. Others feel that given the difficulties and complexities of doing business in India, how many real bidders are up for the challenge of managing these companies – in any given situation there will usually only be two or three strategic bidders who potentially could.

Coupled with the noise about about existing promoters being blocked form bidding for assets, people are uncertain of how well this will all play out in the coming months.

LEGALLY INDIA: HAVE THERE BEEN ANY TEETHING ISSUES WITH THE IBC?

One particular issue surrounds guarantors and moratoriums under the IBC. The IBC – unlike in the old days under the Sick Industrial Companies (Special Provisions) Act 1985 (SICA) – has been drafted in a manner that if a company goes into an IBC proceeding, there is a moratorium over the assets of the company, and it doesn't actually extend to guarantors, group companies or promoters.

Nevertheless, some courts and tribunals have taken the interpretation that if the borrower is in a moratorium, then you can't invoke the guarantee during that period. The general consensus of the legal community is that those judgments have not interpreted the IBC correctly, but it's still causing a great deal of difficulty and risk: you can suddenly find as a creditor that for a period of six or nine months you don't have the comfort of a guarantee anymore and you are in a very different position.

However, people are hopeful because the Supreme Court has been active in interpreting the IBC and also supporting it, because its judges recognise the purpose of the IBC and have interpreted it positively in the past.

LEGALLY INDIA: WHAT HAS THE IBC MEANT FOR LAWYERS AND OTHER PROFESSIONALS?

The IBC has given rise to this whole arena of work that wasn’t there before: for every IBC proceeding you need an insolvency professional to run that company. A lot of the folk from accounting firms have registered themselves as insolvency resolution professionals (IRPs) and are now into this full-time: that’s almost an entire new stream of work that wasn’t there before.

Lawyers too are either involved for the creditors, or they’ll act for the IRPs, or for the new bidders. Furthermore, there are information utilities that are set up under the code, where lawyers file information under the code.

Everybody is currently finding their feet, including the IRPs and the National Company Law Tribunals (NCLTs).

LEGALLY INDIA: WHAT INSTRUMENTS ARE THE MORE POPULAR TYPES OF DISTRESSED DEBT TO BUY FOR FOREIGN FUNDS?

Cross-border regulations do generally make it difficult for foreign funds to come in and take debt, but one obvious piece for them to buy is external commercial borrowing (ECBs), because those are already owned by foreign lenders. However, some of those funds may not be able to buy ECBs because those also have qualifying requirements and restrictions in respect of who can be the lender, and also have minimum
tenor period and pricing requirements.

The second piece of Indian debt foreign funds can buy more easily, is when an Indian company has exposure to offshore assets: a lot of Indian companies have bought offshore companies and have taken funding offshore to buy those companies, with parent company support in India; that kind of financing is much easier for foreign funds to come into.

But even when buying offshore, there are still some issues: if that kind of financing has a specific type of security, it may only be available for bank lenders.

Onshore Rupee-debt is usually much more difficult to acquire from offshore: although non-convertible debentures can be potentially bought via a foreign portfolio investment (FPI) investor, Rupee loans can not be bought offshore.

The alternative is to go the asset reconstruction company route, or to set up here as an NBFC, where the licensing process has been fairly efficient if the minimum RBI norms are complied with.

LEGALLY INDIA: WHAT OTHER INSTRUMENTS HAVE SEEN SUCCESS?

External commercial borrowing, in the form of bilateral ECBs and syndicated ECBs, has always been the traditional instrument that foreign lenders have used to lend to Indian companies in sectors such as infrastructure and manufacturing. But a combination of factors has led to volumes in that market reducing significantly. For one, changes in international liquidity conditions have meant that international banks have been constrained, with some that have looked to cut back on international exposure and to remain in their home jurisdictions.

And then, in the Indian economy, a lot of the financing has also been focused on refinancing as opposed to ECBs’ traditional territory of capital expenditure, which has decreased.

That said, non-convertible debentures (NCDs) have really come into their own in this time: they offer much more flexibility because they don’t have pricing requirements and a lot of people prefer to use the NCD routes.

High yield instruments have worked for companies within a particular range: renewable companies and a few others in specific sectors have really tried to take advantage of the offshore market for around the past two-and-a-half years.

What the government could do to make high yield instruments more attractive is to reduce restrictions in the ECB guidelines.

LEGALLY INDIA: WHAT IS THE CURRENT LANDSCAPE WITH RESPECT TO PRIVATE EQUITY INVESTMENTS AND FINANCING?

There has been significant PE activity in India over the last few years, both in terms of new investments and exits. Leverage for PE investments has also become a key part of such investment activity. Much of this activity has been around the international, offshore private equity players securing financing offshore. That has been driven by regulations as well as the fact that a large number of private equity funds are offshore. But increasingly, private equity financing is looking to move onshore because there are some advantages when a target is onshore and you are getting funding in Rupees, so there

In the Indian economy, a lot of the financing has been focused on refinancing as opposed to ECBs’ traditional territory of capital expenditure.

is a focus on trying to find solutions to provide Rupee financing.

However, the RBI has been quite consistent in not letting Indian banks in entering this style of high-risk leveraged business, which puts the Indian banks at a disadvantage insofar as inbound acquisitions are concerned. Indian banks have been very active on funding Indian companies acquiring offshore companies, but that activity has been significantly less in the last couple of years.

LEGALLY INDIA: WHAT ARE THE DISADVANTAGES IN TAKING ACQUISITION FINANCINGS OFFSHORE?
From the lenders’ perspective, you can not create security over Indian shares under the foreign exchange rules in certain circumstances including if money is coming into India from abroad. In that scenario, the Indian shares cannot be offered as security. The security would therefore also have to be offshore, which has been the major constraint: people would be happy for that rule to liberalise but that hasn’t been the case.

Onshore there’s been an issue regarding foreign-owned and -controlled companies, which are not allowed to leverage the domestic market for the purpose of downstream investments. That has also proved to be a constraint in doing fundraising.

Acquisition financing has also had some knock-on effects. Traditionally in India every bank has followed their own set of documents but there hasn’t been a market standard document. This is in contrast to London and the international markets, where there have been the Loan Market Association documents, for instance, which provides the standard documentation that people then adapt.

But increasingly, players that are doing acquisition financing in India are used to the international style of documentation. Now we are more often also seeing onshore in India those types of documents, including covenants, controls and cure related provisions, that we’ve seen only offshore until now.

**ABOUT THE AUTHOR**

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Prior to moving to TT&A in June 2009, Sonali worked with Linklaters at their Singapore office for nearly four years.

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Clients say:

Sonali Mahapatra is “exceptionally good with her work,” describing her as “extremely focused, solution-oriented and pragmatic in approach.”

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COMPAT IS OUT, NCLAT IS IN: SO FAR THAT’S GOOD NEWS

The Competition Appellate Tribunal (“COMPAT”) has been done away with and has been merged with the National Company Law Appellate Tribunal (“NCLAT”).

Initially, practitioners across the competition bar were concerned about the fact that a specialist tribunal with institutional memory could be lost, as none of the COMPAT judges moved to the NCLAT.

The Bench at NCLAT has ensured that a very strict timeline is adhered to, in the disposal of competition appeals, which is a very welcome move for industry and the evolution of competition jurisprudence. The NCLAT turnaround time has been much quicker than the COMPAT, despite its workload, including company, Insolvency and Bankruptcy Code (“IBC”) matters as well as competition matters.

Overall, NCLAT has been doing a great job with respect to appeals pertaining to competition law, that has a huge economic impact and where time is always of the essence. Previously enterprises would rarely appeal merger control orders because of the time it would take, which could jeopardize the deal itself. However, with the NCLAT’s quick disposal, one is bound to witness a lot more merger control appeals in the future. Going forward as the regime evolves, it is possible that the NCLAT may set up dedicated competition benches instead of the bench hearing IBC matters in the morning and competition matters in the afternoon.

THE SMALL TARGET EXEMPTION PROMISES TO STREAMLINE MERGER CONTROL NOTIFICATIONS

The second major change for India’s competition regime has been the small target exemption, where the MCA on 27 March 2017 has extended the de minimis exemption to mergers and amalgamations from just acquisitions earlier. This move recognizes that the mode of corporate structuring is irrelevant to the applicability of the exemption.

The MCA further clarified that in the case of an asset acquisition, they will only look at the value of the assets being acquired and the turnover emanating from such assets, rather than the entire vendor’s balance sheet, as done previously. While this is a welcome relief for industry, the modalities of auditor certification for such asset acquisitions need to be addressed, given that most businesses do not maintain separate financials for assets/business divisions.

Effectively, this move has reduced the number of unnecessary merger notifications filed with the CCI and is a very positive step, consistent with international best practices.

CCI PROVIDES GUIDANCE ON NON-COMPETE COVENANTS

In July 2017, the Combination Division of the CCI,
for the very first time, issued a guidance note on non-compete obligations. The guidance note provides the CCI’s framework and approach for assessment of non-compete restrictions. This is a welcome step as around 60% (13 cases) of all modifications voluntarily offered or imposed by the CCI since 2011 (22 cases) pertained to scope and duration of the non-compete clause. The guidance note provides a very clear roadmap for the industry with respect to the overall framework and approach by the CCI, which will in part reduce the number of commitments and lead to efficiencies in the merger control process.

INDIA IS NO LONGER AN ANOMALY WITH RESPECT TO DEADLINES FOR MERGER CONTROL FILINGS

The CCI also did away with the mandatory 30-day filing deadline for notifying mergers and acquisitions. The removal of the 30-day filing deadline for notifiable transactions is an excellent move and will contribute to the ease of doing business in India.

Until recently, India was amongst the few outlier jurisdictions which had specified timelines with respect to notifying a combination. Companies can now file the merger notifications with the CCI at any point of time prior to closing of the proposed transaction, which is in line with the approach adopted in other jurisdictions such as, Europe, the United States of America (“U.S.A.”), etc.

This move recognises notifying parties are incentivised to file as soon as possible and ensures that they can file based on the requisite information being available, instead of having to rush an Indian merger filing with limited information within the (previous) 30-day deadline. This deadline was a major hurdle particularly for merger filings which were subject to filing requirements across several jurisdictions.

Significantly, this move also does away with the CCI imposing penalties for belated filings (up to 1% of companies’ global assets or turnover, whichever is higher). Previously, GE-Alstom was penalised for an inadvertent delay in filing based on differing interpretations of what construed the notifiable trigger to file – such cases will now become a thing of the past.

BUT MERGER CONTROL EXEMPTION FOR CERTAIN PSUS IS SHORTSIGHTED

In terms of not-so positive changes, the MCA has exempted certain public-sector undertakings (“PSUs”) from the purview of merger control. The MCA has exempted all combinations involving nationalized banks from the obligation to file a merger notification, for a duration of 10 years from the date of the exemption notification. Separately, mergers involving regional rural banks and the oil and gas PSUs are exempt from filing a merger notification, for a period of 5 years from the date of the exemption notification. The exemptions for Government companies, first in banking and then the oil sector rolled out by the MCA, discriminates companies on the basis of ownership and is contrary to international best practices.

LENIENCY REGIME

The CCI in 2017 amended the Lesser Penalty Regulations providing the much-needed clarity to the leniency regime in India and provide incentives for companies and individuals to pro-actively assist in cartel enforcement.

The amended Lesser Penalty Regulations recognize markers beyond the first three markers, i.e., now more than three applicants can apply for
leniency. Such subsequent applicants (after the third applicant), will also be eligible for reduction in penalties of up to 30%, provided they assist in giving ‘significant added value’ to the evidence already in the possession of the CCI.

Since there is no longer a cap on the number of leniency applicants, this amendment provides a clear incentive for more cartel participants to come forward and disclose the existence of a cartel. It also brings the Indian leniency regime in line with the leniency regime in the U.S.A. and is a step in the right direction.

Separately, the amended Lesser Penalty Regulations permits access to documents in the possession of the CCI to not only leniency applicants but also to non-leniency applicants, including third parties who have been impleaded in leniency proceedings. The amendment grants those who have the right of access to file, the right to obtain copies of the non-confidential version of the evidence and information submitted by the leniency applicants, after the Director General's investigation report (“DG Report”) has been sent to the parties. This effectively addresses the single largest complaint under the earlier leniency regime in India (of non-access to any information filed by leniency applicants), which resulted in several non-leniency applicants approaching High Courts by way of writs, to gain access to information provided by a leniency applicant. It also balances the confidentiality requirements under a leniency regime, while addressing the rights of defence for non-leniency applicants and is in line with the approach adopted by the European Commission.

**The Competition regulator is becoming increasingly confident as it introduces reforms.**

**KEY COMPETITION DECISIONS OF 2017**

**Hyundai**
In June, the CCI fined Hyundai INR 87 crores for its practice of maintaining and monitoring the maximum discount offered by its car dealers, including penalties for non-compliance with the suggested discounts. This is the first case relating to resale price maintenance where penalty was imposed and this sent a clear signal to the industry that while monitoring of downstream prices may not be problematic, even threats against deviation from the suggested price/discount can be regarded as resale price maintenance.

In the same case, Hyundai was also found to be engaged in a tying arrangement concerning lubricant oils. The CCI found that Hyundai’s dealers were forced to provide lubricant oil to customers from two lubricant oil manufacturers with whom Hyundai had entered into agreements and Hyundai communicated this requirement to its dealers through bulletins.

**Film Trade Unions**
The CCI passed cease and desist orders against certain national and regional trade associations of film artists and producers for engaging in practices of limiting and controlling the services in the Western Indian film and television industry. The CCI rejected arguments raised by parties that they were exempt as trade unions.

However, the CCI considered substance over form in considering whether a party constituted an enterprise under the Act, as recently held by the Hon'ble Supreme Court in its examination of an enterprise in the Co-ordination Committee of Artist and Technicians of West Bengal Film and Television Industry vs. CCI.

**Monsanto**
In 2016, the CCI ordered an investigation into whether Monsanto abused its dominant position as a supplier of genetically modified cotton seeds and also imposed vertical restraints in the sub-licensing agreements entered into with the informants. In 2017, during the investigation, the Director General (“DG”) directed Monsanto to provide information eight times, which the company failed to provide. Monsanto filed a writ petition in the Hon’ble High Court of Delhi that it would not provide the information immediately or would provide it on a ‘without prejudice’ basis. While Monsanto eventually provided the said information, the CCI imposed a penalty of INR 2 crores on Monsanto for non-co-operation.
The CCI’s penalty signals its “zero tolerance” approach to non-co-operation during investigations, even if parties have challenged the CCI’s proceedings in the High Courts. In other words, a failure to co-operate will lead to penal consequences.

**Ola**

Another seminal order by the CCI was its order in the information filed by Meru Cabs and Fastrack Cabs against Ola Cabs. The CCI found that Ola Cabs was not dominant in the market for “radio taxi services in Bengaluru”, and was the first case where the CCI considered two-sided markets, the role of technology in reducing transaction costs, as well as the role of an early adopter of disruptive technology. More importantly, the CCI explained why a non-interventionist approach is required for nascent and evolving markets to evolve and innovate, as an intervention in a nascent market has the potential of disturbing market dynamics and providing a sub-optimal solution. The CCI is expected to come out with its order investigating Google, and it will be interesting to see the position it adopts and whether it will follow the Ola approach.

**Delhi Jal Board**

In the Delhi Jal Board alleged bid-rigging case, the CCI rejected the argument of a single economic entity (SEE) advanced by Grasim Industries Limited (Grasim) and Aditya Birla Chemicals (India) Limited (ABCIL), despite the CCI’s own merger control order adopting and recognizing that Grasim and ABCIL are part of a SEE.

The CCI tried to reconcile its merger control order by stating that the word “group” is not found in section 3 relating to anti-competitive agreements (but is present on Sections 4 and 5 relating to abuse of dominant position and merger control) and resultantely the defense of SEE will not be applicable for Section 3 cases. The CCI further held that this defense would not be applicable in public procurement cases involving tax payer’s money, where entities of one group purportedly behaved as independent undertakings.

It is essential that for clarity and consistency the CCI should consider adopting a consistent definition of ‘group’ and SEE for the application to the Competition Act, 2002 (“Act”) and not create an artificial segmentation of Sections 4 and 5 vis-à-vis Section 3. The need for such clarity is also important given that corporate entities should have the flexibility to conduct business through multiple vehicles in the same group.

**IN MERGER CONTROL, THE CCI IS NOW ONE OF THE MOST EFFICIENT REGULATORS**

On the merger control front, in addition to further streamlining the merger notification process in line with international best practices, the CCI has top scored on its timelines for assessing notifiable mergers. The CCI’s average review time for notifiable transactions has been reduced from approximately 34 working days on an average in 2016 to approximately 24 working days on an average in 2017 – this despite the CCI having limited resources in the merger control division when compared to its international counterparts.

The annual review of the combination regulations where the CCI continually addresses industry concerns has yielded great results. The merger control regime is “almost perfect”, and one key change which remains on the industry’s wish list is the right of hearing before the CCI can invalidate a merger notification – which it currently can, and does, without affording notifying parties a right to be heard.

The economy has been witnessing an incredible amount of consolidation across sectors such as, telecom in India. Globally, 2017 saw major consolidation amongst the agro-chem and fertilizer industry with giants such as, Dow Chemicals, DuPont, Syngenta, China Nationals Agrochemical, Bayer and Monsanto, all being part of mergers or acquisitions in the sector. The CCI has indicated its preference for structural modifications as opposed to behavioral commitments to remedy competition concerns that arise from transactions. This has meant that the CCI has had to scrutinize and assess near simultaneous mergers between competitors and has done a commendable job of ensuring timely reviews of consolidation in the market, despite having a skeletal team.

**TELECOM SECTOR**

In the telecommunication sector, the CCI unconditionally approved the Idea-Vodafone merger in under four months and it was the first regulator to do so, even before the Securities and Exchange Board of India (“SEBI”), National Company Law
Tribunal or the telecommunication’s regulator. This merger involved complex economic analysis, multiple relevant markets and a sector which was witnessing a series of consolidations among players.

In fact, in 95% of all notified transactions involving approvals from more than one regulator or schemes filed with the Courts, the approval from the CCI has always come first.

**SPILL-OVER EFFECTS**

The CCI has also begun to consider other potential effects that a transaction may result beyond a particular relevant market. In the assessment conducted into the notification provided by three Japanese shipping and logistics entities for the formation of a joint venture in the container terminal business worldwide, namely NYK, MOL and K-Line, the CCI for the first time also considered potential “spill-over effects”. The CCI conducted the competition assessment keeping in mind the effect of the joint venture with respect to other shipping related businesses such as, bulk shipping, car transport services, logistics, and freight forwarding services, maritime training, ship management and manning etc. in which the parties were engaged. The CCI approved this joint venture after the notifying parties offered certain voluntary commitments to ensure that the joint venture would not result in the exchange of information between the notifying parties and the employees of the joint venture were to adhere to certain restrictions on sharing of information.

The CCI has evaluated multiple sectors and, has over time, developed sectoral expertise in relation to sectors such as agro-chem, cement, pharmaceuticals and telecommunications. In-depth market knowledge coupled with economic tools for relevant market delineation have led to the evolution of a robust merger control regime which is not just efficient but efficacious as well.

**LOOKING FORWARD TO 2018**

The Hon’ble Supreme Court of India has finally settled the issue of “turnover” in respect of which penalty can be imposed by the CCI. It is now clear that an enterprise can only be penalised with respect to turnover pertaining to those of its businesses which violated the Act, and not with respect to its entire turnover. However, given that CCI has the ability to levy India’s highest economic penalties, it is critical for the CCI to formulate penalty guidelines which will serve as a barometer to guide the industry.

In 2018, the NCLAT is expected to decide upon several contentious matters which are currently on appeal. We foresee continued enforcement action being undertaken by the CCI in the agrochemical sector and pharmaceutical sectors as evidenced by the CCI’s scrutiny of the Bayer Monsanto deal.

Finally, the 2018 International Competition Network (“ICN”) Annual Conference is being hosted by the CCI in New Delhi from 20 March 2018 to 23 March 2018, where the CCI and other international competition authorities will share their experience in enforcement and merger control. It is expected that these discussions will further strengthen the Indian competition regime, improve and evolve its procedures.

Further to contribute to the ease of doing business in India, and given that a substantial majority of the CCI’s matters originate in Mumbai, it is imperative for the Government to set up benches of the CCI in Mumbai. SEBI, the securities market regulator has 19 offices across India and for ease of doing business, the Government should replicate this model for the CCI starting with India’s financial capital.

**ABOUT THE AUTHOR**

Nisha Kaur Uberoi is a Partner and the National Head of the Competition Law Practice at Trilegal, leading one of the largest competition law teams in India.

Previously, she was co-heading the competition practice at AZB & Partners and headed the competition law practice at Cyril Amarchand Mangaldas – which she set up. Nisha started her career with Amarchand Mangaldas in 2002.

Nisha advises on a full range of competition matters, including cartel enforcement, abuse of dominance, leniency applications, merger control, competition law audit and compliance. Nisha represents clients in cartel investigations as well as abuse of dominance proceedings and regularly appears at the Competition Commission of India (CCI), the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court regularly.

Nisha is currently the lead lawyer on the alleged cement cartel case, where she is representing ACL,
in which the cement companies were penalized approximately USD 1.6 billion by the CCI. Nisha is currently defending companies in alleged cartels across several sectors, including inter alia, tyre, cement, auto-parts and shipping liner businesses.

She has successfully represented several high-profile clients in complex, precedent-setting behavioural matters, including the Board of Control for Cricket in India, Ola, International Spirits and Wine Association of India, International Air Transport Association, Gujarat Gas Company Limited, Prestige Estates Projects Limited, etc.

Nisha has advised on several complex merger control cases, including India’s first two Phase II investigations involving divestitures, Sun Pharmaceuticals/Ranbaxy USD 4 billion merger and the Lafarge/Holcim Euro 41 billion merger. She recently obtained an unconditional approval on the USD 22 billion Idea-Vodafone merger. She has obtained a significant number of merger control clearances in India (200 of an approximate total of 497 merger notifications), having particular expertise in acting for clients in Form II (long form) merger notifications (10 of an approximate total of 16) filed with the CCI. Her significant merger control clearances include the Etihad/Jet transaction, the Kotak Mahindra/ING USD 2.4 billion merger and UltraTech/Jaypee USD 3.3 billion acquisition of cement assets across India.

Nisha is internationally recognized as one of India’s leading competition lawyers, including being recognized by Chambers, Who’s Who Legal: Competition, IFLR 1000, Asia Law Leading Lawyers and Euromoney Women in Business. Nisha has also featured in the inaugural ALB Asia’s 40 under 40, GCR 100 Women in Antitrust as well in the A-List of India’s top 100 lawyers by India Business Law Journal and Indian Corporate Counsel Association.

The RSG India Report (2013) details her as “one of the most excellent Competition lawyers in India” for her work in this field.

Nisha currently serves as India’s Non-Governmental Advisor for the International Competition Network (ICN). She is a member of the Unilateral Conduct Working Group for the International Bar Association, 2017. Nisha also serves a member of the Permanent Working Group of the IBA Antitrust Committee on Non-Cartel Behavioural Issues and is a member of the Ad Hoc Working Group on Merger Control of the IBA Antitrust Committee.

Nisha is an alumnus of National Law School of India University, Bangalore and did her LL.M. from the National University in Singapore with a focus on Comparative Competition Law and Law and Economics.

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ABOUT TRILEGAL

Trilegal is one of India’s leading law firms with offices in five of India’s major cities - Mumbai, New Delhi, Bangalore, Hyderabad and Gurgaon. We represent clients on a large number of the most complex and high value transactions in India.

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Rise of the Institutions: India Takes a Giant Leap Towards Institutional Arbitration

The creation of a robust and vibrant eco-system for institutional arbitration in India is on its way, explains Verus.

The momentous rise in international trade and commerce over the last few decades has caused a commensurate surge in the number of commercial disputes globally. India too, being one of the fastest growing economies of the world, has witnessed significant industrial growth, modernization, and improvement of socio-economic circumstances and resultantly, spiraling commercial disputes. However, these developments have far outpaced the evolution and development of dispute resolution mechanisms which are still plagued with policy ambiguities and regulatory impediments, ludicrous costs and endemic delays and have resultantly inundated the investor community causing anguish and distrust. The same was reflected in the World Banks’ recent ‘Ease of Doing Business Rankings’ where India ranked abysmally low in respect of enforcement of contracts. For India to give a fillip to its economic growth and development and gain investor confidence, much needs to be done towards dispensation of expeditious and affordable justice.

In this context, arbitration has always been regarded as one of most preferred alternatives to litigation in India and is considered to hold the promise of flexibility, speed and cost-effectiveness. However, in reality, arbitration in India, till very recently, has been far removed from these objectives. Lack of credible arbitral institutions, muddled notions of public policy, excessive judicial intervention, unprofessional and inexperienced arbitrators, inordinate delays, poor quality of awards and the absence of a dedicated arbitration bar, are some factors which have caused skepticism on the efficacy of arbitration as a dispute resolution mechanism. With series of recent policy reforms introduced by the Indian lawmakers including the Arbitration and Conciliation (Amendment) Act, 2015 and the enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 for facilitating swift disposal of arbitration-related court proceedings coupled with the minimal interventionist approach taken by the judiciary in respect of arbitrations in the recent past, India has made a decisive move towards augmenting issues pertaining to arbitration. However, much still needs to be done on this front and the creation of a robust and vibrant eco-system for institutional arbitration will be one of the key challenges for the government if it were to promote India as a preferred hub for international arbitrations. It is against this background that the rise of the arbitration institutions in India assumes significance; and if the recent developments are any signs of things to come, then the stage looks set for a new beginning.

INSTITUTIONAL ARBITRATION LANDSCAPE IN INDIA
India presently has around 35 institutions administering arbitrations in the country including various domestic and international arbitral
institutions, arbitration facilities provided by various public sector undertakings, trade and merchant associations, and city specific chambers of commerce and industry. Some of the notable Indian institutions administering arbitrations include the ICADR, the Indian Council of Arbitration, the Delhi International Arbitration Centre and the recently started Mumbai Centre for International Arbitration. Amongst the international institutions which have set up their operations in India are the Singapore International Arbitration Centre ‘SIAC’ and the London Court of International Arbitration ‘LCIA’ – which unfortunately ended its operations in 2016. SIAC recently has also opened a second representative office in India at the Gujarat International Finance Tec-City (GIFT) pursuant to an MOU signed between SIAC and GIFT. Besides these, certain statutes and bye-laws also envisage resolution of disputes arising under them under the aegis of an institution/centre rendering dispute resolution services. For instance, Section 18(3) of the Micro, Small and Medium Enterprises Act, 2006 provides that a dispute regarding amounts due for the supply of goods or services must be referred to the Micro, Small and Medium Enterprises Council which would conduct conciliation itself or make a reference to an institution or centre for conciliation. In case the conciliation is not successful, the Council would thereafter refer the disputes to arbitration before an institution or before the centre. Similarly, Bye-laws of the Mumbai Stock Exchange provide for arbitration between members and non-members under the aegis of an arbitration committee.

However, despite the presence of these arbitral institutions, India has not fully embraced institutional arbitration as a preferred mode of arbitration. Contrary to global practices where majority of arbitrations, including arbitrations involving the state and state-owned enterprises, are administered by arbitral institutions, arbitrations in India are pre-dominantly skewed towards an ad hoc rather than an institutional set-up. Resultantly, caseloads being handled by most of these institutions continue to remain insignificant when compared to their well-established global peers where a steady growth of cases has been noted in the last 10 years. For instance, the International Court of Arbitration of the International Chamber of Commerce, Singapore International Arbitration Centre, China International Economic and Trade Arbitration Centre and the Hong Kong International Arbitration Centre, noted that 9662, 343, 2183 and 460 new cases were filed before them respectively in the year 2016 alone.

Lack of rudimentary physical infrastructure and access to quality legal expertise, negligible exposure to international best practices, outdated rules of procedure, inadequately trained staff, and poorly staffed panels of arbitrators are some factors which have hindered the development and growth of arbitral institutions in India. Additionally, misconceptions persist regarding institutional arbitration, particularly its supposed inflexibility and high costs. This, coupled with a lack of awareness about the advantages of institutional arbitration and the existence of certain institutions, leads to parties avoiding institutional arbitration or preferring foreign arbitral institutions over Indian ones. In fact, out of the 307 cases administered by the Singapore International Arbitration Centre (SIAC) in the calendar year 2016, 153 cases involved Indian parties. Similarly, Indian parties contributed to around 4.4% of the LCIA’s caseload in the calendar year 2016.

Another significant roadblock in the growth of institutional arbitration in the country is the lack of governmental support and statutory backing for institutional arbitrations. While the government and its instrumentalities are amongst the most prolific litigants in the country, the government has been averse to taking initiatives to encourage the development and growth of arbitral institutions. Even
the Arbitration and Conciliation Act, 1996 has been agnostic to promoting institutional arbitration in the country. The same is in contrast to jurisdictions like Singapore and Hong Kong where Arbitral institutions have been statutorily designated as the appointing authority for arbitrators. Moreover, some of the recently introduced amendments in the Act providing for stricter timelines and regulating the fees of the arbitrators have also been perceived to make arbitral institutions wary of arbitration in India.

**JUDICIAL TRENDS TOWARDS INSTITUTIONAL ARBITRATION**

Indian arbitration law jurisprudence has been severely criticized in the past particularly because of its over interventionist approach in regulating arbitration proceedings. However, with several recent landmark judgments of the Supreme Court, the arbitration regime in India has witnessed a paradigm change with greater degree of sanctity being afforded to arbitral decisions and arbitration as a mechanism for resolution of disputes. Various observations have further been made by the Courts in India providing impetus to the growth of institutional arbitration in the country.

The Hon'ble Supreme Court in Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust, while adumbrating the need of regulating arbitrators’ fees and development of institutional arbitration regime in the country took note of instances where arbitrations are being shifted to neighbouring jurisdictions like Singapore, Kuala Lumpur etc., owing to the presence of more professionalized or institutionalized arbitrations, which get concluded expeditiously at a lesser cost. In another case, the Hon’ble Apex Court expressly acknowledged the advantages of institutional arbitration over ad hoc arbitration in relation to determination of the arbitrators’ fees which is not fixed by the arbitrators themselves on a case-to-case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the arbitration is being held.

Again, in Nandan Biomatrix Ltd. v. D 1 Oils Ltd., the Hon’ble Supreme Court held an arbitration clause which required institutional arbitration without particularly identifying an institution to be valid. In National Agricultural Cooperative Marketing Federation of India Limited v. R Piyarell Import and Export, the Hon’ble Calcutta High Court while taking note of the rise in the popularity of institutionalized arbitration under the aegis of the ICA (Indian Council of Arbitration) and other established, recognized institutions held that in case of institutional arbitrations, photocopies of the award with photocopied signatures, or digitally signed awards, duly certified by an authorized office bearer of the institution, conducting the arbitration, should satisfy the requirement of Section 31(5) of the 1996 Act.

Signaling a major boost to the growth of institutional arbitration in the country, the Hon’ble Supreme Court for the first time of what may optimistically be many, in Sun Pharmaceutical Industries Ltd., Mumbai v. M/s Falma Organics Limited Nigeria, while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 referred the matter to the Mumbai International Arbitration Centre to appoint an arbitrator for resolution of disputes between the parties. The judgment delivered by the Hon’ble Court is a welcome step and marks a positive shift in approach towards institutional arbitration in the country. It is hoped that this process is systemized whereby the parties can approach designated arbitral institutions directly for such purpose, instead of the court acting as an intermediary for every such appointment.

**JUSTICE SRIKRISHNA COMMITTEE REPORT AND THE NEW DELHI INTERNATIONAL ARBITRATION CENTRE BILL, 2018**

The Government of India, in line with its goal to make India a hub for institutional arbitration, had in January, 2017 constituted a high-level committee under the Chairmanship of Justice B.N. Srikrishna, with the mandate of reviewing the institutionalization of arbitration mechanism in India and suggesting reforms to bolster the institutional arbitration regime in the country.

The Committee, which submitted its report to the government on August 03, 2017, identified several critical areas for improvement and reform, such as the creation of Arbitration Promotion Council of India (APCI) which would be responsible for grading arbitral institutions in India and accrediting arbitrators, the need for minimum standards for arbitral institutions, the creation of a specialist arbitration bar and bench, incentivizing institutional arbitration by providing incentives for developing physical infrastructure for arbitration, necessary
provisioning in the National Litigation Policy and the State Litigation policies to promote arbitration in government contracts and as a dispute resolution mechanism in disputes involving government departments or PSUs and private parties. The report also proposed several amendments to the Arbitration and Conciliation Act, 1996 aimed at removing the ambiguities in the Act, incorporating international best practices and limiting the involvement of Indian Courts in the arbitration process.

Based on the reforms suggested by the High Level Committee and in a bid to provide impetus to institutional arbitration in the country, the Government introduced the New Delhi International Arbitration Centre Bill in the Lok Sabha in January, 2018 for establishment and incorporation of a New Delhi International Arbitration Centre (NDIAC)\(^{13}\). The Bill envisages acquisition and transfer of undertakings of the International Centre for Alternative Dispute Resolution (ICADR) and vests such undertakings in the NDIAC for better management of arbitration. The Bill further seeks to declare the NDIAC to be an institution of national importance and envisages appointment of persons of repute and having knowledge and expertise in institutional arbitration as chairperson and members of the NDIAC.

The new Centre (NDIAC) would work towards promoting research and providing training in alternative dispute resolution; providing facilities and administrative assistance for the conduct of arbitration, mediation and conciliation proceedings; maintaining a panel of accredited professionals to conduct arbitration, mediation and conciliation proceedings and to ensure the conduct of such proceedings in a professional, timely and cost-effective manner.

The NDIAC will be required to maintain a fund which will be credited with grants received from the central government, fees collected for its activities, and other sources. The Bill further provides for establishment of a Chamber of Arbitration by NDIAC which will maintain a permanent panel of arbitrators as well as an Arbitration Academy for training arbitrators and conducting research in the area of alternative dispute resolution.

**THE ROAD AHEAD**

As arbitration continues to grow with Indian parties, policy makers and courts of law have emphasized the need and importance of development of an institutional arbitration regime in the country. With recent developments like the creation of the Mumbai Centre for International Arbitration and the Maharashtra arbitration policy, discussion for development of BRICS-centric arbitration centre in New-Delhi, SIAC’s tie-up with the Gujarat International Finance Tec-City, policy reforms recommended through the High Level Committee’s report and the most recent introduction of the New Delhi International Arbitration Centre Bill, 2018, the development and growth of institutional arbitration regime in the country has received a major thrust. The said developments exhibit a lot of promise and if implemented effectively, can go a long way in strengthening arbitration practice in India. One aspect, however, which the lawmakers need to be cautious about is to identify a city (and not the entire country) as the chosen ‘hub’. Historically, an arbitration hub has always been associated with a city – like London, Paris, Singapore, Vienna, Hong Kong, New York – and not a country. Therefore, the messaging and positioning must be clear; and the lawmakers must identify and pick between Mumbai or Delhi – the seat which would come to represent India’s offering to the international arbitration world as a seat.

At present, while there is a definite momentum and clamour towards building an institutional setup, stakeholders need to ensure that we do not fall prey to an internal rivalry between different arbitration institutions (like MIAC, NDIAC) set up in different cities in India in their effort to project themselves as the primary institutional offering from India. Recent developments have however made one thing certain: that the coming years will bear witness to the rise of the institutions in the arbitration jurisprudence of India.

**ABOUT THE AUTHORS**

Krishnayan Sen  
*Partner, Verus*  
E: krishnayan.sen@verus.net.in

Krishnayan is a partner at Verus and heads the firm’s disputes practice. He has been a trusted adviser to a diverse range of clients, including international corporations, government undertakings, banks and statutory authorities. He is a versatile litigator, having regularly represented...
clients across different courts and tribunals. He is also an advocate-on-record at the Supreme Court of India and has appeared in several leading cases.

His recent cases include successfully representing the American Tower Corporation in various arbitration proceedings before the Delhi High Court for claims involving about $150 million; representing Schlumberger in a public procurement tender involving about $35 million and in liquidation proceedings against an oil major; advising and representing PSI Incontrol (Malaysian MNC) in an international commercial arbitration; advising and representing United Bank of India against Kingfisher Airlines and Vijay Mallya at the Supreme Court of India in recovering its dues of $60 million (awarded Deal of the Year by the India Business Law Journal); successfully defending McDonald’s in relation to the accounting method of rounding-off followed in its chain of restaurants; advising; advising UBER in actions for defamation against a regional media house; successfully represented Huntsman International in recovering its contractual claims against a vendor before the Delhi High Court; advised GE Healthcare in an arbitration involving a claim for personal damages; and, advised Kotak Mahindra Bank in defending secured creditor’s rights under the Securitisation Act before the Supreme Court.

His principal areas of practice include international arbitration, corporate-commercial disputes and banking litigation. He is fluent in English, Hindi and Bengali.

Ankit Jain
Associate, Verus
E: ankit.jain@verus.net.in

Ankit Jain is an associate at Verus and is a part of the firm’s disputes practice group at New Delhi. A graduate from the University of Petroleum and Energy Studies, Dehradun, ankit focuses on civil and commercial litigation, oil & gas, competition, mining and arbitration. He regularly represents clients across different courts and tribunals and advises them on a wide array of legal issues.

His recent representations include advising and representing a leading global oilfield services provider in a dispute pertaining to award of an offshore oilfield services contract before the Supreme Court and the Bombay High Court; representing a global oilfield services provider in a service dispute before the Rajasthan High Court; advising and representing a leading telecom infrastructure provider in various arbitration proceedings before the Delhi High Court, advising and representing one of the leading ARC’s in IBC proceedings before the NCLT, advising and representing a leading public sector undertaking before the anti-trust regulator and NCLAT in a matter pertaining to bid rigging in a public procurement tender; representing a multi-national corporation in an international commercial arbitration pertaining to a services and supply contract.

Ankit is fluent in English and Hindi.

NOTES

7 (2012) 1 SCC 455
9 2009 2 SCC 495
10 2015 SCC Online Cal 7 198
11 2017 SCC Online SC 1 200
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. From winning the “Best New Law Firm” Award by the India Business Law Journal in 2012 and the “Deal of the Year (Dispute)” Award by the India Business Law Journal in 2014, being featured as an IFLR 1000 recognized firm for financial and corporate services and to recently being named as the “Rising Star” by the India Business Law Journal in 2017, VERUS consistently aspires and works towards creating a niche in its practice in the country.

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FIRM OVERVIEW:
Number of partners: 5
Number of associates: 35
Number of offices: 4

LANGUAGES:
English and Local Indian Languages

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Web: www.verus.net.in

Verus is India member firm of:
Key Movements and Compensation Benchmarking in the Indian Legal Sector

2017 saw another healthy year for legal recruitment in India, with key trends continuing to reflect both global and regional influences. Vito India Advisors provide an overview of key movements, compensation and hiring trends.

YEAR IN REVIEW:
2017 saw another healthy year for legal recruitment in India, and it remains the most exciting function for career opportunities in the corporate governance space. Hiring across the legal sector (private practice firms and in-house legal teams of corporations and financial institutions) remained steady throughout 2017 with key trends continuing to reflect both global and regional influences. This piece provides an overview of key movements across the legal sector (divided into three segments- (i) private practice firms, (ii) In-House legal teams (BFSI), and (iii) In-House legal teams (commerce & industry) and then does a mid-market review of compensation and hiring trends in the organised Indian legal sector.

KEY MOVEMENTS:

A. Private Practice Firms
The following table reflects key partner level moves in large and prominent private practice firms (to and/or from) in India last year (2017).

<table>
<thead>
<tr>
<th>Name</th>
<th>Organization From</th>
<th>Organization To</th>
<th>New Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rishi Gautam</td>
<td>AZB &amp; Partners</td>
<td>Cyril Amarchand Mangaldas</td>
<td>Partner</td>
</tr>
<tr>
<td>Pallavi Bedi</td>
<td>J. Sagar Associates</td>
<td>Luthra &amp; Luthra Law Offices</td>
<td>Partner</td>
</tr>
<tr>
<td>Ashish Jejurkar</td>
<td>Cyril Amarchand Mangaldas</td>
<td>Atsumi &amp; Sakai (Japan)</td>
<td>Of Counsel</td>
</tr>
<tr>
<td>Saurav Kumar</td>
<td>Shardul Amarchand Mangaldas</td>
<td>Indus Law</td>
<td>Partner</td>
</tr>
<tr>
<td>Anoj Menon</td>
<td>Desai &amp; Diwanji</td>
<td>AZB &amp; Partners</td>
<td>Partner</td>
</tr>
<tr>
<td>Ami Parikh</td>
<td>Cyril Amarchand Mangaldas</td>
<td>AZB &amp; Partners</td>
<td>Partner</td>
</tr>
<tr>
<td>Nisha Kaur Uberoi</td>
<td>AZB &amp; Partners</td>
<td>Trilegal</td>
<td>Partner</td>
</tr>
<tr>
<td>Faraz Alam Sagar</td>
<td>Trilegal</td>
<td>Cyril Amarchand Mangaldas</td>
<td>Partner</td>
</tr>
<tr>
<td>Name</td>
<td>Firm 1</td>
<td>Firm 2</td>
<td>Position</td>
</tr>
<tr>
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<td>-------------------------------</td>
<td>-------------------------------</td>
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<tr>
<td>Tirthankar Dutta</td>
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<td>Partner</td>
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<tr>
<td>Akhil Anand</td>
<td>Shardul Amarchand Mangaldas</td>
<td>Luthra &amp; Luthra Law Offices</td>
<td>Partner</td>
</tr>
<tr>
<td>Piyush Mishra</td>
<td>Cyril Amarchand Mangaldas</td>
<td>AZB &amp; Partners</td>
<td>Partner</td>
</tr>
<tr>
<td>Varun Sriram</td>
<td>J. Sagar Associates</td>
<td>VB Legal</td>
<td>Founding Partner</td>
</tr>
<tr>
<td>Abhilekh Verma</td>
<td>Khaitan &amp; Co</td>
<td>Kochhar &amp; Co</td>
<td>Partner</td>
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<tr>
<td>Niloufer Lam</td>
<td>Cyril Amarchand Mangaldas</td>
<td>Zarir Bharucha &amp; Associates</td>
<td>Partner</td>
</tr>
<tr>
<td>Abhishek Shinde</td>
<td>KLaw</td>
<td>AZB &amp; Partners</td>
<td>Partner</td>
</tr>
<tr>
<td>Megha Arora</td>
<td>HSA Advocates</td>
<td>J. Sagar Associates</td>
<td>Partner</td>
</tr>
<tr>
<td>Sumit Sinha</td>
<td>J. Sagar Associates</td>
<td>DMD Advocates</td>
<td>Partner</td>
</tr>
<tr>
<td>Upendra Joshi</td>
<td>Khaitan &amp; Co</td>
<td>Legasis Partners</td>
<td>Partner</td>
</tr>
<tr>
<td>Abhimanyu Ghosh</td>
<td>Trilegal</td>
<td>Khaitan &amp; Co.</td>
<td>Associate Partner</td>
</tr>
<tr>
<td>Gaurav Singhil</td>
<td>Shardul Amarchand Mangaldas</td>
<td>Cyril Amarchand Mangaldas</td>
<td>Partner</td>
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<tr>
<td>Nalina Mayegowda</td>
<td>Poovayya &amp; Co</td>
<td>Khaitan &amp; Co.</td>
<td>Partner</td>
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<tr>
<td>Shahan Pradhan</td>
<td>J. Sagar Associates</td>
<td>HSA Advocates</td>
<td>Associate Partner</td>
</tr>
<tr>
<td>Srinivas Kilambi</td>
<td>Cyril Amarchand Mangaldas</td>
<td>Mandala Law Offices</td>
<td>Co-founding Partner</td>
</tr>
<tr>
<td>Raghuram Raju</td>
<td>Cyril Amarchand Mangaldas</td>
<td>Mandala Law Offices</td>
<td>Co-founding Partner</td>
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</table>
### B. In-House Legal (BFSI)

The following table reflects key senior level in-house legal and compliance professional moves in the BFSI sector last year (2017).

<table>
<thead>
<tr>
<th>Candidate Name</th>
<th>Company From</th>
<th>Company To</th>
<th>New Title</th>
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</thead>
<tbody>
<tr>
<td>Ishwar Shandilya</td>
<td>Adani Group</td>
<td>ESR</td>
<td>Head – Legal</td>
</tr>
<tr>
<td>Devendra Raghav</td>
<td>Aditya Birla Payment Bank</td>
<td>QNB</td>
<td>Head – Compliance</td>
</tr>
<tr>
<td>Parmanand Sawlana</td>
<td>Aditya Birla Payment Bank</td>
<td>SCILL</td>
<td>Head – Compliance</td>
</tr>
<tr>
<td>Dipali Dalal</td>
<td>Axis Capital</td>
<td>Centrum</td>
<td>VP &amp; Head – Legal NBFC</td>
</tr>
<tr>
<td>Rakesh Rai</td>
<td>Bajaj Finserv</td>
<td>Aditya Birla Capital</td>
<td>Head – Legal</td>
</tr>
<tr>
<td>Supriya Bharadwaj</td>
<td>Bajaj Finserv</td>
<td>Bain Piramal Distressed Fund</td>
<td>VP – Legal</td>
</tr>
<tr>
<td>Salim Vohara</td>
<td>BTMU</td>
<td>Mashreq Bank</td>
<td>Head – Compliance</td>
</tr>
<tr>
<td>Sri Phani Y</td>
<td>Citibank</td>
<td>Bajaj Finserv</td>
<td>Head – Legal</td>
</tr>
<tr>
<td>Nita Sanghavi</td>
<td>Credit Suisse</td>
<td>Avendus</td>
<td>Head – Legal</td>
</tr>
<tr>
<td>Praveen Thomas</td>
<td>Deutsche Bank</td>
<td>SSG Capital</td>
<td>Director &amp; Head – Legal</td>
</tr>
<tr>
<td>Nehal Shah</td>
<td>Deutsche Equities</td>
<td>Yes AMC</td>
<td>Head – Compliance</td>
</tr>
<tr>
<td>Uttara Deka</td>
<td>Ex Deutsche Bank</td>
<td>Invesco</td>
<td>Director – Legal</td>
</tr>
<tr>
<td>Murlidhar Lakhra</td>
<td>First Rand Bank</td>
<td>Indusind</td>
<td>Head – Compliance</td>
</tr>
<tr>
<td>Nilakshi Kalambi</td>
<td>HSBC</td>
<td>Citibank</td>
<td>Director &amp; Head Legal – Consumer Banking</td>
</tr>
<tr>
<td>Raghvendra Rao</td>
<td>HSBC</td>
<td>Bajaj Finserv</td>
<td>Senior Legal Counsel</td>
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<tr>
<td>Srinivas Yanamandra</td>
<td>IDFC</td>
<td>New Development Bank</td>
<td>Chief, Compliance</td>
</tr>
<tr>
<td>Harsha Punjabi Kamdar</td>
<td>JP Morgan</td>
<td>BTMU</td>
<td>Head – Legal</td>
</tr>
<tr>
<td>Sanjayu Nair</td>
<td>Motilal Oswal Securities</td>
<td>Kotak Securities</td>
<td>VP &amp; Head – Legal</td>
</tr>
<tr>
<td>Ashish Lakhtakia</td>
<td>Reliance Nippon Life Insurance</td>
<td>Edelweiss General Insurance</td>
<td>CS, Chief Legal &amp; Compliance Officer</td>
</tr>
<tr>
<td>Mohit Kapoor</td>
<td>Religare Finvest</td>
<td>Ratnakar Bank</td>
<td>Group EVP &amp; Head – Legal</td>
</tr>
<tr>
<td>Ramanathan S</td>
<td>Societe Generale</td>
<td>BTMU</td>
<td>Head – Compliance</td>
</tr>
<tr>
<td>Abhishek Yadav</td>
<td>Yes Bank</td>
<td>L&amp;T Financial Services</td>
<td>Head – Regulatory Compliance</td>
</tr>
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</table>
C. In-House Legal (Commerce & Industry)

The following table reflects key senior level in-house legal and compliance professional moves across commerce and industry last year (2017).

<table>
<thead>
<tr>
<th>Candidate Name</th>
<th>Company From</th>
<th>Company To</th>
<th>New Title</th>
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</thead>
<tbody>
<tr>
<td>Gopi Krishnan</td>
<td>Infosys</td>
<td>WNS Global Services</td>
<td>Group General Counsel</td>
</tr>
<tr>
<td>Inderpreet Sawhney</td>
<td>Wipro</td>
<td>Infosys</td>
<td>Group General Counsel</td>
</tr>
<tr>
<td>Shuva Mandal</td>
<td>Shardul Amarchand Mangaldas</td>
<td>Tata Group</td>
<td>Group General Counsel</td>
</tr>
<tr>
<td>Sanjit Nagarkatti</td>
<td>Syngenta</td>
<td>Johnson &amp; Johnson India</td>
<td>Legal Director (Medical Devices)</td>
</tr>
<tr>
<td>Apurva Mehta</td>
<td>Microsoft</td>
<td>Qualcomm</td>
<td>Director – Government Affairs (India &amp; South Asia)</td>
</tr>
<tr>
<td>Mukund RS</td>
<td>Symphony Teleca</td>
<td>ISB Software Services</td>
<td>Head – Legal and Company Affairs</td>
</tr>
<tr>
<td>Smriti Subramanian</td>
<td>Oyo Rooms (Oravel Stays Pvt Ltd)</td>
<td>Snapdeal</td>
<td>General Counsel</td>
</tr>
<tr>
<td>Joyjyoti Misra</td>
<td>Khaitan &amp; Co</td>
<td>Uber India</td>
<td>General Counsel</td>
</tr>
<tr>
<td>Vikas Goyal</td>
<td>Ferrero India</td>
<td>Avantor India</td>
<td>Head – Legal and Compliance (Asia, Middle East and Africa)</td>
</tr>
<tr>
<td>Mekhla Basu</td>
<td>IBM</td>
<td>Intel Corp</td>
<td>Regional Compliance Counsel (India &amp; SE Asia)</td>
</tr>
<tr>
<td>AS Kumar</td>
<td>Dr Reddy's Laboratories</td>
<td>Cipla</td>
<td>Global General Counsel</td>
</tr>
<tr>
<td>Praveen Singh</td>
<td>Sembcorp Green Infra</td>
<td>Ayana Renewable Power</td>
<td>General Counsel (South Asia)</td>
</tr>
<tr>
<td>Surender Sharma</td>
<td>Marico</td>
<td>Colgate Palmolive (India)</td>
<td>Associate Legal Director</td>
</tr>
<tr>
<td>Ranabir Basu</td>
<td>Dr Reddy's Laboratories</td>
<td>Mondelez India</td>
<td>Senior Counsel &amp; AVP</td>
</tr>
<tr>
<td>Priyanka Sinha</td>
<td>Yum!</td>
<td>Vodafone Shared Services (India)</td>
<td>General Counsel</td>
</tr>
<tr>
<td>Vidyut Gulati</td>
<td>Cairn India</td>
<td>Bharti Enterprises</td>
<td>Director – Legal</td>
</tr>
<tr>
<td>Nilanj Sinha</td>
<td>Marsh &amp; McLennan</td>
<td>Godrej &amp; Boyce</td>
<td>Head of Corporate Advisory</td>
</tr>
<tr>
<td>Nabeel Saleem</td>
<td>CLP India</td>
<td>Monsanto India</td>
<td>Head – Legal</td>
</tr>
<tr>
<td>Ankur Rabha</td>
<td>Private Practice</td>
<td>Essilor India</td>
<td>Head – Legal and Secretarial</td>
</tr>
<tr>
<td>Rajneesh Jaswal</td>
<td>Michelin India</td>
<td>Metro Cash and Carry India</td>
<td>Head – Legal and Compliance</td>
</tr>
</tbody>
</table>

This data is for your general reading purpose only. ALL data that has been published is based on aggregation of information curated through placements done by Vito India, news “heard on street” and aggregation of news from public domains / proprietary research of Vito India.

Unless placed by Vito India, the information has NOT been verified directly with either the candidate or company mentioned in this data and no communication in any form has been received from ANY of the companies and/ or their employees directly or indirectly to either confirm or not confirm ANY of the information published in this data. Vito India reserves the right to amend or delete any of this information subsequently. Vito India is not responsible for any loss of damage that may arise of action taken by any one based on the contents of this data.
COMPENSATION AND HIRING TRENDS: A MID-TERM REVIEW (2017-18)

A. Private Practice Firms

In 2017, we witnessed high levels of hiring activity in general corporate and M&A space across levels. Other transactional areas such as banking, capital markets and structured finance were busier than the previous years, but hiring at the mid-level especially was limited to replacing leavers rather than growing that practice area. The litigation market remained steady and so did other practice areas like IPR, taxation and competition law.

Overall the 2017 private practice market was balanced but the firms and candidates remained cautious. At large-sized and prominent private practice firms- excellent communication skills, top law school and law firm pedigree have been a must for most hires. On the candidate side, few lawyers are moving for financial gain alone as was earlier the case, but are now placing equal (if not more) emphasis on work/life balance, the quality of the work on offer and the reputation of the hiring partners.

Below are the salary figures for 2017-18 in terms of seniority and PQE at reputable private practice firms across New Delhi NCR and Mumbai. These are due to be revised later this year for 2018-19.

<table>
<thead>
<tr>
<th>PQE</th>
<th>Annual Compensation Range (In INR Lacs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Associate (till 4 years of PQE)</td>
<td>11 – 35</td>
</tr>
<tr>
<td>Senior Associate (4 to 6 years of PQE)</td>
<td>30 – 53</td>
</tr>
<tr>
<td>Principal/Managing Associate/Counsel (6 to 8 years of PQE)</td>
<td>48 – 82</td>
</tr>
<tr>
<td>Salaried/Retained/Associate Partner (8 to 12 years of PQE)</td>
<td>70 – 200</td>
</tr>
</tbody>
</table>

Key Notes:

- Compensation numbers for lawyers working in litigation teams of these private practice firms (where benchmarks are different from their colleagues working in corporate teams) have not been considered.
- Bonuses have been considered in these figures. Bonuses 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.
- Background / pedigree of the professional also impacts the compensation figures. Apart from the reputation within the ecosystem of a professional (especially at a senior level), law school, previous firm and years of experience are some of the major defining factors.
- Compensation is usually 10 - 15% higher in Mumbai than Delhi especially at the mid and senior levels.

B. In-House Legal

The market produced a number of opportunities as in-house lawyers moved around and looked for better opportunities. In addition, employers sought replacements predominantly from within the in-house market. Lawyers with about six to ten years of PQE were typically sought after, as they were often perceived to be a safe pair of hands and who could manage internal clients. These counsel were commonly groomed into a deputy head or head of position (depending on the team size) within the team. Specialist skill-sets, including compliance, remain in demand and many lawyers filled these newly created roles. Company secretarial professionals remained relatively busy, especially those with legal qualification, and high-quality individuals sometimes had multiple opportunities when considering a move. Apart from observing stricter interviewing processes that range anywhere between 4 to 8 rounds at the senior level, we are seeing emergence of specialized roles such as disputes counsel, transactions counsel, regulatory and government affairs counsel.

With the overall expanse of financial services sector widening in the last 2 years, 2017 saw an aggressive demand for legal and compliance talent spanning across New financial sponsor led platforms within wholesale NBFC, Housing Finance Companies, Distress Funds, Payment Banks, Retail NBFCs and Fintech. Key deputy head talent from leading banks and established NBFCs were enticed by emerging Indian NBFCs and global single bank branches to spearhead the legal function. Lawyers with Compliance/Secretarial function experience were preferred over a single function lead as they offered holistic solutions and control which is key for any start-up. Apart from being a cost effective measure for these firms, candidates were offered a...
bigger portfolio and wealth-creating opportunities in form of ESOPs versus the standard declining bonus pay outs in banks.

In the commerce and industry space, we observed Pharma & Healthcare, IT & ITeS, Energy & Infrastructure as the top sectors; e-commerce slowed down a bit and so did the FMCG and manufacturing sectors (though there were a few senior level hires in these sectors but they were not comparable to the number of hires made in the previous years). Talent from within the industry (preferably same sector) was mostly required when hiring a counsel, and hence, we saw another year of the 'musical chairs' effect within the industry.

Below are the fixed salary figures for 2017-18 in terms of experience levels at top global banking and financial services institutions having legal teams in India. These are due to be revised later this year for 2018-19.

<table>
<thead>
<tr>
<th>PQE</th>
<th>Fixed Compensation Range (In INR Lacs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Junior-level</td>
<td>7.2 – 20</td>
</tr>
<tr>
<td>Mid-level</td>
<td>22 – 50</td>
</tr>
<tr>
<td>Deputy Head of Legal/</td>
<td>50 – 90</td>
</tr>
<tr>
<td>Associate General Counsel</td>
<td></td>
</tr>
<tr>
<td>Head of Legal/General Counsel/</td>
<td>90 – 150+</td>
</tr>
<tr>
<td>Legal Director</td>
<td></td>
</tr>
</tbody>
</table>

Key Notes:
- In-house legal salary scales above for BFSI and commerce and industry do not include the variable payouts.
- Only top global BFSI companies have been taken into account while preparing the salary scales for the BFSI sector. Other global and domestic companies have not been considered.
- Bonuses can vary from 20% to 50% of the total fixed compensation depending on various levels of seniority.
- Total compensation can vary according to the location of the where the role is based- salaries in Mumbai are generally slightly higher than the ones offered in Delhi NCR.
- Some of the other key factors impacting compensation are- (a) pedigree of the professional (law school and organisational background), (b) additional qualifications such as CS and/or LLM, (c) market reputation of the organisation and (d) the reporting matrix and size of the legal team.
- Apart from the above, we also observed that MNCs (especially if they are listed) tend to offer better salaries and benefits than their Indian counterparts.

Below are the fixed salary figures for 2017-18 in terms of experience levels at prominent corporations having strong legal teams in New Delhi NCR and Mumbai. These are due to be revised later this year for 2018-19.

<table>
<thead>
<tr>
<th>PQE</th>
<th>Fixed Compensation Range (In INR Lacs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Junior-level</td>
<td>7 – 18</td>
</tr>
<tr>
<td>Mid-level</td>
<td>20 – 45</td>
</tr>
<tr>
<td>Deputy Head of Legal/</td>
<td>48 – 80</td>
</tr>
<tr>
<td>Associate General Counsel</td>
<td></td>
</tr>
<tr>
<td>Head of Legal/General Counsel/</td>
<td>65 – 135+</td>
</tr>
<tr>
<td>Legal Director</td>
<td></td>
</tr>
</tbody>
</table>

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Business Opportunities in Brazil

Pinheiro Neto outlines the efforts that are paving the way towards bilateral economic and social development between India and Brazil.

INTRODUCTION

The 70th anniversary of diplomatic relations between Brazil and India, which began with installation of the Brazilian embassy in New Delhi in the following year of India independence, is celebrated in 2018. The similarities of both countries may be a good perspective to explain the critical value of such partnership to Brazil, which has grown stronger through so many different times and contexts.

Both countries are democracies with a multi-ethnical, multi-cultural and multi-religious society, with a vast territory, heavily populated metropolis, sharing similar ambitions of economic and sustainable growth, but also struggling against social inequality, each one due to their particular reasons.

Such similarities may also explain the level of alignment between Brazil and India in foreign policies, representing a strategic partnership built on a common global vision, shared democratic values and a commitment to foster economic growth with social inclusion. Said cooperation is reflected in the intense and multifaceted relationship in larger multilateral bodies such as the United Nations ("UN"), World Trade Organization ("WTO"), United Nations Organization for Education, Science and Culture ("UNESCO") and World Intellectual Property Organization ("WIPO"), as well as in several plurilateral fora such as the blocs Brazil, Russia, India and China ("BRICS") as well as Brazil, South Africa, India and China ("BASIC"), the Group of Twenty ("G-20"), the G4 countries ("G-4"), the India-Brazil-South Africa Dialogue Forum ("IBSA"), International Solar Alliance ("ISA"), Biofuture Platform.

Another resemblance regards the economic opening of said countries, which took place in the nineties (90s) upon several regulatory reforms aiming at making the economy more business-oriented, also pursuing their economic development through funding of private and foreign investments. Since then, the Brazilian-Indian relation has rapidly intensified resulting in several bilateral agreements, the creation of India-Brazil Joint Commission Meeting – which is the main mechanism of dialogue coordination of both parties - a strategic partnership commenced in 2006 and, more recently, an ongoing negotiation of an Investment Cooperation and Facilitation Treaty (ICFT) expected to boost direct foreign investments reciprocally.

The areas of cooperation are as broad as expected for countries with such importance and may play an important role in creating synergy in key areas, such as:

(a) Science, Technology and Innovation – with respect to which India may enormously contribute, being a well-established global producer, and which resulted in the creation of the Scientific Council Brazil-India, in 2005, which enables the financing of joint researches in IT, Geoscience, Engineering, Renewable Energy, Math, Health;

(b) Economic and Social Development – (i) the creation of IBSA in June 2003, which includes the IBSA Fund, aiming at supporting projects in several sectors and, more recently, resulting in
the IBSA Facility for the Alleviation of Poverty and Hunger entered into on October 17, 2017; as well as (ii) the creation of the New Development Bank in 2014 purporting to mobilize resources for infrastructure and sustainable development projects in BRICS and other emerging economies;
(c) Defense – an agreement entered into between India and Brazil in 2003 establishes the cooperation in defense-related matters, especially in the field of Research and Development, acquisition and logistic support;
(d) Agriculture – execution of memoranda of understanding between Brazilian Agriculture Research Corporation (EMBRAPA) and Indian Council of Agricultural Research (ICAR) – for cooperation in the fields of genetic resources, agriculture, animal husbandry, natural resources and fisheries – as well as Department of Animal Husbandry, Dairying & Fisheries (DADF) – for cooperation in the fields of zebu cattle genomics and assisted reproductive technologies;
(e) Health/Pharmaceutical – a memorandum of understanding was entered into between Brazilian Health Surveillance Agency (ANVISA) and Indian Central Drugs Standard Control Organization of the Directorate General of Health Services (CDSCO/DGHS), in 2016, for cooperation in pharmaceutical production regulation; and
(f) Foreign Trade – Preferential Trade Agreement between Common Market of the South (“MERCOSUR”) and the Republic of India of 2004, entered into force in 2009, establishing 450 tariff lines for each party, deemed to be a milestone towards the creation of a free trade area among the parties.

Within the Latin America and Caribbean region, Brazil is one of the most important trading partners of India, having substantially increased their bilateral trade over the past decades. However, with the global drop in commodity prices, the economic recession and political turmoil in Brazil, the overall bilateral trade in 2015 was severely affected. Such scenario resulted in a collapse of the overall bilateral trade, reducing from US$11.429 billion in 2014 to US$5.64 billion in 2016, representing a decrease of approximately 49%. The recovery of Brazilian economy is expected to increase again the flow of bilateral trade.

The products portfolio of import and export between both countries from 2013-2015 are summarized in the charts overleaf.

After a long period of optimism in Brazil and the commodity super-cycle, Brazilians have been facing for the last couple of years uncertain times. While attempting to handle an ongoing economic, political and fiscal crisis, business were definitely affected by such context and, consequently, key assets are being sold either as a result of financing and corporate restructure of major Brazilian players or to generate additional income for the Federal, State and Municipal Governments. There has been an increase in major M&A transactions as a result of divestment programs carried out by government-controlled companies, as well as by companies involved in corruption scandals or otherwise in need of cash availability to meet debt obligations or to for selected investment more focused on their core business.

BRAZIL – AN OVERVIEW
Brazil is the world’s fifth largest country (and the largest in South America) by geographical area. It extends over an area of more than 8.5 million square kilometers, and is divided into 26 states and one Federal District (Brasília). With its vast expanse of territory spanning three time zones, the country is crossed in the north by the Equator, and in the south by the Tropic of Capricorn. Its 200 million-plus population lives mostly in urban areas, according to the latest census carried out by Instituto Brasileiro de Geografia e Estatística.
BRAZIL

The country’s population derives from a mix between European ancestors who migrated at different times in history, Africans brought to the country as slaves, and Amerindians. Black and multiracial citizens make up a majority of the country’s population (50.7%); whites account for 47.7% of the total.

The country has by far the largest economy in Latin America; the second in America (after the USA only); and the ninth in the world. The agricultural, mineral, manufacturing and services segments are the strongest in Brazil. The country’s major exports encompass electric equipment, aircraft, orange juice, automobiles, ethanol, textiles, iron ore, steel, coffee, soya and meat.

Brazil has teamed up with its neighbors Argentina, Uruguay, Paraguay and Venezuela (currently suspended) to form MERCOSUR, a customs union and trade bloc representing a potential 240 million-plus consumer market. The country has also increasingly expanded its presence in the international financial markets, and is also part of the BRICS.

Brazil is a federative presidential constitutional republic formed by the Federal Government, states and municipalities, where power is exercised by distinct and independent bodies. The head of state is democratically elected for a four-year term of office, one reelection being permitted. The president of the Republic acts as head of state and head of government cumulatively. Brazilian states have political autonomy, and a multi-party political system is in place.

### BRAZILIAN IMPORT PORTFOLIO FROM INDIA (US$ MILLION)

<table>
<thead>
<tr>
<th>Group of Producers</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Amount</td>
<td>Percentage</td>
<td>Amount</td>
</tr>
<tr>
<td>Fuels</td>
<td>3,365</td>
<td>52.9%</td>
<td>3,519</td>
</tr>
<tr>
<td>Organic Chemicals</td>
<td>640</td>
<td>10.1%</td>
<td>644</td>
</tr>
<tr>
<td>Pharmaceutical products</td>
<td>181</td>
<td>2.8%</td>
<td>230</td>
</tr>
<tr>
<td>Mechanical Machines</td>
<td>320</td>
<td>5.0%</td>
<td>278</td>
</tr>
<tr>
<td>Chemical Industry</td>
<td>195</td>
<td>3.1%</td>
<td>192</td>
</tr>
<tr>
<td>Syntetic filaments</td>
<td>269</td>
<td>4.2%</td>
<td>252</td>
</tr>
<tr>
<td>Vehicles</td>
<td>190</td>
<td>3.0%</td>
<td>198</td>
</tr>
<tr>
<td>Electric Machines</td>
<td>120</td>
<td>1.9%</td>
<td>133</td>
</tr>
<tr>
<td>Tanning Substances</td>
<td>110</td>
<td>1.7%</td>
<td>151</td>
</tr>
<tr>
<td>Clothing</td>
<td>110</td>
<td>1.7%</td>
<td>122</td>
</tr>
<tr>
<td>Subtotal</td>
<td>5,500</td>
<td>86.5%</td>
<td>5,719</td>
</tr>
<tr>
<td>Other Products</td>
<td>858</td>
<td>13.5%</td>
<td>921</td>
</tr>
<tr>
<td>Total</td>
<td>6,358</td>
<td>100.0%</td>
<td>6,640</td>
</tr>
</tbody>
</table>

Commercial Intelligence Division - Ministry of Foreign Trade, Industry and Development – MDIC. November 2016
The three branches of Brazilian government are: the Executive, led by the president of the Republic at federal level; the Legislative, which at federal level comprises a bicameral Congress that is composed of the Senate and the House of Representatives (whose members are elected on a proportional representation basis, thus favoring less populous states); and the Judiciary, which is made of the Federal Supreme Court, the Superior Court of Justice, and lower federal and state courts.

The Constitution of the Federative Republic of Brazil, enacted in 1988, is the country's fundamental law. Each of the 26 Brazilian states may pass its own state constitutions and laws, provided that they do not conflict with the principles enshrined in the Federal Constitution.

In the last couple of years, Brazil has been seen as a buyer's market with several opportunities throughout the different segments of the economy. Many transactions related to divestment plans of private and mixed-capital companies, distressed assets, large-scale debt restructuring and reorganization, generally involves several stakeholders, such as creditors, courts, judicial administrator, regulatory agencies or granting authorities, in the particular case of projects subject to concession, authorization or permission regimen.

Within such context, not only the due diligence process becomes crucial to adequately identify the relevant risks of the transaction, but also negotiations pursuing appropriate protections for the buyer can be particularly challenging.

Compliance and corporate ethics of the target company and the seller's group, as well as their financial soundness in the medium and long term may be key aspects to avoid being dragged into liability discussions at a later stage and also to effectively benefit from indemnification provisions in case of potential breaches or price adjustments.

Furthermore, several ongoing regulatory discussions are simultaneously being held purporting either to address specific market

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**BRAZILIAN EXPORT PORTFOLIO TO INDIA (US$ MILLION)**

<table>
<thead>
<tr>
<th>Group of Producers</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Amount</td>
<td>Total</td>
<td>Amount</td>
</tr>
<tr>
<td></td>
<td>Percentage</td>
<td>Percentage</td>
<td>Percentage</td>
</tr>
<tr>
<td>Fuels</td>
<td>1,587</td>
<td>50.7%</td>
<td>2,348</td>
</tr>
<tr>
<td>Grease and Oil</td>
<td>236</td>
<td>7.5%</td>
<td>370</td>
</tr>
<tr>
<td>Sugar</td>
<td>435</td>
<td>13.9%</td>
<td>643</td>
</tr>
<tr>
<td>Mining</td>
<td>241</td>
<td>7.7%</td>
<td>367</td>
</tr>
<tr>
<td>Gold and precious stones</td>
<td>19</td>
<td>0.6%</td>
<td>288</td>
</tr>
<tr>
<td>Iron and Steel</td>
<td>69</td>
<td>2.2%</td>
<td>150</td>
</tr>
<tr>
<td>Organic Chemicals</td>
<td>72</td>
<td>2.3%</td>
<td>108</td>
</tr>
<tr>
<td>Airplanes</td>
<td>26</td>
<td>0.8%</td>
<td>30</td>
</tr>
<tr>
<td>Wood</td>
<td>22</td>
<td>0.7%</td>
<td>27</td>
</tr>
<tr>
<td>Mechanical Machines</td>
<td>62</td>
<td>2.0%</td>
<td>73</td>
</tr>
<tr>
<td>Subtotal</td>
<td>2,769</td>
<td>88.5%</td>
<td>4,404</td>
</tr>
<tr>
<td>Other Products</td>
<td>361</td>
<td>11.5%</td>
<td>385</td>
</tr>
<tr>
<td>Total</td>
<td>3,130</td>
<td>100.0%</td>
<td>4,789</td>
</tr>
</tbody>
</table>

*Commercial Intelligence Division - Ministry of Foreign Trade, Industry and Development – MDIC. November 2016*
concerns or to promote broader reforms in many different sectors. Also as a result of the opening of specific segments, which were being maintained as monopolies operated by mixed-capital and government controlled companies, discussions on the new regulatory regimen are defining the legal framework for future operation by multiple private parties. Another reason for such regulatory reforms might also have occurred as a response to dysfunctions in certain sectors (such as, local content requirements in the Oil & Gas and discussions involving the generating scale factor in the energy sector), which resulted in an increase of lawsuits in such sectors, so as to adapt their rules to the current economic scenario.

For 2018, the market is expecting a scenario of controlled inflation rate and a better defined political environment upon election of new president of the Republic and State governors. Therefore, the preparation and follow-up on the ongoing discussions might give leverage to potential investors when making investment calls in the near future.

Just to name a few regulatory aspects currently being discussed in Brazil, which are expected to offer interesting business opportunities in different sectors:

(a) **Infrastructure** – created by Law No. 13334 of September 2016, the Investment Partnership Programme (the "PPI Programme") purports to increase and strengthen the participation of the private sector in infrastructure projects, by means of public-private partnerships and privatization measures. Such law focuses on facilitating the early stages in the planning and development of infrastructure projects, as well as addresses relevant concerns of the market upon recognizing the need for securing and making stable policies. Accordingly, said law establishes that the federal government must define long-term policies and strategic guidelines for investment, privatization and public bids. It also sets forth the infrastructure projects considered of national priority by public authorities (in all levels), requiring an efficient and timely coordination of such public entities for the development and approval of PPI projects which includes, among others: (i) oil and gas bidding rounds; (ii) divestments of mixed capital companies in energy sector (generation and distribution of electric energy); (iii) mining assets; (iv) ports; (v) airports; (vi) roads;

(b) **Oil & Gas** – one of the most important measures recently adopted by the Brazilian Petroleum, Natural Gas and Biofuels Agency ("ANP") and governmental authorities to heat the industry, is to give predictability of the bidding rounds and scheduled several bids for the next years, as follows: (a) 2018 – (i) 15th Bidding Round (May); (ii) 4th Production Sharing Bidding Round – Pre-Salt (May); (iii) 5th Marginal Fields Bidding Round (to be defined); (b) 2019 – (i) 16th Bidding Round (3rd Quarter); (ii) 5th Production Sharing Bidding Round – Pre Salt (3rd Quarter); and (iii) 6th Marginal Fields Bidding Round (to be defined). The Brazilian local content requirement policy is also currently undergoing an intense debate by multiple public authorities and a specific regulation on the matter is expected to be enacted in the near future, as ANP carried out a Public Consultation and Hearing to discuss with the industry and civil society improvements on the local content policy aiming at elaborating a new specific resolution to regulate the matter, while there is also a bill of law currently being debated by the Brazilian House of Representatives purporting to regulate a local content requirement policy for oil, natural gas and other fluid hydrocarbons by virtue of law. As regards tax matters, the Brazilian Federal Revenue has recently issued a normative instruction regulating the tax treatment of exploration, development and production of oil and natural gas activities, as well as established a calculation formula for the purpose of withholding income tax applicable to cross-border charter/lease contracts of vessels operating in Brazil, subject to contractual split (whenever there is charter with rendering of services) applicable to charter hire above certain limits established in law. Such new regulation is expected to enhance the legal certainty for investors of the oil and gas industry;

(c) **Electric Power** – Ministry of Mines and Energy ("MME") launched in 2017 a Public Consultation on changes to the electric power regulations, aiming at improving the legal framework and also to reduce the litigations involving agents of the electric power sector. There are also recent official announcements by the MME that the Federal Government is considering the privatization of Centrais Elétricas Brasileiras S.A. – Eletrobrás, which is a listed company controlled by the Brazilian government
(mixed-capital company) with presence throughout the entire electric chain, such as generation, transmission and distribution segments. Electrobrás is the largest company in the electricity sector in Latin America, participating either, directly through its subsidiaries, or together with the private sector in joint-venture arrangements. If such privatization is implemented, this transaction will certainly represent a game changer for the electricity sector in Brazil;

(d) **Shipping** – there is an ongoing controversy with respect to the validity of a foreign vessel mortgage in Brazil. Due to a decision rendered at the lower court in charge of an enforcement action, which considered a foreign mortgage as invalid in view of the absence of registration at Brazilian maritime authorities, several ship financing transactions were being restructured in Brazil, with migration of vessel ownership registration to countries that are party to certain international treaties entered into by Brazil (Bustamante Code and 1926 Brussels Convention). Fortunately, on November 2017, the Brazilian Superior Court of Justice reverted the original decision acknowledging the validity of the foreign mortgage based on international treaties, despite the fact that the country of origin where the vessel is registered is not a signatory of the relevant international treaty. Although such decision is still not final and unappealable, it seems that such leading case tends to consolidate the validity of foreign mortgages in Brazil, enhancing a standard ship financing practice widely adopted in the international market and providing additional comfort to lenders in Brazilian operations;

(e) **Port** – recent changes to port regulatory framework in Brazil improved the business environment for the private sector, enhancing the competitiveness and establishing a more stable legal regimen for private terminals. New rules have extended the duration of operating authorizations from 25 to 35 years, which may now be extended for successive periods for up to 70 years. The management of public ports may also negotiate the anticipation of tariff revenue with users aiming at performing immediate investments in infrastructure to be afforded by the tariff; and

(f) **Aviation** – Brazilian domestic airlines have currently a legal restriction on foreign capital which limits the corporate participation of foreign investors at 20 per cent of the total voting capital of the company. There are recent official announcements indicating that the Federal Government intends to gradually lift such restriction so as to enable foreigners to hold up to 100% (one hundred per cent) of equity interest in Brazilian airlines.

Brazil continues to be a solid and feasible option for those investors with medium and long term strategy. With a worldwide economy, a significant internal consumer market and assets distributed all over its vast territory, the country combines a deficit of infrastructure facilities with an enormous demand for such facilities in a variety of areas, including also transportation, sewage, biofuels, construction and energy, just to name a few. Brazil might also be the long awaited-chance to make the difference in selected investment portfolios, with a chance of return rates above the average business in the global market. There are a myriad of opportunities for Indian investments in Brazil and the strong, stable and friendly bilateral relationship between India and Brazil over the years is certainly an additional element to foster business between such great countries.

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Germany’s Continued Attractiveness for Foreign Investment

Germany remains one of the world’s most open economies. Partners at GSK Stockmann outline the legal landscape that continues to make the country attractive to foreign investors.

A. FOREIGN BUSINESSES IN GERMANY

Germany’s attractiveness as a place to invest and as a trading partner is unbroken. The same is true for Germany’s great openness to foreign investments. Despite a recent tightening of the foreign investment regime, Germany remains one of the most open economies in the world. German law generally treats Germans and foreign nationals equally regarding investments or the establishment of companies. Basically, foreign investors are not subject to significant restrictions, specific administrative approvals, formal review procedures, as well as permanent import/export- or currency controls.

According to the German Foreign Trade Act (Außenwirtschaftsgesetz – AWG) restrictions on inbound investments may only be imposed in order to protect public security.

However, under the new AWG rules, the German Federal Ministry of Economic Affairs and Energy can check whether a specific foreign investment of 25% or more poses a threat to German public security or public order. In this context the new AWG rules also provide specific examples for potential threats to the German public security or public order.

B. INTELLECTUAL PROPERTY RIGHTS (IP RIGHTS) PROTECTION

Germany offers a comprehensive and robust legal environment to protect intellectual property rights, such as patents, utility models, design patents, trademarks or copyrights, just to name only the most important. Furthermore, Germany is a party to all major international intellectual property protection agreements.

In addition, many of the recent changes in German intellectual property laws derived from European Union (EU) legislation to further enhance not only national, but European IP protection.

Application procedures for IP rights at the German Patent and Trademark Office or the European Patent Office, both based in Munich (Germany) are of highest international standard. Foreign investors must decide whether to register f.e. a trademark in Germany individually or to go for an EU-wide trademark- or design protection by applying for a Community Trademark and/or a registered Community Design.

German law grants a protection period for patents for 20 years, but also offers the possibility to protect technical inventions by registering a utility model which provides low-cost protection for such inventions with the exception of processes. Utility model protection starts on the filing date and ends 10 years after the month of filing.

A registered trademark also grants protection for a period of 10 years, which, however, can then be extended indefinitely by 10 years at a time.
Trade secrets, both technical and commercial, are protected by the German Law Against Unfair Competition.

C. CORPORATE LAW AND LAWS IN DAILY BUSINESS

I. Company Forms
Foreign investors can choose freely between various legal forms for German companies.

TABLE 1 – OVERVIEW: FORMS OF CORPORATIONS

<table>
<thead>
<tr>
<th>Legal/Establishment Form</th>
<th>Minimum Number of Shareholders/Partners</th>
<th>Minimum Share Capital</th>
<th>Legal Liability</th>
<th>Establishing Formalities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited Liability Company (GmbH)</td>
<td>One partner</td>
<td>EUR 25,000</td>
<td>Liability limited to share capital</td>
<td>Moderate-high</td>
</tr>
<tr>
<td>Limited Liability Entrepreneurial Company (UG)</td>
<td>One partner</td>
<td>EUR 1.00</td>
<td>Liability limited to share capital</td>
<td>Moderate</td>
</tr>
<tr>
<td>Stock Corporation (AG)</td>
<td>One partner</td>
<td>EUR 50,000</td>
<td>Liability limited to share capital</td>
<td>High</td>
</tr>
<tr>
<td>Partnership Limited by Shares (KGaA)</td>
<td>Two partners: general partner and limited shareholder</td>
<td>EUR 50,000</td>
<td>General partner: personal unlimited liability Limited shareholder: limited share liability</td>
<td>High</td>
</tr>
</tbody>
</table>

1. Corporations
Corporations are usually the best option for larger and established companies.

A corporation is a legal entity, i.e. the company itself – and not the shareholder – is the holder of assets and liabilities, rights and obligations. Once the share capital has been contributed, the shareholders’ liability is limited to the corporation’s business assets.

Table 1 gives a brief overview of German corporations and the minimum share capital required.
A corporation implies more extensive accounting obligations (compared with partnerships) and liability to corporate income tax, trade tax and solidarity surcharge. The average tax burden is less than 30 percent. In some regions, due to a locally variable rate of trade tax, it is below 23 percent.

2. Partnerships
Partnerships are not independent legal entities but associations of partners. Generally, each partner is responsible for the liabilities of the company (including private assets), except limited partners in a limited partnership (KG or GmbH & Co. KG). Generally, there is no minimum share capital required, and accounting obligations and publication requirements are less extensive than those for corporations.

Basically, the management of a partnership may – with a few exceptions – only be carried out by partners only.

Table 2 gives a brief overview of German partnerships.

There is another form of partnership (Partergesellschaft or PartG) specifically designed for the joint exercise of professional freelance activities, such as architects, doctors or attorneys. This company form is not further explained in this article.

Contrary to corporations, partnerships themselves are not subject to corporate tax, but only the individual partners; partnerships are only subject to trade tax.

3. Branch Offices
A foreign company with head office and registered business operations outside of Germany may establish a German branch office. Table 3 shows how two kinds of branches are possible in Germany.

A branch office is subject to taxation in Germany if it is considered as a permanent establishment according to the applicable double taxation agreement (DTA).

II. Company Foundation; Company and Business Registration
Anyone – i.e. irrespective of nationality or place of residence – can establish a business in Germany.

1. Establishing of a Partnership

### TABLE 2 – OVERVIEW: FORMS OF PARTNERSHIPS

<table>
<thead>
<tr>
<th>Legal / Establishment Form</th>
<th>Minimum Number of Partners</th>
<th>Minimum Share Capital</th>
<th>Legal Liability</th>
<th>Establishing Formalities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Law Partnership (GbR)</td>
<td>Two partners</td>
<td>None</td>
<td>Personal unlimited liability</td>
<td>Minimum</td>
</tr>
<tr>
<td>General Commercial Partnership (oHG)</td>
<td>Two partners</td>
<td>None</td>
<td>Personal unlimited liability</td>
<td>Low to moderate</td>
</tr>
<tr>
<td>Limited Partnership (KG)</td>
<td>Two partners: general partner and limited partner</td>
<td>None</td>
<td>General partner: personal unlimited liability Limited partner: limited share liability</td>
<td>Low to moderate</td>
</tr>
<tr>
<td>GmbH &amp; Co. KG</td>
<td>Two partners: general partner (GmbH) and limited partner (the general partner is typically limited partner of the KG)</td>
<td>EUR 25,000,000 (but only for the GmbH as general partner)</td>
<td>General partner: personal unlimited liability but limited to the GmbH's assets Limited partner: limited share liability</td>
<td>Moderate to high</td>
</tr>
</tbody>
</table>
Establishing a partnership is comparably easy and basically requires the conclusion of a partnership agreement between the partners without any form requirements.

A registration of the partnership with the German commercial register is required for the general commercial partnership (oHG) and the limited partnership (KG and GmbH & Co. KG) which requires involvement of a German notary public. For business activities the competent local trade office (Gewerb-/Ordnungsamt) must be notified accordingly.

With respect to the special but very common form of the limited partnership where a limited liability company (GmbH) acts as generalpartner (GmbH & Co. KG), also the GmbH is required to be founded as described below under lit. b). However, the GmbH & Co. KG is a very popular form of a partnership since no (natural) person is generally liable without a limit and the company form benefits from tax advantages and lower form requirements compared with the GmbH.

2. Establishment of a Corporation
A corporation can be established by any number of different partners by agreeing in the articles of association. In case of the limited liability company (GmbH), the articles of association require notarial form. In any case the establishment procedure is completed with registration in the German commercial register (Handelsregister).

The most common form of a corporation used for businesses in Germany is the limited liability company (GmbH) which can be founded by the conclusion of the company’s articles of association in notarial form and its registration with the German commercial register. Since the registration of the company requires that the share capital of EUR 25,000 (at least to the half amount of EUR 12,500) is contributed to the company, a bank account at a German bank is to be opened (for which the KYC rules for a bank a required to be met in each single case). Costs for foundation and registration of a GmbH vary in a range between approx. EUR 700 and EUR 800 for the notary and the court (plus bank fees and plus lawyer’s fees when required).

Anyone can be appointed as a managing director of a GmbH also with place of residence in a foreign country. However, the GmbH strictly requires a business address in Germany. Declarations of a managing director vis-à-vis the commercial register require to be authenticated in front a German notary public or require authentication in form of legalization in India.

It is also possible to acquire a shelf company (Vorratsgesellschaft) as a GmbH. Such acquisition generally costs around EUR 3,000 plus notarial and court fees of approx. EUR 700 to EUR 800.

3. Commercial Register Display
Documents and information registered with the German commercial register are open to public and can be downloaded online at minor charges.

4. Trade Office
Before starting business operations, each business operator is required to notify the local trade office (Gewerb-/Ordnungsamt) where the business operation is located regardless of the company form (except freelancers and professionals).
Specific business licenses are required in some sectors (e.g. pharmacies, property developers, real estate agents, brokers, security firms, pubs and hotels or banks).

The trade office automatically sends a copy of the business registration to the responsible tax office (Finanzamt). The tax office will then send a registration form to the company for tax registration purposes. Further, the trade office will also inform other relevant institutions such as the respective Employer's Liability Insurance Association (Berufsgenossenschaft), the competent Chamber of Industry and Commerce (IHK) and, if applicable, the Chamber of Crafts (Handwerkskammer).

5. Chambers of Industry and Commerce (IHKs) and Chambers of Crafts

In Germany, the Chambers of Industry and Commerce (IHK) and the Chambers of Crafts (Handwerkskammer) represent the interests of local groups of business operators.

Many foreign managers of German companies underestimate the risks in infringing respective laws, rendering themselves open to prosecution.

Membership in such the Chamber of Industry and Commerce or the Chamber of Crafts is mandatory and occurs automatically on registration in the trade office without special registration. The fees for the membership depend on the turnover of the respective company.

III. Labour Law

Besides relatively high employment costs and complex tax regulations, it is mostly the relatively rigid German labour law which may impede foreign investments into Germany. However, foreign investors, working with German labour laws on a daily basis, cope with it particularly well.

German labour law is not laid down in one uniform act, but in a multitude of legal sources. Even if employer and employee are generally free to agree on the terms of an employment contract, the rights of both parties are limited by mandatory laws and ordinances, and sometimes also by collective bargaining agreements as well as company-specific works agreements.

The German social security system consists of pension insurance, health insurance, unemployment insurance, accident insurance and nursing insurance. In principle, social insurance coverage is mandatory for all employees, working in Germany, regardless of their citizenship. If a foreign investor transfers a foreign employee only for a certain period of time to a German branch, exceptions may apply.

Many foreign managers, acting – officially registered – as a managing director of a German branch, underestimate the latent risks to infringe respective laws and obligations, rendering himself/herself to prosecution.

In particular, the strict laws of manager liability should be known to foreign managers heading German companies.

The responsibility of a Managing Director of a GmbH not only encompasses the operating business, but also specific legal terms of office being an addressee of legal obligations. Examples include the strict and complex capital maintenance rules for German companies and the various managerial duties of compliance in this regard. Furthermore, particularly serious obligations for Managing Directors exist under the German Insolvency Code (Insolvenzordnung) if the German branch falls into a severe economic crisis or if the company risk to become insolvent. In case of illiquidity or over-indebtedness, the Company's managing director has to file for insolvency within three weeks or else he/she will not only commit a criminal offence, but also be personally liable to Company creditors for damages caused by delayed filing for insolvency (Insolvenzverschleppung).

IV. Contract Law; Commercial Law; Sales and Purchase Law
1. Contract Law / Law of Contract
German commercial and contract law gives a reliable operational framework to foreign investors. The principle of contractual freedom and the low level of formal requirements enables companies to freely choose contractual partners and to freely determine the subject matter of an agreement within the wide limits of the law. However, strict and mandatory German law on general terms and conditions (T&C) limit the possibility of one party to impose discriminating terms and conditions to the other party if not individually agreed in the single case.

The key types of contracts are governed by the German Civil Code (BGB). Contractual stipulations are standardized to a high degree. Also, the EU and UN law provides for the general possibility to agree on the application of German law between the parties of a contract.

Contracts under German law usually follow a short and simple structure. Applicable legal stipulations apply unless agreed otherwise in the contract. This is a basis for time and cost efficient drafting of German law contracts.

2. Commercial Law
German commercial law is in line with international standards and an excellent basis for fast forward-moving businesses and markets (Automotive & Mobility; Real Estate “Smart City”; Industry 4.0). Global trading standards such as “Incoterms” (International Commercial Terms) are well recognized.

Standard financial tools for international trade such as letters of credit and payment guarantees are also commonly used in Germany.

3. Sales and Purchase Law
A purchase contract is the most frequent type of contract. German law considerably simplifies the conclusion of purchase contracts in daily business.

The UN Convention on Contracts for the International Sale of Goods (CISG) applies to international delivery of good contracts with German business partners.

4. V. Product Liability
Besides the general liability under German contractual or tort law, under strict and mandatory German product liability law a manufacturer or importer is liable for personal injuries and property damages in Germany which arise in connection with the use of a defective product regardless of the manufacturer’s or importer’s fault.

This strict liability vis-à-vis contractual partners and any third party cannot be waived by way of agreements between individuals.

German commercial and contract law gives a reliable operational framework to foreign investors. German commercial law is an excellent basis for fast-moving businesses and markets.

VI. Credit Security
In connection with granting of loans German banks usually require the provision of corresponding and reasonable securities. German law provides for a number of recognized credit securities such as e.g. retention of title (Eigentumsvorbehalt), ownership transferred by way of security only (Sicherungsübereignung), assignment of claims (Forderungsabtretung), mortgages (Hypothek) and land charges (Grundschiul), or bonds (Pfandbrief).

Moreover, there are a number of other options like e.g. suretyships (Bürgschaft) or personal guarantee (Garantie) which offer suitable solutions for individual security needs.

D. PLANNING; BUILDING AND REAL ESTATE LAW

I. Construction Laws
Public construction law in Germany is governed by federal and state law, in particular zoning law (Bauplanungsrecht) and building regulations law (Bauordnungsrecht).
Zoning law (Bauplanungsrecht) as a German federal law determines the purpose for which a property may be used and whether a building project fits into its surroundings.

Building regulations law (Bauordnungsrecht) as state law determines how buildings may be designed and constructed in order to meet the planning law requirements. Most German states have adopted sample building regulations which provide for standards within this field.

II. Building Permits
Construction, alteration, demolition, and/or change in use of a building require a building permit (Baugenehmigung) approving that the project complies with the zoning and building regulation law as well as with all other applicable laws (such as e.g. environmental laws). The local building authority and the building supervisory authority (Bauamt) are competent for issuing building permits.

The application for a building permit must include detailed documentation on the building project, such as inter alia a detailed plan of the project, accompanied by necessary supporting documentation such as site plan, construction drawings, building specifications (heating, noise prevention, fire protection plans). The documentation required for the application is also to be presented to adjacent property owners.

In order to simplify and coordinate the permit procedure, the emission control permit application procedure (see below III.) also includes the building permit process.

III. Emission Control Permits
Environmental protection is a general state goal in the German Constitution (Grundgesetz). A number of different laws and regulations strictly protect the environment.

Investors in large industrial facilities should focus their attention to the emission control permit, which is required prior to construction in order to prove that facilities and projects comply with the requirements of environmental law and other regulations aimed at protecting the common good.

Facilities and projects subject to this approval procedure are emitting industrial plants, waste management plants, nuclear (power) plants, highways and railroad tracks, airports, navigable waterways and plants subject to the law on genetic engineering.

The emission control approval procedure is governed by the German Federal Emission Control Act (Bundesimmissionsschutzgesetz, BImSchG) and related ordinances. The competent environmental agency of the respective federal state (Landesumweltamt) is responsible for the emission control permit procedure.

IV. Real Estate Commercial Law
Insurance companies, banks, investment companies, funds, and real estate holding companies own most of commercially used German real estate.

The German local courts (Amtsgerichte) maintain the German land registers (Grundbücher) which contain records of the entire German territory and provide information on ownership in land and apartments as well as any existing encumbrances. The German land register ensures good faith in its completeness and correctness.

Real estate purchase contracts in Germany require notarization in front of a German notary in order to be legally effective. Any transfer of ownership of real estate requires application and registration with the German land register. Due to the time gap between the conclusion of the real estate purchase and transfer agreement and the final registration of the purchaser in the land register, the purchaser may register a so called priority notice (Vormerkung) in order to secure the preliminary rights of ownership. Such priority notice protects the purchaser from dispositions made by the seller after its entry.

Generally, an acquisition of real estate in Germany does not require permits (except with respect to real estate intended for agricultural or forestry usage).

German rental law is (equally to purchase law) governed by the BGB and more or less tenant-friendly.

E. LEGAL PROCEEDINGS

I. Attorneys at Law
All German attorneys at law are members of the regional bar council (Rechtsanwaltskammer). The Federal Bar Council (Bundesrechtsanwaltskammer)
is the professional umbrella association of the regional bar councils. The professional practice of German lawyers is regulated by comprehensive professional laws.

II. Civil Courts
In Germany, ordinary courts are organized at different levels: local courts (Amtsgericht), regional courts (Landgericht), higher regional courts (Oberlandesgericht) and the Federal Court of Justice (Bundesgerichtshof). A right of appeal is usually permitted against initial decisions to a court of a higher level.

The costs for court proceedings in Germany depend on the value in dispute and are comparably low. Generally, the unsuccessful party has to bear the costs of the dispute; costs will be shared between the parties in the event of a partial success.

III. Jurisdiction in civil law disputes
Basically, a German local court is only competent by law if the monetary value of the dispute does not exceed EUR 5,000. In other cases, the regional courts are competent.

Generally, entrepreneurs may agree to regional courts being the competent forum. Furthermore, contractual parties may agree to an exclusive place of jurisdiction. In legal proceedings on regional court or a higher regional court level, both parties are required to be represented by an attorney at law. Representation in front of the German Federal Court of Justice (Bundesgerichtshof) requires attorneys at law with special permission.

IV. Order of payment procedure (Mahnbescheid)
In principle, a judicial order for payment procedure (Mahnbescheidsverfahren) is applicable to all payment claims. A small upfront court fee will be charged for this procedure and assuming the claim does not require a formal reasoning of the preconditions for the claim. A formal legal dispute will be initiated only if the defendant formally challenges the claim (during a period of one month) and the claimant (i) has either applied for an automatic initiation at the time of filing or (ii) the claimant applies for such initiation upon receipt of the defendant’s declaration of challenge.

If the defendant does not challenge the claim within the deadline set by the court the claimant may apply for an enforcement order from the court for the claimed amount and the court and legal fees. An order for payment (Mahnbescheid) is often a time and cost efficient way to realize an undisputed claim against an debtor who is in default of payment (Zahlungsverzug).

V. Alternative Dispute Resolution
Arbitration is becoming more and more important in Germany, in particular in the business sector. Different international arbitration institutions are recognized in Germany, such as the German institution for arbitration (Deutsche Institution für Schiedsgerichtsbarkeit – DIS) or the International Chamber of Commerce (ICC). Arbitration procedures are non-bureaucratic and confidential.

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WHERE DO YOU SEE THE GREATEST AVENUES FOR BUSINESS BETWEEN INDIA AND THE GULF STATES?
The Gulf countries have always had strong trade relations with India and we see this bond strengthening over the coming years. With bilateral trade projected to reach US$ 100 billion by the year 2020 between India and the UAE alone, avenues for business and cross border investments between the Indian subcontinent and the Gulf look bigger and brighter than ever before.

Talking specifically in terms of sectors, renewable energy and infrastructure are on the forefront as both countries are moving towards strengthening their foothold in the international economy and leaving a mark globally. With the advent of tourism in recent times, the hospitality and hotel industry is yet another promising sector to watch out for along with information technology, defense and healthcare.

According to a recent report of the Dubai Land Department, Indian nationals emerged as one of the top investors in the Dubai real estate market in terms of both, volume and value of investment as compared to other foreign investors.

Increasing investor confidence and growing bilateral relations between the two nations has led to the recent decision of the Dubai Chamber to open a representative office in Mumbai. This strategic move will boost cooperation between business communities on both sides. The India office of the Dubai Chamber is being set up with the aim of assisting UAE-based companies that want to invest in the Indian market. The office will also work to promote Dubai as a lucrative trade and investment hub, and attract Indian companies that plan to expand to Dubai and access markets in the Middle East.

HOW DO BUSINESSES AND LAWYERS FROM THE REGION PERCEIVE INDIA AS AN INVESTMENT DESTINATION?
India has continuously been emerging as an investment destination for business houses in the Gulf countries and more particularly, the UAE.

With enhanced political co-operation between India and the UAE coupled with strategic decisions taken by the heads of the states in recent times, investments to India have increased substantially in the past few years and will continue to grow in the coming years as well.

Political changes and policy reforms in India have contributed to increasing investor confidence and have boosted the flow of inbound foreign investments especially in sectors such as infrastructure, food processing and oil and gas.
In addition, investments by Non Resident Indians (NRIs) residing the GCC, form a considerable chunk of the investments into India.

As lawyers, we continuously advise clients on making investments in India and assist them in making a sound and informed decision by conducting thorough legal due diligence. We also provide sector specific information in association with leading law firms in India. Recently, we have seen a surge in the number of multinational corporations, high net worth individuals and even small businesses keen to channel their funds into investments in India.

WHAT ARE THE MAIN CULTURAL AND/OR LEGAL DIFFERENCES BETWEEN DOING BUSINESS IN THE GULF AND INDIA?

Politically, legally as well as culturally, India and the UAE are two very diverse nations, each having unique challenges in terms of legal procedures as well as conducting business.

While India’s legal regime is structured around the common law system, UAE is a civil law based jurisdiction. Arabic is the local language in the UAE and legal proceedings are conducted in Arabic. The UAE legal system does not recognize the doctrine of precedents or the common law principles of reasonableness and balance of probability. Injunctive relief is granted only in certain exceptional cases and oral hearings are fairly limited with heavy reliance placed on documentary evidence. Rights of cross-examination are also restricted and hence litigation in the UAE is vastly different from litigation in India.

In terms of the business environment, the UAE is a heavily regulated and legislated market for foreign investments. While most Emirates have their own legislation on foreign investments, typically, foreign ownership in businesses is limited to ensure local participation. At present, in mainland Dubai, foreigners apart from nationals of the Gulf Cooperation Council (GCC) countries, are allowed to own up to forty-nine percent of the shares in a commercial limited liability company with the balance shares being owned by a local UAE national. However, the owners are free to decide the profit sharing ratio, which need not be congruent with the shareholding.

There are also designated free zones within the UAE, which operate as distinct legal jurisdictions governed by their own regulations and procedures.

The UAE legal system does not recognize the doctrine of precedents or the common law principles of reasonableness and balance of probability. Litigation in the UAE is vastly different from litigation in India.

Typically, 100% foreign ownership of businesses is allowed in the free zones. One such coveted free zone is the Dubai International Financial Centre (DIFC), which is a leading global financial hub for the Middle East region. Having its own independent regulator as well as a global financial exchange, it attracts investments from wealth funds, trusts and financial institutions all across the globe. With its own set of legislation issued in English and an independent judicial system modeled on the English common law framework, litigation and arbitration in the DIFC are increasingly being favored by businesses in the region.
With regards to investment in property and real estate in the UAE, freehold ownership of real estate is restricted to certain notified areas for foreign nationals. Most emirates in the UAE have their own local laws pertaining to foreign ownership of real estate. In Dubai, foreigners can lease property for a short term (not exceeding ten years) in all areas in the emirate. However, long term lease and freehold ownership is regulated and restricted to UAE and GCC nationals, companies owned wholly by UAE and GCC nationals as well as public joint stock companies. Foreign nationals may obtain a long term lease or freehold ownership in property only in certain designated areas as approved by the Ruler of Dubai from time to time.

WHAT DO UAE COMPANIES MOST OFTEN REQUIRE FROM THEIR DISPUTE RESOLUTION CLAUSES IN AGREEMENTS WITH INDIAN COMPANIES?
UAE based companies prefer to settle their claims by litigation in the Dubai Courts or the DIFC Courts. While legal proceedings in the Dubai Courts are conducted in Arabic, English is the language of operation of the DIFC Courts. However, in complex cross border transactions with high stakes involving large sums of money, arbitration is the preferred dispute resolution mechanism.

Typically, we advise clients on the ideal dispute resolution forum based on the parties concerned, the purpose of the transaction, activities proposed to be carried out and the jurisdictions involved.

WHAT ARE THE MOST POPULAR ARBITRATION VENUES FOR UAE COMPANIES WORKING WITH INDIAN COMPANIES?
For cross border transactions involving large sums of money, arbitration is generally the preferred alternate dispute resolution mechanism. Arbitration in the UAE has come a long way and is now seen at par with international best practices. While there are various arbitration forums in most emirates, centers in Dubai and Abu Dhabi are more popular amongst businesses.

The Dubai International Arbitration Centre (DIAC) is currently the busiest arbitration center in the nation with the default language of arbitration proceedings being English. The Dubai International Financial Centre (DIFC) has arbitration rules based on the UNCITRAL Model Law on International Commercial Arbitration and is commonly chosen as the seat of arbitration. Within the DIFC, another forum is the DIFC-LCIA Arbitration Centre which has been set up in collaboration with the London Court of International Arbitration (LCIA). The enforcement and ratification of DIFC arbitration awards is done by the DIFC courts based on the common law framework.

Apart from Dubai, arbitration in the Abu Dhabi Commercial, Conciliation and Arbitration Centre (ADCCAC) is also popular and is the preferred venue for Abu Dhabi based companies.

HOW DOES ENFORCEMENT OF ARBITRATION AWARDS IN THE UAE DIFFER FROM ENFORCEMENT OF INDIAN COURT AWARDS?
In principle, foreign court judgments will be enforceable in Dubai if they are pronounced by a country, which has a treaty with the UAE for reciprocal recognition of judgments.

However, practically, it is difficult and cumbersome to enforce foreign judgments, especially those which involve Dubai based companies as the local courts assume jurisdiction in such cases.

On the other hand, a favorable trend can be seen over the last few years in relation to the enforcement of foreign arbitration awards in the UAE.

Given that UAE is a signatory to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York convention), local courts have upheld that that New...
York convention has the force of law in the nation. Hence, provided that procedures and safeguards laid down in the convention are followed, it is likely that an arbitration award originating from a nation which is also a signatory to the New York convention is recognized and enforced in the UAE.

It is crucial to have a well-drafted dispute resolution clause in place right from inception when the transaction is being finalized between the parties.

WHAT IS THE BASIC PROCESS OF LITIGATING IN THE UAE, AND WHAT ARE SOME ESTIMATED TIMELINES?
The process of litigation is fairly straightforward in the UAE with disputes being contested first in the Court of First Instance, then in the Court of Appeal and finally in the Court of Cassation, which is the highest appellate court. Various special committees such as the Rental Disputes Committee have also been set up within the nation to ensure speedy disposal of disputes pertaining to certain specific sectors.

With the exception of the DIFC courts, all court proceedings in the UAE are conducted in Arabic using certified translations of case documents. Reliance is placed heavily on documentary evidence and oral pleadings are rarely allowed.

While timelines differ greatly based on the complexity of the matter involved, typically it takes between eighteen to twenty four months for a final verdict to be pronounced by the apex court in a civil dispute. In the event that the parties do not prefer an appeal from the judgment of the Court of First Instance, the judgment may be pronounced within a year.

HOW MUCH DOES IT COST TO LITIGATE IN THE UAE? DOES THIS VARY ACROSS STATES?
The UAE is a federation of seven emirates wherein each emirate is free to opt out of the federal judicial system and have its own local court system in place. At present, the emirates of Dubai, Abu Dhabi and Ras Al Khaimah, as well as a few free zones such as the DIFC and the Abu Dhabi Global Markets (ADGM), have their own court system. Given this structure, the cost of litigation varies greatly within the nation based on the regulations and fee structure of the concerned judicial forum. Typically, court fee is charged as a percentage of the claim amount of the dispute, with the numbers varying approximately between four percent and six percent with a maximum fee cap placed on large claims.

WHAT ELSE CAN INDIAN COMPANIES DO TO PROTECT THEMSELVES AGAINST LITIGATION RISK IN THE UAE?
To best mitigate any future risks involved in a cross-border transaction, it is strongly recommended that legal advice is sought from UAE based lawyers at the time of entering into the transaction itself.

To best mitigate any future risks involved in a cross-border transaction, it is strongly recommended that legal advice is sought from UAE based lawyers on a continuous basis, especially at the time of entering into a transaction.

Thorough legal due diligence should be conducted on parties domiciled in another jurisdiction and immense care should be taken while drafting dispute resolution clauses. Particular clarity is needed while drafting all aspects of the agreement including the commercial terms agreed between the parties. If the parties have mutually agreed to have an arbitration clause in the agreement, it is crucial that particulars such as the arbitration forum, seat of arbitration, number of arbitrators as well as the language of the arbitration proceedings is clearly mentioned and agreed between the parties to avoid any future challenges on jurisdiction.

Since the UAE is a fast developing nation, it is imperative for investors and businesses to stay abreast with legislative and political developments in...
the region and comply with all laws and regulations in force from time to time. Recently, the Federal Tax Authority in the UAE has introduced Value Added Tax (VAT) and it is recommended that all businesses operating in the country amend their systems in line with the regulations issued in this regard. It is also advisable for companies to consult legal advisors in the event of any uncertainty and protect themselves from any future penalties.

ABOUT GALADARI ADVOCATES & LEGAL CONSULTANTS
Galadari Advocates & Legal Consultants was established 35 years ago in Dubai, and is recognized today as one of the leading full service business law firms in the region. With a team of more than 100 lawyers and supporting professionals from around the world and offices in Abu Dhabi, Dubai, and the Dubai International Financial Centre (DIFC), the team offers an in-depth understanding of the practices and procedures essential to doing business successfully in the region.

The firm comprises of internationally and locally qualified lawyers, enabling us to provide effective and commercially focused advice and representation in all UAE courts. Our lawyers are committed to maintaining an understanding of their clients’ industries, and are regularly called upon to speak and publish on legal and market developments.

The firm offers clients a gamut of legal practices, including:
• Arbitration, Litigation and Dispute Resolution
• Corporate and Commercial
• Compliance and Regulatory
• Intellectual Property
• Insurance and Reinsurance
• Healthcare and Medical Malpractice
• Employment
• Construction
• Maritime
• Real Estate
• Finance

Ziad Galadari
Chairman
Ziad Galadari is a graduate of law from the UAE University in Al Ain. He is the founder and chairman of Galadari Advocates and Legal Consultants and has been practicing as an advocate, legal advisor and arbitrator since 1983. His expertise is primarily in international and regional litigation and arbitration with a particular focus on complex, high-value disputes involving major infrastructure construction projects, banking and finance, debt recovery and fraud and M&A transactions. With 35 years of experience in the UAE he is recognised as a pioneer for the legal profession in the region.

Ziad Galadari is a member of the Board of Directors of the Dubai World Trade Centre, which is charged with promoting trade and foreign investment in Dubai. He is also a member of the International Bar Association, the Chartered Institute of Arbitrators and is on the Tribunal Panel of the Dubai Technology and Media Free Zone (formerly known as TECOM). He is on the board of Directors for Dana Gas, DU Telecommunications and is often called upon by government and NGO’s as an advisor to major turn-key contracts for development projects in the Middle East.

Manish Narayan
Co-Head, Real Estate Practice
Manish is the Co-Head of the Real Estate practice at Galadari Advocates and Legal Consultants in Dubai and advises on various corporate, commercial and real estate matters in the region. Manish has advised on contentious and non-contentious matters and has represented interests of developers and investors in arbitration proceedings at various forums such as DIAC, RAK, and DIFC etc. He specialises in all aspects of real estate and property and has recently been involved in advising on real estate finance and investment, property disputes, mixed-use developments, tenancy disputes and strata law.

His diverse list of clients includes some of the largest property developers in the region, corporate and individual investors, hotel operators, banking and financial institutions, private equity firms and investment funds amongst others. Manish has over 9 years of legal experience in the UAE.

Manish graduated as a lawyer from the National Law School of India, University and has completed his Masters in International Economic Law from the University of Warwick, United Kingdom. Most recently, Manish has gained a certificate in Real Estate Planning from George Washington University.

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GENERAL FRAMEWORK

Which domestic laws and regulations govern the recognition and enforcement of foreign judgments in your jurisdiction?

A foreign judgment can be enforced in Hong Kong by one of two means – first, through the statutory registration scheme based on reciprocity under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) or, second, under common law.

The Reciprocal Enforcement Ordinance applies to the following 15 jurisdictions: Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, Netherlands, New Zealand, Singapore and Sri Lanka.

In the absence of applicable special regimes set out in various ordinances in Hong Kong, the common law regime applies as the legal framework in recognising and enforcing foreign judgments in Hong Kong.

Which international conventions and bilateral treaties relating to the recognition and enforcement of judgments apply in your jurisdiction?

The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to the Choice of Court Agreements between Parties Concerned applies to money judgments arising from commercial contracts where the parties concerned have made a prior express agreement to submit to the exclusive jurisdiction of the courts of either mainland China or Hong Kong.

Other than the above-mentioned arrangement with mainland China, Hong Kong is a party to no international convention or bilateral treaty relating to the recognition and enforcement of judgments.

Which courts are competent to hear cases on the recognition and enforcement of foreign judgments?

The Court of First Instance is competent to hear such cases.

Is there a legal distinction between the recognition and enforcement of a judgment?

Yes. There is a difference between recognition and enforcement of judgments. The concept of recognition itself can also differ slightly depending on whether it is considered under the Reciprocal Enforcement Ordinance or under common law.

In the first case, ‘recognition’ means that a foreign judgment is given the same force and effect
as if the foreign judgment were a judgment of the Hong Kong courts.

In the second case, the foreign judgment is recognised only to the extent that it is proof of a valid debt that can be sued on, and judgment given directly from the Hong Kong courts.

While the recognition of a foreign judgment means that the judgment becomes enforceable in Hong Kong, the judgment creditor needs to take additional steps for enforcement. For example, a judgment creditor holding a recognised foreign judgment could enforce that judgment by applying for a garnishee order compelling a bank to pay what it holds on behalf of the judgment debtor to the judgment creditor.

In general, how easy is it to secure recognition and enforcement of foreign judgments in your jurisdiction?

In general, the Hong Kong courts adopt a liberal approach to the recognition and enforcement of judgments.

Are any reforms to the framework on recognition and enforcement of judgments envisioned or underway?

Despite the above mechanisms, Hong Kong lacks a comprehensive and reciprocal procedure for registering and recognising foreign judgments.

In 2016 the Hague Conference on Private International Law established a special commission to prepare a draft Convention on the Recognition and Enforcement of Foreign Judgments. The main goal of the convention is to enhance access to justice and facilitate cross-border trade and investment by reducing costs and risks associated with cross-border dealings. Hong Kong is included in the discussions as part of the Chinese delegation.

The special commission held its first meeting in June 2016, when the preliminary draft convention was agreed. The convention is expected to be finalised by late 2017.

If the Hague Conference adopts the convention, the Hong Kong government may consider its application to Hong Kong. The application of the convention in Hong Kong would provide both foreign and Hong Kong judgment creditors with a more efficient way to enforce their judgments in member states.

In general, the Hong Kong courts adopt a liberal approach to the recognition and enforcement of judgments.

Which types of judgment (eg, monetary judgments, mandatory or prohibitory orders) are enforceable in your jurisdiction and which (if any) are explicitly excluded from recognition and enforcement (eg, default judgments, judgments granting punitive damages)?

The following specific subject matters are governed by neither the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) nor common law:

- Family law and insolvency matters under the Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap 188);
- Particular regimes relating to judgments in connection with the carriage of nuclear materials or oils under the Nuclear Material
The Hong Kong courts have consistently upheld registration of foreign judgments, even where foreign judgments are subject to appeal.

How are foreign judgments subject to appeal treated?
Despite the requirement that foreign judgments be final and conclusive before they may be recognised and enforced in Hong Kong, the Hong Kong courts have consistently upheld registration of foreign judgments (eg, Woodcraft Corporation v Yang [2015] HKCFI 428), even where foreign judgments are subject to appeal. Whether a foreign judgment is final and conclusive continues to be a difficult matter to predict and will depend heavily on the facts of each case.

What are the formal and documentary requirements for recognition and enforcement of foreign judgments?
The procedure for recognition under the Reciprocal Enforcement Ordinance involves registering the foreign judgment, which can be done in the following way:

- The judgment creditor of the foreign judgment should apply ex parte to the Court of First Instance at the Hong Kong High Court;
- The application should be supported by an affidavit and a draft order setting out the basis upon which the requirements under the ordinance are met (see the section on substantive requirements below);
- If the application and other documents are in order, the court will register the foreign judgment;
- The judgment creditor must serve the notice of registration on the judgment debtor;
- The judgment creditor may attempt to set the registration aside (the grounds are set out in the section on substantive requirements below); and
- If the registration is not set aside within the specified time (see below), the judgment creditor may proceed with the enforcement of the registered foreign judgment.

The procedure for recognition under common law is as follows:
- Civil proceedings are started in Hong Kong by way of writ. The writ can be generally endorsed or include a statement of claim setting out the claim of a debt arising from the foreign judgment;
- The writ must be served on the defendant. The plaintiff can apply for default judgment if the defendant either does not state its intention to defend within 14 days, or provide a defence within 28 days; and
- If a judgment (default or otherwise) is obtained, it can be enforced just like any other Hong Kong judgment.

Once the foreign judgment is either registered or successfully sued upon under the common law process, the resulting registered foreign judgment or Hong Kong judgment can be enforced. The procedure for enforcement will vary depending on the type of enforcement desired.

For example, enforcement via garnishee proceedings can be achieved by following the steps below:

- Issuing an ex parte summons supported by an affidavit. The affidavit must state the identity of the garnishee (eg, a bank) in Hong Kong and in what way the garnishee is indebted to the judgment debtor;
- At the first hearing, the court will generally issue a garnishee order to show cause specifying a further hearing date for the garnishee to
attend; and

- At the second hearing, the court may make the garnishee order absolute if the garnishee does not attend or does not dispute liability to the judgment debtor.

What substantive requirements (if any) apply to the recognition and enforcement of foreign judgments? Are enforcing courts in your jurisdiction permitted to review the foreign judgment on the merits?

The requirements for recognition of a foreign judgment in Hong Kong will depend on whether any of the relevant Hong Kong ordinances apply and, if not, whether common law applies.

Recognition under the Reciprocal Enforcement Ordinance

The primary applicable ordinance in Hong Kong is the Reciprocal Enforcement Ordinance. If a foreign judgment falls within the ordinance’s statutory regime and is from a country listed in the ordinance (Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, Netherlands, New Zealand, Singapore and Sri Lanka), the ordinance is mandatory and no other process can be invoked (including any common law process).

For a foreign judgment to be recognised under the ordinance:

- The judgment must be from a superior court – that is, one that has unlimited jurisdiction in civil and criminal matters;
- The recognition application must be made within six years of the date of the original judgment;
- The judgment must not have been wholly satisfied;
- If the judgment has been satisfied in part as at the date of registration, the judgment shall be registered only in respect of the balance remaining payable at that date;
- The judgment must be enforceable by execution in the country of the original court;
- The judgment is final and conclusive between the parties; and
- The judgment is for a sum of money.

Recognition under common law

Should the foreign judgment fall outside of the ordinance, the common law process can be used. A judgment creditor can apply for a local Hong Kong judgment (without a review of the merits of the foreign judgment) if the foreign judgment is:

- Final and conclusive upon the merits of the claim in the foreign jurisdiction; and
- A claim for a fixed sum.

Enforcement of judgment in Hong Kong

The basic pre-requisite for enforcing a judgment in Hong Kong is to have either a registered foreign judgment or a local Hong Kong judgment.

As long as the foreign judgment is final and conclusive, the Hong Kong court will not look behind the foreign judgment and investigate the underlying merits of that judgment. As such, a conflict in local law or prior judgment on the same issue is unlikely to have any effect on the recognition and enforcement of the foreign judgment in Hong Kong.

What is the limitation period for enforcement of a foreign judgment?

Under Section 4(1) of the Reciprocal Enforcement Ordinance, a judgment creditor has six years from the date of the foreign judgment to have the judgment registered in the Court of First Instance.

On what grounds can recognition and enforcement be refused?

Challenging recognition of foreign judgment under the common law

In relation to a foreign judgment sought to be recognised and sued upon through the common law process, the judgment debtor can simply defend the proceedings brought in Hong Kong by the judgment creditor. The judgment debtor can use any of the following defences:

- The foreign court had no jurisdiction over the claim;
- The foreign judgment is not final and/or conclusive over the merits of the claim; or
- The claim is not for a fixed sum.

Challenging enforcement of foreign judgment

Successfully challenging the recognition of the
foreign judgment will render the foreign judgment unenforceable in Hong Kong. There would thus be no need to challenge separately the enforcement of the foreign judgment.

If challenging the recognition of the foreign judgment is unsuccessful, the judgment debtor may appeal the decision and apply for a stay of execution of the foreign judgment. However, if a stay of execution is not granted, the judgment debtor generally has no standing to challenge any enforcement procedure.

Where the enforcement of the foreign judgment is contrary to public policy in Hong Kong, it would not normally be enforced.

Where the enforcement of the foreign judgment is contrary to public policy in Hong Kong, it would not normally be enforced. The Hong Kong courts may take into consideration a range of public policy issues in their decision to grant recognition and enforcement of a foreign judgment.

A foreign judgment would not normally be enforced where:

- A foreign judgment was obtained in violation of a Hong Kong anti-suit injunction (Phillip Alexander Securities & Futures Ltd v Bamberger [1997] 1 LPR 73); and
- The judgment of a foreign court is inconsistent with a previous decision of a competent Hong Kong court concerning proceedings between the same parties (Vervaeke v Smith [1983] 1 AC 145).

What is the extent of the enforcing court’s power to review the personal and subject-matter jurisdiction of the foreign court that issued the judgment?

The Reciprocal Enforcement Ordinance provides that a foreign court is deemed to have had jurisdiction in the case of a judgment given in an action in personam in the following circumstances:

- If the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings;
- If the judgment debtor was the plaintiff or counterclaimed in the proceedings in the original court;
- If the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court;
- If the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
- If the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.

The Hong Kong courts may refuse to recognise the foreign judgment where it was given in default of appearance and the defendant was not given sufficient notice.

To what extent does the enforcing court review the service of process in the original foreign proceedings?

The Reciprocal Enforcement Ordinance requires the judgment debtor – that is, the defendant in the original foreign proceedings – to be given notice of those proceedings in sufficient time to enable it to defend those proceedings. The Hong Kong courts may refuse to recognise the foreign judgment where it was given in default of appearance and the defendant was not given sufficient notice.

What public policy issues are considered in the court’s decision to grant recognition and enforcement? Is there any notable case law in this regard?

For example, a garnishee application is generally made ex parte, which means that the judgment debtor is not even notified of the enforcement process. Only the garnishee (e.g., the bank) is notified and has standing to dispute liability to the judgment debtor. There is no standing for any party during a garnishee application to dispute the primary liability between the judgment debtor and creditor.

What is the extent of the enforcing court’s power to review the personal and subject-matter jurisdiction of the foreign court that issued the judgment?
which the subject matter was immovable property or in an action in rem of which the subject matter was movable property, the foreign court is deemed to have jurisdiction if the property in question was, at the time of the proceedings in the original court, situated in the country of that court.

In the case of a judgment given in an action other than one mentioned above, the foreign court is deemed to have jurisdiction if the jurisdiction of the original court is recognised by the law of the registering court.

**How do the courts in your jurisdiction address applications for recognition and enforcement where there are concurrent proceedings (foreign or domestic) or conflicting judgments involving the same parties/dispute?**

In general, the Hong Kong courts adopt a liberal approach to the recognition and enforcement of judgments.

However, where there are concurrent proceedings (foreign or domestic), it is difficult to see how local proceedings pending between the parties on potentially different issues from the foreign judgment can have any effect on recognition of that foreign judgment in Hong Kong.

In terms of conflicting judgments involving the same parties/dispute, it is unlikely that a Hong Kong court will recognise the foreign judgment as being final and conclusive (for registration under either the Reciprocal Enforcement Ordinance or the common law process) if there are conflicting local judgments on the same issues.

**OPPOSITION**

**What defences are available to the losing party to a foreign judgment that is sought to be recognised and enforced in your jurisdiction?**

Whether there can be grounds for challenging the recognition of a foreign judgment will depend on the method in which recognition has been sought.

**Challenging recognition of foreign judgment under the Reciprocal Enforcement Ordinance**

For a foreign judgment recognised in Hong Kong by registration under the ordinance, a judgment debtor can apply to set the registration aside on the following grounds:

- The requirements for registration were not met;
- The foreign court had no jurisdiction;
- The judgment debtor did not receive notice of the foreign proceedings;
- The judgment was obtained by fraud;
- The enforcement of the foreign judgment is contrary to public policy in Hong Kong; or
- The rights under the judgment are not vested in the person by whom the application for registration was made.

**Challenging recognition of foreign judgment under common law**

In relation to a foreign judgment for which the judgment creditor seeks recognition through the common law process, the judgment debtor can simply defend the proceedings brought in Hong Kong by the judgment creditor. The judgment debtor can defend on any of the following grounds:

- The foreign court had no jurisdiction over the claim;
- The foreign judgment is not final and/or conclusive over the merits of the claim; or
- The claim is not for a fixed sum.

**Challenging enforcement of foreign judgment**

Successfully challenging the recognition of the foreign judgment would render the foreign judgment unenforceable in Hong Kong. There would thus be no need to challenge separately the enforcement of the foreign judgment.

If the recognition of the foreign judgment is challenged unsuccessfully, the judgment debtor may appeal the decision and apply for a stay of execution of the recognised foreign judgment. However, if a stay of execution is not granted, the judgment debtor generally has no standing to challenge any enforcement procedure.

For example, a garnishee application is generally made ex parte, which means that the judgment debtor is not even notified of the enforcement process. Only the garnishee (e.g., the bank) is notified and has standing to dispute liability to the judgment debtor. There is no standing for any party during a garnishee application to dispute the primary liability between the judgment debtor and creditor.

**What injunctive relief is available to defendants (e.g., anti-suit injunctions)?**
For a foreign judgment recognised in Hong Kong by registration under the Reciprocal Enforcement Ordinance, a judgment debtor may make an application to set the registration aside to prevent enforcement of the recognised foreign judgment.

RECOGNITION AND ENFORCEMENT PROCEDURE

What is the formal procedure for seeking recognition and enforcement of a foreign judgment?
The procedure for recognition under the Reciprocal Enforcement Ordinance involves registering the foreign judgment, which can be done in the following way:

- The judgment creditor of the foreign judgment should apply ex parte to the Court of First Instance at the Hong Kong High Court;
- The application should be supported by an affidavit and a draft order setting out the basis upon which the requirements under the ordinance are met (see the section on substantive requirements below);
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- At the first hearing, the court will generally issue a garnishee order to show cause specifying a further hearing date for the garnishee to attend; and
- At the second hearing, the court may make the garnishee order absolute if the garnishee does not attend or does not dispute liability to the judgment debtor.

What is the typical timeframe for the proceedings to grant recognition and enforcement?
In straightforward cases, the application under common law typically take six to 12 months. Under the Reciprocal Enforcement Ordinance, the proceedings, when uncontested, take two to four months to complete.

What fees apply to applications for recognition and enforcement of foreign judgments?
For an application under the ordinance, the court fee is HK$1,045 for an originating ex parte application.

For an application under common law, the court fee is HK$1,045 for sealing a writ of summons in the Court of First Instance.

Must the applicant for recognition and enforcement provide security for costs?
If matters become contested, a judgment creditor may be well advised to take out an additional application for security for costs or an order that interim payment be made in court to safeguard the
judgment creditor’s interests pending contested litigation in Hong Kong.

Are decisions on recognition and enforcement subject to appeal?
If recognition of the foreign judgment is unsuccessfully challenged, the judgment debtor may appeal the decision and apply for a stay of execution of the recognised foreign judgment. However, if a stay of execution is not granted, the judgment debtor generally has no standing to challenge any enforcement procedure.

How does the enforcing court address other costs issues arising in relation to the foreign judgment (eg, calculation of interest, exchange rates)?

Calculation of interest
An application for registration of a foreign judgment made under the ordinance must specify the amount of the interest, if any, which under the law of the foreign court has become due under the judgment up to the time of registration.

Exchange rate
Pursuant to the ordinance, where the foreign judgment is expressed in a foreign currency, it must be converted to Hong Kong dollars as at the date of registration of that judgment.

To what extent can the courts enforce a foreign judgment against third parties?
Garnishee proceedings are a simple method of enforcement where the judgment debtor is itself the creditor of a third party. The most common example is garnisheeing a judgment debtor’s bank account. Through garnishee proceedings, the obligation of the third party to pay money to the judgment debtor is transformed into an obligation of the third party to pay the money directly to the judgment creditor.

Can the courts grant partial recognition and enforcement of foreign judgments?
Where a foreign judgment contains both matters that can be registered and matters that cannot be registered, the Hong Kong court may register the judgment in respect of only the parts that can be registered.

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Ireland has recently introduced purpose-specific domestic legislation that enables two or more Irish companies to merge into a single company. This form of domestic merger enables one or more companies to transfer by operation of law all its assets and liabilities to another Irish company, upon which the transferor company is dissolved without going into liquidation. It mirrors aspects of the EU cross-border merger regime, which has been available to EEA companies, including Irish companies, since 2008.

One noteworthy consequence of a domestic merger is that all of the contracts and agreements to which a transferor company is a party are assigned and novated by operation of law to the successor company (notwithstanding anything to the contrary contained in that contract or agreement). This removes many of the hurdles to transferring a company’s business by eliminating the need for numerous assignments and novations requiring counterparty consent.

The practical aspects of carrying out such mergers are set out in more detail below.

TYPES OF DOMESTIC MERGER INTRODUCED BY THE ACT
A “merger” under the Companies Act 2014 (the “Act”) can take place in one of three ways:

- Merger by acquisition – where an existing company acquires all of the assets and liabilities of one or more companies in exchange for the issue of shares in the acquiring company to the members of the transferor company or companies, with or without cash payment, and the transferor company is dissolved without going into liquidation;
- Merger by absorption – an existing company acquires all the assets and liabilities of its wholly-owned subsidiary and the subsidiary is dissolved without going into liquidation;
- Merger by formation of a new company – where one or more companies transfers all of its assets and liabilities to a newly formed company in exchange for the issue of shares in the newly-formed company to the members of the existing company or companies with or without cash payment, the transferor companies are dissolved without going into liquidation.

TYPES OF COMPANY THAT CAN MERGE
Provided that at least one of the merging companies is a private company limited by shares, all types of Irish company, with the exception of public limited companies (“PLCs”), can use the above regime to effect a domestic merger. A different EU-derived merger regime applies to mergers involving PLCs.

APPROVAL OF THE MERGER
The domestic merger regime differs from the Irish regime for EU cross-border mergers in one important respect. While the Act permits a merger
to be approved by a High Court order, it also permits all of the three types of merger to take place by way of Summary Approval Procedure ("SAP"). Where a SAP is used, it avoids the need for an application to the High Court to approve the merger. This is a substantial cost saving for companies, since it avoids expenses such as the retention of an independent barrister and advertising costs in a national daily newspaper.

The SAP is based on a declaration of solvency of the directors of each merging company and the passing of unanimous resolutions by the members of each such company – each of these is likely to be obtainable in the case of an intra-group merger. It is worth noting, however, that the declaration of solvency includes an affirmation that the successor company will be able to discharge its debts and other liabilities and those of each merging company in full as they fall due during the period of 12 months after the effective date of the merger. The Directors can be personally liable without limitation of liability for all or any of the debts or other liabilities of the successor company where it is found that they made the declaration without having reasonable grounds for their opinion.

Generally, where the companies involved in the merger apply to the High Court to approve the merger, this eases the individual responsibility of directors as no declaration of solvency is required. The process to obtain a High Court order is set out in the Act and in particular it:
- gives rights to minority shareholders to have their shares brought,
- gives creditors the right to be heard in Court, and
- gives the holders of securities in any transfer or company the right to have equivalent interests in the successor company.

The process also imposes obligations on the relevant companies to publish certain details in a national newspaper, which when coupled with the costs of retaining an independent barrister, make it a more costly option than a SAP.

**Steps to Complete a Merger**

The steps prescribed by the Act for completing a domestic merger include:
- The directors of the companies involved agreeing common draft terms of the merger which must deal with certain matters prescribed by the Act.
- Save in the case of a merger by absorption, the directors of the merging companies preparing an explanatory report, which requirement may be waived with the unanimous consent of the shareholders.
- The appointment of an expert to prepare a report for the members of the merging companies on the common draft terms of the merger, which requirement may be waived with the unanimous consent of the shareholders or if other specified circumstances are satisfied.

**The Use of a Summary Approval Procedure Avoids the Need for Companies to Apply to the High Court to Approve a Merger.**

- In certain instances, the preparation of merger financial statements.
- In the case of a merger being confirmed by court order, notification of the common draft terms of merger to the Companies Registration Office ("CRO") and publication by the CRO of certain information relating to the merger in the CRO Gazette.
- In the case of a merger being confirmed by court order, notification of the merger by each merging company in one national daily newspaper.
- In the case of a merger being confirmed by way of SAP, making a declaration of solvency by the directors of each of the merging companies and passing resolutions by the members approving the merger and filing at the CRO.
- Except in specified circumstances, the merging companies making certain documents available for inspection by any member of the company at its registered office for a period of 30 days before the final approval of the merger by shareholders.

**Effect of Merger**

The statutory consequences of a domestic merger becoming effective are that:
- All of the assets and liabilities of each transferor company become the assets and liabilities of the
successor company.

- The transferor company or companies is or are dissolved.
- All legal proceedings pending by or against any transferor company continue with the substitution for each transferor company of the successor company as a party.

In the case of a merger confirmed by the High Court, the Act specifically provides a mechanism by which the successor company can be registered as the successor in title to the transferor company or companies in relevant public registers. There is no equivalent mechanism in the case of confirmation using the SAP.

**TAX CONSIDERATIONS**

While the Irish tax legislation contains provisions dealing with cross-border mergers, aimed at achieving a tax neutral transfer of assets on the merger where certain conditions are satisfied, to date, no such provisions have been published for domestic mergers between two Irish companies.

A merger involves (i) a transfer of assets and liabilities from one company to another and (ii) a dissolution of the transferor company. These two elements of the merger need to be considered from a tax perspective and each tax head analysed. In essence, the merger is like any transfer of assets under an asset purchase or business transfer agreement.

Depending on the type of merger involved, existing reliefs and exemptions may be of relevance. Below is a high level overview of some of the key tax considerations. There are numerous practical issues that will need to be considered by companies considering mergers.

**RELEVANT TAX HEADS – MERGERS**

- **Stamp duty** – Stamp duty is a tax on documents. It applies to documents which effect the transfer of assets and stamp duty applies at the rate of 1% or 2% depending on the asset involved.

  Where the assets transfer by operation of law under a merger, then technically a charge to stamp duty should not arise and the court order (in a court approved merger) or directors’ resolution (in a merger approved by way of the SAP procedure) should not be regarded as stampable instruments.

  Negotiations and discussions with Revenue are currently ongoing in relation to the legal effect of the domestic merger and whether a legislative amendment is required.

- **Capital gains tax** – The transfer of a chargeable asset by a transferor to the successor company on any form of merger will constitute a disposal of the asset by the transferor for capital gains tax. Whether relief is available will depend on the type of merger involved. In a merger by absorption, assets are transferred from a subsidiary to its parent company and ordinarily such a transaction would benefit from group relief. However, as the transfer of assets occurs at the same time as the transfer is dissolved there is some doubt as to whether there is in fact a group transfer. This matter is also being discussed with Revenue.

In a merger by formation of a new company or a merger by acquisition, reconstruction relief may apply as shares are issued in consideration for the acquisition of the assets. A number of technical points are being clarified with Revenue on this point and where applicable, the assets would transfer for their original acquisition cost.

Each of the assets transferring should be reviewed to determine whether any other exemptions apply, for example, in the case of shareholdings being transferred, the substantial shareholding exemption might apply.
The dissolution of the transferor company will involve a disposal by its shareholder. There is an exemption for cross border mergers which apply equally to a domestic merger by absorption where the assets are transferred from a subsidiary to its parent: this is not treated as a disposal by the parent company of the shares in the subsidiary.

• Corporation tax – The transfer of a company’s assets and liabilities will be treated as the cessation of the company’s trade. Depending on the date of the transfer, the date for payment of preliminary corporation tax and filing tax returns may be brought forward.

Provided certain conditions are met, there is specific relief in Irish legislation to allow a trading company which ceases its trade and is carried on by another company, to have its unused trading losses used by the successor company against profits of the same trade.

• VAT – Transfer of business relief should apply where the transfer of the assets and liabilities amounts to a supply for VAT purposes, provided the successor company is VAT registered.

• Payroll taxes – The current practice in the case of a business or asset transfer involving the transfer of employees is for the parties to apply to Revenue to confirm that there is no requirement to issue certificates of cessation (P45s) to the transferring employees. This practice will continue for domestic mergers and employees will have continuity of service.

CONCLUSION
The domestic mergers regime has already proved a useful addition to Irish corporate law. It benefits groups that wish to reorganise and simplify their structures by, for example, merging and dissolving group companies without the need to put them into liquidation. It enables spin-outs and hive-downs in a manner that is more straightforward than was previously available. We have seen considerable use of this merger process by groups that have Irish companies in their structures.

The particular circumstances in each given case will determine which type of merger is most appropriate and whether a SAP or an application to Court is suitable. The SAP has benefits in a group context, especially where the parties wish to proceed by way of a merger by absorption and where there are no complexities (such as the need to transfer title to real estate). On the other hand, in larger or more complex transactions, the directors may have legitimate reasons not to risk personal liability; in which case, a Court approval merger is more appropriate.

The tax position of domestic mergers is undergoing detailed analysis by practitioners in conjunction with Irish Revenue. It is hoped that this will progress as quickly as possible so that taxpayers can be assured of the correct tax treatment. Until then, the Irish Revenue continues
to deal with at least stamp duty and capital gains
tax aspects of mergers on a case by case basis.

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Mason Hayes & Curran is one of Ireland’s leading
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Legal Considerations for Asian Investors in the Russian Market

As Russia seeks to attract substantial foreign investments from India and Asia, the Russian Far East has the potential to become a significant player in Asian-Pacific trade.

INTRODUCTION
Russia is both a European and an Asian country, but has often appeared to pay more attention to relations with Europe. That is changing, as shown by major energy deals between Russia and China; robust bilateral trade and political discussions with Japan, South Korea, India and Vietnam; and Russia’s hosting of regional conferences, including the Eastern Economic Forum in September 2017. Among other goals, Russia seeks to attract substantial foreign investments from its Asian and Indian partners. For both geographical and practical reasons, foreign investors may wish to focus on the Russian Far East, a historically neglected region which has the potential to become a significant player in Asian-Pacific trade. This is a vast area with a population of more than 7 million people that includes the ports of Vladivostok, Khabarovsk and Nakhodka and extensive natural resources.

To facilitate investments into the region, Russia has developed several programs, including the establishment of special economic zones with reduced tax regimes, a special gaming zone in the city of Artem in Primorskiy Krai to attract hospitality and tourism investors, and a free port zone in Vladivostok. However, the applicable rules are scattered among a number of different laws and regulations, and are somewhat difficult to navigate. Below we provide a brief overview of the Russian legal framework for investment incentives in the Russian Far East.

SPECIAL REGULATED TERRITORIES
There are four types of specially regulated territories in the Russian Far East that seek to attract foreign investments:
- special economic zone (the “SEZ”) (the creation and operation of SEZs is governed by Federal Law No. 116-FZ dated 22 July 2005 “On Special Economic Zones in the Russian Federation”);
- priority development area (the “PDA”) (introduced by Federal Law No. 473-FZ dated 29 December 2014 “On Territories of Priority Social-Economic Development”);
- free port Vladivostok (Federal Law No. 212-FZ dated 13 July 2015 “On Free Port Vladivostok”);

Each of the above territories has its own unique legal framework and exists independently from the others. Notably, the regulations for each territory include special incentives for foreign investments.

Special Economic Zones
Currently there is only one operating SEZ in the Far East: the industrial and manufacturing SEZ
“Vladis”. Previously, two more SEZs existed, namely “Russkiy Island” and “Soviet Harbour”, but they were terminated by the Russian Government in 2016, apparently with the goal of switching to the PDA model.

Vladis was created on the basis of existing joint enterprises in the region – LLC “Mazda Sollers Manufacturing Rus”, an automobile manufacturing joint venture of Mazda Motor Corporation and PJSC “Sollers”, and LLC “Mazda Pacific Logistic”.

SEZ Vladis offers several types of benefits to its residents, including (i) tax benefits; (ii) a free customs zone regime; and (iii) liberalized administrative regulations.

A summary of the tax benefits is outlined in Table 1.

### Priority Development Areas and Free Port Vladivostok

While SEZs were introduced a decade ago, PDAs or priority development areas are a more recent innovation in Russia’s legal system, focused primarily on the Russian Far East.

Currently there are 18 PDAs in several locations within the Russian Far East. These have already experienced some success in attracting Asian and Indian investors:

- Korea Trading & Industries Co. invested $7 million in the construction of a fish processing complex in PDA “Kamchatka”;
- The Japanese greenhouse complex JGC Evergreen focuses on growing and marketing vegetables for the Russian market in PDA

<table>
<thead>
<tr>
<th>Tax Type</th>
<th>SEZ Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate Profit Tax/20%</td>
<td>2% (within the first 5 years from the moment of receiving first profit or upon expiration of 3 years since the creation a legal entity)</td>
</tr>
<tr>
<td></td>
<td>3% (during the period from 2017 to 2020)</td>
</tr>
<tr>
<td></td>
<td>12% (from the 5th until the 10th year)</td>
</tr>
<tr>
<td></td>
<td>15.5% (starting from the eleventh year till the termination of the SEZ)</td>
</tr>
<tr>
<td>Property Tax (2.2%)</td>
<td>0% (within 10 years since the moment of registration of property with tax authority)</td>
</tr>
<tr>
<td>Land Tax (0.3 – 1.5%)</td>
<td>0% (within 10 years since registration of rights to the land plot)</td>
</tr>
</tbody>
</table>
KGK Diamonds Private ltd., a major Indian diamonds producer has become a resident of the free port Vladivostok with a gem-cutting factory project.

PDAs offer their residents a preferential tax regime, as summarized in Table 2 above. PDA residents also benefit from a free customs zone regime with duty and tax free import, storage and consumption of import goods.

**Vladivostok Free Port**

The Vladivostok Free Port includes the key sea ports of the Southern Far East and the Knevichi airport in Vladivostok.

Its legal regime provides the following incentives for foreign investors:

- the right to lease land plots at their registered "cadastral" value (generally, a low historical value) without the need for public tenders;
- right to hire foreign staff without meeting quota requirements; foreign employees may comprise up to 20% of the total workforce;
- reduced inspections by government authorities and liberalized administrative regulations;
- disputes with government authorities may be resolved with the assistance of the Russian Far East Development Corporation, a special state-owned entity designed to promote investment; and
- reduced visa requirements; foreign citizens arriving through checkpoints in the free port may stay up to 8 days without a visa.

PDA and Vladivostok Free Port residents enjoy tax and payroll tax benefits as described in Table 2.

**Primorye Gaming Zone**

Under a Russian law adopted in 2006, gambling is only allowed in a limited number of designated regions. One such zone, "Primorye", is located in the city of Artem in Primorskiy Krai, 50 kilometers from Vladivostok.

Foreign investors are already active in the gaming zone. A subsidiary of Hong Kong-based Melco Group has built and operates one of the biggest casinos in Russia, Tigre de Cristal. The gaming zone also benefits from the same simplified visa regime as the nearby free port, supporting the flow of visitors.

**INVESTMENT SUPPORT VEHICLES**

In addition to creating special territories, the Russian government has established a special investment fund to facilitate new projects in the Russian Far East.

**Far East Development Fund**

The Far East Development Fund provides government co-financing to foreign and domestic investment projects. Created as a wholly owned subsidiary of the Russian state corporation "Vnesheconombank", the Fund provides long-term financing on preferential terms for investment projects in designated industries and sectors, including infrastructure.

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**TABLE 2 – PRIORITY DEVELOPMENT AREA PREFERENTIAL TAX RATES**

<table>
<thead>
<tr>
<th>Payment (Basic Rate)</th>
<th>Free Port Rate (Period)</th>
<th>PDA Rate (Period)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Security Payments (30%)</td>
<td>7.6% (within the first 10 years)</td>
<td></td>
</tr>
<tr>
<td>Profit tax (20%)</td>
<td>0% (within the first 5 years from the moment of receiving first profit)</td>
<td></td>
</tr>
<tr>
<td>Property Tax (2.2%)</td>
<td>0% (within the first 5 years since the moment of registration of property with the tax authority)</td>
<td></td>
</tr>
<tr>
<td>Land Tax (0.3 – 1.5%)</td>
<td>0% (Within the first 3 years since registration of property rights to the land plot)</td>
<td>1.1% (within the following 5 years)</td>
</tr>
</tbody>
</table>

“Khabarovsk”; and
upstream and downstream production of minerals, small and medium enterprises and agriculture, in the Russian Far East and Baikal regions.

The Fund has its own selection criteria and models for assessing which projects to finance. Government approval is required before funding. Generally, qualifying investment projects should:

• have goals in line with the Russian government’s strategy for social and economic development of the Russian Far East and Baikal Regions;
• produce goods and services in the Russian Far East and Baikal regions;
• generate positive investment returns;
• together with Fund’s input have a value in excess of 500 million Rubles (about US$48.8 million at current exchange rates); and
• attract private investments.

The procedure to obtain approval for Fund financing includes coordination with several different government agencies, notably the Ministry for Far East Development and the Governmental Commission for Questions of Social-Economic Development of the Far East and Baikal Region.

Several have been co-financed by the Fund to date, including:

• construction of a trans-border bridge crossing the Amur River into China;
• construction of a pig-breeding complex in the Primorsky Region;
• construction of a refrigeration warehouse complex in Primorsky Region; and
• formation of the Japanese-Russian Investment Platform.

Other Investment Support Vehicles
In addition to the Fund, other Russian institutions are also involved in attracting foreign investments to the Russian Far East, such as:

• the Far East Development Corporation;
• the Far East Agency for Attracting Investments and Export Support; and
• the Agency for Development of Human Capital in the Far East.

Notably, the Far East Development Corporation oversees PDAs in the Far Eastern Federal District. The Agency for Development of Human Capital in the Far East provides support to investors looking out to hire employees in the region, including assistance with relocation. The Far East Agency for Attracting Investments and Export Support acts as a general promoter of investments.

While Russia’s programs to promote investment in the Russian Far East are in early stages of development, the Russian government appears to be making this a strategic priority, in line with geopolitical developments. Accordingly, more projects can be expected in the future.

NOTES
1 See the Fund’s investment memorandum at: http://www.fondvostok.ru/en/about/documents/
2 See: http://www.fondvostok.ru/en/

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I. TRENDS IN M&A TRANSACTIONS

In recent years, the global M&A market has shown steady signs of recovery from the effects of the financial crisis. Transactions span a wide range of industry sectors, including healthcare, financial services, energy and technology. However, difficult market conditions pose significant challenges for newly acquired businesses. The underlying factual bases upon which the purchase price is premised are crucial. In what has become an increasingly professionalized transaction process, buyers routinely take another close look after closing at what they were told about the acquired business and they are more inclined to initiate proceedings if they suspect breaches of warranties given by the seller.

II. COMMON DISPUTES IN M&A TRANSACTIONS

It has become standard to categorize M&A disputes according to the stage of the transaction in which they arise. One commonly distinguishes pre-signing disputes (arising prior to the signing of the transaction agreement), pre-closing disputes (arising between the signing and the closing), closing disputes (arising at the closing) and post-closing disputes (arising after the closing). While M&A disputes may occur across these phases, post-closing disputes are most frequent in practice. Most commonly, M&A disputes arise out of or in connection with representation and warranties as well as price adjustment agreements.

A. Pre-signing Disputes

Pre-signing disputes primarily arise out of, or in connection with, confidentiality and exclusivity agreements concluded by the parties at the outset of the negotiations. Pre-signing disputes also arise in the context of letters of intent or term sheets. These disputes turn in particular on whether a party is obliged to enter into, or to continue, negotiations towards the conclusion of an M&A transaction agreement, and on whether such obligation may be enforced through arbitration. Finally, pre-signing disputes may arise over the issue of whether a transaction agreement has been validly concluded despite the fact that it has not yet been signed by at least one of the parties.

B. Pre-closing Disputes

After the signing of the M&A transaction agreement the parties work towards the closing and take the necessary actions to fulfill the closing conditions (conditions precedent) set forth in the agreement. In the transaction agreement the parties typically agree to commit, or refrain from committing, certain actions during the period between the signing and closing (covenants). In this context, the question arises as to which remedies are available if the counterparty does not take the agreed actions (or if such actions do not comply with the agreement) or does not refrain from committing acts that are prohibited by the contract. In our experience, the specific enforcement of such contractual obligations through litigation...
or arbitration is rare. This is primarily owed to the fact that at this stage, the parties usually still have mutual interests in closing the transaction. In addition, the enforcement of pre-closing covenants is difficult from a practical point of view, in particular in terms of timing: If the time period between signing and closing lasts more than six months, the prospects of a successful takeover and integration of the target company are diminished as this leads to uncertainties for all parties involved (including stakeholders such as employees, clients and suppliers). This often has a negative impact on the expected economics of a transaction.

C. Closing Disputes
If following the signing a party refuses to close an M&A transaction, the other party is entitled to specific performance if the closing conditions are met or have been waived. In such action the claimant demands that the defendant be ordered to render his performance in exchange and simultaneously to the claimant’s performance, for instance that the seller transfers the shares of the target company against payment of the purchase price by the buyer.

D. Post-Closing Disputes
In the post-closing phase, contractual representations and warranties represent a major cause of dispute. It has become standard practice to sell on the basis of a long list of representations, warranties and specific indemnities with the purpose of allocating the risks between the transacting parties taking into account the level of disclosure in the due diligence process. It has also become routine to analyze those risks in detail immediately after the closing and to evaluate potential claims on that basis.

Another important type of disputes arising after the closing concerns the adjustment of the purchase price (post-closing). Most common are adjustment mechanisms that seek to account for value changes of the target company between signing and closing. Sometimes, however, adjustments focus on future developments – for example, if the parties are not able to agree on the appropriate value of the target, they may provide for some form of earn-out mechanism. This would enable the seller to try and hold the new owner responsible for decisions potentially causing an earn-out shortfall. More frequent are arguments about the calculation of earn-out parameters (e.g., EBITDA or similar indicators of a company’s performance). In these cases, disputes may revolve around the scope and meaning of the price adjustment provision, the application and interpretation of accounting principles and related quantum considerations.

III. ARBITRATION AS A PREFERRED MEANS OF RESOLVING M&A DISPUTES

A. Key Differences of Arbitration as compared to Litigation
In the negotiations over an M&A transaction the parties have to decide whether they prefer to have disputes arising from the transaction resolved through arbitration or in litigation proceedings before state courts. Moreover, they need to address if their preferred general dispute resolution mechanism shall apply to all disputes or if a different mechanism shall be applicable to specific disputes.

Apart from the parties’ legal background and familiarity with dispute resolution, the decision between litigation and arbitration is mainly triggered by the various differences between these two dispute resolution mechanisms. In this regard, arbitration is widely perceived to have several advantages over state court
proceedings, in particular with respect to the extent of party autonomy, the flexibility of the proceedings, the better means to protect privacy and confidentiality, the selection of arbitrators and the time until a final resolution of the dispute (with limited possibilities of appeal). In our experience, in the context of M&A disputes the key differences between arbitration and litigation arise in particular from the flexibility of arbitration proceedings, the possibility to select experienced arbitrators, and the different approach of arbitral tribunals with respect to the substantiation and proof of claims (damages).

Obviously, what one party may view as an advantage of a particular form of dispute resolution, is in most cases perceived as disadvantage by the other side. Moreover, the advantages of one dispute resolution mechanism may not apply to all disputes arising at the different stages of an M&A transaction since different aspects are relevant, for instance, in pre-signing disputes as opposed to post-closing disputes. Therefore, it is generally not accurate to describe either arbitration or litigation as the more advantageous dispute resolution mechanism for M&A disputes. Rather, in the negotiations on the transaction agreement each party must assess which form of dispute resolution better suits its interests with respect to specific anticipated disputes arising out of this agreement.

1. **Flexibility**

One of the main differences, and advantages, of arbitration as compared to state court litigation is the flexibility of the proceedings. The parties may structure and tailor the proceedings to suit their specific needs for dispute resolution. This flexibility applies in particular with respect to the taking of evidence, specifically the presentation of witnesses and expert witnesses which is often limited in litigation proceedings.

The downside of the increased flexibility of arbitration proceedings is that it provides a reluctant party with additional opportunities to delay, obstruct or frustrate the proceedings. Different from a state court, an arbitral tribunal lacks the power to directly enforce its orders against the parties or third parties and may thus not effectively prevent such behavior.

2. **Selection of Arbitrators with the Required Expertise**

The possibility of the parties to select the members of the arbitral tribunal is undoubtedly one of the key distinguishing aspects of (international) arbitration as opposed to state court litigation. Parties may select arbitrators with a specific expertise, e.g., in a particular practice area (such as corporate and M&A or accounting), with a certain legal background, or to address any other sensitivity that the parties may deem relevant to their particular case.

3. **Substantiation and Proof of Claims (Damages)**

While the concepts, requirements and legal standards for the assessment of claims under Swiss law are in principle the same for arbitration and litigation proceedings, in practice there are significant differences as regards the admission of prayers for relief and the substantiation and proof of claims.

Swiss state courts apply strict standards with respect to the wording, definiteness and type of the prayers for relief submitted by the parties. This applies in particular with respect to prayers for declaratory relief (i.e., for a declaration of a specific right or legal relation).

Arbitration proceedings provide more flexibility also with respect to the substantiation and proof of claims, in particular damages. The interrogation of witnesses (or the review of witness statements filed by the parties together with their briefs) or of expert witnesses appointed by the parties is of significantly greater importance than in litigation proceedings. For a party to an M&A dispute for whom witness testimony may become indispensable to make its case (e.g., to prove an oral agreement), this can be a decisive aspect in favor of an arbitration agreement.

At least under Swiss law, there is no conceptual difference between litigation and arbitration as regards the burden of substantiation and proof (as these are regarded matters of substantive – not procedural – law). However, Swiss state courts often apply very strict, sometimes even exaggerated, standards in this regard. In addition, state courts are more inclined to dismiss claims for lack of substantiation or proof without reviewing the substance of the claims if the claimant does not
meet these standards. In contrast, arbitral tribunals are often more generous also in this regard. Once liability is established in principle, an arbitral tribunal is more likely to admit a claim for damages even if the damage can only be estimated, as long as it is supported by convincing (expert) evidence. For a claimant who asserts claims for breaches of contract, in particular of the representation and warranties, and claims damages resulting from such breaches (e.g., the diminished value of the target company), arbitration proceedings may thus be more favorable. In contrast, the defendant may have better chances for prevailing in litigation before a state court which is prepared to fully dismiss such damages claim already for lack of proper substantiation.

**B. Planning and Drafting Arbitration Clauses**

The proper planning and drafting of dispute resolution clauses is an important aspect in any transaction. Planning for dispute resolution – and considering arbitration in that context – typically involves the pursuit of a number of strategic goals. These include the parties’ desire to ensure a neutral decision-making, consolidate all disputes in a single forum, ensure enforceability of the arbitration agreement, avoid unnecessary delays in resolving disputes, take advantage of procedural flexibility, ensure confidentiality and control cost. Proper planning and drafting of dispute resolution clauses help to save time and costs when it comes to a dispute, but also to make the resolution process more predictable.

Whether a party can obtain its preferred dispute resolution method for a particular transaction depends on that party’s negotiation power and the interests of the opposing side. Moreover, drafting of dispute resolution clauses is typically not the center focus of parties negotiating M&A contracts. Often, they are not able or willing to devote sufficient time to that aspect. And sometimes, dispute resolution clauses are the result of a compromise that does not serve either party’s interest and instead may lead to uncertainties, procedural complications or inefficiencies.

In our experience, the vast majority of international M&A contracts provide for institutional arbitration (such as the Swiss Rules, the ICC Rules or the SIAC Rules), while one sees ad hoc-arbitration clauses occasionally and mainly in purely domestic settings. Where the parties opt for institutional arbitration, this largely simplifies their task of drafting the arbitration agreement. In this case, the starting point should be the standard arbitration clause of that particular institution (which can be found in the applicable arbitration rules or on the institution's website).

The parties may then consider supplementing the clause, taking into account the specific circumstances of a particular transaction. The more obvious points the parties may want to consider addressing include the number of arbitrators, the place of the arbitration, the language of the arbitration, and the substantive law applicable to the merits of the dispute. Depending on the parties’ needs in a particular transaction, they may want to address additional aspects such as specific confidentiality arrangements, a provision for fast track arbitration and related timing aspects or a carve-out for certain disputes that should be subject to a separate and distinct dispute resolution mechanism (e.g., expert determination proceedings). Also, multi-party and multi-contract situations (including issues of joinder and consolidation) may require specific arrangements that need to be addressed in the arbitration clause.

If the parties agree on ad hoc (non-administered) arbitration, additional points may need to be included in the arbitration agreement, particularly relating to the initiation of proceedings and the appointing of the arbitrators.

While most M&A transactions provide for arbitration as a general dispute resolution mechanism, some agreements carve out selected aspects of the transaction and provide for separate means to resolve disputes relating to these aspects – such as expert determination proceedings for price adjustment disputes or fast track arbitration for certain pre-closing disputes.

Expert determination is in particular of great practical importance for price adjustment disputes. These disputes often turn on complex valuation or accounting questions and the parties want to ensure that the person deciding these questions has the required knowledge and expertise. The distinctive feature of expert determination is that it is binding upon the parties (and in case of subsequent
Fast track arbitration (or expedited procedure), with shortened time-limits for the various steps of the proceedings, can be a viable option at least for certain types of M&A disputes when time is of the essence – in particular with respect to pre-closing and closing disputes.

These alternative dispute resolution mechanisms can readily be combined with a general arbitration clause, but particular attention is required to the drafting of such separate and distinct dispute resolution clauses to avoid jurisdictional objections or parallel proceedings. The same applies when the dispute resolution mechanism should address multi-party and multi-contract situations or be relied on with respect to non-signatories.

IV. SUMMARY

In recent years, we have experienced in our practice an increase in the number of M&A disputes. While controversies may occur across all phases of an M&A transaction, post-closing disputes are most frequent in practice. This applies in particular to disputes concerning representation, warranties and covenants as well as price adjustment agreements (which in practice often involve expert determination and sometimes raise complex procedural issues and interrelations with arbitration proceedings – before, after or even in parallel to expert determination).

In today’s globalized economy, arbitration has become the method of choice for dispute resolution in international M&A transactions. It is generally perceived as a commercially effective means to resolve M&A disputes and given preference over state court proceedings. This applies in particular if the available options are the home courts of the opposing side or the courts of a third country. Among other advantages often quoted in favor of arbitration, it allows the parties to select a neutral forum and to appoint arbitrators who are not only experienced in dispute resolution, but would also understand the relevant aspects of an M&A transaction. But perhaps most importantly, arbitration provides the required flexibility in the handling of proceedings that allows tailor-made practical solutions to particular issues as they may arise in M&A disputes.

Naturally, what one party may view as an advantage of a particular form of dispute resolution, is often perceived as disadvantage by the other side and each transacting party will have to assess which form of dispute resolution best suits its interests (in anticipation of the possible disputes that may arise under the relevant transaction agreement).

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Switzerland is the preferred centre of international arbitration. As are we.
Recent Developments in the UK Dispute Resolution Landscape

Dispute resolution in the UK is in the midst of significant change, not least due to the uncertainty created by Brexit.

The dispute resolution landscape in the UK is in the midst of significant change. Many consider the reforms to be the most far-reaching civil justice transformations since the 1870's1 and this is not even taking into account what may happen with Brexit (which we will discuss below).

The aim of the current modernisation programme is to deliver a system which is more unified, technology driven and continues to compete with, and ultimately continues to lead, other major legal jurisdictions around the world well into the 21st Century. The reforms include:

• The unveiling of the new Business & Property Courts in October 2017 incorporating the Commercial Court, the Admiralty Court, the Technology and Construction Court, the Financial List and the courts of the Chancery Division (including those dealing with financial services, intellectual property, competition and insolvency).

• The use of electronic working in the major courts in London was introduced in April 2017 allowing claim forms, statements of case and witness statements to be filed electronically at any time of the day or night.

• Planned changes to procedure to address the steadily increasing costs of litigation; a voluntary capped costs regime for claims up to £250,000 (approximately 21,570,000.00 Indian Rupee2) and, amendments to the disclosure process proposed by a working group led by Lady Justice Gloster to address the considerable cost and burden of the current disclosure process.

The scope of the right to legal professional privilege has continued to exercise the courts as they maintain a narrow approach to the definition of who constitutes a ‘client’ for the purposes of legal advice privilege3 (the privilege that arises in non-contentious situations). In May 2017 the High Court took a similarly restrictive approach when considering whether and at what point litigation privilege applies to a claim brought by a regulator in the context of both criminal and civil proceedings. That decision will be the subject of an appeal in late 2018 and we await the Court of Appeals’ judgment with interest.

Arbitration and ADR continue to prove to be very popular methods of dispute resolution and the courts continue to show that they are willing to support these alternative methods of dispute resolution. Litigation funding continues to grow with the courts increasingly accepting its place in the litigation landscape and we discuss this in more detail below.

Class actions are developing a higher profile than previously in competition matters as a result of the Consumer Rights Act 2015, although, The Competition Appeals Tribunal which deals with such cases has adopted a fairly restrictive approach to these cases to date.

We also expect that data related litigation is likely to increase in the areas of privacy, data protection and cyber security. Many of these cases will have a significant cross-border element.

HAS BREXIT ALREADY HAD ANY IMPACT ON THE UK AS A DISPUTE RESOLUTION DESTINATION?

We are not seeing any significant impact of Brexit
at the moment, although there are signs that this is beginning to alter. This is probably because everyone is still trying to address the legislative uncertainty regarding what the decision to leave actually means as without a defined plan from the UK government we have no clear idea what the position will look like following Brexit day.

What we do know, and this is the basis upon which we are advising our clients, is that current EU rules will continue to apply until the negotiations between the UK and the EU are finalised and may continue to apply if the government’s proposed European Union Withdrawal Bill (“EUW Bill”) is enacted. The EUW Bill proposes the enshrinement of EU law into UK law on the day that the UK actually leaves the EU. The aim is prevent a legal lacuna once Brexit occurs, although, this will depend on the outcome of the negotiations.

In its Future Partnership Paper outlining the future of cross border dispute resolution, the UK government has ‘mirrored’ the European Commission’s proposals that applicable EU law should apply to matters which are on-going on Brexit day. For example, this could mean that on the date of withdrawal EU rules on jurisdiction and recognition and enforcement of judgments should continue to govern any pending judicial proceedings and procedures. In addition, the relevant provisions regarding choice of law should continue to apply to contracts concluded before the withdrawal date, and (regarding non-contractual liability) to events which occurred before the withdrawal date. Likewise, judicial cooperation procedures that are on-going on the withdrawal date should continue to be governed by the relevant provisions of EU law applicable on the withdrawal date. These proposals are sensible and will, if agreed, provide much needed certainty for business.

Parties are however well-advised to take practical steps to help reduce the risks that the decision to leave could give rise to in relation to cross border disputes. For example, parties who are negotiating contracts should think carefully about their dispute resolution and governing law clauses; these clauses should be drafted to make clear which courts are to have jurisdiction in the event of a dispute and which law is to govern the contract. If English governing law was ‘right’ for the parties pre-Brexit it is ‘right’ to apply that to your contract post-Brexit especially as the rules on choice of law will continue to apply.

However, the position on jurisdiction and enforcement is more complex. We are seeing subtle changes being proposed by industry bodies. For example, ISDA, the International Swaps and Derivatives Association, has recently announced that although the majority of its ISDA Master Agreements entered into between counterparties based in the EU or EEA are governed by English law, it will be drafting French and Irish law governed Master Agreements as additional governing law options, along with French and Irish court jurisdiction clauses to manage the fact English court judgments will not be automatically recognized in EU/EEA countries. We are advising our clients to look at their jurisdiction clauses carefully and if they provide for exclusive jurisdiction of the English courts to consider whether this will still be appropriate on Brexit – the key factor here will often be the risk that enforcement of an English court judgment under the relatively quick European regime will no longer be available.

Clients should be aware that arbitration will not be affected by the vote to leave and consideration should therefore also be given as to whether arbitration would be a better method of dispute resolution. Arbitrations seated in England remain in good health not least due to the excellent reputation of the Commercial Court in supporting arbitration but also as a result of the popularity of English law as the choice of international parties to govern their contracts.
WHAT EFFECTS IS BREXIT LIKELY TO HAVE ON THAT FRONT?

Most commentators in the UK think it is unlikely that Brexit will have a big effect on the UK as a dispute resolution destination and so far the statistics support this contention as does the anecdotal evidence from our clients. In 2017 English law was used in 40% of all global corporate arbitrations and 70% of the cases in the Admiralty and Commercial Court were international in nature. The judiciary and the government have indicated that the UK courts are ‘open for business’ and will continue to lead the way in international dispute resolution. There is every reason to be upbeat and positive about the future.

However, the current measures in relation to jurisdiction and enforcement of judgments that presently exist between EU and EFTA member states do provide a degree of certainty on important issues that often arise between parties litigating disputes with a cross-border element. Brexit will undermine that certainty although the extent to which it will do so will depend on the steps taken by the UK Government to address the position and the speed with which it is able to do so.

Generally, disputes between parties who are both based in EU member states, where the subject matter of the dispute ‘relates’ to an EU member state, are unlikely to be affected by Brexit. The existing EU Regulations will continue to apply to these disputes where relevant, as will the relevant Regulations relating to service of documents and the taking of evidence. One caveat to this however, is where the parties have agreed to the exclusive jurisdiction of the English courts. As discussed above, this could create a risk regarding the speed with which any judgment of the English court will be enforced in a remaining EU member state. If non-exclusive jurisdiction of the English courts has been specified then the party bringing the claim will be able to consider this and decide where it will need to enforce any judgment it obtains, issuing the claim in the jurisdiction most applicable to its needs.

Disputes between parties outside the EU, where the subject matter of the dispute has no connection with a member state, are unlikely to be affected by Brexit. Where relevant, existing common law principles, statutes, agreements and/or Conventions concerning these disputes will continue to apply.

Disputes where one party is based in the UK and the other party is based in an EU member state, or the dispute itself has some connection to an EU member state, may be affected by Brexit.
Overall, the picture remains one of uncertainty at this stage. Although the UK has voted to leave the EU and Article 50 has been triggered, it will still be some time before there is likely to be any clarity on how civil justice cooperation measures currently in place with EU member states will be affected.

ARE ARBITRATION CENTRES SUCH AS THE LCIA LIKELY TO BE IMPACTED?

Arbitration, and therefore by default, arbitration centres are unlikely to be impacted in any significant way by Brexit. This includes those based in London such as the LCIA. This is because arbitration is outside the scope of the EU Regulations that impact cross-border dispute resolution. Indeed it is possible that parties will be more likely to adopt arbitration clauses for contracts with an EU element rather than risk the potential uncertainty of litigating in the post-Brexit landscape. For example, enforcement of any UK court judgment in an EU member state following Brexit could be affected whilst the enforcement of any arbitral award will not be, even if it is made in the UK.

WHAT CAN INDIAN COMPANIES DOING BUSINESS IN THE UK DO TO PREPARE FOR BREXIT, FROM A DISPUTES PERSPECTIVE?

Many Indian companies are well versed in using arbitration clauses in their international contracts and, as set out above, these will not be affected by Brexit. English law and English seat remain a popular choice for Indian parties when entering into arbitration agreements.

Where Indian suppliers are entering into contracts in the UK, they may well find themselves having to enter into jurisdiction clauses for the English courts with English customers but this should not be a problem in most cases. More care may need to be taken where the contracts are entered into to provide services in the UK with companies based in EU Member States; consideration should be given to how any disputes might arise, which party is most likely to bring the dispute and where the assets of that party are located if a subsequent court judgment needs enforcing. It may be that a clause providing for the exclusive jurisdiction of the English courts is no longer appropriate and instead non-exclusive jurisdiction between the English courts and courts of a number of other member states will be the right choice. However this will need to be considered on a contract by contract basis.

HOW ARE COMPETITION LAW DISPUTES LIKELY TO BE EFFECTED BY BREXIT?

England is one of the leading jurisdictions for the private enforcement of competition damages, especially in relation to claims suffered as a result of cartel activity. Claims can be brought as “follow-on” claims against the cartelists in England and other EU courts which means that a European Commission decision on cartel infringement is binding on the UK courts. It is possible that after UK withdrawal from the EU the Commission’s decision may carry less weight than previously and may only be treated as persuasive by the English courts; judges may be able to take their own view on the evidence and come to a different view on the law. The exact impact will depend on how Brexit is finally implemented by the government. However, in those circumstances, competition litigation in England may become less attractive to companies outside the UK who are currently keen to find an anchor defendant in the UK to take advantage of its enforcement friendly environment, as they may well need to bring a “stand alone” claim requiring them to establish liability rather than relying on the finding of the Commission to do so. This will significantly alter the risk profile for claimants and importantly for third party funders who are financing a material proportion of the competition litigation in the English courts. Further, the Recast Brussels Regulation may no longer apply in the UK which may increase the risk of parallel proceedings on the same or similar facts in different EU jurisdictions. These factors could result in a reduction in EU wide competition litigation in the UK.

Many Indian companies are well versed in using arbitration clauses in their international contracts and these will not be affected by Brexit.
HOW DO UK COMPANIES PERCEIVE ARBITRATION CENTRES SUCH AS SINGAPORE, DUBAI, ABU DHABI AND OTHERS?

Singapore, Hong Kong, Dubai and Abu Dhabi are all gaining increasing recognition as alternative jurisdictions in which to conduct arbitrations. Companies with significant business interests in the MEA and Pan-Asian jurisdictions may want to consider these jurisdictions for arbitration.

Singapore has been proactive in attracting potential disputes with innovations to arbitral procedures that appear to have influenced the established institutions such as the ICC and the LCIA. For example in 2010 the SIAC introduced an expedited procedure and last year adopted a summary disposal procedure. The ICC reacted by revising the ICC Arbitration Rules in 2017 to incorporate expedited proceedings which apply automatically to any arbitration in which the amount in dispute is less than USD$2 million.

In addition Singapore, and latterly Hong Kong, have also opened up their jurisdictions to third party funding attracting further users of dispute resolution services to their shores.

However, these innovations have not led to a withdrawal from the traditional jurisdictions and arbitral institutions. Surveys point to the continued preference for arbitrations seated in London, Paris and New York and with English law being used in 40% of all global corporate arbitrations, London is still the leading preferred centre for arbitration favoured by 47% of respondents in the 2015 International Arbitration Survey undertaken by Queen Mary University of London. It compares with 38% favouring Paris, the next most popular seat. The survey also found that 90% of respondents prefer international arbitration as their dispute resolution mechanism, either as a stand-alone method (56%) or together with other forms of ADR (34%), so it could be concluded that the strength of jurisdictions such as Singapore show that arbitration as a dispute resolution method is simply growing, rather than traditional jurisdictions or institutions going out of fashion.

From an Indian perspective, we see that Indian parties are increasingly arbitrating in Singapore not least because of its relative geographic proximity but that for them London remains an important seat for larger international arbitrations.

WHAT IS THE CURRENT STATE OF LITIGATION FUNDING IN THE UK? HAS IT SUCCESSFULLY REDUCED LITIGATION RISK OR HAVE THERE ALSO BEEN UNINTENDED CONSEQUENCES?

Whilst some still view third party litigation funding in the UK as "at a relatively early stage in its development", it is undoubtedly developing rapidly with new funders entering the market and all involved looking to 'invest' and make money. In the UK, the legal professions reaction to litigation funding has also changed. It used to be seen primarily as a vehicle for those with limited access to funds to bring claims but now it is part of the dialogue with clients who are looking to spread some of their litigation risk in 'big-ticket' litigation.

The government appears to have been supportive by confirming that it has no plans to formally regulate third party providers of litigation funding. Instead funders are encouraged to seek membership of the Association of Litigation Funders of England & Wales, and those who do seek membership, must sign up to the Association's Code of Conduct for Litigation Funders. So in this regard, the market is quite mature.

The courts are also increasingly putting their weight behind the concept with the UK Supreme Court confirming in 2016, and the Court of Appeal concurring in 2017, that third party funding of litigation is a normal and usual way to conduct litigation. And in the context of international arbitration the English Commercial Court made a seminal decision in 2016 upholding an arbitrator’s decision to allow a successful party in an ICC arbitration to recover the costs of their funding, not just their legal costs. This decision has been seen as opening up the third party funding of disputes to a global market and further cementing the appeal of London as a leading ‘go to’ destination to settle disputes with an international element.

WHAT DO YOU THINK WILL BE THE FUTURE ROLE OF LITIGATION FUNDING, IF THE UPSURGE CONTINUES?

We consider that litigation funding will continue to play an ever increasing role in helping companies and individuals to commence litigation (whether as a claimant or as a counter claimant). This is especially the case in specific sectors such as the financial services sector where claims by individuals, for example
for mis-selling of financial products are becoming increasingly common, often backed by litigation funding. Competition damages claims are another area where funding is booming (subject to post Brexit concerns as outlined above). As the market continues to grow we consider that the price of taking out funding will start to decrease but the way that litigation will be financed will be subject to increasingly complex finance models which will reflect the sophistication of the clients opting to fund litigation by these structures.

WHAT ARE THE BIGGEST HURDLES (OR DEVELOPMENTS) TO ENFORCING AWARDS (EITHER ARBITRAL OR LITIGATION) IN THE UK, IF ANY?

The UK has a long established and clear system for enforcing court judgments and arbitral awards handed down or given in other jurisdictions. But all roads appear to lead back to Brexit. When the UK withdraws from the EU it will be leaving a civil judicial cooperation system widely acknowledged to provide predictability and certainty regarding the laws which apply to cross-border relationships, the courts which are responsible for implementing those laws and the ability of citizens and businesses to rely on decisions from one country’s courts in another state.

Enforcement of court judgments is one area which will be subject to change on Brexit unless the UK government and the EU can reach agreement on this topic. The UK government would like to see a system which replicates the current system of reciprocity operating between EU member states however, this is not simply a question of enshrining this part of EU law into UK law because the EUW Bill is domestic law and does not amount to legislating with other countries.

Enforcement will need to form part of the agreed negotiations with the EU. If there is no agreement, on Brexit day the EU law relating to enforcement of court judgments will no longer apply and the UK will be left with a mixture of bi-lateral treaties, Conventions and the common law. However, this only applies to court judgments given by EU member states. England still has the advantage of having reciprocal enforcement arrangements with most former Commonwealth countries including India and Canada so still has advantages over other jurisdictions and there will be no change to those arrangements. Likewise, the enforcement of arbitration awards following Brexit will not be affected.

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NOTES
1 Taken from para 1 of a speech given by Sir Terence Etherton, Master of the Rolls on 14 June 2017.
2 Exchange carried out on 11 January 2018
3 RBS Rights Issue Litigation [2016] EWHC 3161 (Ch) and SFO v ENRC [2017] EWHC 1017 (QB)
5 TheCityUK: UK Legal Services 2017
6 Lord Keen of Elie in January 2017 responding to a written parliamentary question in the House of Lords
7 Impact Funding Solutions Limited v AIG Europe Insurance Ltd [2016] UKSC 57 and Excalibur Ventures LLC v Texas Keystone Inc [2016] EWCA Civ 1144
Dispute Resolution for USA and Indian Businesses

As Indian-USA business grows substantially, disputes will inevitably increase. Frost Brown Todd examine how an Indian business can minimize its cost and risks.

Indian and USA businesses would prefer that disputes never arise or get settled easily. But disputes are inevitable and increasing as Indian-USA business grows substantially. What should an Indian business know about how disputes are resolved in the USA and what can be done to minimize cost and risks?

ALTERNATIVE DISPUTE RESOLUTION
Court litigation is expensive, public, and time-consuming in both India and the USA. USA businesses embrace arbitration to resolve disputes – to minimize publicity, lower cost, and manage risk. Most USA parties include arbitration clauses in their commercial and other business agreements, and especially in cross-border matters. Drafted properly, an alternative dispute resolution clause will achieve its purpose of keeping commercial disputes out of the courts.

CHOICE OF FORUM AND THE SEAT OF ARBITRATION
Indian arbitration has been viewed by USA businesses as unpredictable and slow. Few USA businesses have agreed to arbitration conducted in India by an Indian arbitration forum. The 2015 Arbitration and Conciliation (Amendment) Act aimed to address concerns of the international business community about arbitration in India. It expressly limits the duration of on-shore arbitration to twelve months, with a possible six-month extension. After the prescribed period, the panel’s mandate automatically expires unless the parties appeal to the courts for a further extension. While theoretically sound, these time limits are yet to be tested in practice. It will take time for USA businesses to come to view Indian arbitration as a fair or preferred choice.

India’s arbitration infrastructure continues to mature despite setbacks such as the closure of the London Court of International Arbitration’s (LCIA) India office in 2016. A prime example is the Mumbai Center for International Arbitration (MCIA) formed in 2016. Other Indian forums such as the Nani Palkhivala Arbitration Centre (NPAC) in Chennai, the Indian Council of Arbitration (ICA), the Indian Merchant Chamber (IMC) in Mumbai, and the Delhi International Arbitration Centre (DAC), as well as the beginnings of a more robust domestic arbitration bar all make India a less daunting seat of arbitration than it was before 2015.

Despite India’s progress in the ADR space over the past two years, American companies will continue to prefer USA-based or neutral locations to meet their dispute resolution needs until Indian forums earn the reputation that other non-USA forums have achieved, such as the ICC, LCIA, and Singapore International Arbitration Centre (SIAC). A 2013 PricewaterhouseCoopers (PWC) study found Singapore and London were the most popular seats to arbitrate disputes involving Indian cross border deals. Both Singapore and London have large Indian expat populations, highly professional arbitration bars, well-developed and sophisticated
DRAFTING THE INTERNATIONAL ARBITRATION CLAUSE – BLINC LLC

BLINC LLC. This mnemonic device is a great way to consider how to draft an effective pre-dispute arbitration clause: Broad, Law, Institutional, Number, Costs, Location, Language, and Carve-Out (BLINC LLC).

Broad: Arbitration clauses should be broad and clear. Best practice is to use the model language of the chosen arbitration forum if the goal is to send any dispute between contracting parties to arbitration rather than court.

Law: A choice-of-law clause, if it can be agreed upon, is imperative. It should include language that the choice of law is substantive and so should exclude the specified country’s conflict of laws rules. USA courts will generally honor a choice of law provision. If a USA source of law is agreed, it should be that of a particular state and not worded to say “USA law.”

Institutional: Institutional rather than ad hoc arbitration is greatly preferred. Naming a specific forum with published arbitration rules eliminates delays in getting a proceeding under way and creates greater certainty that an award will be enforced and the proceeding handled efficiently.

Number: Multi-arbitrator cases are more expensive and time-consuming than if a sole arbitrator is designated. USA businesses increasingly specify single arbitrators instead of the traditional three for large disputes.

Costs: The “American rule” refers to the USA practice that each party to a dispute generally bears its own attorney fees and other expenses, in contrast to most of the world where the losing party generally pays some of the victorious party’s attorney fees and costs. The clause should be worded specifically to address attorney fees and costs with awareness that if a USA state's law is the governing law, that would mean no shifting of attorney fees against the losing party in most cases.

Location: Hearing location is often a contentious issue in negotiating an arbitration agreement. Parties with equal bargaining power sometimes select a neutral country as the seat of arbitration while parties with greater bargaining power usually insist on their home country as the seat. Singapore, London, and other English-speaking common-law countries are often a compromise choice, though this means the cost can be greater overall to both parties.

Language: While English is the obvious default choice of arbitration language, it is best to specify the language of arbitration. All arbitration forums provide for interpreters as needed.

Carve-Out: When intellectual property or important non-monetary issues are at stake, a party should reserve the right to seek interim judicial relief, pending arbitration of the merits. USA companies will not generally agree to arbitration to resolve patent or trademark disputes or other “bet-the-company” matters. To ensure that applications for immediate equitable relief – such as for an injunction or an order to attach assets – may be heard by a court wherever allowed, the arbitration agreement should include express carve-outs from what will be decided exclusively in arbitration.
commercial legal regimes, and established and respected arbitral institutions. However, there have been problems associated with this option.

Prior to the 2012 Indian Supreme Court’s BALCO decision, unless the language of an arbitration clause stated otherwise, foreign arbitral proceedings were potentially subject to Indian judicial oversight. The BALCO Court held that Indian courts had no supervisory jurisdiction over foreign arbitration. But the Court also determined that interim injunctive relief from Indian courts was not available to parties engaged in off-shore arbitration. Although the primary holding in BALCO was well received, foreign companies were unwilling to give up the ability to seek interim relief when engaged in off-shore arbitration. The 2015 amendments to the Arbitration Act addressed this issue, and parties are now able to access Indian courts for interim relief even if the seat of arbitration is outside of India, making arbitration an increasingly more accessible option for both Indian and American companies.

The dominant USA-based arbitration forum to resolve international disputes is the International Centre for Dispute Resolution (ICDR), an arm of the American Arbitration Association (AAA). It has a robust and distinguished global list of potential arbitrators and rules reflecting international norms for fairness and ultimate enforceability of awards. If an Indian business agrees to a USA forum, it should be ICDR instead of AAA, with specification of ICDR’s rules for commercial or other disputes (such as a special panel available for resolving energy disputes).

ENFORCING INTERNATIONAL ARBITRATION AWARDS VERSUS INDIAN COURT AWARDS
The basic difference between an arbitration award and a court judgment is that it is highly likely a proper arbitral award will be enforced both in India and the USA, whereas a court judgment in one country may or may not be enforced in the other country without the need to litigate the dispute. As signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), both India and the United States are committed to enforcing arbitral awards if the parties agreed to resolve disputes in a specified manner and an award was issued after basic due process was present. Nonetheless, there are significant differences in how each country applies these principles, particularly in their approaches to the public policy exception.

In the United States, the New York Convention is enabled by the Federal Arbitration Act (FAA), as well as by similar state laws that aim to streamline the enforcement of fairly issued arbitral awards. Parties can seek enforcement of an award in either state or federal court based on a determination of which law and procedure is more favorable.

There are limited exceptions to when a USA court will refuse to enforce an arbitral award, including due process matters (e.g., no notice to a party of a proceeding). Courts will dismiss actions to enforce foreign arbitral awards if personal jurisdiction is lacking. Numerous courts have required personal or quasi in rem jurisdiction in enforcing a foreign arbitral award under the New York Convention. While the decision of where to file may be difficult, once a determination has been made, the actual process itself is very simple. A party applies for an order confirming the award within three years after it is rendered, and absent proof of one of the narrow exceptions to enforcement, the award promptly becomes a court judgment. The period for enforcing an award begins to run when the award is issued, not when any appeals or other procedures are exhausted. To apply for enforcement, a party submits a petition to a court with jurisdiction over the matter with an authenticated copy of the arbitration agreement and award. In several USA jurisdictions enforcement does not require a hearing, though parties may request one. Most frequently judges review the submitted motions and supporting documents and enter a judgment without any proceedings, all of which can occur within a month.

The New York Convention contains grounds on which a losing party can challenge the validity of an arbitration award, although awards are presumed valid. The most important is the public policy exception. American courts take a conservative approach to interfering with international awards for public policy purposes. In Scherk v. Alberto-Culver Co, the Court held:

The invalidation of such an agreement in the case before [it] would reflect a parochial

In *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du papier (RAKTA)*, the court expressed a pro-enforcement bias and unequivocally held that a court may only refuse to enforce a foreign arbitral award under the public policy defense “where enforcement would violate the forum state’s most basic notions of morality and justice.” In the USA the goals of fostering international arbitration and cross-border business relations consistently outweigh public policy concerns in enforcing arbitration awards.

By contrast, there is no federal statute that requires the enforcement of foreign court judgments. This is left to state law, and there is no single law of all USA states concerning enforcement of foreign court judgments. Most but not all states have adopted either of two model acts: The Uniform Foreign-Country Money Judgments Recognition Act (2005 Act) or the Uniform Foreign Money-Judgments Recognition Act (1962 Act). To be recognized under either Act, a foreign award must be for a money judgment, so court awards that require injunctive relief are not generally enforced. There are several grounds permitting a USA court not to enforce a foreign court’s judgment, including 1) fraud in obtaining the judgment; 2) public policy infringement; 3) conflict with another judgment; 4) inconsistency with the arbitration agreement; and 5) for cases based solely on personal service, if the court was a seriously inconvenient forum. The 2005 Act adds two more: 1) circumstances raise substantial doubt over the foreign court’s integrity; and 2) the foreign court failed to follow due process. Overall, it is uncertain if an Indian court judgment will be enforced in the USA, despite the lack of reciprocity.

**WHAT’S THE BASIC PROCESS FOR LITIGATING IN THE USA?**

Business disputes are handled in civil litigation, so we’ll ignore how crimes are litigated in the USA. USA courts are mostly state courts, but for cross-border disputes involving more than US$75,000 or cases involving federal statutes, a federal court will usually have jurisdiction over a business dispute.

A case starts by filing a complaint. Aside from attorney fees, the cost is minimal and no bond or large deposit of fees is required to do this, as the USA has an “open courts” philosophy. The defendant is served with the complaint and has a month or so to respond with a motion or answer and any counterclaims. A scheduling order is promptly issued, with deadlines for discovery and an ultimate trial date. Mandatory mediation is often present, requiring the parties to try to resolve their dispute before it goes to trial. More than 95% of civil disputes are settled after a complaint is filed.

The burden of proof is a “preponderance of the evidence” (more likely than not in most cases). The party bringing the case is called the Plaintiff. Discovery is thorough and generally requires each party to disclose every document that has potential relevance to the dispute. This openness to disclosure of facts makes USA litigation expensive and time-consuming. Both parties must preserve documents in digital or hard copy form. The parties hold an initial discovery conference to craft a discovery plan, and within 14 days they also share initial disclosures, including names and addresses of individuals with discoverable information, copies or descriptions of electronically stored information, relevant insurance agreements and damages computations and details. Either party may insist on trial by jury or may consent to trial only by the assigned single judge.

While complicated disputes take longer than simple matters and many matters can be resolved by summary judgment (when there is no dispute about the material facts and only a question of law is involved), a case requiring a trial will take on average nationally about 19 months to resolve through the trial court. Once a judgment is entered, an appeal may be taken as of right, and that can add 8 months to a year before a judgment becomes final.
LITIGATION COSTS?
The median cost of a USA civil case includes US$60,000 in attorney fees and US$7,000 in other costs. But with global disputes, the costs can vary widely. Patent infringement cases through trial often range over US$1 million in cost to each side, given the stakes. The more focused and simpler the issue, the less costly the matter will be. This obviously increases the attractiveness of alternative dispute resolution for business.

The USA’s Federal Judicial Center found plaintiff attorneys charged US$1,600-US$280,000 per case, and defense attorneys charged US$5,000-US$300,000. Average attorney fee expense varies by dispute type: US$53,000 for premises liability cases, US$65,000 for real property quarrels, US$86,000 for employment disputes, US$90,000 for contractual battles. The USA allows plaintiff attorneys to take cases on a contingent basis, often rewarding the attorney one third of what is recovered (and one third of 0 means the attorney gets nothing if the case is lost). Class action cases are common when a business affects large numbers of individuals from a single incident or issue (e.g., a defective product that allegedly injures many people).

CAN INSURANCE COVER BUSINESS RISKS?
Because the USA is a litigious society, with a keen sense of justice when an individual or business is injured by another person or entity, insurance is a thriving and comprehensive solution for virtually all business risks. Beyond basic comprehensive insurance policies that any business with a presence in the USA will acquire, insurance can be purchased to protect directors and officers, to cover data breach, flood, product liability, and a wide range of other risks. An Indian company should hold a thorough discussion of risk management with a leading insurance provider before selling its goods or services in the USA. Foreign businesses are often surprised at the relatively inexpensive cost of obtaining this protection and will find that often the most important benefit of purchasing a broad range of insurance is that the insurer will pay the cost of defending claims at bargained legal rates. Global businesses may explore sophisticated measures such as captive insurance.

WHAT ELSE CAN INDIAN COMPANIES DO TO PROTECT AGAINST USA LITIGATION RISK?
Of course, avoiding litigation is best done by good business practices, fair dealing, an active compliance program and full awareness of what is required to conform to any country’s laws, regulations and business and consumer expectations. A thorough discussion with counsel about risk management will help build a protective foundation for an Indian business that wants to expand into and grow within the world’s largest single country market – that of the USA.

NOTES
2 See, e.g., Telcordia Tech Inc. v. Telkom SA Ltd, 458 F.3d 172, 178-79 (3d Cir. 2006); Glencore Grain Rotterdam B.V. v. Shivnath Rai Hanrahan Co., 284 F.3d 1114, 1120-22 (9th Cir. 2002); Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory,” 283 F.3d 208, 212-13 (4th Cir. 2002).
4 Id. at 519.
5 508 F.2d 969, 975 (2d Cir. 1974).
6 Id.

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Rights of Persons with Disabilities in India and Other Jurisdictions

Ius Laboris is the world’s largest global HR and employment law firm alliance. In this article, member firms outline the laws in their respective countries concerning disabled rights.

OVERVIEW

According to the World Health Organisation, more than one billion people in the world currently experience disability, of which approximately 200 million experience considerable disability in functioning. Such people typically suffer from poor health, lower educational achievements, limited economic opportunities and higher rates of poverty. Hence, initiatives undertaken to improve the lives of people with disabilities, through progressive legislations and/or policies by different local governments and NGOs, are relevant to all corners of the world.

The UN Convention on the Rights of Persons with Disabilities (the “Convention”) was adopted during the sixty-first session of the General Assembly on December 13, 2006, and came into force on May 3, 2008. The objective of the Convention was to promote, protect and ensure the enjoyment of all human rights and fundamental freedoms by persons with disabilities, and to promote respect for their inherent dignity. As per the Convention, persons with disabilities are essentially those who have long-term physical, mental, intellectual or sensory impairments, which hinder their full and effective participation in society on an equal basis with others.

Countries such as India and Mexico were amongst the first to have ratified the Convention in the year 2007 itself, while most others including United Kingdom of Great Britain (‘UK’), France and Ukraine ratified the Convention during subsequent years. Below is an outline of the laws/ legal position prevailing in each of these countries concerning the rights of disabled persons.

INDIA

In implementation of its obligations under the Convention, India enacted the Rights of Persons with Disabilities Act, 2016 (the “New Act”) and the rules there under (the “Rules”) in 2017. The New Act replaced the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995 (the ‘previous Act’), which covered only seven disabilities. The New Act covers more than 15 disabilities including dwarfism, acid attack victims, intellectual disability and specific learning disability. It defines a ‘person with disability’ as someone with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his / her full and effective participation in society equally with others. This definition under the New Act has been formulated using the text included in Article 1 of the Convention.

Under the New Act, persons with at least 40% of a disability (referred to as “persons with benchmark disability”) are entitled to certain
benefits. One such benefit is that at least 4% of the total number of vacancies in Indian Government establishments in specified categories (and 1% in certain others) are required to be reserved for their employment.

**OBLIGATIONS ON PRIVATE ESTABLISHMENTS IN INDIA**

While Indian private establishments are exempt from reserving jobs for persons with disabilities, the New Act requires them to adhere to a slew of obligations. The term ‘private establishment’ has been very widely defined to include a company, firm, factory or such other establishment. This would include the Indian presence of any foreign company, be it a liaison office, branch, subsidiary or a joint venture. The New Act makes it unlawful for an establishment to discriminate against a person on the ground of his or her disability unless it can be proved that the discriminating act in question is a proportionate means to a legitimate objective. The Rules make the “head” of the establishment responsible for ensuring that this provision of the New Act is not misused to the detriment of disabled persons.

The New Act requires establishments to prepare and publish an Equal Opportunity Policy (the “EOP”) for persons with disabilities. A copy of the same is required to be registered with the State Commissioner or the Central Commissioner. The EOP must inter alia contain: (a) details regarding amenities and facilities put in place for persons with disabilities; (b) lists of posts identified for such persons; and (c) details of training, promotion, allotment of accommodation and provision of assistive devices and barrier free accessibility for such persons. Further, these establishments must appoint a liaison officer to look after the recruitment of persons with disabilities including the provisions and amenities for disabled employees. Such appointment is to be notified in the EOP. Furthermore, the establishments are required to maintain records relating to persons with disabilities enumerating the following:

i. the number of disabled persons employed and the date of commencement of their employment;
ii. the name, gender and address of employee(s) with disabilities;
iii. the type of disability that such employee(s) are suffering from;
iv. the nature of work being performed by such employee(s); and
v. the type of facilities being provided to the disabled employee(s).

The establishments are further required to produce the aforesaid records for inspection as and when called upon to do so by the relevant authorities.

The Rules prescribe adherence to standards concerning physical environment, transport and information & communication technology applicable to disabled employees.

**COMPLAINTS AND PENALTIES**

The Rules also lay down the procedure for dealing with complaints relating to discrimination. Complaints about exploitation of persons with a disability can be made to the Executive Magistrate and the local police. Violation of any provision of the New Act invites fines and penalties and in certain cases makes directors and senior officers of an establishment personally liable.

The New Act stipulates a monetary fine of Rs 10,000/- for the first violation and fines between Rs. 50,000/- and Rs. 500,000/- for subsequent violations. If the violation is committed by a company, both the entity as well as the person(s) responsible for the conduct of the business of the company would be liable. Directors, officers and managers of a company would be individually liable if it is established that the violation was committed with their consent, or is attributable to their negligence.
Failure by an establishment to provide required information, documents or records (as required under the Act) is an offence under the New Act. The monetary fine provided for each such offence by an organisation is Rs. 25,000/- An additional fine of Rs.1,000/- would be applicable for each continuing day of such failure or refusal, as the case may be.

The Act also imposes criminal liability on anyone who within public view insults or intimidates a disabled person with the intention of humiliating such person. This would also apply to such actions within a workplace. The punishment provided for such an offence is imprisonment for a term between 6 months to 5 years and fine.

Prosecutions for offences under the New Act are triable by a Sessions Court which is required to be notified by State Governments for each district as a 'Special Court'.

UKRAINE
In Ukraine, the current legislation provides for a set of mechanisms aimed at protecting disabled persons' rights in the workplace.

Firstly, the Ukrainian Constitution, Labour Code and Protection of Disabled Persons Law ensure that individuals with disabilities have equal rights at all times. Discrimination based on disability is strictly prohibited. Disability cannot be used as a ground for hiring or dismissals, unless the state of the individuals' health (to be proven by medical and expert evidence) prevents them from carrying out their work duties or poses a threat to the safety of others.

Secondly, employment of individuals with disabilities has been further incentivised with the mandatory employment quota which has been stipulated by the Protection of Disabled Persons Law. Companies with 8 – 25 employees are required to employ at least one individual with a disability. For companies with more than 25 employees, this figure increases to 4% of the total workforce. Failure to comply with the foregoing quota incurs a heavy fine.

Thirdly, the Fund for Social Protection of Disabled is a very effective institution in Ukraine. The Fund is a 'not for profit budget organisation' which provides financial support to ensure that adequate measures are taken for the protection of disabled persons from a social perspective, and also that suitable mechanisms are put in place to enable them to effectively undertake their work.

Moreover, there is a range of further guarantees, preferences and privileges for disabled persons. Pursuant to the Labour Code, there is no probation period for those with disabilities. Disabled individuals are entitled to receive full annual leave whenever convenient to them. The duration of such leave increases to a minimum of 26 days, when compared with other employees who, in general, receive 21 days. Furthermore, upon request by the disabled employee, employers are required to provide them with the opportunity to work part time. It is strictly prohibited to demand that such persons work any overtime and on night duty without their full prior consent. Finally, employers must create favorable conditions of work and services (transport, buildings and medicines), which are required to be accessible and usable for disabled persons.

UK
In the UK, the Equality Act 2010 prohibits disability discrimination in the workplace. It covers all types of workers (employees, self-employed, agency staff, partners and those undergoing vocational training) and applies to all stages of work from recruitment to post-employment victimisation.

A ‘disability’ for these purposes means a physical or mental impairment that has a substantial and long-term adverse effect on a person’s ability to
carry out day-to-day activities. This is a wide-ranging definition that also includes conditions such as chronic back pain or clinical depression.

The act enumerates and prohibits various types of discrimination:

- less favourable treatment because of a disability. This is not capable of "justification" (see below);
- unfavourable treatment of disabled persons for reasons arising from their disability – unless the treatment is justified;
- indirect discrimination (where the employer applies a provision, criterion or practice to everyone which puts a disabled person at a particular disadvantage). Indirect discrimination can be justified;
- harassment;
- victimising an individual for complaining about discrimination or for assisting someone else who is complaining.

Certain behaviour which would otherwise be discrimination could be justified in certain circumstances. Justification means that the act or omission is a proportionate means of achieving a legitimate aim and it is a defence.

The act also obliges employers to make "reasonable adjustments" if a practice or a physical feature of their premises puts a disabled person at a substantial disadvantage. This means that the employer is obliged to take reasonable steps to avoid the disadvantage. Examples of adjustments might include wheelchair ramps, adjusting hours of work, or delegating some duties to another worker. There could be circumstances in which an employer may argue that it is unreasonable to be expected to make such an adjustment. For instance, if it is too expensive given the size of the employer or simply not practical given the needs of the business. If the disabled person's hours or duties need to be reduced, it is lawful to reduce their pay to reflect this.

FRANCE
In France, employees with any form of disability cannot be discriminated against in any manner, whether during the hiring process, or when they are actually employed.

In fact, employers have a duty to ensure that the working conditions meet the needs of the employee in accordance with his/her disability. This must be done in conjunction with the occupational doctor whose role is to provide the employer with recommendations. Of course, any changes in the employee's working conditions or environment, in this particular context, would not be considered as a discriminatory act, whenever they are reasonable and justified.

The employment of disabled persons is strongly encouraged by public stakeholders. Accordingly, as a general rule, any employer with more than 20 workers has a general obligation to have at least 6% of its workforce composed of disabled employees.

However, in practice, this general requirement may be fulfilled through other means such as subcontracting work to companies that employ disabled individuals for certain tasks. For instance, if a company is unable to meet the 6% threshold, which is often the case, it is possible to enter into a contract with a third-party that hires employees with disabilities.

Companies hiring disabled workers may also benefit from public funding, depending on the seriousness of the actual disability, particularly to ensure the working conditions and the environment are suitable for the employee.

Disabled workers are also protected by specific rules in relation to termination of their employment contract. As a general rule, their legal notice period is longer and in redundancy cases, when determining which employees must be dismissed, disabled workers are protected from such dismissal.

In addition, employers that employ more than 50 workers who are unionised have an obligation to negotiate on a regular basis (every year, failing an agreement that provides otherwise) specific issues relating to the quality of the work environment and gender equality. This obligation includes a requirement to negotiate on the integration of disabled workers in the workplace, their working conditions and benefits as well as the measures implemented to inform all employees about disability-related issues.
GLOBAL EMPLOYMENT

MEXICO

In Mexico, there are no affirmative action requirements or quotas that employers must observe when hiring employees; however, there is a tax incentive for employers who do in fact hire disabled persons. They can claim deduction in respect of 100% of a disabled employee’s salary, provided that the disability is partial and equal to at least 80% of the individual’s normal abilities or if the individual is blind. To qualify for this incentive, the disability must be certified by the Mexican Institute of Social Security.

Even though employers are exempt from providing jobs to individuals with disabilities, Mexican Federal Labor Law stipulates that employers with 50 or more employees must adapt the workplace to accommodate employees with disabilities, regardless of whether someone with a disability works at the company or not. Any failure on this count may provide grounds for an inspection authorised by the Ministry of Employment and Social Welfare, which may then result in a fine.

Federal Labour Law also defines what benefits workers are entitled to if they become ill or disabled as a result of activities taken place at work. The level of benefits would depend on the classification of the disability, which could be total, partial or permanent.

Mexican Social Security is required to provide disabled employees with access to clinical care, physical therapy and rehabilitation, hospitalisation if required, orthopaedic devices and prosthetics to replace limbs, or other body parts, if they have been affected due to a workplace incident. In such instances, it is important to note that companies are required to pay injured or ill employees their full regular wage for a period of up to three months, beginning on the day on which the disability was certified by the Mexican Institute of Social Security. After the said ninety day period, employers can request that medical personnel examine the employee’s disabilities to determine whether the injuries or illnesses will cause a permanent disability or not. If the injury does become permanent, the employment relationship can be legally terminated and compensation to the employee would then be paid in full by the Mexican Institute of Social Security. Needless to say, claims cannot be made for injuries that occur as a result of a worker being under the influence of drugs or alcohol while in the workplace, if the injury is self-inflicted or is the result of a suicide attempt.

Workers’ compensation in Mexico, through the Federal Labor Law, identifies four hundred types of workplace injuries and indicates the percentage of permanent disability allowance granted for each. Furthermore, according to Mexico Federal Labor Law, more than one hundred and fifty illnesses and diseases are considered to be occupational in nature.

CONCLUSION

While Indian private establishments are exempt from the legal obligation of hiring persons with disabilities, the New Act still imposes stringent obligations on them. There are high fines and penalties for contravention of the New Act which could also apply to officers, directors and managers of such establishments. Foreign companies with Indian branches and subsidiaries may not anticipate such onerous obligations, and should be particularly cautious to ensure compliance.

Overall, the New Act and the Rules feel like an attempt by the government to over-regulate. The legislation does not fit with the Modi Government’s philosophy of ‘Minimum Government and Maximum Governance’. While upholding the legal rights and interests of disabled persons, the legislature could have chosen a path more persuasive than punitive. Legislations in the UK, France, Mexico and Ukraine seem less onerous and the Indian Parliament would do well in taking a leaf out of them to introduce amendments that tone down the penal provisions in the new Rights of Persons with Disabilities Act.

This article has been prepared by member firms of Ius Laboris, the world’s largest global HR and employment law firm alliance.

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