India Business Law Journal

Your partner in legal intelligence

February 2015

Volume 8, Issue 7

Shutting up shop

The complexities of closing a factory in India

Indian Law Firm Awards

How Tata tapped the debt markets

Why Indian firms are eyeing the Middle East

Plus: expert advice from correspondent law firms

Vantage Asia

www.indilaw.com

INTA International Trademark Association

Register Today for INTA's 137th Annual Meeting

May 2–6, 2015 | San Diego, California, USA

Look forward to these highlights:

- Almost 300 customized educational offerings, including 33 general educational sessions, more than 250 table topics, users' group meetings with leaders from several national and regional trademark offices, a 2-day Course on International Trademark Law and Practice with 18 course segments, a 2-day Basic Mediation Training, Academic Day, Career Development Day, the Trademark Administrators Brunch and more.
- Special offerings for IP professionals at corporations of all sizes, including the In-House Practitioners Luncheon and Seminar, the In-House Practitioners Reception and a new series of Industry Exchanges.
- New hassle-free ways to conduct business in the San Diego Convention Center by booking one of 4 different types of meeting spaces.
- More than 30 official networking events, including the INTA Gala, the Sunday evening Opening Ceremony and Welcome Reception, a new array of smaller networking excursions and the Grand Finale to expand your client and referral network.
- Over 100 committee, project team and Global Advisory Council meetings.
- Exhibition hall with more than 100 exhibitors and numerous sponsorship opportunities to help you spread the word about your company and make new connections.

We expect more than 9,500 trademark professionals from all over the world to register!

www.inta.org/2015AM

www.inta.org #INTA15 PowerfulNetworkPowerfulBrands.

Contents

Editorial board

Pravin Anand
Managing Partner
Anand and Anand

Shamnad Basheer
Founder
SpicyIP

Lalit Bhasin
Managing Partner
Bhasin & Co

Himavat Chaudhuri
Chief Legal & Regulatory Affairs Officer
Tata Sky

Sumes Dewan
Managing Partner
Lex Favios

Girish Gokhale
Senior Litigation Consultant
DSK Legal

Toby Greenbury
Consultant
Khaitan & Co

Manik Karanjawala
Partner
Karanjawala & Co

Amit Anant Moghay
General Counsel
HSBC

Fali S Nariman
Senior Counsel

Jane Niven
Regional General Counsel
Jones Lang LaSalle

Mysore R Prasanna
Independent Consultant

Premnath Rai
Founding Partner
PRA Law Offices

S Ramaswamy
President
Indian Corporate Counsel Association

Vijaya Sampath
Senior partner
Lakshmikumaran & Sridharan

Sunil Seth
Senior Partner
Seth Dua & Associates

Ashok Sharma
Founder President
Indian Corporate Counsel Association

Pallavi Shroff
Partner
Amarchand Mangaldas

Amarjit Singh
Managing Partner
Amarjit & Associates

Shruti Dvivedi Sodhi
Chief Compliance Officer
Aircel

Shardul Thacker
Partner
Mulla & Mulla & Craigie Blunt & Caroe

Bhavna Thakur
Corporate development adviser for entrepreneurs

Jagannadham Thunuguntla
Strategist & Head of Research
SMC Global Securities

Rohan Weerasinghe
General Counsel & Company Secretary
Citigroup

Correspondent law firms

- Afridi & Angell
- Amarchand Mangaldas
- Bennett Jones
- Bharucha & Partners
- Economic Laws Practice
- India Law Offices
- Khaitan & Co
- Khaitan Sud & Partners
- LexOrbis
- Luthra & Luthra
- Phoenix Legal
- Saikrishna & Associates
- TLT
- Trilegal

Subscription information

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

Three easy ways to place your order:

cs@indilaw.com **+852 3622 2623** **www.indilaw.com**

India Business Law Journal

February 2015
Volume 8, Issue 7
ISSN: 1994-5841

Contact us

Editorial
Email: editorial@indilaw.com
Telephone: +852 3622 2673

Subscriptions & customer service
Email: cs@indilaw.com
Telephone: +852 3622 2623
Fax: +852 3006 5377
www.indilaw.com

Editor
Vandana Chatlani
Deputy editor
Rebecca Abraham
Sub-editor
Simmie Magid
Contributors
Lalit Bhasin
Production editor
Pun Tak Shu
Head of marketing
Fiona Leung
Associate publisher
Tina Tucker
Publisher
James Burden

Printed in Hong Kong

Vantage Asia Publishing Limited

21/F Gold Shine Tower
346-348 Queen's Road Central
Hong Kong
Telephone: +852 3622 2673
Fax: +852 3006 5377
Email: enquiries@vantageasia.com
www.vantageasia.com

Directors
James Burden, Kelley Fong

Disclaimer & conditions of sale

Vantage Asia Publishing Limited retains the copyright of all material published in this magazine. No part of this magazine may be reproduced or stored in a retrieval system without the prior written permission of the publisher. The views expressed in this magazine do not necessarily reflect the views of the publisher, its staff or members of the editorial board. The material in this magazine is not offered as advice and no liability is assumed in relation thereto. The publisher, staff and all other contributors to *India Business Law Journal* disclaim any liability for the consequences of any action taken or not taken as a result of any material published in this magazine.

© Vantage Asia Publishing Ltd, 2015

High time to disprove the cynics

How long is too long to wait for change to kick in?

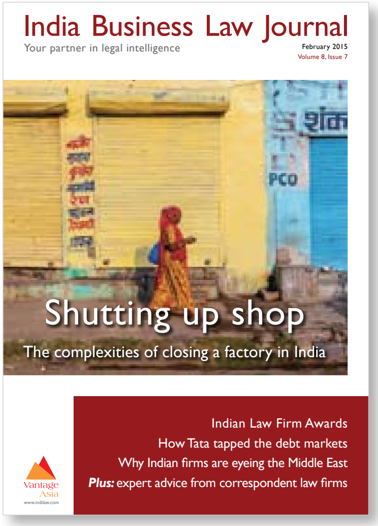
Governments across the world have been swept into power on the back of bold promises of change. But while such promises are a sure-fire way to capture the imagination of the electorate, they also run the risk of raising expectations to a level where they are almost impossible to meet.

Has India's government fallen into this trap? The magnitude of the task at hand has always been daunting, but that didn't stop people believing in Narendra Modi and his promise of change. Now, seven months after the euphoria and expectations began, the belief that India can be turned around has begun to fray at the edges.

If cynicism is not to take hold, the inspirational promises must be followed up with bold and effective action. The areas in which such action is required are countless, and one could easily forgive Modi's government for not knowing where to start.

In terms of business law at least, a good starting point might be to overhaul the country's antiquated labour laws, which have long frustrated domestic and international companies.

This month's **Cover story** (page 15) offers a poignant reminder of just how serious the problem has become. Our coverage tells the story of Nokia's Sriperumbudur factory, just outside Chennai, which once boasted of being the largest handset manufacturing facility in the world. Now, mired in a tax dispute and excluded from the sale of Nokia's mobile phone assets to Microsoft, production at the plant has ground to a halt. Yet Nokia is bound by India's labour laws to continue paying its employees until the tax dispute is resolved.



A key problem, according to Ajay Raghavan, a partner at Trilegal, is that the government rarely gives permission for factories to be closed. "Seven or eight out of 10 cases are rejected or stuck in a time warp," he says.

It's not just factory closures that require government permission. Under the Industrial Disputes Act, 1947, establishments with 100 staff or more require permission to let go of just one employee.

Clearly this has to change if Modi is to succeed in his drive to revitalize the economy.

In last month's issue of *India Business Law Journal*, we reported on renewed moves to liberalize India's legal market and allow the entry of foreign law firms. Writing in this month's **Vantage point** (page 22), Lalit Bhasin, the president of the Society of Indian Law Firms, explains why after "vehemently and successfully" opposing such moves for nearly two decades, he now welcomes the phased entry of foreign firms. He puts his change of heart down to improvements in the quality of services provided by Indian law firms, which he believes now equip them to "stand up to the competition from foreign law firms".

While international law firms take stock of the opportunities that may present themselves in India, many Indian companies have focused their gaze on opportunities outside the country. In *A busy corridor* (page 23) we shine the spotlight on an upswing of India-related transactions in the Middle East. "A lot of companies know they cannot expand in India" and so look outward, explains Jayshree Gupta, a partner at Baker & McKenzie Habib Al Mulla.

Singapore is another place that has seen increases in India-related transactions. This month's **What's the deal?** (page 29) analyses a hybrid bond issue in the lion city from a Tata Group company. The deal required some out-of-the-box thinking to get past what Philip Lee, a partner at Herbert Smith Freehills, describes as the "slightly unique" aspects of Indian regulations.

Will this spur on more creative thinking? With Indian companies seeking to take on more debt, often to repay existing debt, chances are it will.

Rounding off this month's line-up is a special report revealing the winners of *India Business Law Journal*'s 2014 **Indian Law Firm Awards** (page 33). The year gone by saw India Inc hold its breath during the run-up to the general elections, and then breathe a collective sigh of relief as Modi's victory gave rise to hopes of change and the prospect of an end to the policy paralysis that had stifled the country for several years. Since then companies have been relooking at stalled investment plans and law firms have been competing for the new work.

To find out which firms finished the year ahead of the pack, our editorial team sought the opinions of in-house counsel and other qualified observers of India's legal profession. Nomination forms were sent to thousands of India-focused in-house counsel and other legal professionals in India and around the world. Respondents were asked to nominate Indian law firms in each of the awards categories and to justify their nominations with relevant information.

For the third year running, our top award of Law Firm of the Year goes to Amarchand Mangaldas, which also receives 12 practice area awards. "[Amarchand] was fundamental to ensuring the completion of our transaction," notes one happy client.

It was a strong year for India's largest law firm, but one cannot escape the irony of Amarchand winning this award as it endures a period of uncertainty resulting from the high profile dispute between Shardul and Cyril Shroff, the brothers who own it (page 5).

Amit Chandra, the managing director of Bain Capital Advisors, observes in our coverage that "law in India is a very tricky business." His observation, it seems, applies not only to the practice of law but also to the management of law firms. ■

Foreign law firms

Indian market not fully matured

Dear Editor

I refer to your article on the possible opening up of the Indian legal market (in the December 2014/January 2015 issue). On the question of whether the Indian legal market is ready for foreign law firms, I would say that different law firms are positioned differently for the market to open up. The structure of an Indian law firm will determine readiness.

What is clear is that our legal market has come a long way since the liberalization of the economy in the 1990s and today it stands as a professional and dynamic market. It can be argued that the entry of foreign law firms would have the same effect that liberalization had on other sectors in India – it enhanced competitiveness, ensured better quality of services and more opportunities for all stakeholders.

With regard to the comment by an in-house counsel that there is "no comparison" between the quality of a foreign firm's service and what an Indian firm provides, I would say that it's unfair to generalize all the Indian firms under the same category.

One has to keep in mind that the market in India is not fully matured, for example, we are only recently moving towards sector specialization.

The ground reality is that a number of Indian law firms are young and small; they cannot be compared to an international law firm with multiple offices and hundreds of lawyers!

If an Indian law firm is able to get work from an international client (without the need for that client to engage their international law firm on the same matter) it speaks for its quality.

And I would agree that not all firms can do it. Firms in India have come a long way and making the right choice makes the difference. I also feel that Indian companies are increasingly becoming sophisticated consumers of legal services, which is resulting in a shift in the quality of output by Indian law firms.

Rabindra Jhunjhunwala
Partner
Khaitan & Co
Mumbai

Correction

The December 2014/January 2015 issue of *India Business Law Journal* contained an article titled *Deals of the Year* (page 31) that showcased the most significant deals of 2014 and the legal advisers who guided them. The list of principal law firms on Sun Pharmaceuticals's acquisition of Ranbaxy (page 43) did not include Khaitan & Co, which advised Sun Pharmaceuticals on the competition law aspects of the transaction. We apologize for this omission.

Opinions?

Observations?

Feedback?

We want to hear from you.

India Business Law Journal welcomes your letters.

Please write to the editor at editorial@indilaw.com.

Letters may be edited for style, readability and length, but not for substance.

Due to the quantity of letters we receive, it is not always possible to publish all of them.

Media rebuked for reports of Amarchand split

Shardul and Cyril Shroff, the managing partners of Amarchand Mangaldas in New Delhi and Mumbai, respectively, are continuing with mediation efforts to resolve a dispute over the will of their mother, Bharati Shroff.

The Economic Times (ET) and *Mint* have speculated that the brothers will divide the firm, reporting that Shardul will assume responsibility for the firm's offices in Delhi, Gurgaon, Kolkata and Ahmedabad, while Cyril will take over the firm's operations in Mumbai, Bangalore, Chennai and Hyderabad.

In a letter, former Supreme Court justice BN Srikrishna, on behalf of the mediation panel, reprimanded the newspapers for "certain incorrect and irresponsible reports" relating to the mediation proceedings.

"We have read articles in the front page of ET and in the Mint and other publications," wrote Justice Srikrishna. "The mediation process towards an amicable settlement is still on and such articles impede and interfere in the process of mediation which is pursuant to orders of the Mumbai High Court." He added that if such reports continued, the panel would be "constrained to inform the High Court of an attempt to interfere in a process that has been mandated by the court and is *sub judice*."


Shardul Shroff
Cyril Shroff

India Business Law Journal contacted both brothers for comment. Vandana Shroff, Cyril's wife and a partner at Amarchand in Mumbai, said she did not wish to comment as the matter was "sensitive" and a "work-in-progress".

Shardul Shroff told *India Business Law Journal*: "The mediation is ongoing and both Cyril and I are participating in the same without hesitation."

"The mediation is expected to be over by March 31 at the latest," he added.

Meanwhile, Amarchand Mangaldas has been named *India Business law Journal*'s 2014 Law Firm of the Year (see page 33).

Law firms

Dentons and Dacheng unite

International law firm Dentons and China's largest law firm, Dacheng Law Offices, have agreed to merge their practices to form the world's biggest law firm with over 6,500 lawyers across 50 countries.

Peng Xuefeng, the present director and founding partner of Dacheng and chairman of its standing committee, will be the chairman of the global board and the chairman of the global advisory committee of the new firm.

Joe Andrew, Dentons' global chairman, will be the global chairman of the new firm, and Elliott Portnoy, the global

CEO of Dentons, will take on the role of CEO of the combined entity.

Portnoy said the attraction of China to Dentons' clients was strong and that all of its competitors were looking East. "By uniting East and West in one firm – not merely through a few offices in large cities, but with a deep presence across China – we can provide Chinese businesses with global ambitions and international clients with interests inside China a reach and depth that simply can't be found elsewhere," he said.

The merger is structured as a verein, allowing for the entity to share the same strategy and brand, but operate separate regional profit centres.

China prohibits foreign firms from practising in the country, however many have used the route of advising multinational clients on outbound investments to China as a means to penetrate the legal market.

Khurana marches to Mumbai

IP boutique Khurana & Khurana has acquired Closer2Patents in order to better serve its clients in Mumbai. Closer2Patents, another IP boutique, was established by Abhishek Pandurangi in 2010. He joins Khurana & Khurana as a partner in Mumbai along with four associates.

The firm now has six partners and over 50 professionals. Over 35 are in Delhi, with the remainder divided among Mumbai, Bangalore and Pune.

Khurana & Khurana's Mumbai-based clients include Piramal Healthcare, Larsen & Toubro, Glenmark Pharmaceuticals, Cipla, Unichem, Midas Healthcare and Crompton Greaves. "We didn't have a physical office presence in Mumbai," Tarun Khurana, the firm's managing partner, told *India Business Law Journal*. "Abhishek being a close associate for Mumbai operations expressed an interest to be acquired and had a good patent and trademark portfolio."

Speaking to *India Business Law Journal,* Pandurangi said he joined Khurana & Khurana to better serve Closer2Patents' growing client base. "To be very honest, the firm was outgrowing me," he said. "It was growing at a faster rate than I could manage with my existing team, especially in the area of litigation." Investing in or merging with a bigger law firm seemed to be the most practical way forward. "What was appealing was my personal interaction and flexibility with Tarun and the prospects in terms of litigation and other avenues that I would personally be involved with at Khurana & Khurana."

Khurana said the firm would strengthen its focus on the media and entertainment sector this year. Last year the firm handled copyright and trademark matters and provided general counselling on commercial law issues for media houses in Mumbai and Delhi. "We plan to focus strongly on that practice, more at the counselling level in 2015 and on contentious matters from 2016 onwards."

People moves

Shearman partner moves to Singapore

Sidharth Bhasin, a partner at Shearman & Sterling, relocated from Hong Kong to Singapore last month to boost the firm's M&A and private equity practices in Singapore and Southeast Asia.

Bhasin is a key member of the firm's India practice and represents Indian companies on cross-border mergers and acquisitions, financings and restructurings globally. He also focuses on private equity investments and exits, public and private mergers and acquisitions, joint ventures, restructurings and workouts, and capital market transactions.

He is part of a team that recently advised a consortium of investors on its proposed US$260 million acquisition of the global business process outsourcing division of Aditya Birla Minacs from ABNL IT & ITeS, a wholly owned subsidiary of Aditya Birla Nuvo.

Phoenix poaches KSP team

Mrinal Ojha and Trinath Tadakamalla have joined Phoenix Legal as partners, along with their team from Khaitan Sud & Partners. The new recruits will strengthen Phoenix's dispute resolution practice.

"Phoenix Legal has a solid reputation when it comes to client service and it seemed the right fit for Trinath and I in terms of the approach to work and the sectors we wish to service," Ojha told

India Business Law Journal.

Phoenix Legal runs its disputes practice from both Mumbai and Delhi, with partner Jyoti Singh focusing exclusively on this area. "The practice has grown to the point where the need to scale up is a natural next step," said Ojha. "Trinath and I will work towards adding to that capability and bring in the experience in a variety of sectors, including infrastructure, energy and insurance, which also complements Phoenix Legal's non-contentious practice areas well."

Discussing the team's ambitions, Ojha said they will aim to address the "shortage of detail-oriented litigators dealing with high-end and complex domestic and cross-border disputes".


Mrinal Ojha


Trinath Tadakamalla

Cognia lawyer joins Quislex

David Chamberlin has rejoined legal process outsourcing (LPO) provider Quislex as the director of legal services for Europe, the Middle East and Africa (EMEA).

Chamberlin previously worked with Quislex in Hyderabad for almost two years managing its transactional solutions portfolio. In his new role he works with general counsel and law firm partners to optimize the value of litigation and M&A services, contract life-cycle management and regulatory compliance.

At Cognia Law, he was an LPO consultant and later became the head of legal services and general counsel for Europe. He has also worked with Intelsat, at Watt Tieder Hoffar & Fitzgerald, and as an independent consultant.

Chamberlin said he decided to return to Quislex because of its leading position in the LPO market and because it is "investing heavily in next-generation legal services". He added that the company possessed "the right know-how and reputation", and "the nimble executive leadership despite its size to continue to flourish as competition grows. I very much want to be a part of that unique formula for success."

In his new role, Chamberlin will build on Quislex's existing client base and work with close to 1,000 employees to implement legal support services regionally adapted to the appetites of EMEA law firms and companies.

He expects Indian LPO providers will experience continued segmentation in EMEA. However, he said that those with experience and solid funding would be in a good position to capitalize on new technologies and add new service dimensions, such as consulting expertise, to address evolving client needs. "Leading Indian LPOs can bring their expertise to bear in a growing array of geographic markets, as the value proposition increasingly rests with subject-matter expertise and less with shoring dynamics such as wage arbitrage," he said.


David Chamberlin


Gautham Srinivas

Link Legal promotes partner

Link Legal India Law Services has promoted Gautham Srinivas to its partnership.

Srinivas, a capital markets specialist, joined the firm in 2013 after nine years at Amarchand Mangaldas. He has advised various infrastructure, real estate, manufacturing, services and retail companies on their fundraising plans. He also advises on mergers, amalgamations and other investments and corporate matters.

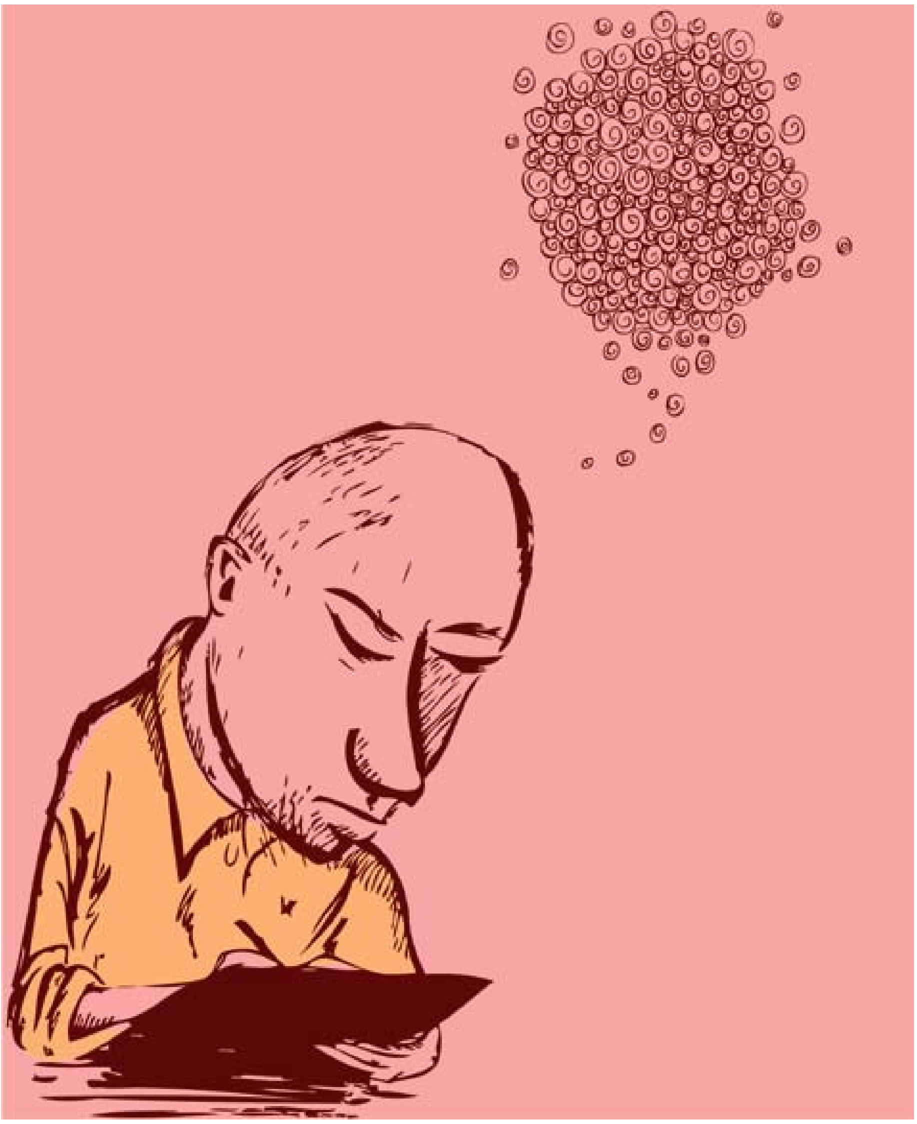
"It's essential for us now to continue to raise the bar on quality and focus on building the bench strength," he said. "I have the freedom to operate on an entrepreneurship [basis] with support from lawyers with domain expertise … this helps."

"Gautham's promotion is a step towards creating a more robust transaction advisory team," said managing partner Atul Sharma. "The constantly changing paradigm in the legal field requires firms like ours to also gear up so as to match corporate clients' expectations."

Srinivas' addition takes the firm to 16 partners and 86 associates across its offices in New Delhi, Mumbai, Bangalore, Hyderabad and Chennai.

EDUCATION

NALSAR's hat trick with winning essay



Tanya Choudhary, a student from Hyderabad's NALSAR University of Law, has won first prize in the third Arb Excel All India Essay Writing Competition organized by Kachwaha & Partners.

The firm received 57 entries from universities across India. The articles were evaluated by the firm's partners on the basis of original thinking, grasp of the subject, writing skills and choice of topic.

Choudhary won ₹100,000 (US$1,600) for her essay on the arbitrability of competition law disputes in India. She is the second student from NALSAR to take first prize in the contest. The previous two competitions were won by Ridhi Kabra.

Divyanshu Agrawal and Arunima Kedia from Bangalore's National Law School of India University came second and third in the competition, respectively, winning ₹75,000 and ₹50,000. Agrawal's essay examined the validity, use and abuse of anti-arbitration injunctions in India, while Kedia offered a critical analysis of India's competition and arbitration law regimes.

"We were very pleased with the quality of the contributions," Sumeet Kachwaha, the managing partner of Kachwaha & Partners, told *India Business Law Journal*. "Indeed the competition was so close at the top that we had to spend weeks rereading some of the contributions."

Arshiya Sharda from NALSAR, Rohan Tigadi from Jodhpur's National Law University, and Shruti Raina from Pune's Symbiosis Law School received honourable mention, ₹10,000 each, and a book prize for their submissions.

Four other students were also awarded book prizes: Anu Shrivastava from Gujarat National Law University, Gourav Mohanty from Symbiosis Law School, Radhika Gupta from Pune's ILS Law College, and Sanika Gokhale from Kolkata's National University of Juridical Sciences.

CAPITAL MARKETS

Tree House thrives with QIP

Tree House Education & Accessories, a pre-school education services provider, has raised ₹2 billion (US$32 million) through a qualified institutional placement. The deal involved the issue of 4.5 million equity shares with a face value of ₹10 each at a price of ₹440 per equity share.

Tree House has over 500 pre-schools in 75 cities in India which it operates on its own and through its franchisees.

Luthra & Luthra was the Indian counsel to bookrunning lead managers CLSA India, India Infoline and Inga Capital. The team included partner Manan Lahoty, managing associate Ravi Dubey, senior associate Komal Mehta and associates Aashima Johur, Sampada Bannurmath and Aditya Vikram Singh.

Jones Day was the international counsel to the bookrunning lead managers.

Tanvish Bhatt, a partner at Wadia Ghandy & Co in Ahmedabad, advised Tree House.

COMPETITION LAW

ACI fined for abuse of dominance

The Competition Commission of India (CCI) has slapped a penalty of ₹45.2 million (US$725,000) on US-based ACI Worldwide and its subsidiaries in India and Singapore for abuse of dominance, following a complaint brought by Financial Software and Systems (FSS).

ACI Worldwide licenses software for electronic banking to banks in India. FSS provided software modification and customization services to banks that use ACI software.

In May 2013, ACI sent letters to all the banks using its software saying it would not allow them to use FSS or any other third party to customize its software beyond July 2013.

FSS alleged that ACI abused its dominant position under section 4 of the Competition Act, 2002, by not allowing banks to choose a service provider of their choice to modify ACI's software; imposing unfair conditions on the purchase or sale of goods or services through exclusive supply arrangements with banks that used the software; and directing the banks not to use the services of FSS.

The CCI found there was a prima facie case of contravention by ACI of the provisions of sections 3 and 4 of the act. It ordered the Director General (DG) to investigate the matter and also granted an interim stay against the allegedly contravening conduct of ACI.

The DG found that ACI had abused its dominant position in contravention of various provisions of section 4 of the act, by imposing unfair and discriminatory conditions on the banks. It also found that ACI used its dominance in the upstream relevant market to enhance its presence in the downstream relevant market, thus violating section 4(2)(e) of the act. The CCI upheld the findings of the DG.

JSA advised ACI Worldwide on the matter. The team comprised partner Amitabh Kumar, senior associate Gautam Shahi, associates Kabita Das and Lagna Panda, and junior associate Ela Bali.

Luthra & Luthra advised FSS.

INTELLECTUAL PROPERTY

Adobe counsel takes on INTA presidency

The International Trademark Association (INTA) has elected J Scott Evans of Adobe Systems to be its president this year. He will take over from current president Mei-lan Stark, the senior vice president for intellectual property at Fox Entertainment Group.

Evans is the associate general counsel at Adobe Systems, responsible for legal and strategy issues relating to trademarks, copyrights, brands, domains and Internet Corporation for Assigned Names and Numbers (ICANN) policy. He is also the company's global advertising and marketing counsel.

Evans said the transition of ICANN governance away from the US government and the legal implications surrounding 3D printing technology would be among the issues on which INTA and the global trademark community would focus this year.

In addition, he spoke of the expanding role of trademarks. "When we work with trademarks, it's important to remember all the associations that go along with the brand such as customer loyalty and concern about corporate social responsibility, for example," he said. "I look forward to exploring these ideas and to deepening our understanding about the role of trademarks and brands."

Evans has contributed actively to INTA for several years. He was the senior legal director of global brands and trademarks at Yahoo! prior to joining Adobe.

Also taking office this year are Ronald van Tuijl of JT International (president elect); Joseph Ferretti of PepsiCo and Frito-Lay (vice president and secretary); Tish Berard of Hearts On Fire Company (vice president); David Lossignol of Novartis (treasurer); and David Fleming of Brinks Gilson & Lione (counsel).

CRIMINAL LAW

Gautam Khaitan out on bail

A Delhi court on 9 January granted bail to Gautam Khaitan, the managing partner of OP Khaitan & Co, in connection with a money laundering probe into the ₹36 billion (US$583 million) AgustaWestland helicopter deal.

The Enforcement Directorate took Khaitan into custody on 23 September on charges by the Central Bureau of Investigation that some of the funds concerned were routed through his law firm. Khaitan has denied this.

Indian politicians and military officers are alleged to have taken kickbacks from AgustaWestland to secure the purchase in 2010 of 12 AgustaWestland AW101 helicopters, intended to serve the Indian president and other high ranking state officials.

The deal was subsequently cancelled in January 2014. Khaitan, a former board member of Chandigarh-based Aeromatrix, which was involved in the helicopter acquisition, was the first in India to be arrested in connection with the case.

Senior counsel PV Kapur and advocate PK Dubey, representing Khaitan, pointed out that the other accused parties, who were the supposed recipients of the bribes, had not been arrested while Khaitan had spent three months in custody.

The court was to hear the matter again on 2 February.

Gautam Khaitan

MERGERS & ACQUISITIONS

Par picks up Ethics Bio Lab

New Jersey-based generics company Par Pharmaceuticals has acquired Ethics Bio Lab, a contract research organization in Chennai offering bioavailability and bioequivalence study and clinical end point study services to the pharmaceutical and biotechnology industry.

Par Pharmaceuticals develops, manufactures and distributes innovative and cost-effective pharmaceuticals for the US market. It currently sells 80 different products and has 90 products awaiting regulatory approval.

The US company purchased the entire issued, subscribed and paid-up share capital of Ethics Bio Lab through Par Formulations, a wholly owned Indian subsidiary.

Amarchand Mangaldas worked with Par Pharmaceuticals on structuring the deal, regulatory issues, due diligence of the target company, drafting of the transaction documents, negotiations with the sellers' counsel, and the closing.

The team consisted of partners Amit Kumar and Arvind Sharma, principal associate-designate Janani Sekhar and senior associate Ananda Malhotra.

K&L Gates was Par Pharmaceuticals' US counsel.

HSB Partners represented the sellers – Ethics Bio Lab promoter Jaganathan Jayaseelan and Clan Laboratories.

HEALTHCARE

Laws proposed to promote IT

The Associated Chambers of Commerce and Industry of India (ASSOCHAM) has proposed the introduction of legislation to encourage the adoption of information technology (IT) in the healthcare sector. BK Rao, the chairman of ASSOCHAM's healthcare council, said once such a law was introduced, the government should offer incentives to promote the use of IT in hospital administration and penalize those that hindered the adoption of such technology.

Rao also suggested linking patients' records to their unique identification number (Aadhaar) or their permanent account number issued by the Income Tax Department, to "negate the hassle of providing a unique ID to every patient". The numbers would be recognized by all medical institutions at the state and national level and help to streamline medical records.

Rao further called on the government to recommend data standards for all hospitals and institutions when storing data and for improving health literacy among the public.

The Ministry of Health and Family Welfare is planning to set up a central authority to ensure proper compliance standards in maintaining electronic health records. In addition, it aims to standardize codification for health procedures in India; frame metadata and data standards to increase interoperability and improve the sharing of information; use tele-medicine for remote consultation and diagnosis; and increase collaboration among healthcare providers.

Business law digest

Foreign investment

Foreign investment policy amended for medical devices

India's Department of Industrial Policy and Promotion amended the foreign direct investment (FDI) policy in the pharmaceutical sector through press note 2 of 2015, dated 6 January. Effective from 21 January, up to 100% FDI is permitted for the manufacturing of medical devices under the automatic route.

"Medical device" has been defined in the press note (subject to the amendment in the Drugs and Cosmetics Act, 1940) as:

1. Any instrument, apparatus, appliance, implant, material or other article, used alone or in combination, intended to be used specially for human beings or animals for one or more of the purposes specified, and which does not achieve its primary intended action in or on the human body or animals by any pharmacological or immunological or metabolic means, but which may be assisted in its intended function by such means;
2. An accessory to such an instrument, apparatus, appliance, material or other article;
3. A device which is reagent, reagent product, calibrator, control material, kit, instrument, apparatus, equipment or system, whether used alone or in combination, intended to be used for examination and providing information for medical or diagnostic purposes by means of *in vitro* examination of specimens derived from the human body or animals.

Banking & finance

RBI expands security options for ECBs

On 1 January, the Reserve Bank of India (RBI) amended the regulations for external commercial borrowings (ECB) to liberalize and expand the options of securities and consolidate various provisions related to creation of charges to secure ECBs.

The new rules state that authorized dealer category-I banks may allow the creation of charges on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees in favour of overseas lenders/security trustees, subject to the banks satisfying themselves that the security creation: (a) is in compliance with existing foreign exchange norms; (b) is required to be created under the loan document; and (c) that a no objection certificate from the existing lenders in India has been obtained.

Some of the conditions to be met for the creation of security are as follows:

Creation of charge on immovable assets: In the event of enforcement/invocation of the charge, the immovable asset/property will have to be sold only to a person resident in India and the sale proceeds must be repatriated to liquidate the outstanding ECB.

Creation of charge on movable assets: In the event of enforcement/invocation of the charge, the claim of the lender, whether the lender takes over the movable asset or otherwise, will be restricted to the outstanding claim against the ECB. Encumbered movable assets may be taken out of the country.

Creation of charge over financial securities: Pledge of shares of the borrowing company held by the promoters as well as in domestic associate companies of the borrower will be permitted. Pledge on other financial securities specified will also be permitted.

Private equity

SEBI redefines 'venture capital undertaking'

The Securities and Exchange Board of India (SEBI) has made amendments to the SEBI (Foreign Venture Capital Investors) Regulations, 2000, through the SEBI (Foreign Venture Capital Investors) (Amendment) Regulations, 2014, dated 30 December 2014.

Under the amended clause (m), "venture capital undertaking" means a domestic company whose shares are not listed on a recognized stock exchange in India at the time of making the investment.

The following activities/sectors have been explicitly excluded from the meaning of venture capital undertaking: (a) non-banking financial companies, other than core investment companies in the infrastructure sector, asset finance companies and infrastructure finance companies registered with the RBI; (b) gold financing; (c) activities not permitted under the government's industrial policy; and (d) any other activity which may be specified by the board of SEBI in consultation with the government from time to time.

Arbitration

Government amends act for speedy arbitration

The government, by an ordinance dated 30 December 2014, has amended the Arbitration and Conciliation Act, 1996. Some of the changes introduced by the ordinance are outlined below.

1. The arbitral tribunal must make its award within nine months. On finding that the arbitrator has delayed for personal benefit, the court may debar the arbitrator from taking fresh arbitrations for three years.
2. "Public policy" as a ground to challenge an arbitration award under section 34 of the act is restricted only to cases where the award was induced by fraud or corruption, is in conflict with the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice.
3. The court must dispose of an application to challenge an award within one year.
4. Section 36 of the act has been amended so that the mere filing of an application to challenge an award would not automatically stay execution of the award. Execution would be stayed only when a court passes a specific order on an application filed by the party.
5. A new sub-section to section 11 of the act provides that application for appointment of an arbitrator must be disposed of expeditiously, within 60 days if possible.
6. A new sub-section to section 11 provides that while considering an application for appointment of an arbitrator, a court will only examine the existence of a prima facie arbitration agreement and no other issues.

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

Dispute digest

COMPETITION LAW

Evidence needed to substantiate charge of collusion

Dismissing a complaint in *Muthoot Mercantile Ltd v State Bank of India & Ors*, the Competition Commission of India (CCI) held that "parallel behaviour needs to be substantiated with the additional evidence" when allegations of the contravention of the provisions of section 3 of the Competition Act, 2002, are made. Section 3 prohibits anti-competitive agreements.

Muthoot Mercantile, a non-banking financial company (NBFC), had alleged that State Bank of India and 11 other banks had formed a cartel which launched a new gold loan product in a concerted bid to get rid of the competition. It said that the new product – an agri-gold loan at the rate of 4% – was causing an adverse effect on NBFCs that also provided gold loans.

Muthoot Mercantile argued that the banks not only offered their product at a rate of 4% but that they also shut their eyes to the end use of the loans. The NBFC said that by offering these loans – ostensibly as agricultural loans – the banks were contravening the guidelines of the government's Interest Subvention Scheme. This was collusive pricing, which is prohibited under section 3(3)(a) of the act. Further, the Reserve Bank of India had clarified that the benefit of the Interest Subvention Scheme was not meant for products such as agri-gold loans or gold loans.

After considering the record, the CCI observed that there was no material on record which suggested any collusion or concerted practice on the part of the banks which could be said to contravene the provisions of section 3 of the act or could be termed as anti-competitive. Rejecting the contentions of the informant, the CCI observed that no prima facie case of contravention of the provisions of either section 3 or section 4 of the act had been made out.

CORPORATE CRIMINAL LIABILITY

Support of law is required for vicarious liability

Allowing an appeal in *Sunil Bharti Mittal v Central Bureau of Investigation*, the Supreme Court has held that "when the company is the offender, vicarious liability of senior officers of the company cannot be imputed automatically, in the absence of any statutory provisions to this effect".

As such, the three-judge bench set aside an order passed by a special judge summoning Bharti Cellular chairman cum managing director Sunil Mittal and Essar Group promoter Ravi Ruia in a case concerning allocation of additional 2G spectrum in 2002.

The special judge had held that the appellants, as the heads of their respective companies, were the alter egos of their companies, and hence the acts of the companies could be attributed to them.

After examining the facts of the

case and analysing the legal principles involved, the Supreme Court deemed it fit to look into the principle of alter ego, according to which if the person or group of persons who control the affairs of the company commit an offence with a criminal intent, their criminality can be imputed to the company as well, as they are alter ego of the company.

The Supreme Court observed that in the case at hand, however, this principle was applied in an exactly reverse scenario as acts of the company had been attributed and imputed to the appellants.

BANKING LAW

Uniform treatment is not required for all defaulters

In *Keshavlal Khemchand and Sons Pvt Ltd & Ors v Union of India & Ors,* the Supreme Court upheld the constitutional validity of an amendment made in 2004 in section 2(1)(o) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The section allows creditors to classify a borrower's account as a non-performing asset (NPA) in accordance with guidelines and directions of the Reserve Bank of India (RBI).

The amendment had classified borrowers into two categories: those that obtain secured loans from institutions that follow the RBI's guidelines on the classification of NPAs; and those that borrow from institutions that are governed by regulators other than the RBI.

The petitioners argued the amendment was bad on account of excessive delegation of the legislative function and that it discriminated between two classes of borrowers. Under RBI guidelines a bad debt can be declared an NPA after 60 days, while other regulators allow up to 180 days before it is declared an NPA.

The court held that borrowers cannot expect creditor institutions to function as a homogenous unit, as there are innumerable differences among them. The differences are based on the legal structure of the institution, the nature of the loan advanced, and its terms and conditions.

The court emphasized that recovering money from a debtor by resorting to the filing of a suit takes a long time. Speedy recovery of monies due to financial institutions is an important element in determining not only the efficiency of such institutions but also the financial health of the country.

Dismissing the petitions, the Supreme Court directed the borrowers to pay costs to the various creditors, at 1% of the amount outstanding on the date of the notice.

Bombay High Court clarifies concept of drawee bank

In the case of *Smt Sangita v Sukrant & Anr*, Bombay High Court considered the question of the territorial jurisdiction and the concept of drawee bank in cheque dishonour cases, against the background of the Supreme Court's landmark decision in *Dashrath Rupsingh Rathod v State of Maharashtra & Anr.* The Supreme Court held that the court within whose territorial jurisdiction the drawee bank has dishonoured the cheque has jurisdiction to deal with a complaint filed under section 138 of the Negotiable Instruments Act, 1881.

Nagpur-based Sangita lodged a complaint under the act against her father-in-law, who was based in Jamshedpur, for dishonouring a ₹22.5 million (US$365,000) cheque. She filed the complaint with the Nagpur magistrate, stating that the criminal proceedings should be conducted in Nagpur in light of the real time gross settlement (RTGS) system. The magistrate rejected and returned her complaint, saying it should be filed in Jamshedpur, where the bank which had dishonoured the cheque was located.

Challenging the decision before Bombay High Court, Sangita contended that since under the RTGS system payments can be made by any branch of a bank, any branch can be the drawee bank for offences under the act.

Dismissing the petition, the court observed that there can be only one drawee bank. Processing a cheque for payment differs from giving approval to the processing branch for the payment. The branch which processes the cheque and obtains approval for payment from the branch where the funds are parked is only a facilitator and not the drawee under section 7 of the act.

RTGS contemplates transfer of funds by the drawee bank to other branches which received the cheques. Dishonouring of a cheque takes place because of failure or refusal to transfer funds, which occurs at the place where the drawee bank is situated.

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

Shutting up shop

Mired in a tax dispute and hamstrung by labour laws, the plight of Nokia's plant near Chennai highlights the perils and complexities of closing a factory in India

Vandana Chatlani reports

It was a shining example that presaged today's "Make in India" dream. Nokia, the Finnish mobile phone producer, set up a factory in Sriperumbudur, 40 kilometres southwest of Chennai, that became the largest handset manufacturing operation in the world. Established in 2006, the factory at its peak employed an army of over 15,000 workers who produced 100 million phones a year.

Work at the huge factory is now suspended (see *Timeline of Nokia events* on page 16). The assets of Nokia's Indian subsidiary have been frozen since October 2013 following claims in March that year by India's tax authorities that the company owed ₹20.8 billion (US$335 million) in taxes in relation to royalty payments for the software used in its products. In February 2014 Tamil Nadu's tax authorities presented Nokia with a separate sales tax bill for selling mobile phones domestically (which would attract tax) rather than internationally (which would be tax-exempt).

In April 2014, Nokia completed the sale of its devices and services business to Microsoft for US$7.2 billion. The Sriperumbudur factory was originally to be transferred to Microsoft as part of this deal but was excluded from the purchase at the last minute. Instead, Microsoft agreed to use the factory as a contract manufacturer to produce the low-cost Asha series of mobile phones. However, in October 2014, Microsoft announced that it no longer required these services and would terminate its agreement with Nokia at the end of the month. With no other contracts retained, Nokia's operations came to a grinding halt, its fortunes and the future of its disgruntled employees in the hands of India's tax officials.

> We call on the government to lift the asset freeze … so we can explore potential opportunities [to sell our plant] to a suitable buyer
> Brett Young
> Senior Communications Manager
> Nokia

Closing time?

What will ultimately happen to Nokia's factory is unknown. With the asset freeze in place, the company cannot sell its Sriperumbudur premises and is bound by India's labour laws to continue paying its employees until the tax dispute is resolved (see *Reform long overdue* on opposite page). "With production at Chennai suspended, we call on the government to lift the asset freeze imposed by the tax authorities so we can explore potential opportunities for a sale to a suitable buyer," Brett Young, a senior communications manager at Nokia, told *India Business Law Journal*.

"This is an urgent prerogative not only for Nokia, which is no longer in the business of making mobile phones, but also for [India] to move towards its goal of supporting local manufacturing and reducing electronic imports," he said. "We believe that an eventual sale would offer a far brighter option for employment in the region and support the government's 'Make in India' initiative."

If India lifts its freeze on Nokia's assets and the company is unable to sell the factory, it may decide to shut it down. In this case, Nokia would need to obtain the government's permission for closure at least 90 days ahead of the proposed shutdown date, and to provide a copy of the document to its workers and trade unions. It would also have to submit detailed information regarding sales, balance sheets and other particulars. In addition, it would need to obtain indications of no objection from the tax department, provident fund authorities and several other regulators.

"Obtaining the government's permission for closure is always a challenge," says Ajay Raghavan, a partner and employment law specialist at Trilegal. "Welfare statutes look out for the interest of employees and discussions between the company and its workforce are often protracted. That's where it all gets stuck. It never happens quickly."

According to Raghavan, chances are the government will not grant its approval. "Many companies have failed miserably," he says. "You need to demonstrate you can't continue as a business or that you have a workforce that is extremely disruptive. The government has approved closures when it has seen a combination of all these issues, but seven or eight out of 10 cases are rejected or stuck in a time warp. You need to maintain status quo as long as the government continues to deliberate on the issue."

Reducing headcount

Factories, plants and other such facilities in India are governed by the Factories Act, 1948, and the Industrial Disputes Act, 1947. In line with section 25 subsection O of the Industrial Disputes Act, industrial establishments with a workforce of 100 or more must seek government permission before terminating even one employee. This is a constant cause of frustration for companies looking to modify headcount in line with production demands.

One strategy that companies use to avoid the cumbersome task of obtaining government approval for each termination is by employing some contract workers, as

Timeline of Nokia India events

January 2013	Nokia tax inquiry in India begins. Gurgaon and Sriperumbudur facilities raided.
March 2013	Tax department serves notice to Nokia demanding ₹20.8 billion (US$335 million) in unpaid taxes related to royalty payments
September 2013	Microsoft says it will buy Nokia's devices and services business
October 2013	India's tax authorities freeze Nokia's immovable assets in India including its buildings and facilities to ensure it can pay its outstanding tax bill
February 2014	Tamil Nadu tax authorities slap a ₹2.4 billion sales tax bill on Nokia for mobile phones manufactured in Sriperumbudur that were sold domestically rather than exported. Nokia appeals central tax authorities' ruling
April 2014	Delhi High Court rules that Nokia is prohibited from selling its Sriperumbudur plant to Microsoft because it does not have enough assets to meet its tax bill. Microsoft completes acquisition of Nokia's devices and services business leaving Sriperumbudur plant out of the deal. Sriperumbudur plant becomes a contract manufacturing unit for Microsoft, producing the low-cost Asha series of mobile phones
May 2014	Commissioner of Income Tax Appeals dismisses Nokia's appeal
October 2014	Microsoft says it no longer needs the services of Nokia's Sriperumbudur plant. Nokia is in trouble as the factory has no other contracts
November 2014	Nokia suspends work at Sriperumbudur plant

Obtaining the government's permission for closure is always a challenge … seven or eight out of 10 cases are rejected or stuck in a time warp

Ajay Raghavan
Partner
Trilegal

this offers more flexibility when it comes to hiring and firing under India's labour laws. Despite efforts to exploit this loophole, many businesses still have high numbers of full-time employees that cannot be dismissed at will.

Struggling companies with many such workers are often advised by lawyers to reduce their headcount before seeking government permission for closures. In some instances, this may be relatively easy. The manufacturing operations of India's domestic and international companies are dotted around the outskirts of the country's major cities and in "tier two cities", where land is cheap and labour even cheaper. Workers in high industrial growth areas may be willing to leave and try their luck at other production facilities nearby. Workers in places where factories and plants are few and far between may be harder to persuade.

Some employers have contacted recruitment and placement agencies in a bid to find jobs for workers they want to dismiss. One company gave its workers three-wheeler auto-rickshaws as compensation. "It's helpful if you are able to identify alternative employment," says Vikram Shroff, head of HR law at Nishith Desai Associates."In many cases workers won't put up a fight if they are reassured that they will continue to remain gainfully employed."

If work opportunities are scarce, companies, particularly multinationals, may offer compensation or voluntary retirement schemes to encourage employees to leave. The success of this solution largely depends on how much an employer can afford to pay.

Indian promoter-driven companies, by contrast, tend to be less concerned about labour and litigation issues and have a bigger appetite for risk when it comes to dismissals. "They have political clout and take aggressive views

Reform long overdue

India's labour laws have been described as draconian, but what needs to change?

Domestic and international companies, legal advisers and observers all agree that India's labour laws require major reform. Problems cited include inconsistencies between state and central laws; the outdated definition of a "workman"; stringent rules regarding termination; and excessive red tape and bureaucracy.

Critics have called for the removal of chapter VB of the Industrial Disputes Act, 1947, which mandates that industrial establishments with a headcount of 100 or more require government permission to let go of even one employee. Some suggest this should be replaced with a higher severance pay that employees are entitled to receive. "The law doesn't tell us the parameters in which the government will approve or reject an application for termination," says Vikram Shroff, head of HR law at Nishith Desai Associates. "There is always uncertainty. The proposed reforms we've seen in Rajasthan and Haryana are hopefully just the start of more serious movement at the government level."

This is a problem from an operational perspective if an employee performs poorly, but it becomes a bigger danger in cases where the motivation for termination is theft, abuse or sexual harassment. The termination process can be mired by improper handling of the domestic enquiry process, allowing the worker to continue being employed.

If an employee working outside an industrial setting is charged and proved to have committed an offence under India's Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, they could immediately be asked to leave. In the case of a worker at a factory covered by the Industrial Disputes Act, says one in-house lawyer, "we would have to first talk to the worker's union and may then have to consult the labour commissioner to get their buy-in before we can retrench the workman".

India's laws also need to consider the realities of business where winding up and retrenchment are inevitable.

Shukla Wassan, the executive director of legal and company secretary at Hindustan Coca-Cola, believes that labour law needs to be a balancing act. "The business world today is rapidly changing and companies are required to keep pace with it," she says. "A company many decide to modernize and automate some of its processes, which could result in reducing its workforce. It should have the flexibility to restructure its operations in the best interests of future growth but at the same time, employee interests should also be protected, whether through compensation schemes, or other methods."

Milbank

TAKING ON THE BIGGEST CHALLENGES. CLOSING THE MOST COMPLEX PROJECTS.

Our India Practice is honored to be recognized with five Deal of the Year Awards from *India Business Law Journal*

2014 DEALS OF THE YEAR

TATA STEEL LTD. $1.5 BILLION BOND OFFERING

BHARTI AIRTEL $2 BILLION DUAL CURRENCY BOND OFFERING

KKR'S €235 MILLION REFINANCING FOR AMTEK GLOBAL

RELIANCE JIO $750 MILLION 4G TELECOM FINANCING

RELIANCE INDUSTRIES' $60 MILLION AND €100 MILLION EXPORT CREDIT-BACKED FACILITIES

BEIJING

FRANKFURT

HONG KONG

LONDON

LOS ANGELES

MUNICH

NEW YORK

SÃO PAULO

SINGAPORE

TOKYO

WASHINGTON, DC

"Milbank's multidisciplinary India group has broad-ranging experience of acting on high-end banking and finance, capital markets, projects and energy, and corporate and M&A transactions."

- Chambers Asia 2014

Jim Grandolfo
Hong Kong
JGrandolfo@milbank.com

Naomi Ishikawa
Singapore
NIshikawa@milbank.com

Suhrud Mehta
London
SMehta@milbank.com

Milbank.com

around terminations," says Raghavan. "They don't mind strikes or creating a situation of unrest to demonstrate to the labour department that business simply cannot continue."

Vested interests & bargaining power

The heavily politicized nature of labour issues in India further complicates negotiations between employers and employees. Most factories in India have a strong union-

The definition of workman is so wide that it could cover a coder or a software programmer
Vikram Shroff
Head of HR Law
Nishith Desai Associates

ized workforce, particularly in industrialized states such as Maharashtra, Kerala, Tamil Nadu and Karnataka. The unions are highly politicized and viewed as vote banks by parties that support, promote, develop and operate them.

Most factories have more than one union, which reduces the chances of a solution that will appeal to all workers. Elected by the workforce, each union tries to outdo the others and many strive to get the workers' attention through what employers view as making unreasonable demands, raising frivolous matters and trying to build up workers' dreams and expectations. Unions have also been associated with streaks of violence as evidenced by incidents in Kerala, Gurgaon and Bihar in 2013 during a two-day all-India strike organized by 11 trade unions.

"Collective bargaining agreements take a huge amount of time to negotiate," says Jasmeet Wadehra, the general counsel at International Paper in Hyderabad. The company employs a workforce of 5,500 of which 3,000 are full-time employees with the remainder on board as contract workers.

Predicting the outcome of termination negotiations is a huge challenge, Wadehra says, "particularly because these agreements involve various 'social' stakeholders and unions are backed by political parties. If there is a breakdown in negotiations, at some stage you see the involvement of the district administration and labour enforcement authorities because these political parties who influence the process then get the government machinery working in their favour."

Employees who belong to a union that has no political affiliation are much easier to handle according to an

Workforce considerations should be a priority from the beginning of the business planning and strategy phase
Jasmeet Wadehra
General Counsel
International Paper

in-house lawyer whose company owns several manufacturing operations. "The challenge arises with the political party affiliation," she says. "Often we've noticed political parties drive their agendas through innocent and naive workers who don't understand the political motives. A company may sometimes do far more than the law requires, but with political infiltration, employee views become tainted and the issue become mucky."

So what is the best way to resolve an impasse (see *Trouble on the shop floor*, page 21)? Vijayshyam Acharya, the legal counsel at OnMobile, has worked in the past with companies such as Aditya Birla, Himatsingka Seide and Mitsui affiliates, all of which have large manufacturing operations. He has observed a few routes that have led to amicable settlements without political interference. In many cases the human resources head or the head of industrial relations within the organization, having gained the trust of the workforce, is able to mediate between the management and workers to resolve the issue. In other

Educating workers with transparency and clarity on what exactly they are entitled to is essential to build trust
Vijayshyam Acharya
Legal Counsel
OnMobile

cases, specialists or consultants with the right kind of expertise are called in and compensated to sort out problems. However, Acharya notes that "in some cases where management is not sensitive to ground realities, it could turn political and management may have to engage with either the labour union or the locally elected representative to ensure that the ultimate solution is delivered."

Not just factory workers

Factory owners are not alone in their anxieties about India's stringent labour laws governing recruitment and retrenchment. Last month, Madras High Court restrained Tata Consultancy Services (TCS) from terminating a pregnant employee who alleged that her dismissal was illegal and a violation of the Industrial Disputes Act. According to the employee, TCS had planned to retrench 25,000 engineers, replacing them with 55,000 new junior recruits to slash operating costs. A week later, TCS revoked the termination order. "This is the first time I've seen this kind of writ petition involving an IT company in India," says Shroff. "Some companies in the IT sector had a belief that their highly paid employees may not fall within the workman category … but the definition of workman is so wide that it could cover a coder or a software programmer as long as they don't necessarily have managerial authority."

Raghavan points out that such dismissals are not unusual. "They tend to replace senior level employees with junior resources (who can do the same job) quite frequently and in this instance it was possibly a larger number of people that they let go," he says. "From media reports, it appears that it wasn't necessarily just bad performers that were asked to leave, and it received a lot more media coverage than these incidents usually get, maybe because of the way they went about it." Raghavan comments that a move of this nature may not gather steam, but it's enough reason for the labour department to argue for more "policing of the law and for unions to demand a more active role, especially in the service sector."

Nokia never considered what path it would take if things went wrong. They had issues with labour but they doubled and tripled salaries

Savitha Jagadeesan
Partner
Kochhar & Co

Start thinking that the labour force is a major contributor to your growth

Shukla Wassan
Executive Director of Legal and Company Secretary
Hindustan Coca-Cola

The term "workman" under the Industrial Disputes Act is archaic. A workman is defined as someone "employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward". Employees who are not supervisors or managers of people fall under the workman category and so even some senior-level bank employees and pilots for example, have been defined as workmen. If an employer was to terminate such an employee's contract, the employee could challenge the action as the termination would only be possible with the labour department's permission.

"That's crazy," says the in-house lawyer of an Indian company who wishes to remain anonymous. "Leaner organizations mean less managerial and supervisory roles," he says. "More senior people, more subject matter experts and more individual contributors are coming in as specialists at very high salaries who by no stretch of the imagination can be considered workmen. This is a fundamental change which is needed."

A holistic view

Whether Nokia will succeed in freeing its assets from India's clutches is anyone's guess. From a labour law perspective, the case highlights the rigidity and painfully slow procedures attached to India's employment laws, especially in terms of retrenchment, which seem to be at odds with the country's ambitions to ramp up manufacturing.

The Prime Minister's Office recently sent a letter to the chief secretaries of all states suggesting they follow the example of Rajasthan, where state laws have been amended so that government approval for dismissal is only required for industrial operations with 300 or more workers (rather than the original 100). This may be a step in the right direction, but how meaningful is it?

Observers also say India needs to reconsider its treatment of companies such as Nokia, which for many years provided jobs directly and indirectly to at least 15,000 people, as its actions could jeopardize any future investment.

"You have to ask, are the government departments working in silos?" says the in-house counsel at an Indian company. "They clearly are, because they are not speaking to each other." He points out that Nokia was awarded state prizes for excellence and exports during the period when the Tamil Nadu government filed the sales tax case against the company.

"Had the tax man been speaking to the labour guys or vice versa, the government would have been able to take a more comprehensive view on whether the claim was valid, and how it would affect the economy of the region and the company," he says. "Reforming labour law is not just about changing the definition of a 'workman'. It is far more than this." ■

Trouble on the shop floor

How do you prevent labour unrest and trade union backlash?

Trade unions are often blamed for the labour unrest in India's manufacturing districts, but experts say it is possible for managers and workers to coexist and understand one another's viewpoints if the relationship is nurtured at an early stage.

"From an investor's point of view workforce considerations should be a priority from the beginning of the business planning and strategy phase," says Jasmeet Wadehra, the general counsel at International Paper in Hyderabad. Wadehra says the focus on employees is usually inconsequential with companies prioritizing cash returns, exit plans, dividends, capital structures and tax planning. "Employee management takes a back seat and that's a big mistake," he says. "We need to understand where to get good talent and that can influence where to locate your operations. It boils down to the cultural and social landscape that employees come from, which affects productivity, morale and industrial relations in general."

Vijayshyam Acharya, the legal counsel at OnMobile, suggests "an intelligent mix of three or four solutions", to effectively deal with your workforce. "It is not advisable to contractually curtail rights that the workforce is entitled to." He says higher workforce productivity with proper checks and balances can be achieved by employing a diverse and heterogeneous workforce where the composition is a mix of men, women, employees from different communities and apprentices. "Compared with workers, apprentices and contract labourers are on a different footing," he says.

Acharya notes a high level of community bonding in rural India. "This is helpful and can be channelled to effective workforce contribution, but sometimes, there could be a preference in recommendations affecting larger common interests," he says. Such preferences may become stronger if labour unions become associated with local politics, which linked with community dynamics, could leave management with challenging demands if handled carelessly. "The key to conflict resolution largely lies in appreciating the inter-community and intra-community cultural mindset and ideologies to create a win-win situation. Management can ill-afford to be indifferent to, or dismissive of the underlying cultural framework."

"The key mantra to avoid any trouble is to win the hearts of employees," says Wadehra. "Very often, money is not everything. You may offer a large pay packet only to find yourself facing the same problems six months later." In addition to the right cultural and social environment, he suggests that employers focus on the skill development and growth of employees, training, job security and family welfare.

Educating employees about their rights also puts managers in a positive light. One of the biggest challenges is getting the trade unions to understand the management's perspective. "They are largely confined, sometimes by design, to shop floor issues," says Wadehra. "They rarely have insights into the overall management strategy and business plans … Management is to be blamed to some extent because they don't want them to share in the business spoils."

According to Wadehra, the labour unions in Gujarat are benign in comparison to other parts of India partly because the workforce participates handsomely in the growth process through either direct or indirect compensation. Acharya notes that worker apprehensions often stem from a lack of proper knowledge. "Educating workers with transparency and clarity on what exactly they are entitled to is essential to build trust," he says. "There is a need for engagement via discussion platforms for them to rest assured that they aren't being cheated."

Savitha Jagadeesan, a partner at Kochhar & Co in Chennai, says imparting such knowledge is not always difficult, especially in the south of India where the workforce is often well educated. She warns, however, that employers should be realistic about their promises, even while a company is growing. "You need to keep your eyes and ears open," she says. "Complacency should not set in. Nokia never considered what path it would take if things went wrong. They had issues with labour but they doubled and tripled salaries." She advises drawing up a contingency plan, conducting workshops to educate employees about their rights, and adopting a strong policy in the event of a business meltdown.

Lawyers both at law firms and in-house say that they should be the last port of call during a labour dispute. "Human resources and lawyers should be the very last teams to be involved as they will often create more problems than solutions," says Wadehra. "Managers should think from a business perspective. They have an inherent right to think about productivity and employee contribution, but they are equally responsible and accountable for ensuring employee development, happiness and social and cultural alignment."

Adds Shukla Wassan, the executive director of legal and company secretary at Hindustan Coca-Cola: "Treat your labour force with dignity. Start thinking that the labour force is a major contributor to your growth. Provide a reasonable amount of amenities and treat your workers fairly."

Road map for reform

Lalit Bhasin, the president of the Society of Indian Law Firms, explains why he now supports the phased entry of foreign law firms

The government of India, in consultation with the country's legal profession, is in the process of formulating its position with regard to opening the legal services sector to foreign legal practitioners. The government is of the view that the competitiveness and attractiveness to foreign investors of India's manufacturing sector will improve only if we improve the quality of our services sector. We thus need to introduce reforms in our legal services market. The government has underlined the need to ensure that any such reforms are gradual and calibrated. This is particularly important given the sensitivities of the legal fraternity on this issue.

The government has set up a high profile inter-ministerial group (IMG) under the chairmanship of Rajeev Kher, the commerce secretary, to prepare a road map for reforming and opening the legal services sector in India.

The road map will comprise two broad phases. Phase I will introduce domestic regulatory reforms and the simultaneous partial liberalization of the sector, including the opening up of international arbitration and mediation services and advisory services in foreign law and international law. The opening up is likely to be spread over a period of five to seven years. Phase II will go a step further with the proposed opening of certain advisory and non-litigious services in Indian law.

It is clear that the road map will not include any proposal to open representational or litigious practice of any law, including Indian law, to foreign competition. It is also important to note that every stage of the reform process will be subjected to the regulatory oversight of the Bar Council of India (BCI), which is the regulatory body for India's legal profession.

The road map will not prescribe details such as the scope of practice that may be undertaken by foreign lawyers and law firms, the titles that may be used, the disciplinary rules, the number of years of prior practice experience required, etc. These important issues will be under the strict remit of the BCI.

The Society of Indian Law Firms (SILF), of which I am the president, has informed the IMG that Indian law firms are now ready for a phased sequential approach to the entry of foreign lawyers and law firms.

SILF vehemently and successfully opposed the entry of foreign law firms for nearly two decades, and I have previously written for the pages of this magazine opposing any such entry. During this period India's legal profession has experienced monumental growth, not only in terms of the number of lawyers and law firms, but also in terms of the quality of services provided.

Indian law firms are now second to none in the world in terms of their knowledge, efficiency, research, competence, use of technology and speed of disposal. One can now say with daring certainty that given a level playing field, Indian law firms can successfully stand up to the competition from foreign law firms, as long as their entry is managed in a phased sequential manner.

Even the BCI has indicated that it is now ready to discuss the road map for legal reform, as long as the plans are calibrated to meet the requirements of the various stakeholder groups. The Department of Legal Affairs of the Ministry of Law and Justice, meanwhile, has stated that it will be guided by the advice of the BCI.

It must be emphasized that India's legal community will not agree to any proposal that will result in commercialization of the profession. In other words, SILF is not in favour of foreign direct investment being allowed in the legal sector and profits being shared as dividends, as they are in corporate bodies, which is very common in the case of law firms in the UK. SILF is also opposed to the entry of multidisciplinary practices (MDP), where lawyers and other professionals, such as accountants, practise together. While the Indian legal services sector is prepared to face competition from foreign law firms, allowing MDP firms would open the door for the "Big Four" accountancy firms to enter India's legal services sector.

The BCI is of the view that under the five year integrated law courses in India, students are already getting sufficient exposure in fields like economics, accountancy and commerce, and hence the need to permit MDP firms is not felt. Furthermore, law firms in India take recourse to lateral assistance where required.

It is heartening to note that the road map being prepared by the government will mention that access to foreign lawyers will be subject to the principle of reciprocity. The implementation of this principle will be best addressed through mutual recognition agreements, the negotiation of which will come under the sole remit and prerogative of the BCI. SILF and the BCI are in complete agreement with this approach.

In terms of the domestic regulatory reforms that will accompany the phased opening of the profession, the BCI and SILF both favour permitting Indian law firms to issue brochures, build websites, access bank finance, increase the limit of professional indemnity and structure their practices as limited liability partnerships.

The initiative to liberalize India's legal profession is timely, topical and significant. The discussions with stakeholders are ongoing and a clearer picture will emerge once the road map is ready for further deliberations by the IMG, the BCI and SILF. ■

Lalit Bhasin is the president of the Society of Indian Law Firms.

A busy corridor

Outbound investment from India to the Middle East is gathering pace. What are the trends and where is the activity?

Rebecca Abraham investigates

Lawyers in the Gulf states, and the Middle East in general, speak of an upswing in India-related transactions. While some say this is on account of a renewed interest in India following the change in government, others such as Jayshree Gupta, a Dubai-based partner at Baker & McKenzie Habib Al Mulla, say it is due to outbound investment from India.

"A lot of companies know they cannot expand in India and are looking outward," says Gupta, who adds that Indian companies "are looking at or using Dubai" as a hub for their growing Africa business.

"We definitely see a rise in the demand for work visas in the recent few months," says Amit Acco, a partner at Tel Aviv-based Kan-Tor & Acco, which provides legal assistance with obtaining work visas in Israel. "The establishment of the new government and the positive attitude towards Israel has contributed to the boom."

Meanwhile at Ankara-based Uslu Law Firm, lawyer Kerem Uslu says the amount of India-related work he is doing is increasing as there has been a "valuable relationship between Turkey and India" for the past five years.

A lot of companies know they cannot expand in India and are looking outward

Jayshree Gupta
Partner
Baker & McKenzie Habib Al Mulla

Practitioner's perspective

A tale of two countries

Jayshree Gupta at Baker & McKenzie Habib Al Mulla contrasts the UAE and Indian legal systems

BAKER & MCKENZIE

Dubai
T: +971 4 423 0000

Email:Jayshree.Gupta@bakermckenzie.com

Jayshree Gupta

The ties between the UAE and India, which have existed from ancient times, are stronger than ever. India's new prime minister, Narendra Modi, is prioritizing investor sentiment in the Gulf Cooperation Council (GCC) countries and the UAE has once again become an interesting proposition for Indian investment.

The UAE – with its political stability, internal security, investment-friendly policies, advanced infrastructure, and a dynamic open market approach – fits the bill perfectly for Indian investors and companies expanding into the region. All of these advantages are complemented by a zero per cent tax regime and possibility of full repatriation of capital.

But doing business in the UAE is not without its challenges, and having local help is crucial.

Common law v civil law

While India follows a common law system, the UAE is a civil law jurisdiction and its legislative framework is based on Egyptian laws.

The difference between the two systems lies in the main source of law. In addition, while precedent has great importance in common law systems, it is used only as guidance in civil law systems. As such, two cases with the same issues may have different outcomes in a civil law system as the interpretation of the judge handling the matter is all important and an earlier judgment is not binding.

In the UAE, this difference can be mitigated as parties can chose to litigate commercial disputes in the courts of the Dubai International Financial Centre (DIFC), even when the businesses are based outside the DIFC. The DIFC courts are an independent, common law judicial system that use English as the main language. Other UAE courts use Arabic.

The DIFC courts form part of the Dubai legal system. Its judgments are enforceable in Dubai and in the six other emirates of the UAE. DIFC judgments may be enforced in the Dubai courts if the judgment is final, translated to Arabic and certified by the DIFC courts for execution.

Principle of good faith

In the UAE civil law there is an overriding principle that parties must act in good faith in the performance of contractual obligations. However, the Indian legal system does not recognize this principle of good faith, with the exception of in "relational contracts" where there is a fiduciary relationship. This inconsistency, if not considered, may create additional obligations for contracting parties in the UAE.

Ownership in a company

The UAE Commercial Companies Law No. 8 of 1984 requires that UAE nationals, or companies wholly owned by UAE nationals, must own at least 51% of the capital of any company formed in the UAE. As such, the normal maximum permitted foreign ownership in a company formed under the Companies Law is 49%, and pursuant to other applicable laws, regulations and policies, the permitted foreign ownership threshold may be lower for companies engaged in certain types of activities. Investors may find it more appealing to establish a presence in the free zones, where they are not subject to such restrictions.

There are a number of methods to minimize the risks associated with minority ownership and to channel benefits to the minority shareholder (e.g. entry into shareholder's agreements, management contracts, supply contracts, etc.).

Real property ownership

Except in certain designated areas or certain free zones, real property may only be owned only by UAE nationals (or nationals of other GCC countries) or entities that are wholly owned by such persons.

Corporate governance

The UAE has seen advances in corporate governance over the past few years. However, there is no binding comprehensive corporate governance code and this area of law, unlike in India, is unsophisticated and evolving.

It is also worth noting that rules and regulations in the UAE can change without prior public proclamation, and that the intricacies of procedure may vary in practice. Investors will benefit greatly from having a trusted local partner that can help navigate the business and legal environment.

Outlook

In 2013-14, investment to the UAE accounted for 4.9% of outward investment from India, making it one of India's largest trading partners. The strong cultural, political and trading ties between the two countries, the UAE's favourable investment environment, and the significant economic benefits that Dubai is expected to realize from hosting Expo 2020, makes investing in the UAE a good choice for Indian investors with the right local knowledge.

Jayshree Gupta is a partner at Baker & McKenzie Habib Al Mulla, based in Dubai.

There is lot of interest in India in investing in Oman

Jeffrey Rodwell
Partner
Duane Morris

More widespread

The UAE, Israel and Turkey are not the only jurisdictions seeing a rise in India-related activities.

Jeffrey Rodwell, a Duane Morris partner at the Dr Said Al Mashaikhi & Partner Law Firm, which represents Duane Morris in Oman, says "since the elections and the coming of [prime minister Narendra] Modi, I have been much more interested in India".

Rodwell reports that Duane Morris has recently been empanelled by India's Oil and Natural Gas Corporation (ONGC) and ONGC Videsh, which have concessions in Oman. He adds that "there is lot of interest in India in investing in Oman," focused mainly on the manufacturing and chemicals sectors.

Other lawyers in Oman echo his sentiments. At Dentons, managing partner Paul Sheridan says that India-related work is increasing. The firm has had an office in Oman since the 1980s, and has other offices across the Middle East – in the UAE, Saudi Arabia, Qatar, Jordan, Lebanon and Egypt.

Sheridan says the firm assisted with the transfer of shares owned by Indsil, a company listed on the BSE in Mumbai, in its Oman-based joint venture. The transaction was not straightforward due to the regulatory regimes in both Oman and India.

Dhana Pillai, a Muscat-based lawyer at Dentons, explains that having "an established relationship" with the concerned ministry helps in obtaining the go-ahead in such cases.

Visa worries

Curtis Mallet-Prevost Colt & Mosle, which prides itself as being the only licensed US law firm in Oman, has also seen an increase in India-related work. However, Muscat-based associate Akanksha Choubey points out that Oman has recently tightened up on work visas for expatriates.

Since 1 July 2014, the Ministry of Manpower has been enforcing a restriction on visas for expatriates who had previously worked in Oman and had been out of the country for less than two years. Although this is in accordance with article 11 of the Expatriate Residency Law of 1995, this provision had not been strictly adhered to until July.

"It is a significant change from an investor's point of view," says Choubey, who is one of three India-qualified lawyers at Curtis in Oman.

Obtaining visas for expatriates is a concern also in Israel, where Acco at Kan-Tor & Acco says there is a "high level of cross-investment" with India and as a result a movement of professionals.

"The main barrier toward implementation of IT projects in Israel is the visa requirements," remarks Acco, who says his firm works with major Indian and multinational companies, including NaanDanJain Irrigation, a subsidiary of BSE-listed Jain Irrigation Systems.

Blossoming relationship

Acco says new regulations that should ease movement of professionals into Israel are expected. He believes this will give many companies the confidence to make cross-border investments as they will be able to move key personnel.

Symbolic of the changing relationship between Israel and India is Tata Sons' US$5 million investment in April 2013 in a technology transfer company at Tel Aviv University. This was seen as a sign of Israel looking beyond its traditional partners in the US and Europe.

Yet Sun Pharmaceuticals acquired a majority stake in Israel's Taro Pharmaceuticals some years earlier – an effort that began in 2007 and ran into considerable legal disputes.

"This has probably been the largest investment in Israel by any Indian company," remarks Clifford Felig, a partner at Meitar based in Ramat Gan outside Tel Aviv, who has been counsel to Sun Pharmaceuticals from the beginning.

Felig, who heads Meitar's India practice, says he has seen an increase in interest and transactions and that "Israel is very much on the map for Indian law firms". He finds that Indian investors are careful about doing their due diligence, unlike Israeli clients who "may jump first and look later".

Defence is another area where the relationship between the two countries has blossomed and not just since the change of government in India. In October 2013, the Foreign Investment Promotion Board gave Pune-based Bharat Forge the go-ahead to sell a 26% equity stake in its BF Elbit Advanced Systems subsidiary to an Israeli company, Elbit Systems.

The main barrier towards implementation of IT projects in Israel is the visa requirements

Amit Acco
Partner
Kan-Tor & Acco

Practitioner's perspective

Riding the UAE building wave

Opportunities abound for Indian companies but as Sachin Kerur explains, understanding the rules is vital

Pinsent Masons
بنسنت ماسونز

Dubai
T: +971 4 373 9600
Email: sachin.kerur@pinsentmasons.com

Sachin Kerur

Only too aware of the need to diversify their economies, the Gulf Cooperation Council (GCC) states are planning significant development projects, even as oil prices decline. National governments will embark on massive construction and infrastructure procurement programmes. This provides Indian companies with enormous growth opportunities.

The primary destination of Indian know-how and ambition will continue to be the UAE, where the value of announced and planned construction projects hit $300 billion last year. The spending will continue as the country's infrastructure spending matches its development aspirations. So what are the basics to be aware of?

High quality engineering consultancy (in the UAE it includes architectural design) and contracting businesses are highly regulated in the UAE. Individual emirates have their own regulations and a designer or contractor wishing to work in an emirate must be licensed in that emirate.

A key consideration for designers or contractors is the type of investment vehicle to be established. While in Dubai, a design business can generally only operate through a civil company (akin to a partnership) or a branch of a foreign company, in Abu Dhabi it can be undertaken by a limited liability company that is 51% owned by an Emirati national, or a branch of a foreign company. Contractors can be established as a limited liability company or a branch of a foreign company in both Dubai and Abu Dhabi.

To tender for contracts companies must go through an approval process (in Abu Dhabi known as 'classification' and in Dubai as 'Dubai Municipality approval') by the relevant authority. There are various grades of approval depending on the nature and value of the work being undertaken.

UAE construction projects must employ a minimum number of labourers. This depends on the contractor's grade of classification and not on the specific project. In terms of 'emiratisation' policies, while there is a requirement for companies of a certain size to employ a minimum number of emiratis in professional roles, there is no such requirement for construction projects.

Where businesses operate without the adequate licences or approvals, sanctions including suspension of licence and fines could follow.

Construction contracts

Construction contracts used in the UAE are predominantly from the FIDIC suite, as published by the International Federation of Consulting Engineers. For traditionally procured projects (design-bid-build), the FIDIC 1999 Red Book is the most common form, whereas for design-and-build, the FIDIC 1999 Yellow Book is used. Bespoke contracts are more common for infrastructure and EPC projects, but often use the FIDIC 1999 Silver Book form.

The standard FIDIC risk allocation is almost always adjusted to allocate more risk to the contractor and remove obligations usually imposed on the engineer or employer. The risk adjustment can create what is effectively a bespoke contract with a FIDIC badge. Contracts in the UAE need not be drafted in Arabic. English is the more common contractual and business language. Apart from contracts with Dubai government entities, there are no restrictions on choice of law or dispute resolution venues or procedures under UAE law. Article 19 of the UAE Civil Code recognises the right of parties to agree that foreign law will govern a contract, while article 203 of the UAE Civil Procedures Law recognises that parties may agree that disputes arising between them be submitted to one or more arbitrators.

The default mechanism for resolving disputes is the local courts, where proceedings are conducted in Arabic. There are limitations on the rights of audience before Arabic courts and only UAE nationals or a small number of senior Arab advocates with special licences can represent litigants. Cases take a minimum of six months and often up to 12 months to reach first judgement, and may be subject to more than one round of appeal.

Projects which are particularly liable to give rise to complex, technical disputes have an arbitration clause. Where there is a clear reason for a dispute to be dealt with in a non-public forum, parties are also likely to opt for arbitration.

The UAE hosts three arbitration centres and has signed the New York Convention on the Recognition and Enforcement of Arbitral Awards, 1958. Therefore, where an agreement to arbitrate is clear, the courts will uphold it and if an agreement specifies that arbitration will be governed by a particular body of rules, those rules will be applied.

In practice, most Dubai-based employers and developers seek to ensure that arbitration is held within the UAE and that a set of domestic arbitration rules will apply. While it is not unknown to specify a law other than the national laws of the UAE as governing a dispute, this can lead to conflicting terms where the project works are based in the UAE and subject to UAE laws and regulations.

Sachin Kerur is head of the Middle East region for Pinsent Masons.

Israel is very much on the map for Indian law firms
Clifford Felig
Partner
Meitar

More recently, Modi's cabinet reportedly cleared a long-delayed purchase of Israeli missiles for the navy and in October 2014 the government closed a US$520 million deal to buy Israeli anti-tank missiles. Soon after it was reported that an aerial defence system developed jointly by India and Israel had passed a major trial.

"We are recently seeing a lot of interest in cyber security," says Jay Kupietzky a partner at Tel Aviv- based Herzog Fox & Neeman, who reports that he assisted with a large joint venture between an Israeli company and a Tata company in the field of security.

Commenting on the challenges faced by Israeli investors looking to invest in India, Kupietzky remarks that Israelis are "somewhat fearless" and while they may not be intimidated by the legal and regulatory complexity of India, they are concerned. "What they are tempted by is the seemingly endless market."

Politics of investment

The story is different across the border in Egypt despite strong ties between the two countries.

"The recent events and political unrest has impacted all inbound foreign investments," says Khaled El Shalakany, the managing partner at Shalakany Law Office in Cairo. He adds that Oberoi Hotels, which until recently managed the Mena House Hotel in Cairo, had been a client for decades. The Oberoi Group continues to have other hotel interests in Egypt.

Despite the political turmoil, Ramez Kozman, a trademark agent at Halim & Associates, a Cairo-based intellectual property firm, says interest in the Egyptian market is increasing and that the firm has "registered many trademarks of Indian companies in Egypt and some Middle East countries".

Major Indian investments in Egypt include TCI Sanmar Chemicals at Port Said, Dabur Egypt, and Egyptian India Polyester Company.

Understanding the political necessities of the jurisdiction and factoring them into the business plan is particularly important in Saudi Arabia, where Stephen Matthews, a partner at Baker Botts in Riyadh, says a priority for the government is providing good jobs and training opportunities for Saudi Arabian nationals and the "Saudization requirements will only increase over time".

As such, Matthews cautions that any Indian company planning to invest in Saudi Arabia needs to make the recruitment, training and retention of Saudi Arabian nationals a top priority. "Failure to emphasize this in one's business plan for Saudi Arabia may jeopardize the entire investment."

A notional majority

Meanwhile, with bilateral trade between the UAE and India set to pass US$60 billion in 2013-14, Dubai and Abu Dhabi continue to be key destinations for outbound investment from India.

Lawyers at Norton Rose Fulbright, which has offices in Abu Dhabi and Dubai, say that the potential renewal of onshore and offshore oil and gas concessions in Abu Dhabi could create opportunities for new entrants. According to Patrick Bourke, head of the firm's Dubai International Financial Centre practice, and Sherina Pettit, a London-based partner, investments in renewables will also be attractive as there have been "large commitments in alternative energy through major initiatives in both Abu Dhabi and Dubai" and Abu Dhabi is expected to enact a regulatory framework for renewables.

Be that as it may, Gupta – who has been practising in the UAE for nearly 20 years and who recently joined Baker & McKenzie Habib Al Mulla with plans to "grow the portfolio of Indian clients on the outbound side" – flags compliance with Dubai's Commercial Companies Law, which limits foreign participation to 49%, as a challenge.

Other Gulf states also have such restrictions. In Qatar Abdul Rasheed, a legal consultant at Doha-based Law Offices of Abdul Majdalany, says the firm routinely provides advice on setting up a business. "We advise on ways to minimize the risks involved in investing in a jurisdiction which allows only up to 49% foreign investment."

While this inevitably raises issues of control and management, Gupta and others point out that innovative structuring of investments can safeguard investor interests.

"This is a difficult concept to get across to the clients," say Manish Narayan and Maymoona Talib, who co-head the India desk at Galadari, a 75-lawyer UAE-based firm.

Part of the difficulty arises because the innovative structures put together require the investor to take on certain

We [in Israel] are recently seeing a lot of interest in cyber security
Jay Kupietzky
Partner
Herzog Fox & Neeman

risks. Vivek Agrawalla, a Dubai-based associate at Afridi & Angell, explains that these risks typically arise because "side agreements" reached between the majority shareholder and the investor – necessary to overcome the limit on foreign participation – are not registered or notarized.

"In case there is a dispute and if there is a challenge of the document [formalizing the side agreements], enforceability may be doubtful," says Agrawalla. "This is the calculated, commercial risk that the investor takes."

In addition, lawyers at Galadari warn potential investors that "the UAE is a civil law jurisdiction, court proceedings are in Arabic and there is no system of binding precedents".

Despite all of this, Galadari reports that its India-related work is rising, not least because of "proximity to India" and "the straightforward legal and regulatory regime of the UAE".

Good times roll on

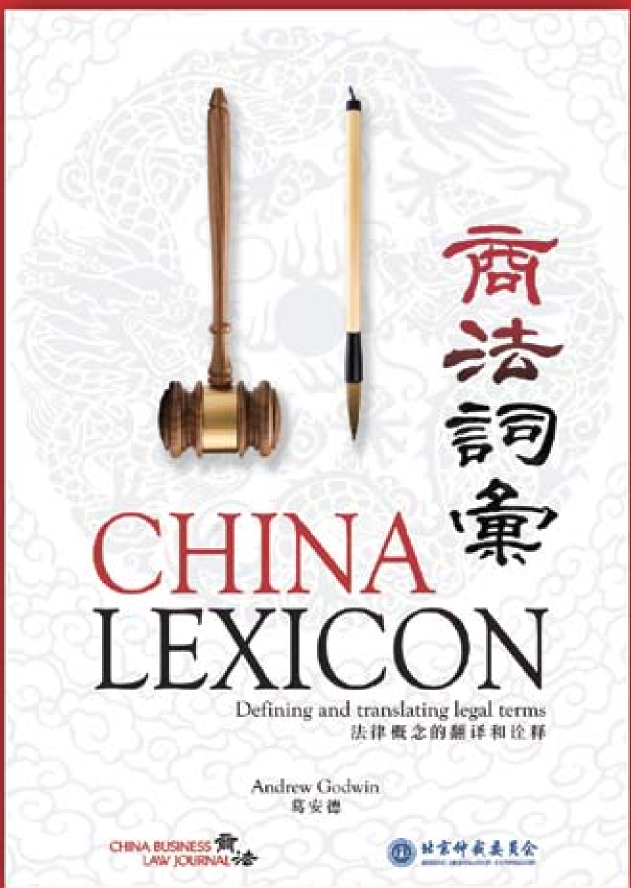
With the largest Indian companies routinely investing in assets throughout the Middle East and North Africa, National Bank of Abu Dhabi is getting ready to join Abu Dhabi Commercial Bank and Dubai-based Mashreq as the third UAE bank with a presence in Mumbai.

A US$27 million Saudi-India joint venture in a free trade zone in Dubai has reportedly made Dubai the largest hub for storage and distribution of Basmati rice in the Middle East and North Africa.

And according to Gupta at Baker & McKenzie Habib Al Mulla, international investors – many based in the Middle East – are saying "let's dust off our India business plan and talk to the joint venture partner".

The next few months will tell whether the talking leads to more transactions for lawyers across the region and in India. ■

> If there is a challenge of the document [formalizing the side agreements], enforceability may be doubtful
>
> Vivek Agrawalla
> Associate
> Afridi & Angell



New from the publisher of
India Business Law Journal

China Lexicon is a unique bilingual guide to the complex issues that arise when translating legal terms and definitions from English into Chinese and vice versa. It provides insightful analysis of key terms, phrases and principles in Chinese and English-language legal terminology, as well as the issues and nuances that come into play when translating them.

The author, Andrew Godwin, is a former partner of Linklaters who spent more than a decade in China and is currently an associate director of the Asian Law Centre at Melbourne Law School in Australia.

China Lexicon is the perfect desktop companion for all legal professionals, from academics and lawmakers to in-house counsel and partners at regional and international law firms. It is also of considerable value to law students.

Hardcover • 220 pages
US$138 • Free worldwide delivery

Order your copy now at
www.vantageasia.com
or call +852 3622 2623

Vantage Asia

How Tata tapped the debt markets

Capital raising requires gumption and out-of-the-box thinking. Rebecca Abraham reports on a hybrid bond issue that showed both

New paths are being charted as Indian companies seek to take on more debt, often to repay existing debt, from sources other than banks.

In November 2014 Tata International, the global trading arm of the Tata Group, issued S$150 million (US$110 million) in perpetual bonds priced at 6.65%. The issue, which was done through Tata International Singapore, was the first perpetual bond issue by an Indian company in the Singapore debt market.

Perpetual bonds have no fixed maturity date. Indian companies that have issued them elsewhere include Ballarpur Industries – in April 2011 through a subsidiary in the Netherlands – and Reliance Industries in January 2013. Indian banks have also issued perpetual bonds.

The nitty-gritty of the Tata International issue was however unusual. In what may be a first for perpetual bonds issued in Singapore, the bonds were guaranteed by the Singapore issuer's parent company, Tata International. Both companies are privately held and unrated.

"The guarantee was given by the Indian parent in order to link the Indian parent to the issuer," explains Philip Lee, a Singapore-based partner at Herbert Smith Freehills, who led the team that advised the underwriter, HSBC, as the sole international counsel on the transaction. "The credit was the Indian parent."

But there lay a catch. Indian regulations do not allow an Indian company to give its overseas subsidiary an unlimited guarantee or one that is open-ended, as would be expected for a perpetual bond.

"Indian regulations on guarantees are slightly unique … we haven't come across this [limit on guarantee period] before," remarks Lee, who was assisted by sen-

LEGAL CONFEX

BUYERS AND SERVICE PROVIDERS MEET IN THE LEGAL INDUSTRY

28 APRIL 2015

INDIA HABITAT CENTER, NEW DELHI, INDIA

www.legalconfexdelhi2015.com

Organised By

GOAL

Global Outsourcing Association of Lawyers

Event Management Partner

EVENTS 4 SURE

Topics to be discussed at the ConfEx

- Litigation
- Intellectual Property
- Compliance
- Risk Management
- Legal Outsourcing
- Dispute Resolution
- Data Security
- Mergers and Acquisitions
- Contract Management
- Anti Fraud Awareness

Venue

Habitat World at India Habitat Centre
Convention Centre
Lodhi Road
New Delhi – 110003
Website: www.habitatworld.com

Who will attend the Legal ConfEx?

- In-house Counsel
- General Counsel
- Chief Legal Counsel
- Law Firm Partners
- Law Firm Associates
- Government Representatives
- Company Secretaries & Managers
- Law Firms Managing Partners
- Heads of Legal Depts
- Directors of Legal Administration
- CEOs and Directors of LPO Companies
- Directors of Legal Services
- Directors of Legal Operations
- Attorneys/Solicitors/Paralegals
- BPO/FPO/KPO Industry Top Brass
- Technocrats from the Legal Industry
- Executives - Legal Software Companies

Free Registration

FOR DIRECT REGISTRATION UNDER THE COMPLIMENTARY SILVER CLASS CATEGORY, CALL US AT +91-11-45149995 OR WRITE TO US AT INFO@EVENTS4SURE.COM

Other Benefits:

FOR MORE DETAILS ABOUT THE GOLD CLASS CATEGORY AND OTHER OPPORTUNITIES, WRITE TO US AT INFO@EVENTS4SURE.COM OR CALL US AT +91-11-45149993

Pre and Post Event activities include: Delhi Excursion, Law Firm & LPO Office Tours and a Visit to Taj Mahal

For more details please visit
www.legalconfexdelhi2015.com
www.connect-goal.com
www.events4sure.com

info@events4sure.com
+91-11-45149993

Indian regulations on guarantees are slightly unique … we haven't come across this [limit on guarantee period] before

Philip Lee
Partner
Herbert Smith Freehills

ior associates Gareth Deiner and Preeti Kamat, associate Nupur Kant and trainee Emma Reid.

Indian regulations stipulate that the amount and period of a guarantee must be specified upfront, and that prior approval from the Reserve Bank of India (RBI) must be obtained if the amount of the guarantee is to exceed 400% of a guarantor's net worth and also US$1 billion in a financial year.

Regulations governing overseas direct investments by Indian residents and issuances of guarantees by Indian companies in favour of their overseas subsidiaries include the Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004, and the RBI's Master Circular on Direct Investment by Residents in Joint Venture/Wholly Owned Subsidiary Abroad.

With the guarantee amount expected to breach the net worth limit, RBI approval was obtained in September 2014. Tata International's guarantee was set at 175% of the outstanding principal amount of the securities being issued, for an initial period of 10 years.

"There was some thought that the RBI would not approve a request for a perpetual guarantee, whereas it would approve a request for exceeding of the net worth criteria," remarks Srinivas Parthasarathy, a partner at Trilegal who, along with associate Albin Thomas and then-senior associate Priyanka Kumar, advised Tata International on the application to the RBI.

A team from Rajah & Tann which comprised partners Abdul Jabbar, Xin Mei Lee and Cheryl Tan advised HSBC on Singapore law.

Tying down the fine print

But more needed to be done for, as Lee at Herbert Smith Freehills explains, a 10-year guarantee "doesn't gel with a perpetual".

SAMVĀD: PARTNERS

"Deals of the Year 2014"
- India Business Law Journal

- Flipkart's acquisition of Myntra
- Investment by Ascent Capital and IDG Ventures (India) in Newgen Software Technologies Limited
- Series F investment into Snapdeal

"Very responsive," "Hard-working, diligent team; with the ability to negotiate a win-win outcome for all parties involved."

- Chambers Asia Pacific 2014

PRACTICE AREAS

Anti-Corruption and Corporate Governance . Banking & Finance . Commercial Real Estate . Competition Law . Dispute Resolution – Arbitration & Litigation . General Corporate Advisory . Human Resources & Employment . Infrastructure . Intellectual Property . Mergers & Acquisitions and Joint Ventures . Private Equity & Venture Capital . Technology, Media & Telecommunication .

BANGALORE
+91 80 4268 6000 . infoblr@samvadpartners.com

CHENNAI
+91 44 4306 3208 . infochn@samvadpartners.com

MUMBAI
+91 22 6104 4000 . infomumbai@samvadpartners.com

NEW DELHI
+91 11 4601 4220 . infodel@samvadpartners.com

www.samvadpartners.com

The anomaly of a fixed-term guarantee for a bond that has no maturity date was overcome by including a covenant that requires Tata International to "use its best endeavours to maintain in force and effect" the RBI's approval of the guarantee. Accordingly, Tata International has agreed to go through the renewal process for each successive 10-year period following the initial 10-year guarantee period.

But what if Tata International breaches the covenant? The terms and conditions written into the issuance allow for a 5% increase or step-up of the price of the bonds in the event of a breach of covenant.

"The step-up reflects the lesser credit of the deal if it wasn't guaranteed," says Lee. "Investors are covered while the perpetual equity nature of the instrument is preserved and yet we have a covenant that incentivizes the company to go out and renew the guarantee."

The interest rate payable on the bond will increase by 5% also if the Tata Group is no longer in control of Tata International. When the offering circular of the issue was published on 30 October 2014, Tata Sons owned approximately 41.75% of Tata International and the Tata Group as a whole controlled almost 100% of its equity.

There aren't too many other Indian corporates that actually have the ability from a marketing perspective to carry this off

Srinivas Parthasarathy
Partner
Trilegal

Win-win situation

In general, perpetual bonds are considered as hybrids as they have some characteristics of both equity and debt. Hybrids are desirable as both ratings agencies and the tax authorities look on them favourably.

For evaluation by the ratings agencies the goal for the issuer is to obtain "equity credit". This depends partly on whether the issue has loss-absorbing features such as interest deferral.

The interest on Tata International's perpetual bonds is to be paid twice each year, but the company has the option to defer all such payments.

At the same time to ensure that interest payments are tax deductible the goal is to ensure that the issue has debt-like features. Tata International's perpetual bonds fulfil this criterion too.

"The issue is treated as equity for accounting purposes and as debt for tax purposes … it's half equity and half debt," remarks Lee, who adds that the issue improves the company's debt-to-equity ratio as it reduces debt and increases equity. "So in fact it strengthens the balance sheet of the company."

The offering circular indicated that for accounting purposes the bonds issued would be recorded as "equity" on the books of both Tata International Singapore and Tata International.

It also suggested that for taxation purposes the bonds would be regarded as "debt securities" by the Singapore tax authorities.

No rating?

Tata International acquired public funds for the first time in its history in April 2013, when it undertook a S$50 million fixed-term bond issue in Singapore. The 4.3% bonds due in 2018 were similarly guaranteed by Tata International.

Neither the fixed-term bonds issued in 2013 nor the perpetual bonds issued in 2014 have been rated by a rating agency. The offering circular for the 2014 issuance categorically stated: "The securities are not, and are not expected to be, rated by any rating agency."

"This deal and the one before was unique in that it was not rated and was quite successful," remarks Lee at Herbert Smith Freehills. "Normally bond issues are rated because it helps with marketing."

Even without the securities being rated investors appeared keen. *The Economic Times* reported that the perpetual bond issue was close to seven times oversubscribed.

"The market's acceptance of this mechanism bodes well for similar structures to be adopted in future," Lee told *India Business Law Journal* after the issue.

"The Tata name has a lot of credibility with investors," says Parthasarathy at Trilegal. "There aren't too many other Indian corporates that actually have the ability from a marketing perspective to carry this off."

Perpetual bonds issued in April 2011 by Ballarpur Industries were treated as 100% equity for accounting purposes and got 50% equity credit from rating agencies.

In a statement issued after the issue was priced the company said the issuance was expected to "improve the capital structure significantly".

Perpetual bonds priced at 5.875%, issued by Reliance Industries in 2013, were rated Baa2 by Moody's. In a statement before the issue, Moody's said: "Although the proposed bond is a perpetual instrument, it does not have any loss absorption features including coupon deferral."

More in the pipeline?

Trilegal and Herbert Smith Freehills were involved both times when Tata International tapped the Singapore debt market.

"In 2013 the company was testing the market, to see whether they are able to attract investors and because it was a successful offering they decided to go ahead and do a proper capital markets perpetual issue," says Lee.

As for the future, Parthasarathy at Trilegal says similar issuances are "unlikely" as only "very select" Indian companies "would be able to pull off an operation like this".

Lee is more upbeat. He reports that Herbert Smith Freehills has received "at least three new instructions" to do bond issues for Indian companies. ■

Indian Law Firm Awards

India Business Law Journal turned to in-house counsel and other legal professionals to help identify the leading law firms of 2014 in a wide range of practice areas

Rebecca Abraham reports

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

ABOUT THE FIRM

Economic Laws Practice ("**ELP**") is a leading full-service Indian law firm established in the year 2001 by eminent lawyers from diverse fields. ELP brings to the table a unique combination of professionals consisting of lawyers, chartered accountants, cost accountants, economists and company secretaries; enabling the firm to offer services with a seamless cross-practice experience and top-of-the-line expertise to its clients.

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

With offices in Mumbai, New Delhi, Pune, Ahmedabad, Bangalore and Chennai, ELP has a team of over 130 qualified professionals having professional acumen in diverse practice areas. The firm works closely with leading global law firms in the UK, USA, Middle East and Asia Pacific region enabling it to provide a pan India and global service offering to its clients.

ELP is the firm of choice for its clients due to its commitment to deliver excellence and is the proud winner of the ***Taxation Firm of the Year*** award in ***India Business Law Journal's Indian Law Firm Awards from 2009 to 2014***; and ***Competition & Antitrust Firm of the Year*** in ***India Business Law Journal's Indian Law Firm Awards from 2009 to 2011 and 2013 & 2014.***

OFFICES

MUMBAI
1502, A Wing
Dalamal Towers
Nariman Point
Mumbai 400 021
T: +91 22 6636 7000
F: +91 22 6636 7172
E: mumbai@elp-in.com

AHMEDABAD
801, Abhijeet III
Mithakali Six Roads
Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8
F: +91 79 6605 4482
E: ahmedabad@elp-in.com

DELHI
405-406
World Trade Centre
Barakhamba Lane
New Delhi 110 001
T: +91 11 4152 8400
F: +91 11 4152 8404
E: delhi@elp-in.com

PUNE
Suyog Fusion
7th Floor, No. 1
97 Dhole Patil Road
Pune 411 001
T: +91 20 4146 7400
F: +91 20 4146 7402
E: pune@elp-in.com

CHENNAI
No. 6
4th Lane
Nungambakkam High Road
Chennai 600 034
T: +91 44 4210 4863
E: chennai@elp-in.com

BENGALURU
6th Floor
Rockline Centre
54, Richmond Road
Bangalore 560 025
T: +91 80 4168 5530/1
E: bengaluru@elp-in.com

The year gone by was an interesting one for law firms across India. The buildup to the general elections in June saw India Inc holding its breath in anticipation of an end to the policy paralysis that had come to characterize the previous government. With a new government in place companies began relooking at plans for fresh investments and projects. Lawyers in turn rushed to be first off the block in providing advice.

Yet as Amit Chandra, the managing director of Bain Capital Advisors, says: "Law in India is a very tricky business, given immense ambiguities and process delays. It is critical to have a legal advisor who is extremely practical and multi-disciplinary, with a good geographical spread of capabilities."

It is against this backdrop that we present *India Business Law Journal*'s 2014 Indian Law Firm Awards. We identify one law firm of the year; six best overall law firms; six winners of equal standing in 19 practice areas; and highlight three best new firms.

Searching for the winners

The results are based on nominations made by India-focused in-house counsel and legal professionals in India and around the world. The nominations were considered in combination with other factors, such as each firm's landmark deals, cases and other notable achievements. Our editors also consulted widely with law firm clients and conducted reference checks on a large number of Indian law firms.

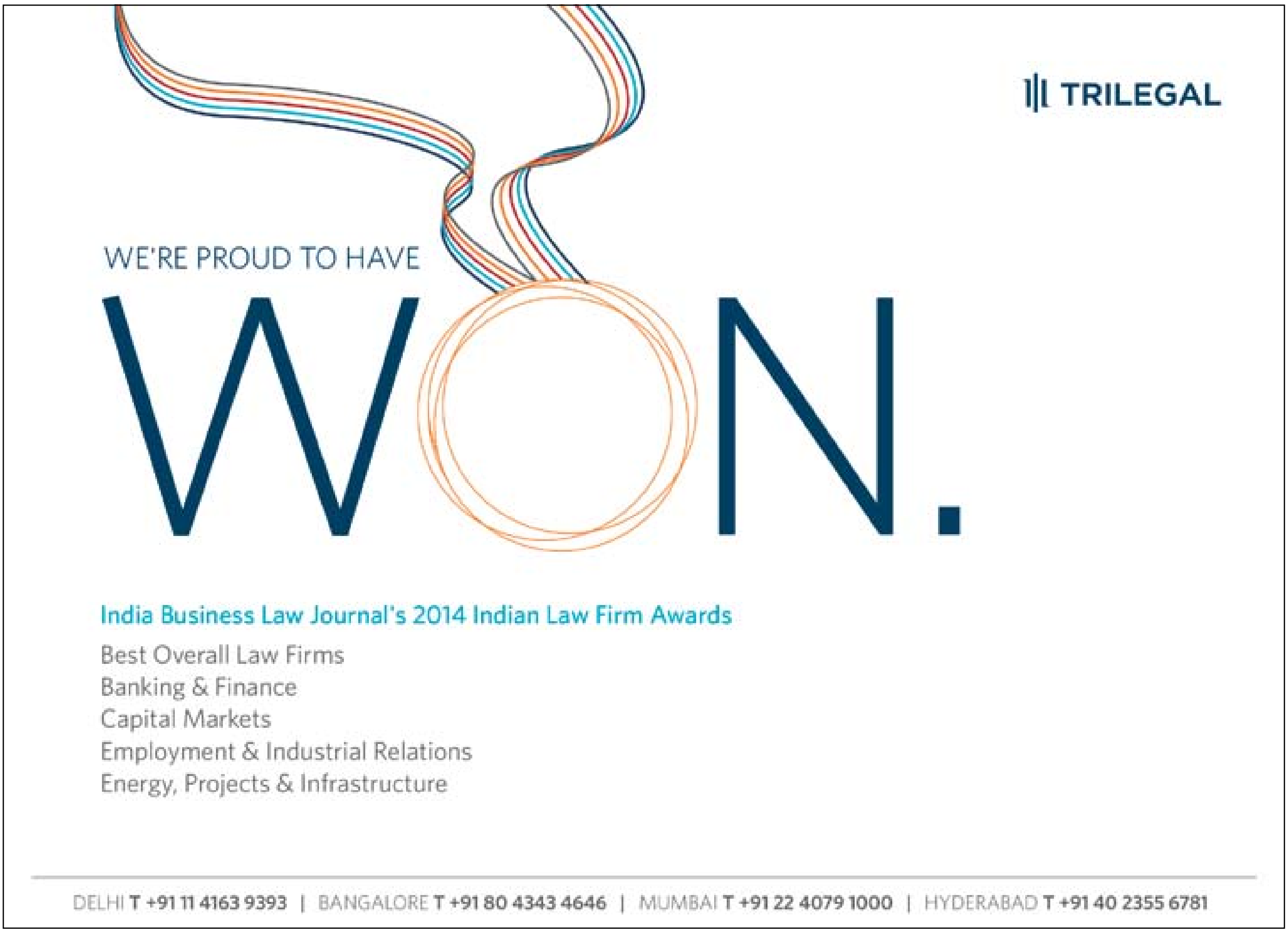
In determining the winners, our editorial team considered both prominent and smaller law firms, whose achievements sometimes go unnoticed. Our six best overall law firms rightly dominate the award tables. However, our winners also include mid-size law firms that are engaged for their legal expertise, commercial acumen and competitive pricing.

The views of some of the in-house counsel who participated in the awards process are included in this report. Many more shared their views, but requested that their comments remain confidential. A detailed account of the awards methodology is provided on page 55.

Law firm of the year

Winner
Amarchand Mangaldas

For the third year running this award goes to Amarchand Mangaldas. In 2014, the 700-lawyer firm with principal offices in Mumbai and New Delhi advised on some of India's most complex and high value transactions. Clients have included Ranbaxy and its erstwhile principal shareholder, Daiichi Sankyo, both of which were advised by lawyers from Amarchand's Mumbai office when Sun Pharmaceuticals acquired Ranbaxy. Lawyers from the firm's Delhi office are



advising the Gas Authority of India on a US$6 billion project that will see gas from Turkmenistan being shipped to India through pipelines traversing Afghanistan and Pakistan.

As a result of the formidable depth and breadth of the firm's expertise it was involved in 19 of *India Business Law Journal*'s 50 deals and cases of the year 2014 (see our December 2014/January 2015 issue). Amarchand Mangaldas also picks up 12 practice area awards in our Indian Law Firm Awards below.

The Delhi office of the firm reports that it "has been at the forefront of major regulatory developments". It provided input to the Law Commission during its recent review of India's arbitration laws. The firm's experience and expertise are routinely sought out when regulators need to give the go-ahead to deals such as the acquisition of Rio Tinto's coal assets in Mozambique by International Coal Ventures (ICVL). Sanjay Kassen, joint head of ENSafrica's India practice, who worked with lawyers from Amarchand's Delhi office on the transaction, says: "Amarchand, as Indian legal counsel to ICVL ensured that all regulatory approvals were obtained and was fundamental to ensuring the completion of our transaction."

The Mumbai office reports it advised on transactions that notched up a number of firsts. These included the first initial public offering (Sharda Cropchem) and the first rights issue (Tata Group's Indian Hotels Company) after relevant sections the Companies Act, 2013, came into effect. Jatin Jalundhwala, chief legal officer of Adani Enterprises, says the company has dealt with Amarchand's Mumbai office periodically and has been satisfied with its services.

Since November 2014, the two managing partners of the firm, Mumbai-based Cyril Shroff and Delhi-based Shardul Shroff, have been engaged in a high profile dispute over the will of their mother, Bharati Shroff. They are currently seeking to resolve the dispte through mediation (see page 5).

Best overall law firms

Winners
Amarchand Mangaldas
AZB & Partners
J Sagar Associates
Khaitan & Co
Luthra & Luthra
Trilegal

India Business Law Journal's list of best overall law firms has remained unchanged since we began the Indian Law Firm Awards. As such, for the seventh year running the best overall law firms of India continue to be Amarchand Mangaldas (as described above), AZB & Partners, J Sagar Associates, Khaitan & Co, Luthra & Luthra, and Trilegal.

AZB & Partners' team of experienced lawyers is sought after both by India Inc and international investors and companies. The 275-lawyer firm routinely acts on complex transactions and disputes and recently advised on a large investment by global private equity firm KKR into Gland Pharma, which involved "multi-layered investment structures to meet the investment need of the investors and promoters". AZB & Partners advised Gland Pharma and obtained the go-ahead from the Foreign Investment Promotion Board, the Cabinet Committee on Economic

[Amarchand] was fundamental to ensuring the completion of our transaction
Sanjay Kassen
Director and Joint Head of India Practice
ENSafrica

Affairs and the Competition Commission of India – a challenge as regulations underwent changes while the transaction was in progress.

"Many firms have attempted to build … [multi-disciplinary] capabilities but have faltered on account of the complex personality issues that come to the fore in an industry that is steeped in individualism. AZB is distinctive in having worked through ups and downs and keep getting better with every passing year," says Chandra at Bain Capital Advisors. "The gap between them and others is widening."

AZB & Partners was legal counsel on 14 of *India Business Law Journal*'s 2014 Deals of the Year and receives eight practice area awards in our Indian Law Firm Awards.

J Sagar Associates has long been recognized as one of India's top-tier firms. Dina Wadia, a Mumbai- based partner at the 300-lawyer firm, led a team that advised State Bank of India (SBI) when it raised US$1.2 billion through a qualified institutional placement. This was a first for SBI and also the biggest equity sale to date through this route.

The firm is well known also for its regulatory work. It

The gap between [AZB & Partners] and others is widening
Amit Chandra
Managing Director
Bain Capital Advisors

reports that it advised on the petitions filed seeking compensatory relief to offset commercial impracticability due to spiralling prices of imported coal for power plants at Mundra in Gujarat operated by Tata Power and Adani Power.

Jatin Jalundhwala, chief legal officer at Adani Enterprises, reports that his company has engaged lawyers at the Delhi office of J Sagar Associates "specifically for matters relating to electricity laws" and was satisfied with the firm's services.

J Sagar & Associates expanded its footprint into Southern India when Vichar Partners, a Chennai firm of repute, merged with it in April 2014. It also recently set up a white collar crime practice.

J Sagar & Associates was legal counsel on four of *India Business Law Journal*'s 2014 Deals of the Year and receives five practice area awards in our Indian Law Firm Awards.

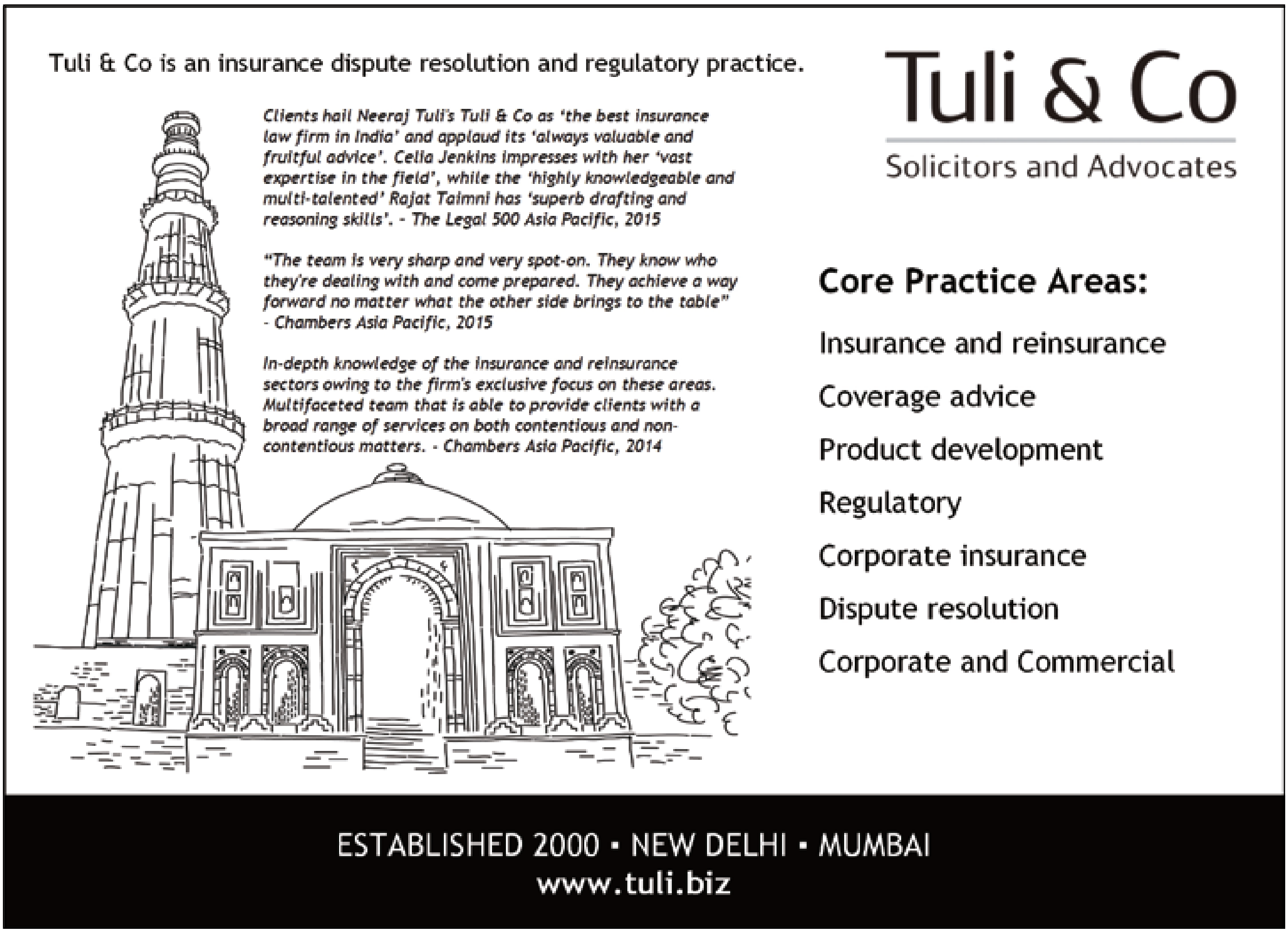
Khaitan & Co is a top choice for both international and domestic clients. The depth and breadth of its expertise includes a reputed competition law practice. A team from Khaitan & Co led by partner Avaantika Kakkar advised Sun Pharmaceuticals on the competition law aspects of its acquisition of Ranbaxy, as a result of which Sun Pharmaceuticals is now India's largest pharmaceutical company.

With debt expertise being sought after in 2014, the firm advised on the structuring of a debt fund by Piramal Enterprises and the Canada Pension Plan Investment Board. The fund is to be managed by Piramal's real estate private equity arm and will be the Canada Pension Plan's first debt-focused investment into India.

Khaitan & Co have been instrumental in our success in India for the past several years

Michael Johannesen
Vice President, Legal
Hospira

The firm's clout continues to grow through high-profile lateral hires including non-lawyers Gautam Chemburkar from KPMG India and Jean Muller from the French Trade Commission in Mumbai, who are expected to add value to Khaitan & Co's strategy team. Legal hires include three former partners from PXV Law Partners, an erstwhile Delhi startup.



Kachwaha & Partners is honoured to be declared a

Winner of the **Indian Law Firm Awards 2014** by

India Business Law Journal in the category of

Restructuring, refinancing & insolvency

We are grateful to *India Business Law Journal* and our

clients for their trust.

KACHWAHA & PARTNERS
New Delhi and Mumbai
91.11.41661 333
mail@kaplegal.com
www.kaplegal.com

We and our Canadian clients were impressed with the Trilegal team's knowledge and diligence … They were responsive, timely and efficient in their service delivery

Manoj Pundit
Partner
Borden Ladner Gervais

Clients are impressed. "Khaitan & Co have been instrumental in our success in India for the past several years," says Michael Johannesen, vice president, legal, at Hospira. He praises the firm for its "consistency, tenacity and sage advice" and for the "tremendously complicated and grueling work" it did in Hospira's recent acquisition of manufacturing and research and development facilities from Orchid Chemicals & Pharmaceuticals.

Commending Khaitan & Co for its "excellent domain knowledge backed by state of the art infrastructure and tech support", Anurag Madan, director at Edelweiss Asset Management, says the firm has practices "in almost all categories under one roof with good networking amongst the partners and the teams".

Khaitan & Co, which was legal counsel on six of *India Business Law Journal*'s 2014 Deals of the Year, receives four practice area awards in our Indian Law Firm Awards.

Luthra & Luthra continues to be one of India's top-tier law firms. The 280-lawyer firm advised Petronas when Indian Oil Corporation acquired a 10% stake in the shale gas assets and a linked liquefied natural gas project from a Petronas subsidiary in Canada.

Luthra & Luthra also advised State Bank of India on a rupee term loan to ONGC Tripura Power Company and on Yes Bank's qualified institutional placement, which was among the first such placements under the new Companies Act regime.

The firm is recognized too for its regulatory work. It advised Ranbaxy before the Competition Commission of India when the regulator's go-ahead was sought for the company's acquisition by Sun Pharmaceuticals.

Luthra & Luthra was legal counsel on five of *India Business Law Journal*'s 2014 Deals of the Year and wins awards in seven practice areas.

Trilegal has been striving to plug gaps in its services as and when client demands change. In 2014 the 166-lawyer firm added what it describes as a "much needed corporate taxation practice" with a lateral hire of a tax litigator. The firm reports that it has strengthened its focus on litigation and competition law and has developed expertise in the areas of white collar crime and investigations.

Trilegal's clients have included Tesco, which in 2014 became the first global retailer to apply for and receive approval to conduct multi-brand retailing in India. Two teams from the firm advised in separate rounds of funding when e-retailer Snapdeal raised around US$900 million. A team from the firm also advised on Tata International's issuance of perpetual bonds in the Singapore debt market (see page 29).

Clients are pleased. Manoj Pundit, a partner in the securities and capital markets practice at Borden Ladner Gervais, says: "Both we and our Canadian clients were impressed with the Trilegal team's knowledge and diligence in executing on transactions with India connections. They were responsive, timely and efficient in their service delivery."

Commending the firm for its level of service, which "has been excellent on all fronts", Palwinder Hare, head of legal, M&A/corporate, at Standard Chartered Bank in London, says the firm is "very responsive, takes a practical approach to resolving issues" and has "good knowledge of sector and specific requirements we have as a client". Trilegal "provides a consistent team … overall good value for money".

Trilegal was legal counsel on four of *India Business Law Journal*'s 2014 Deals of the Year and wins awards in four practice areas.

Aviation

Winners
ALMT Legal
Bhasin & Co
Desai & Diwanji
Gagrats
Link Legal India Law Services
Rajinder Narain & Co

ALMT Legal, a 100-lawyer firm with offices in Mumbai and Bangalore, is a full-service firm that has aviation expertise. Sameer Tapia, a founding partner, has represented and advised airlines in respect of matters before high courts and

[Sonali Mahapatra at Talwar Thakore and Associates] is superb – very thorough, professional

Neeta Sanghavi
Head of Legal, India
Credit Suisse

> [Dua is] an extremely able firm which understands the fine line between best interest, negotiating strengths and realistic approaches
>
> Amrish Kumar
> CEO
> Ritu Kumar

tribunals and on other aspects of their business activities. A client who uses the firm for general matters reports that they are "very prompt" and "solution oriented".

Bhasin & Co, a 40-lawyer firm with offices in Delhi and Mumbai, is sought after by airline clients including Thai Airways. Reporting that "we are greatly satisfied" with the firm's services, P Vijaykumar, a vice-president cum company secretary at Thai Airways, says: "The adequacy of satisfaction has been measured by the quality time given to us for discussions, draft of report/letters drafted, plus the structured approach in their understanding and request for associated material before they finally opined in the matters."

Desai & Diwanji continues to be recognized for its aviation practice. Vihang Virkar, who had advised GoAir on its acquisition of aircraft, is seen as the firm's key aviation expert.

Gagrats, a full-service Mumbai firm of 60-plus lawyers, is seen a go-to firm for its aviation expertise. Senior partner Rustam Gagrat was counsel to Jet Airways in its high-profile stake sale to Etihad.

At **Link Legal India Law Services**, founder partner Atul Sharma is recognized for dispute resolution in several sectors including aviation.

Rajinder Narain & Co continues to be sought out for its aviation expertise. Managing partner Ravi Nath is recognized for his structured aviation and other finance and leasing experience. The firm's clients have included Boeing and Airbus.

Banking & finance

Winners
Amarchand Mangaldas
AZB & Partners
Juris Corp
SNG & Partners
Talwar Thakore & Associates
Trilegal

Banking and finance continues to be an area where clients routinely gravitate towards the largest firms. Yet even while Amarchand Mangaldas, AZB & Partners and Trilegal are recognized for their banking and finance practices, the requisite expertise is available elsewhere.

PHOENIX LEGAL

Firm Profile:

Phoenix Legal is a full service law firm offering an extensive range of transactional, regulatory, advisory and dispute resolution services. The firm advises a diverse clientele including domestic and international companies, banks and financial institutions, funds, promoter groups and public sector undertakings. Our offices are located in New Delhi and Mumbai.

Recognitions and Awards:

- It's hard to think of areas where Phoenix Legal can improve. The firm is better than nearly all legal firms - ***Asia Law Profiles***
- ***Winner in the category: Finance Litigation Law Firm of the Year – India*** – Global Awards for 2014 - Corporate Livewire.
- ***Winner in the category: Energy, projects & infrastructure -*** India Business Law Journal's 2014 Indian Law Firm Awards.
- ***Winner in the Category : Structured Finance & Securitization –*** India Business Law Journal's 2014 Indian Law Firm Awards
- ***Highly recommended as a leading firm***: Banking and Finance, Corporate / M&A, Private Equity, Projects, Infrastructure & Energy, Technology, Media, Telecoms (TMT) – Chambers Asia Pacific – 2014.
- Highest client satisfaction rating amongst top 20 Indian law firms -***2013 Indian Law Firm Ranking and Report***
- Great Value for money and very responsive services -***Chambers and Partners 2011***

Contact Details:

Mumbai
Vaswani Mansion, 3rd floor, Office No. 17 & 18,
120 Dinshaw Vachha Road, Churchgate,
Mumbai – 400 020.
T +91 (0) 22 4340 8500
F +91 (0) 22 4340 8501
E mumbai@phoenixlegal.in

New Delhi
Second Floor, 254, Okhla Industrial Estate, Phase III,
New Delhi 110 020
T +91 (0) 11 4983 0000
F +91 (0) 11 4983 0099
E delhi@phoenixlegal.in

Website: www.phoenixlegal.in

A team from **Juris Corp** acted as counsel to lenders including HSBC France when Reliance Industries raised funds through 2014. Veena Sivaramakrishnan and Sneha Korde from Juris Corp acted alongside Milbank Tweed Hadley & McCloy.

SNG & Partners is routinely sought out for its banking and finance expertise. Its clients include State Bank of India, which it advised on a term loan facility for Orange Mamatkheda Wind, and Standard Chartered Bank. In July 2014 the firm opened an office in Singapore.

Talwar Thakore & Associates advised lenders and underwriters on a term loan and revolving credit facilities for a UK unit of Tata Steel. Neeta Sanghavi, head of legal, India, at Credit Suisse, says banking and finance partner Sonali Mahapatra "is superb – very thorough, professional, provides cutting edge advice on a very timely basis. Also provides clear risk-reward scenarios." Talwar Thakore & Associates has a best-friend relationship with Linklaters.

Capital markets

Winners
Amarchand Mangaldas
AZB & Partners
J Sagar Associates
Luthra & Luthra
S&R Associates
Trilegal

Capital markets practices in India were busy keeping up with numerous debt and equity issuances in 2014. While Amarchand Mangaldas, AZB & Partners and Luthra & Luthra continue to be the first port of call for companies looking for expertise in the area, J Sagar Associates and Trilegal have ratcheted up their capital market credentials.

S&R Associates is an exception to the rule that the most experienced lawyers are to be found in the larger firms. The 55-lawyer firm was involved in some of the most high profile issuances last year, acting for companies, their shareholders, bookrunning lead managers and brokers. The firm's clients include MakeMyTrip, Bank of America Merrill Lynch, Jefferies, Edelweiss and Macquarie Capital.

Competition & antitrust

Winners
Amarchand Mangaldas
AZB & Partners
Economic Laws Practice
Khaitan & Co
Luthra & Luthra
Vinod Dhall and Talwar Thakore & Associates

As the Competition Commission of India (CCI) works to level the playing field, law firms continue to bolster their competition law practices. This is an area where Amarchand Mangaldas, AZB & Partners and Khaitan & Co continue to excel. Luthra & Luthra's reputation for regulatory work extends to its expertise in competition law matters.

Economic Laws Practice is recognized for its competition expertise. Its clients for its antitrust work include Google, which was represented by senior associate Ravisekhar Nair before the CCI.

Vinod Dhall and Talwar Thakore & Associates Joint Competition Practice, consisting of six lawyers, continues to punch above its weight. Clients include Novartis, which it represented during merger filings after Novartis acquired the oncology business of GlaxoSmithKline (GSK) in a complicated transaction that saw Novartis sell its vaccines business to GSK, while also forming a joint venture with it for the non-prescription products business of both companies.

The practice also represented a complainant in the first case in which the CCI imposed a penalty for a vertical agreement on a party that was not dominant in the relevant market. Describing Dhall, the executive chairman of the practice, and associates Sonam Mathur and Kabyashree Chaharia as "extremely professional lawyers", the group compliance officer of a European listed company says: "All three of them are very responsive, have a hands-on mentality and we as clients felt advised well and taken care of. Further, we can confirm the excellent reputation which was communicated by third parties to us upfront before our cooperation with Mr Dhall and Talwar Thakore & Associates."

Corporate & commercial

Winners
DH Law Associates
Dua Associates
Fox Mandal
Krishnamurthy & Co
Rajani Singhania & Partners
Singh & Associates

DH Law Associates, a 50-plus lawyer firm with offices in Mumbai, New Delhi, Goa and Patna, is recognized by clients and the market for its full-service offering and its corporate and commercial expertise. The firm successfully guided Huawei in recovering US$2.7 million from Loop India in action triggered by reports that Loop India was entering into a business transfer agreement with a third company. Other clients include HZPC Holland, a seed potato company and Tribune Digital Ventures Singapore, an arm of a US multimedia company.

Dua Associates, with 215 lawyers and a large network of offices across India, continues to be recognized for its full-service offering. "Dua is our corporate law firm in India … they value client relationships over a longer term, try and grasp client perspective and most importantly have delivered results to us," says a client who is in a senior managerial position at a large global company.

"[Dua is] an extremely able firm which understands the fine line between best interest, negotiating strengths and realistic approaches," says Amrish Kumar, CEO of Ritu Kumar, one of India's leading fashion houses. Other appreciative clients include Estée Lauder, where Rohan Vaziralli, county manager India, says lawyers at the firm "take a special interest in understanding your business".

Fox Mandal, with 150 lawyers and a large network of offices, is recognized for its substantial expertise. “Fox Mandal provides professional, fast and pragmatic legal advice,” says Martin Imhoff, a Dusseldorf partner at Heuking Kühn Lüer Wojtek. “We are extremely happy with their service, personal touch to complex legal issues and quick turnaround time,” says Kiran Bhupathi Raju, CEO of Laila Neutraceuticals, who used the firm’s services for drafting and vetting of agreements and as legal counsel on intellectual property rights and litigation matters.

Clients of **Krishnamurthy & Co**, a 70-lawyer full-service firm with offices in Bangalore, Mumbai, Delhi and Chennai, include housing.com, a property portal which received investments from Softbank and others in 2014. The firm also assisted L&T Infotech in its acquisition of the engineering services division of Dell.

Rajani Singhania & Partners, a full-service firm with offices in New Delhi, Mumbai, Hyderabad and Bangalore, is described as “outstanding” by a European client. “They review the pending issues with your team and then they come up with clever suggestions and solutions.” The firm reports that it acted as legal counsel to Shandong Ruyi Science and Technology Group when it recently entered into a joint venture with the textile business unit of Reliance Industries.

Singh & Associates, with 90 lawyers and offices in New Delhi, Mumbai, Bangalore and Ranchi, is recognized as a full-service firm that provides cost-effective services. A client who wishes to remain anonymous says managing partner Manoj Singh is an exceptional strategist and that corporate partner Daizy Chawla has a “comprehensive approach … with excellent turnaround time”.

[Agarwal Law Associates] is very good on strategy and approach and knows the Indian judicial system very well

Himavat Chaudhuri
Chief Legal and Regulatory Affairs Officer
Tata Sky

Khaitan Sud & Partners

Dispute Resolution

Project Finance

Insurance & Reinsurance

Corporate Advisory

Real Estate

D-41
Defence Colony
New Delhi 110 024

Tel: 91 11 4155 2824/25

1001-C, Tower 2, 10th Floor
Indiabulls Financial Centre, Elphinstone (W)
Mumbai 400 013

Tel: 91 22 3096 5500/01/02/03

www.kspartners.co.in

Dispute resolution

Winners
Agarwal Law Associates
Amarchand Mangaldas
Bharucha & Partners
Federal & Rashmikant
Karanjawala & Co
Mulla & Mulla & Craigie Blunt & Caroe

While most of India's high stakes litigation work goes to the firms and individuals who know what works in India's opaque court and tribunal system, the formidable depth and width of expertise at Amarchand Mangaldas allows it to provide valuable assistance in this area for its corporate clients.

New Delhi-based **Agarwal Law Associates** is recognized as a go-to firm for representation in courts and tribunals. "It is very good on strategy and approach and knows the Indian judicial system very well. The partners know what will really work in practice," says Himavat Chaudhuri, chief legal and regulatory affairs officer at Tata Sky.

The dispute resolution practice at **Bharucha & Partners** continues to be held in high respect. Partner Vivek Vashi represents several corporate clients and has acted for German wind turbine maker Enercon in courts across India in a long-running dispute.

Federal & Rashmikant, a small Mumbai firm, is known for its litigation practice, which is headed by partner C Rashmikant. It is reputed to pull in high-profile clients who gravitate towards the experience and expertise of its low-key partners.

New Delhi-based **Karanjawala & Co**, a 65-lawyer dispute resolution boutique, has represented Cineyug Films and its promoter and director Karim Morani in connection with the 2G spectrum scam over the past four years. It is also representing Tata Motors at Delhi High Court challenging a penalty levied by the Competition Commission of India. The firm reports that it has recently "augmented its bandwidth" by hiring more than 15 lawyers.

Mulla & Mulla & Craigie Blunt & Caroe is once again recognized for its dispute resolution practice, particularly in litigation relating to maritime disputes.

Employment & industrial relations

Winners
ALMT Legal
Khaitan & Co
Kochhar & Co
Majmudar & Partners
Nishith Desai Associates
Trilegal

Gagrats

Established in 2005

Key practice areas: Arbitration, asset-based finance, aviation, banking & finance, capital markets, corporate, dispute resolution, infrastructure, projects & energy, insurance, intellectual property, investment funds, M&A, oil & gas, private equity, project finance, real estate, securities law, shipping, TMT and tax.

Number of partners and associates: 60+
Principal office: Mumbai
Other offices: New Delhi and Dubai (associate offices)

Gagrats has a broad-based practice covering a wide range of legal disciplines. Most members of the firm have attended prestigious universities in England, the US and India, and some have qualified as solicitors of the Supreme Court of England. The firm has represented clients on significant transactions, including cross-border financings, large acquisitions and disposals in India and overseas, private equity deals, power projects and securities offerings (including IPOs, ADRs, GDRs and FCCBs). The firm has received many prestigious awards, including *India Business Law Journal*'s Indian Law Firm Awards from 2008 till 2014.

CONTACT DETAILS

Nirmal, Nariman Point,
Mumbai 400 021, India

Telephone:
+91 22 6752 9037-52 (Mumbai)
+91 11 2332 2311 (New Delhi)
+971 472 5164 (Dubai)

Fax:
+91 22 6752 9053 (Mumbai)
+91 11 2371 3657 (New Delhi)
+971 472 5049 (Dubai)

Email:
gagrats@gagrats.com

Contacts:
Mr RJ Gagrat (Mumbai)
Mr UA Rana (New Delhi)
Mr HD Gardi (Dubai)

Mulla & Mulla
& Craigie Blunt & Caroe
Advocates, Solicitors and Notaries

Mumbai Office: Mulla House, 51, Mahatma Gandhi Road, Flora Fountain, Mumbai - 400 001, India **Tel:** +9122 22623191 / +9122 22044960 **Fax :** +9122 66345496 / +9122 22040246 **Bangalore Office:** 209, Regency Enclave, 4, Magrath Road, Bangalore-560 025, India **Tel:** +9180 25550370 **Fax:** +9180 25598549 **Delhi Office:** 502, Nilgiri Apartments, 5th floor, 9 Barakhamba Road, New Delhi 110 001, India Tel: +9111 23321501 **Fax:** +9111 23321520 **Email :** info@mullaandmulla.com	**Total number of partners:** 14 **Total number of associates:** 100+ **Year Established:** 1895 **Key areas of practice:** Admiralty; Arbitration (Domestic & International); Aviation Law; Banking & Securities; Capital Markets; Competition/ Anti-trust; Construction; Company / Commercial Law; Customs and Tariff; Employment & Industrial Relations; Energy Law (Oil & Gas); Entertainment Law; Environmental Law; Finance Law (Aircraft, Ship & Project); Foreign Investment; IT; Infrastructure Projects (Power & Ports); Intellectual Property; Insurance Law; Litigation; Logistics; Mergers & Acquisitions; Media & Entertainment; Offshore Investment & Securities; Privatization; Real Estate & Property Law; Tax Laws; Telecommunications; Trade & Transport.

A worldclass firm with a broad-based practice and a diversified client base. Founded by Sir Dinshaw Mulla in 1895, the firm has emerged as a top tier leading law firm known for its unparalled legacy in litigation and trend-setting solution-providing capabilities.

With 14 partners and over a 100 fee-earners, it is one of India's leading law firms proudly acting as legal Counsel to numerous multi-national companies, several large Indian corporates and a number of Fortune 500 Companies. Individual partners concentrate on different practice areas providing specialist legal, commercial & technical services to clients. The firm's in-depth knowledge and sound understanding of commercial and market realities results in providing relevant solutions which are legal and of real commercial value.

With one of the strongest litigation and dispute resolution practices, the firm advises on managing litigation risk and facilitates negotiations to resolve disputes, thus resulting in the least possible adverse effect to the clients business.

Over the last four decades, the firm has a corporate practice group, which advises and acts for both MNCs & Indian commercial houses in joint ventures, acquisitions (public listed / unlisted public / private limited companies), mergers, demergers, disinvestments, asset and business transfers, advising and obtaining FIPB / RBI approval with respect to foreign investment in India depending on the sectoral caps and FDI Policy including advising on anti – trust / competition laws.

The firm has a strong admiralty practice with a worldwide reputation as specialists in all aspects of the shipping laws, extensive structured ship & asset finance practice, structuring finance transactions, advised lenders in their India related ship finance of LNG vessels flying foreign flags and chartered by Indian companies, cabotage, tonnage tax, applicable taxes etc.

The firm has the expertise in relation to project, infrastructure and construction contracts, expansion of ports and investments in Indian private ports, drafting EPC contracts compliant with FIDIC templates, reviewing bid documents, advising on structuring of the bidding entity, reviewing concession agreements and assessing risk areas, take-or-pay agreements, long term cargo handling agreements, etc.

The firm is traditionally known for its Pan-India real estate practice – both transaction and real estate litigation.

With a well-recognised insurance and reinsurance practice group developed over 40 years, the firm exclusively acts for insurance companies.

As employment and industrial relations issues continue to be a key concern for corporate clients, large corporate firms such as Khaitan & Co and Trilegal have continued to deepen their expertise in this area. Mid-size firms such as ALMT Legal have been doing the same as they widen the services they provide.

Kochhar & Co, a full-service firm, is recognized for its employment law practice, which is headed by a senior partner.

Majmudar & Partners is a relatively small full-service firm with an employment and industrial relations practice. Simon Lyell, a partner at Weil Gotshal & Manges in London, says lawyers at the firm are "pragmatic" and that it is "similar to a Western firm".

Nishith Desai Associates, which is lauded for its good resources and dedicated teams of lawyers that work closely with in-house teams, is also recognized for its expertise in the area.

Energy, projects & infrastructure

Winners
Amarchand Mangaldas
HSA Advocates
Link Legal India Law Services
Phoenix Legal
Seth Dua & Associates
Trilegal

Amarchand Mangaldas and Trilegal have built up expertise as clients undertake investments in this area. While HSA Advocates and Link Legal India Law Services have previously received awards in this category, Phoenix Legal and Seth Dua & Associates are new winners.

HSA Advocates, with offices in Delhi, Mumbai and Kolkata, has a strong team in this area. The 70-lawyer firm, led by Hemant Sahai, recently drafted templates of energy performance contracts and energy service contracts and reviewed existing agreements for Energy Efficiency Services, a joint venture under the Ministry of Power. The firm has made two lateral hires: Abeezar Faizullabhoy, a former group CEO of a Dubai-based investor group that was responsible for the development of a mega power project in India; and Sakya Singha Chaudhuri, an experienced regulatory and litigation lawyer.

At **Link Legal India Law Services**, a team led by managing partner Atul Sharma is representing Delhi Airport Metro Express in a dispute with a supplier of rolling stock. The firm also advised on the financing of working capital requirements of Dewan Housing Finance Corporation.

Phoenix Legal, a 55-plus lawyer full-service law firm with offices Delhi and Mumbai, is recognized for its expertise in the area. A team lead by Sawant Singh advised India Infradebt on financial assistance provided to Himalayan Expressway. The firm also advised IL&FS Infrastructure Debt Fund on financial assistance of ₹1.4 billion (US$22.6 million) provided for refinancing of an iron ore pellet plant in Orissa. Phoenix Legal, which has made key lateral hires in its litigation department, reports that it has recently recorded its highest revenue growth to date.

Seth Dua & Associates senior partner Sunil Seth has considerable experience in the area. He has worked on several power, oil and gas, construction, mining, road, water, railway and urban development projects and acted for project sponsors, project financiers and contractors.

Tuli & Co is extremely dependable, quick, meticulous, and provides consistent and high quality service

Praveen Gupta
Managing Director and CEO
Raheja QBE General Insurance Company

Insurance & reinsurance

Winners
Amarchand Mangaldas
Brus Chambers
Khaitan Sud & Partners
Luthra & Luthra
Mulla & Mulla & Craigie Blunt & Caroe
Tuli & Co

With the foreign direct investment ceilings being raised in the insurance sector, legal expertise in the area is sought after. Once again the large full-service firms such as Amarchand Mangaldas and Luthra & Luthra have sufficient bandwidth to attract clients. Yet this is another area where the mid-size and smaller firms stand out.

Mumbai-based **Brus Chambers** specializes in admiralty, shipping and maritime matters. Partners Binita Hathi and Vidya Rajan have expertise in marine insurance.

Khaitan Sud & Partners, a 50-lawyer full-service firm, continues to be recognized for its work in the insurance area. Salil Sinha at ReNew Power says the firm is "result oriented and not driven by commercial factors". A client who does not wish to be named commends the firm for its turnaround time and says that it stands out "in terms of quality of their advice and documentation as well as their ability to find solutions".

Mulla & Mulla & Craigie Blunt & Caroe is sought out for its insurance expertise particularly in connection with its maritime work.

The 25-lawyer firm of **Tuli & Co** continues to be a powerhouse in the area. Headed by Neeraj Tuli, the firm functions in association with Kennedys, an international firm that specializes in insurance and reinsurance.

"Tuli & Co is extremely dependable, quick, meticulous, and provides consistent and high quality service," says Praveen Gupta, managing director and CEO of Raheja QBE General Insurance Company. "The response we normally receive … is thorough, precise, well-formulated and swift," says Ewa Styn, claims counsel at HCC Global Financial Products in Barcelona. Anshoo Sharma, assistant vice president for legal and compliance at Max Life Insurance, commends partner Celia Jenkins "for her thoroughness in insurance laws and expert and prompt advice on legal issues faced by us most of the time without any notice".

Intellectual property

Winners

Anand and Anand
K&S Partners
Remfry & Sagar
Saikrishna & Associates
Singh & Singh
ZeusIP

[Anand and Anand's] approach to any matter is very business oriented
Xavier Ragot
Group General Counsel
Christian Louboutin

Anand and Anand, a 90-lawyer IP boutique, continues to draw in high-profile matters and clients. Nominating the firm, APK Chettiar, company secretary and head of legal at Tata SIA Airlines, applauds the expertise and commitment of the entire team of lawyers at the firm. "Pravin Anand in particular knows the court procedure like the back of his hand and has the ability to develop complex and creative strategies for progressing and running a case," says a lawyer at an international law firm who wishes to remain anonymous. "Their approach to any matter is very business oriented. They are very sensitive to the client's need," says Xavier Ragot, group general counsel at Christian Louboutin.

K&S Partners is a 71-lawyer IP boutique with offices in Gurgaon, Bangalore, Mumbai, Hyderabad and Chennai. Its clients include ZTE Corporation, which faced an *ex parte* injunction in Delhi High Court, and ASUS, a Taiwanese computer company. The firm, which is the IP affiliate of J Sagar Associates, has augmented its

Seth Dua & Associates

Established in 1998

- Number of Partners: 12
- Number of Fee Earners: 28
- Principal Office: New Delhi

Key practice areas: Aviation; aerospace & defence; automotive; banking & finance; capital markets/securities; corporate & commercial (M&A); cross-border investments & transactions; competition law; dispute resolution & litigation; hospitality & leisure; infrastructure projects; energy & natural resources; intellectual property; PPP; procurement; private equity & venture capital; real estate & construction; direct taxes/indirect taxes; international trade & WTO; telecom; media & technology (TMT).

Our Services: Seth Dua & Associates (SDA) is a leading full-service Indian law firm headquartered in New Delhi. SDA specializes in corporate, commercial and tax laws relevant to M&A, joint ventures, foreign investment transactions. Leading position in the practice areas of aerospace & defence, dispute resolution, TMT, infrastructure and energy projects, real estate and construction, international trade and tax services.

The firm derives its strength from a unique combination of legal, tax and dispute resolution services that can be seamlessly offered under one roof.

sda Seth Dua & Associates
Solicitors & Advocates

Contact us

601, 6th Floor
DLF South Court
Saket, New Delhi – 1100 17
India

Tel: + 91 11 4164 4400
Fax: + 91 11 4164 4500

Contacts

Sunil Seth, Senior Partner
sunil.seth@sethdua.com
Mobile: + 91 98 1005 5100

Atul Dua, Senior Partner
atul.dua@sethdua.com
Mobile: + 91 98 1016 2645

Website
www.sethdua.com

resources by hiring "about 15 professionals in diverse areas of technology".

Remfry & Sagar, an 80-lawyer IP boutique with offices in Gurgaon and Chennai, has been the IP firm of choice for several IP rights-rich companies and continues to command respect. The firm represented Procter & Gamble in a trademark infringement case in Bombay High Court in which a swift perpetual injunction was obtained and the suit successfully disposed of within a fortnight of it being filed. A trademark administrator at an international company, who has used the firm for more than a decade, says it has "provided excellent service to me and to the companies I represent for many, many years" and as a result he has never felt the need to seek any other IP counsel in India.

Saikrishna & Associates, a 50-lawyer firm with offices in Delhi and Mumbai, continues to be recognized for its IP rights expertise, even as it deepens its competition law and corporate practices. "Saikrishna & Associates is not only extremely responsive, they deliver positive results in a cost-effective manner," says Heather McDonald, assistant general counsel at Pfizer, who has used the firm for contentious trademark matters and reports for "approximately 10 years".

Singh & Singh, a 24-lawyer IP boutique with offices in Delhi and Mumbai, is recognized for its involvement in high-profile IP litigations. Its clients include Ericsson, which it represented in India's first case of infringement of standard essential patents, Cipla and Ranbaxy. Over

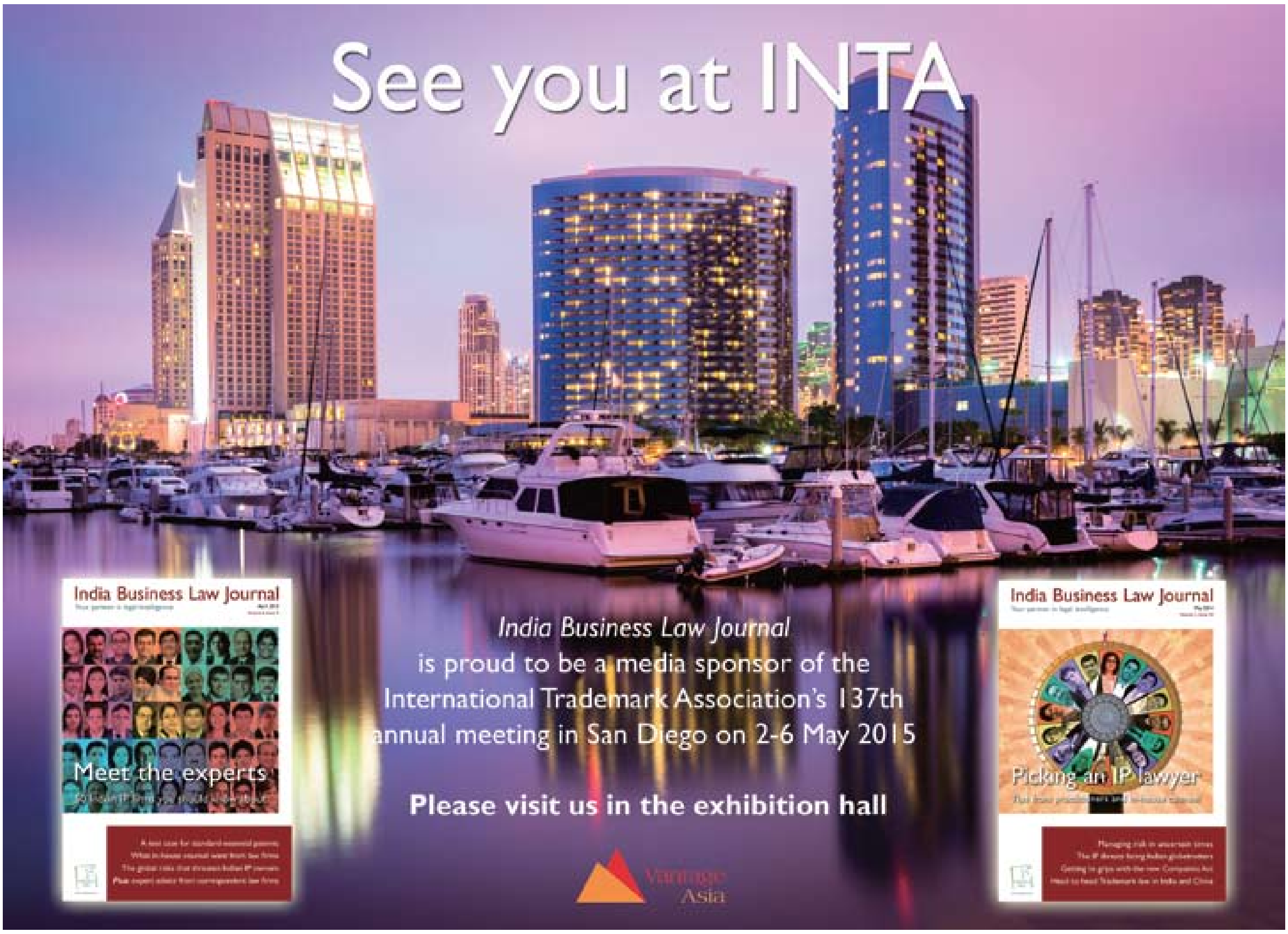
Saikrishna & Associates is not only extremely responsive, they deliver positive results in a cost-effective manner

Heather McDonald
Assistant General Counsel
Pfizer

the past year the firm has been reorienting itself after Prathiba Singh, its former managing partner, was designated as a senior advocate. This has not dampened the enthusiasm of clients.

"The lawyers [at Singh & Singh] take lot of initiative and effort to understand and satisfy the requirements of their clients," says A Mohan, president, legal and regulatory, at Zee Entertainment Enterprises. "The entire firm works like a team and there is a good camaraderie amongst all," remarks Kaizad Irani, head of legal at Entertainment Network India.

ZeusIP is a new winner in this category. Nominating the 17-lawyer New Delhi firm for an award, an international IP lawyer says it "is among the most creative, responsive, pragmatic, and cost-efficient law firms I have ever worked with in the world in my long career". The firm's clients include Red Bull, for which it looks after strategizing and implementation of enforcement



SAIKRISHNA & ASSOCIATES

ADVOCATES

Delhi

A-2E, CMA Tower, 2nd Floor
Sector 24, NOIDA 201 301
National Capital Region, India

Mumbai

411, Lotus House, 40/41
Sir VT Road, New Marine Lines
Mumbai 400 020, India

Contact Us

eMail: info@saikrishnaassociates.com
Phones: +91.120.4633900 (100 Lines)
Facsimile: +91.120.4633999

Saikrishna & Associates is a Tier-1 Intellectual Property Law Firm in India which specialises in all the aspects of Intellectual Property including Trade Marks, Copyrights, Patents, Trade Secrets, Confidential Information, Internet Law, Technology, Media & Entertainment and Competition Law. In addition to this, the firm extensively deals with allied areas of law such as Sports Law and Broadcasting Law, etc. The Firm's individuals are ranked as leading practitioners of IP and the Firm is ranked as a Tier-1 top-of-its-game IP law firm.

While we are adept at prosecuting or litigating to protect client IP, we are equally efficient transactional lawyers creating, advising on and negotiating business documentation around our clients' IP needs.

We are industry specialists and thrive on domain-specific knowledge, which is why we represent most of the leading industry groups. Some of the world's largest IP owners trust us implicitly with their Intellectual Property, and rightly so; we haven't let them down yet.

We let our work speak for itself, whether it is assisting courts in establishing guidelines determining the conduct of civil anti-piracy actions or assisting courts to recognise the torts of unfair competition and unjust enrichment as a basis to support the "hot news" doctrine.

We don't rest on our laurels because we want to do even better each time around, though we have a few great stories of our own. Our passion and love for IP drives us to achieve innovative results for our clients each time they trust us with their IP concerns and assets.

We are 14 years old but have attracted among the best lawyers in the country to our ranks. We have grown and retained among the best lawyers in the country ensuring that clients can place reliance on all levels of the firm. We have been doing this only since 2001, which is why we can go on doing this for another 100 years or more.

IP Dispute Resolution

Enforcement & Investigations

Prosecution

Media & Entertainment

(Print, Theatre, Film, Music, Talent, TV, Radio, Digital)

Software

Corporate Laws

General & Commercial Litigation

Transactions

Policy Reform & Development

Competition Law

Telecom [Patent Litigation]

Garments/Apparel

Criminal Law

action in India, Pakistan and Bangladesh, and Columbia Sportswear.

"The cooperation with ZeusIP ensures our instructions only need to go out once and never requires any correction or repetition," says David Lopez, head of intellectual property at SICPA Holding, a global provider of security inks, authentication and traceability solutions and services, which has handed over its entire patent and trademark portfolio in India, Myanmar and Bangladesh to ZeusIP. Gunjan Paharia, the firm's managing partner, receives praise for her "her outstanding legal skills and capability to focus on the core of a matter".

Mergers & acquisitions

Winners
Amarchand Mangaldas
AZB & Partners
J Sagar Associates
Khaitan & Co
Luthra & Luthra
Platinum Partners

Expertise in this area is widely recognized to lie in the largest law firms, five of which are winners in this category.

Platinum Partners is a smaller firm that continues to be sought out for its experience and expertise in M&A transactions. A team of lawyers from the firm – Nihar Mody, Yash Mohanram and Piusha Bose – represented Diageo on Indian law when it took control of United Spirits.

Policy & regulation

Winners
Amarchand Mangaldas
AZB & Partners
Hammurabi & Solomon
J Sagar Associates
Luthra & Luthra
PLR Chambers

This is another area where the largest law firms have the most expertise.

An exception is **Hammurabi & Solomon**, a 35-lawyer firm with offices in Delhi, Mumbai and Ranchi. Its managing partner, Manoj Kumar, is a member of industry groups such as the Confederation of Indian Industry. The firm reports that it represented a client that was resisting the government's termination, on the ground of expropriation or compulsory acquisition, of a concession agreement in

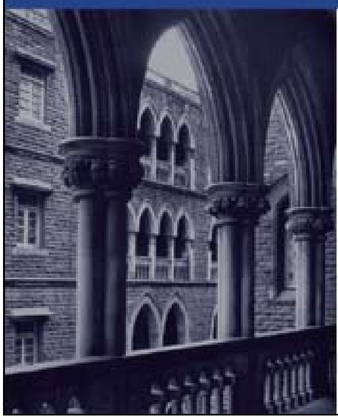
Bharucha & Partners offers a blend of rich experience, creativity, and the energy of youth. Each partner has handled complex commercial transactions or disputes, and each associate share the partners qualities and vision.

With six partners and forty associates we work across practice areas, and count leading international and Indian corporate houses, banks, financial institutions, and funds amongst our clients.

- *Chambers Asia-Pacific Asia's Leading Lawyers for Business 2013*
- *Asia Law Leading Lawyers – 2013*
- *ACQ Global Awards 2013 (India - Law Firm of the Year)*

Practice Areas

• Mergers & Acquisitions • Corporate Restructuring
• Joint Ventures • Private Equity • Banking
• Structured Finance • Projects and Project Finance
• Capital Markets • Litigation • International and Domestic Arbitration • Intellectual Property
• Telecoms • Information Technology • Real Estate
• Employment Laws • Financial Regulation



E-mail: sr.partner@bharucha.in
www.bharucha.in

bharucha & partners
Advocates & Solicitors

Cecil Court, 4th floor,
M. K. Bhushan Marg
Colaba
Mumbai 400 039. India
Tel: +91 22 2289 9300
Fax: +91 22 2282 3900

Hague Building,
9, S.S. Ram Gulam Marg
Ballard Estate,
Mumbai 400 001. India
Tel: +91 22 6132 3900
Fax: +91 22 6633 3900

705, Kailash,
26, K.G Marg,
New Delhi 110 001. India.
Tel: +91 11 4593 9300
Fax: +91 11 4593 9399

India's first build operate transfer project. The firm has a consulting entity that assists with strategizing.

PLR Chambers is a new firm with recognized expertise in the area. The firm's managing partner, Suhaan Mukherji, formerly led the policy and government affairs practice at Amarchand Mangaldas.

Private equity & venture capital

Winners
Amarchand Mangaldas
AZB & Partners
Indus Law
J Sagar Associates
Khaitan & Co
Nishith Desai Associates

This is yet another area where India's largest law firms routinely have the most recognized expertise. Clients benefit from the breadth of complementary services available at firms such as Amarchand Mangaldas, AZB & Partners, J Sagar Associates, and Khaitan & Co – all of which were winners in the same category in 2013.

Indus Law, a 66-lawyer firm with offices in Bangalore, Delhi, Hyderabad and Mumbai, is a new winner in this category. A team from the firm advised Snapdeal and its promoters when SoftBank made a US$625 million investment in the company. Partner Srinivas Katta led the team on this complex deal, which involved over 30 parties.

Nishith Desai Associates – a winner in this category in 2013 – advised Bangalore-based Flipkart when it raised funds twice and also snapped up a competitor over a four-month period in 2014. PM Devaiah at Everstone Capital lauds the firm for its "intense partner involvement and dedication, plus timely response".

Real estate

Winners
Amarchand Mangaldas
Anup S Shah & Co
Federal & Rashmikant
Hariani & Co
Kanga & Co
Luthra & Luthra

This is an area where Mumbai firms tend to dominate. In addition, the larger firms such as Amarchand Mangaldas and Luthra & Luthra are recognized for their expertise in the area.

Anup S Shah & Co, a 40-lawyer firm with offices in

Rajani, Singhania & Partners
Advocates & Solicitors

CHAMBERS AND PARTNERS
Recognised as one of the Leading Law Firms in Corporate / M&A and Capital Markets, 2015

MERGERMARKET
Consistently ranked since 2012 and ranked amongst the top 15 in the M&A League Tables, 2015

RSG CONSULTING
Ranked amongst the top 40 Law Firms in India

asialaw
Recommended Law Firm in the Asia Pacific for Capital Markets and Corporate/M&A.

IFLR 1000
Recommended Law Firm in the Asia Pacific for Banking & Finance, Capital Markets, Energy & Infrastructure, M&A and Power

The Legal 500 Asia Pacific Leading Firm 2015
Recommended Law firm in Asia Pacific for Capital Market, Aviation, Dispute Resolution, Corporate M&A, Projects & Energy, Patent and Trademark Practice, Banking & Finance, Intellectual Property, TMT & Tax.

Corporate Litigation & Arbitration
Mergers & Acquisitions
Capital Markets
Corporate & Commercial
Private Equity
Projects & Project Finance
Real Estate & Trust
Tax
Banking & Finance
Structuring
Technology & Telecommunications
Trademarks & Patents
Employment

www.rsplaw.in

New Delhi
RSP House
P-24, Green Park Extension
New Delhi 110016, India
Tel: +91 (11) 4747 1414
Email: new.delhi@rsplaw.in

Mumbai
Krishna Chambers
59 New Marine Lines
Mumbai 400020, India
Tel: +91 (22) 4096 1000
Email: mumbai@rsplaw.in

Bangalore
401, Prestige Meridian II
30, Mahatma Gandhi Road
Bangalore 560001, India
Tel +91 (80) 4113 1900
Email: bangalore@rsplaw.in

Hyderabad
614, Babukhan Estate
Basheer Bagh
Hyderabad 500001, India
Tel +91 (40) 4210 2424
Email: hyderabad@rsplaw.in

The cooperation with ZeusIP ensures our instructions only need to go out once and never requires any correction or repetition
David Lopez
Head of IP
SICPA Holding

Bangalore and Chennai, is an exception to the rule. The firm reports that it was instrumental in obtaining a landmark decision from Karnataka High Court on the applicability of zoning in Bangalore. It represented EIH – part of the Oberoi Group – in a matter arising out of the lease of lakes in a public-private partnership project in Bangalore. JC Sharma, vice chairman and managing director at Sobha, commends lawyers at the firm for their "complete focus on the work assigned to them" and says that "they handle the assignment with utmost professional competency".

Federal & Rashmikant is a Mumbai firm that is recognized by peers and clients for its expertise in the area. Its real estate practice is handled by Muffazal Federal.

Hariani & Co, with offices in Mumbai, Pune and Goa, is a small firm that has built up a reputation for its excellent real estate practice. Managing partner Ameet Hariani and several other partners have expertise and experience in the area.

Kanga & Co is a full-service firm that continues to be recognized for its real estate work. Partners KM Vussonji, SS Vaidya, Rishiraj Bhatt and Mosam Mody advise on real estate matters.

Restructuring, refinancing & insolvency

Winners
Amarchand Mangaldas
Dhir & Dhir
Kachwaha & Partners
Kesar Dass B & Associates
Luthra & Luthra
Sibal & Co

This is one of several areas that firms of the stature of Amarchand Mangaldas and Luthra & Luthra are recognized for their expertise.

Dhir & Dhir is a full-service firm with offices in Delhi and Mumbai that continues to win recognition in this area. Managing partner Alok Dhir, who is both a qualified chartered accountant and a lawyer, specializes in turning around financially unviable entities.

Kachwaha & Partners, a 15-lawyer full-service firm, is recognized by its peers for its work in the area. Ioan Lepadatu, manager at Universal Tractor Holding, says the firm is "without a doubt a law firm of professional caliber".

Kesar Dass B & Associates, led by Hemant Batra, is recognized by its peers for its work in this area. The firm has one office in Gurgaon.

Sibal & Co continues to be recognized for its bankruptcy and insolvency work. The New Delhi firm is headed Vivek Sibal, who has expertise in the area.

Shipping & maritime

Winners
Bhatt & Saldanha
Bose & Mitra
Brus Chambers
Crawford Bayley & Co
Mulla & Mulla & Craigie Blunt & Caroe
Zarir Bharucha & Associates

The winners in this category are unchanged from 2013. This is a reflection of the deep expertise built by the firms despite the competition.

Crawford Bayley & Co and Mulla & Mulla & Craigie Blunt & Caroe are both full-service law firms that have well-established maritime practices. At Crawford Bayley, partner Prashant Asher is a key shipping and maritime expert, while at Mulla & Mulla, maritime law is one of partner Shardul Thacker's key areas of expertise. The other four winners are shipping and maritime boutiques.

Bhatt & Saldanha, a Mumbai firm headed by Adil Patel, continues to be rated highly by its peers. Patel and partner Raman Walawalkar are recognized for their maritime law expertise.

Bose & Mitra, headed by Amitava Majumdar (Raja), is recognized for its extensive experience in admiralty and other matters.

Brus Chambers, a Mumbai firm headed by Shrikant Hathi, continues to be recognized in admiralty, shipping and maritime matters.

Zarir Bharucha & Associates, a four-lawyer Mumbai firm, is recognized for its maritime law practice. "They give you realistic advice with a commercial edge," says Nicola Mason, the deputy head of diversified maritime insurer Skuld Hong Kong. Mason has used the firm's services for five years, including in a recent maritime litigation matter in a US$54 million dispute.

Structured finance & securitization

Winners
Amarchand Mangaldas
AZB & Partners
Dave & Girish & Co
Juris Corp
Nishith Desai Associates
Wadia Ghandy & Co

This is yet another area where recognized expertise remains in the larger law firms. Both Amarchand Mangaldas and AZB & Partners have expertise in the area, although the latter is a new winner in this category.

Dave & Girish & Co, a Mumbai firm, continues to be recognized for its expertise in this area. The firm takes pride in having pioneered many innovative transactions in India, including the first securitized transaction. The structured finance practice is headed by partner Mona Bhide.

Lawyers at **Juris Corp** regularly act on high-profile transactions. Managing partner H Jayesh has deep expertise in the area. Partner Veena Sivaramakrishnan acts on key transactions.

Lawyers at **Nishith Desai Associates** are recognized by their peers and clients for their expertise in the area. The firm's clients include Shree Renuka Sugars, which it advised in a multi-layered complex infusion of funds.

Wadia Ghandy & Co, a 171-lawyer firm with offices in Mumbai, New Delhi, Chennai, Ahmedabad, Bangalore and Pune, advised on refinancing of senior debt and providing an additional subordinated loan to a special purpose vehicle in a complex transaction.

Technology, media & telecommunications

Winners

DSK Legal
J Sagar Associates
Naik Naik & Company
Nishith Desai Associates
Saikrishna & Associates
Seth Dua & Associates

This is an area where expertise often lies outside the larger full-service firms. J Sagar Associates is an exception. Partner Sajai Singh in the firm's Bangalore office is recognized for his expertise in the area. He has experience in representing emerging technology companies on inbound investments.

DSK Legal continues to be recognized for its expertise in this area. Managing partner Anand Desai has experience in advising on media and entertainment matters.

Naik Naik & Company, a 35-lawyer firm with offices in Mumbai and Delhi, is recognized for its expertise in the area. Its clients include the Indian Broadcasting Federation, which it is assisting in challenging changes brought in by the Copyright (Amendment) Act, 2012, and Bollywood actor Anil Kapoor, who says lawyers at the firm are prompt and that feedback from managing partner Ameet Naik is succinct, clear and accurate. "He is also well networked within the entertainment fraternity and carries a lot of goodwill. This always helps in resolving certain contracts that reach a deadlock."

Nishith Desai Associates is recognized for excellence in this field, which is one of its core practice areas.

Saikrishna & Associates is a new winner in this category. Lawyers from the firm represented Star India, Multi Screen Media (a unit of Sony) and Fox Star Studios India in obtaining orders that directed the Department of Telecommunications to ensure the blocking of over 350 pirate websites. A client who wishes to remain anonymous says partner Ameet Datta's "knowledge of the law is second to none". SK Jain, general counsel at Spice Group,

DHIR & DHIR

Number of Partners: **13**
Number of Associates: **75**
Principal Offices: **Delhi**
Other Offices: **Mumbai**
International Offices: **Japan**

Firm Profile: Dhir & Dhir is a full service law firm, with offices in New Delhi, Mumbai, a representative office in Japan and alliances in more than 15 states. This network of offices and relationships provide a single window service to the clients across the country.

Established in 1993, the firm brings to the table expertise and experience gathered over two decades across various sectors and practice areas. Our team is over 100 strong with 75 professionals with some of the lawyers with dual qualification of Chartered Accountants / Company Secretaries / Cost Accountants / MBAs / Engineers, having experience relevant to a wide range of legal and financial issues. The Firm is professionally managed by a full time CEO, CFO and COO.

Areas of Practice & Industries: Our practice & sector groups' matrix enables us to develop a comprehensive understanding of our clients' businesses and markets to constantly deliver sound and commercially viable advice. The practice includes Restructuring & Insolvency, Dispute Resolution & Arbitration, Anti Trust & Competition, Anti-dumping and International Trade & WTO, Capital Market & Securities Law, Corporate Bid-Process & Project Management, Mergers & Acquisitions, Joint Venture, Private Equity, Corporate & Commercial, Regulatory, Employment, Environment, FDI and Intellectual Property.

Some of the Industries the team has advised/advising in are Aerospace & Defence, Automobile, Banking & Finance, Infrastructure & Energy, Telecommunication, Pharmaceutical, Food & Drug, IT, Outsourcing, Media & Broadcasting, Real Estate and Retail.

Dhir & Dhir

Contact us

New Delhi

D-55, Defence Colony
New Delhi – 110024
Tel: +91-11-42410000
Fax: +91-11-42410091

Contact
Mr Alok Dhir
Managing Partner

contact@dhirassociates.com

Website
www.dhirassociates.com

Languages
English & Hindi

commends the firm for "expertise that has few parallels" in media, entertainment and telecom matters involving complex IP rights issues, and patents with regard to mobile devices. "This has helped us to understand these issues clearly and deal with them efficiently."

Seth Dua & Associates, a Delhi firm, is recognized for its expertise. Partner Salman Waris, who heads the firm's TMT practice, has worked on a broad range of transactional, advisory and contentious matters in the telecom, IT and IP sectors.

Taxation

Winners
AZB & Partners
BMR Legal
Economic Laws Practice
Lakshmikumaran & Sridharan
Nishith Desai Associates
Vaish Associates

If a client likes he can even forget about the case after having assigned it to Vaish Associates

Rajesh Gupta
Vice President, Taxation
HCL Technologies

Many law firms are seeking to deepen their expertise in this key practice area. The larger full-service firms such as AZB & Partners – a new winner in this category – routinely attract the best lawyers but some smaller firms provide excellent services.

BMR Legal, a 45-lawyer firm with offices in New Delhi, Mumbai, Chennai and Bangalore, has gone from strength to strength with several lateral hires including Madhav Rao, a former senior partner at Lakshmikumaran & Sridharan, who is an indirect tax expert and has represented clients in high courts and tribunals. A client who uses the services of the firm for transfer pricing matters commends managing partner Mukesh Butani for his "overall experience and knowledge on the subject".

Economic Laws Practice is recognized by peers and clients for its expertise in taxation. The firm has advised on several significant matters including one pertaining to the determination of tax liability on erection and installation of elevators for its client Otis Elevators, which is of great significance for revenues in the elevator industry. A client who wishes to remain anonymous commends managing partner Rohan Shah for his "insight, clarity of mind, simple but extremely effective written and oral communication, and calm demeanor even in stressful situations" and for being "accessible at relatively short notice wherever in the world he may be". He also recommends senior associate Anay Banhatti for "his attention to detail, thorough preparation and ability to work patiently" with all levels of a client's team.

Simply the best: *India Business Law Journal*'s annual Indian Law Firm Awards are a benchmark of excellence in India's legal profession.

Lakshmikumaran & Sridharan continues to excel in this area. The firm prides itself on its wide range of domain experts who are equally adept at litigation and advisory. It recently opened an office in Geneva – a first for an Indian law firm – to advise on World Trade Organization-related issues.

Nishith Desai Associates and its managing partner, Nisith Desai, are well known for their expertise in this area. The firm's tax team plays a key role in cross-border transactions.

Vaish Associates, a 100-lawyer full-service firm with offices in New Delhi, Mumbai, Gurgaon and Bangalore, has a robust tax practice. Partners Vinay Vaish and several partners in the Delhi office are recognized for their taxation expertise. Referring to the firm as his company's "valued advisors for direct tax matters", Rajesh Gupta, vice president, taxation, at HCL Technologies, says: "If a client likes he can even forget about the case after having assigned it to Vaish Associates; they'll take good care of it and keep the client informed, even proactively."

M/s. Crawford Bayley & Co

Advocates & Solicitors

4th Floor, State Bank of India Buildings
NGN Vaidya Marg, Fort, Mumbai 400 023, India

Tel: +91 22 2266 8000
Fax: +91 22 2266 3978

Crawford Bayley & Co, established in 1830, currently has a team of 150 members, 20 partners, more than 125 associates and 15 paralegal personnel. It also has a supporting staff of more than 75 individuals. It has served its Indian clients with complete dedication and adherence. It has reached to the top of the peak, where its strength is matched with the top 10 law firms of India.

The firm's individual partners specialise in the following practice areas: corporate and commercial practice, mergers and acquisitions, capital markets, joint ventures and foreign collaboration, privatisation and disinvestment, banking and corporate finance, intellectual property law, litigation and dispute resolution, real estate and property law, indirect taxation, labour and employment, admiralty and shipping law, information technology, e-banking and e-commerce.

Crawford Bayley & Co is one of India's oldest law firms and is well established in corporate practice, mergers and acquisitions, capital markets, joint ventures and foreign collaboration, private equity, banking and finance and several other practice areas.

Best newcomers

Winners
AK Law Chambers
Samvad Partners
PLR Chambers

[AK Law Chambers] is a firm whose journey has just begun
Tony Adam
Proprietor
Adam & Coal Resources

In this category, our editorial team considers law firms that have been set up during the past two years. This is an exciting task as over the years several lawyers have peeled off from their employers and set up on their own or regrouped with others to form new firms.

AK Law Chambers, a Chennai-based eight-lawyer firm set up in April 2013, describes itself as a boutique specializing in corporate and commercial litigation and arbitration, and real estate. It reports that it has been representing Shapoorji Pallonji & Co in an ongoing case where the disputed sum is about US$15.5 million and that it has obtained a crucial interim injunction. Other clients include Nissan Motors India, for which it has challenged proceedings before the Competition Commission of India in Madras High Court. Clients are impressed. "This is a firm whose journey has just begun and I am sure the legal fraternity will hear a lot about them in the not too distant future," says Tony Adam, proprietor of Adam & Coal Resources, who sought the firm's services in a matter involving an international arbitration award.

AK Law Chambers' founder partner, Anirudh Krishnan, was a consultant to an expert panel constituted by the Law Commission of India to deliberate on the proposed reforms to arbitration law in India. The commission's report states that input given by him and another expert was "incisive, vital and require special appreciation".

Samvad Partners is a 15-plus lawyer firm that was formed in early 2013 with the merger of two firms: Narasappa Doraswamy & Raja and V Law, which was set up in November 2012 by Vineetha MG, a former partner at AZB & Partners. Samvad Partners has acted on several headline grabbing transactions including Flipkart's fundraising and acquisition of Myntra Designs, where the firm represented an existing investor. Lawyers from the firm advised Helion Venture Partners when it recently invested US$5.7 million in ID Fresh Foods. The firm has offices in Bangalore, Chennai, Mumbai and New Delhi.

PLR Chambers was founded in 2014 by Suhaan Mukherji and has since taken on more lawyers. The firm offers legal and public policy advisory services. Mukherji, a former partner at the Delhi office of Amarchand Mangaldas, was a member of an expert committee that assisted the Law Commission in its deliberations on proposed reforms to arbitration law in India. ■

Awards methodology

Now in their seventh year, *India Business Law Journal*'s annual Indian Law Firm Awards benchmark excellence in India's legal profession. As in previous years, the awards are intended to reflect the opinions of *India Business Law Journal*'s readers and other qualified observers.

To achieve this, nomination forms were sent to thousands of India-focused in-house counsel and other legal professionals in India and around the world. Respondents were asked to nominate Indian law firms in each of the awards categories and to justify their nominations with relevant information and, where possible, examples.

Indian law firms, meanwhile, were requested to provide information in support of their candidacy for the awards, including up to 10 referees, whom *India Business Law Journal*'s editorial team could contact to verify the quality of their services. They were also given the opportunity to make nominations for the awards, but were not permitted to nominate themselves.

Nominations were received from a wide range of companies including Aditya Birla, Alstom, Cargill India, Century Pulp & Paper, Credit Suisse, Etisalat, LG Electronics India, Mitsubishi Corporation, SICPA Holding, Tata SIA Airlines, Toshiba and Wockhardt.

In determining the winners, *India Business Law Journal*'s editorial team considered the objective data obtained from the nomination process alongside subjective information provided by survey respondents and law firm referees. Law firms' recent deals, cases and professional accomplishments were taken into account, as were their achievements in practice development, such as prominent hires and office openings.

In order to reflect the depth and diversity of India's legal market, and to ensure that the results recognize not only the pre-eminence of India's largest general practice firms, but also the achievements of smaller and more specialized firms, six winners of equal standing were selected in each practice area category. In addition, three firms share the prize for best newcomers and a single firm is crowned law firm of the year. While no awards process can be without some degree of controversy, *India Business Law Journal*'s editorial team has done everything possible to ensure that the Indian Law Firm Awards are thoroughly researched, expertly judged, independent, impartial and something of which all of the winning firms can be justifiably proud.

Further evolution required for 'factoring' to fulfil needs

By Babu Sivaprakasam, Deep Roy and Okram Singha, Economic Laws Practice

ELP ECONOMIC LAWS PRACTICE ADVOCATES & SOLICITORS

109 A Wing, Dalamal Towers
Free Press Journal Road
Nariman Point, Mumbai – 400 021, India
Tel: +91 22 6636 7000
Fax: +91 22 6636 7172
Email:BabuSivaprakasam@elp-in.com
DeepRoy@elp-in.com
Mumbai | New Delhi | Ahmedabad | Pune | Bengaluru | Chennai

Where businesses are clamouring for liquidity, especially manufacturing entities, "factoring" presents a viable option towards maintaining a steady cash flow by providing finance against the receivables due to such entities. Prior to the Factoring Regulation Act, 2011 (Factoring Act), coming into force, there was no regulatory structure for assignment of debt. This rendered the enforcement of rights under an assignment in a factoring arrangement rather difficult.

Further, an assignment deed for the purposes of factoring services was subject to high rates of duty under the provisions of the applicable stamp laws. In 1988, the Reserve Bank of India (RBI) set up the Kalyanasundaram Committee to examine the feasibility of factoring in India.

Features of the statute

Pursuant to the Kalyanasundaram Committee report and recommendations of various committees set up later, the Factoring Act came into force in February 2012. The Factoring Act for the first time has defined "factoring business" and identifies the rights and obligations of the assignor and assignee under factoring transactions. Further, to provide a much needed boost to factoring business in India, the schedule to the Factoring Act required the insertion of section 8D into the Indian Stamp Act, 1899, under which documents for assignment of receivables to a factor are exempted from payment of stamp duty.

Although the Factoring Act provides a much needed framework within which and clarity on how factoring can be conducted in India, and clearly identifies rights and obligations of parties to contracts for the assignment of receivables from one to another, a host of areas remain unregulated and ambiguous.

Unresolved issues

The Factoring Act envisages both "recourse" and "non-recourse" factoring. However, it does not distinguish between recourse and non-recourse factoring with regard to the nature of the transaction and the corresponding effect on the rights and liabilities of the parties.

With the Factoring Act allowing banks to undertake factoring business without any requirement for registration, one would have expected a greater response from banks. But unfortunately, with lack of clarity from the RBI on certain fundamental concepts, e.g. provisioning requirements and exposure norms, this has not been the case.

Additionally, banks currently are prohibited from purchase of bills drawn otherwise than under a letter of credit on a "without recourse" basis (as specified in the RBI's master circular on Loans and Advances – Statutory and Other Restrictions, dated 1 July 2014). Where most entities are looking to assign their receivables on a "true sale" basis, this serves as a major hindrance to banks undertaking factoring business because "'with recourse' factoring may not be treated as true sale for assignor" (as pointed out in the Report of the Technical Committee on Services/Facilities to Exporters dated 29 April 2013. Further, there is a lack of clarity on who the "debtor" is in case of payment of receivables falling overdue under a factoring arrangement.

Insurance restrictions

Restrictions imposed by the Insurance Regulatory and Development Authority on the issuance of trade credit insurance to banks/financial institutions, other than by ECGC (formerly called Export Credit Guarantee Corporation of India), are also not helping the cause. Banks and financial institutions cannot be expected to undertake such credit exposures without due protection.

Further, most Indian exporters obtain a buyers cover policy from ECGC to insure against from risk of default of buyers. When obtaining factoring facilities from banks these exporters assign these instruments to such banks. As highlighted in the technical committee report of 2013, in several instances of default by the buyers in making payments, these exporters decline to lodge claims with ECGC leaving the banks high and dry. There is a need to statutorily install certain deterrents to prevent such actions.

As far as extending the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, to non-banking financial companies is concerned, the final call rests with the central government.

Conclusion

While the Factoring Act brings a much needed structure to factoring in India, it has to further evolve to be in tandem with the market needs. The RBI needs to ensure that there is due synergy between the act and its policies on factoring in India. Ambiguities in concepts and understanding are not giving the much needed impetus to factoring in India.

Babu Sivaprakasam is a partner, Deep Roy is an associate partner and Okram Singha is an associate manager at Economic Laws Practice. This article is intended for informational purposes and does not constitute a legal opinion or advice.

Canadian oil sector may be a good bet as prices 'bleed'

Bennett Jones

Suite 3400, 1 First Canadian Place
P.O. Box 130
Toronto, Ontario M5X 1A4
Fax: +1 416 863 1716
Tel: Raj Sahni, Chair – India Business Group +1 416 777 4804
Website: www.bennettjones.com

By Raj Sahni,
Bennett Jones LLP

As Baron Rothschild once noted, "the time to buy is when there's blood in the streets". Could the recent decline of crude oil prices to six-year lows represent just such an opportunity for Indian companies to consider investing in the North American (and particularly Canadian) oil sector?

With Brent and WTI crude in the US$45-50 range in mid-January, valuations of oil companies in Canada are falling and restructurings of Canadian oil companies may soon follow. That could be an opportune time for India to consider investing in the Canadian oil sector (including oil sands).

Time to diversify

India imports more than 70% of its crude oil requirements, with the vast majority of that supply coming from the Gulf region. As announced by India's oil minister Dharmendra Pradhan in July 2014, India is diversifying its sources of oil imports to reduce dependence on any one region.

Canada is the world's sixth largest producer of oil and gas with the third-largest proven oil reserves (including oil sands) in the world and offers a stable source of supply. While Canadian oil often sells at a (sometimes steep) discount to world crude prices, traditional barriers to export of Canadian oil to India have included shipping costs and issues as to whether Canadian grades of crude could be refined in India.

Late in 2013, Husky Energy broke that barrier by selling 1 million barrels of crude to Indian Oil Corporation, to be shipped from Canada's east coast to Indian Oil's refineries in India. India's refineries include some of the most advanced in the world and the Husky Oil-Indian Oil deal shows that at least lighter grades of Canadian crude can be successfully processed and refined in India.

In addition, as noted by Pradhan in a written reply in the Lok Sabha on 8 December 2014, India's refining capacity has more than tripled over the past 15 years and India's present refining capacity exceeds the demand for petroleum products in the country. Accordingly, India could become a consistent net exporter of petroleum products if it can obtain reliable and economic sources of crude, and the Canadian oil sands may present such a source.

Groundwork done

India and Canada have already done the groundwork for investments and partnerships in the oil and gas sector. A five-year memorandum of understanding (MOU) to "establish a framework for discussions on petroleum and natural gas issues with the view to advance the trade and investment ties between Canada and India, enhance energy security and increase cooperation" was negotiated in October 2013. This MOU gives high-level officers in each government the responsibility of heading a working group to develop and implement activities to foster trade and investment in oil and natural gas.

While Canada currently ships the bulk of its oil to the US, Canada has realized the need to diversify its oil markets. One of the primary challenges in relation to the export of oil to Asia has been development of the infrastructure needed to move crude from Canada's oil sands projects in Alberta, which is a central-western province, to either the Pacific or Atlantic coast for shipping.

Pipeline in the works

Canada is moving forward in answering this challenge. In June 2014, the Canadian government approved the construction of the C$7 billion (US$5.8 billion) Northern Gateway pipeline, which is a 1,177-kilometre twin pipeline system running westward from the oil sands in Alberta to a new marine terminal in Canada's western-most province, British Columbia. From there, the oil will be loaded on tankers and shipped to international markets, including Asia. The project still faces a number of conditions, including environmental approvals and consultation with First Nations communities affected by the pipeline, but approval by the Canadian government was viewed as a major step towards completion of the project.

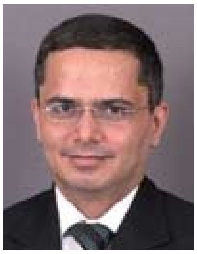
Many economists are predicting that the dramatic fall in crude prices will have a positive impact on India's economy and foster growth of India's manufacturing sector, particularly with the push by the Narendra Modi-led central government to turn India into a global manufacturing powerhouse. A source of reliable and economical crude for use as fuel and in the manufacture of petroleum-based products and components will be critical in ensuring India's growth in that regard.

Canada is one of the most politically, socially and economically stable countries in the world, and arguably the most stable among major oil producing nations. And, while the cost of shipping oil between India and Canada is significant, Canada's commitment to develop the necessary infrastructure to export Canadian crude overseas and the relative discount still afforded to Canadian crude may make it an increasingly economical alternative as well.

Raj Sahni is a partner and chair of the India Business Group at Bennett Jones LLP, a law firm with offices in Calgary, Toronto, Edmonton, Ottawa, Vancouver, Washington DC, Doha, Bermuda, and a representative office in Beijing.

Whipping tipping: 'Tippee' now liable as insider trader

By Suhail Nathani, Yogesh Chande and Malek-ul-Ashtar Shipchandler, Economic Laws Practice



ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

109 A Wing, Dalamal Towers
Free Press Journal Road
Nariman Point, Mumbai – 400 021, India
Tel: +91 22 6636 7000
Fax: +91 22 6636 7172
Email: SuhailNathani@elp-in.com
YogeshChande@elp-in.com
Mumbai | New Delhi | Ahmedabad | Pune | Bengaluru | Chennai

Securities regulation is based on the core idea that all investors should have equal access to the rewards of participation in securities transactions. Insider trading is the antithesis to this equal access theory.

Insider trading violations occur when an individual in possession of unpublished price sensitive information (UPSI) – a "tipper" – relays that information for personal gain (or in violation of a duty) to another person (a "tippee"), who trades on the basis of that information. One issue that frequently arises in such cases is proving that an individual who receives such a tip has the requisite *scienter*, or state of mind, to have committed a violation. A recent US court decision in *United States v Newman* has dealt a severe blow to the US government's efforts to prosecute individuals who trade on inside information but have one or more "layers" between them and the insider who initially disclosed the tip.

The Newman case

The Newman decision followed a 2013 criminal insider trading trial in New York. Todd Newman, a former portfolio manager at Diamondback Capital Management, and Anthony Chiasson, a former portfolio manager at Level Global Investors, were charged with receiving confidential information about Dell's and NVIDIA's quarterly earnings through a series of intermediaries, and trading on that information prior to its public disclosure. The two portfolio managers' trades in Dell and NVIDIA stock resulted in a combined US$72 million in profits for their respective funds.

The court held that to sustain an insider trading conviction against a tippee, the government must prove each of the following elements beyond a reasonable doubt: (1) the tipper was entrusted with a fiduciary duty; (2) the tipper breached his fiduciary duty by disclosing confidential information to a tippee, in exchange for a personal benefit; (3) the tippee knew of the tipper's breach i.e. knew the information was confidential and divulged for personal benefit; and (4) the tippee used the information to trade in a security or to tip another individual for personal benefit. The court also held that the "personal benefit" received by the tipper must be "objective, consequential, and represent at least a potential gain of a pecuniary or similarly valuable nature".

It may be difficult for the prosecution to demonstrate that the tippee was aware of the tipper's breach of fiduciary duty and that the tip was disclosed for personal benefit, particularly when the tipper and tippee have no direct nexus and are separated by several layers.

Indian scenario

The Securities and Exchange Board of India (SEBI) notified the SEBI (Prohibition of Insider Trading) Regulations, 2015, on 15 January. Under regulation 2(g)(ii), any person who is in possession of or has access to UPSI is presumed to be an insider, with the onus to carve a defence under regulation 4. The note appended to regulation 4 states: "When a person who has traded in securities has been in possession of unpublished price sensitive information, his trades would be presumed to have been motivated by the knowledge and awareness of such information in his possession … Once this is established, it would be open to the insider to prove his innocence by demonstrating the circumstances mentioned in the proviso, failing which he would have violated the prohibition."

The 2015 regulations thus clearly characterize insider trading as trading in securities with the advantage of having asymmetrical access to UPSI. The liability of tippees arises from their superior access to information. Therefore, anyone who is in possession of UPSI falls under the definition of "insider".

The 2015 regulations have incorporated comments made in a 2008 SEBI consultative paper on amendments to the SEBI (Prohibition of Insider Trading) Regulations, 1992, which stated that "the regulations prohibit persons from tipping people about inside information by insiders i.e. the tipper. However, there seems to be no liability for a person who improperly receives a tip i.e. a tippee from trading. There is a vague prohibition against 'procurement' of information. However, it does not clearly prohibit a tippee from trading." It was further proposed that "the language of the regulation may be improved by way of clarification to specifically penalize a tippee of information from trading."

It is interesting to note that the Sodhi Committee in December 2013 proposed that tippees be allowed to raise a defence stating that they were an innocent recipient of UPSI and, having exercised the diligence expected of a reasonable person, had no reason to believe that the information in their possession was UPSI or that the person who communicated it to them had violated any law or confidentiality obligation owed by such person. However, this defence has not been incorporated in the 2015 regulations.

Suhail Nathani is a partner, Yogesh Chande is an associate partner and Malek-ul-Ashtar Shipchandler is a trainee at Economic Laws Practice. This article is intended for informational purposes and does not constitute a legal opinion or advice.

CCI reiterates its stand on trade associations' conduct

TRILEGAL

Mumbai
One Indiabulls Centre
14th Floor, Tower One, Elphinstone Road
Mumbai – 400 013
Tel: +91 22 4079 1000
Fax: +91 22 4079 1098
Email: kunal.chandra@trilegal.com
gautam.chawla@trilegal.com

By Kunal Chandra and Gautam Chawla, Trilegal

In an interview in 2013, Competition Commission of India (CCI) chairman Ashok Chawla was quoted as saying: "Rather than being party to a cartel, the trade associations should encourage their members and constituents to follow competition compliance norms at the corporate level." The interview followed decisions by the CCI in 2012 against the Cement Manufacturers Association and the Chemists and Druggists Association of Baroda. These associations were found to be engaged in anti-competitive practices in contravention of section 3 of the Competition Act.

Section 3 provides that any agreements or decisions taken by associations of persons in identical or similar trades (i.e. horizontal arrangements) are presumed to have an appreciable adverse effect on competition in India and consequently void. In this connection, what can constitute an agreement is important and should not be construed narrowly. "Agreement" is broadly defined under the Competition Act and includes any arrangement or understanding or action in concert, regardless of whether it is formal or in writing or whether it is intended to be enforceable by legal proceedings.

Recent cases

Recently, in two cases in December 2014 against the Film Distributors Association, Kerala (FDAK), the CCI held that FDAK was in violation of section 3 and in doing so, reiterated its position on the conduct expected from trade associations. In essence, there is heavy burden on trade associations to be cognizant of the wide ambit of anti-competitive practices owing to the high risk that such associations run of non-compliance with section 3. Therefore such associations need to be proactive and encourage members to operate within the ambit of competition law.

In the two cases filed against it, FDAK was found to be guilty of: (a) taking collective decisions against distribution of films of certain persons; (b) issuing directions to its members to boycott the films of such persons; and (c) initiating action against non-complying members. The CCI viewed these practices as anti-competitive and a limitation of the market for film distribution/exhibition business in the state of Kerala.

In defending its actions before the Director General and the CCI, FDAK contended that: (a) it is its fundamental right under article 19(1)(c) of India's constitution to "form associations or unions"; and (b) an association such as FDAK, which was formed to protect the interest of film distributors and to bring uniformity in payment of royalties across Kerala without any discrimination towards any cinema theatre owner, deserved constitutional protection.

The CCI however rejected this defence (and in our view rightly so). The CCI reiterated its stance as cited in its order dated 1 July 2013 in the case of *Advertising Agencies Guild v Indian Broadcasting Foundation & its members.*

Key aspects of CCI's views

(1) A trade association provides a forum for entities working in the same industry to meet and to discuss common issues. A trade association carries out many valuable and lawful functions which provide public benefit such as: (a) setting common technical standards for products or interfaces; (b) arranging education and training for potential entrants in the industry; (c) paying for, and encouraging, research into new techniques; and (d) developing a common response to changing government policy.

(2) Formation, membership and participation in the collective activities of a trade association does not by itself amount to violation of competition law. However, when such trade associations are used as a platform to aid illegitimate objectives contrary to the Competition Act, such as: (a) taking collective decisions which are anti-competitive; (b) issuing anti-competitive circulars/diktats; (c) facilitation of collusive or collective decision making with the intention of limiting or controlling the production, distribution, sale or price of or trade in goods or services, by its members, it will amount to violation of the provisions of the act.

(3) There is no dispute with the constitutionally recognized freedom of the right to form associations or unions within the prescribed limits. However, if the trade association's conduct falls foul of the Competition Act, the conduct needs to be examined in terms of the act.

(4) Competition law is not an impediment to appropriate trade association activities. The members of a trade association should be fully aware of the conduct prohibited under the Competition Act (especially section 3) while carrying out their activities.

The message from the CCI couldn't be clearer and trade associations ought to sit up and take notice. More so, since the CCI has not only penalized the associations but in recent cases, also officials (in their personal capacity) of such associations. Trade associations should not be deterred by decisions of the CCI. They should use their unique position to explore ways of enhancing competition among their members rather than stifling it.

Kunal Chandra is a counsel at Trilegal and Gautam Chawla is an associate. The views expressed herein are their personal views. Trilegal is a full-service law firm with offices in Delhi, Mumbai, Bangalore and Hyderabad.

Threshold for grant of an anti-arbitration injunction

By Vivek Vashi and Shaheda Madraswala, Bharucha & Partners

Bharucha & Partners Advocates & Solicitors
Cecil Court, 4th Floor, MK Bhushan Road
Mumbai-400 039
India
Tel: +91-22 2289 9300
Fax: +91-22 2282 3900
E-mail: sr.partner@bharucha.in

Delhi High Court in its recent judgment in *Vikram Bakshi & Anr v McDonald's India Pvt Ltd & Ors* has set a threshold to be met before grant of an anti-arbitration injunction. Although there are many decisions on grant of anti-suit injunctions, cases on anti-arbitration injunctions are fewer in number.

The court has also sought to widen the scope for interference by civil courts in international arbitrations in cases where the parties have contractually opted for a specific manner and mode of conducting arbitration.

The Bakshi case further falls under one of the contingencies laid down in section 45 of the Arbitration and Conciliation Act, 1996, and gives impetus to the wording of the section, which states that in circumstances where the arbitration agreement is found to be null and void, inoperative, or incapable of being performed, the parties may not be referred to international arbitration.

Summary of the case

In 1995, Bakshi (the plaintiff) had entered into a joint venture agreement (JVA) with McDonald's India (defendant No. 1) in terms of which a new company was incorporated (defendant No. 2). When McDonald's sought to issue a "call option" notice offering to buy out Bakshi's stake in defendant No. 2, Bakshi filed a petition before the Company Law Board (CLB) claiming oppression and mismanagement and seeking his re-election as the managing director of defendant No. 2, pursuant to clause 7(e) of the JVA. The CLB in an interim order directed parties to maintain the status quo with respect to their shareholding.

McDonald's then filed an application under section 45 of the act before the CLB, asking that the parties be referred to arbitration, under the provisions of the JVA. The application was eventually withdrawn.

Clause 40(b) of the JVA provided that disputes arising between the parties were to be referred to arbitration. The clause further stated that the proceedings were to be conducted in London by a panel of three arbitrators, using the London Court of International Arbitration rules.

Bakshi argued that McDonald's, by choosing to withdraw its section 45 application, and later failing to press its section 9 application seeking greater reliefs, had waived its right to refer the disputes to arbitration and had submitted to the jurisdiction of the CLB. He then filed for grant of an anti-arbitration injunction restraining the defendants from initiating arbitration proceedings in London.

The court granted the injunction, holding that McDonald's conduct constituted waiver and/or abandonment of rights and it was no longer open for the defendants to seek arbitration.

Inappropriate forum

Broadening the scope for court interference in matters under the act, the court went on to hold that since: (a) apart from one, all the other parties were Indian; (b) the area of operation of business was in India; (c) the cause of action arose in India; and (d) the governing law was Indian law; London being the place of arbitration would become a *forum non conveniens* for the plaintiffs.

The court based this finding on the fact that McDonald's had sought to oust the jurisdiction of the arbitral tribunal by withdrawing its section 45 application and submitting to the jurisdiction of the CLB.

In reaching this conclusion, the court relied on the Supreme Court judgment in *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd*, which held that before referring a case to arbitration under section 45 of the act, a court must look into whether the agreement is null and void, inoperative or incapable of being performed. Further, as the World Sport Group case dealt with the same matter as the Bakshi case, and was the last in a series dealing with the issue of jurisdiction of a civil court, the court thought it prudent to follow the World Sport Group case.

By doing so, the court sought to resolve the conflict with the Supreme Court's judgment in *Chatterjee Petrochem Co v Haldia Petrochemicals Ltd*, which held that the jurisdiction of the civil court would be ousted in cases of international arbitration.

Impact

The Bakshi case widens the scope of interference by courts even in cases where parties have consented to a particular mode and manner in which the arbitration is to be conducted. Further, it addresses one of the contingencies which fall under section 45 of the act and offers a threshold to be met before grant of an anti-arbitration injunction.

At a time when arbitration is a popular means to resolve disputes, Delhi High Court has tried to be helpful by reconciling the conflicting decisions on jurisdiction of the civil court by concluding that such jurisdiction need not be necessarily ousted in a case where parties have agreed to refer the dispute to international arbitration.

Whether this will lead to a higher number of litigants approaching courts for anti-arbitration injunctions despite having an unequivocal arbitration agreement remains to be seen.

Vivek Vashi is the mainstay of the litigation team at Bharucha & Partners, where Shaheda Madraswala is an associate.

Solutions proposed to settle civil nuclear liability issues

By Akshay Jaitly and Kartikeya Panwar, Trilegal


TRILEGAL

New Delhi
311 B, DLF South Court,
Saket, New Delhi - 110 017
India
Tel: +91 11 4163 9393
Fax: +91 11 4163 9292
Email: akshay.jaitly@trilegal.com
kartikeya.panwar@trilegal.com

In 2008, India and the US entered into the Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy. This permitted nuclear equipment manufacturers, suppliers and service providers to participate in India's nuclear energy market despite India not being a signatory to the Treaty on the Non-Proliferation of Nuclear Weapons. However, US-based suppliers have been hesitant to go ahead because of their concerns regarding India's Civil Liability for Nuclear Damage Act, 2010 (Nuclear Liability Act).

During US president Barack Obama's state visit to India in January, he and Indian prime minister Narendra Modi announced that breakthroughs had been achieved on these concerns.

Current situation

Nuclear power currently accounts for less than 5% of the total electricity produced in India. To fulfil its power generation needs, India aims to greatly enhance nuclear energy production.

Private players are not permitted to operate nuclear power plants. Section 22 of India's Atomic Energy Act, 1962, states that only the government (GoI) has the authority to generate nuclear power and to operate atomic power stations. The Nuclear Liability Act also defines an "operator" to mean the GoI or any authority or corporation established by it or a government company which has been granted a licence under the Atomic Energy Act. Private players are allowed to supply equipment, materials and services to establish and operate a nuclear power plant.

Nuclear suppliers had been sceptical about their prospects in the Indian nuclear energy market even after the US-India nuclear agreement was signed because of the absence of a legal regime governing civil liability following a nuclear incident. The Nuclear Liability Act was promulgated to bring certainty in this regard. Its aim is to provide for civil liability pursuant to nuclear incidents causing nuclear damage and compensation to the victims of nuclear damage. The act stipulates a strict, no-fault liability regime which primarily holds the operator liable.

Key issues

Assignment of liability under the Nuclear Liability Act has been a hotly debated issue in relation to the US-India agreement and the promotion of nuclear commerce in India. Section 17(b) and section 46 of the Nuclear Liability Act have been the primary bones of contention.

Operator's right of recourse to suppliers: Section 6 of the act limits the liability of an operator of a nuclear power plant and section 17 of the act provides the operator a right of recourse to suppliers after paying compensation under section 6. Sections 17(a) and 17(c) are comparable to article X of the Vienna Convention and article 10 of Annex to the Convention on Supplementary Compensation for Nuclear Damage. Section 17(b), which is unique to the Nuclear Liability Act, makes available a right of recourse if the nuclear incident was a result of an act of a supplier (or its employee) or supply of defective equipment or sub-standard services if the contract does not provide so.

Liability under other laws: Another cause for concern arises from section 46, which states that the provisions of the Nuclear Liability Act are in addition to, and not in derogation of, any other applicable law. Therefore, the Nuclear Liability Act does not exempt the operator from any proceeding under a law such as the law of tort. This means that an operator could be made liable under tort law for claims in excess of the limits specified in the act.

Proposed solutions

The primary concern relating to section 17(b) is that it deviates from general international practice by making suppliers liable when the cause of a nuclear incident (for which the operator has paid compensation) can be traced to defective equipment or sub-standard services provided by a supplier. The operator can be made liable for a maximum of ₹15 billion (US$240 million) under the Nuclear Liability Act, which, as mentioned above, it can claim from the supplier.

Since amending the act was not considered feasible, the proposed solution to supplier's liability under section 17(b) appears to be to create an "India Nuclear Insurance Pool". Although the details are still being finalized, it has been reported that government-owned insurance companies will contribute about half of the required ₹7.5 billion and the rest will be provided by the GoI.

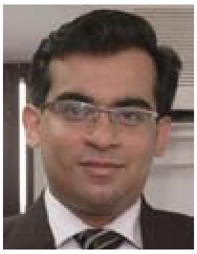
Suppliers' concerns about being exposed to potentially unlimited tortious liability have been sought to be resolved by a "memorandum of law". It is believed that this will amount to a legal opinion from the Attorney General stating the GoI's understanding that the section is applicable only to operators and not suppliers. However, this might remain a concern as the opinion will not bind Indian courts to interpret section 46 in a similar manner.

It is hoped that when details of both these solutions are disclosed, these issues will be addressed.

Akshay Jaitly is a partner at Trilegal and Kartikeya Panwar is an associate. Trilegal is a full-service law firm with offices in Delhi, Mumbai, Bangalore and Hyderabad.

Construction development: Press note a fresh lifeline?

By Sundeep Dudeja and Saurabh Tiwari, Luthra & Luthra Law Offices



Luthra & Luthra Law Offices

9th Floor, Ashoka Estate
Barakhamba Road
New Delhi - 110 001
Tel: +91 11 4121 5100
Fax: +91 11 2372 3909
Email: delhi@luthra.com
www.luthra.com

The construction development sector (township, housing and built-up infrastructure) has been the second highest recipient of foreign direct investment (FDI) in India since April 2000, with investment of about US$23 billion (10% of the total FDI received). Yet some projects are stalled and investors cite difficulties on account of land issues, prolonged approval processes and complicated exit. Given the sector's importance and its effect on growth, the government issued Press Note 10 of 2014 in December, intending to ease sectoral conditions.

FDI policy prohibits FDI in "real estate business", defined by the Reserve Bank of India as "dealing in land and immovable property with a view to earning profit or earning income therefrom", but excluding construction development activities. This exception for construction development is subject to stringent conditions as to minimum area requirements, capitalization thresholds and investor lock-in, which have now been revised by the press note. Certain exemptions from complying with such norms are not affected.

Minimum area and capitalization: Earlier, an Indian company with FDI undertaking a serviced plots project had to develop a minimum land area of 10 hectares. The press note removes this prescription. In other construction development projects, a minimum built-up area of 50,000 square metres was required, which is now modified to a minimum floor area of 20,000 square metres. Interestingly, for both joint ventures and wholly owned subsidiaries (WOS) of foreign investors, a minimum FDI threshold of US$5 million is now uniformly applicable, vis-à-vis US$10 million earlier required for WOS.

Importantly, the press note specifies that the minimum FDI is to come within six months of "commencement of project", defined as "date of approval of building plan/layout plan by authorities". Earlier, the funds were to be brought in within six months of "commencement of business of the company", which was difficult if the implementing company was not a new entity. Uncertainty led to varying interpretations. The press note has brought that clarity, however, it has limited the time frame within which the first FDI can be brought.

FDI in ongoing projects: Further, the press note now permits that subsequent tranches of FDI can be received up to 10 years from commencement of a project, or before the completion of a project, whichever is earlier. This may assist uncompleted projects struggling for funds. For the past few years, India's real estate sector has been heavily debt ridden, and major players have faced legal and regulatory hurdles. Fresh FDI in stalled projects which were at an advanced stage of development has also not been looked at favourably by regulators. Thus, allowing access to foreign capital irrespective of stage of completion (though within an outer limit of 10 years from commencement) is a welcome step for projects in dire need of funds.

Further, the onerous condition that at least 50% of the project must be developed within five years of obtaining all statutory clearances has been deleted. This allows necessary flexibility in a sector where injunctions/litigations are widespread, cost of raw material is high and the legal landscape is ever changing.

Investor lock-in & exit: Prior to the press note, an investor's entire FDI in an Indian company undertaking a construction development project was locked in for three years. There were regulatory flip-flops as well on the meaning of "entire FDI" in this context. This has been a major reason for negative investor perception towards the sector in the past five or six years.

In contrast, the press note allows an investor to exit on completion of the project, or "after development of trunk infrastructure (namely, roads, water supply, street lighting, drainage and sewerage)". This provides a simple and objective guideline on what needs to be achieved before an exit can occur under automatic route. The Foreign Investment Promotion Board (FIPB) retains its power to consider exits in other scenarios.

While the amendment seems good in spirit, effective implementation will be critical for investors. The FIPB should come out with instances when exit would be allowed, for example, where the project has not commenced or is unreasonably delayed on account of local government or authorities' inaction. Such clarifications would boost investor confidence.

FDI in completed projects: The press note specifies that 100% FDI under automatic route is permitted in completed projects for operation and management of townships, malls/shopping complexes and business centres. This has provoked immense curiosity in the industry.

This provision suggests that foreign investors can acquire ownership of completed projects, so long as the Indian investee company (holding the project) undertakes operation and management of the project. If such is the intent, this provision could provide a massive boost to FDI in retail/office assets. However, despite industry representations, the government has not yet clarified its intent and confirmation is awaited.

Luthra & Luthra Law Offices is a full-service law firm with offices in New Delhi, Mumbai and Bangalore. Sundeep Dudeja is a partner and Saurabh Tiwari is a managing associate at the firm. This article is intended for general informational purposes only and is not a substitute for legal advice.

Erosion of IP rights: Impact on fashion and textile sector

By Ameet Datta and Suvarna Mandal, Saikrishna & Associates

SAIKRISHNA & ASSOCIATES
ADVOCATES

A-2E, CMA Tower, 2nd Floor
Sector -24, NOIDA - 201301
National Capital Region, India
Tel: +91 120 4633900 (100 Lines)
Fax: +91 120 4633999
Email: ameet@saikrishnaassociates.com
suvarna@saikrishnaassociates.com

India's fashion industry complements its textile industry, which contributes significantly to exports and GDP. Trends in terms of colours, styles, fabrics, etc., determine the fashion industry's fortunes, which rest on the creative endeavours of legions of designers and traditional craftsmen.

These trends are normally seasonal and designs are rapidly replaced in each successive season, so the industry is always under pressure to be more creative than before. Unfortunately the legal system has not kept up with the needs of the fashion and textile industry.

Statutory provisions

The fashion world is often a victim of blatant imitations and knock-offs of designs. Two statutes impact the fates of the fashion industry: the Copyright Act, 1957, and the Designs Act, 2000. While registration is not mandatory under the Copyright Act, designs must be registered for a designer to establish a monopoly right over their creation.

The pre-conditions for registration of a design are that it should be original and novel; it should not have been disclosed to the public; and it should not comprise or contain scandalous or obscene matter. The protection extends for 10 years, which can be extended for a further five years.

A registered design enables the right-holder to restrict others from using the design and to sue for damages in case of infringement of the design. Unfortunately, section 15 of the Copyright Act extinguishes copyright in designs which are registered or registrable under the Designs Act. The only exception to this rule is a registrable design will be capable of copyright protection if it has not been registered under the Designs Act and has not been applied to an article that has been reproduced over 50 times by an industrial process by the owner.

Protection limited

Thus, though haute couture (which implies a limited number of reproductions of a certain design) may be protectable under the Copyright Act, which affords criminal law remedies against infringements, general artistic works intended to be mass produced as textile and fashion design cannot be protected in this way if they are registered under the Designs Act, which does not afford any criminal law remedies.

Several court decisions have addressed the issue of the overlap of copyright and design protection and the scope of section 15 of the Copyright Act. One of the most debated judgments is that of Delhi High Court in *Rajesh Masrani v Tahiliani Design Pvt Ltd* (2008). In that case, Tahiliani Designs had produced fewer than 20 sets of the costume, and the court held that inherent copyright protection was available to the owner of the artistic work by virtue of its creation.

The court pointed out that section 2(d) of the Designs Act expressly excludes "artistic work" from the definition of a design, and observed that if a party is able to bring its case within the framework of section 2(c) of the Copyright Act, a suit for infringement of copyright is maintainable. Tahiliani Design was granted an injunction against Masrani.

In *Microfibres Inc v Girdhar and Co and Anr* (2009), Microfibres claimed copyright protection in its "artistic work" applied to upholstery fabric which was industrially produced over 50 times. A division bench of Delhi High Court ruled against Microfibres, holding that if a design is registrable but has not been registered under the Designs Act, the design would enjoy copyright protection until an article to which it has been applied is produced 50 times by an industrial process. However, once that threshold is crossed, it would lose its protection under the Copyright Act.

These judgments lead to the conclusion that if a registrable design is not registered and is industrially produced over 50 times, then the design is not protected under either the Copyright Act or the Designs Act. From the Microfibres case it can be inferred that if a design is applied to an article for commercial purposes using an industrial process, the owner should register it under the Designs Act as the copyright in the work may be lost if it is applied to an article and industrially produced over 50 times.

This raises certain practical issues, namely the time taken by the Designs Wing of the Patent Office to register a design. The process takes roughly eight months, while fashion styles and designs change every three to four months. The time taken for registration renders the owner of the design helpless as the market may be flooded with counterfeit and imitation designer wear, and the owner cannot sue the infringer until the design is registered. For this reason it is critical to have a system in which designs can be registered within 30 days of filing the application with complete specifications.

The Indian fashion and textile industry and Indian designers are gaining international recognition and acclaim, which makes the protection of designs and artwork indispensable to curb piracy, cheap imitations and knock-offs.

Ameet Datta is a partner at Saikrishna & Associates, where Suvarna Mandal is an associate. The views expressed in this article are personal.

Ashok Kumar lends name to tool against movie piracy

By Manisha Singh Nair and Priya Anuragini, LexOrbis

LexOrbis INTELLECTUAL PROPERTY ATTORNEYS

709/710 Tolstoy House, 15-17 Tolstoy Marg
New Delhi - 110 001
India
Tel: +91 11 2371 6565
Fax: +91 11 2371 6556
Email: mail@lexorbis.com
www.lexorbis.com

Decades after veteran actor Ashok Kumar charmed movie makers and viewers alike with his natural acting and effervescent personality, his name continues to resonate in the corridors of the entertainment industry courtesy of Ashok Kumar orders. Directed against nameless defendants, these orders are a judicially created copyright enforcement mechanism to rein in rampant piracy plaguing the entertainment sector in a world where technological innovations grant protective anonymity to specific culprits.

Legal innovation

While piracy has always been an archnemesis for Indian film makers, the problem is exacerbated in the digital world, where culprits who can never be identified accurately, or may be identified too late to be of any use, operate behind a veil of networks. Films, after all, have a limited shell life. And while film makers are busy securing an interim injunction, pirated content goes viral courtesy of file sharing websites and the damage is already done.

Even after a favourable order from the court, film makers are not able to control piracy effectively for the simple reason that the court order may not cover every potential violator and infringer. This is where Ashok Kumar orders, also referred as John Doe orders, come in (Ashok Kumar or John Doe being pseudonym for unknown infringers and violators). Based on the premise that "if litigating finger is directed at unknown defendants, the inability to identify him by name is a mere misnomer", these orders are usually sought in a *quia timet* action before the movie release and cover both alleged and potential violators. They are particularly instrumental in preventing movie piracy through unauthorized websites, CDs or DVDs, cable networks, etc.

While these orders are a judicially created enforcement mechanism and represent legal ingenuity to combat technological anonymity, they are not entirely without statutory basis. Order 7 rule 1 of the Civil Procedure Code, 1908 (CPC), states that a plaint should state the name, description and place of residence of the defendants "so far as they can be ascertained", whereas section 151 of CPC confers on every court inherent power to make such orders as may be necessary for the ends of justice. A combined reading of these two provisions clearly indicates that courts have the power to restrain even unknown defendants in the interests of justice.

Key judicial observations

While the trend of passing John Doe orders was started by Delhi High Court, other high courts have followed suit, albeit not as regularly. The first such order was passed by Delhi High Court in *Taj Television v Rajan Mandal* to prevent unauthorized telecast of the 2002 Football World Cup by unknown cable operators. While initially these orders were directed against cable operators, with the surge in online piracy, unknown websites also came within their ambit.

In *Star India Pvt Ltd v Haneeth Ujwal*, Delhi High Court observed that to protect exclusive rights of the plaintiff against anonymous defendants such as rogue websites, blocking complete access to the entire website, rather than just the uniform resource locators (URLs), is essential.

Issuing an Ashok Kumar order prior to the release of *Happy New Year*, Bombay High Court categorically stated that that the plaintiff was entitled to take action against anyone who was found to be pirating its copyright work without having to move the court once again, and also directed the police to assist the plaintiff in restraining defendants from violating or infringing the plaintiff's copyright.

Earlier, such orders were issued before the release of *7 Khoon Maaf*, *Gangs of Wasseypur*, *Players*, *Singham*, *Don2*, *Bodyguard*, etc.

Areas of concern

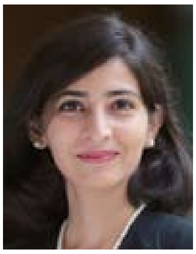
While Ashok Kumar orders may not be an impenetrable shield against piracy, they do limit it or film makers and producers would not have been queuing before the courts to secure pre-release Ashok Kumar orders. However, certain grey areas need immediate attention to ensure optimal functioning of these orders. To begin with, in the absence of judicial guidelines, there is no clarity on the scope of these orders or the circumstances that merit granting them. For instance, Madras High Court has held that in cases of online piracy, Ashok Kumar orders should be limited to blocking of specific URLs while Delhi High Court subsequently has extended such orders to entire websites.

Another area that needs attention is the implementation of these orders. Insofar as the orders are applicable against unnamed entities, their implementation must be monitored properly or they may be misused to harass harmless entities. Already there are concerns that broadly worded Ashok Kumar orders are curbing internet freedom, placing onerous responsibility for curbing piracy on internet service providers, and harming bona fide users. It's time to define the perimeters of these orders or a serious challenge to their constitutionality may be in the offing.

Manisha Singh Nair is a founding partner of LexOrbis, where Priya Anuragini is an associate.

Locked-box mechanism in M&A transactions

By Raghubir Menon, Ekta Gupta and Deepa Rekha, Amarchand Mangaldas



amarchand mangaldas

216 Amarchand Towers
Okhla Industrial Estate, Phase III
New Delhi - 110 020
Tel: +91 11 41590700, 40606060
Fax: +91 11 2692 4900
Managing Partner: Shardul Shroff
Email: shardul.shroff@amarchand.com

Over the past 10 years, India's M&A landscape has become more sophisticated, adopting international best practices. Parties are negotiating, at length, clauses relating to purchase price adjustments, completion conditions, representations, warranties and indemnifications in a share purchase agreement (SPA), and the "locked-box" mechanism for determining price is gaining recognition.

Under a traditional completion accounts approach, the purchase price is set using a valuation methodology specified in the SPA and is typically paid as an estimate at completion. Subsequently, the purchase price is adjusted based on the difference between the price paid and price determined from a set of special purpose completion accounts prepared as of the completion date. However, due to regulatory restrictions in India, merger valuation techniques include a mish-mash of the discounted cash flow method, enterprise value method, the net asset method or valuation determined on multiples of earnings before interest, taxes, depreciation and amortization.

Under a locked-box mechanism, the purchase price of the target company is fixed and calculated by reference to historical accounts and financial statements of the target company. The buyer bears the risk in, and reaps of the rewards of, the performance of the target company from the date of the historical financials (the locked-box date) up to completion of the transaction. Since the purchase consideration is fixed upfront, protection against any leakage in the value of the target company between the locked box date and the completion date of the transaction (the gap period) is provided by the seller to the buyer through strong covenants, warranties and indemnities for events since the date of the latest audited accounts.

Critical for using a locked box for valuation is the quality of the historical financial statements. Locked boxes have not been much used in India because accounts traditionally have been viewed with a healthy amount of suspicion. However, this perception is slowly changing as industry and M&A in India develops and internationalizes.

Extensive negotiations take place between the seller and the buyer to determine what the buyer will accept as permitted leakages. Permitted leakages are expenses that a company ordinarily incurs to continue operating. Typically, such expenses exclude: (a) dividends, returns of capital, management fees and bonuses paid by the company to the seller; (b) waivers of rights or claims against members of the seller group or third parties; (c) changes to any "permitted" trading arrangements between the target and members of the seller group, or any new arrangements; and (d) transaction costs incurred by the target.

In addition, the SPA normally provides for extensive interim operating covenants and restrictions on what the target company can do during the gap period without the buyer's prior consent.

Pros of locked-box deals

A locked-box mechanism obviates the need to prepare completion accounts, which automatically results in saving time and expenses of the seller and the purchaser. In addition, regulatory approvals for the completion adjustment will not be required. The locked-box structure provides price certainty, which makes it easier for a seller to compare bids in an auction.

From the buyer's perspective as well the locked box mechanism is beneficial: with no need to prepare completion accounts, a seller is not motivated to manipulate the target business during the gap period to exploit any loopholes in the completion accounts adjustment. Further, a buyer can draw comfort from the locked-box mechanism as long as: (a) the SPA provides strong representations and warranties and sufficient control over potential leakages during the gap period; and (b) the purchaser has an opportunity to conduct an independent review and full due diligence of the historical balance sheet.

Disadvantages

The biggest concern in a locked-box deal is the risk of the seller exploiting any potential leakage or engaging in an improper transfer of value from the target to the seller during the gap period. This leakage could be as obvious as a dividend payout or as elusive as the target incurring transaction costs which the parties have agreed are for the seller's account.

A locked-box will not be appropriate if the transaction involves a long and uncertain gap period or if the acquisition of the target is a part of a larger transaction because the purchaser continues to run the risk of the seller entering into intra-group arrangements on terms other than on arm's-length basis.

Given the number of secondary buyouts and exits by private equity players being seen today and the emphasis on extensive diligence on target companies, the locked-box approach to price setting should gain popularity considering the amount of time and money that it can save.

Raghubir Menon is a partner, Ekta Gupta is a principal associate and Deepa Rekha is an associate at Amarchand & Mangaldas & Suresh A Shroff & Co. The views expressed in this article are those of the authors and do not reflect the position of the firm.

New DIFC Netting Law: A boost for derivatives?

By Vivek Agrawalla, Afridi & Angell

AFRIDI & ANGELL
LEGAL CONSULTANTS

Jumeirah Emirates Towers
Office Tower, Level 35
Dubai, United Arab Emirates
Tel: +971 4 330 3900
Fax: +971 4 330 3800
Email: dubai@afridi-angell.com
www.afridi-angell.com

Towards the end of 2014, the Dubai International Financial Centre (DIFC) enacted the DIFC Netting Law, which is the first of its kind in the Middle East. The Netting Law is based on the International Swaps and Derivatives Association model law.

The Netting Law gives certainty to close-out netting provisions, particularly in an insolvency situation. The concept of close-out netting is designed to operate at a master agreement level, allowing a party (usually the non-defaulting party) to terminate all the transactions, including those transactions that have not yet matured, with a counter-party; set off the dues and liabilities between the parties on a particular day; and arrive at a net amount payable by one party (usually the defaulting party) to the other party.

Enforceability of close-out netting, particularly in a situation of potential or actual insolvency of a counter-party, is one of the key credit-risk considerations for any party entering into a derivative or similar transaction. The Netting Law provides ample clarity and certainty on this front.

Salient features of the law

Applicability: The Netting Law applies to any "qualified financial instrument", netting agreement or collateral arrangement which is entered into by a DIFC entity or which is governed by DIFC law. A "qualified financial instrument" is widely defined to include derivative transactions, securities contracts and similar Shari'a compliant contracts or undertakings. It does not include insurance and reinsurance contracts.

Validity: In a major boost for the perception of derivative transactions in the region, the Netting Law clarifies that a "qualified financial instrument" cannot be held void or unenforceable on the grounds that it is a wager, lottery, gambling or gaming contract. In this context, it is pertinent to note that in the past, the courts in Abu Dhabi have held commodity and currency futures and spot trading to involve unenforceable contracts of risk, on the basis that the intent of the parties is not to engage in the physical transfer of the underlying subject matter of the contracts at issue but to cash settle the profit or loss on the contract to reference movements in value of the related commodity or currency.

Limitation of Insolvency Law: Save one exception, the Netting Law clarifies that in the event of any contradiction between the provisions of the Netting Law and the DIFC Insolvency Law of 2009 or the DIFC Insolvency Regulations, the provisions of the Netting Law will prevail. The powers of a liquidator to cherry pick specific transactions have been curtailed, and now the liquidator is required to apply the close-out netting provisions at the master agreement level only. It would, however, be curious to see how a UAE court (outside the DIFC) dealing with liquidation of a UAE company (incorporated outside the DIFC) would interpret the provisions of Netting Law in a situation when the company in question has entered into a qualified financial instrument governed by DIFC law.

Enforceability: The netting and set-off provisions of a qualified financial instrument will be enforced as per its terms against the counter-party, guarantor and any other security provider. The provisions of the Netting Law will be enforceable irrespective of appointment of any liquidator or any insolvency proceedings. Any claw-back or similar provision of law, or any court order will not render a provision of the Netting Law unenforceable.

Liquidation of collateral: The Netting Law provides wide scope for realization, appropriation and liquidation of collateral under a collateral arrangement in relation to a qualified financial instrument provided the steps are taken without prejudice to any agreement between the parties and are taken in a commercially reasonable manner as per the applicable laws.

Conclusion

Derivatives and securities transactions involving netting and set-off are not unknown in the UAE. The Netting Law brings a degree of certainty in relation to these transactions.

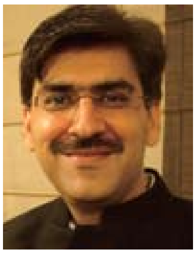
With the enactment of the Netting Law the DIFC joins a league of select jurisdictions in the world with such legislation. It is likely to provide the impetus required for derivatives and securities transactions in the region. The new law will apply by default to DIFC entities, and it is likely that entities in the region will increasingly opt for DIFC law as the governing law to attract the benefits of the Netting Law.

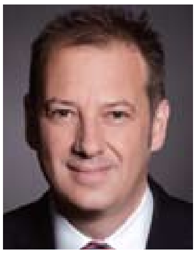
Comprehensive insolvency proceedings are rare in the UAE, and there is hardly any reported instance where the close-out netting provisions of a financial instrument were tested in an insolvency situation. It will be interesting to see how the new law is applied by the DIFC courts, as and when the occasion arrives. While the application of the Netting Law should be reasonably straightforward in relation to a DIFC entity, it could create challenges when applied in relation to a non-DIFC entity undergoing liquidation proceedings.

Vivek Agrawalla is an associate at Afridi & Angell, a UAE-based law firm with offices in Abu Dhabi, Dubai, the DIFC and Sharjah.

Buying a German business is easier than one may think

By Gautam Khurana, India Law Offices and Walter Schmidt, ETL International AG





D - 19 (GF) & D - 31, South Extension - I
New Delhi - 110 049
Tel: +91 11 2462 2216, 2462218
Fax : +91 11 2465 4364
Email: g.khurana@indialawoffices.com

Germany has the biggest economy in Europe, and one of the strongest. Mid-sized firms, often family owned, are the backbone of Germany's economy, and many are open to expansion through investment. So, what are the crucial points when thinking of investment in German companies?

In general, foreign investors who intend to buy a German company face no limitations and there is no requirement for any public authority to approve a transaction. The typical acquisition routine involves due diligence followed by a letter of intent and detailed deal negotiations. The results are laid down in a term sheet, which lawyers later put into the legal documentation. With respect to purchase price the discounted cash-flow approach is fairly standard.

Finding a suitable target may be a challenge but specialist consultants are available and chambers of commerce and banks are often helpful contacts.

Legal aspects

German law distinguishes between a purchase agreement and the acquisition. The agreement stipulates the terms and conditions of the transfer of the ownership of the shares or assets in question and so determines an obligation, whereas the transfer requires a second act. However, both aspects may be combined in one document.

Purchases of companies are usually made as asset deals or share deals. No German statute explicitly deals with the sale of companies. From a legal point of view, the sale of a company is treated similar to the sale of a banana. No surprise, most investors prefer complex guarantee provisions in the purchase agreement instead of relying on the standard warranty obligations provided by the Civil Code.

The principle of *caveat emptor* – the buyer bears the risk – applies in Germany. However, due diligence is not as common as in other countries. The failure to conduct due diligence is not automatically seen as negligence and does not bar claims against the seller.

Although most transactions can be made in simple written form or even orally, the sale of shares of a GmbH (limited company) is subject to notarization. The management of a GmbH also has to file an updated list of shareholders with the commercial register. That list, together with other publicly available data, is online for anyone to see.

With asset deals, usually all the assets of an enterprise along with the business are transferred into a new entity. By law this includes the employment contracts. Dismissing employees in Germany is a burdensome and expensive undertaking.

Indian staff require a work permit and a valid visa. In general, one needs to demonstrate that the specific position requires an Indian person and cannot be done by an EU person.

Tax aspects

Tax aspects may be important when setting the purchase price. The sale of a business, part of a business or assets by an individual or a tax transparent entity (e.g. partnership) is subject to income tax at the individual tax rate (up to 47.48%). Trade tax will also become due (about 15%, depending on the location of the business) but can be deducted from income tax.

If an individual sells shares that are held as business assets 60% of the profit is subject to income and trade tax. If the shares are held as private assets a flat 25% income tax applies and trade tax is not applicable.

If a company sells a business, part of a business or assets, any gain will be subject to corporate tax and trade tax. Profit from the sale of shares, however, is to the extent of 95% exempt from tax.

For the investor, tax claims arising later may frustrate an initially successful purchase. To avoid this, a purchaser should check the documentation of the last tax inspection and ascertain how many years are "open" for tax changes. Usually tax claims are barred if based on facts that are more than four full years old. A change in ownership may lead to the loss of all or part of any tax loss carry-forward.

In case of an asset deal the purchase price is split pro rata over the assets bought and the new value serves as base for further depreciation. So, tax refunds may help to refinance the acquisition. Since shares are not subject to wear and tear there is no depreciation in a share deal. The price only becomes tax relevant when the company is sold later and the capital gain is defined.

The double tax treaty between Germany and India provides for German withholding of 10% on any dividends transferred to an Indian shareholder. The acquisition of a business in whole or in part and share purchases are exempt from value-added tax.

So, not rocket science. Access to one of the most powerful markets is nothing to be scared of.

Gautam Khurana is the managing partner at India Law Offices in New Delhi. Walter Schmidt is CEO of ETL International AG, Berlin. The firms collaborate for entry to Germany and tax, audit and legal assistance for Indian companies.

Regulation proposed for crowdfunding in India

By Ganesh Prasad and Sharad Moudgal, Khaitan & Co

KHAITAN & CO
Advocates since 1911

Simal, 2nd Floor
7/1 Ulsoor Road
Bengaluru 560 042, India
Tel: +91 80 4339 7000
Fax: +91 80 2559 7452
Email: bengaluru@khaitanco.com
Bengaluru | Kolkata | Mumbai | New Delhi

Crowdfunding is a popular mode for raising funds for startups and entrepreneurs. Simply put, crowdfunding is the solicitation of funds, usually a small amount, from multiple investors through an online platform or through social networking to launch a specific venture or cause. Investors are typically individuals, often forming part of an entrepreneur's social network.

Risks associated with crowdfunding include: (a) shifting of risk from sophisticated institutional investors to retail investors; (b) lower success rate; (c) genuineness of ventures; and (d) illiquidity, given the absence of a secondary market.

Globally, crowdfunding has evolved largely into four models based on end use: (a) donation-based, where funds are invested with no expectation of repayment; (b) reward-based, where funds are invested with the expectation of a reward; (c) peer-to-peer lending, where investors lend funds to entrepreneurs at fixed interest rates through a platform; and (d) equity-based, where investors receive shares for funds invested.

India has no legal framework regulating crowdfunding. A consultation paper on securities-based crowdfunding published by the Securities and Exchange Board of India (SEBI) in June 2014 is the sole indicator of regulatory deliberation on the subject so far. The paper envisages three models for securities-based crowdfunding: equity-based, debt-based and fund-based. The equity and debt-based models permit companies to raise up to ₹100 million (US$1.6 million) through the private placement of equity and debt securities.

Under the equity-based model, no single investor may hold more than 25% of an issuer, and promoters of the issuer are required to hold at least 5% for at least three years. Under the debt-based model, debt securities are to be issued in compliance with the Companies Act, 2013.

The fund-based model permits companies to raise monies from "crowd funds", a new class of pooling vehicle to be registered under the under the SEBI (Alternative Investment Funds) Regulations, 2012.

In all three models, accredited investors are allowed to make investments through online crowdfunding platforms. Accredited investors comprise: (a) qualified institutional buyers (QIBs); (b) Indian companies with a minimum net worth of ₹200 million; (c) high net worth individuals (HNWIs) with a minimum net worth of ₹20 million; and (d) retail investors with a minimum annual gross income of ₹1 million, reasonable investment knowledge and experience, and access to investment advice.

Equity and debt-based models permit private placements of securities on crowdfunding platforms to a maximum of 200 HNWIs and retail investors, and any number of QIBs. The minimum offer value proposed is ₹20,000 per person, provided that retail investors cannot invest more than ₹60,000 in an issue, and a retail investor's investments through crowdfunding should not exceed 10% of its net worth. QIBs are required to hold a minimum of 5% of any crowdfunded offer. The minimum ticket size is five times the minimum offer value per person for QIBs, four times for companies, three times for HNWIs, and the minimum offer value per person for retail investors.

Under the fund-based model, crowd funds may solicit funds from up to 1,000 accredited investors, with each investor contributing not less than ₹2.5 million. In addition, the crowd fund's sponsor or manager is required to maintain a continuing interest of at least 2.5% of fund's corpus in the form of an investment, and not a waiver of management fees.

The equity and debt-based models are intended to benefit early-stage startups, and unlisted small and medium enterprises. Eligible entities may raise up to ₹100 million during a 12-month period through a single crowdfunding platform only, subject to satisfaction of other requirements. There are fewer restrictions in the fund-based model. No issuer can raise funds through crowdfunding without using a recognized platform and getting approval from a screening committee constituted to assess viability of ideas.

Entities eligible to establish crowdfunding platforms have been divided into: (a) class I entities, comprising recognised stock exchanges with nationwide terminals and SEBI-registered depositories; (b) class II entities, comprising self-sufficient government-promoted technology business incubators registered as not-for-profit entities, having a minimum track record of five years and a net worth of at least ₹100 million; and (c) class III entities, comprising registered not-for-profit associations of private equity and angel investors, with at least 100 active members and having a minimum track record of three years.

The SEBI consultation paper is a positive step, and impliedly recognizes crowdfunding as a fund-raising route for Indian entrepreneurs. However, certain conditions seem restrictive and impractical. Crowdfunding aims to connect retail investors with entrepreneurs to encourage growth of ideas with minimal interference. Certain conditions proposed make crowdfunding a sub-set of venture capital, which will hinder entrepreneurs from finding legitimate sources of capital to nurture novel ideas.

Ganesh Prasad is a partner and Sharad Moudgal is a principal associate at Khaitan & Co. The views of the authors are personal, and should not be considered as those of the firm.

Documentation expected to reflect new NBFC rules

By Bhumika Tripathi, Khaitan Sud & Partners

Khaitan Sud & Partners
D-41, Defence Colony
New Delhi - 110024
India
Tel: +91 11 41552824-25
Fax: +91 11 41510266
Email: bhumika.tripathi@kspartners.co.in
www.kspartners.co.in

The Indian banking sector has witnessed a paradigm shift in the past decade. Non-banking financial companies (NBFCs) have played a pivotal role in providing an array of financial services and innovative products, and have contributed significantly in meeting the credit needs of the corporate sector, small borrowers and other segments generally neglected by banks.

With a view to address risks faced by NBFCs, plug regulatory gaps arising from differential regulations (both within the sector and vis-à-vis other financial institutions) and strengthen governance standards, the Reserve Bank of India (RBI) has, based on recommendations of two working group reports, prescribed certain changes in the current regulatory framework applicable to NBFCs.

Funds & assets

At present, the minimum net owned fund (NOF) is ₹20 million (US$325,000) for new NBFCs and ₹2.5 million for NBFCs in existence before 21 April 1999. In order to strengthen the financial sector and encourage technology adoption, all NBFCs will be required to attain a minimum NOF of ₹20 million before the end of March 2017. Non-adherence to this requirement will result in cancellation of the NBFC's certificate of registration.

In reference to loans, any asset owned by an NBFC which remains overdue for a period of six months or more has been classified as a non-performing asset (NPA) as compared to 90 days in the case of banks. NBFCs now will have to mark a loan as an NPA if the interest has not been paid in 90 days or three months. This directive will come into force from March 2018 and is intended to be implemented in a phased manner.

Deposits

Previously, unrated asset finance companies (AFCs) with a minimum NOF of ₹2.5 million could accept or renew public deposits up to 1.5 times their NOF or a maximum of ₹10 million (whichever is lower). Rated AFCs could accept or renew deposits up to 4 times their NOF.

Unrated AFCs that fail to get themselves rated by a rating agency by 31 March 2016 will not be allowed to renew existing deposits or accept fresh deposits. Until that time, unrated AFCs are allowed to only renew existing deposits.

The limit for acceptance of deposits for AFCs has been reduced from 4 times to 1.5 times of NOF with immediate effect thereby harmonising the limit across the sector. AFCs holding deposits in excess of the revised limit are barred from accepting fresh deposits or renewing existing deposits until they conform to the revised limits. However, AFCs can hold existing deposits until they mature.

Prudential norms

Prudential norms and conduct of business regulations are enforced to address systemic risks. Now, non-deposit taking NBFCs with an asset size of less than ₹5 billion will no longer be subject to prudential norms or conduct of business regulations if they do not have any access to public funds and do not have a customer interface.

Those having customer interface with no access to public funds will be subject only to conduct of business regulations. NBFCs with access to public funds with no customer interface will be subject to prudential norms and conduct of business regulations will not apply to them. NBFCs that accept public funds and have customer interface must abide by the prudential norms as well as conduct of business regulations.

Aftermath

Recent regulatory changes brought the norms for restructuring of advances by NBFCs in line with the norms specified by the RBI for banks. Now, restructured project loans for infrastructure and non-infrastructure sectors enjoy standard classification. While stringent norms are being introduced, it is imperative that certain benefits currently enjoyed by banks be extended to NBFCs.

With reduction in the timeframe for declaration of NPAs, recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (which empowers banks to recover NPAs without the intervention of the court) should be extended to NBFCs to enable banks and NBFCs to compete on equal footing. Also, options such as easy access to external commercial borrowings for raising funds (especially given the reduced deposit ceilings) should be made available to all types of NBFCs. While there may be a dip in the profits of NBFCs due to increase in NPAs and higher provisioning requirements in the transition phase, these norms are likely to form a stronger structure for NBFCs thereby equipping them to withstand asset quality shocks in the long run. The immediate effect of the new regulatory framework is likely to be seen in project financing documentation, where moratorium periods, periodic repricing and repayment provisions may be harmonized.

Khaitan Sud & Partners is a fast growing law firm providing specialist legal services to both domestic and international clients. Bhumika Tripathi is an associate at the firm.

Will payments banks help foster financial inclusion?

By Sawant Singh and Aditya Bhargava, Phoenix Legal

PHOENIX LEGAL

New Delhi
Second Floor,
254, Okhla Industrial Estate
Phase III
New Delhi – 110 020, India
Tel +91 11 4983 0000
Fax: +91 11 4983 0099
Email: delhi@phoenixlegal.in

Mumbai
Vaswani Mansion, 3rd Floor
120 Dinshaw Vachha Road
Churchgate
Mumbai – 400 020, India
Tel: +91 22 4340 8500
Fax: +91 22 4340 8501
Email: mumbai@phoenixlegal.in

Unlike jurisdictions such as Singapore, India did not (until very recently) have differentiated licensing for banks, i.e. granting licences for conducting a specific line of banking business. The prevalence of universal banking licences coupled with the burden of fulfilling increasingly stringent prudential norms meant that banks that received licences rarely ventured outside Indian cities which were their main profit centres. Consequently, the avowed goal of successive central governments to make basic banking services available to all citizens was not fulfilled.

While the Reserve Bank of India (RBI) tried to work around this roadblock through means like allowing banks to use business correspondents, linking branch expansion to the opening of branches in lesser banked areas, and offering incentives for priority-sector lending, the lack of commercial viability meant that millions of Indian citizens in rural and lesser banked areas did not have access to basic banking services. Government initiatives such as requiring public sector banks to take an active role in lesser banked areas too had limited success.

The lack of access to basic banking services became glaring when the government tried to move away from the subsidy model towards the direct cash benefit model, in which the subsidy recipient's account would be credited with the amount of the subsidy enabling them to purchase goods like kerosene at non-subsidized rates. While the direct cash benefit model would have helped India's woeful balance of payments situation, its implementation required subsidy recipients to have access to low or zero balance accounts. The lack of basic banking services for most subsidy recipients meant that the direct cash benefit model could not be fully implemented.

Separate licensing for banks was raised in a discussion paper on banking structure in India released by the RBI in August 2013, which also voiced the requirement for non-universal banking. The discussion paper noted that differentiated licensing in India would be "a desirable step", and that banks with differentiated prudential regimes and levels of access to public deposits could be established.

The next fillip to the concept of differentiated licensing came from the report of the Committee on Comprehensive Financial Services for Small Businesses and Low Income Households, which recommended the differentiation of banks on the basis of design such as payments banks for processing payments and deposits, full-service banks, and wholesale consumer banks.

The central government noted in its budget for 2014-15 that the RBI would create "a framework for licensing small banks and other differentiated banks … to meet credit and remittance needs of small businesses, unorganized sector, low income households, farmers and migrant work force".

The RBI issued draft guidelines for licensing of payments banks in July 2014, finalized guidelines in November 2014, and clarifications on the guidelines in January 2015.

As per the guidelines, payments banks promote financial inclusion by providing small savings accounts and payments/remittance services to low-income households, small businesses, etc. Casting a wide net, the guidelines allow existing pre-paid instrument issuers, public sector entities, individual professionals, and entities such as mobile telephone companies and supermarket chains to establish payments banks.

A payments bank will be required to include "payments bank" in its legal name. Payments banks will be able to accept current and savings deposits up to ₹100,000 (US$1,620) from individuals, small businesses and other permitted entities. A payments bank cannot accept deposits from non-resident Indians.

To provide operational flexibility, the guidelines allow payments banks to conduct a series of transactions exceeding ₹100,000 as long as the balance at the end of the day does not exceed ₹100,000. This cap can be enhanced by the RBI based on the bank's performance.

Payments banks are allowed to issue "ATM" and debit cards, but not credit cards. Further, the banks can provide internet banking and undertake bill payments. The banks are also allowed to access payment gateways and process cross-border remittances that are in the nature of personal payments and current account remittances.

Although payments banks cannot engage in lending activities, they are permitted to engage in simple financial activities not requiring them to commit funds such as distributing mutual fund units and insurance products, with the prior approval of the RBI.

Payments banks are a step in the right direction to foster and encourage financial inclusion in India. The deadline for receipt of applications to establish payments banks is 2 February 2015, and many private sector participants as well as government-operated India Post are said to have applied to the RBI to establish payments banks. Similar to the granting of universal banking licences by the RBI in 2014 to IDFC and Bandhan, this too is expected to have a positive effect in strengthening and deepening the Indian financial market.

Sawant Singh is a partner and Aditya Bhargava is a principal associate at the Mumbai office of Phoenix Legal.

Is fair market value fitting for valuation of services?

By Kumar Visalaksh and Rahul Khurana, Economic Laws Practice

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

109 A Wing, Dalamal Towers
Free Press Journal Road
Nariman Point, Mumbai – 400 021, India
Tel: +91 22 6636 7000
Fax: +91 22 6636 7172
Email: KumarVisalaksh@elp-in.com
RahulKhurana@elp-in.com
Mumbai | New Delhi | Ahmedabad | Pune | Bengaluru | Chennai

Fair market value (FMV) is generally understood as the price for which a specified asset or property would be sold in the market and that a knowledgeable, willing, and unpressured buyer would pay to a seller. As a concept, FMV has been widely used for a long time across many areas of law to determine the value of assets for payment of taxes, excise duty, insurance claims, etc.

However, it is interesting to note that it was only in 2012 – the year when the service tax law was comprehensively revamped with the introduction of a negative list approach to taxation of services – that the concept of FMV was introduced for the purpose of payment of service tax in relation to specified services of construction, works contract and supply of food by restaurants and caterers.

The Service Tax (Determination of Value) (Second Amendment) Rules, 2012, and abatement Notification No. 26/2012, provided that while determining the value for the payment of service tax for the services of construction, works contract and supply of food by restaurants and caterers, the FMV of any goods provided by the service recipient to the service provider during the course of provision of such service should form part of the amount for discharging the service tax.

The FMV of such goods is to be determined in accordance with generally accepted accounting principles. In other words, for the first time, it was statutorily provided that "gross amount" for the purposes of payment of service tax would include the FMV of supplies/goods made available by service receiver to the service provider while providing the specified services of construction, works contract and supply of food by restaurants and caterers.

Debate before recognition

The statutory recognition of FMV for the payment of service tax under specified services was preceded by a bitter history of litigation related to the erstwhile taxable services of erection commissioning, works contract, etc. The tax authorities contended that the "gross amount charged" ought to be read as inclusive of all components which are loaded in the taxable service including the raw materials supplied free by the principal. This argument was based on the authorities' belief that the scheme of valuation under section 67 of the Finance Act, 1994, and abatement notifications in 2004, 2005 and 2006 mandate such inclusion.

The issue was further complicated by conflicting decisions of the Bangalore and Ahmedabad service tax tribunals. The issue was finally referred for adjudication to the larger bench of the Delhi tribunal in *M/s Bhayana Builders (P) Ltd v CST, Delhi* (2013). Examining the service tax scheme in terms of the valuation provisions under section 67 of the act, the larger bench held that "value of goods and materials supplied free of cost by a service recipient to the service provider, being neither monetary or non-monetary consideration paid by or flowing from the service recipient, accruing to the benefit of service provider, would be outside the taxable value or the gross amount charged, within the meaning of the expression in Section 67 of the Act". Hence, free supplies ought not to be included for the purpose of computing the "gross amount" under the abatement notifications as it has no legal sanctity under section 67.

However, it is imperative to note that though the concept of FMV has been introduced under the Service Tax Valuation Rules and abatement Notification No. 26/2012, section 67 – the substantive provision dealing with the valuation under the act within which the rules are issued – remained unchanged. Hence, it can be argued that the *ratio* of Bhayana Builders, insofar as it held that the scheme of section 67 does not allow the inclusion of "free supplies" in the definition of "gross amount" for the payment of service tax, holds true.

Challenges with concept

Moreover, as FMV has been vaguely defined to mean value as per generally accepted accounting principles, there is no uniform criterion for fixing the FMV of goods/materials and it is left to the parties to justify that their declared value of goods is the "fair market value" of such goods. The vagueness in the definition of FMV allows enough leverage to tax officers to question the correctness of the value of goods for the payment of service tax.

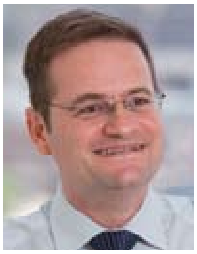
It is equally relevant to note that FMV as a concept clearly ignores the commercial freedom of a service receiver to make goods and materials available to its service provider with the ultimate objective of reducing the cost of services which it ultimately has to bear.

It is undisputable that the concept of FMV for valuation of services raises several unanswered questions in relation to its validity and its application. However, it is certain that in its current form, the concept of FMV has the potential to lead to another round of litigation.

Kumar Visalaksh is an associate partner and Rahul Khurana is an associate manager at Economic Laws Practice. This article is intended for informational purposes and does not constitute a legal opinion or advice.

Comparative advertising in the UK: Do's and don'ts

By James Touzel, TLT LLP



20 Gresham Street
London, EC2V 7JE
Tel: 0333 006 0300
Fax: 0333 006 0311
Email: James.Touzel@TLTsolicitors.com
www.TLTsolicitors.com

Comparative advertising is a well-known and long-standing marketing tool in the UK, as it is in India and many other countries around the world. It allows companies to compare their products with a competitor, to show customers why their particular offering is better.

Comparative advertising isn't always just a one-off; it can also form part of a long-running campaign against a company's competitor in a kind of "battle of the brands". Some famous examples are the marketing battles between Coca-Cola and Pepsi, Apple and Microsoft and, in the UK, between the large supermarket chains.

Although comparative advertising is allowed in the UK, there are some specific regulations that must be complied with to ensure that any campaign is legal.

Keeping it legal

The principles of comparative advertising are set out in the EU Comparative Advertising Directive of 2006. Provided that a comparative advert complies with the conditions set out in this directive, it should be permitted and a competitor would not be able to rely on its trademark rights to oppose the advertising.

Generally, a comparative advert is allowed if it: (a) is not misleading; (b) compares products meeting the same needs or intended for the same purpose; (c) objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price; (d) does not create confusion between the advertiser's and a competitor's goods, services or trademarks; (e) does not discredit or denigrate the competitor's trademarks; (f) relates in each case to products with the same designation, for products with designation of origin; (g) does not take unfair advantage of the reputation of the competitor's trademark; and (h) does not present products as imitations or replicas of products bearing a protected trademark or trade name.

Response of the courts

The courts in the UK and Europe are generally reluctant to get involved in comparative advertising and seem to appreciate that comparative advertising promotes competition within the UK market, which is in the interest of consumers.

However, to avoid trademark infringement, businesses need to be careful that their use of a competitor's trademark does not give rise to a likelihood of confusion between their respective goods and services.

In most cases this seems unlikely, as the whole point of comparative adverts is to draw a distinction between the goods and services of the advertiser and those of its competitor. The difficulty in proving confusion may be one reason why so few cases relating to comparative advertising go before the courts.

Role of standards authority

The majority of comparative advertising cases in the UK are dealt with by the Advertising Standards Authority (ASA), which upholds the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing, and its broadcast equivalent, the UK Code of Broadcast Advertising.

The codes contain principles similar to those of the EU directive, but go into more explicit and practical details in order to advise companies considering comparative advertising on how to comply with the law and with the codes.

Although the ASA cannot grant injunctions, levy fines or award compensation, the ASA may refer persistent or serious offenders to Trading Standards or, for broadcast advertising, the Office of Communications (Ofcom).

Trading Standards is a local government department set up to ensure that businesses in the local area trade within the law. Ofcom is the government-approved regulatory and competition authority for the UK's broadcasting, telecommunications and postal industries.

Both can initiate court action or, where there are wider competition law issues, can refer the matter on to the Competition and Markets Authority.

In recent years the ASA has made rulings against hundreds of companies in relation to their comparative advertising, including ASDA, Easyjet and Unilever.

Comment

Comparative advertising is a complex area of law, but it seems to be an area where companies are willing to push the boundaries in order to show their products are better than those of a competitor.

On the one hand, comparative advertising is in the interest of consumers and companies, as it encourages competition that drives down prices and in turn increases sales. However, on the other hand, if used in an unfair or misleading manner, it can adversely affect competitors and decrease consumer choice. Advertisers need to make sure that they find a balance between these differing interests and make sure that their comparative adverts fall on the right side of the law.

James Touzel is a partner at TLT LLP.

mininginvestmentasia conference

800+ attendees
250+ companies
60+ speakers
30+ exhibitors

18 - 20 March 2015
Resorts World Convention Centre, Singapore

WHERE MINERS & INVESTORS CONVERGE IN ASIA

Mining Investment Asia 2015 connects mining companies with mining funds, private equity firms, alternative financing and private wealth companies covering mining investment landscape, latest updates on government policies, strategic partnerships, innovation, disruptive technologies & business strategies.

Confirmed Speakers Include:

- **Frank Holmes**, CEO & CIO, **U.S. Global Investors**
- **Pan Guocheng**, Executive Chairman, **China Hanking**
- **Prof. Ian Plimer**, Director, **Hancock Prospecting**
- **Bob Hoye**, Chief Financial Strategist, **Institutional Advisor**
- **Ken Hoffman**, Sector Head, Metals and Mining, **Bloomberg**
- **Chris Berry**, Co-Author, **The Disruptive Discoveries Journal**
- **Geoff McNamara**, Investment Director, **Pacific Road Capital**
- **John A Robertson**, Director, **E.I.M. Capital Managers**
- **Cai Hongyu**, Managing Director, **China International Capital Corporation**
- **Biao Chen**, Managing Partner, **Jinjiang Mining Fund**
- **Keith Spence**, President, **Global Mining Capital Corporation**
- **Graeme Robertson**, Chairman & CEO, **Intrasia Capital**
- **Jayant Bhandari**, Founder & Senior Analyst, **Anarcho Capital**
- **Travis Hamilton**, Chairman, **Khan Investment Management**
- **Thomas Puppendahl**, Founder & CIO, **Chancery Asset Management**
- **John-Mark Staude**, CEO & President, **Riverside Resources**
- **Jasbir Singh**, Chairman & CEO, **Wollongong Coal**
- **Chris Powell**, Secretary & Treasurer, **GATA**
- **Edward Gustely**, Managing Director, **Penida Capital**
- **Aye Lwin**, Secretary General, **Myanmar Federation of Mining Association**
- **Nicholas Bias**, Head, Investor Relations, **IRC Group**
- **Anthony Tse**, Managing Director, **Galaxy Resources**
- **Michael Kiernan**, President Director PT Internasional Mangan Grup, **Gulf Minerals Corporation**
- **Tim Sun**, Chairman, **Overseas Mining Investment Net**

Confirmed Sponsors & Exhibitors

Gold Sponsor

铁货 IRC

Project Spotlight Sponsors

GALAXY

GULF MINERALS CORPORATION LIMITED

Wealth from the ground MISU

Exhibitors

Government of Western Australia Department of Mines and Petroleum

Supporting Partners

HKIMA

JIC HOLDINGS

Speaking and sponsorship opportunities are available

Daniel Radziszewski | daniel.radz@spire-events.com | +65 96491062

www.mininginvestmentasia.com

Spire Events

LOCAL FOCUS
GLOBAL REACH

- International Law Firm of the Year 2014 (*LegalEra Awards*)
- Two Deal of the Year awards in 2014 from *India Business Law Journal*
- Equity Capital Markets Deal of the Year 2014 (*The Asian Lawyer*)
- #1 international law firm in India by M&A deal volume (*Mergermarket, 2013*)
- Three Deal of the Year awards in 2013 from *India Business Law Journal*
- International Capital Markets Law Firm of the Year 2013 (*LegalEra Awards*)

We combine international insight and best practice with local know-how. This means we understand our clients' businesses and provide them with the best legal advisory services.

We have in the past three years been the "go-to" international business law firm for Indian corporates and we remain committed to continue helping them build truly global operations.

"They are extremely accommodating and get things done under tight timelines, which is critical."
Chambers Global 2014

Lee Miller, Chairman Emeritus, Partner, Co-Chair India Group
T +1 312 368 4029 | lee.miller@dlapiper.com

Dr. Daniel H. Sharma, Partner, Co-Chair India Group
T +49 (0)8923 237 2220 | daniel.sharma@dlapiper.com

www.dlapiper.com

DLA PIPER

DLA Piper is a global law firm operating through various separate and distinct legal entities.
Further details of these entities can be found at www.dlapiper.com

Copyright © 2015 DLA Piper. All rights reserved. | FEB 15 | DLA.AS1042.15