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INDIA BUSINESS LAW JOURNAL

LEGAL INTELLIGENCE FOR IN-HOUSE COUNSEL

Mitigating risk in M&A deals

The top international law firms for India work

How a court ruling increased stamp duty on mergers

The fallout from India's new tax agreement with Mauritius

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Laying foundations

Are legacies built by strong men and women or by the institutions they create?

A bit of both, is what most people would say. It takes individual talent backed by dogged determination and strength of character to climb to great heights, but to remain there and create significant ripples requires team effort. Yet, the challenge of creating robust teams – and beyond that, institutions – is considerable. This is more so in people-focused spheres of activity, such as the practice of law, where raw talent, entrepreneurship, management skills, egos and family ties (and feuds) all come into play.

This month's **Cover story** (*Partnership*, page 17) investigates law firm partnerships in India, where equity partners as understood at international law firms are a rare breed. As clients with their ear to the ground will know, the majority of "partners" at Indian law firms are either salaried employees or those on a retainership, who occupy a virtual no-man's land somewhere south of equity and salaried partners.

What does this mean for clients? Most would agree with PM Devaiah, partner and general counsel at Everstone Capital Advisors, who says: "The real challenge in dealing with a pseudo as against a real partner is one of continuity rather than competency. Partners with no stakes tend to watch for greener pastures."

Would more inclusive partnership structures work better? Karan Singh, a partner at Trilegal, believes they would. But Trilegal is the exception rather than the rule when it comes to attitudes towards partnership. It is one of the few law firms in India where everyone with the title "partner" is an equity holder, and every partner gets one vote irrespective of the percentage of equity held. Singh explains that this approach has come about because the firm "has always been very focused on institution building". But in a market where, in the words of J Sagar Associates' senior partner Berjis Desai, "everybody is on one big crazy ego trip," such a focus is rare.

Further scrutiny of India's legal market can be found in this month's **Vantage point** (page 22), where Murali Neelakantan, a former general counsel at Cipla and experienced private practice lawyer, argues that while the legal profession globally has evolved to nurture specialization, Indian lawyers have a predilection towards becoming generalists. "We compete, at the highest levels, as generalists, to the detriment of our clients," he says, adding that this often results in "the blind leading the blind, in more ways than one".

Neelakantan believes that the aversion to specialization is fuelled to some extent by insecurity over the risks posed by the possible entry of foreign law firms.

In *Commercial shields* (page 26) we investigate risks of a different nature – those posed by mergers and acquisitions. M&A activity involving Indian companies was worth US$48.4 billion in 2015, an 11% jump from the previous year, triggered in no small part by a relaxation of foreign direct investment limits and a wave of private equity funds divesting mature assets. With the surge in activity, companies are seeking new ways to manage and mitigate the risks associated with M&A deals, and many are warming to idea of taking out specialist M&A insurance. As a result, risk protection for M&A deals looks set to become big business in India.

Other considerations for parties to M&A deals include the structuring and tax efficiency of their investments, and in this regard, a recent change to the India-Mauritius double taxation avoidance agreement, pushed through by a confident India in May, has given many companies the jitters. In *Paradise lost* (page 23) we investigate the implications of the change for companies that have already used the Mauritius route, as well as for those that were planning to use it in the future. Has the goose that laid the golden egg been killed?

Staying on the subject of mergers and acquisitions, this month's **What's the deal?** (*A cat among the pigeons*, page 32), investigates a recent ruling – *The Chief Controlling Revenue Authority, Maharashtra State v Reliance Industries Limited* – that is set to significantly increase the transaction cost of schemes of amalgamations. A full bench of Bombay High Court ruled that every order sanctioning a scheme is chargeable to stamp duty. Our coverage considers the implications of the ruling and provides some pointers on how companies can minimize the impact.

In this month's **Intelligence report** (page 35) *India Business Law Journal* presents its 10th annual survey of the top international law firms for India work. Drawing on submissions from hundreds of international law firms that have documented deals and matters with an Indian element in the past 12 months, and testimony from clients and peers, we deliver our verdict on the firms that are are leading the field. Our coverage reveals the top 10 foreign firms, as well as 10 key players and 22 significant players. We also highlight 15 regional and specialist law firms, and 43 "firms to watch", which we believe clients should keep well within their sights. At a time of renewed interest in India by foreign investors, and with talk of liberalizing the legal market back on the agenda following a long hiatus, this year's survey is of particular interest.

This issue of *India Business Law Journal* marks the start of our 10th year of publication and we have laid the foundations for our second decade with a fresh new look. In redesigning the magazine we aimed to make *India Business Law Journal* more attractive, accessible and compelling, while enriching its unique focus and quality. We hope you like it. Drop us a line and let us know what you think.

Concerns about role of GC

Dear Editor,

I read the article on corporate sustainability and why corporate counsel in India should make it a priority (*Buying into business ethics*) in the April issue of *India Business Law Journal*. My compliments to Akhil Prasad and Manoj Kumar Agarwal for highlighting the Guide for General Counsel on Corporate Sustainability (G4CC). Their efforts are indeed laudable.

These guiding principles on sustainability itself raise some concerns in my mind.

- Global best practices on sustainability of a foreign parent are mirrored in the organizational documents of its subsidary. To that extent a subsidiary of a multinational company operating in India has an obligation to toe its parent's line.
- Will the whole concept of sustainability become a part-time pastime of the board?
- Would sustainability remain a governance issue, or would it become a theme that cuts across all verticals?
- Would an audit committee or CSR [corporate social responsibility] committee make sustainability a part of their agenda and not make it part of the way businesses are run?
- How far would a domestic company go to faithfully make the G4CC a hand maiden to institutionalize sustainability?
- Will Indian GCs as a community be empowered to be the torch bearers and vigilantes of sustainability?
- Is there a financial dimension to sustainability?
- How will corporates provide for sustainability spend in a manner that is conducive to CSR spend?
- How would accountability be ensured?

I have been a GC myself, but never did I get the opportunity to actively contribute to CSR or sustainability. It was all seen as part of a larger governance domain and so was within the realm of the respective boards. I would like to be proved horribly wrong but the current diverse hierarchical structures in various organizations do not see a GC as the first port of call for developing and implementing a sustainability programme.

I have often moderated debates on whether a GC in India is truly a GC as seen and understood by the Western world. I have heard most of the speakers agreeing that it is not the case, and that the Indian GC is yet to evolve as a true GC.

I am not for a moment generalizing this. There may be companies that position their GC at the same level as the multinational companies would. But I am not sure if the GCs in India would be allowed to play a pivotal role in matters of sustainability. I am very passionate about the GC role and I do hope organizations increasingly look to GCs as the flag bearer on sustainability, and that GCs demonstrate their desire and willingness to run with that torch. Amen!

MR Prasanna
Advocate, Arbitrator & Mediator
The Chambers
Bangalore

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FEEDBACK?

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India Business Law Journal welcomes your letters.
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Due to the quantity of letters we receive, it is not always possible to publish all of them.

PEOPLE MOVES

SHAH IN SHOCK ELP EXIT

In what is seen as a surprise move, Rohan Shah, who has been the managing partner of Economic Laws Practice (ELP) since its inception in 2001, is to step down and exit the firm and its equity partnership on 30 September.

Speaking to *India Business Law Journal*, Shah said that transitioning the leadership of the firm was always part of his plan and "certainly not knee-jerk in any way".

In what he described as a "well-prepared move", Suhail Nathani, another founding partner of the firm, will take over as managing partner when Shah leaves.

"Even on day one we had very clear commitments not to continue forever and actually had identified a retirement date," said Shah. "In my case I have just done it earlier than I should otherwise have done it."

Shah confirmed that he was leaving his equity behind when he moves on. He said exiting the firm was "the only way of ensuring that [the transition] was genuinely done and ... the new leaders could take the firm forward in the way they wanted".

Nathani told *India Business Law Journal* that the change of leadership was a "massive step" towards building a firm that would outlast its founders.

"This transition from a founder is unique in the context of Indian law firms," said Nathani. "We are transitioning in a non-confrontational manner and to a team of professionals who believe that we have a legacy to carry forward."

While Shah and Nathani signed the firm's first partnership deed in 2001, two other equity partners – Rohit Jain and Sanjay Notani – have also been at the firm since its inception.

Shah, who is a first-generation lawyer, said: "The reason we set up this firm was to ensure that lawyers like me should have a chance. They should really aspire to say that I can lead a firm and I don't have to be somebody's brother or someone's son."

After leaving ELP, Shah is planning to set up a counsel practice, which he described as being close to his heart. He said that he would also continue to work on "certain social and public initiatives".

"I believe ELP 'borrowed' Rohan from the bar," said Sujjain Talwar, another partner at the firm. "It is time the bar gets enriched with yet another brilliant commercial mind and orator. We wish him the best in his new chapter and will hopefully continue to make him proud of ELP."

Initially set up as a tax and trade advisory firm, Economic Laws Practice now covers a broad range of practice areas and won awards from *India Business Law Journal* in February 2016 for its work in competition and antitrust, dispute resolution, policy and regulation, and taxation. It has six offices and 130 lawyers, of whom 27 are partners and seven are equity partners. The firm's clients include Google, Ericsson and Skoda.

SUHAIL NATHANI

Rohan Shah
Managing Partner, Economic Laws Practice

The reason we set up this firm was to ensure that lawyers like me should have a chance. They should really aspire to say that I can lead a firm and I don't have to be somebody's brother or someone's son.

PEOPLE MOVES

Khan to head CAM's national funds practice

Cyril Amarchand Mangaldas (CAM) has appointed Shagoofa Rashid Khan as a partner and national head of the firm's funds, investment and advisory practice.

Khan, who joins the Mumbai office, has 17 years of experience in structuring funds, managed accounts, fund documentation, acquisitions, exits, restructuring, joint ventures, international taxation and planning, corporate and commercial law, business advisory, compliance and ethics advisory, and auditing and finance.

She has worked extensively as an in-house counsel in the Indian financial services sector, holding senior positions at Kotak Investment Advisors and most recently at IDFC Alternatives, where she was a senior director and head of legal and compliance.

Khan has also had stints at Tata Sons, where she worked on corporate law matters and transaction advisory, and in private practice with Nishith Desai Associates, where she was head of the real estate funds and international tax policy teams.

"The funds industry in India, I believe, is at an inflection point due to interplay of market dynamics, increasing contribution from domestic savings, the evolving legal and tax regime, and realignment of regulatory oversight," said Khan. "It is an exciting time to return to private practice by partnering with Cyril Amarchand Mangaldas."

SHAGOOFA RASHID KHAN

HSA HIRES JURIS CORP PARTNER

Aninda Pal, a former partner at Juris Corp, has joined HSA Advocates as a partner in the firm's Mumbai office.

Pal has more than a decade of legal experience and specializes in mergers and acquisitions, private equity, venture capital, joint ventures, corporate restructurings, regulatory advisory and general corporate matters. HSA says Pal will work alongside the partnership to collectively develop and strengthen the firm's presence, profile and practice areas.

The appointment takes HSA to a total of 22 partners and associate partners across Delhi, Mumbai, Kolkata and Bangalore.

ANINDA PAL

ADSULE JUMPS TO JP INFRA AS GC

Vidya Adsule has left her position as general counsel at Kolte Patil Developers Group to join JP Infra as its general counsel.

Adsule will head the legal, compliance and secretarial function at JP Infra, which is a business of real estate builders and developers creating high-end residential projects and commercial properties in Mumbai and Gujarat.

She is supported by an in-house team of five: two lawyers with 15 years of experience, two junior lawyers and one paralegal.

Adsule spent 10 months at Kolte Patil, and prior to that was a senior partner at Hammurabi & Solomon. She has held a number of in-house roles at companies such as Bombay Dyeing and ICICI Venture Funds.

LAW FIRMS

SINGHANIA & CO OPENS DOORS IN INDORE

Singhania & Co, one of India's oldest law firms, has opened a new office in Indore in an effort to better serve its clients in Madhya Pradesh.

The Indore practice currently focuses on general corporate advisory, forensics and white collar crime.

Pradeep Jain, Singhania & Co's managing partner in Mumbai and head of the Indore practice, said the firm was already serving clients in the region from its Mumbai and Delhi offices, but that a presence in Indore would "ensure that our clients have around-the-clock support from us in person".

Banking and finance partner Ramnath Pradeep said the firm's pan-India presence has helped it "develop its forte in local laws". He said the firm believed in opening regional offices as they provided greater access to local resources, "which come in handy while conducting in-depth research and investigations for clients".

This is the firm's 10th office in India, following New Delhi, Mumbai, Ahmedabad, Bangalore, Chandigarh, Chennai, Hyderabad, Jaipur and Kolkata. The firm also has a presence in London.

Dua expands in Mumbai and Chandigarh

Dua Associates has acquired Thakore Jariwala & Associates in Mumbai and SAK & Associates in Chandigarh.

Dua took on 16 professionals from 25-year-old Thakore Jariwala & Associates: equity partners Hetal Thakore and ZA Jariwala, who each have more than 30 years of litigation experience, and non-equity partners Agnes Baradia and Jyoti Ghag who each have over 10 years of practice experience. Dua also added 12 other professionals from Thakore Jariwala and now has three offices in Mumbai, which the firm said would be an "interim arrangement" until it finds a bigger space to accommodate its team.

Siddhartha Kumar joined the firm in Chandigarh as an equity partner accompanied by five supporting professionals while Aman Bahri, a litigation practitioner with 15 years of experience, came on board as a non-equity partner.

Managing partner CR Dua told *India Business Law Journal* that Chandigarh "is an affluent growth centre for northern India" and

Mumbai would "always require additional strength as our practice grows". The firm also announced the promotion of five lawyers to its partnership: Amarta Roy and Suneera Tandon (New Delhi), Rayappa Hadagali and PK Shrikara (Bangalore) and S Arjun Suresh (Chennai).

In addition, Munawwar Naseem, who was earlier at Dua, returned to the firm's New Delhi office after five years of private litigation practice. The firm now has 59 partners and more than 200 professionals.

JSW ENERGIZES JINDAL DEAL

Jindal Steel & Power has agreed to transfer a 1000 MW (4x250 MW) coal-fired thermal power plant in Chhattisgarh, owned by its subsidiary, Jindal Power (JPL), into a separate special purpose acquisition company, which JSW Energy will acquire.

The transfer, using the special purpose company, Everbest Steel and Mining Holdings, is being made through a scheme of arrangement under sections 391-394 of the Companies Act, 1956. Once the scheme is made effective, JSW Energy will acquire 100% of Everbest and the power plant.

The deal is valued at around ₹40 billion (US$590 million), which will increase to ₹65 billion if the power plant meets certain pre-agreed conditions regarding fuel security and power offtake arrangements. The deal is expected to close before June 2018.

Cyril Amarchand Mangaldas acted for JSW Energy. The team was led by infrastructure and projects partners L Viswanathan (Mumbai) and Ramanuj Kumar (New Delhi), competition law partner Nisha Uberoi (Mumbai) advising on competition law aspects. Capital markets partner Gaurav Gupte (Mumbai) handled listing company-related aspects.

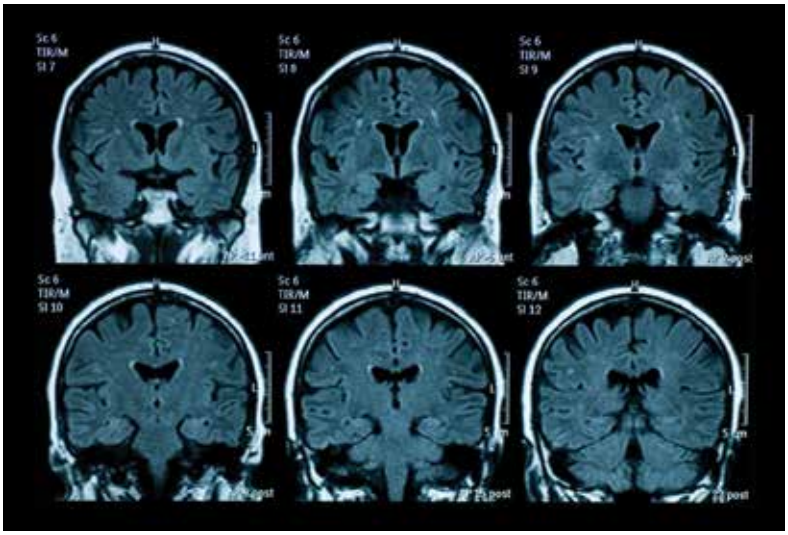
Jindal was advised by its in-house lawyers.

S-SQUARED FUNDS FUTURE SMILES

US-based S-Squared Capital Investments completed a pre-series A funding of ₹110 million (US$1.63 million) in Vatsalya Centre for Oral Health. Vatsalya, which operates two dental clinics in Bangalore, will use the funds to expand to other cities, add to its technology offerings and hire new talent, said Srivats Bharadwaj, a preventative dentistry specialist and the company's founder.

J Sagar Associates advised Bharadwaj on the investment. The team comprised partners Sajai Singh and Probir Roy Chowdhury, senior associate Sherill Pal and associate Yajas Setlur.

Peter Quittmeyer, a partner at Sutherland Asbill & Brennan in Atlanta, advised S-Squared Capital.



TPG pumps money into CTSI

TPG Growth Fund has invested approximately US$33 million in Cancer Treatment Services International (CTSI US). CTSI US operates the American Oncology Institute, a specialty cancer treatment centre at Citizens Hospital in Nallagandla, Hyderabad.

Through this investment, TPG Growth Fund, TPG's middle market growth equity investment platform, has acquired a 65% stake in the India operations of CTSI US.

J Sagar Associates represented CTSI US and its subsidiaries in Mauritius and India. The team comprised partner Vivek Chandy and senior associate Siddharth Vedula.

Cooley was the international counsel to CTSI US.

Cleary Gottlieb Steen & Hamilton teamed up with AZB & Partners to advise TPG Growth Fund.

FOREIGN FUNDS POUR INTO MOBIKWIK

Japanese payment gateway GMO and Taiwan's semiconductor company MediaTek have led a US$50 million round of funding for mobile wallet company Mobikwik. Sequoia Capital and Treeline Asia, existing investors in Mobikwik, also took part in this round.

MobiKwik provides pre-paid mobile wallets and digital pre-paid payment services for shopping, mobile recharge, direct-to-home recharge, money transfers and bill payments.

Partner Gautam Saha and senior associate Dushyant Bagga at AZB & Partners advised Tree Line Asia on the deal.

Themis Associates advised Sequoia Capital. Shardul Amarchand Mangaldas & Co acted for GMO and MediaTek.

HELIOS BITES INTO BHARTI AIRTEL

Helios Towers Africa has agreed to purchase 100% of Bharti Airtel International's passive infrastructure business in the Democratic Republic of Congo (DRC) for an undisclosed amount. The divestment comprises approximately 950 towers and includes towers currently under construction in the DRC.

Helios builds and manages telecoms infrastructure, leasing it to operators across Africa. It has a network of over 5,500 towers in four markets. Bharti will have full access to the towers from Helios under a long term lease contract.

The deal is part of a bid by Bharti to deleverage through debt reduction and reduce ongoing capital expenditure through the sale of all of its towers in Africa. The deal marks Bharti's third round of asset shedding this year. In January, it agreed to sell its operations in Burkina Faso and Sierra Leone to Orange for US$900 million, and in March it entered into an arrangement to sell around 1,350 of its communications towers to American Tower Corporation in Tanzania for around US$180 million.

Partners Gautam Saha and Amrita Patnaik, along with associate Punita Gupta at AZB & Partners, are advising Bharti on the DRC deal. Vinson & Elkins advised Helios.

NHPC undertakes offer for sale

The government has divested 11.36% of its equity in hydropower generation company NHPC, raising approximately US$406 million through an offer for sale. The sale of 1.26 billion shares reduces the state's stake in NHPC to 74.6%.

The shares were sold pursuant to regulation S and rule 144A of the US Securities Act, 1933.

The deal ensures NHPC's compliance with the Securities and Exchange Board of India's minimum public shareholding norms, which mandate all public sector companies (except state-owned banks) to have a minimum public shareholding of 25%.

Duane Morris & Selvam, led by Jamie Benson, head of the firm's India desk, was US legal counsel to the Ministry of Power.

Crawford Bayley & Co acted as Indian legal counsel to the president of India.

AZB & Partners represented the brokers.

BERGER, NIPPON ADD COLOUR TO BNB

Berger Paints India and Nippon Paint Automotive Coating (NPAU) have boosted their joint venture company – BNB Coatings India – by transferring two of their business divisions through a slump sale.

Berger Paints India agreed to sell its automotive paints business, which relates to four-wheeler passenger cars, SUVs, three-wheelers and ancillaries, while Nippon Paints India – NPAU's parent company – said it would sell its four-wheeler passenger car body paint business to BNB.

BNB manufactures and sells paint coatings for plastic substrates of automobiles. NPAU holds 51% and Berger Paints India holds 49% in the joint venture.

Khaitan & Co advised Nippon Paint on the sale. Advising on the corporate aspects were partner Rajat Mukherjee, associate partner Arindam Sarkar, principal associates Monika Srivastava and Suhana Islam, senior associate Nidhi Killawala and associate Prithwijit Gangopadhyay.

Senior associate Shounak Mitra and associates Shourya Sengupta and Nikita Bhuwania handled the due diligence, while executive director Daksha Baxi and principal associate Ritu Shaktawat advised on direct tax issues.

Partner Adheesh Nargolkar, counsel Shailendra Bhandare and senior associate Alisha Ganjawala handled the intellectual property elements of the deal, while senior associate Aditi Gopalakrishnan and associate Nikita Agarwal took care of competition law issues.

Associate partner Rashmi, principal associate Devendra Deshmukh and associate Bhargav Rao handled real estate concerns, and associate partner Anshul Prakash dealt with employment issues.

Japanese firm Anderson Mori Tomotsune was the international legal adviser to Nippon Paint.

TAXATION

INDIA AMENDS DTAA WITH MAURITIUS

On 10 May, India signed a protocol to amend its double taxation avoidance agreement (DTAA) with Mauritius. The following summarizes the amendments introduced under the protocol:

1. Taxation of capital gains on shares

Under article 13(4) of the India-Mauritius DTAA, capital gains derived by a Mauritius resident from alienation of shares of a company resident in India were subject to tax in Mauritius alone. However, the protocol amends the DTAA to source-based taxation principles. Therefore, capital gains arising on or after 1 April 2017 from alienation of shares of a company resident in India will be subject to tax in India.

However, this change is subject to the following qualifications:

- The amendments under the protocol will not apply to a sale of shares of companies resident in India that have been acquired by Mauritius residents before 1 April 2017.
- The protocol also provides for a reduced tax rate for capital gains on the sale of shares arising between 1 April 2017 »

and 31 March 2019. The tax rate during this period must not exceed 50% of the domestic tax rate in India.

- The benefit above has been made subject to a "limitation of benefits" article that is proposed to be introduced to the DTAA. This article states that the benefits must only be available to Mauritius residents who are not (i) shell or conduit companies and (ii) satisfy the main purpose and bona fide business test. Further, the protocol states that a company must be deemed a shell or conduit company if its total expenditure on operations in Mauritius is less than ₹2.7 million (US$40,000) in the 12 months preceding the alienation of shares.

2. Taxation of interest income

The protocol revises article 11 of the DTAA to state that if the beneficial owner of the interest income is a resident of the other contracting state, then the tax charged on such income must not exceed 7.5% of the gross amount of interest. However, it is also important to note that the the exemption on interest income derived and beneficially owned by a bank resident in the other contracting state will continue to apply if it relates to interest income arising from debt-claims existing on or before 31 March 2017.

3. Introduction of service PE

The protocol introduces a service permanent establishment (PE) provision to the DTAA. A provision has been added to article 5 of the DTAA, stating that "permanent establishment" must also include the furnishing of services (including consultancy services) by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) for a period or periods aggregating more than 90 days within any 12-month timeframe.

4. Taxation of other income

The protocol amends article 22 of the DTAA to include "other income" within the taxing powers of a contracting state. The added language states that items of income of a resident of a contracting state that are not dealt with under the DTAA may also be taxed in that other state.

5. Fee for technical services

Through the introduction of a new article (article 12A), the protocol has introduced taxation provisions in relation to fees for technical services under the DTAA. The protocol states that fees for technical services arising in a contracting state and paid to a resident of the other contracting state may be taxed in that other state. However, the protocol also states that fees for technical services may also be taxed in the contracting state in which they arise, and according to the laws of that state, but if the beneficial owner of the fees is a resident of the other contracting state, the tax so charged must not exceed 10% of the gross amount of the fees for technical services.

6. Exchange of information

The exchange of information article (article 26) has been amended to bring it in line with international standards. Provisions such as assistance in collection of taxes and assistance in source-based taxation of other income have been introduced. The amended article specifically states that if information is requested by a contracting state in accordance with this article, the other contracting state will use its information gathering measures to obtain the requested information, even though it may not need such information for its own tax purposes.

7. Assistance in collection of taxes

These provisions have been inserted through a new article (article 26A) which states that contracting states will lend assistance to each other in collection of revenue claims. The term "revenue claim" has been defined to mean an amount owed in respect of taxes of every kind and description imposed on behalf of the contracting states, or of their political sub-divisions or local authorities, insofar as the taxation is not contrary to the DTAA or any other instrument to which the contracting states are parties. The term also includes interest, administrative penalties and costs of collection or conservancy.

The protocol states that when a revenue claim of a one of the contracting states is enforceable under the laws of that state and is owed by a person who, at that time, cannot, under the laws of that state, prevent its collection, that revenue claim must, at the request of the competent authority of that state, be accepted for purposes of collection by the competent authority of the other contracting state. Such revenue claims will be collected by the other state in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that state.

PARADISE LOST, PAGE 23

FOREIGN DIRECT INVESTMENT

FDI LIMITS EASED FOR ASSET RECONSTRUCTION COMPANIES

On 6 May the Department of Industrial Policy and Promotion issued press note 4, allowing 100% foreign direct investment (FDI) in asset reconstruction companies (ARCs) under the automatic route. Under the earlier FDI policy, FDI in ARCs above 49% was allowed only after obtaining Foreign Investment Promotion Board approval.

Further, the investment limits applicable to sponsor in the shareholding of an ARC will now be governed by the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Earlier, investments by sponsors were capped at 50% of the shareholding of an ARC.

The permissible limit on investments by foreign institutional investors and foreign portfolio investors in each tranche of security receipts issued by ARCs registered with the Reserve Bank of India has been increased from 74% to 100%.

The changes above are applicable with effect from 12 May.

BANKRUPTCY LAW

PARLIAMENT PASSES INSOLVENCY AND BANKRUPTCY CODE

The Insolvency and Bankruptcy Code, 2015, provides a consolidated statutory framework for the resolution of bankruptcy and insolvency proceedings. This framework is a far cry from the multiple legislative and judicial forums that creditors had to navigate under the existing framework and looks to enhance the ease of doing business in India.

The code has introduced the corporate insolvency resolution process (CIRP) and the insolvency resolution process for time-bound insolvency resolution of companies and individuals, respectively. These processes will be completed within 180 days. If insolvency cannot be resolved, the assets of the borrowers may be sold to repay creditors.

The National Company Law Tribunal (NCLT) will adjudicate insolvency resolution for companies while the Debt Recovery Tribunal will adjudicate insolvency resolution for individuals. In case of the CIRP, the deadline for completion of proceedings, within 180 days of submission of the application to the NCLT, can be extended for up to 90 days if 75% of the creditors agree. In the event that a body corporate prefers to conclude the process sooner than 180 days, it can opt for a fast-track resolution that would see proceedings concluded within 90 days.

The resolution processes will be conducted by licensed insolvency professionals (IPs). These IPs will be members of insolvency professional agencies (IPAs). Information utilities (IUs) will be established to collect, collate and disseminate financial information to facilitate insolvency resolution. The Insolvency and Bankruptcy Board of India will be set up to oversee the functioning of IPs, IPAs and IUs. In CIRP, an IP's primary function is to act as an intermediary between the adjudicating authority and the creditors. In insolvency resolution proceedings for individuals and partnership companies, the IP is required to submit a report recommending whether the application merits acceptance or dismissal. The IP is also required to ensure the creditors meet and vote on components of a debt repayment plan submitted by the debtor. The IP must then provide the adjudication authority with a report on the meeting, on the basis of which the authority may implement the repayment plan as approved by the creditors.

The "fresh start option" caters to individuals who meet certain criteria, allowing them to apply for discharge from the liability to repay a debt.

If the IP believes it is appropriate to pass an order for liquidation, the code gives priority to different parties who have a claim to the debtor's assets.

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.

CONSUMER LAW

HDFC BANK PENALIZED FOR NEGLIGENCE

Allowing an appeal in *Mohinderjit Singh Sethi & Anr v HDFC Bank and Anr* the National Consumer Disputes Redressal Commission (NCDRC) ordered HDFC Bank to pay the plaintiffs compensation of ₹500,000 (US$7,400) on account of "negligence, inaction and passivity on the part of the bank". The NCDRC said the bank had "no love and respect for India" and that it had failed to act "knowing fully well that Indians were trapped in a foreign country".

In 2008, Mohinderjit Singh Sethi and his wife opened a joint account with HDFC Bank and were issued a debit card with the assurance that it could be used outside India. While the couple were travelling in Thailand and Singapore, they found the debit card to be unusable. When they contacted the bank they were told that it was due to a minor discrepancy in the records, which was to be rectified. However, the bank did not sort out the problem and the debit card continued to be unusable.

Sethi filed a complaint to the District Consumer Forum seeking ₹3 million as compensation, but was awarded ₹50,000. An appeal filed before the State Consumer Commission requesting higher compensation was dismissed, prompting a further appeal to the NCDRC.

In view of the harassment and mental agony caused to the complainant, the NCDRC said, the amount awarded by the District Forum was "just peanuts". It said that the bank is at liberty to take action against the manager of the bank, and that at least ₹50,000 may be deducted from the manager's salary.

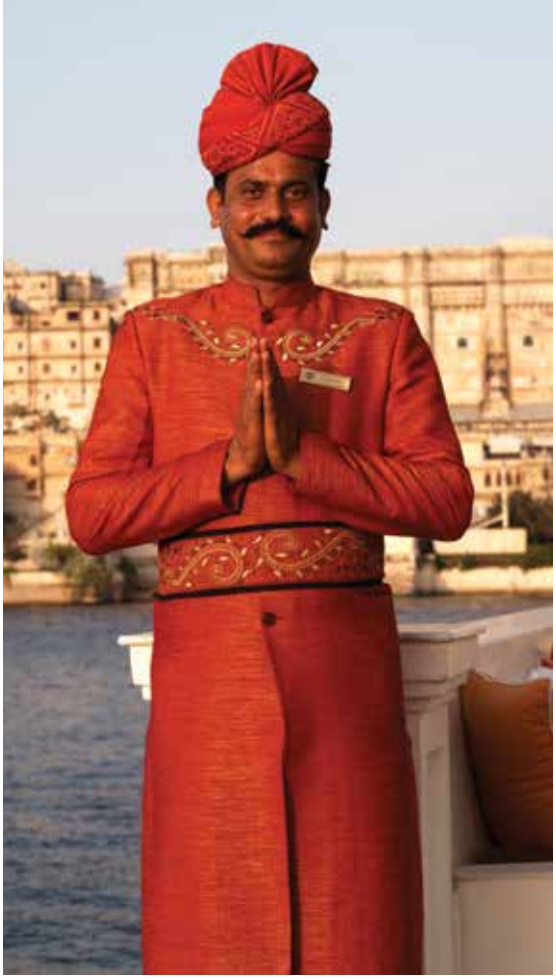
DEBT RECOVERY

NO LIEN ON DEPOSIT IN DRAT

Dismissing an appeal in *Axis Bank v SBS Organics Private Limited & Anr* the Supreme Court held that a partial deposit held by the Debt Recovery Appellate Tribunal (DRAT) as a pre-condition for considering an appeal on merits in terms of section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, is not a secured asset.

Axis Bank had appealed a ruling of Gujarat High Court, which held that such a deposit held by the DRAT is refundable to an appellant. An appeal under section 18 before the DRAT can be entertained only if a borrower deposits 50% of the amount in terms of the order passed by the Debt Recovery Tribunal under section 17 of the act, or 50% of the amount due from the borrower as claimed by the secured creditor – whichever is less. The DRAT may reduce the amount to 25%. The question before the Supreme Court was whether this deposit can be returned to an appellant when the appeal is disposed of.

The Supreme Court observed that the borrower or the aggrieved person has not created any security interest on such a deposit held by the DRAT in favour of the secured creditor. As such the court said the DRAT has to return the deposit to the borrower on disposal of the appeal, either on merits or on withdrawal, or on it being rendered infructuous, unless the secured creditor, with the consent of the depositor, requests the DRAT to be allowed to appropriate the deposit towards the liability of the borrower.



TAXATION

SUPREME COURT SAYS NO TAX AT SOURCE ON TIPS

In *ITC Limited Gurgaon v Commissioner of IT (TDS) Delhi*, the Supreme Court recently held that tips received by hotel employees do not amount to salary and hence an employer need not deduct tax at source under section 192 of the Income Tax Act, although tips would be taxable in the hands of the employees as income from other sources. Section 192 states that any person responsible for paying any income chargeable under the head salaries must, at the time of payment, deduct income tax on the amount payable.

ITC owns, operates and manages hotels. Surveys conducted at its premises allegedly revealed that the company had been paying tips to its employees but not deducting taxes on it. The assessing officer treated the receipt of the tips as income under the head salary in the hands of the various employees and held that the company was liable to deduct tax at source from such payments under section 192.

On appeal, the Commissioner of Income Tax (Appeals) set aside the assessment. On appeal, Delhi High Court held that tips received by employees in cash are outside the purview of section 192, as the employer has no role to play. However, tips paid by way of a credit card by a customer would amount to salary within the extended definition of section 17, as it goes into the employer's account before it is distributed to the employees.

Setting aside the Delhi High Court judgment, the Supreme Court observed that the amount of tip paid by the employer to the employees has no reference to the contract of employment. Tips are received by the employer in a fiduciary capacity as a trustee for payments that are received from customers, which they disburse to their employees for service rendered to the customer.

EMPLOYMENT LAW

Minor expectations, major consequences

Allowing an appeal in *The Inspector General of Prisons & Ors v P Marimuthu*, a division bench of Madras High Court recently held that "continuation of penury or indigent circumstances of the family" is not the only factor to be considered while examining a request for an appointment on compassionate grounds. It said that providing employment to an eligible family member of an employee who dies is only a concession and not a right that can be exercised by minors when they reach the age of majority (legally coming of age).

P Marimuthu's mother had been working at Central Prison in Tiruchirappalli when she died. An application for employment on compassionate grounds by Marimuthu, who was a minor at that time, was rejected.

A single judge of Madras High Court set aside the rejection order and directed that the Inspector General of Prisons, Tiruchirapalli district, Tiruchirapalli, reconsider his application. On appeal, the division bench held that the request of the petitioner for appointment on compassionate grounds cannot be entertained as he was a minor when he made the application. The court said that a post cannot be kept vacant for him until he reached the age of majority. Posts that fall vacant have to be filled up according to the recruitment rules.

COMPETITION LAW

REAL ESTATE WEBSITES NOT DOMINANT

The Competition Commission of India (CCI) recently dismissed a complaint by the Confederation of Real Estate Brokers' Association of India (CREBAI) alleging abuse of dominance by Magicbricks.com and four other real estate websites, holding that none of the websites are dominant in the relevant market, which it defined as the market for the services of real estate brokers and agents. The CCI held that "online and offline services of brokers cannot be distinguished" while defining the relevant market.

The CREBAI, which comprises 35 real estate brokers' associations with a combined membership of about 20,000 real estate brokers, argued that by advertising a no brokerage policy the real estate websites were imposing unfair and discriminatory conditions on real estate brokers who carry out real estate business on the basis of commission. The complainant alleged that the five real estate websites are dominant as they are the top real estate websites in India, and because of their dominance they are able to decide the percentage of brokerage on real estate deals, or decide not to collect any brokerage at all.

The CCI held that as there is no licence or registration requirement for real estate brokers in India, "the presence of a large number of listing sites and traditional brokers in the said relevant market pose competitive restraint on each other and hence no specific player can act independently of the market forces and affect the consumers or other players in its favour". Looking through the website ranking figures submitted by the complainant, the CCI noted that "it was not possible to gauge the dominance of any of the five real estate websites in the relevant market because the ranking was limited to only the websites/portals and does not include the offline brokers".

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.

PARTNERSHIP

WHAT IT MEANS TO BE A PARTNER AT AN INDIAN LAW FIRM AND WHY IT MAY MATTER TO CLIENTS

BY **REBECCA ABRAHAM**

India's legal profession differs from most other jurisdictions, with established firms housing some of the brightest legal minds, who in many instances are stubbornly dynastic and by design more conducive to individual endeavour.

Individualism in many respects is a good thing, but too much of a good thing may not be wise; self-interest precludes unity, and dynasties, as we know too well, will rise – and fall.

Writing almost half a century ago, Marc Galanter, an American academic with a keen interest in the Indian legal profession, wondered if lawyers in India would be capable of overcoming "their individualism to find forms of enduring collaboration" so as to develop expertise in the areas required by their clients. Galanter noted that India's "simultaneous commitments to economic development, a welfare state and democracy imply vast new demands on the legal system".

TOO MUCH OF A GOOD THING?

Fast forward to the current environment and questions continue to be asked about the ability of India's many corporate lawyers to find, and sustain, forms of enduring collaboration.

"People [lawyers in India] don't appreciate how to balance their individual and career aspirations, and the need to build an institution," says Berjis Desai, senior partner at J Sagar Associates. Having laid the foundation for an egalitarian partnership at the firm along with Jyoti Sagar, the firm's founder, Desai appears somewhat defeated when he says "everybody is on one big crazy ego trip and I think that is the biggest stumbling block in developing a good durable institution that is merit-based and survives an individual".

Desai, who will retire from the firm in March 2017, believes that Indian lawyers don't think like their counterparts in the West, as "too much importance" is paid to the individual's ego in India. "It's not about greed or money, or desire to make more money," he adds.

Rajiv Luthra
Managing Partner
Luthra & Luthra
Law Offices

There is no single strategy to get the structure right

STRATEGIES VARY

Forging collaborations between lawyers is a challenge and, according to Rajiv Luthra, managing partner of Luthra & Luthra Law Offices: "There is no single strategy to get the structure right, since what constitutes the 'right' structure varies depending on the na-

Berjis Desai
Senior Partner, J Sagar Associates

Everybody is on one big crazy ego trip and ... that is the biggest stumbling block in developing a good durable institution

A STRAW POLL

DO CLIENTS CARE IF THE 'PARTNER' THEY ARE DEALING WITH HAS LITTLE OR NO STAKE IN A FIRM?

India Business Law Journal turned to corporate counsel to find out. Excerpts of their opinions follow:

Anurag Chauhan, head of legal and senior vice president, Max Life Insurance: It really does not matter to me that a lawyer I am dealing with may have little or no stake in the firm.

Ashok Sharma, founder president, Indian Corporate Counsel Association: Basically what matters is the competence of the partner.

Badrinath Durvasula, senior vice president, legal, Adani Group: Of late, and with the emergence of multiple firms, the swap of partners has become the order of the day. In my view, a partner's credibility is established with a tenure in comparison to personality. Maturity is the key, which I look for.

Debolina Partap, vice president legal and general counsel, Wockhardt: It really does not matter so long as the partner or the law firm is able to provide a person with the right set of skill sets and able to keep the cost of the service competitive.

Himavat Chaudhuri, chief legal and regulatory affairs officer, Tata Sky: I would always like to work with a firm where the equity is not family held, if an equally good alternate exists. And yes, I always enquire whether a partner is equity or salaried. As they are less invested in the firm salaried partners are more open to change.

PM Devaiah, partner and general counsel, Everstone Capital Advisors: The real challenge in dealing with a pseudo as against a real partner is one of continuity rather than competency. Partners with no stakes tend to watch for greener pastures.

Sanjit Kaur Batra, senior counsel & legal manager (South Asia), DuPont India: I assess if the person, irrespective of designation, can deliver on the commitment and the timelines and if she or he has enough clout in the firm to get me the best rates, the right resources, and an opinion from the most well regarded subject matter expert.

ture, history and dynamics of the partnership, among other things."

"The Indian market is very complex so you have to have a very sensible balance between younger and older partners," notes CR Dua, managing partner of Dua Associates, which has 36 equity partners, and 55 partners in total. "It is completely fallacious to run an Indian firm with just youngsters. You will just give bad advice and your clients will just run away."

While the vast majority of law firms across India are sole-proprietorships, the number of partnerships is increasing. However, with the power within firms typically held by certain individuals or families, crafting a partnership structure that blends the vision of a firm with the interests of its partners is a challenge.

CR Dua
Managing Partner
Dua Associates

It is completely fallacious to run an Indian firm with just youngsters

Melissa Pereira
Co-founder, Asia Search Partners

Each firm in India does its own thing in terms of partnership structures

COMPLEX FACTORS

There are several reasons for this. India is a country that "respects seniority and grey hair", as Cyril Shroff, managing partner of Cyril Amarchand Mangaldas, puts it, yet it is also a very young country from a demographic perspective. Add to this considerable growth in demand for legal services in the past few years and the result is that, unlike in most other jurisdictions, lawyers in India with around eight years of post-qualification experience can be designated partners, albeit often only in name.

"The average age of a junior partner is much lower at an Indian firm than in a UK or international firm," says Krishnava Dutt, man-

aging partner of Argus Partners in Mumbai. Dutt, who was a partner at 31 at the now defunct Amarchand Mangaldas, credits the firm with popularizing, and possibly pioneering, the concept of a seven- to eight-year roadmap to partnership.

In addition, partnerships in India do not always have a two-tier structure as in most other jurisdictions. In a market where titles are sought after, some firms have a third strata of partners – sometimes referred to as retained partners – who occupy a rank below that of equity and salaried partners. Similarly equity partners, as understood at international law firms, are virtually non-existent.

Bithika Anand, founder and CEO of New Delhi-based Legal League Consulting, points out that "at a lot of firms equity partnership is a designation that provides a big leap in the career path of an individual. Often the partner gets only some token equity".

The lack of any visible pattern in equity structures across firms can be baffling for observers looking in from the outside. "Each firm in India does its own thing in terms of partnership structures," remarks Melissa Pereira, a co-founder of legal recruiter Asia Search Partners in Hong Kong.

Cyril Shroff
Managing Partner
Cyril Amarchand Mangaldas

Our equity partnership is something to be coveted I believe

HOW IT SHOULD BE DONE

THREE SIGNIFICANT PLAYERS IN THE LEGAL MARKET DETAIL THEIR EXPERIENCE OF FORGING AN IDEAL COLLABORATION. EXCERPTS FOLLOW

Cyril Shroff, managing partner, Cyril Amarchand Mangaldas: It is tough to be an equity partner, in my firm at least, and the journey is helped by many of the existing equity partners who groomed, mentored and nurtured the talent that we have.

We have a two-tier partnership of salary and equity. Looking back in history we were the first firm to announce a formal career path, and the road to partnership and then to equity partner was laid out. It is aspirational.

To be designated as an equity partner is a matter of honour and pride. I guess it takes market standing, maturity, subject matter knowledge.

Karan Singh, partner, Trilegal: We have always been very focused on institution building.

Each year we have a performance evaluation that is done by the management committee. They then decide the lockstep configuration for the partner for the year. Each year you can go up by a fixed number of units, and once you get into one step you don't go down.

I think fundamentally a partnership is as much a social contract as a legal arrangement. The reason we are successful is that a partner gets a lot of importance from the system, and evidence of that is we haven't lost a partner in eight years. Each partner gets one vote. We don't vote according to our equity.

I think if you've been a personality-led firm all along then it's very hard to move beyond it. But if the firm's DNA has been to promote the personality of the firm and not the individual then everyone comes into the personality of the firm. We don't think it's necessary to have a personality lead the firm.

Our partnership deed had an overhaul about three years ago. It went through a unanimous approval and until everyone was satisfied with it we didn't approve it. We used RSG Consulting to do our partnership structure, together with Moray McLaren, who now works with Redstone Consultants. Now we work with Brad Hildebrandt – the guru of law firm management – who runs Hildebrandt Consulting.

Ranji Dua, managing partner, Dua Associates: In our firm, equity means equity ... it is one firm and a true equity in the sense equity is understood in mature economies. The current structure has been in place for 15 years, if not more.

As an equity partner, we look at the overall contribution, including how much they contribute to the administration of the firm, how much they contribute to client building and training youngsters. We have some people who are very bright but are only interested in the money, so opt to stay as salaried partners because the salary structure is very clear. There is a formula and on the basis of that formula people are paid. So there may be some salaried partners who earn more than equity partners.

Karan Singh
Partner, Trilegal

It's very much our model to have the firm's personality ahead of that of the partners

CONCENTRATED POWER

Those who know how matters stand at larger law firms say that few equity partners get to see a partnership deed. According to a lawyer who wishes to remain anonymous, this is quite simply because partnerships in India "are all about power, which is something that the owners of the law firm don't want to let go of".

This may be understandable in the Indian context, where partnerships are typically built by founding partners, and partners – even those who are given some equity – who join subsequently are not required to put any capital into the partnership.

"If you put yourself in the shoes of the old guard, the point is quite simply that everything was made out of their blood and sacrifice … so why should they share management or powers with partners who join later," explains the same lawyer.

Describing the experience of being a junior partner almost a decade ago at one of India's most respected firms, another lawyer who also wants anonymity says: "Partnership at the firm meant you had the confidence of its controlling lawyers … you served at the behest of 'the king'."

He says that not only did he not have a contract, as he was a partner only in name, but there was uncertainty about his monthly earnings. "There was little need for any paper … I would not be able to put my hand on the bible and say I knew what I would earn, because I did not, I did have a fair idea of how much it might be. The timing, however, was a bit uncertain because when I got paid depended on a lot of factors."

Despite all this, "everybody aspires and desires, and legitimately so, to be an equity partner," as Desai at J Sagar Associates points out.

"Our equity partnership is something to be coveted I believe," says Shroff at Cyril Amarchand Mangaldas. The 650-lawyer firm has over 90 partners.

Sawant Singh
Partner,
Phoenix Legal

Becoming an equity partner is a question of time, and of having the competency and the wherewithal to wear that hat

A CONSTANT CHURN

The current dynamism in the Indian legal market has been triggered to a large extent by the lack of transparency in the country's firms. Entrepreneurial lawyers have moved on to set up on their own, and some have succeeded in creating structures where equity and power is not concentrated in the hands of a few. (See *How it should be done* on page 20 for details of how some firms work.)

At Trilegal, where all 36 partners are part of the firm's 13-year lockstep partnership structure, Karan Singh says: "It's very much our model to have the firm's personality ahead of that of the partners." Singh, who is part of the two-partner management committee of the firm, says doing so "keeps all the egos in check and makes the firm much larger than the individual".

Phoenix Legal, which has both equity and non-equity partners, is another firm where power and remuneration is dispersed. "There is the lockstep that governs the growth within the equity … there are milestones," says Sawant Singh, one of its three founding partners. "Becoming an equity partner is a question of time, and of having the competency and the wherewithal to wear that hat … the technical skills are a given, but not everybody is ready for enjoying the upside and shouldering the burden of the downside."

The writing on the wall is clear: Beyond a point, growth may not occur unless equity is shared. An understanding of this is slowly but surely catching on.

RESISTING THE WINDS OF CHANGE

MURALI NEELAKANTAN ARGUES THAT INDIA'S LEGAL PROFESSION IS INSECURE, HAS LOST ITS COMMITMENT TO PUBLIC SERVICE AND IS FAILING TO MOVE WITH THE TIMES

While national legal systems seem very different from each other, there seems to be a set of common principles that regulate the legal profession across continents – integrity, independence and public service. One explanation for why we see them as so very different is the social milieu, cultural uniqueness and the values that we promote as a society.

The legal profession has evolved globally to nurture the growth of specialization. Yet, we in India continue to resist the winds of change. While there is a high level of specialization at the tribunals and subordinate judiciary, lawyers as they get more experienced seems to want to turn into generalists. A number of specialist lawyers who were well regarded seem to actively seek out a wider variety of matters once they are designated as senior advocates. Similarly, once appointed as judges, they are expected to become experts in every aspect of law.

Very few lawyers will turn away clients or refer them to others when the issue at hand is beyond their knowledge. We compete, at the highest levels, as generalists, to the detriment of our clients, and fail in our duty to clients and the court. There is many a case of the blind leading the blind, in more ways than one. The insecurity among many lawyers, especially at law firms, is perhaps fuelled by a fear of the invasion of foreign lawyers. While we may look upon law firms from other Indian cities with scorn, experience in India, Europe and Hong Kong tells us that the insecurity is unfounded.

Law firms that have established themselves across India have recruited and trained local talent, rather than export lawyers from their home offices. This is no different in France, Germany and other European countries, where international law firms coexist with successful local or regional firms.

The choices our clients make are rapidly evolving, and those of us who remain insulated from this phenomenon have become irrelevant. Classic English literature shows the position that lawyers once held in society. Clients trusted solicitors more than their own children or relatives. But over the years, bankers replaced them as the clients' friend, philosopher and guide. Then, when the bankers let down the client, accountants replaced them as the keeper of the clients' secrets.

In India, too, while we have been busy worrying about foreign law firms, accountants have managed to slowly encroach upon our monopoly. Now they are, in all but name, practising law. Many even provide corporate finance and investment banking services in addition to accounting and tax advice.

The underlying theme of our profession was public service. Many lawyers have given up lucrative private practices to work for various arms of government. Senior lawyers could be providing valuable expertise by serving on a number of tribunals, such as the Intellectual Property Appellate Board and the Company Law Board, and with regulators such as the Competition Commission of India and the Securities and Exchange Board of India. How many of us have been before the Company Law Board, where the chairperson has no knowledge of company law because he or she spent most of his or her life in the sales tax or other government department? We will have many who will redeem our reputation if we recognize their public service and celebrate their contribution. We have become a country of cynics, who waste 60 years trying to finding ulterior motives for altruism.

Leading academics in the US typically file amicus briefs and provide expert testimony in significant matters. There have been few instances of this in India. In 2012, professor Shamnad Basheer was an amicus curiae in the Novartis case before the Supreme Court, and prior to that, in 1993, a few of the students at the National Law School of India University filed an amicus brief in Unnikrishnan, a landmark case on reservation in higher education.

In the 2G spectrum case (2012), an academic may have highlighted the inequity in expropriating valuable telecom infrastructure, and that the government might be liable to pay compensation awarded by arbitral panels constituted under various investment protection treaties. Academics can make a big impact on the development of the law and may even help law students understand how they can shape the future of the nation.

Rather than be cynical about the profession and predict gloom and doom, we should be celebrating the champions of our values and learning from them. That will hasten the next revolution in the legal profession.

MURALI NEELAKANTAN is a former global general counsel of Cipla. He was previously a senior partner at Khaitan & Co, and before that an equity partner at Ashurst. He is a dual-qualified (Indian and English law) lawyer.

PARADISE LOST

WHAT ARE THE IMPLICATIONS OF INDIA REGAINING TAXATION RIGHTS ON INVESTMENTS MADE THROUGH MAURITIUS?

REBECCA ABRAHAM REPORTS

On 10 May, when it was announced that India was to regain the right to tax capital gains on investments made through Mauritius, India's ministry of finance said the move would "curb revenue loss, prevent double non-taxation" and help "curb tax evasion and tax avoidance".

None of this will have come as a surprise as there have long been calls to amend the India-Mauritius double taxation avoidance agreement (DTAA) signed in August 1982. Allegations of treaty abuse and round-tripping have increasingly marked the discourse between both countries, and India has been working to tighten up the agreement since around 2001.

In Mauritius, the signing of the protocol to amend the DTAA was acknowledged to bring an end to the uncertainty that prompted investors to vote with their feet. Reports say the share of Mauritius in foreign direct investment (FDI) going into equity in India

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

TWEAKING THE MAURITIUS ROUTE

Rohan Shah and Vidushi Maheshwari at Economic Laws Practice analyse what lies ahead

Rohan Shah

Vidushi Maheshwari

The double taxation avoidance agreement (DTAA) between India and Mauritius has applied from the assessment year 1983-84. The key benefit under it is an exemption from capital gains tax (both long term and short term) in India for Mauritius residents and there have been several disputes in this regard. After a lengthy process of negotiation, on 10 May the two governments signed a protocol to amend the DTAA. It aims to counter issues relating to treaty abuse, litigation, double non-taxation, and revenue loss, as well as to bring clarity.

The protocol amends provisions relating to permanent establishment, interest, fees for technical services, other income, limitation of benefit (LOB) and crucially, capital gains.

DIFFERENT SCENARIOS

- Shares acquired prior to 1 April 2017 and sold at any time: Benefit of the DTAA available i.e. grandfathering.
- Shares acquired and sold between 1 April 2017 and 31 March 2019: Taxable in India at 50% of the domestic tax rate, subject to LOB.
- Shares acquired on or after 1 April 2017 and sold after 31 March 2019: Taxable in India at the domestic rate (40% for short term and 10% for long term).

Under the LOB provision, a resident of Mauritius is not entitled to the reduced tax rate if it fails the main purpose test or bona fide business test. A shell or conduit company (whose total expenditure on operations in Mauritius is less than ₹2.7million (1.5million Mauritian rupees) in the immediately preceding 12 months) will also not be entitled to these benefits.

Impact on investments: The amendments will bring clarity and certainty to investment decisions. Investors will now have to factor in Indian capital gains tax on account of source-based taxation. However, there is still an open window for investment in instruments such as debentures, since taxation is limited to shares. Yet, there are certain issues that must be addressed:

Benefits for convertible instruments: It is unclear whether convertible instruments such as compulsorily convertible debentures (CCD) and compulsorily convertible preference shares (CCPS) converted after 1 April 2017 will be treated as shares acquired after 1 April 2017 and accordingly taxed in India. In the case of CCDs it is understandable that an entirely different instrument is issued on conversion. However, when CCPS are converted, only a different species of shares come into being. Clarity is required in this regard for holders of CCD and CCPS to fully appreciate the benefits.

> Investors will ... have to factor in the Indian capital gains tax [due to] source based taxation to invesment

Amalgamation/Demerger: In case of shares allotted on account of amalgamation or demerger, an issue of determining the date of acquisition could arise.

Indirect transfers: The amendment has yet to address the issue of taxation of indirect transfers. It is debatable whether indirect transfers prior to 1 April 2017 will now be taxed under the DTAA based on the benefits secured to the Mauritian resident company without looking to the antecedent transaction of the indirect transfer.

OTHER ISSUES

General anti-avoidance rules (GAAR): Investments made during the grandfathering period may be seen as having been entered into mainly to seek benefits under the DTAA on account of the impending introduction of GAAR.

LOB: From April 2017 to March 2019, entities incorporated in Mauritius solely for investment purposes may be unable to meet LOB conditions, thus rendering them liable to tax in India. After April 2019, LOB conditions may not be relevant, which could result in the setup of shell entities in Mauritius.

Singapore: Article 6 of the India-Singapore Protocol provides that capital gains benefits will apply only so long as they are available under the India-Mauritius DTAA. Even though grandfathering provisions have been provided, there is ambiguity on the benefits available to Singapore residents for capital gains earned from 1 April 2017.

Netherlands and Cyprus: Proposals to amend provisions of the India-Netherlands DTAA and India-Cyprus DTAA could be done either by introducing a LOB clause or an amendment similar to Mauritius.

Overall, the amendment is a welcome move as it is expected to reduce substantial litigation. However, clarifications, mainly in relation to CCDs and CCPS, would send a stronger signal to foreign investors and assure them of a non-adversarial taxation system in India.

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halved from 42% in 2012 to 21% in 2015, while that going into Singapore almost quadrupled in the same period.

REASSERTING RIGHTS

Now that India has pushed through the amendments to the tax treaty, commentators in India have been applauding the prospective nature of the amendments.

As such, investment made prior to 1 April 2017 will continue to profit from the benefits of the DTAA, while capital gains on equity investments made after 1 April 2017 will be taxable in India – for the first two years at 50% of the domestic tax rate, and thereafter at the full domestic tax rate.

However, the lower tax rate for the first two years is available only for Mauritius tax residents of substance: those that have a total expenditure in Mauritius for the preceding 12 months of more than ₹2.7 million (US$40,000).

Speaking to *The Financial Express* on 14 May, India's revenue secretary clarified that the amended DTAA will not apply to short-term capital gains arising out of investments in derivatives and debt instruments such as debentures.

The amendment to the DTAA will also result in interest arising in India on loans made after 31 March 2017 by banks in Mauritius being subject to a withholding tax of 7.5% in India.

UPSETTING THE APPLE CART

While investors are expected to benefit from the certainty provided by the amendment, it has opened up questions about the viability of other routes used by investors.

Talk has resurfaced of attempts to renegotiate India's tax treaties with Cyprus, the Netherlands, and crucially with Singapore, which had recently overtaken Mauritius as a source of investment inflow into India.

The DTAA between India and Singapore, which was signed in 1994, states that capital gains tax benefits are to be on par with those available in the India-Mauritius treaty. This would imply that India can assume the right to tax capital gains on equity investments made after 31 March 2017.

Investors are concerned and are urging the Indian government to take into account the more rigorous conditions – expenditure of more than S$200,000 (US$145,000) in the preceding 24 months – that an entity must meet in order to benefit from the treaty.

India's finance minister, Arun Jaitley, recently said that the current India-Singapore tax treaty will be renegotiated before the end of March 2017.

There are concerns over the failure of the Mauritius government to get India to agree to a most favoured nation clause in the amended agreement

TROUBLE IN PARADISE

Meanwhile, in Mauritius the amendment to the DTAA is prompting disquiet, despite the benefits of the so-called grandfathering of the treaty provisions – the maintenance of status quo until 31 March 2017 – which is credited for preventing a rush by investors to exit existing structures.

Writing in the Mauritian newspaper *L' Express*, Rama Sithanen, a member of parliament and former finance minister, said that while Mauritius had "no choice than to share taxing rights with India, as the days when all such rights rest with the resident country are numbered," the decision to give away taxing rights altogether would be disastrous.

Crucially, there are concerns over the failure of the Mauritius government to get India to agree to a most favoured nation clause in the amended agreement. In a press release issued a day after the amended agreement was signed, Global Finance Mauritius, a coalition of financial services industry providers, said, "there is the possibility that India could be signing more favourable DTAAs with other countries in the future".

If this happens, it could spell the end of the Mauritius route into India, and there is little the island-nation will be able to do.

"India gained, they are the winners, it is Mauritius which has lost its taxing rights," remarks Muhammad Uteem, a Port Louis-based barrister and member of parliament.

ADVANTAGES REAPED

Be that as it may, the DTAA between India and Mauritius has proved its worth for both countries. The Mauritius route accounted for about 35% of FDI into India between 2000 and 2015. It provided investors with the confidence to invest in India as the country's stock markets began opening up to foreign funds and portfolio investors in the 1990s. Several high-profile investments into India, including Vodafone's acquisition of a 33% stake in Vodafone Essar in 2011 and Vedanta's purchase of a 51% stake in Cairn India in 2010, have been channelled through Mauritius-based entities.

Mauritius has also been used by Indian companies looking to raise capital on global markets. When Azure Power, one of India's leading solar power developers, filed a draft red herring prospectus with the Securities and Exchange Commission in the US in December 2015, it did so through a company it set up in Mauritius, Azure Power Global.

This in turn has brought opportunities to Mauritius and led to the creation of a robust financial services industry on the island, which today contributes over 10% of its GDP. It is estimated that one in 900 of the 1.3 million people in the country is an accountant and one in 2,500 is a lawyer.

More importantly it has been recognized that despite the recent push to establish Mauritius as a provider of financial services for Africa, it will be a challenge to continue to develop the country as an international financial centre without business from India. Business on account of the DTAA with India is said to account for at least two-thirds of what the financial services industry does.

"It is so clear that we have cut the branch of the tree on which we are sitting" wrote Sithanen in *L'Express*.

COMMERCIAL SHIELDS

CORPORATE BUYERS ARE WARMING TO THE IDEA OF M&A INSURANCE IN A BID TO PROTECT THEMSELVES FROM TRANSACTION RISKS

JAMES KELLY REPORTS

Risky business is forecast to be big business for those offering merger and acquisition (M&A) insurance in 2016. With private equity (PE) funds divesting mature assets and the relaxation of foreign direct investment (FDI) limits in India, insurance companies offering risk protection for M&A and cross-border transactions will be kept busy.

While countries across Asia are at different levels of maturity, the consensus is that transaction risk insurance is increasingly part of the mix in M&A deals. And India is one market that is expected to see an increase in the uptake of M&A insurance products.

According to data from Bloomberg, M&A involving Indian companies hit US$48.4 billion in 2015, 11% up from the previous year. Overseas companies announced US$13.2 billion of acquisitions in India last year, compared with US$17.1 billion in 2014. Observers forecast an upswing in M&A deal activity later this year due to changes in the country's regulatory framework including revised FDI caps for

sectors including multi-brand retail, telecommunications, insurance and defence.

A DESIRE FOR PROTECTION

With the relaxation of the FDI cap on India's insurance sector last year, the expected surge in M&A activity in the industry in 2016 would bring with it more specialized transactional products and expertise.

"Comparing 2015 with 2014, M&A activity in India remained more or less flat in value and volume," says Sushant Sarin, national head for liabilities at Tata AIG General Insurance Company in Mumbai. "With India emerging as a front-runner economy for startups, a good number of investments were early-stage funding, with just a handful of mergers. All the indicators point to an increase in India M&A activity in 2016."

These indicators include economic reforms taking deeper root, a growth forecast of 7%, the "Make in India" campaign, less red tape, and global funds seeking opportunities in stable economies. Other trends are also emerging as the market matures and becomes more familiar with the risk insurance products available.

"While M&A insurance was usually preferred by large global PE

M&A UPDATE

M&A ACTIVITY WAS ON THE RISE IN THE FIRST QUARTER OF 2016. WHICH LAW FIRMS ADVISED ON THESE DEALS?

Mergers and acquisitions (M&A) involving Indian companies hit US$48.4 billion in 2015, 11% up from the previous year. In the first quarter of 2016, it stood at US$8.2 billion, which was 5.2% higher than the same period last year, according to statistics compiled by Mergermarket.

The data research company said the top two deals totalling US$3.1 billion were both in the construction sector.

The sector has become the most active target sector in M&A, with a 43.4% market share by deal value. The tables below provide an update on M&A deals and law firms that advised on the deals.

TOP M&A DEALS Q1 2016

ANNOUNCED	BIDDER	TARGET	SELLER	BUY-SIDE LEGAL ADVISERS	SELL-SIDE LEGAL ADVISERS	DEAL VALUE (US$ MILLION)
31 March 16	UltraTech Cement	Jaiprakash Associates	Jaiprakash Associates	Cyril Amarchand Mangaldas	Vaish Associates	2,401
4 February 16	Birla Corporation	Reliance Cementation	Reliance Infrastructure	Nishith Desai Associates	J Sagar Associates	706
4 March 16	Siemens	Siemens (Healthcare business division)	Siemens	N/A	AZB & Partners	451
2 March 16	Plutus Financials	GE Capital Services; and GE Money Financial Services	General Electric Company	Allen & Overy; Cyril Amarchand Mangaldas	Shardul Amarchand Mangaldas & Co; Shearman & Sterling	330
28 March 16	Fairfax India Holdings Corporation; and FIH Mauritius Investments	Bangalore International Airport (33% stake)	GVK Power & Infrastructure	N/A	Cyril Amarchand Mangaldas	320

MILANO AIPPI 2016

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September 16-20, 2016

AIPPI

AIPPI, the International Association for the Protection of Intellectual Property, was founded in 1897 and is dedicated to the development, improvement, and legal protection of intellectual property. AIPPI is a non-affiliated, non-profit organization headquartered in Switzerland, having approximately 9,000 members representing over 100 countries. The members of AIPPI include lawyers, attorneys, and agents working across all fields of intellectual property in corporate and private practice throughout the world, as well as academics, judges, government officials and other persons interested in intellectual property. AIPPI is organized into 66 National and Regional Groups.

The objective of AIPPI is to improve and promote the protection of intellectual property at both national and international levels. It does this by studying and comparing existing and proposed laws and policies relating to intellectual property, and working with both government and non-government organisations for the development, expansion and improvement of international and regional treaties and agreements, and national laws.

Don't miss the opportunity to be at the AIPPI World Congress in Milan and register for the early bird fee by June 14, 2016.
More information at aippi.org.

The programme boasts a vast range of topics covering the entire field of intellectual property:

PANEL SESSIONS

Pharma Day
- "In(gene)ious but not patentable? Patentable subject matter"
- Biosimilars – similar but different?
- Skinny Labels – Wide Impact
- Antitrust and Pharma – Seeking a Balance

High Technology
- Computer implemented technologies: patentable?
- No frontiers: the European Digital Single Market

Patent
- Infringers without borders – current issues in contributory infringement
- Prioritising priority rights
- UPC Mock Trial

Copyright/Trademark
- Unwrapping the European Trademark Reform Package
- An indication of developments in GIs
- Speaking freely about parody

General IP
- Top IP tips: the TPP and the TTIP
- IP & Fashion
- Buon appetito! IP & Food

Lunch Sessions 1
- Judges' Panel – Expert Evidence and the Role of Experts

Lunch Sessions 2
- The EPO – setting the pace for the 21st Century

PLENARY SESSIONS
- Security Interests over Intellectual Property
- Linking and making available on the Internet
- Requirements for protection of designs
- Added matter: the standard for determining adequate support for amendments

funds in the past, we have noticed that this trend is being adopted by domestic funds and corporate houses as well, which has led to significant growth in M&A insurance in the past 12 to 18 months," says Kaushik Mukherjee, a partner at BMR Legal in Mumbai.

According to a report from insurance broker Marsh last year, PE firms accounted for 61% of M&A insurance policies placed in 2014.

"Only recently have we seen Indian corporate buyers show interest towards such solutions," says Mukherjee. "Although today there generally exists a lack of awareness or appreciation for such products among Indian promoters seeking to divest stakes, continuous dialogue with various stakeholders [at companies], law firms and consultants has been beneficial in generating awareness towards such niche transactional solutions."

TAX TACTICS

M&A insurance policies are designed to reduce transaction risks inherent in complex M&A deals such as legacy legal problems, warranty and indemnity problems, and tax liability. However, these policies should not be regarded by the client as an alternative or replacement for due diligence.

"With increasing awareness among the stakeholders in a transaction – be it buyers and sellers, fund managers, legal advisers or consultants – of the insurance backstop available to secure competing interests, facilitate deals, cap contingent exposures, or transfer risk, there is increasing engagement with us for transaction insurance solutions," says Sarin of Tata AIG.

"Client enquiries are multiplying and there is readiness to share information and seek terms for the insurance cover. The bespoke policy structure finds favour with clients, and policy uptake is projected to grow."

However, the opaque nature of India's tax regime is said to be stymying the provision of some M&A insurance services, with leading firms reluctant to offer tax liability coverage in cross-border M&A because of a relatively high risk of disputes. Tax indemnity insurance is purchased either by the buyer or seller involved in an acquisition, where a known tax issue has been identified during the due diligence process. The insurer typically agrees to compensate for any additional taxes, interest or penalty that has to be paid by the insured in the transaction.

PROTECTION BASICS

WHAT DOES M&A INSURANCE COVER?

M&A insurance facilitates the M&A process by transferring to an insurance policy certain potential risks to the transaction that are already foreseen, or that might surface at a later date. Typically the following M&A insurance products are offered:

EXPAND ALL WARRANTIES AND INDEMNITIES INSURANCE

Warranties and indemnities insurance covers breaches in representations and warranties given as part of the sale of a business. Sellers can cover themselves to prevent sale proceeds being tied up in escrow accounts. Buyers can ensure the warranties have real value, even if the seller is unable to pay a warranty claim that arises sometime in the future.

TAX LIABILITY INSURANCE

Tax liability insurance can reduce or eliminate a loss arising from a challenge by the tax authorities of a taxpayer's tax treatment of a transaction or investment. A taxpayer may have had to proceed with a transaction or investment where there was uncertainty in the application of tax laws, or insufficient time to obtain an advance tax ruling.

LITIGATION BUYOUT INSURANCE

Litigation buyout insurance ring-fences contingent liabilities and legacy management issues in a company and transfers recourse for the liability to the insurer.

Source: www.aig.com

Celia Jenkins
Partner, Tuli & Co

We have had ... amendments to the Insurance Act ... the advent of insurance branch offices, a framework for overseas investors and Indian partners to form reinsurance companies

LEGAL ADVISER LEAGUE TABLE

BY DEAL COUNT

RANKING Q1 2016	COMPANY NAME	2016 VALUE (US$ MILLION)	DEAL COUNT	COUNT CHANGE FROM Q1 2015
1	Khaitan & Co	934	15	7
2	AZB & Partners	2,066	10	-11
3	Cyril Amarchand Mangaldas	3,200	7	6
4	Shardul Amarchand Mangaldas & Co	479	6	3
5	Trilegal	388	5	-1
6	Veritas Legal	217	5	4
7	J Sagar Associates	846	3	-3
8	Nishith Desai Associates	770	3	-1
9	Shearman & Sterling	670	3	
10	Economic Laws Practice	117	3	0
11	Vaish Associates	2,460	2	1
12	Weil Gotshal & Manges	1,100	2	1
13	Dechert	948	2	-
14	IndusLaw	900	2	-2
15	Allen & Overy	484	2	1

Based on announced deals valued over US$5 million, excluding lapsed and withdrawn bids. Based on dominant geography of target company being India. Data run from 1 January 2016 to 31 March 2016

Source: Mergermarket

"Our advice would be always to take out the insurance, particularly for tax insurance," says Celia Jenkins, a partner at Tuli & Co in New Delhi.

Cross-border deals between foreign and Indian companies raise transfer pricing questions about how to value the transactions for tax purposes. Some of the companies in disputes with the tax authorities include Nokia, Vodafone Group, Cairn India and Cadbury chocolate maker Mondelez International, for total claims of about US$10 billion.

HIGHER STAKES

An influx of expertise in M&A insurance is expected in the Indian market, with seven companies having already announced deals where the foreign partners are raising their stake from 26% to 49% thanks to the new investment rules. The deals are: Hong Kong-headquartered AIA in Tata AIA Life Insurance Company; UK-based Bupa in Max Bupa Health Insurance Company; Canadian insurer Sun Life Financial in Birla Sun Life Insurance; French insurer AXA in life and general insurance joint ventures with Bharti Enterprises; German Munich Re's insurance arm ERGO in HDFC ERGO General Insurance Company; and Dutch insurance group Aegon in Aegon Religare Life Insurance Company.

Jenkins offers this overview of the changing landscape: "It's been

Kaushik Mukherjee
Partner, BMR Legal

M&A insurance was usually preferred by large global PE funds in the past … this trend is [now] being adopted by domestic funds and corporate houses

Sushant Sarin
National Head for Liabilities, Tata AIG General Insurance

Client enquiries are multiplying ... The bespoke policy structure finds favour with clients, and policy uptake is projected to grow

a highly interesting year for anybody involved in the insurance space. Bear in mind these changes affect not only existing insurance companies but also insurance intermediaries [which] are huge in number in India. That's a space not a lot of people are talking about, particularly with the guidelines on Indian owned and controlled entities." She says a number of stakeholders are trying to ensure that their interests are maintained and believes this will lead to a spike in activity in both existing and new ventures entering India.

"We have had M&A, amendments to the Insurance Act, we also have had the advent of insurance branch offices, a framework for overseas investors and Indian partners to form reinsurance companies, which has so far been the monopoly of the General Insurance Corporation," says Jenkins. "Again, we are looking at an entirely new structure. There is a framework being put in place for Lloyd's of London to enter into India, again a highly interesting state because once that framework comes through and Lloyd's sets up we are looking at an entirely new marketplace with a number of people coming in to set up their ventures.

"The next couple of years are going to be very heavily active and I think we are going to see a lot of interesting things in this space."

A CAT AMONG THE PIGEONS

STAMP DUTY ON MERGERS IS PAR FOR THE COURSE, BUT A RECENT RULING SIGNIFICANTLY INCREASES THE BURDEN

VIDUR BHATIA REPORTS

The question of whether stamp duty is payable on schemes of arrangement undertaken pursuant to sections 391-394 of the Companies Act, 1956, has been considered several times in courts across India. Such schemes are executed for transferring an entire undertaking, including its assets and liabilities, by way of an amalgamation of companies or a demerger of businesses.

The courts have deliberated on whether transfers by way of schemes of arrangement took effect purely by operation of law as per the provisions of the Companies Act – in which case they were outside the purview of stamp duty – or whether they were a voluntary act undertaken by parties and so had the trappings of a sale. Stamp duty, which is payable on an instrument that transfers property, is administered under the Indian Stamp Act, 1899, and various state laws.

STATUS QUO

In *Hindustan Lever v State of Maharashtra* (2003) the Supreme Court held that a transfer by way of a scheme is a voluntary act and is made effective by a court order. As such, it held that the court order sanctioning the scheme was the instrument on which stamp duty is to be paid. The decision was in the context of an amendment to the definition of the term "conveyance" in the Bombay Stamp Act, 1958, to include every order of the high court under section 394.

Following this decision, high courts across India have held that stamp duty is payable on court orders that sanction schemes of arrangement. High courts have ruled in this manner even in states in which stamp duty laws do not specifically include court orders within the definition of conveyance.

TAKING IT FURTHER

This fairly well settled principle was extended in *The Chief Controlling Revenue Authority, Maharashtra State v Reliance Industries Limited*. A decision arrived at by a full bench of Bombay High Court on 31 March ruled that each order passed by different high courts sanctioning the same scheme is separately chargeable to full stamp duty. The decision concerned the amalgamation of Reliance Petroleum Limited (RPL) into Reliance Industries Limited (RIL), whereby the assets, liabilities and undertaking of RPL were to be transferred to and vested in RIL. (See *The specifics* on page 34 for details of the ruling.)

Mergers between companies need the approval of more than one high court if the companies in question are registered in different states. As a result, this ruling significantly increases the stamp duty costs of companies registered in the state of Maharashtra that propose to undertake schemes of arrangement.

Companies may now think twice before using this route to grow their business, if stamp duty is to be paid on each order sanctioning a scheme of arrangement. In addition it is possible that companies may not receive credit on the stamp duty already paid.

WILL IT HOLD?

Bombay High Court's decision may be technically sound and based on a literal interpretation of the provisions of the Bombay Stamp Act and the Supreme Court decision in *Hindustan Lever v State of Maharashtra*. However, the court has not considered the substance of the underlying transaction, which is a transfer of property by one company to another. As such, it seems inconsistent to require companies to pay stamp duty twice just because they choose to make such a transfer by way of a scheme of arrangement, rather than by a sale deed, which would be one instrument.

There may, however, be some in-built protection in the Bombay Stamp Act, as the cap of stamp duty payable under it relates to, among other things, the market value of the immovable properties of the transferor company that are located in Maharashtra only.

In addition, the decision in *The Chief Controlling Revenue Authority, Maharashtra State v Reliance Industries Limited* did not consider the consequences of RIL paying the stamp duty in Bombay but the scheme being subsequently rejected by Gujarat High Court. The full bench reached a conclusion that RIL was bound to pay the necessary duty on 7 June 2002, which was the date on which Bombay High Court had sanctioned the scheme. It did so despite observing that the transfer would only come into effect after Gujarat High Court had sanctioned the scheme. However, if RIL had paid the stamp duty on 7 June 2002, it would have done so without knowing whether the scheme would ultimately come into effect or not.

Schemes that require the sanction of several high courts typically provide that they come into effect once approval of all high courts is obtained. As each high court in the country works differently, there is a real concern that a scheme may be approved by one high court but is then only approved by a second high court several years later.

In the RIL case, the judge of Gujarat High Court could have rejected RPL's scheme, in which case RPL could file an appeal to the division bench of the court, which could take months to decide the matter.

WHAT CAN COMPANIES DO?

As it stands, the ruling holds good only for companies registered in Maharashtra, however other high courts could arrive at a similar decision. As such, companies may consider shifting the registered

THE SPECIFICS

WHAT LED BOMBAY HIGH COURT TO RULE THAT STAMP DUTY IS PAYABLE ON EACH ORDER SANCTIONING A SCHEME?

In *The Chief Controlling Revenue Authority, Maharashtra State v Reliance Industries Limited,* a full bench of Bombay High Court ruled on the stamp duty payable on schemes of arrangement. The decision concerned the amalgamation of Reliance Petroleum Limited (RPL) and Reliance Industries Limited (RIL), whereby the assets, liabilities and undertaking of RPL were to be transferred to in RIL.

As RPL was incorporated in the state of Gujarat and RIL was incorporated in the state of Maharashtra, RPL was required to seek approval for the scheme from Gujarat High Court, and RIL from Bombay High Court. Bombay High Court sanctioned the scheme on 7 June 2002, and Gujarat High Court passed its order sanctioning the scheme on 13 September 2002.

RIL, the transferee company, paid stamp duty of ₹100 million (US$1.5 million) in Gujarat on the order passed by Gujarat High Court. The maximum stamp duty payable in Maharashtra was ₹250 million, and RIL argued that it was liable to pay only ₹150 million as it was entitled to a credit of the ₹100 million it had already paid in Gujarat. Authorities in Maharashtra rejected this argument and Bombay High Court was asked to rule on it. Bombay High Court rejected RIL's contentions. Its findings were:

- The instrument chargeable to stamp duty is the order passed by the court sanctioning a scheme under section 394 of the Companies Act.
- The scheme/compromise/arrangement between the companies is never a document chargeable to stamp duty.
- The order of Bombay High Court that sanctions the scheme under section 394 will be the instrument chargeable to stamp duty in Maharashtra. When the registered offices of the companies that are parties to the scheme are situated in two different states, sanction by two high courts is required. The order of the second high court sanctioning the scheme is an independent instrument which may be liable to stamp duty in that state.
- Section 19 of the Bombay Stamp Act, 1958, which provides that stamp duty paid on an instrument executed outside the state, and subsequently received in the state, is given credit is inapplicable as the order dated 7 June 2002 was executed by Bombay High Court and was not executed outside Maharashtra.

Concluding that the order was the instrument on which stamp duty was charged, Bombay High Court held that a scheme would have no effect unless sanctioned by a court, and that a scheme itself does not result in transfer of the property.

The court further held that section 17 of the Bombay Stamp Act, 1958, makes it clear that an instrument that is executed in the state is required to be stamped before or at the time of execution, or on the next working day following the day of execution. Bombay High Court said RIL was bound to pay the necessary stamp duty on 7 June 2002, the date the order was passed and before the Gujarat High Court order. Instead, RIL paid part of the stamp duty in Gujarat after the Gujarat High Court order was passed, and several months after the Bombay High Court order.

Significantly, the high court found that "although the two orders of two different high courts pertaining to [the] same scheme, they are independently different instruments and cannot be said to be [the] same document especially when the two orders of different high courts are upon two different petitions by two different companies. When the scheme of the [Bombay Stamp] Act is based on chargeability on instrument and not on transactions, it is material whether it is pertaining to one and the same transaction. The duty is attracted on the instrument and not on transaction." Since RPL had not paid any duty on the order passed by Bombay High Court, RIL was liable to pay full stamp duty on this order.

The high court held that the implementation of Bombay High Court's order of 7 June 2002 sanctioning the scheme was not made dependent upon Gujarat High Court passing an order sanctioning the scheme. However, the court observed that the transfer would have taken effect from when Gujarat High Court passed its order.

offices of the entities that are proposed to be part of a scheme to ensure all such entities are registered in the same state. In such a case, all the companies seeking sanction of a scheme typically file a joint petition and there is one order sanctioning the scheme. Presumably, this would be the only instrument chargeable to stamp duty.

Moving the registered office of a company from one state to another has to be approved by a special resolution of the members of the company and requires the sanction of the Ministry of Corporate Affairs. Applications are to be filed with the regional director and must include a list of creditors who are entitled to object. A decision on the application can be expected within 60 days.

Although Bombay High Court's decision clarified the stamp duty implications with regard to inter-state amalgamations as far as Maharashtra is concerned, this may not be the last word on the subject. Chances are the Supreme Court will rule and have the final say.

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India has witnessed dramatic changes in the past decade propelled by global economic tremors, political transition, industry liberalization and heightened legal market activity. As we have closely monitored India-related deals, *India Business Law Journal* has witnessed and reported on landmark multibillion-dollar transactions, cross-border law firm marriages and break-ups, the emergence of fresh laws and regulations, a landslide election, the proliferation of new Indian law firms, and much more.

In our initial years of tracking international law firm activity on India-related deals, we saw established players reign supreme, making their mark with headline-grabbing deals and unprecedented investment. But market gyrations and a global economic collapse paved the way for lesser known law firms to clinch positions at the top. In the years when transactional work plummeted, law firm behemoths were forced to downsize, retreat into niches, or simply disappear from the India scene altogether.

During those periods, firms with arbitration, litigation and restructuring expertise took centre stage. But over time, activity with these too died down, making way once again for a flood of mergers and acquisitions, joint ventures and other partnerships. As these cycles continue, one thing remains constant: India is a vital market for international legal services.

"The world has changed," said Prime Minister Narendra Modi in his Independence Day address, shortly after being elected in 2014. "India cannot sit isolated in one corner and determine its future." Modi's statement and those made more recently by others in the corridors of power suggest that in line with attracting international investment, India may be closer to welcoming foreign law firms on its soil.

However, actions speak louder than words. Firms are sceptical about India entry becoming a reality, mostly because promises to open the market have not been kept in the past. In the meantime, the country's desperate need for investment in infrastructure, education, healthcare, energy, manufacturing and more will hopefully ensure international legal advisers remain dedicated to the India story.

IN-DEPTH INVESTIGATION

Against this backdrop of ever-changing investment tides, *India Business Law Journal* reveals the India-related achievements and activities of law firms around the world. Our report, now in its 10th year, draws on an analysis of more than 600 law firms from every continent that have documented deals and matters with an Indian element in the past 12 months. To maintain objectivity, our results are based on scrupulous research, vast editorial experience, wide consultation with corporate counsel and Indian law firms, and an extensive network of contacts.

As in previous years, we received hundreds of submissions from law firms and carefully studied public and other records, along with reports in Indian and international media, to ensure the accuracy of our information.

Based on this research, *India Business Law Journal* is pleased to present its selection of the top 10 foreign law firms for India-related work. We also list 10 firms that are considered key players for India-related deals (page 42), and an additional 22 firms that are categorized as significant players (page 45).

As always, we pay close attention to regional and specialist firms in key economies such as Australia, Canada, Japan and Singapore, and emerging regions such as sub-Saharan Africa. We pinpoint 15 firms in this category that are equipped and experienced to take on India-related mandates (see page 53).

We further feature 24 "firms to watch" (page 59) and 19 firms to watch in the regional category (page 61). Some of these firms provide a full spectrum of legal services with multiple practice areas spread across a geographically diverse network of offices. Other firms provide a laser-like focus on India, with niche specialties and robust regional relationships to help India-centric clients with their investments, funding and disputes. We believe, on the evidence available, that these firms are dedicated to India and passionate about attracting India-related work.

All of the lists are in alphabetical order. Our top 10 table consists of law firms that have unparalleled India practices and are routinely engaged to advise on complex and high-value transactions involving Indian businesses as a result of their solid reputation, multidisciplinary practices, size and geographical reach. The names in this category often stay the same, however, heightened activity by firms in the "key players" and "significant players" categories indicates that new firms could challenge the status quo in the years to come.

TOP 10

Allen & Overy
Baker & McKenzie
Clifford Chance
Freshfields Bruckhaus Deringer
Herbert Smith Freehills
Jones Day
Latham & Watkins
Linklaters
Shearman & Sterling
Slaughter and May

Allen & Overy's India team consists of more than 100 partners and associates, including more than 80 Indian lawyers spread across London, Dubai, Hong Kong, Singapore and New York. Expertise in banking and finance, corporate law, international capital markets and dispute resolution enables the firm to advise on a broad spectrum of deals for blue-chip clients such as Bharti Airtel, Tata, Jindal Steel, Standard Chartered and GMR. The firm was an adviser on four of *India Business Law Journal*'s Deals of the Year 2015. Its recent achievements include acting for AION Capital Partners, Apollo's India fund in joint venture with ICICI bank, on its acquisition of GE's commercial lending and leasing businesses in India; and advising JP Morgan Securities and Merrill Lynch International on the first US dollar-denominated green bond out of India for Export-Import Bank of India. It also acted as a strategic adviser to Reliance Industries, BG Exploration and Production India and Indian counsel on a special leave petition before the Indian Supreme Court challenging Indian courts' supervisory jurisdiction over foreign-seated arbitrations.

Baker & McKenzie boosted its India team with a series of new appointments including commercial transactions partner Sonia Baldia (Washington DC), finance and projects associate principal Pallavi Gopinath Aney, local principal and finance specialist Prashanth Venkatesh, and tax expert Sanjiv Malhotra (all in Singapore). Highlights of the past 12 months include acting for Sistema on the US$800 million demerger of its Indian wireless business; Malaysia's Metrod Holdings on its US$115 million acquisition of The Leela Goa; Café Coffee Day's US$175 million initial public offering on the Indian stock exchanges; and acting for the Indian government on its stake sale in Indian Oil Corporation for US$1.4 billion. Virginia Tse, vice president of credit origination and syndication at Wells Fargo in Hong Kong, describes the firm's services as "high-quality and efficient" and recommends Venkatesh, who is "familiar with both the local and international market". The firm is working in conjunction with Cargill to provide financial and volunteering support to help the world's street children influence government policies on their rights.

Clifford Chance makes little noise about its India practice, but the firm's deals say it all. In May last year, it acted for the global joint coordinators, bookrunners and managers on a US$300 million high-yield bond offering by Reliance Communications. Four months later, it advised the lead managers on a US$600 million regulation S/rule 144A qualified institutional placement for Indiabulls Housing Finance. In January, the firm was counsel to Nomura Financial Advisory & Securities India, Axis Capital, JP Morgan India and Edelweiss Financial Services on the ₹13.5 billion (US$200 million) IPO by Indian pharmaceutical company Alkem Laboratories. In the same month, it represented Goldman Sachs on its US$66 million purchase of a minority stake in Samhi Hotels. Capital markets partner Rahul Guptan is one of the firm's best known faces on India matters. Others specialists are Mark Poulton for mergers and acquisitions, Mark Brereton and Ranbir Hunjan (banking and finance) and Kabir Singh (dispute resolution).

Pratap Amin is the golden boy for India transactions at **Freshfields Bruckhaus Deringer** and chairman of its India practice. With more than 30 years of experience advising international companies and government entities investing in India, it is no wonder clients choose Amin when making investment decisions in the country. In a deal that made headlines this year, Amin led a team advising Hewlett Packard on the acquisition of its 60.5% stake in Mphasis by Blackstone Group. The firm was an adviser on three of *India Business Law Journal*'s Deals of the Year 2015, including IndusInd Bank's acquisition of Royal Bank of Scotland's bullion for US$612 million. Corpo-

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LAWYERS AND TAX ADVISORS

Kapil Agarwal
Joint Managing Director
UFO Moviez India

[Latham & Watkins is] one of the finest among top international law firms

rate partner Arun Balasubramanian is another key member of the firm's India practice, having advised numerous companies such as Goldman Sachs, HSBC, Bain Capital, Novartis, and Canada Pension Plan Investment Board on their India mandates.

Herbert Smith Freehills is a magnet for blue-chip companies doing business in India. Bharti, Tata, Godrej, Adani, Aditya Birla Group and Reliance Communications all feature on its enviable client list, so its presence on high-value, headline deals is naturally guaranteed. Its accomplishments in the past 12 months include roles as counsel to Bharti Airtel on the US$900 million sale of its operations in Burkina Faso and Sierra Leone to French telecom operator Orange; Cipla on the US$550 million bridge facility agreement for the acquisition of Invagen Pharmaceuticals and Exelan Pharmaceuticals; and Reliance Communications on the merger into its operations of Sistema JSFC's Indian wireless business. Under the leadership of Chris Parsons, chair of the India practice, the firm organizes the annual national corporate law moot competition at the National University of Juridical Sciences in Kolkata, and an international negotiation competition held at the National University of Law in Delhi. The firm also runs HSF Bridge, which links law students with local charities in India.

Jones Day has always been a big hitter on India-related transac-

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tions, but its practice suffered a blow earlier this year with the exit of three key India specialists – Manoj Bhargava and Ankit Kashyap, who moved to Sidley Austin, and Sumesh Sahwney, who has launched Indian firm Lakshmikumaran & Sridharan's London operations. Nevertheless, the firm enjoyed a good year with a solid string of mandates under its belt. Standout deals include advising Godrej Consumer Products in seven separate acquisition finance transactions in the past 12 months; representing Tata Power and its offshore subsidiary Khopoli Investments in offshore finance transactions worth US$135 million; and securing a role on the Indian government's US$1.4 billion offer for sale of equity shares of Indian Oil Corporation. It is currently representing GAIL India on shareholder arrangements for the Turkmenistan-Afghanistan-Pakistan-India pipeline project to transport gas from the Caspian Sea. Key India contacts are Sushma Jobanputra, Dennis Barsky, Karthik Kumar and Baiju Vasani.

Capital markets heavyweight **Latham & Watkins** holds its turf in the top 10 after another stellar year on India deals steered by partner Rajiv Gupta. Recent achievements include acting for the global coordinators and book running lead managers on InterGlobe Aviation's US$459.7 million 144A IPO and advising Adani Ports and Special Economic Zone in its US$650 million offer of 3.5% senior notes due in 2020. Gupta is also currently representing the book running lead managers on the proposed Nuziveedu Seeds 144A IPO. Kapil Agarwal, the joint managing director of UFO Moviez India who engaged Latham & Watkins for advice on its IPO last year, says it is "one of the finest among top international law firms". He praises Gupta's "thorough knowledge of the subject matter" and "easy accessibility". In February, the firm hired three private equity (PE) and acquisition finance partners – Simon Cooke, Gary Hamp and Amy Beckingham – to support its PE and M&A practice in India.

Linklaters proved its might in the past 12 months after winning roles on five of *India Business Law Journal*'s Deals of the Year 2015 including the US$650 million issue of 3.5% senior unsecured notes by Adani Ports & Special Economic Zone, and Julius Baer Group's US$6 billion acquisition of Bank of America's private wealth management business in India. The firm continued with a spate of impressive deals, advising on the sale of the payments business of Great Indian Retail Group to German payments company Wirecard. Narayan Iyer, the firm's India practice head, led a team that advised Brookfield Property Partners on the acquisition and financing of the entire interest in a portfolio owned by Unitech Corporate Parks and IDFC. This year it acted for Russian oil company Rosneft on the sale of a 29.9% participatory share in its Taas-Yuryakh Neftegasodobycha subsidiary to a consortium of three Indian companies: Oil India, Indian Oil and Bharat Petroresources.

Shearman & Sterling's presence on high-value, big-ticket transactions and cases earns it another year in the top 10. The firm counts Goldman Sachs, Sun Pharmaceuticals, Jaguar Land Rover, Deutsche Bank, CX Advisors and GE Capital among its clients. The firm clinched roles on a number of M&A, PE, project development, finance and capital markets deals in the past 12 months, three of which were named in *India Business Law Journal*'s Deals of the Year 2015. Highlights include representing General Electric on the proposed sale of its commercial lending and leasing business in India, and acting for the underwriters in Tata Motors' US$1.2 billion global rights offering. The firm was also engaged by French energy producer Engie on the sale of its stake in Meenakshi, a coal-fired power plant in India. Nandini Navale, counsel and compliance officer at Capital Square Partners, recommends Sidharth Bhasin for his "balanced commercial insight" and "much needed 'dealmaker' attitude", and credits the team's "24/7 accessibility and responsiveness across locations".

Nandini Navale
Counsel and Compliance Officer
Capital Square Partners

[Sidharth Bhasin at Shearman & Sterling offers] balanced commercial insight [and] much needed 'dealmaker' attitude

Slaughter and May clinched a major victory when it was selected to advise GlaxoSmithKline (GSK) as it entered into a three-part transaction with Novartis, a deal worth US$21.25 billion. The firm is presently acting for Tata Steel on the sale of its steel facilities in Scotland. "I am extremely happy with the level of services provided by Slaughter in comparison to most other international law firms that I have worked with," says Mihir Rale, vice president of legal and regulatory at Star India. He consults the firm for strategic and routine advice in relation to the management of Star India's International Cricket Council rights. "Whether it's on account of turnaround time, quality of advice received or attention provided to the client, they excel and are unparalleled in my experience." Two new India country associates – Krishna Omkar and Samyuktha Rajagopal – have joined the firm's India team to support practice heads Nilufer von Bismarck and Simon Hall in London.

Mihir Rale
Vice President of Legal & Regulatory, Star India

[For] turnaround time, quality of advice received or attention provided to the client, [Slaughter and May] excel and are unparalleled in my experience

KEY PLAYERS

Ashurst
Bird & Bird
Davis Polk & Wardwell
DLA Piper
Eversheds
Milbank
Morrison & Foerster
Norton Rose Fulbright
Reed Smith
Simpson Thacher & Bartlett

Ashurst shares a long relationship with India and profits handsomely from a best friends tie-up with Indian Law Partners (ILP). "Ashurst provides rock-solid advice … the depth of knowledge that [its] attorneys have on India is … without parallel," says Bharat Dube, the CEO of Strategic IP Information in Singapore. Dube commends ILP's "excellent counsel on establishing a representative office for Cartier in India". Christine Dure-Smith, MMM strategic finance director at Merlin Entertainment, which worked with ILP to set up a new Madame Tussauds attraction in Delhi, says: "They have been a one-stop shop with respect to legal support required for a company coming to India for the first time." The firm advised long-time client Vedanta Resources on the proposed US$2.3 billion merger of its oil and gas subsidiaries Vedanta and Cairn India, and acted for Enel Green Power on its acquisition of a majority stake in BLP Energy. Says Mukesh Bhavnani, group legal counsel and chief compliance officer at Vedanta: "Ashurst is indeed one of the finest international firms in the India-related space."

Thanks to its sports law strengths, **Bird & Bird** recently closed a case for the International Hockey Federation in the Court of Arbitration for Sports, successfully defending the decision of its congress to prefer one body's claim over another's to represent hockey in India. Casual Dining Group, an independent operator of mid-market restaurants in the UK, turned to the firm for advice on Bella Italia's first international franchise in India, while English company Agility Global sought Bird & Bird's help on a merger with Agni Motors to create Saietta Group, a UK-based design, engineering and manufacturing company. Ameet Datta, a partner at Saikrishna & Associates, has worked with the firm on a wide range of issues, from Europe and Singapore to Australia and Abu Dhabi. "Bird & Bird is the go-to firm for technology, media and intellectual property services in Europe as well as in Southeast Asia," he says. He credits Nipun Gupta for being "superb at handling Indian client concerns" and notes that the firm is "extremely flexible" and "remarkably sensitive to Indian cost concerns".

Davis Polk & Wardwell captured roles on more deals than any other foreign firm (six in total) in *India Business Law Journal*'s Deals of the Year 2015, so its position as a key player is beyond dispute. Standout deals in its portfolio are Daiichi Sankyo's US$3.2 billion exit from Sun Pharmaceuticals; Reliance Industries' US$1 billion investment grade bond offering; and Reliance Industries' US$200 million Formosa bond offering. The firm's client roster includes DLF Global Hospitality, Diageo, Warburg Pincus, Rolta, Indiabulls Real Estate and ICICI Bank. The firm's India practice was first set up in 2007 and continues to be chaired by Kirtee Kapoor, a partner based in the firm's Menlo Park and New York offices. Kapoor regularly advises on US and cross-border M&A, and represents clients in investments, exits and joint ventures around the world in relation to both public and private companies.

Bharat Dube
CEO, Strategic IP Information

Ashurst provides rock-solid advice … the depth of knowledge that [its] attorneys have on India is … without parallel

DLA Piper's core India strengths lie in capital markets, cross-border M&A, technology and outsourcing, and dispute resolution. Last year, Wipro Digital engaged the firm for advice on the acquisition of Designit, a Denmark-based global strategic design firm, while a group of investment banks selected the firm for advice in connection with the IPO of Teamlease Services this year. Also this year, the firm represented sports network Willow TV International – the only 24/7 live cricket channel in the US – and its founders on the sale of its business to Times of India Group. In addition, it took on a mandate for Mahindra & Mahindra, which sought to launch a strategic joint venture in Japan with Mitsubishi Agricultural Machinery, and acted for HCL Technologies on its acquisition of the IT services arm of Volvo and related long-term outsourcing agreement – a deal valued at over US$1 billion. Munich-based partner Daniel Sharma chairs the firm's global India group.

Eversheds continues to make inroads into India after a year of work for clients such as Seqouia Capital, OnMobile, Kalpataru Power, Rolls-Royce, Axis Bank and Tech Mahindra. The firm's disputes team has also seen consistent activity. Oommen Mathew, managing director of the firm's Singapore office, was recently appointed as an arbitrator on the first international alternative dispute resolution panel of the Indian Merchants Chamber in Mumbai. Mathew is

Ameet Datta
Partner
Saikrishna & Associates

Bird & Bird is the go-to firm for technology, media and intellectual property services in Europe as well as in Southeast Asia

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acting for an Indian conglomerate in a case before the International Court of Arbitration relating to a wind energy project in India and the enforcement of its award in Austria, and advising a global airline network organization on its litigation with Indian travel agencies. The firm is also advising Axis Bank on the restructuring of Indonesia's largest coal producer, Bumi, and representing Practo, an Indian startup that provides a search platform to match doctors with patients on various deals including its tranched PE funding of US$125 million.

When it comes to India-related deals, **Milbank** makes up in value for what it lacks in volume. Last year, the firm advised Korea Trade Insurance Corporation, HSBC Bank as the export credit agency arranger and facility agent, and participating commercial banks in a US$750 million facility for Reliance Jio Infocomm, and also acted for Reliance Industries on its US$225 million US Exim Bank guaranteed notes. Last August, Glenn Gerstell who was head of the firm's India practice, was appointed general counsel of the National Security Agency in Washington DC. He will manage more than 100 lawyers at the agency, which advises the executive branch of government and Congress on intelligence gathering and surveillance in safeguarding communications and information systems. David Zemans, the managing partner of the firm's Singapore office and Milbank's Asia practice, took over Gerstell's role with support from partners Naomi Ishikawa and James Grandolfo.

Morrison & Foerster was an adviser on two of *India Business Law Journal*'s Deals of the Year 2015. It advised longstanding client SoftBank on both deals – a US$400 million G-series round of funding for ANI Technologies, which operates India's Ola Cabs; and a ninth round of funding valued at US$500 million for Indian e-commerce company Snapdeal. It also represented Softbank on its joint venture with Bharti Enterprises and Foxconn Technology to develop solar power projects across India, including in Rajasthan and Andhra Pradesh, and guided it on a series C financing of OYO Rooms, an online marketplace for affordable hotels in India. It also acted for Hitachi and Hitachi Appliances in a mandatory tender offer for shares of Bombay Stock Exchange and National Stock Exchange-listed Hitachi Home and Life Solutions India, triggered by Hitachi's formation of a global air-conditioning joint venture with Johnson Controls. The firm's India practice runs primarily from its Tokyo, Hong Kong and Singapore offices.

A popular choice for banking transactions and dispute resolution, **Norton Rose Fulbright** racked up a respectable roster of deals in the past 12 months. Last year, the firm advised the Bank of New York Mellon on Adani Ports' US$650 million five-year debut dollar bond issue and was counsel to Axis Bank, State Bank of India, Emirates NBD Bank and First Gulf Bank on a limited recourse project refinancing facility of US$202 million for a joint venture entity of Bumi Armada and Shapoorji Pallonji to refinance a floating, production, storage and offloading unit called Armada Sterling. The firm also advised Mitsui in its participation in a joint venture to build the Western Dedicated Freight Corridor in India, which will connect Delhi and Mumbai and form part of one of the world's largest national integrated railway projects. Dispute resolution partner and India practice group head Sherina Petit joined the board of directors of the London Court of International Arbitration in December 2015.

Clients offer generous praise for **Reed Smith**. Alka Bharucha, a senior partner at Bharucha & Partners in Mumbai, says the firm has "exceptional knowledge of the Indian markets and the Indian psyche". She recommends Roy Montague-Jones and Ranajoy Basu for transactional work and Gautam Bhattacharyya for disputes. "Apart from their undoubted competence, each is very responsive, constructive and accommodating," she says. Cyril Shroff, the managing partner of Cyril Amarchand Mangaldas, calls Reed Smith "a fine firm with a very broad practice area range". Loyal client Debolina Partap, the general counsel at Wockhardt, has had a 15-year relationship with the firm. "Reed Smith is extremely prompt … they work round the clock on all seven days [of the week]," she says. "This is very different to other international law firms." The firm successfully defended Barclays Bank as part of a syndicate of lenders comprising the offshore branches of various Indian banks in an English high court litigation against a Dutch company and its Indian parent.

Simpson Thacher & Bartlett had no trouble clocking up deals as a result of its solid reputation as an adviser to PE and strategic clients for a wide range of investments. It welcomed a wave of activity this year thanks in part to participation in the Indian market by loyal client Kohlberg Kravis Roberts (KKR). KKR called upon the firm for advice on the sale of all the shares of India-headquartered Alliance Tire Group to Yokohama Rubber for US$1.2 billion; its investment in financial services company Avendus Capital; and its acquisition of a significant minority stake in CA Media, an Asian media portfolio of the Chernin Group, which is focused on India, China and Indonesia, among other jurisdictions. Simpson Thacher also came on board with Alibaba Group and Ant Financial Services in their US$575 million investment in One97 Communications, the parent company of Paytm, India's largest mobile payment and commerce platform.

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- **#1** in India IPOs (International Firms by Deal Count as Underwriters Counsel) in 2015–2016 by **Prime Database**
- **#1** in Global M&A Market Review (India) (International Firms) by **Bloomberg** for 1H 2015
- **#1** in Mid-Market M&A (India) (International Firms) by **Thomson Reuters** for 1H 2015
- **#2** in India (International Firms by Deal Count – Managers Counsel) by **Bloomberg** Global Legal Advisors League Tables 2015
- **#3** in India (International Firms by Value – Managers Counsel) by **Bloomberg** Global Legal Advisors League Tables 2015
- **#3** in India (International Firms by Deal Count) by **Thomson Reuters** Mid-Market M&A Review 2015
- **#3** Deal of the Year Awards by **India Business Law Journal**
- **#1** in UK Mid-Market M&A by **Thomson Reuters** for 1H 2015
- **#6** in EMEA M&A by **Mergermarket** for 1H 2015
- **#8** in Worldwide M&A by **Mergermarket** for 1H 2015
- **#9** in **The 10 Mightiest M&A Practice Groups** by **Law 360**

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Senior Partner
Bharucha & Partners

Cleary Gottlieb Steen & Hamilton has forged strong relationships with several clients, including TPG, for which it has handled a number of deals. The firm is advising TPG Asia VI in connection with its follow-on investment in Janalakshmi Financial Services; acting for TPG Growth in its acquisition of a majority stake in CTSI (Mauritius); and advising TPG Capital on a US$150 million investment in Manipal Health Enterprises, one of India's largest healthcare networks. Aside from this, it was instructed by Firema Trasporti, a company in administration, on the sale of its business to Titagarh Firema Adler, a joint venture between Titagarh Wagons, an Indian manufacturer of train carriages, and Adler Pelzer, an automotive manufacturer. In addition, the firm represented GlaxoSmithKline on the global antitrust aspects of its three-part transaction with Novartis, valued at US$21.25 billion. Janice Wu, the deputy general counsel for Asia-Pacific at TPG, instructed the firm as transaction counsel and says the firm is "experienced in India transactions", recommending Mike Preston and Gabriele Antonazzo.

In August 2015, **Clyde & Co** confirmed its marine expertise when it advised Anglo-Eastern Ship Management Group on its global merger with Univan Ship Management Group – touted as one of the largest mergers of independent ship management companies to date. The merger created an entity with more than 1,700 shore-based staff, 24,000 seafarers, 600 ships under full management and 100 ships under crew management only. The firm's corporate and commercial team in Hong Kong led the transaction, with support from offices in other key jurisdictions including Singapore and India. In India the transaction was headed by Clasis Law, Clyde & Co's affiliate. Dubai-based partner Abhimanyu Jalan, a member of the India team, is licensed to practice in England & Wales, India and Ontario.

The India desk at **CMS** – the world's sixth-largest law firm – is led by a team of partners and senior associates based in London, Stuttgart, Dusseldorf, Vienna, Zurich and Rome. Its recent accomplishments include acting for an Indian car manufacturer on a €1.8 billion (US$2 billion) greenfield investment in a car manufacturing plant in Slovakia; representing Acrysil, an Indian-based manufacturer of kitchen sinks, on the acquisition of UK-based distributor Homestyle Products; and advising generics pharmaceutical company Cipla on a restructuring and divestment exercise across several jurisdictions in Europe. Gaurav Kumar, head of corporate strategy at Apollo Tyres, which consulted CMS on the setup of a greenfield manufacturing plant in Hungary, said he had "a very good experience" and will "continue to have a long-term engagement with CMS".

Covington & Burling's lawyers have worked on India-related matters for more than 15 years, representing clients on delisting transactions, project financings, joint ventures, trade and regulatory matters, and investigations. The firm prides itself on serving an even mix of major Indian companies and companies based in the US and Europe, rather than focusing exclusively on inbound transactions. Its recent achievements include acting for Mindtree, a Bangalore-based software and technology company, on three separate acquisitions of Relational Solutions, Magnet 360 and Discoverture Solutions. It also represented Famy Care on its US$800 million sale to Mylan Laboratories; acted for Lightbridge Communications on its US$240 million sale to Tech Mahindra; and advised Anheuser-Busch InBev on the termination of its Indian brewing joint venture with RJ Corp along with the transition of the business to Crown Beers India. On the disputes front, the firm successfully defended Indo Count Global against US patent litigation claims brought by a competitor in the Indian textiles industry.

Debevoise & Plimpton's India team draws primarily on lawyers in New York, London and Hong Kong. The firm caters to interna-

Gaurav Kumar
Head of Corporate Strategy, Apollo Tyres

[I had] a very good experience [and will] continue to have a long-term engagement with CMS

tional investment banks, PE firms, international strategic investors and Indian corporates looking to raise capital or acquire companies outside of India. Hong Kong-based life insurer AIA Group turned to the firm for assistance on a landmark exclusive bancassurance partnership with Citibank that encompasses 11 markets in the Asia-Pacific region, including India. Nereus Capital engaged Debevoise for advice on its joint venture with Hareon Solar and Treasury Group to create Nereus Capital Investments Singapore, which will invest in solar power projects in India. Capital International also reached out to the firm when it acquired an 11% stake in India's Mankind Pharma from another private equity seller, ChrysCapital. Debevoise hopes to capitalize on its extensive experience in insurance across Asia at a time when the sector in India's is undergoing substantial change.

Since March 2015, **Foley Hoag** has represented the Indian government in the investor/state arbitration *Louis Dreyfus Armateurs SAS v Republic of India*. The arbitration is being heard by a three-member tribunal under the UNCITRAL Arbitration Rules and is being administered by the Permanent Court of Arbitration in The Hague. On the transactional side, the firm assisted Jana Care, a start-up company tackling diabetes in India, in establishing its US operations in Boston. It regularly assists clients such as United Villages, Oxigen and iGate Computer Systems on corporate matters, and is counsel to Sphaera Pharma, Lupin Atlantis and other drug manufacturers on purchase agreements, patent prosecution and other intellectual property (IP) matters. Ami Karnik, co-founder and head of strategy at Azoi, a US company with a research and development centre in Ahmedabad, recommends Prithvi Tanwar who "is an excellent lawyer and my go-to guy. He is extremely responsive and I can fully trust him to give me advice in the best interest of the company."

Goodwin Procter packs a punch year after year with its PE prowess. One of the firm's long-term PE clients says it provides "unlevelled expertise on India-related matters and an understanding of international business that is second to none". The client uses Goodwin Procter for PE, venture capital and other private investment structures in India including tax structuring. "They are one of the best firms in the world to deal with India-related services among international law firms," says the client. "Yash Rana has deep and broad experience in India, and understanding of their laws and the structuring there, too." The firm completed a spate of deals in the past 12 months including acting for DST Global and Falcon Edge on the series G and H funding rounds worth US$400 million and US$500 million, respectively, for ANI Technologies, which runs India's Ola Cabs. It also represented Warburg Pincus on the sale of its investment in QuEST Global Services to an affiliate of Bain Capital.

Cravath works with many of the leading companies in India on capital markets transactions, mergers and acquisitions, joint ventures, litigation and arbitrations, and U.S.-related compliance and reporting advice. Our lawyers also advise U.S. and international companies in connection with their investments in companies based in India. We are honored to be recognized by the India Business Law Journal as one of the top international firms for India-related work.

CRAVATH, SWAINE & MOORE LLP

Ami Karnik
Co-founder and Head of Strategy, Azoi

[Prithvi Tanwar at Foley Hoag] is an excellent lawyer and my go-to guy. He is extremely responsive

Gowling WLG was formed in February after the merger of Canadian firm Gowlings with UK firm Wragge Lawrence Graham & Co (WLG). Ragi Singh heads up the India practice at the combined firm, which has more than 1,400 legal professionals. The India team has a solid reputation for M&A, equity capital markets, banking and real estate expertise, and sector strengths in energy and natural resources, advanced manufacturing, technology, life sciences, and hospitality and leisure. Sunil Kakkad acted for the independent directors of Greenko when it sold its assets to the government of Singapore's investment arm – GIC – for approximately US$1.3 billion. "I highly recommend Sunil," says Keith Henry, Greenko Group's chairman. "Obviously a very experienced lawyer, very thorough, hardworking and organized, [he] skilfully led a diverse internal and external team involved in a complex transaction with the correct balance of patience and persuasion to coordinate/coerce all the parties to meet their deadlines." Eicher Motors, Mahindra & Mahindra, Lalit Hotel Group and TVS Logistics are also clients.

Much of the India work channelled through **Kaye Scholer** relates to the aviation sector. With a deep bench of senior lawyers in its aviation finance and leasing practice, the firm is a magnet for financial institutions, aircraft operating lessors, aircraft and engine manufacturers, PE and hedge funds, and airlines, which it serves in relation to commercial, cargo and private jet aircraft transactions. Since their appointment in 2014, partners Philip Perrotta and Sidanth Rajagopal

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have increased the size and scope of the firm's aviation finance capabilities throughout the Middle East, Africa and South Asia, with a specific focus on India. The firm recently advised TruJet, a regional airline based in India, on the setup of its operations including the lease of three ATR 72-500 aircraft. It also represented SpiceJet on the restructuring and renegotiation of its leased aircraft portfolio following its recent private acquisition. Air Costa, IndiGo Airlines, Kingfisher Airlines, Abric Leasing and GoAir are other India clients.

Kelley Drye & Warren has seen a spike in activity relating to the Indian generics drug business. Lawyers in the firm's India practice have a deep understanding of the drug approval and development process, and are able to guide Indian clients through the complexities of the US Drug Price Competition and Patent Term Restoration Act (Hatch-Waxman Act). As a result, it has seen a rise in instructions from Indian pharmaceutical companies, which it defends against false claims act allegations. It has also made strides in other areas, acting for the Louis Berger Group in connection with the preparation and negotiation of commercial contracts relating to multiple in-

Atanu Sarkar
General Counsel, Tech Mahindra

[Sheppard Mullin's] attentiveness and commitment to client service has always stood out to us as a differentiating factor

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Sujan Malhotra
Shipping Claims Department, Legal, Scorpio Group

We rely on Stephenson Harwood to give us solid advice and solutions

frastructure projects across India, and providing compliance guidelines to an Indian joint venture company in the defence industry on US regulations relating to its International Trade in Arms and Defence Federal Acquisition Regulation Supplement. Talat Ansari and Deepak Nambiar are the firm's principal India contacts.

King & Spalding's India practice lawyers are spread across Atlanta, Dubai, Geneva, London, New York and Singapore, and work under the leadership of Atlanta-based partner Rahul Patel. The firm has taken on a number of sensitive cases for clients including a dispute in New Delhi under the UNCITRAL rules relating to a production sharing contract with the Indian government, and two International Commercial Court arbitrations being held in Singapore. On the corporate front, the firm was counsel to affiliates of the Avantha Group on multiple M&A-related transactions including the sale of one of its subsidiary companies, Pyramid Healthcare Solutions, to Anthelio Healthcare Solutions. It also served as international counsel to Adjaristsqali Georgia (owned by Tata Power), Clean Energy Invest of Norway and IFC InfraVentures, during the development, financing and construction of a 400-MW portfolio of hydropower facilities located in Georgia, and a cross-border Georgia-Turkey transmission project. This project is expected to be the largest hydropower plant to be constructed in Georgia in the past 30 years.

Ulrich Baumer heads the India practice at **Osborne Clarke**. In October 2015, the firm advised Wirecard on its acquisition of the payments business of Great Indian Retail Group, a leading electronic payment and retail-assisted e-commerce group in India and Southeast Asia. Wirecard acquired 100% of the shares of companies operating payment services in India, the Philippines, Indonesia and Malaysia under the brands iCASHCARD, Smartshop, StarGlobal and Commerce Payment, as well as several segment brands. The firm was also engaged by Bangalore's Mindtree on its acquisition of independent consultancy Bluefin Solutions. Other clients include Tech Mahindra, Aditya Birla Group, Jet Airways and State Bank of India. The firm has a best-friends relationship with Mumbai-based BTG Legal, which was set up by former Osborne Clarke India group co-head Prashant Mara.

Penningtons Manches' India practice is driven primarily from its London office. The firm picked up mandates from New Call Telecom on its acquisition through a Dutch subsidiary of the business and assets of Nimbuzz and its subsidiary Nimbuzz Internet India, and from Tata Advanced Systems on its joint venture with Boeing. Penningtons has also been active on contentious matters, acting for Indian pharmaceutical company Markans Pharma in its claim against Peter Beck & Partner – a German vulture fund – and representing HDFC as claimants in the English Commercial Court for the recovery of a substantial sum against a well-known Indian steel company. It is currently involved in proceedings in the Chancery Division of the English high courts for Syndicate Bank to recover substantial sums owed to it by a customer. Rustam Dubash, Phillip D'Costa, Ajit Mishra and Teja Picton-Howell are key India contacts.

Ropes & Gray handles a broad spectrum of work for India-focused clients. This includes anti-corruption diligence and compliance matters, internal and government investigations and litigation matters, M&A, fund formation, healthcare, financing, life sciences, real estate, and credit and special situations transactions. In the past three years, the firm's anti-corruption team has handled over 50 matters involving India and conducted more than a dozen training sessions in India for global or Indian entities and their portfolio companies and subsidiaries. On the corporate side, the firm attracted mandates from Goldman Sachs' Hong Kong-based Asia Special Situations Group for its investment in YUM! brand franchisees operating more than 200 Pizza Hut, KFC and Delifrance outlets in India and Sri Lanka, and the Carlyle Group on its purchase of a stake in Metropolis Healthcare, a chain of pathology laboratories with a presence in India, Sri Lanka, the UAE, South Africa, Kenya, Mauritius and Ghana.

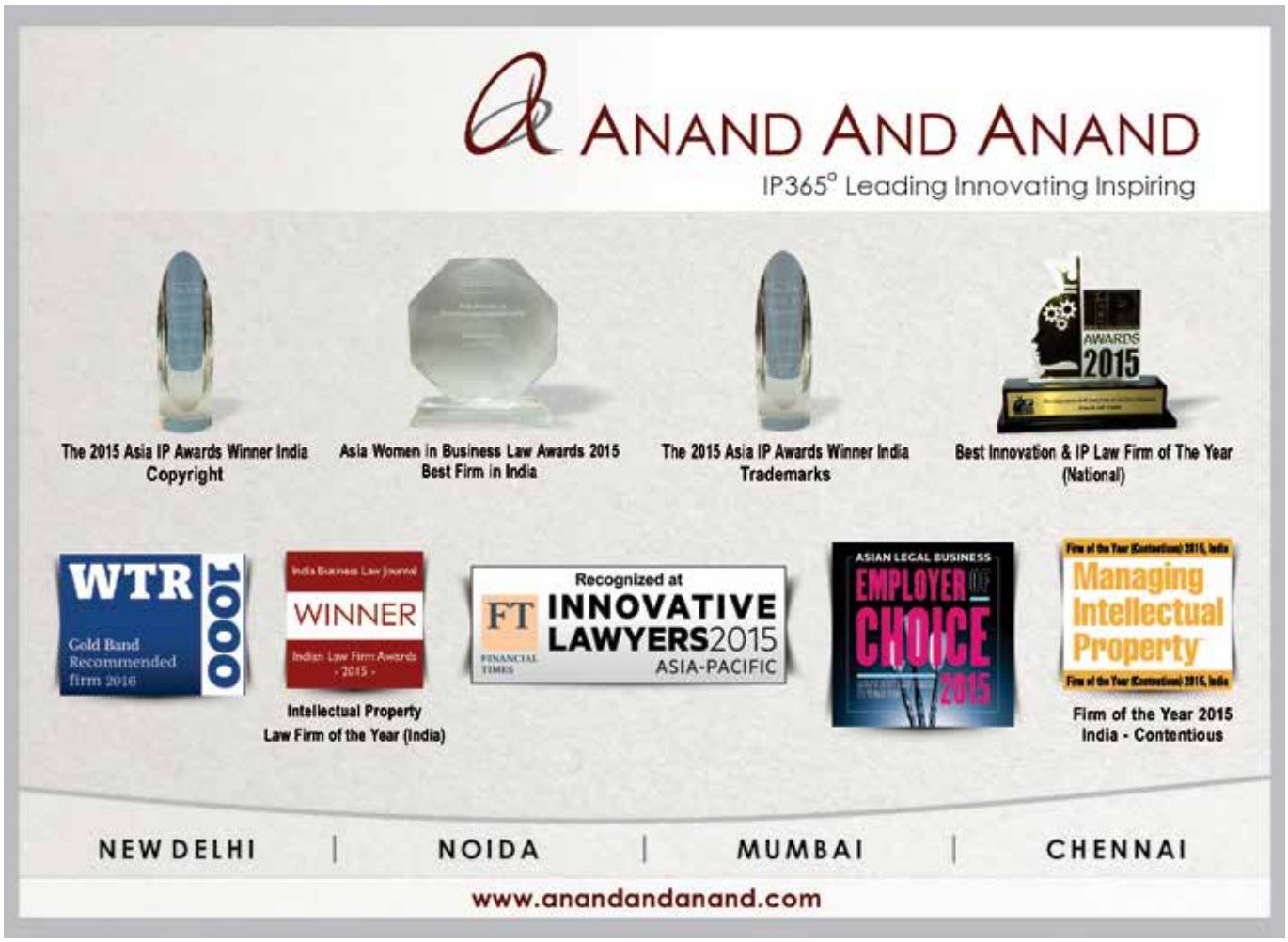
Rajiv Luthra
Managing Partner
Luthra & Luthra

Taylor Wessing brings to the table great knowledge of regulation and markets alike, good quality of work product and a strong sense of responsiveness

Sheppard Mullin Richter & Hampton enjoyed a busy year on India-related deals. The firm advised Alembic Pharmaceuticals in Hatch-Waxman litigation matters and other patent-related issues; acted for Comviva Technologies on litigation matters; provided trademark prosecution and patent advice to Recon Oil; and advised Symbiotec Pharma Lab on US Food and Drug Administration, M&A, and patent matters. Tata is one of the firm's main clients. Atanu Sarkar, the general counsel of Tech Mahindra, praises the firm's quality and user-friendliness. "They are responsive, flexible and cost-efficient," he says. "Rob Friedman serves as our 'relationship partner' and I highly recommend him. He always makes himself available and is extremely responsive. Overall as a [team] they are well knit and come across very well. Their attentiveness and commitment to client service has always stood out to us as a differentiating factor."

A strong capital markets practice has enabled **Squire Patton Boggs** to sail effortlessly through to the Significant Players category. In 2015, the firm completed more than 35 rule 144A and regulation S securities offerings and M&A transactions worth a total value of more than US$4 billion and acted as special US securities law counsel to Indian and international banks such as Barclays, HSBC, Hinduja Group, the Zee Group and State Bank of India on Indian IPOs and other offerings. Under the leadership of Biswajit Chatterjee, the firm was an adviser on IPOs by Equitas Holdings, Infibeam, Quess Corp, Hinduja Leyland Finance, Prabhat Dairy, VRL Logistics and Power Mech Projects. It is currently representing Bharat Heavy Electricals, Citigroup Global Markets India and Edelweiss Financial Services on BHEL's US$1.5 billion offer for sale. One Indian client says Chatterjee offers a "very mature and measured approach" and is "available 24/7". Parag Raval, the chief administrative officer at Infibeam, says the firm is "very professional and responsive".

Clients speak enthusiastically of **Stephenson Harwood**'s India team. Sujan Malhotra, a member of the legal team in the shipping claims department at Scorpio Group in Mumbai, who sought the firm's help with charter party disputes, says "we rely on Stephenson Harwood to give us solid advice and solutions". He says Max Lemanski and Alex McCue are "extremely proactive and sensitized to the shipping world" and understand "that not all battles need to be taken to court or arbitration". Viren Miskita, a partner at MT Miskita & Co, has had "excellent interactions" with the firm on cross-border real estate-related transactions. "We consider them as our first choice for cross-border work," says Miskita. Kamal Shah is "a practical thinker; his knowledge of law and ability to put through a matter are a great asset". Unitech, Piramal Group, Reliance Industries, Vedanta Resources and Axis Bank are among its marquee clients.



Nikhil Patel
Chief Legal Officer
Cipla (South Africa)

[Coulson Harney is] business savvy and they have tons of experience representing foreign corporations in Kenya

"**Taylor Wessing** brings to the table great knowledge of regulation and markets alike, good quality of work product and a strong sense of responsiveness," says Rajiv Luthra, the managing partner of Luthra & Luthra. He notes the firm's "keen interest where India-related work is concerned" and highly recommends India practice head Lawrence Lieberman. "He is well clued into the Indian market and understands the ropes, seemingly instinctively," says Luthra. "Philip Shepherd is also recommended, for his responsiveness and knowledge of the regulatory, compliance and business complexities in India." In the past 12 months, the firm has advised Cipla on a range of contentious and non-contentious commercial matters throughout Europe, rendered pan-European patent advice and guided the company on employment and immigration matters; represented Ranbaxy in relation to its appeal to the general court against the European Commission's decision in the Lundbeck case; and acted for forklift provider Linde on arbitration proceedings brought by the Container Corporation of India.

Mark Beeley and James Loftis are key contacts for the India practice at **Vinson & Elkins**. In the past 20 years, the firm has advised on range of projects and disputes throughout India, while also representing large companies on investments. The firm is advising a consortium of international and domestic companies on a series of long-running disputes against the Indian government regarding the profit sharing from an oil and gas production field valued at more than US$1 billion, including three UNCITRAL arbitrations and at least five cases before the Indian courts. It is also acting for an investor in the Indian telecom sector on a claim regarding the cancellation of 3G licences.

New entrant **Watson Farley & Williams** saw a hive of activity with India-related deals this year, advising clients in its core areas of expertise: maritime, shipping, energy, commodities, natural resources and information and communications technology. The firm advised Standard Chartered Bank on a US$91 million loan facility to Great Eastern Shipping Company to refinance the acquisition cost of seven offshore support vessels; acted for UK Export Finance, TD Bank and BNP Paribas on the export credit agency-backed financing of six A320 aircraft for IndiGo airlines; and represented India's Zee Digital on the launch of its mobile and online television portal in the Gulf Cooperation Council countries. The firm recently established an India working group headed by Dubai-based partner Suhail Mirza to coordinate the firm's approach towards India matters.

Wedlake Bell has made significant strides in rendering employment law advice to parties investing in India in partnership with its subsidiary, London-based iGlobal Law. iGlobal specializes in managing the international labour law needs of global businesses in over 60 jurisdictions including India. It has sector expertise in biopharma, electronics, insurance, IT, oil and gas, medical equipment, software and telecommunications. Wedlake Bell itself attracts clients on the basis of its corporate work and expertise in intellectual property protection and litigation, real estate and commercial litigation. Clients include Wipro, Bharat Heavy Electricals, Larsen & Toubro, Jindal Steel & Power and Tata. Partner Kim Lalli heads up the India group

Despite a notable slowdown in India-related work, **White & Case** still enjoys a good reputation among Indian companies and international entities with an interest in India. In the past, it has advised clients such as Petroneft Resources, Asian Development Bank, Axis Bank, Pfizer, Wockhardt India and Deutsche Bank. This year, longstanding client GMR Infrastructure and GMR Energy (GEL) consulted it in relation to a proposed US$300 million primary capital investment by Tenaga Nasional, Malaysia's largest electricity utility company, for a 30% equity stake in a select portfolio of GEL assets. New York-based partner Nandan Nelivigi leads the firm's India practice and focuses on the development and financing of major energy and infrastructure projects.

REGIONAL AND SPECIALIST FIRMS

Anderson Mori & Tomotsune (Japan)
Anjarwalla & Khanna (Kenya)
Blake Cassels & Graydon (Canada)
Colin Ng & Partners (Singapore)
Corrs Chambers Westgarth (Australia)
Coulson Harney (Kenya)
Drew & Napier (Singapore)
Duane Morris & Selvam (Singapore)
Hengeler Mueller (Germany)
Heuking Kühn Lüer Wojtek (Germany)
McCarthy Tétrault (Canada)
Mori Hamada & Matsumoto (Japan)
Shook Lin & Bok (Singapore)
Torys (Canada)
WongPartnership (Singapore)

Anderson Mori & Tomotsune caters to Japanese clients interested in investing in India through M&A, joint ventures and the setup of subsidiaries. In the past 12 months, the firm advised on two additional investments by Nippon Life Insurance in Reliance Capital Asset Management and Reliance Life Insurance. This year, the firm was counsel to Nippon Paint Automotive Coating in a deal that saw the Japanese company and Berger Paints India bolster their joint venture company – BNB Coatings India – by transferring two of their business divisions through a slump sale. Sumitomo Corporation, Meiji Seika Pharma and NTT Communications are also clients.

With close to 90 lawyers, full-service Kenyan firm **Anjarwalla & Khanna** has sealed its reputation as one of the leading legal advisers for Indian companies in East Africa. It has handled a slew of deals for companies such as Essar Telecom, Tata Communications, Tech Mahindra and Bharti Airtel. The firm works closely with Anjarwalla Collins Haidermota, its regional office in the UAE, which aims to capture work in the Middle East, as well as in India. As a founding member of the Africa Legal Network, an alliance of independent top-tier law firms across 12 African jurisdictions, Anjarwalla & Khanna is well placed to provide local, regional and cross-border legal services in those locations. Pankaj Phadnis at Godrej Industries, who dealt with the firm when Godrej East Africa Holdings acquired Kenya's Canon Chemicals, recommends Karim Anjarwalla "since he acts as a problem solver and has a good domain expertise". Anne Kiunuhe and Akash Devani are also recommended contacts for India deals.

Canadian firm **Blake Cassels & Graydon** advises Indian companies and conglomerates with respect to their business activities in Canada and the Gulf region. The firm's core areas of expertise include infrastructure, oil and gas, power, mining, agribusiness, banking, telecommunications, IP and IT. Kam Rathee is special adviser for India at Blakes and has access to a large network of relationships in India and Canada. Prior to being president and executive director at the Canada-India Business Council for several years, Rathee headed a Toronto-based international consulting firm, assisting Canadian companies in India and Indian companies in Canada. Key achievements include representing Bangalore-based Indegene LifeSystems on its purchase of Canadian company Aptilon, and acting for Punj Lloyd in its defence against a claim launched in British Columbia by Point Grey Capital, a Vancouver-based venture capital firm.

Singaporean firm **Colin Ng & Partners** provides niche expertise in investment funds, M&A and financial sector regulation for the offshore leg of transactions. Within the investment funds sector, the firm deals with hedge funds, PE funds and real estate funds. Recent transactions include advising on the launch of DMIIF, a Singapore-domiciled, India-focused fund that looks for opportunities in Indian corporate debt; acting on the launch of ASOF, a Singapore-domiciled Asia-focused fund that looks for special situations opportunities in Asia, particularly in India; and advising two India-focused fund managers on obtaining registered fund management company status and a capital markets services licence from the Monetary Authority of Singapore.

Australian firm **Corrs Chambers Westgarth** offers strategic advice in several key areas including energy and resources, public-private partnerships and infrastructure, technology and biotechnology, water and clean energy, and agribusiness. The firm recently appointed former Shardul Amarchand Mangaldas & Co lawyer Shaun Star as an India-based consultant to its India business group chaired by Bruce Adkins and Arvind Dixit. Star is the co-founder and chair of the Australia-India youth dialogue and has a network of contacts in the federal and state governments, business, education, and not-for-profits in Australia and India. Corrs recently advised Pune-based Persistent Systems on its acquisition of Australian company PRM Cloud Solutions; acted for Chennai-headquartered Ramco in relation to its Australian operations, including the preparation of template Australian contracts; and cooperates with the Victorian government business office in Bangalore to assist Indian organizations entering the Australian market. "We work closely with Corrs as a partner and find them to be very professional," says one client.

Clients express high praise for Kenyan firm **Coulson Harney**. Jaydev Mody, the chairman of Delta Corp, who consulted the firm primarily for real estate matters in Kenya, says "Paras Shah has been fantastic, proactive and solid in every sense". Nikhil Patel, the chief legal officer of Cipla in South Africa, adds that Shah is "exceptionally good on Indian inbound M&A and private equity matters". Patel entrusted the firm with complex IP and trademark matters. "They know their market, the local law procedures, they are business savvy and they have tons of experience representing foreign corporations in Kenya," he says. He credits John Syekei for being "extremely conscientious, often making himself available after hours and on weekends to assist me with answers", and for his "astuteness in fighting for client rights, especially in the IP space". Coulson Harney is part of the Bowman Gilfillan Africa Group, a

Anthony Coulthard
Senior Vice President of Legal and Corporate Secretary, ICICI Bank (Canada)

Torys proactively focuses on problem solving and protection of client rights … [they] excel at translating legal and cultural differences

pan-African legal advisory services firm with offices in Botswana, Kenya, Madagascar, South Africa, Tanzania and Uganda.

Singaporean firm **Drew & Napier** routinely works with Indian and South Asian clients on corporate matters, dispute resolution and IP matters. The firm has acted on high-value arbitrations and court actions, and taken on advisory roles in disputes involving a wide range of issues from international sanctions to multimillion-dollar plant, infrastructure, and resource development. Clients include Tata Capital, BrandFund Asia, Paramound Investments and Aarken Technologies. David Chong, the managing partner of David Chong Law Corporation, who consulted Drew & Napier for contractual disputes and general legal advice relating to India, says Hri Kumar and Tham Feei Sy are "able and diligent advocates". Other key India contacts are Davinder Singh, Cavinder Bull, Randolph Khoo, Petrus Huang, Priyanka Ahluwalia, Farhana Siddiqui, Blossom Hing and Wendell Wong.

Singapore-based **Duane Morris & Selvam** has quickly risen up the ranks on capital markets deals in India thanks to the expertise of Jamie Benson. Benson has advised on more than 100 equity and debt offerings globally with total proceeds of approximately US$19 billion. Babita Ambekar and Saionton Basu are also key members of the India group. Ambekar advises multinationals on international aspects of transactions involving India. Basu heads the India practice in London and advises international clients who are active in India, as well as Indian companies doing business in the UK and Europe. The firm recently advised Intelligent Energy Holdings on the structuring and financing through Singapore of its £1.2 billion (US$1.74 billion) hydrogen power project with GTL in India and acted as US counsel to the Indian government on the sale of 1.25 billion shares in NHPC for approximately US$406 million in an offer for sale on the stock exchanges in India.

Hengeler Mueller focuses on India-related transactions within the Indo-German corridor. The firm's recent achievements include advising an Indian conglomerate on the defence claims made by an original equipment manufacturer due to potential defect and recovery under the client's insurance policies; representing Lupin on the acquisition of a specialty product portfolio from Temmler Pharma; acting for Tata Steel UK on German merger control aspects regarding the sale of its European long steel business to Greybull Group; and representing Varroc Group on the enforcement of an arbitral award in Germany. The firm's key practice areas in relation to India work are corporate, M&A, labour law, banking and finance, and arbitration. Principal contacts are Daniela Favoccia, Rainer Krause, Thomas Cron, Carsten van de Sande and Abhijit Narayan.

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Heuking Kühn Lüer Wojtek is an active player within the Indo-German business corridor, specializing in commercial transactions; sourcing, supply and agency distribution; energy; IP; media and technology; and logistics. "Heuking Kühn is our most trusted partner and adviser on German law issues," says V Lakshmikumaran, the managing partner of Lakshmikumaran & Sridharan. The firm advised Equity Consulting on the sale of all the shares in REGE Holding to Amtek Global Technologies; acted for Dusseldorf-based shipping company Martrade Holding und Management in connection with its shareholding in the Indian joint venture company TM International Logistics, Kolkata; and is currently representing a German company in the steel industry on compliance matters and representation in white collar criminal proceedings in India. In addition, it was counsel to Tech Mahindra on the German part of its purchase of a controlling stake in Italy's Pininfarina, and Ahmedabad-based Rotex Group on its acquisition of a majority shareholding in Magwen Valves. Martin Imhof heads the India desk.

Canadian firm **McCarthy Tétrault**'s areas of specialty include communications, competition and antitrust, tax, infrastructure, oil and gas, and mining. The firm's IP group provides advice and assistance for firms based in India to obtain patent and trademark protection for their clients in Canada. It recently advised Essar Global Fund on its agreement to provide a near-term cash infusion to Essar Steel Algoma and a substantial deleveraging of Algoma's balance sheet. It also took on a mandate for IKYA Group, part of Fairfax Financial Holdings, held through its Indian-listed subsidiary Thomas Cook India, in its acquisition of IT and engineering company Brainhunter's Zylog Systems (Canada).

Mori Hamada & Matsumoto holds a strong record for advising on Indo-Japan deals. It frequently sends its lawyers on secondment to Indian firms to increase their understanding of business practices unique to India. In addition, two Indian-qualified lawyers – Pavritra Iyer and Soni Tiwari – work with the firm. Tokyo-based Iyer focuses on domestic and cross-border M&A, PE investments, corporate finance, transactional IP and corporate advisory. Singapore-based Tiwari is an M&A lawyer. Clients include Japan Bank for International Cooperation, Nihon Nohyaku, SBS Holdings, Hitachi, Toshiba, Helios Techno Holding and Misumi India. Chisako Takaya is the principal contact for India.

Singapore firm **Shook Lin & Bok** runs an energetic India practice with a deal list stretching from banking mandates to litigation and international arbitration. In the past 12 months, it acted as Singapore counsel to Softbank on its series D round of investment in Grofers International, an Indian online grocery shopping application, and represented a foreign subsidiary of a private sector Indian bank on a US$30 million term loan facility granted to a UK tea producer. On the contentious side, it acted for a Turkish client in an international arbitration against an Indian apparel company in a joint venture dispute involving the construction of a production facility in Bangalore, and advised an Indian cooperative in an arbitration involving a US$75 million claim against a US-listed company and one of its major shareholders. Key India lawyers are Aditi Mathur, Sarjit Singh Gill, Debby Lim and Pradeep Pillai.

Canadian firm **Torys** proved its clout with a busy year on India-related deals. The firm advised Emcure Pharmaceuticals on its acquisition of Marcan Pharmaceuticals; Novelis and some of its US, English and German subsidiaries in its US$370 million and €170 million (US$190 million) receivables factoring facilities with an international syndicate of banks; and is advising Essar group on the restructuring of Essar Steel Algoma under Canada's Companies' Creditors Arrangement Act and chapter 15 of the US Bankruptcy Code. ICICI Bank Canada recently used the firm when arranging a loan for Essar Power Canada secured by guarantees from Indian companies and their subsidiaries. "Torys proactively focuses on problem solving and protection of client rights," says Anthony Coulthard, the bank's senior vice president of legal and corporate secretary. "I would recommend them to any party that is entering Canada or the US as a new jurisdiction, as they excel at translating legal and cultural differences where other firms may focus only on executing instructions in a vacuum."

Rachel Eng, Andre Maniam and Kah Keong Low are the key members of **WongPartnership**'s India practice. The firm was selected for a number of high-value deals this year including advising Kohlberg Kravis Roberts on its acquisition of a significant minority stake in CA Media and acting for KKR Credit Advisors (US) on the proposed investment of US$150 million by KKR Jupiter Investors in JBF Industries and its Singapore subsidiary. It also represented QuEST Global Services, the parent company of Bangalore-based engineering services company QuEST Global Engineering, in relation to Warburg Pincus' exit through the sale of its shares in QuEST Singapore to Bain Capital and GIC for US$325 million.

FIRMS TO WATCH

Akin Gump
Berwin Leighton Paisner
Cravath Swaine & Moore
Dentons
ENSafrica
Garrigues
Gibson Dunn & Crutcher
Hogan Lovells
Kennedys
Kirkland & Ellis
Mayer Brown
Nabarro
O'Melveny & Myers
Olswang
Perkins Coie
Pinsent Masons
Sidley Austin
Simmons & Simmons
Skadden Arps Slate Meagher & Flom
Steptoe & Johnson
Sullivan & Cromwell
Thompson & Knight
Weil Gotshal & Manges
Winston & Strawn

Akin Gump's global investment funds practice enjoys a solid reputation in emerging markets. The firm has a strong focus on India. Last year it advised Everstone Group on the closing of its third PE fund, Everstone Capital Partners III, worth US$730 million.

Singapore-based Deepa Deb-Rattray is the head of **Berwin Leighton Paisner**'s India practice. The firm's India clients include Lodha Group, Hinduja Group and Go Airlines.

Cravath Swaine & Moore was an adviser to Indian private sector bank HDFC on its US$1.27 billion offering of American depository shares and concurrent qualified institutional placement last year. Philip Boeckman, Gregory Baden and Yannick Adler were international counsel to HDFC on the deal, which was named in *India Business Law Journal*'s Deals of the Year 2015.

Tomasz Dąbrowski and Pirouzan Parvine are the key contacts at **Dentons** India desk in Warsaw. The firm's India team is spread across the UK, Europe and the Middle East, and offers particular expertise in sectors including automotive, healthcare, infrastructure, business services and new technologies.

The India desk at **Garrigues** has taken on a number of mandates for Indian clients in the past few years. It has advised Indian and foreign parties on joint venture, manufacturing, supply chain and licensing agreements. It has also acted for a supplier of wind turbines in a US$33 million London seated ICC arbitration and mediation, and represented an Indian party in a London seated arbitration and related high court proceedings in a dispute with a European supplier arising out of a US$500 million agreement for the supply of multi-crystalline silicon wafers for the manufacture of photovoltaic cells in solar panels. The firm has offices in Spain, Portugal, Colombia, Peru, Mexico, Chile, Brazil, Poland, Morocco, Brussels, London and New York. Joe Tirado, who has handled India deals in the past, recently joined from Winston & Strawn.

Kirkland & Ellis was an adviser to New Jersey-based Indian technology company iGate in its US$4.04 billion sale to Capgemini, one of the world's leading providers of consulting, technology, outsourcing and local professional services. In addition, New York-based partner Srinivas Kaushik advised Infosys on its acquisitions of Panaya and Kallidus for a total of US$320 million. Both were *India Business Law Journal*'s Deals of the Year 2015.

Sidley Austin represented the underwriters in a rule 144A IPO and Indian stock exchange listing for Syngene International, an Indian contract research organization. It was India's first pharmaceutical company IPO in five years and the second-highest subscription to an IPO in 2015, after VRL Logistics. The firm also advised the underwriters in a rule 144A IPO on the National Stock Exchange of India by

Arun Nigam Associates Solicitors

Arun Nigam Associates is an established boutique law firm in Hong Hong, located in a vibrant, artistic and historic part of Central. The firm practices English and Hong Kong law with a niche interest in India, China and South East Asia and is strategically placed to be a significant link globally for clients in India and the Asia region. With an increasing focus on litigation and dispute resolution, combined with its strengths in other Practice Areas including banking, capital markets, corporate and commercial, conveyancing, trusts, wills and probate and providing civil celebrant of marriages service, the firm is committed to delivering the results sought by its clients, with a personal touch, versatile style and at a realistic cost.

Practice Areas

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- Asset and Project Finance
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Quick Heal Technologies, a provider of security software products and solutions in India. The firm is poised to climb the league tables following the appointment of India specialists Manoj Bhargava, Ankit Kashyap and two associates. Prabhat Mehta is the firm's key India contact.

Chris Horton, David Neuville and Karun Cariappa are the go-to lawyers for India work at **Simmons & Simmons**. In the past, the firm has worked on transactions by Indian banks as lenders, on corporate finance deals and capital raising exercises for Indian companies, as well as capital markets work, joint ventures and alliances between Indian companies and non-Indian investors, and energy and infrastructure companies establishing offices and investing in India. Recently, the firm advised Bangalore-based Mindtree on corporate and disputes matters in the UK.

REGIONAL FIRMS TO WATCH

Afridi & Angell (UAE)
Al Tamimi & Company (UAE)
Appleby (Mauritius)
Arun Nigam Associates (Hong Kong)
Collyer Law (Singapore)
Conyers Dill & Pearman (Mauritius)
Galadari (Middle East)
Harneys (Cayman Islands)
Inventus Law (US)
Kojima Law Offices (Japan)
Maples and Calder (Cayman Islands)
Montaury Pimenta Machado & Vieira de Mello (Brazil)
Nagashima Ohno & Tsunematsu (Japan)
Noerr (Germany)
Rajah & Tann (Singapore)
Straits Law (Singapore)
Stikeman Elliott (Canada)
TLT (UK)
Webber Wentzel (Africa)

Arun Nigam, the founder of Hong Kong-based **Arun Nigam Associates** (ANA), is a frequent adviser to Indian public and private sector banks in Hong Kong such as ICICI Bank, Canara Bank and Union Bank on financing transactions that require the taking of security. The firm's litigation partner Mark Pierrepont acts for Indian banks in Hong Kong on breaches of facility agreements and defaults on loans, as well as fraudulent transactions. RV Venkatesh, the managing director of Gencor Pacific, which provides botanical ingredients for the healthcare sector, consulted ANA on corporate-related matters and other issues in Hong Kong. He found the firm "professional" and says the services and efficiency that Gaganjot Kaur provided were excellent. Piyush Gupta, the CEO of Riqueza Capital Advisory Services, says the firm is "flexible and competitive", offering "the Indian understanding of things along with international knowledge and expertise".

Singapore firm **Collyer Law** was launched by Azmul Haque only in October last year, however it has already attracted a number of India-related assignments. Anuj Kacker, the co-founder and vice-president of start-up Mycash Fintech in Bangalore, has used the firm for all its legal needs in Singapore including initial start-up documentation, pre-investment restructuring and documentation related to the capital financing for its Singapore company. "Collyer Law is unique among international law firms in their clear focus on the early-stage economy," says Kacker. "They have an entrepreneurial mindset and senior lawyers who have worked extensively in India [and] internationally. We enjoy working with Azmul ... he is responsive and ... commercial and pragmatic." Another attraction for Kacker was the firm's move away from hourly billing rates. "When dealing with them we don't feel that the clock is ticking." Rahul Budhraja, the director of Analytic Edge, says Collyer Law provides "good counsel, are responsive and take the time and effort to ensure client satisfaction".

Anuj Kacker
Co-founder and Vice-President, Mycash Fintech

Collyer Law is unique among international law firms in their clear focus on the early-stage economy

In the past eight to 10 years, Glenmark Pharmaceuticals has called upon Brazilian firm **Montaury Pimenta Machado & Vieira de Mello** for assistance with patent prosecution, claims and status checks in Brazil. Sharvani Jadhav, intellectual property manager at Glenmark Pharmaceuticals in Mumbai, has worked closely with Evandro Félix Ribeiro Leite and Bruna Rego Lins. "We find them very competent, diligent and responsive," she says.

Singaporean firm **Straits Law** recently completed a restructuring of a facility granted by the Hong Kong branch of Indian Overseas Bank to a Singapore company that is the subsidiary of an Indian company in the hospitality industry in India. It also advised on an acquisition and financing requirement for Tata Power's Trust Energy Resources subsidiary, and acted for Mayar Group's Singapore subsidiary, Global Wellness Holding, in the financing and acquisition of spas and beauty salons in Singapore and Malaysia. Financing was provided by the Hong Kong branches of Punjab National Bank and Union Bank of India. KV Rao, the resident director, ASEAN, at Tata Sons in Singapore says: "We are happy with [Straits Law's] service, attention, competence and approach for our local group companies based in Singapore for matters relating to Singapore and region as needed."

By Babu Sivaprakasam,
Deep Roy and Sharmila Ratnam,
Economic Laws Practice

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Considering P2P lending as a finance alternative

With the Indian economy not growing as expected, widespread economic disparity, and financial institutions reeling under pressure from stressed and non-performing assets, there is a strong need for small and medium-sized enterprises, and individuals, to have an alternative access to funds. To bridge this gap, there are more than 30 platforms in India providing alternative sources of funding known as peer-to-peer (P2P) lending.

P2P lending is where the relevant platforms act as loan facilitators to allow the lender/investor to provide loans to borrowers. Both parties have to register on the platform and pay certain fees to the platform. The platform will conduct a diligence on the borrower and make the credit appraisal available to registered lenders. The lender is able to bid for/select the borrower to whom he or she wants to provide the loan.

The terms and conditions, including tenure and rate of interest, are finalized between borrowers and lenders. The lender directly credits the borrower's account, the platform assists in recovery of equated monthly instalments and the same is directly credited into the lender's account. The lender gets to choose their level of risk and receives returns better than normal investments in some other financial products. The borrower gets the loan at rates cheaper than some financial institutions.

With the advent of players in the "fintech" space, the online P2P lending landscape adds convenience for all parties and thus increases the ease of doing business. However, with the increase in importance of any field/business there are several issues raised, giving rise to a requirement for consistency and regulation. India has seen several alternate sources of lending through chit funds, cooperative societies and associations extending credit, and each have had their own perils.

P2P lending is unregulated in India and is still in a nascent stage compared to countries like the US, UK and China. Regulators in India have been discussing P2P lending as a sub-set of crowdfunding. However, considering most of the platforms are not aggregators of funds and merely bring together the parties, they are considered more as a "loan marketplace". Accordingly, the Securities and Exchange Board of India mentioned in its consultation paper on crowdfunding in India that it would not have jurisdiction over such platforms.

With the sharp rise of the P2P lending space in India and the potential that the sector has, it is clear that such platforms will increasingly tie up public money. Most of the platforms don't guarantee any returns (not even the principal) for the lenders. The issue of taking on the liability of providing returns is something that may cause the regulators to re-examine the structure.

Lending through such platforms doesn't have any restrictions on exposure, whether dealing with an industry, geography, age group or otherwise. Therefore, it is always possible to overleverage and have increased exposure to only a particular sector. The lenders have to take a decision based on the credit analysis of the platform for which the platform is not liable. There are no clear parameters that the platforms need to provide for such an analysis and accordingly it increases the risks, including fraud risk.

There is no monitoring on the end-use of the funds. Unlike for financial institutions, where there are credit information companies and other databases, including defaulter lists, there is no repository of information for credit availed by borrowers as P2P lending. The platforms are also unclear about the validity and the binding nature of the document being entered into by the borrower and the lender. It is unclear whether adequate stamp duty is being paid in the relevant jurisdictions.

Considering the enforcement issues that the financial institutions are facing despite their relevant expertise, adequate documentation should be a primary concern. Additionally, since there is no restriction on the eligibility of lenders, the platforms can also be seen to be possible business options for money lenders who may otherwise be required to be registered under state legislation.

In light of the above, the Reserve Bank of India has decided to intervene in the space of P2P lending, and released a consultation paper in April 2016 for public comment. It suggested that the platforms should be considered as intermediaries, without pooling money for on-lending. However, such intermediary platforms have to be registered as non-banking financial companies, and have to satisfy minimum capital requirements and maintain a leverage ratio.

Though there are definitely areas which require clear parameters, it is important to ensure that introducing regulation doesn't stifle a market that has huge potential and is also a requisite.

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

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Shares dispute holds lessons for boardrooms

Recently Bombay High Court (BHC), in the case of *Afzal Khan & Ors v Mehboob Ayub & Ors*, while affirming the decision of the Company Law Board (CLB) in Mumbai, considered two very important aspects of company law, namely: (1) the power of a company to rectify the register of members under section 111 of the Companies Act, 1956 (now section 58 of the Companies Act, 2013); and (2) the manner of transmission of shares held jointly under section 110 of the 1956 act (now section 56 of the Companies Act, 2013) upon demise of a joint holder.

Ayub Khan, the son of filmmaker the late Mehboob Khan, was the shareholder of certain equity shares of Mehboob Productions, incorporated by the late Mehboob Khan.

By a board resolution (the first resolution), the then directors of the company at the request of Ayub resolved to add the names of Mehboob Ayub Khan (Mehboob) and Yasmin Ayub Khan (Yasmin), Ayub's children from his second marriage, as joint shareholders in respect of certain shares of the company held by Ayub solely. Accordingly, the register of members of the company came to be rectified as certain shares came to be jointly held by Ayub and Mehboob, and Ayub and Yasmin (the said shares).

Ayub executed his last will and testament, bequeathing the said shares solely to Mehboob and Yasmin, respectively, in keeping with the first resolution.

After the demise of Ayub, Mehboob and Yasmin called upon the company to transmit the said shares to their sole names by: (a) survivorship (the articles of the company provided that shares held jointly must be transmitted by survivorship on the death of a joint holder); and (b) testamentary succession as beneficiaries under the will of Ayub.

For various reasons, one being a challenge pending to the will of Ayub, the company refused to transmit the said shares solely in favour of Mehboob and Yasmin. Consequently, Mehboob and Yasmin filed a petition before the CLB for rectification of the register of members under section 111 of the 1956 act.

During the pendency of the application, the board resolved to hold the first resolution as void *ab initio*, being in breach of the articles of the company, and *suo motu* deleted the names of Mehboob and Yasmin from the register of members (the second resolution).

FINDINGS

The CLB and the BHC (in appeal) held that this action was illegal and set aside the second resolution, and ordered the said shares to be transmitted in favour of Mehboob and Yasmin by survivorship (as provided in the articles) for the following reasons:

- The first resolution was in force for nearly 19 years until it was declared void by the second resolution, which was motivated.
- The second resolution was illegal as it had the effect of omitting a name in the register of members without sufficient cause, which can be done only upon an application to the CLB under section 111 of the 1956 act. In this context, the BHC interpreted section 111(4) of the act by stating that for rectification of a register of members an application has to be made to the CLB. The present case fell within these parameters and therefore permission of the CLB was required to rectify the register.
- There is an exception to this rule. The company may rectify any mistake or omission if there is sufficient cause to do so. However, where a dispute exists regarding the rectification, as with this case, the exception cannot be used as protection.
- The reason for the legislature not reserving for the company the power to correct a subsisting entry is because the register of members is an important public document and its sanctity cannot be tampered with except in accordance with the law. If such power is vested in the company then surely an unscrupulous management would abuse it for their benefit.
- Since the second resolution is illegal, and the articles of the company provide that shares held jointly shall be transmitted by survivorship on the death of a joint holder, the company was bound to transmit the shares in favour of Mehboob and Yasmin, as the articles of a company constitute a valid contract between the company and the shareholders. This decision has been challenged by way of a special leave petition, which is pending.

Companies cannot *suo motu* rectify subsisting entries in the register of members unless there is sufficient cause to do so, and there exists no dispute regarding the same. And where shares are registered in joint names, and the articles provide that the survivor shall be the only person having any title to or interest in the shares, the shares ought to go to the survivor irrespective of any testamentary or intestate succession of the deceased holder.

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Investors eye RBI move to regulate P2P lending

The online industry and e-commerce have acted as a game-changer, affecting the nature and dynamic of sectors including transportation, retail, hospitality, etc. It is now perhaps set to do the same to the financial sector. The Reserve Bank of India (RBI) in its Consultation Paper on Peer to Peer Lending released on 28 April (paper), while recognizing this potential, has proposed a framework with the goal of "developing an appropriate regulatory and supervisory toolkit that facilitates orderly growth of this sector so that its ability to provide an alternative avenue for credit for the right kind of borrowers is harnessed." Facilitating (without participation) transactions between borrowers and lenders is the primary business of P2P platforms (platforms), though some offer credit assessment, payment monitoring services, etc.

RBI's proposal: Many borrowers without access to traditional credit facilities due to the limited outreach and high transaction cost of credit institutions are forced to rely on the unorganized money-lending sector, which would change if this paper matures. The RBI proposes that platforms register as non-banking financial companies (NBFCs) and suggests a suitable leverage ratio to prevent platforms from expanding with indiscriminate leverage (which may fetter their business model, one that precludes taking liabilities onto their own balance sheets). While the requirements for a physical presence in India and fresh criteria for key managerial personnel of platforms seem positive, suggestions to limit a lender's maximum contribution to borrowers/segments, minimum and maximum rates chargeable by lenders and KYC compliance (which will aid in preventing money-laundering) will help in stabilization.

Requiring a minimum of ₹20 million (US$295,000) capitalization and prohibiting guarantees on assured returns, etc., would alleviate the system in the long term, although in the short term, it may reduce the appeal of the sector for investors. Also, various state governments have enacted legislation to regulate the conduct of "money-lenders", which would affect individual lenders registered on platforms. Since platforms will have users from different states, a balance on compliance with RBI regulations and different state laws is needed.

FDI in P2P platforms: Although the RBI has proposed classifying platforms as NBFCs to bring them under its regulatory ambit (because the RBI views it as a form of financial services), most existing Indian platforms perform no business functions that fall within the scope of any of the 18 activities under clause 6.2.18.8 of the extant foreign direct investment (FDI) policy. There remains a lack of clarity as clause 6.2.18 provides that FDI in financial services other than those listed therein requires government approval.

In light of this uncertainty, the RBI/government could consider treating these platforms as a separate business (though still connected with the financial services sector as an ancillary business) without a sectoral cap and separate conditions attached to safeguard the interest of borrowers and lenders registered on the platforms. Alternatively, since the intent is regulation, these platforms may be treated as e-commerce companies operating under the marketplace model where 100% FDI is allowed under the automatic route since the current business models in India seem to fall under this category as per press note 3 of 2016. However, since this could conflict with the RBI's proposal of having management and operational personnel stationed within India (which may not be the case in a 100% foreign owned and controlled company), specific guidance is needed.

Currently, existing platforms may not fall under any specific sector under the FDI policy and would be able to access 100% FDI under the automatic route. Since platforms are essentially aggregators, as they progress, they will want to access FDI to scale up operations and offer a wider range of services (such as assessment of transaction suitability, monitoring of borrower payments and soft-debt recovery). Therefore, clarity on the FDI norms applicable to platforms is required.

The RBI has done a commendable job in both identifying the risks and potential associated with India's nascent P2P sector, and attempting to regulate a hitherto unorganized sector which has seen significant growth. However, other factors should be considered before the promulgation of the final regulations (expected by December) lest it smother this emerging sector. Industry reactions seem to be largely positive as this move will clear the air on compliance by platforms. Criticisms of the paper centre primarily on the redundancy of prescribed leverage ratios and high minimum capitalization requirements.

Luthra & Luthra Law Offices is a full-service law firm with offices in Delhi, Mumbai, Bangalore and Hyderabad. Dipti Lavya Swain is a partner and Advait Nair is an associate at the firm. The views of the authors are personal. This article is intended for general information purposes only and is not a substitute for legal advice.

By Sanjay Notani, Mrugank Kamdar and Tanaya Sethi, *Economic Laws Practice*

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Public interest and balance in anti-dumping measures

Anti-dumping measures are imposed to protect the domestic industry from dumped imports. Therefore, the adoption of anti-dumping legislation reflects a public interest consideration in favour of the home market. However, anti-dumping measures may have an adverse impact on other interested parties, as well as the interests of the importing country as a whole.

The World Trade Organization's (WTO) Anti-Dumping Agreement (ADA) neither endorses nor prohibits the consideration of public interest. Hence, by default, the ADA allows the usage of the public interest analysis in domestic anti-dumping laws and practices.

During the Uruguay Round, members extensively discussed the inclusion of a public interest clause into the ADA. However, such a clause was not incorporated into the final draft of the agreement for lack of consensus.

Article 9.1 of the ADA confers on members the discretion to decide whether to impose an anti-dumping duty in cases where dumping, injury and causation have been found. It also remains at the discretion of WTO members whether the amount of duty should be to the full extent of dumping or less.

Article 9.1 clarifies that it is "desirable that the imposition be permissive in the territory of all members". A number of WTO members (e.g. Ukraine) have used regulatory latitude provided by this provision to implement the public interest clause into their regulations.

The public interest test, as applied, can be restricted to an analysis of the economic impact of anti-dumping measures, or it can take non-economic considerations into account. The EU, which mandatorily applies the public interest test in each anti-dumping investigation, defines the test as "an appreciation of all the various interests in the union taken as a whole by analysing the likely economic impact of the imposition or non-imposition of measures on economic operators in the union". According to the wording of this test, the public interest analysis in the EU is restricted to economic factors.

The discretion contemplated in article 9.1 of the ADA is guided by factors developed by different member countries.

Some of the factors used by the EU and Canada are identified below:

1. Effect on competition: The Canadian Authority recommended the reduction of anti-dumping duties from 181% to 35% on stainless steel wire because such imposition would lessen competition.

2. Interests of domestic and upstream industries: These are necessary to consider where market conditions do not allow domestic producers to benefit from the measures imposed. Therefore, the European Commission (EC) in the Ferro-Silicon case did not recommend levy of duties; and

3. Interests of consumers (including industrial users): Considered on the basis of prices and consumer choice. While consumer interests are recognized by both the EU and Canada, in practice the non-application of measures due to such concerns is exceptional.

While the antitrust law in India has always provided a public interest requirement, our anti-dumping law does not require an equivalent analysis. The Supreme Court, in the case of *Haridas Exports v All India Float Glass Manufacturers Association*, observed that, "Import of material at prices lower than prevailing in India cannot per se be regarded as being prejudicial to the public interest".

However, in practice, the Ministry of Finance, which has powers to accept or reject the recommendation of the Directorate General of Anti-dumping and Allied Duties (DGAD) and impose duties, chose not to impose anti-dumping duties recommended by the DGAD in the recent investigations concerning Penicillin-G potassium from China and solar cells/modules from Malaysia, China, Taiwan and the US.

Anti-dumping measures have the tendency to continue for long periods of time. In doing so, they make consumers pay the price for the unfair trade alleged by the domestic industry. The public interest test reflects the principle of proportionality in balancing competing interests.

While the non-imposition or elimination of anti-dumping measures due to the public interest concerns is rare, it is not an indication of the ineffectiveness of the test. The scarce use of the test merely suggests that the non-imposition of anti-dumping duty on public interest grounds is an exception. However, the need for its application has to be weighed from time to time based on market conditions pertaining to the product under consideration.

A balance between the affected domestic industry and the consuming industry must be established, taking into perspective economic, financial and geopolitical issues of all stakeholders.

Sanjay Notani is a partner, Mrugank Kamdar is a senior associate and Tanaya Sethi is an associate at Economic Laws Practice. This article is intended for informational purposes and does not constitute a legal opinion or advice.

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India needs more than laws for true gender equity

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As a part of its intent to offer equal rights and opportunities to its citizens India has formulated several statutes including displaying its intent through the constitution of India (1950).

The constitution enshrines the principle of gender equality and also grants fundamental rights of equality to women. India has also ratified various international conventions committed to equality for women including the Convention on Elimination of All Forms of Discrimination Against Women.

Fundamental rights, among others, ensure equality before law and equal protection of law. Fundamental rights also prohibit discrimination of any citizen on grounds of religion, race, caste, sex or place of birth, and assure equality of opportunity to all citizens. To endorse the constitution's objective, India's central government and various state governments have enacted several laws aimed at ensuring equal rights, opposing discrimination and providing support to women workers.

Although Indian labour and employment laws are generally gender neutral, some laws such as the Equal Remuneration Act (1976); Maternity Benefit Act (1961); Contract Labour (Regulation and Abolition) Act (1970); Factories Act (1948); Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (2013) or POSH Act; and state-specific Shops and Establishments Act – contain provisions to safeguard the interest of women working in India.

This article explores some of the key elements of certain statutes that have specific provisions involving organized workforces (concerning private companies) in India.

1. Equal Remuneration Act: Provides for the payment of equal remuneration to men and women. Employers are obliged to avoid discrimination in the workplace in terms of employment, remuneration and promotion.

2. Maternity Benefit Act: Provides for maternity leave and other benefits before and after childbirth, medical termination of pregnancy or miscarriage. However, nowadays some companies have voluntarily enhanced maternity leave to 20-24 or more weeks in order to retain more women talent. The act also prohibits termination of a woman employee while she is on maternity leave. It is also relevant to mention that the Ministry of Women and Child Development has proposed to increase maternity leave from 12 to 26 weeks and extend this to all women workers in private employment.

3. Factories Act, Contract Labour (Regulation and Abolition) Act, and state-specific Shops and Establishment Act: These laws prohibit women working night shifts and provide for crèche and separate washrooms for women employees. Various state governments have proposed allowing women employees in factories to work night shifts. Subject to this, the state governments require companies employing women in night shifts to comply with a number of conditions regarding the transportation to work, personal safety and security of women workers.

THE POSH ACT

The enactment of the POSH Act has significantly addressed the need to recognize the issue of sexual harassment of women in the workplace. The POSH Act requires the constitution of an internal complaints committee (ICC) at each office or branch of an organization employing at least 10 employees.

An aggrieved woman can file a complaint with such an ICC, which is duty bound to complete the inquiry into the complaint within 90 days. In addition, the POSH Act mandates the employers to organize workshops and sensitize employees regarding sexual harassment in the workplace.

The POSH Act also prescribes punishment for non-compliance with its provisions as well as for filing frivolous complaints of sexual harassment.

Apart from the above-mentioned laws, the Indian Penal Code (1860) also provides punishment for offences involving women, such as outraging the modesty of a woman, sexual harassment by men, insulting the modesty of a woman and indecent representation of women, etc. The punishment could range from imprisonment for a term of one year to seven years, or a fine, or both.

The constitution and central and state governments have enacted laws and laid down policies to ensure that women enjoy equal rights in the workplace. However, there seems to be a continuing need to propagate and instil a sense of equality and respect in society to treat women as an equal gender. It is up to employers to recognize the fact that disparity, if any, at the workplace needs to be addressed and further dignity extended to women employees. Additionally, a shift in the social mindset is needed to ensure that women enjoy rights equal to men, not only in statutes and books, but in reality.

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By Jasleen Oberoi, Rudra Kumar Pandey and Vishal Nijhawan, *Shardul Amarchand Mangaldas & Co*

Class action suits under the Companies Act, 2013

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A class action enables one or more plaintiffs to file a suit on behalf of a larger group or class, wherein such class has common rights and grievances. Class action is a well-defined area of litigation in the US and can be broadly categorized into securities class action and consumer class action.

The Indian legislature considered instances of corporate fraud in India, primarily the "Satyam scam" while introducing the concept of class action. In this case, no proceedings could be initiated in India due to the absence of any statutory provision for class action. The Companies Act, 2013, addresses this with a provision on class action.

Inclusion of this concept under the statute was also considered and recommended by different committee reports such as the JJ Irani Committee Report, 2005, the 21st report of the Standing Committee on Finance on the Companies Bill, 2009, and the 57th report of the Standing Committee on Finance on the Companies Bill, 2011.

The 2013 act has now introduced the concept of class action under section 245, which has been notified with effect from 1 June.

Section 245 introduces a distinct regime of class actions. A class action can be instituted by specified numbers of members, depositors or any class of them before the National Company Law Tribunal (NCLT, which has been constituted with effect from 1 June), if they are of the opinion that the management or conduct of the company is being conducted in a manner prejudicial to the interest of the company, its members or depositors.

It can be instituted against the company, its directors, its auditor (including the audit firm), any expert, adviser, consultant, or any other person for specified acts or omissions.

Reliefs which can be granted in a class action suit include: restraining the company from committing an act that is beyond the authority of the articles of association (AoA) or memorandum of association (MoA) of the company, from committing any act contrary to the provisions of the 2013 act or any other applicable law, and declaring a resolution altering the MoA or AoA of the company as void if the resolution was passed by not disclosing material facts, or by misstatement to the members or depositors. These reliefs are akin to preventive reliefs and are based on the principles under the Specific Relief Act, 1963.

Section 245 also allows seeking damages or compensation or any other suitable action against the company or its directors, for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on their part; its auditor (including audit firms), for any improper or misleading statements of particulars made in the audit report or for any fraudulent, unlawful or wrongful act or conduct; any expert, adviser, consultant or any other person for any incorrect or misleading statements made to the company or for any fraudulent, unlawful or wrongful act or conduct, or any likely act or conduct on their part.

While section 245 prescribes a limit for the fine that may be imposed for non-compliance with NCLT orders, it does not prescribe a limit for the amount of damages or compensation claimable. This exposes the company and other relevant entities and persons to unlimited liability, as if a tortious claim was to be adjudicated in a class action.

Unless section 245 is amended to provide the amount of claimable damages or compensation, clarity on the same will come only from the decisions of NCLT, or the National Company Law Appellate Tribunal (NCLAT, which has been constituted with effect from 1 June) or the Supreme Court of India, as the case may be.

Principles under the 1963 act and under the Contract Act, 1872, are settled and the scope of liability and damages under section 245 of the 2013 act will be settled when this provision is tested by NCLT, NCLAT or the Supreme Court. However, it is vital to impose a limit on the liability of the relevant entities and persons, and to base the damages or compensation on an assessment of actual damage.

Introduction of the provision on class action suits under the 2013 act is likely to have far reaching implications. However, the possibility of misuse of this remedy by filing false and frivolous complaints cannot be ruled out. Therefore, it is important for the relevant authorities to balance the interest of all the parties while deciding a class action suit.

Another important issue is the likely creation of two parallel offences of fraud both emanating from the same cause of action; one under section 245(1)(g) and other under section 447 of the 2013 act. While section 245(1)(g) provides for unlimited damages or compensation or other suitable action, section 447 provides for fine and imprisonment for offence relating to fraud. This may increase the exposure of the relevant entities and persons to the specified liabilities.

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Five exit challenges for VC and PE investors

The period between 2006 and 2008 saw a large number of venture capital and private equity (VC/PE) deals in the Indian market. The exit rights negotiated by VC/PE investors during the haydays of India's growth story gain importance in today's context, as most of the funds have now reached the end of their fund lifecycle. In view of decelerating capital markets, exits remain a key challenge for VC/PE investors, and this has hampered fresh fundraising prospects from their limited partners (LPs) in the absence of a track record.

Key factors in an exit include: 1) the promoters managing and negotiating rights and expectations of the new investor with those of the exiting investor or any other continuing investors; 2) the exiting VC/PE preference for a complete release and waiver from the investee company, its promoters and the new investor from all past and future liabilities, and negotiating representations, warranties and consequent indemnities; and 3) the new investor conducting thorough due diligence.

VC/PE investors should negotiate the following five exit challenges as early as the term sheet stage:

Due diligence: A common challenge VC/PE investors face includes negotiating and agreeing on the scope of the diligence exercise. An exiting investor should always try to limit the scope of diligence to the bare minimum and ensure it is conducted in a timely manner. Some other challenges include: 1) procuring the active cooperation of the promoters; 2) absence of enough secondary data; and 3) reluctance among promoters of a family-run businesses to share information with investors conducting diligence. From the purchasers' perspective, it is imperative to gather as much market intelligence on the credentials and background of the promoters, in particular the reason for the VC/PE exit.

Warranties and indemnities: The extent and nature of warranties to be sought from an exiting VC/PE investor will entirely depend on the status of that investor (i.e. financial investor or a strategic investor). An incoming investor would want a full set of representations and warranties, but to what extent the exiting investor can provide such indemnities is a moot question. The exiting investor should limit its representations and warranties to title, author and performance.

Tax indemnities: Post the Vodafone judgment, seeking a withholding tax indemnity on capital gains from the seller has become a key challenge. Some safeguards that purchasers have considered include cash holdback for an agreed percentage of purchase consideration, tax insurance, and backstop indemnities from LPs. These mitigators, however, need to be evaluated keeping in mind the lifecycle of the fund and provisions relating to clawback contained in the fund documentation. The recent protocol of 10 May which amended the India-Mauritius double taxation avoidance agreement has cleared the air of uncertainty by exempting transactions undertaken prior to 1 April 2017 from the purview of capital gains tax (CGT), after which the tax on capital gains will be charged at 50% of the domestic CGT from 1 April 2017 until 31 March 2019, and at the full rate after 1 April 2019. The above issues continue to be relevant until the India-Singapore treaty is formally modified.

Buyback: This route is predicated upon the target company having enough resources to honour its buy-back commitments. There is a view that buyback of compulsorily convertible preference shares (CCPS) issued to a foreign investor is not permissible under India's foreign direct investment (FDI) policy as such buyback would be akin to the redemption of preference shares, which would indirectly run afoul of the FDI policy, which states that preference shares should be compulsorily convertible. In view of this, CCPS would have to be converted to equity mandatorily, and after conversion the company would have to meet with the conditions specified in the Companies Act, 2013.

Put/call options: Enforceability of put and call options has always been a topic of debate with conflicting regulatory and judicial views. Clarifications by the Securities and Exchange Board of India on 3 October 2013, and the Reserve Bank of India on 9 January 2014, specifically recognizing put and call options as valid contracts have helped ease investor concerns. But their implementation still requires promoter cooperation and has resulted in such disputes being referred to arbitration.

There are enough issues in terms of economic progress, sector-specific legal and regulatory compliance, and risks associated with implementating an exit strategy that could jeopardize the returns of exiting VC/PE investors. Active promoter cooperation is vital for any successful exit. A systematic approach by PE/VC investors towards their investments and returns, and managing their relationship with the promoters is key to a successful exit.

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Financing bidding process for big PPPs needs review

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In public-private partnership (PPP) projects in India, financial closure indicates the commencement of the concession period. Financial closure is defined as a stage when all the conditions of a financing agreement are fulfilled prior to the initial availability of funds. Financial closure is attained when all the tie-ups with banks and financial institutions for funds are made, and all the conditions precedent under the financing agreements to initial drawing of debt are satisfied.

The date on which the conditions precedent set out in the concession agreement are met and financial closure is achieved is the appointed date. The appointed date is deemed to be the start date of the concession period, and the concessionaire is permitted to begin construction of the project from that date. Typically, concession agreements provide anywhere between 180 and 240 days after signing the concession agreement to achieve financial closure.

This important milestone in the project cycle is often delayed, or not achieved in many successfully awarded PPP projects in India for various reasons thus rendering these projects unviable or resulting in their ultimate termination. The global financial crisis, coupled with India's own mounting pressure on domestic banks from non-performing loan assets, are having a major impact on financial closure of PPP projects.

This is more particularly affecting mega infrastructure PPP projects. Given the tighter debt finance market, combined with the emergence of mega infrastructure PPP projects, it is time for the government to revisit standard bidding practices and consider alternative approaches that will help achieve timely financial closure.

Banks and financial institutions typically fund 60-80% of the total project cost of PPP projects by way of project finance. This makes banks and financial institutions vital stakeholders in any PPP project, particularly the mega infrastructure PPP projects, where the total costs amount to billions of dollars. It is normal to get these banks and financial institutions involved in such a PPP project only after the bidding process has been completed and the PPP project is awarded to the successful sponsor/bidder.

At the stage when the banks and financial institutions get involved in the project, they are often not allowed to make any changes to the concession agreement and to related project documents, which in turn has a direct and adverse impact on financial closure of the project.

At times during the bidding process sponsors are asked to submit to the government, along with their bids, letters of intent from their banks and financial institutions confirming their willingness to fund the project subject to full due diligence, credit approval, appropriate documentation and fulfilment of conditions set out in the finance documents.

Such a letter also states that the letter is not a legally binding commitment on part of the concerned banks and financial institutions. Banks and financial institutions often take the letters seriously to ensure their involvement in a project. However, these letters should not be regarded as a real commitment, as most banks and financial institutions issue these letters without going through any internal credit approval.

To avoid delays in financial closure and to make PPP projects bankable, the government should require financial commitment at the time of a bid. This is vital for the timely financial closure of mega infrastructure projects.

This requirement will force banks and financial institutions to complete their due diligence process, put together a detailed financial package, obtain credit approvals, and in some cases, also agree to the financing documentation with the bidders. This would considerably extend the timeframe to complete the bidding process, however, this would help sponsors/bidders to show that financing can be provided and the PPP project can begin without delay.

Sponsors/bidders are often reluctant to agree and include this requirement of commitment from banks and financial institutions in the bid process, as this would involve fee payments and substantial legal and other costs at a stage when there is no certainty that they will win the bid. To address this issue the government may agree to cover the costs of the losing bidders up to a pre-agreed amount.

The government should not require full commitment from banks and financial institutions for all bids for PPP projects, but rather only for mega infrastructure ones; projects that have structured novel risk mitigating methods; and those where there is a doubt about the bankability of such projects.

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Paradigm shift to 'on tap' universal bank licences

In its monetary policy statement for 2014-15 on 1 April 2014, the Reserve Bank of India (RBI) announced that it would work on a framework for granting licences "on tap" to universal banks, and for granting of differentiated bank licences with the intent to "to expand the variety and efficiency of players in the banking system while maintaining financial stability". This statement had been preceded by a policy paper in August 2013, which recommended reviewing the then prevailing policy of granting licences for establishment of banks on a "stop and go" basis, and instead put in place a continuous authorization policy.

The RBI issued a draft framework on 5 May 2016 for public comment on granting licences to universal banks on a continuous basis. The draft framework is based on the feedback received on the policy paper, the RBI's experience with the granting of licences to IDFC and Bandhan to establish universal banks, and its experience with the granting of differentiated licences to payments banks and small finance banks. Once issued, the framework will replace the 2013 guidelines for licensing of new private sector banks.

The draft framework prescribes the following entities as eligible to apply for a licence to establish a bank: (a) existing non-banking financial companies (NBFCs) that are "controlled" by Indian residents, and that have a successful track record of 10 years; (b) resident individuals that have 10 years' experience in banking and finance; and (c) private sector entities and groups that are owned and controlled by residents, with total assets of at least ₹50 billion (US$750 million), a successful track record of 10 years, and where the non-financial business income does not account for more than 40% of total assets or gross income.

The eligibility criteria are considerably narrower than the 2013 guidelines, which allowed private and public sector entities, and NBFCs, to apply for a licence to establish a bank. This provision presumably reflects the intent of the RBI to allow only qualified persons with a proven track record to establish banks and to avoid conglomerates controlling or concentrating bank credit. This also seems to be supported by the prescription in the draft framework that companies or individuals directly or indirectly connected with large industrial houses can hold only up to 10% of the equity of a bank, and cannot have a controlling interest. Such persons will also not be able to appoint a director on the board of the bank.

While the 2013 guidelines made the requirement of a non-operative financial holding company (NOFHC) mandatory, the draft framework exempts applicants that are individuals, promoters and stand-alone entities that do not have other group entities from establishing an NOFHC as a holding company for the bank and other financial services group entities. As the intent of the NOFHC requirement is to ring-fence the banking and financial services activities of a group from its other activities, this relaxation shows welcome consideration of the RBI to the practical advantages of allowing a simpler holding structure in certain cases.

An overarching theme of the draft framework is that applicants must not only be eligible, but must also be serious about establishing and operating a bank. For instance, while both the 2013 guidelines and the draft framework prescribe that all applicants must submit their business plans along with their applications, and that the business plan must also address financial inclusion, the draft framework goes a step further by prescribing that in case a successful applicant deviates from its business plan, the RBI may "consider restricting the bank's expansion, effecting change in management and imposing other penal measures as may be necessary".

The use of terms such as "successful track record" in the draft framework, which have not been completely fleshed out, gives the impression that the evaluation of an application will still have a considerable element of discretion. Perhaps it is the intent of the RBI to retain this discretion so as to weed out applicants that may not suit its long-term goal of diversifying sources of bank credit and ensuring stability of the financial system.

Importantly, the draft framework clearly spells out the intent of the RBI, that licences will be issued on a very selective basis, to applicants with "an impeccable track record, and who are likely to conform to the best international and domestic standards of customer service and efficiency", and not just to all applicants that fulfil the prescribed eligibility criteria.

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TARC leads the way on taxation reform

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In an attempt to radically reform the tax administration in India, the central government appointed the Tax Administration Reform Commission (TARC), with Dr Parthasarathi Shome at its helm. Since its inception in August 2013, the TARC has carried out in-depth studies of the tax administration system and submitted five detailed reports that suggest various reforms to improve the system.

TARC: RECOMMENDATIONS

Some of the key recommendations made by the TARC, which when implemented will have a significant impact on the business environment in the country, are discussed below:

- Focus on taxpayers as customers: Taxpayer services should be the first focus of tax administration. Taxpayers should be treated as customers and their experience with tax departments should be improved.
- Reduce complexity in tax laws and uncertainty in business climate: India's taxation regime is often considered one of the most complex in the world, and the TARC recommends eradicating poorly drafted and ill-considered laws, and also quickly removing uncertainty in the business climate and unwarranted risk in economic activity.
- Introduction of industry-based assessment: The present system of territorial jurisdiction must be scrapped and replaced with industry-based assessment, where officers specializing in a particular industry will handle the assessments, of such industry so tax authorities can better understand the position, practices and requirements of each industry. A tax council headed by a chief economic adviser should be created for greater economic analysis and precision in the legislative drafting of tax laws with a view to improve quality and coherency of such tax legislation.
- Reducing/expeditious disposal of disputes: Pre-dispute consultation should be introduced, which allows for an open interaction between tax authorities and taxpayers to eliminate disputes at the pre-notice stage.
- Closer coordination between the Central Board of Excise and Customs (CBEC) and the Central Board of Direct Taxes (CBDT): This is proposed as a precursor to the slow merger of both the boards. The TARC has also recommended the setting up of large business services (LBS) which will be integrated and operated jointly by the two boards. LBS when introduced will replace existing large taxpayer units, and, will also adopt the international practice of industry-based assessment. The said recommendation has been made in line with the current international thinking which favours closer coordination between direct and indirect taxes. Agencies like the OECD and World Customs Organization are researching, cooperating and contributing towards this end at a global level.
- Other recommendations to improve tax administration: These include training officials, establishing a system for online tracking of grievances, applications for refunds, etc., sufficient allocation of funds for customer research, and setting up independent evaluation offices.

IMPLEMENTATION

The TARC has made a total of 226 recommendations, out of which 41 have been accepted and implemented, 126 have been accepted but are yet to be implemented, and 59 are under examination. The CBEC has issued an office memorandum dated 8 March 2016 enumerating the recommendations that have been implemented. The following critical recommendations of the TARC have been implemented: i) creation of the Directorate General of Taxpayer Services; ii) constitution of a high-level committee for regular stakeholder consultation; iii) consultative meetings with trade the community before policy decisions; iv) retrospective amendments only to iron out deficiencies in law, not to create liability; v) pre-dispute consultation in cases involving ₹5 million tax; and vi) restructuring of procedures on related-party transactions (for the purposes of customs valuation) to bring certainty, as also with the creation of linkages between customs valuation and transfer pricing (indirect and direct taxes).

CONCLUSION

The well thought-out recommendations of the TARC are in tune with global best practices. The Indian government has chosen the right path to better the prevailing tax administration by seeking to implement some of the recommendations. The authors fervently hope that this process will continue, and, that the Indian tax administration will change and be counted as one of the best tax administration(s) globally in the foreseeable future.

Karthik Sundaram is an associate partner and Karthik Nair is an associate manager at Economic Laws Practice. This article is intended for informational purposes and does not constitute a legal opinion or advice.

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