India Business Law Journal

Your partner in legal intelligence

June 2013

Volume 7, Issue 1

Punching above its weight

Is India's competition watchdog up to the task it has set itself?

Scrutinizing India's solar power policies

The top foreign law firms for India deals

Learning lessons from UK banking disputes

In-house counsel share IP protection tactics

VANTAGE ASIA

www.indilaw.com

Contents

Editorial board

Correspondent law firms

- Amarchand & Mangaldas & Suresh A Shroff & Co
- Bennett Jones
- Bharucha & Partners
- DH Law Associates
- Economic Laws Practice
- Khaitan & Co
- Krishna & Saurastri
- Mine & Young
- Mulla & Mulla & Craigie Blunt & Caroe
- OP Khaitan & Co
- Phoenix Legal
- RRG & Associates
- Saikrishna & Associates
- Singh & Associates
- Trilegal
- Tyabji Dayabhai
- Udwadia Udeshi & Argus Partners

Subscription information

India Business Law Journal is published 10 times a year and has a subscription price of US$790 for one year or US$1,264 for two years. To subscribe, please call +852 3622 2623, email cs@indilaw.com or subscribe online at www.indilaw.com.

India Business Law Journal

June 2013
Volume 7, Issue 1
ISSN: 1994-5841

Contact us

Editorial
Email: editorial@indilaw.com
Telephone: +852 3622 2681

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

Editor
Vandana Chatlani
Deputy editor
Rebecca Abraham
Consultant editor
Simmie Magid
Contributors
Bhavana Alexander
Gargi Chatterjee
DG Shah
Nicola Vinovrški
Production editor
Pun Tak Shu
Head of marketing
Billy Chung
Associate publisher
Tina Tucker
Executive editor
Chris Hunter
Publisher
James Burden

Printed in Hong Kong

Vantage Asia Publishing Limited

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

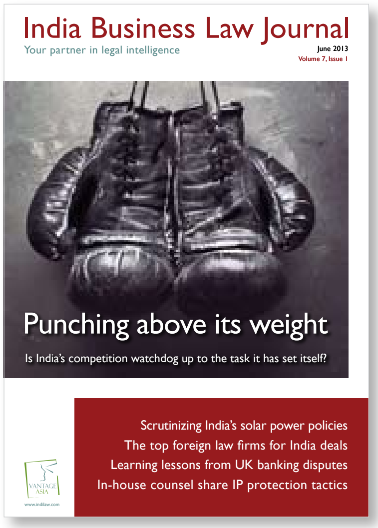
Directors
James Burden, Kelley Fong, Chris Hunter

Building trust in troubled times

These have been tough times for cricket lovers across India

A recent spot-fixing scandal that revealed the seamier side of the glitzy Indian Premier League has left many fans questioning the wisdom of their long-standing loyalty to the game. Even after the Indian team emerged triumphant at the ICC Champions Trophy in early June, the struggles to keep the faith continue on account of the turmoil within the body that oversees Indian cricket, the Board of Control for Cricket in India.

While this is bad news for Indian cricket, the scepticism it has triggered may also cast a shadow on other bodies that regulate sectors of the Indian economy. For, if the powers-that-be lack the necessary vision and integrity to ensure the well-being of a sport, can they be trusted to regulate critical sectors of the economy in a manner that secures the common good?



The confidence inspired by a regulator is critical for the well-being of the sector that it oversees. Writing in this month's **Vantage point** (page 16), DG Shah, the secretary general of the Indian Pharmaceutical Alliance, argues that regulatory inadequacies are holding back India's drugs industry. Shah expresses serious concerns over the effectiveness of India's drugs regulator, the Central Drugs Standard Control Organization, and argues that the regulator's shortcomings are damaging the international credibility of the country's pharmaceutical industry.

Shah may have been heartened when India's finance minister, P Chidambaram, recently spoke of the need for a regulator that "favours none and spares none". The minister was delivering a lecture organized by India's antitrust watchdog, the Competition Commission of India (CCI). But is this a regulator that is up to task?

In our **Cover story** this month (page 17), we look back at the CCI's short history and ask whether it is capable of rising to the considerable challenges it has set for itself. The CCI has been fully functional for just two years, but it has already been flexing its muscles. It has imposed widely publicized penalties of previously unheard-of amounts and some observers have expressed concerns over the manner in which it has gone about prosecuting cases of anti-competitive behaviour.

Samir Gandhi, a partner at AZB & Partners who heads the firm's competition law practice, believes the CCI "may be missing the wood for the trees" in its hurry to send out a powerful message. However, others suggest that the CCI is yet to develop the necessary rigour to be an effective regulator. This may well prove to be the CCI's Achilles heel and will need to be overcome if the regulator is to make any headway in levelling the playing field, and in doing so, earning people's trust.

As every in-house lawyer will know, maintaining the reputation of a company is often linked to protecting its intellectual property. While this is a particular challenge in India, the fact remains that the country is an immensely attractive market for many global IP owners. In *Looking in-house for IP insights* (page 29) we turn to in-house counsel at the Indian operations of DuPont and JCB for their perspectives on the problem. Their insights are incisive and will be of great interest to other in-house counsel in India and beyond. After all, nothing can beat local knowledge for getting a handle on what is a very Indian problem.

Knowledge of a more distant kind comes into focus in this month's **What's the deal?** (page 32). Here we examine the implications for Indian investors and financial institutions of banking-related judgments by UK courts. The UK is a major hub for the resolution of banking and derivatives disputes, and as such, many of the judgments issued there – and the precedents they set – are directly relevant to India.

Our coverage includes analysis of recent cases involving the London Interbank Offered Rate (LIBOR) scandal, which will have far-reaching consequences around the world.

Closer to home, an acute shortage of power has long been one of the greatest challenges to India's development. As steps are taken to tackle the problem, renewable energy technologies, including solar power, have risen to prominence. In *Sunny solutions* (page 24) we consider the burning issues facing investors in the sector. While the Electricity Act, 2003, remains the significant legislation regulating the generation, transmission and distribution of electricity, investors must also grapple with numerous different state laws and policies. Our coverage compares some of the key state solar power policies and sheds much light on the how investors may pursue opportunities in the sector.

This month's **Intelligence report** (page 37) presents *India Business Law Journal*'s seventh annual survey of the top international law firms for India-related work. Our coverage reveals the top 10 foreign firms for India-related work, as well as 10 key players and 20 significant players. We also highlight 25 regional and specialist law firms, and 35 "firms to watch", that we believe in-house counsel should keep well within their sights.

This issue of *India Business Law Journal* marks the start of our seventh year of publication. Since our first issue in June 2007, we have strived to make sense of complex transactions and regulations, to bring clarity to areas of confusion or ambiguity, and to foster intelligent debate on significant issues. As we mark this important anniversary, we would like to thank our readers, our contributors, our advertisers, our correspondent law firms and our editorial board members. We look forward to continuing to serve you in the years ahead. ■

Africa-India trade

Roadmap for the savvy investor

Dear Editor,

Congratulations on the release of yet another insightful edition of *India Business Law Journal*. The **Intelligence report** on investments in Africa published in the May issue of the journal highlights the recent investment climate and issues particularly of interest to Indian businesses in light of an increase in trade volume.

The estimated annual trade volume between India and Nigeria in 2012, for example, was US$10 billion, resulting in India overtaking the US as Nigeria's largest trading partner. The assessment of the regulatory environment for investments in key African countries certainly provides a roadmap for the savvy investor.

The format that included comments from trade regulators and industry participants gave an outlook of a steady and dynamic transition from struggling African economies to vibrant investor-friendly platforms.

The journal further put the economic histories, reforms, challenges, and the stages of development of divergent African economies into focus. Such a multifaceted approach adds value to the overall content and is useful to those with interests in both Africa and Asia.

The particulars are specific in content and elaborate in jurisdiction. It goes without saying that the comments and contributions are a useful addition to advanced discourse on investment in Africa.

Oladiran Ajayi
Senior Associate
Templars
Lagos

Intellectual property

Creative aesthetics

Dear Editor,

India Business Law Journal is informative and keeps readers abreast with the latest legal developments. I was intrigued particularly by the May issue, which I saw at your booth at the International Trademarks Association conference. The cover, which featured pictures of professionals in the IP arena, was very creative. Keep it up!

Vikram Grover
Principal
Groverlaw
New Delhi

Opinions?

Observations?

Feedback?

We want to hear from you.

India Business Law Journal welcomes your letters.

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

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

Due to the quantity of letters we receive, it is not always possible

to publish all of them.

SEBI sparks race to comply with shareholding rules

The Securities and Exchange Board of India (SEBI) has begun penalizing public listed companies that failed to meet the 3 June deadline for putting a minimum of 25% of their equity shares in public hands. Statistics from 4 June show that 105 companies have failed to comply with the regulator's new public shareholding norms.

The securities regulator has responded by imposing a range of sanctions on non-compliant companies. It has prohibited the promoters, promoter groups and directors of such companies from buying, selling or otherwise dealing in the securities of their companies. It has also ordered the freezing of promoters' and promoter groups' voting rights and corporate benefits. Furthermore, the promoters and directors of non-compliant companies have been restrained from holding new positions as a director of any listed company until they comply with the public shareholding norms.

Companies affected by the penalties include Essar Ports, Hindustan Breweries & Bottling, Plethico Pharmaceuticals, Ras Resorts & Apart Hotels, Steelco Gujarat, Tata Teleservices and Videocon Industries.

SEBI says it may take further action on a case-by-case basis against companies that fail to comply. However, the Associated Chambers of Commerce of India (Assocham) has called for leniency. "While it is true that it has been three years since SEBI had asked listed firms to take firm steps to increase public holding, it must also be realized that selling stocks in the marketplace is a function of sentiments or else the promoters would be compelled to offload equity at a distressed price," Assocham's secretary general, DS Rawat, said in a statement. "This is particularly true about the small and mid-cap companies."

Nevertheless, the new rules have sparked a race for compliance. Adani Ports and Special Economic Zone, one of the 105 non-compliant companies named, issued a US$180 million institutional private placement of equity shares on 5 June in order to make itself compliant. This diluted the promoter stake, taking the public holding in Adani Ports just over the 25% threshold to 25.83%.

Jones Day partners Manoj Bhargava and Colleen Laduzinski and associates Nikhil Naredi, Kevin Khan and Brandon Morris advised a syndicate of DSP Merrill Lynch, Morgan Stanley, Goldman Sachs, Standard Chartered, SBI Capital Markets, Axis Capital, Citi, Deutsche Equities, IDFC and Macquarie Capital on the deal.

Amarchand Mangaldas, led by partners Yash Ashar and Gaurav Gupte, acted as counsel to Adani Ports, while Khaitan & Co partner Nikhilesh Panchal and executive director Sudhir Bassi were counsel to the placement agents.

In another quick-fire deal to comply with the new public shareholding norms, Oracle Global (Mauritius) sold 4.4 million equity shares in Oracle Financial Services Software (India) at a price of ₹2,275 (US$37.75) per share. The deal, which was valued at around ₹1 billion, reduces the Mauritian company's stake in Oracle Financial Services Software (India) to 75%. Kochhar & Co, led by partner Harry Chawla and associate Akshit Kapoor, advised Oracle Global (Mauritius) on the sale. Partner Yash Asher and principal associates Kranti Mohan and Abhimanyu Bhattacharya at Amarchand Mangaldas in Mumbai represented the brokers Morgan Stanley India and Deutsche Equities India on the sale.

Latham & Watkins in Singapore fielded a team including partner Rajiv Gupta and foreign legal consultant Scott Calver to represent the brokers.

In some cases, more extreme measures have been taken. Indian IT, consulting and outsourcing group Wipro, for example, has split itself into two companies to comply with the new public shareholding rules.

The company has demerged its non-IT divisions, including consumer care, lighting, infrastructure engineering and medical diagnostic product divisions, into a separate promoter-controlled entity, leaving Wipro as a pure IT company.

Amarchand Mangaldas led by Mumbai-based managing partner Cyril Shroff along with Bangalore partners Arjun Lall and Nivedita Rao advised Wipro on the demerger.

Wilson Sonsini Goodrich & Rosati acted as US counsel to the investment banker – JM Financial Institutional Securities – while SPJ Legal was the legal counsel in court.

The demerger has been effective since 31 March. The American depositary receipt issuance is expected to be complete on 7 June.

CAPITAL MARKETS

Rolta issues high-yield bonds

Rolta India has completed a Rule 144A/Regulation S high yield bond offering after issuing US$200 million of 10.75% senior notes in the international markets. The notes will be listed on the Singapore Stock Exchange.

Rolta India is a technology company that provides IT solutions for defence and national security, utilities, power, financial services and other industries.

The bonds were issued by one of Rolta's US subsidiaries, Rolta LLC, with guarantees provided by subsidiaries in the US, the UK and the UAE in addition to the Indian parent company. The issue was jointly managed by Barclays, Citigroup, DBS Bank and Deutsche Bank.

DLA Piper designed the security structure of the deal and prepared intercompany loan documentation to help implement the debt repayment aspects of the use of proceeds. The firm was US counsel to Rolta. The team was led by Stephen Peepels, the head of DLA Piper's US capital markets practice in Asia. He was assisted by associates Timothy Franklyn and Clark Chen.

Partners Chris Paci and Jason Harmon provided support in negotiating the covenant package and implementing the security structure, while partner Steve Weerts assisted with tax aspects of the deal. Sharon Smith and Debbie Barbour, partners in London and Abu Dhabi respectively, also assisted with the security structure.

AZB & Partners advised Rolta and its guarantors on Indian law matters, while Davis Polk & Wardwell acted as US counsel to the joint lead managers.

The Mumbai office of Trilegal advised the parties on the Indian law implications of the New York law-governed transaction documents and the regulatory regime governing guarantees by an Indian company to an indirect wholly owned subsidiary. The team at Trilegal consisted of partner Srinivas Parthasarathy, senior associate Priyanka Kumar and associates Gaurav Mukherjee and Anshul Gosavi.

PEOPLE MOVES

Rao races back in-house

Private practice has proved not to be Pramod Rao's cup of tea. The former IndusLaw partner has resigned from the law firm after just over a year to move back to an in-house role.

In his new position as general counsel at Citibank, Rao will head a team of around 18 lawyers in Mumbai. Previously he had worked as general counsel of ICICI Bank. He had spent almost 14 years with the bank, of which he was general counsel for seven, before joining IndusLaw to set up the firm's Mumbai office.

Rao said that when he left ICICI, many law firms approached him, but "it was I who approached IndusLaw and wanted to be a part of [the firm]". He said he enjoyed his rapport with other members of the firm. "I was delighted with the wonderful core team of partners," he said. "I found them to be experienced, business focused and supportive. The establishment of the Mumbai office and the inclusion of Priyanka [Roy, formerly of Alliance Legal] as a partner … is testament to the vision of IndusLaw."

Rao said his colleagues were supportive of his decision to move back in-house. "Personally the role of partner at a law firm in private practice is not what I am happy with. I am more comfortable in being an in-house counsel, and that is where my path lies," he added.

Commenting on Rao's departure, Kartik Ganapathy, a partner at IndusLaw, said: "It was wonderful when Pramod reached out and said he wanted to be a part of IndusLaw. We did realize that Pramod remained an in-house person at heart, but would try to make the transition. It has been great working with him, and we hope that this will continue."

Rao replaces Sandeep Beri, the former general counsel for South Asia at Citibank. Beri joined Amarchand Mangaldas as a lateral partner in its New Delhi office.


Pramod Rao

ELP rounds up new recruits

Economic Laws Practice (ELP) has reconstituted its dispute resolution team with the addition of nine new lawyers.

The new appointments were made to replenish the firm's litigation wing following the departure of 14 lawyers, including partners Sanjay Notani and Tarun Gulati, in April.

Kirat Singh Nagra joins ELP's Delhi office as a partner after practising with Amarchand Mangaldas for more than 10 years. Nagra handles commercial litigation and arbitration matters and has represented clients in sectors such as telecoms, aerospace and real estate. He has appeared before the Supreme Court of India, high courts, regulatory forums and tribunals.

Tarun Jain joins ELP as a senior associate following a six year stint at Lakshmikumaran & Sridharan. His expertise lies in indirect tax laws, primarily in central excise, customs, foreign trade policy, service tax and value added tax.

Also joining the firm are Pranav Vyas, formerly an associate at Fox Mandal, Kartik Yadav, who was an associate with AZB & Partners, and Somnath Shukla, who was an associate at Vaish Associates. The other new hires are Kshitiz Karjee, Prithvi Kapur, Shankey Agrawal and Avneesh Arputham who have all joined ELP as associates.

Finsec gains one, loses two

Mumbai-based finance boutique Finsec Law Advisors has appointed Anil Choudhary as a senior associate. Choudhary is a New York and India-qualified lawyer specializing in transactional work in the securities market.

The Harvard law graduate worked at Luthra & Luthra, Nishith Desai Associates and Trilegal before joining Finsec.

Choudhary has advised large corporate houses and investment banks on corporate and capital market transactions including IPOs, cross-border listings on stock exchanges and private equity investments.

Speaking to *India Business Law Journal*, he said his reasons for moving to Finsec were "to have a focused practice area in securities and financial laws and to have an opportunity to work with Sandeep [Parekh], one of the leading securities lawyer in this country". He added that the firm was "a great place for legal minds interested in contributing to the financial and securities law policies of the country".

Parekh, the founder of Finsec Law Advisors, said Choudhary's appointment would strengthen Finsec's "presence in financial sector transactional practice". He also told *India Business Law Journal* that his firm would be taking on more new professionals in the near future.

Choudhary's appointment comes hot on the heels of two departures from Finsec.

Indrajit Mishra and Tejesh Chitlangi left Finsec in May to join IC Legal. Mishra, who was a partner and head of private equity at Finsec, and Chitlangi, a former senior associate at the firm, moved to become equity partners at IC Legal.

Mishra takes on the role of head of private equity and M&A while Chitlangi heads up the firm's investment funds practice. Janhavi Seksaria, who also had a stint at Finsec, has joined IC Legal as an associate.

"IC Legal came up with a brilliant opportunity and our desire was to move from a proprietary model to a partnership which gives greater independence and opportunities to grow," Chitlangi told *India Business Law Journal*.

IC Legal was set up in 2004 and specializes in real estate, litigation and media law.

The firm comprises 15 lawyers including five partners. It aims to become a full-service law firm with the new capabilities in private equity, M&A and investment funds as a result of the hires.

Banking & finance

Canara grants loan to 3B Fibreglass

The London branch of Canara Bank has provided a €10 million (US$13 million) facility to 3B Fibreglass SRPL (Belgium), a member of the 3B Binani group of companies. The loan facility was backed by a corporate guarantee extended by Binani Industries India – the holding company of the 3B Binani group. The deal required Reserve Bank of India approval.

Majmudar & Partners advised Canara Bank (London) on the loan. Partner Prashanth Sabeshan in Bangalore led the Majmudar & Partners' team. TLT was English counsel to the lender and Ashurst represented the Canara Bank on Belgium and Luxembourg laws.

Mergers & acquisitions

McGraw Hill lifts stake in CRISIL

McGraw Hill Financial has made an open offer to acquire up to 15,670,372 shares from the public shareholders of CRISIL, a global analytical company which provides ratings, research and risk and policy advisory services. The share amount equals 22.23% of the total equity shares outstanding in CRISIL. Full acceptance of the offer would increase McGraw Hill Financial's total stake in CRISIL to 75% from 52.77%.

The parties intend to purchase the shares at an offer price of ₹1,210 (US$21.42) per share, making the total value of the deal approximately ₹19 billion.

Singhania & Partners advised McGraw Hill Asian Holdings, along with McGraw Hill Financial, S&P India and Standard & Poor's International, on the voluntary open offer under the Securities and Exchange Board of India's takeover regulations. The team was led by the firm's senior partner Ravi Singhania and partner Manish Kumar Sharma and was supported by senior associate Shradha Dubey and associate Medha Shah.

Khaitan & Co advised Morgan Stanley India as the manager to the issue. The team included partner Arindam Ghosh and executive director Sudhir Bassi.

Multiples purchases stake in Milltec

Mumbai investment company Multiples Alternate Asset Management has acquired a 50% stake in Milltec Industries (Bangalore), a manufacturer of agricultural equipment. The deal, valued at US$43 million, was conducted through a secondary investment by Multiples in Milltec Machinery and an acquisition of a 100% stake by Milltec Machinery in Milltec Industries (Bangalore) and Milltec Outsourcing.

Khaitan & Co Bangalore partner Ganesh Prasad advised Multiples. J Sagar Associates represented the Milltec Group and the continuing shareholders throughout the transaction. The team comprised partners Sajai Singh and Gerald Manoharan, senior associate Prashant Kumar and associate Roy George.

Dua Associates was counsel to the selling shareholders on the deal.

Victor Reinz acquires licence

S&R Associates has advised US vehicle parts manufacturer Dana Holding Corporation on an agreement to license its heat exchange technology to Victor Reinz India. Victor Reinz is Dana's joint venture in India with the Jayant Group.

Victor Reinz India, which has been producing gaskets and heat shields for automotive customers in India since 2009, will now produce engine, transmission and power steering oil and fuel coolers.

Dwayne Matthews, the president of Dana Power Technologies, said the agreement was "the next logical step to meet the rising demand for high-quality thermal solutions in India."

The deal is subject to customary closing conditions and expected to be complete within two months.

The S&R Associates' team that worked on the deal consisted of partners Rajat Sethi and Juhi Singh and associates Radhika Iyer and Radhika Agrawal.

Mozambique draws OIL and OVL

Oil India (OIL) and ONGC Videsh (OVL) have signed definitive agreements with Videocon Mauritius Energy to acquire 100% of the shares of Videocon Mozambique Rovuma 1.

Videocon Mozambique holds a 10% participating interest worth US$2.475 billion in a gas project in Rovuma Area 1 Offshore Block in Mozambique. OVL and OIL will make the acquisition through a newly formed entity in which OVL will own 60% and OIL will hold 40%.

Kochhar & Co's Delhi office, led by partner Ngangon Junior Luwang, represented OIL and OVL as Indian counsel on the deal, advising on the transactional documents, litigation, taxation and general corporate issues. He was assisted by associates Avichal Prasad and Tarana Khan. The Hong Kong office of Simmons & Simmons was the international counsel to the two companies.

Shardul Shroff, the Delhi managing partner of Amarchand Mangaldas, led a team that acted for Videocon. He was supported by partners Vidyut Gulati, Nikhil Narayanan and Puja Sondhi, principal associate-designate Ramanuj Gopalan and associate Neha Yadav.

Tech Mahindra seals Satyam merger

Indian IT company Tech Mahindra has completed its US$1 billion merger with Mahindra Satyam. Tech Mahindra had already acquired a 43% interest in Mahindra Satyam in 2009 and agreed in March 2012 to fully merge Mahindra Satyam with Tech Mahindra.

Mahindra Satyam shareholders will get two shares of Tech Mahindra for every 17 shares of Mahindra Satyam.

Jones Day was the global antitrust counsel to Tech Mahindra. The team was led by partner Carsten Gromotke in Frankfurt with assistance from staff attorney Tanja Neumann and lawyer Lisa Schlepper, also in Frankfurt, partner Fiona Schaeffer in New York, partners Bevin Newman in Washington and lawyers Jean-Christoph Deverines, Thomas Dinh and Annette Morin, also in Washington. AZB & Partners acted as principal legal adviser to Tech Mahindra in India.

Legislative and regulatory update

TAXATION

Key amendments incorporated in Finance Act, 2013

The president of India on 10 May signed into effect the Finance Act, 2013. Several key amendments were incorporated into the Finance Act during the course of its passage through the Lok Sabha (the lower house of parliament) and the Rajya Sabha (the upper house). The following is a summary of the key amendments made to the Finance Bill, 2013, as proposed by India's finance minister in his budget speech on 28 February.

Tax residency certificates

The Finance Bill had sought to provide that a tax residency certificate even if in the prescribed format would only be a necessary but not a sufficient condition for claiming benefits under a tax treaty. Responding to concerns raised by investors, the government abandoned the proposal and replaced it with the requirement to provide such other documents and information as may be prescribed. As yet, the government has not indicated what information and documents (if any) will be required for obtaining treaty benefits.

Foreign investment in Indian debt

Further easing the country's debt investment regime, the government has introduced a new provision (section 194LD) in the Income Tax Act, 1961 (ITA), through which interest payments made to foreign institutional investors and qualified foreign investors on or after 1 June 2013 but before 31 May 2015 on rupee denominated bonds of an Indian company and on government securities would be subject to tax at the rate of 5%, instead of the ordinary rate of 20%. However, the lower withholding rate would be applicable only on interest paid on bonds whose interest rates do not exceed the rate as specified by the central government in this regard.

Additionally, the Finance Act, 2012, had introduced section 194LC in the ITA, through which interest payments made on foreign currency denominated long-term infrastructure bonds and loan agreements in foreign currency were afforded a lowered 5% rate of tax. This lowered rate was subject to production of a permanent account number (PAN) because of section 206AA of the ITA, which provided that if the details of the payee's PAN have not been provided, tax would be withheld at a minimum rate of 20% or the actual rate, whichever was higher. The PAN requirement has now been done away with.

Commodities derivative transactions

A series of amendments to the Finance Bill clarifies the status of commodities transactions, in the context of the imposition of commodities transactions tax. Under Indian tax law, transactions not by way of spot delivery of goods are treated as speculative transactions and losses arising from speculative transactions are allowed to be set off only against income from speculative transactions. The Finance Act, 2013, has amended section 43(5) of the ITA to provide that any "eligible transaction" in respect of commodity derivatives executed on a recognized association will not be considered a speculative transaction. As a consequence, going forward, businesses engaged in commodities trading would be able to set off losses from commodity derivative transactions against other kinds of income (available only against gains derived from other speculative transactions).

Transfer pricing

The Finance Act, 2012, had introduced a provision whereby the time limit for completion of an assessment, where the matter has been referred to a transfer pricing officer (TPO), was extended to three years (from the year in which the income was first assessable), as opposed to two years, in cases where (i) reference has been made on or after 1 July 2012, or (ii) reference has been made before 1 July 2012 but an order has not been passed before that date. The Finance Bill, 2013, has been amended to provide that the time lines for any assessment where a reference has been made to the TPO will be three years.

EMPLOYMENT LAW

New law targets sexual harassment of women at work

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, received the president's assent and was enacted on 22 April.

The provisions of the act may be summarized as follows:

- The definition of sexual harassment includes any unwelcome sexually determined behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, sexually coloured remarks, showing pornography, or any other unwelcome physical verbal or non-verbal conduct of a sexual nature.
- The scope of "workplace" includes government and non-governmental bodies, private and public sector organizations, organizations carrying on commercial, vocational, educational, entertainment, industrial or financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums.
- The definition of "employee" covers regular, temporary and ad hoc employees, daily wage employees either working directly or through an agent, independent contractors, trainees, and apprentices, with or without the knowledge of the principal employer and working on a voluntary basis.
- Under the act, the employer is required to set up an internal complaints committee (ICC) at each office or branch of an organization that employs at least 10 employees. At the district level, the government is required to set up a local complaints committee (LCC) to investigate complaints regarding sexual harassment from establishments where an ICC has not been constituted due to non-fulfilment of the above criteria or if the complaint is against the employer.
- The act provides that at the request of an aggrieved employee, the ICC and the LCC may recommend to the employer interim relief such as transfer of the aggrieved employee or granting her up to three months of paid leave.
- The law allows female employees to request to settle the matter through conciliation although a monetary settlement should not be made as a basis of conciliation. The act provides a detailed elaboration of the grievance redressal mechanism.
- The act includes other employer obligations such as providing a safe working environment, displaying the penal consequences of acts that may constitute sexual harassment and regularly organizing workshops for sensitizing employees on this issue.
- The non-fulfilment of certain employer obligations (such as failure to constitute an ICC) could lead to penal consequences for the employer.

SEBI guidelines on employee stock schemes clarified

The Securities Exchange Board of India (SEBI), through a circular dated 13 May, provided some clarifications to an earlier SEBI circular dated 17 January 2013, which made amendments to the SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999, and the Equity Listing Agreement.

The clarifications are as follows:

Applicability

It was clarified that the circular dated 17 January is applicable to all employee benefit schemes involving securities of a company where the schemes are set up, managed or financed by the company, whether directly or indirectly.

Time extension

The earlier deadline of 30 June 2013 has been extended to 31 December 2013 and by this date all employee benefit schemes involving securities of companies must be made to conform to the guidelines. The Equity Listing Agreement must also be amended accordingly. Any further grant of options after 17 January 2013 has to be strictly in accordance with the guidelines.

Holding of securities by trusts

Employee benefits trusts which have already acquired securities of the company from the secondary market before 17 January 2013 may continue to hold them beyond 31 December 2013 provided that the schemes have been aligned to the guidelines.

Securities held by other schemes

Existing employee benefit schemes involving securities but not involving

grant of options to purchase or purchase of securities by employees will be permitted to: (i) either hold securities of the company already acquired by them beyond 31 December 2013 provided the schemes have been aligned with the guidelines; or (ii) dispose of the securities by 31 December 2013.

Further, the circular requires that listed companies must disclose the following information to the stock exchanges:

1. Details of benefits granted/shares allotted in the past up to 17 January 2013 and benefits due/options granted and pending exercise as on 17 January 2013, in pursuance of employee benefit schemes involving securities of the company which are not in alignment with the guidelines, must be disclosed in the prescribed format by 30 June 2013.
2. Details of allotments made/benefits granted post 17 January 2013 up to 13 December 2013 pursuant to employee benefit schemes not in alignment with the guidelines must be disclosed in the prescribed format within seven days from the end of each quarter. The details pertaining to the quarter ended in March are required be disclosed along with the quarter ending 30 June 2013.

The legislative and regulatory update is compiled by ***Nishith Desai Associates****, a Mumbai-based law firm. The authors can be contacted at nishith@nishithdesai.com. Readers should not act on the basis of this information without seeking professional legal advice.*

Court judgments

BANKING LAW

Debt recovery tribunal cannot rule on workmen claims

Stating that "once the company is in winding up the only competent authority to determine the workmen's dues is the liquidator", a three-judge bench of the Supreme Court recently held that claims of workmen who claim to be entitled to payment *pari passu* have to be considered and adjudicated by the liquidator of a debtor company and not by a Debt Recovery Tribunal (DRT).

Allowing an appeal in *Bank of Maharashtra v Pandurang Keshav Gorwardkar & Ors*, the court ruled that where a winding up petition against a debtor company is pending and a bank or financial institution has been repaid its loans following an order of sale by a DRT, the disbursements made by the DRT cannot be reopened when the debtor company subsequently goes into liquidation. However, if the debtor company goes into liquidation before the DRT has fully disbursed the sale proceeds, the DRT can disburse the undisbursed proceeds only after giving notice to, and hearing, the liquidator.

The ruling was prompted by two appeals – by Bank of Maharashtra and the Indian Banks Association – against a ruling by Bombay High Court, which allowed a writ filed in 2004 by Pandurang Keshav Gorwardkar and others who were workmen of a defaulter company. The court held that under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the jurisdiction to determine the payment of sale proceeds of a company and its priorities is vested entirely with the DRT.

The Bank of Maharashtra and the IBA had argued that the workmen had no claim or right over the security held by a financial institution, that their dues could only be adjudicated in an appropriate court (e.g. Industrial Tribunal) when the company is not in liquidation, and that the DRT had no competence in this regard.

EDUCATION LAW

AICTE approval not required for MBA courses

Allowing an appeal in *Association of Management of Private Colleges v All India Council For Technical Education & Ors*, the Supreme Court recently held that a course for a master's degree in business administration (MBA) "is not a technical course" within the definition of the All India Council for Technical Education Act, 1987. As such, private colleges do not require approval from the All India Council for Technical Education (AICTE) to run MBA courses.

The court also held that while a

Real estate

Court quashes circular prohibiting GPA sales

Ruling in *Pace Developers and Promoters Pvt Ltd v Govt of NCT through its Secretar*y, Delhi High Court recently set aside a 27 April 2012 circular issued by the government of the national capital territory of Delhi, which prohibited the transfer of immovable property on the basis of a general power of attorney (GPA), a will and an agreement to sell, collectively or separately.

Holding that the circular was contrary to the observations made by the Supreme Court in *Suraj Lamp and Industries (P) Ltd v State of Haryana*, the court ruled that "as long as the transaction is genuine, the same will have to be registered by the sub-registrar … a person may enter into a development agreement with a land developer or builder for development of a parcel of land or for construction of apartments in a building, and for this purpose a power of attorney empowering the developer to execute sale agreements can be executed".

Pace Developers and Promoters had entered into a collaboration agreement in September 2011 with the owner an immovable property, who had executed a GPA in its favour. The GPA was registered and stamp duty paid according to the Delhi Stamp Duty Amendment Act, 2001. The owner of the property had also executed a will giving a director of the company a 25% share in ownership rights to the land.

The high court clarified that it was open to the government to examine the genuineness of transactions reflected in documents filed, at the time of registration. If the sub-registrar concludes that a transaction is not genuine, those presenting documents would be called on to explain their case and if unconvinced the sub-registrar could pass a "speaking order" giving the reasons why the documents were not liable to be registered.

master's degree in computer applications (MCA) is a technical course, the AICTE's role in its conduct and regulation "must be advisory".

The Association of Management of Private Colleges (AMPC) was appealing a 2003 ruling by Madras High Court, which held that while a university does not need to obtain permission from the AICTE for technical courses it runs, its affiliated colleges must do so. Further, the high court held that private colleges should get MCA courses that they intend to run ratified by the AICTE.

The AMPC argued that this contravened settled principles of interpretation of statutes and was also contrary to the law laid down by the Supreme Court in *Bharathidasan University & Anr v AICTE & Ors*. The AMPC further argued that the words MBA and MCA were inserted in August 2000 in regulations of the AICTE, but were unenforceable as parliament had not ratified the amendment as required under the act.

The Supreme Court held that under the University Grants Commission Act, 1956, colleges are part of the university that sanctions their courses. As a result, the court held that "the exclusion of university in the definition of technical institution as defined in section 2(h) of the AICTE Act must be extended to the affiliated colleges".

Motor accident claims

Court clarifies guidelines on compensation

In *Reshma Kumari & Ors v Madan Mohan & Or*s, a three-judge bench of the Supreme Court held that the multiplier specified in the second schedule of the Motor Vehicles Act, 1988, need not be scrupulously followed for calculating compensation in accident claims.

For over a decade Supreme Court judges have expressed differing views about the application of the multiplier. While some judgments held that the table for calculating damages was "unworkable", others maintained that the schedule was a good guide for computing compensation. As despite this controversy parliament had failed to amend the law for over two decades, a two-judge bench of the Supreme Court referred this case to a larger bench for a final view.

The three-judge bench clarified the position regarding the application of the multiplier in the second schedule to claims for compensation under section 166 of the Motor Vehicles Act .

The task of the court was to remove discrepancies which may arise between applications filed under section 166 and those filed under section 163A. Section 163A allows compensation claims to be filed and provides for calculation of compensation on the basis of the second schedule. The multiplier mentioned in the schedule is a numerical value used for calculating the final quantum of compensation. The discrepancy arose because section 166 also allows compensation to be sought, but no formula is given for calculating compensation, nor is there any reference to the multiplier in the second schedule.

Stressing the importance of having a standard method to determine compensation in cases of death, the Supreme Court directed all forums below to follow the new guidelines and those laid down in para 19 of its judgment in *Sarla Verma (Smt) and Ors v Delhi Transport Corporation and Anr.*

RETAIL

Supreme Court upholds FDI policy in multi-brand retail

Holding that "on matters affecting policy, this court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power", the Supreme Court recently dismissed a writ petition in *Manohar Lal Sharma v Union of India & Another*, which challenged the government's foreign direct investment (FDI) policy.

A three-judge bench of the court held that "the competence of the central government to formulate a policy relating to investment by a non-resident entity/person resident outside India, in the capital of an Indian company is beyond doubt".

Sharma had petitioned the court to quash press notes 4, 5, 6, 7 and 8 (2012 Series), dated 20 September 2012, issued by the Department of Industrial Policy and Promotion, by which the government reviewed its policy on FDI in single-brand retail, multi-brand retail, air transport services, broadcasting carriage services and power exchanges.

Sharma argued that the press notes were "unconstitutional and without any authority of law" and that the central government had no power to make policies regarding FDI, as only the Reserve Bank of India (RBI) could do this as per the Foreign Exchange Management Act, 1999.

The court on enquiry found that after the press notes were issued the RBI had amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, to allow for the changes to the FDI policy. The court observed that in the absence of any challenge to the amended regulations, the petitioner's contention that the press notes had no force of law, did not survive.

The update of court judgments 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.*

Falling short

Regulatory inadequacies are holding back India's drugs industry, argues DG Shah of the Indian Pharmaceutical Alliance

In May, Ranbaxy, an Indian pharmaceutical company that is part of the Daiichi Sankyo Group, was fined US$500 million by the United States Food and Drug Administration (FDA) for offences relating to the manufacture and distribution of adulterated drugs that were made in India.

India has the largest number of FDA-approved plants outside the US, and there are fears that the penalty has damaged the image of the country's pharmaceutical industry. It has also focused attention on the shortcomings of India's regulatory infrastructure for the sector.

The FDA has zero tolerance for manufacturing deficiencies. Statistics on import alerts, which are issued by the FDA when a product is deemed to present a safety risk, show that complying with the regulator's exacting standards is a challenge for every company, whether Indian or American, generic or innovator. Indeed, 63 import alerts are currently in force for Canadian products, 42 for UK products, 40 for Japanese products, 35 for German products and 47 for Indian products.

Maintaining consistently high quality is a particular challenge for companies in India, where over the decades people have developed a tolerance for low standards in hygiene, food, medicine and drinking water. As such, any Indian company that has to adhere to more challenging standards has to work to ensure that the entire organization embraces a new culture.

The Ranbaxy episode has driven home the fact that the cost of non-compliance far outweighs the cost of compliance. It has also focused attention on the changes in attitude and corporate culture – from the grassroots up – that are needed to foster quality organizations where higher technical and ethical standards are the norm.

In the pharmaceuticals sector, an effective regulatory framework is a prerequisite if Indian companies are to achieve the necessary jump in quality and the changes in attitude and corporate culture that need to accompany it. However, as it stands, there are serious concerns over the working of India's drugs regulatory authority, the Central Drugs Standard Control Organization (CDSCO).

Various committees have attempted to make the CDSCO more effective and accountable. Noteworthy among them are the Pharmaceutical Research and Development Committee, which published a report in November 1999, and the Mashelkar Committee, which released its report four years later. More recently, in its 59th report, the Parliamentary Standing Committee on Health and Family Welfare highlighted the need for greater transparency, accountability and efficiency in the working of the CDSCO.

Sadly, most of the recommendations made by these committees have not seen the light of day, and as a result, the CDSCO has failed to kept pace with global changes. An unfortunate consequence of this is that the credibility of India's pharmaceutical industry, which is judged in part by the standing of its regulatory authority, has suffered.

Furthermore, with confidence in the CDSCO lagging, other countries will become less trusting of the quality and safety of Indian pharmaceutical products, thus seriously damaging India's reputation as a supplier of safe, effective and quality medicines.

India's pharmaceutical industry already exports more of its products than it sells domestically. For exports to grow further, it is vital that the industry has the backing and oversight of a robust regulator that is held in high esteem by other regulators and industry observers around the world.

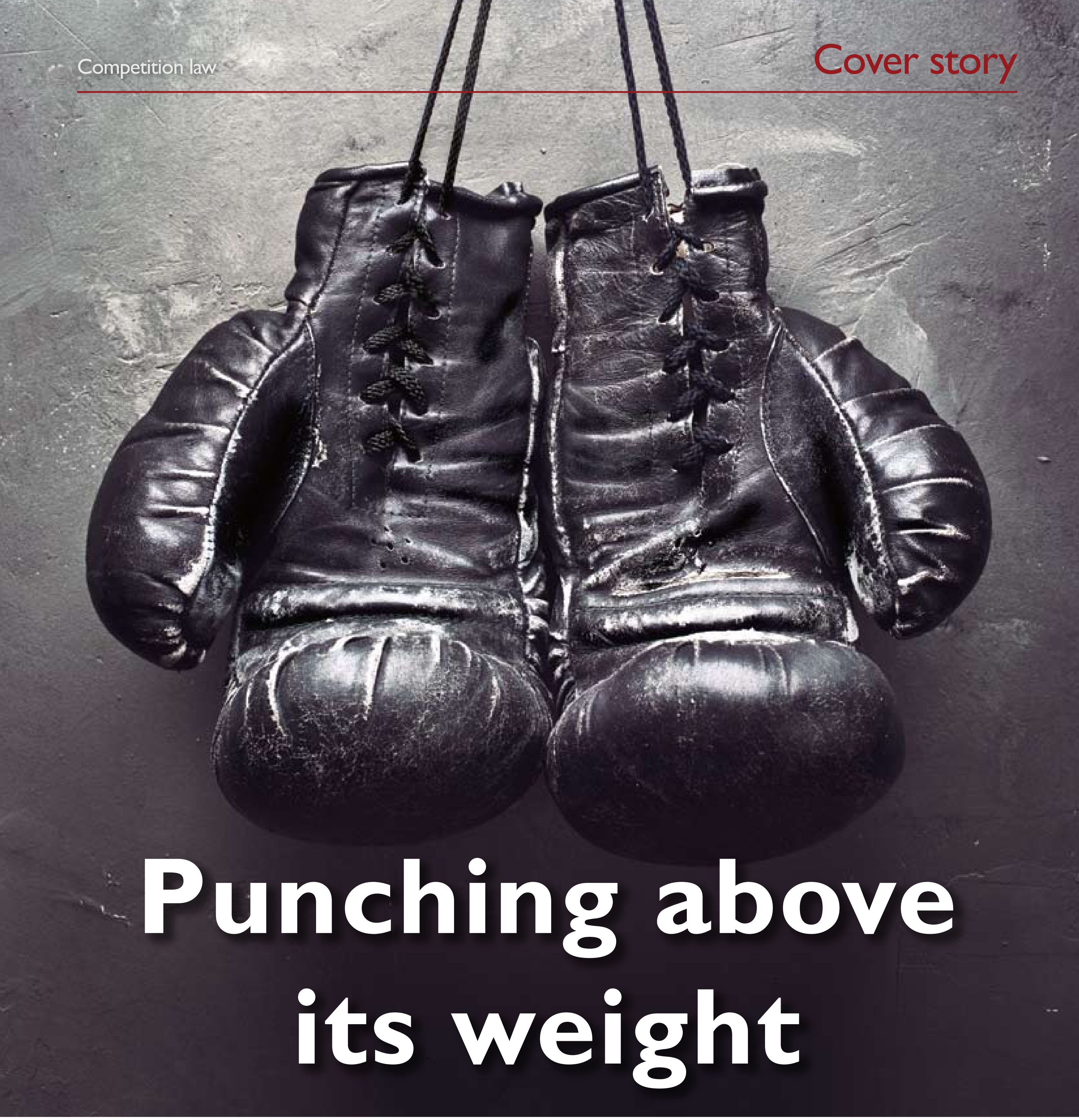
For the past three years, the Indian Pharmaceutical Alliance (IPA) has been urging the government to address the shortfalls of the CDSCO and implement reforms that will facilitate the upgrading of India's pharmaceutical regulatory framework. Just as building a quality organization happens by design, not by accident, building an effective regulator requires strong leadership and a pathway with well-defined milestones.

In a recent submission before an expert committee tasked with formulating policy guidelines and standard operating procedures for the approval of new drugs, clinical trials and the banning of drugs, the IPA highlighted an increasing reluctance by the CDSCO to grant approvals for new drugs, even if they have been approved elsewhere, as well as a worrying trend for the CDSCO to withhold permission for clinical trials or bio-studies for exports.

This is a typical example of the malaise that has permeated the CDSCO and given rise to an unhealthy culture that seems to equate decision-making with risk-taking. This situation not only inhibits India's pharmaceutical industry as it strives to compete in global markets, but also drives home the magnitude of the challenge that lies ahead if the CDSCO is to be reinvigorated.

Indian companies that value their presence in the US and other international markets have already embraced the need to raise their standards and develop corporate cultures that encourage and facilitate excellence. Now it falls to the country's pharmaceutical regulatory authority to recognize that it too needs to change in the interest of the long term growth and prosperity of the industry. Such a change is long overdue. ■

DG Shah is the secretary general of the Indian Pharmaceutical Alliance, which comprises 19 leading research-based Indian pharmaceutical companies.



Punching above its weight

India's competition watchdog may be the new kid on the block, but it has already been flexing its muscles. Is it up to the challenges it has set for itself?

Rebecca Abraham reports

Levelling the playing field in India was never going to be an easy task so there was little surprise when it took six years for the country's competition watchdog, the Competition Commission of India (CCI), to be up and running.

That the CCI has to be taken seriously was driven home when it began imposing widely publicized penalties of previously unheard of amounts. These included a ₹6.3 billion (US$110 million) penalty against one of India's top real estate companies, DLF, for abuse of dominance, and a ₹60 billion penalty against an 11-strong cartel of India's top cement companies. Both DLF and the cement companies are appealing the orders against them before the Competition Appellate Tribunal (COMPAT).

Practitioner's perspective

Competition in cyberspace

Owners of patents used in cloud computing should review their antitrust risks urges Priya Christian at Dua Associates

"By 2020, the people of India will be more numerous, better educated, healthier and more prosperous than any time in our long history". This is the Planning Commission's vision as stated in a report entitled India Vision 2020.

To achieve this vision, the government views cloud computing – a method of delivering information technology services over a network – as a cost-effective tool for a number of purposes, including setting up remote classrooms and delivering telemedicine. However, the use of cloud computing raises serious competition concerns.

Competition laws look to ensure that firms in a free market economy do not restrict or distort competition in a way that prevents the market from functioning optimally.

What is cloud computing?

Cloud computing is the provision of data, storage or a software application to remote users on demand over the internet. A cloud can be viewed as a five-layer stack: hardware; virtualization; infrastructure as a service; platform as a service; and software as a service (SaaS).

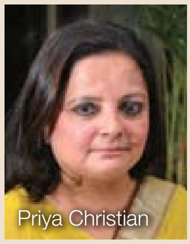
Correct interworking between layers is vital for the cloud to work. So, when users open photographs in their Facebook accounts on their smartphones, they are using a SaaS application (the Facebook app) to retrieve data (the digital photograph file) stored in remote hardware (the Facebook servers) that is managed by virtualization software and an operating system.

Each layer has potential product and technology markets that are interdependent. Most of the underlying technologies in these markets is protected by intellectual property (IP) laws. Service providers rely on patent licensing, often in the form of cross-licences and portfolio licences. But competition laws impose limits on these processes.

Application of competition law

Competition laws are mainly concerned with firms with the market power to raise prices above marginal costs. To assess a firm's market power, the relevant market of the product or services needs to be defined. A competition authority's task is to assess if a cloud provider has the power to influence prices or output in the relevant market.

It could be argued that two separate markets – one providing cloud computing capabilities (primary market) and the other providing services or software within a cloud (aftermarket) – should be considered while defining the relevant market for cloud services. This has been supported by some court rulings, notably, a European Court of Justice ruling in *Hugin Kassaregister AB and Hugin Cash Register Ltd v Commission of the European Communities* and a US Supreme Court ruling in *Eastman Kodak Co v Image Technical Services*. In Eastman Kodak, the US Supreme Court made it clear that the relevant market must be from a customer's perspective and include only products or services that the customer views as interchangeable.



In a cloud, customers may have a choice among providers in a primary market. However, once they have subscribed to a particular provider, they may have no choice for services in the aftermarket in that cloud and antitrust claims may arise if providers are seen to be bundling or locking-in services.

This is just the beginning

The global public cloud services market is set to grow by 18.5% to US$131 billion in 2013, with Asia-Pacific expected to have highest growth rates. Licensing practices used in cloud computing are within well established legal principles, but the growing importance of the cloud means that it's only a matter of time before competition authorities question such practices.

Tackling these fast moving and complex industries involves maintaining a balance between causing harm to innovation and avoiding the emergence of entrenched market power. Competition law decisions that relate to challenging markets can alter established practice or influence emerging business models.

As cooperation increases between competition authorities, it is worth keeping in mind European Commission competition commissioner Joaquín Almunia's thoughts on IP rights: "It is totally legitimate for a firm to protect its intellectual property – that goes without saying – but property rights cannot be used to block entry in markets that were not covered by them initially. The digital sector is just the most prominent among the many industries that need an open environment to thrive, and I will continue to promote openness and information in all of them".

With this in mind, companies that own patents used in the cloud should review their strategy for competition law risks.

Priya Christian is a partner in the competition practice of Dua Associates in New Delhi. An Indian advocate and English solicitor, she specializes in Indian and EU competition law and has experience in oil and gas, aviation, defence, automobile, chemicals, financial services, information technology, manufacturing and media. She has appeared before the CCI and the European Competition Commission.

For a new body which does not have that many staff, [the CCI] are doing a phenomenal job in terms of turning around merger notifications

Nisha Kaur Uberoi
Partner
Amarchand Mangaldas

Low hanging fruit?

These are early days for competition law jurisprudence in India. While sections 3 and 4 of the Competition Act, 2002, which deal with the prohibition of anti-competitive agreements and abuse of dominance respectively, came into force in June 2009, a mandatory merger control regime as provided for in sections 5 and 6 of the act has been in effect only since June 2011.

The CCI's investigations into anti-competitive agreements and abuse of dominance have so far mostly centred on steel, tyres, cement, sugar and other sectors which Samir Gandhi, a Delhi-based partner at AZB & Partners and head of the firm's competition law practice, refers to as "low hanging fruit".

"It was clear and evident that these were going to be the first targets," says Gandhi, who points to an almost "eye to eye" comparison between the most investigated sectors in the world and those that the CCI has investigated.

Forging ahead

Be that as it may, most observers report that the CCI has made great strides in getting itself up to speed and in training and other activities.

On the merger control front, figures to the end of June indicate that the CCI has received 121 notifications of combinations (acquisitions of shares, voting rights and control, and mergers and amalgamations) and has passed orders in 116.

"For a new body which does not have that many staff, they are doing a phenomenal job in terms of turning around merger notifications," says Nisha Kaur Uberoi, a partner at Amarchand Mangaldas who heads the competition practice at the firm's Mumbai office.

Uberoi adds that in all instances where her team had filed a notice of combination and approval was required from the CCI and another regulator, the CCI's approval had come first.

Withstanding scrutiny

However, commentators suggest that the manner in which the CCI has gone about prosecuting cases of anti-competitive behaviour may prove to be its Achilles heel.

A case in point is the cement case, in which the CCI relied on circumstantial evidence to establish the existence of a cartel. In the absence of any direct evidence, the order has been challenged on appeal and the COMPAT is expected to clarify the roles of direct and indirect evidence in deciding a cartel case.

In another case, the COMPAT recently stayed an 8 February order by the CCI that found the Board of Control for Cricket in India (BCCI) had abused its dominant position by using its power to sanction events to foreclose competition. The CCI had imposed a ₹522 million penalty on the BCCI. On appeal the BCCI argued that issues considered by the CCI were not part of the report submitted by its investigative arm, the Director General (DG), and the COMPAT found a prima facie case in the BCCI's favour.

Observers such as Vinod Dhall, a former chairman of the CCI, put such reversals down to the CCI being "constrained for resources".

"A cartel investigation or an abuse of dominance investigation requires a lot of evidence, and the reports [by the investigative arm of the CCI] have to stand scrutiny first at the CCI and then subsequently in any appeal," says Dhall, who is now the managing partner of Dhall Law Chambers, a law firm that specializes in competition law matters.

Others suggest that the competitions watchdog is yet to develop the rigour necessary for this kind of work.

"In their hurry to send out a powerful message, they may be missing the wood for the trees," says Gandhi at AZB & Partners.

Investigations can be tricky

There is also considerable concern about work done at the office of the DG, which is staffed by one DG and several additional director generals.

Dhall says that "the DG's office is struggling to keep pace with the number of cases which are with them". But others question the manner in which investigations are undertaken.

The DG "often starts off with the assumption that something wrong has been done as opposed to letting the investigation reveal it," says Ravisekhar Nair, a senior associate at Economic Laws Practice.

These sentiments are echoed by Sharad Bhansali,

The DG's office is struggling to keep pace with the number of cases which are with them

Vinod Dhall
Managing Partner
Dhall Law Chambers

Practitioner's perspective

Time to align

Transfer of technology agreements run the risk of falling foul of India's competition regime say Meenakshi Arora, Harvinder Singh and Sumedha Dutta at HSA Advocates

The rapid evolution of technology can in part be attributed to protection given to innovators through intellectual property (IP) laws, which give IP owners an exclusive legal right to exploit their work. However, there are inherent tensions between IP and competition laws, as the latter strives to keep markets competitive by reducing barriers to trade.

Restraining competition

The transfer of technology and know-how typically occurs through licensing agreements. These agreements normally contain restraining clauses such as tie-in arrangements, grant-back provisions, exclusive supply arrangements and other restrictions, that limit how the licensed technology can be utilized. As a result, licensing arrangements may have a detrimental effect on competition.

Section 3 of the Competition Act, 2002, prohibits anti-competitive agreements that may cause appreciable adverse effects on competition within India. However, an exemption detailed in section 3(5)(i) is granted to ensure that "reasonable conditions" exist for the protection of rights granted under several IP laws, including the Patents Act, 1970, and the Copyright Act, 1957. As a result, technology transfer arrangements that impose "unreasonable conditions" do not fall under this exemption and attract the provisions of the Competition Act.

Protecting public interests

The Competition (Amendment) Bill, 2012, which is pending before the Indian parliament, proposes amendments which may affect technology transfer arrangements.

In its present form, the act focuses only on the sale of goods within vertical agreements. However, the bill proposes to expand the scope of vertical agreements to include the provision of services. Accordingly, restraining clauses in technology transfer agreements pertaining to the provision of services would come within the scope of vertical agreements. This is subject to the exemption granted in section 3 of the Competition Act, detailed above.

The bill also proposes to amend this exemption, by expanding it to make it applicable to IP rights granted through "any other law for the time being in force relating to the protection of other intellectual property rights". The change would protect IP arrangements granted under foreign laws as well as Indian IP laws, whether currently in force or enacted in the future.

Section 3 of the Competition Act, which grants exemptions for IP laws and other "reasonable conditions", has been criticized for not having a similar exemption based on public welfare. Other laws arguably balance this by including provisions that clearly protect the public interest. The Patents Act, for example, facilitates the compulsory licensing of patents. This was enforced yet again last year when the Controller General of Patents, Designs and Trademarks directed German pharmaceutical company Bayer to licence its anti-cancer drug Nexavar on public interest grounds.

Guidelines needed

The European Union's attempts to align competition and IP laws have seen the prohibition of anti-competitive arrangements, while also providing exemptions for technology transfers.

India, meanwhile, has only a blanket exemption from competition laws for the protection of IP rights. The Competition (Amendment) Bill proposes to widen the scope of this exemption, but there is a clear need for more specific regulations, particularly with regards to technology transfer agreements. In spite of the fact that the link between IP laws and competition law has been recognized in a report published in 2000 by the High Level Committee on Competition Policy and Law, no such regulations currently exist. There are also no authoritative judicial pronouncements in this area.

As a result, the Competition Commission of India has been forced to rely heavily on US and UK competition jurisprudence when dealing with technology transfer agreements. In this regard, the 6 April 1995 antitrust guidelines for the licensing of intellectual property by the US Department of Justice and the Federal Trade Commission, and European Commission Regulation No 772/2004 of 7 April 2004 on the application of article 81(3) of the EU treaty to categories of technology transfer agreements, are the most noteworthy.

Given the broad and somewhat ambiguous nature of the Competition Act (Amendment) Bill, 2012, specific guidelines will provide clarity to all.

Meenakshi Arora is a partner at HSA Advocates and heads its litigation practice. Harvinder Singh is a partner at the firm and Sumedha Dutta is a senior associate – both are with the firm's corporate M&A practice group. Rohan Dang and Vasav Anantharaman, associates at the firm, contributed to the article.

managing partner of Delhi-based APJ-SLG Law Offices, who states that the DG's office has some way to go before its investigative skills become good enough for the challenge at hand.

"Conceptually the officials have to be trained as to who is playing what role," says Bhansali, who recently represented an informant in a case where the CCI investigated and ruled on alleged cartelization in the market for soda ash in India. Bhansali reports that the informant was required to "prove himself to the hilt", rather than just provide information that could set the ball rolling on the investigation.

"If the informant has to give everything, what is the point of having the legal power to call for information?" asks Bhansali.

"A large part of this problem is that the DG's office receives people for two years and they leave just when they are well trained," says Uberoi at Amarchand Mangaldas. "It's not good for capacity building as there is a loss of knowledge and as a result industry suffers."

Conceptually the officials [of the investigative arm of the CCI] have to be trained as to who is playing what role

Sharad Bhansali
Managing Partner
APJ-SLG Law Offices

How and why of fines

There is considerable concern about the lack of consistency in the quantum of fines, as there are no clear guidelines as to how and when penalties are to be imposed.

"The orders are not reasoned orders," says Uberoi, pointing to two instances of bid-rigging in which COMPAT had reduced the penalty imposed by the CCI while agreeing with the CCI that competition laws had been violated.

In February, the COMPAT reduced a penalty imposed in April 2012 on MDD Medical Systems India and two other companies, from 5% of the average turnover to 3%. Doing so the COMPAT had criticized the CCI for not giving any reason for fixing the penalty at 5%, stating that there was a "catena of Supreme Court decisions which have unhaultingly held that in the absence of any justifying reasons the exercise of discretion tends to become arbitrary".

COMPAT said it was reducing the fine taking in view mitigating factors such as the nascent stage of competition law in India and as the parties in question were first-time offenders.

This ruling was cited by Gulf Oil Corporation and others when they appealed an April 2012 order of the CCI, in which they had been found guilty of bid-rigging and awarded penalties averaging 3% of three years' turnover. In April, choosing to "dilute the punishment" after taking into account several mitigating factors, COMPAT reduced the penalty to 10% of the amount imposed by the CCI.

"There is a lack of consistency in fining," remarks Suhail Nathani, a Mumbai-based partner at Economic Laws Practice. He adds that this and the fact that "on similar facts the case may turn differently" leaves clients, and sometimes even practitioners, confused.

But relief may be at hand. Dhall believes that "the commission and the appellate tribunal both are actively considering as to what should one do about penalties and what should be the guiding factors to determine the penalty".

There is also concern about the COMPAT's position that it will hear appeals against orders only after the parties in question pay a percentage of the penalty imposed by the CCI. This is seen in other jurisdictions and is common for tax-related disputes in India. However, Nathani argues that it is fundamentally wrong in the Indian context, especially in view of the delays that parties can face in court.

"Much as I would love to see anti-competitive behaviour fined, I am watching in dismay as practices in this realm hurtle towards those in the tax jurisdiction of the country," says Nathani.

Extra-territorial reach

In recent months, the CCI has also imposed fines on international companies that failed to notify India's antitrust regulator before going ahead with an acquisition.

In April, the CCI penalized a New York Stock Exchange listed company, Titan International, for the delay in notifying the commission of its end-2012 acquisition of Titan Europe. As a result, Titan International has indirectly acquired 35.91% of the equity share capital of Wheels India and while the CCI ruled that there was no appreciable adverse effect on competition in India, it fined the company ₹10 million.

The CCI can potentially fine companies up to 1% of combined assets or turnover, whichever is higher, for failing to file notices of combinations on time. While it is yet to impose a fine of this magnitude Uberoi warns that "global M&A will now have to watch out for the CCI".

Greater powers on the way

The Competition (Amendment) Bill, 2012, introduced in parliament in December 2012, would give the CCI greater powers to investigate anti-competitive conduct. One of the better known amendments would allow the chairman of the CCI to authorize the DG to conduct dawn raids. As it stands the CCI can conduct dawn raids only after a magistrate has issued a warrant.

Gandhi at AZB & Partners believes that while dawn raids "are not necessarily a bad thing", the amendment should have included rules on how the chairman's discretion is to be exercised.

In addition, Gandhi highlights other "more nuanced and legalistic amendments", which may not have caught

Much as I would love to see anti-competitive behaviour fined, I am watching in dismay as practices in this realm hurtle towards those in the tax jurisdiction of the country

Suhail Nathani
Partner
Economic Laws Practice

as much attention, but are as problematic.

These include the bill's introduction of the concept of joint dominance in section 4 of the act, which prohibits abuse of dominance. As a result, two or more companies that may not have been independently dominant can now be collectively dominant and consequently they could be found to be guilty of abusing their dominance.

This is seen as problematic by several commentators including the Confederation of Indian Industries, which said in a statement that in the absence of a definition of collective dominance this would give the CCI discretionary powers.

"Surely if it was a concerted effort in doing so [abusing dominance] together that would be caught under the cartel provisions," remarks Gandhi, who says the concept of joint dominance blurs the distinction between collective and unilateral action. "I really think it's far too early for the Indian commission to be going on this line."

Back-door protectionism?

The bill also seeks to introduce sector-specific merger thresholds. It would allow the government to lower or raise the thresholds for notification according to the sector in which the merger or acquisition was taking place.

"This defeats the reason why thresholds were initially set in such a high way," says Gandhi pointing out that existing thresholds are the result of industry concerns about the merger regime. "This is an indirect way of lowering thresholds in not just one sector, but in a number of them and we have no idea of which sectors are going to finally be affected by this".

Commentators suggest that the move to introduce sector-specific thresholds has been triggered by the government's desire to protect India's valuable generics industry, which is made up of a large number of small manufacturers. These companies are targets for acquisition by big players in the global pharmaceutical industry and there is a fear that the increasing involvement of multinational corporations in the generics industry will drive the smaller players out of business. As it stands, acquisitions made in this sector do not meet existing merger thresholds.

"Here you have a public policy purpose, which is ostensibly protectionist in nature, being put in through the competition law system," says Gandhi. "This is essentially not supposed to happen."

Other significant changes being proposed in the bill include widening the scope of the exemption for intellectual property rights provided under the Competition Act. At present rights conferred by certain specific laws, such as the Copyright Act, 1957, the Patents Act, 1970, and the Designs Act, 2000, cannot be restricted by the Competition Act. The bill proposes that this exemption be extended to "any other law for the time being in force relating to the protection of other intellectual property rights".

Amendments proposed in the area of regulation of combinations could result in the definition of a group being changed to two or more enterprises where either enterprise can exercise 50% or more of voting rights. At present the level is set at 26% or more.

In addition, the bill proposes that the time allowed for the CCI to pass an order after being notified of a combination be reduced to 180 days from 210 days.

Growing area of work

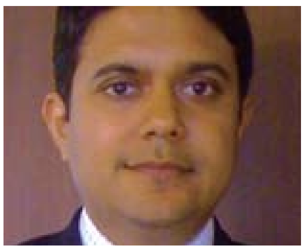
Competition law is a growing area of work for many of India's corporate law firms in Delhi and Mumbai. While merger filings are done by the larger firms, which typically advise on large mergers and acquisitions, firms of all sizes are taking on competition law specialists, some with experience in jurisdictions with more mature competition law regimes.

Firms that have done so include Dua Associates, which recently took on Priya Christian, a lawyer who had previously worked at Freshfields Bruckhaus Deringer in London. Christian, who has also worked at the competition directorate of the European Commission in Brussels, has joined Dua's office in Delhi.

Similarly, Kochhar & Co hired Piyush Gupta in 2012 to set up its competition law practice. Gupta, who was part of the in-house team at Singapore Airlines between 2008 and 2010, had also worked at Singapore-based Rajah &

[Sector-specific merger thresholds] is an indirect way of lowering thresholds in not just one sector, but in a number of them

Samir Gandhi
Partner
AZB & Partners



Tann and in-house at IndiGo airlines.

Commenting on the task ahead for companies in India, Gupta says that that given that they "tend to explore the extreme boundaries" beyond which an act becomes illegal, "a paradigm shift in mentality" will be needed before companies take on board the realities of the new competition law regime.

Interesting times ahead

While these are clearly challenging times for both competition law practitioners and companies that need to figure out how to remain compliant, there is a growing realization that several large tracts of the Indian economy remain untouched.

Delivering the CCI's annual day lecture on 20 May, the finance minister, P Chidambaram, remarked that "the deadening effect of lack of competition or the lack of incentives to innovate or produce quality goods and services is as likely to affect public sector enterprises, where survival is assured, as it does private sector enterprises". He also turned the spotlight on the vast public procurement machinery of the state, which he said was "an often neglected area of competition policy".

Remarking on this and other opportunities that lie ahead Rahul Singh, a counsel at Trilegal who is an academic turned practitioner, comments: "Every new regulator can either become a pawn in the hands of corporate players … or become an independent really autonomous regulator and carve out a niche for itself".

Only time will tell how the CCI will evolve and whether in so doing it will level the playing field. ■

Figuring out filings

After two years of merger control the number of law firms that have experience in this kind of work is slowly increasing

India has one of the most liberal merger control regimes in the world so merger control filings are typically done only by firms with clients that undertake large M&A deals.

Speaking recently to *India Business Law Journal*, Nisha Kaur Uberoi, a partner at the Mumbai office of Amarchand Mangaldas, reported that her team had filed (singly or jointly) 30 of the 57 notices of acquisitions received by the Competition Commission of India (CCI). The team was also involved in the two long-form notifications of acquisitions that had been filed to date.

The CCI has received 121 merger filings, of which 55 relate to intra-group reorganizations.

The Delhi office of Amarchand Mangaldas reported that while they had filed 14 notices of combinations, they had "advised several clients on various exemptions available … so as to ensure that notifications are not necessary".

Slicing the pie

Samir Gandhi, a partner at AZB & Partners, reports that his team has been involved in 26 notifications of combinations – none of which have been long-form filings – and that this is a large part of what he does. But, as he says, "there are many ways in which you can slice this pie", so it is important to understand how and why a particular firm has made a filing.

One of the two long-form filings was for a transaction whereby the UK drinks giant Diageo bought a stake in United Spirits. Amarchand Mangaldas, which advised the seller, filed the notification of acquisition jointly with Platinum Partners, the firm that advised the acquirer.

"Diageo had a minimal market share in India and the majority of market share and determination of relevant market pertained to the target," says Uberoi, explaining the reasoning behind the joint filing.

While it is the acquirer's responsibility to notify the CCI about acquisitions of shares, voting rights and control that meet certain thresholds, notifications of mergers and amalgamations can be filed by any party or jointly.

Khaitan & Co reports that its competition team, which consists of lawyers in both New Delhi and Mumbai, has filed 13 notices of combinations.

Trilegal reports that it has filed "approximately 10 notifications of combinations".

Smaller firms also file

However, there are signs that mid-size and smaller firms are muscling their way into this area of work. The mid-size firm of Udwadia Udeshi & Argus Partners reports that it has notified the CCI of one joint venture, one merger, two amalgamations, one restructuring and two acquisitions.

Pankaj Singla, a senior associate at Corporate Professionals, a small firm in Delhi, says the firm has filed two notifications of combinations, both of which were approved within 30 days of the notification being filed.

The 30-day period as calculated by the CCI includes only days on which the CCI is working on the notification and does not include periods when the party that has made the filing is putting together additional information that the CCI has sought. When this happens the clock stops.

"If you don't give them the information that is required in the form that they expect it, it's a continuing defect," says Uberoi. She points out that a lot of the work surrounding merger filing "is not just mere filing and letting it be, there is a lot of interaction which happens with the case teams at the CCI".

Sunny solutions?

Bhavana Alexander and Gargi Chatterjee compare India's state solar power policies and consider the burning issues facing domestic and foreign investors in the sector

India is suffering from an acute energy shortage. Rolling blackouts, which plague large parts of the country on a daily basis, affect all levels of Indian society, from the pantries of modest homes to major domestic and international businesses and even the country's parliament. Yet as state and national policymakers grapple with the problem, their efforts to find a solution are frustrated by inconvenient realities such as declining coal reserves and severe water depletion. As a result, renewable energy technologies, including solar power, are taking on greater significance in energy planning.

Solar energy law

The Constitution of India, 1950, gives the central and state governments the power to legislate on electricity. However, in the event of a conflict, central law prevails. The Electricity Act, 2003, remains the significant piece of legislation regulating the generation, transmission and distribution of electricity in India. A host of policies, codes, rules and guidelines encompassing all areas of the energy sector along with the act form the comprehensive law on the sector.

The Ministry of New and Renewable Energy (MNRE) is responsible for all matters relating to new and renewable energy. Each state has its own renewable energy development agency. In an attempt to harness the potential of solar energy, the central government launched the Jawaharlal Nehru National Solar Mission (NSM) in 2010, setting a target to deploy a 20,000MW solar power grid by 2022 through private participation. Among other aims, the NSM seeks to reduce the cost of solar power generation to ₹4-5/Kwh by 2017-2020 to achieve grid parity by 2022.

Tamil Nadu issued its much awaited solar policy in 2012. This article examines Tamil Nadu's new solar policy and compares it with the policies in other states, particularly Rajasthan, Andhra Pradesh and Gujarat, to assess the opportunities and threats the different policies present to domestic and foreign investors in the sector.

Tamil Nadu

Tamil Nadu's solar policy consists of the following:

1. Solar rooftop systems
   a. All domestic consumers will be encouraged to install rooftop solar installations. A generation-based incentive scheme (GBI) will be provided for all solar or solar-wind hybrid rooftops installed before 31 March 2014.
   b. Solar home lighting is to be installed in 300,000 houses under the chief minister's Solar Powered Green House Scheme by 2015-2016.
   c. Solar energy is to be used to power 100,000 street lights by 2015-2016.
   d. All new government/local body buildings must install solar rooftops. Existing buildings must do so in a phased manner to meet energy needs and to energize water supply systems.

2. Solar purchase obligations (SPO)
   Domestic consumers, cottage and tiny industries, power looms, low tension industrial consumers and agricultural consumers are exempted from SPO. A mandated 6% of SPO (3% till December 2013 and 6% from January 2014) has been imposed on high tension consumers including special economic zones (SEZs), industries guaranteed with 24/7 power supply, IT parks, telecom towers, colleges and residential schools, buildings with a built-up area of 20,000 square meters or more. These entities must fulfil their SPO obligations by:
   a. Generating captive solar power;
   b. Buying equivalent to, or more than, their SPO from third-party solar power projects in Tamil Nadu;
   c. Buying renewable energy certificates (REC) generated by solar power projects in Tamil Nadu equivalent to, or more than, their SPO;
   d. Purchasing power from Tamil Nadu Generation and Distribution Corporation at tariffs applicable to solar power.

3. Competitive bidding mechanisms will be encouraged to initiate joint ventures and the REC mechanism, which permits developers to possess one tradable REC for every 1,000 units of energy wheeled to the distribution utility/other licensee.

4. Industries that have hot water or steam boilers using fossil fuels must install solar water heating systems. The state government issued amendments to the Tamil Nadu District Municipalities Building Rules, 1972, making the use of solar water heating systems mandatory for all designated new buildings.

5. The government also aims to develop solar power projects through competitive and reverse bidding in order to fulfil the target of building utility-scale solar parks with a capacity of about 50MW each in 24 districts.

6. Other aims include fostering research and development on solar technologies, solar thermal storage systems, testing facilities and technology demonstrations on innovative projects in association with reputed institutions.

7. Tamil Nadu will promote integrated solar generation and manufacturing parks. Preference will be given to establish solar manufacturing industries in SEZs, industrial estates, parks and similar government organizations.

8. Global industry leaders in the solar value chain will be invited to invest in the creation of manufacturing facilities in Tamil Nadu, with appropriate incentives.

Rajasthan

The state government of Rajasthan seeks to promote:

1. Early execution of projects sanctioned by the MNRE under the guidelines for GBI for grid interactive solar power generation projects issued by the MNRE.

2. Solar power plants will be sanctioned under orders of the Rajasthan Electricity Regulatory Commission (RERC). The power produced from these plants must be procured by NTPC Vidyut Vyapar Nigam (NVVN) and purchased by the state distribution companies (known as discoms).

3. Development of solar photo voltaic (SPV) and solar thermal power plants of 50MW by selection of solar power producers through a tariff-based competitive bidding process using a concept of bundling solar power with the equivalent amount of MW capacity of conventional power. Power from the solar power plant and an equivalent amount of MW capacity from conventional power plants must be purchased by state discoms through a tariff-based competitive bidding process.

4. Utility grid power projects of unlimited capacity for captive use or direct sale to third parties or states other than Rajasthan or for sale through the REC solar mechanism. The solar power producers are required to deposit a security amount of ₹500,000 per MW by demand draft and ₹2 million per MW in the form of a bank guarantee within one month from the date of issue of in-principle clearance.

5. Rooftop photo voltaic and other small solar power plants connected to LT/11kV grid. The capacity for these

power plants must be in line with MNRE guidelines.

6. Set up of solar power plant to promote manufacturing facilities in the state along with SPV manufacturing plants. Solar power producers that establish SPV manufacturing plants (thin film technology modules or crystalline technology modules involving processing from wafers stage) of a minimum of 25MW per annum in Rajasthan will be eligible for sanction of SPV-based solar power plant.

7. The state proposes to promote solar thermal collectors in public/private hospitals, hotels, housing boards, educational institutions, prisons, other government buildings, public places and in industrial applications.

8. Development of solar parks of more than 1,000MW capacity in identified areas of Jodhpur, Jaisalmer, Bikaner and Barmer districts in various stages.

9. The state has agreed to extend government land for the purpose of setting up a solar power project and has laid down the procedure for the allotment or reservation of land subject to the Rajasthan Land Revenue (Allotment of Land for Setting Up of Power Plant Based on Renewable Energy Sources) Rules, 2007. Government land required for solar power plants must be allotted to solar power producers at a concessional rate of 10% of the district level committee rate.

Andhra Pradesh

Andhra Pradesh has agreed to promote the set up of solar power plants for captive use, or for the sale of power to third parties and other states. Under this policy, the government will encourage solar power developers to set up solar power plants for captive use or sale of power to third parties or states other than Andhra Pradesh. Andhra Pradesh's government has not only withheld any financial incentives but has also made it very clear in the policy that the burden of acquiring land for any solar power project will be the responsibility of the project developer.

Gujarat

Renewable purchase obligations for distribution licensees have progressively increased from 0.25% in 2011 to 1.5% in 2014. Land is the responsibility of the developer although there is a system of single window clearance. Developers must furnish a bank guarantee of ₹5 million per MW when signing the power purchase agreement with the distribution licensee. Gujarat Energy Transmission Corporation must set up the evacuation for power transmission. Projects set up under the MNRE cannot claim dual benefits. Any other subsidy or incentive received by a project should be reduced from the benefits available under Gujarat's solar policy.

Only new plant and machinery must be installed in projects under this policy. All incentives granted to solar power generators are valid for 25 years from the date of commissioning of the power project or the lifespan of the power project. The generator must sell the energy from a solar power project to the distribution licensees in the state at fixed tariffs for 25 years. The policy seeks to enforce the purchase of solar power by levying a penalty of ₹12 per KwH on distribution licensees who fail to meet the minimum solar power purchase, wheel for captive consumption or third party sale. This penalty must be lifted in the event of inadequate generation from solar power projects in Gujarat.

Bird's eye view

The Tamil Nadu policy is the only one that lays a strong emphasis on the fulfilment of solar purchase obligations or renewable purchase obligations. This policy deserves credit for encouraging the proliferation of rooftop solar applications and solar parks containing research facilities unlike its counterparts.

Gujarat was the first Indian state to launch its own solar policy in 2009 preceding the NSM. Gujarat's notable success owes much to the fact that reverse bidding for projects and the domestic content requirement (DCR) were not introduced.

Unlike the NSM, Rajasthan's solar power policy mandates that solar power producers within the state are required to source SPV modules from their own manufacturing units in Rajasthan. It shows far more thought leadership in the area of solar energy and is naturally conducive to solar projects due to indigenous advantages of cheaply available land and high solar irradiation.

Andhra Pradesh's solar policy was the first to be based entirely on the renewable energy certificate mechanism. However, the policy also includes exemption from cross-subsidy charges, electricity duty, refund of value added taxes, stamp duty and registration charges, which are not permitted under the Central Electricity Regulatory Commission for REC-based projects as these projects are prohibited from using any other benefits. It is unclear if the government has clarified this policy.

Karnataka has abolished all wheeling and transmission charges in order to promote investment in solar energy, however, the state has very limited availability (only 40MW allocations every year till 2017 and applications have already been received for 1.7GW). It is the only state to emphasize energy conservation.

Investment and funding

Off-grid solar power projects fall under priority sector lending. Nevertheless, costs remain a significant obstacle for solar developers. Foreign investors are permitted to invest up to 100% in the clean energy segment under the automatic route and can enter into a joint venture with an Indian partner for financial and/or technical collaboration. The government encourages foreign investors to set up projects on a build, own and operate basis. However, if an Indian company is a foreign direct investment (FDI) company i.e. where FDI in the Indian company exceeds 50% of its shareholding and/or the board of the Indian company is dominated by foreign investors, the company may face problems while procuring land, especially agricultural land. It would be advisable to seek prior Foreign Investment Promotion Board clearance to acquire agricultural land for conversion into a solar farm.

The renewable sector is also privy to sundry tax and custom benefits. State policies do not have a funding mechanism such as viability gap funding, but instead operate using preferential tariff-based competitive bidding (although Gujarat and Andhra Pradesh have moved from preferential tariff to the REC market due to the heavy financial burden). Tamil Nadu is the only state to provide tax incentives to foreign investors investing in solar power projects. The Tamil Nadu Industrial Policy grants exemptions from entry tax on works contract and input taxes in relation to standalone high-technology research and development centres. However, this means that companies will have to structure their group entities in such a manner so as to satisfy the standalone criteria.

Further, the absence of a domestic content requirement in the state policies further augments participation from foreign investors. In fact the presence of the DCR in the NSM is one of its major disadvantages.

The governments of Rajasthan and Karnataka are the only state governments that have created fund vehicles to foster developments in the solar energy sector. The benefits of the Rajasthan Renewable Energy Infrastructure Development Fund are not clear, however, Karnataka's policy statement has created a fund to foster project finance and energy conservation.

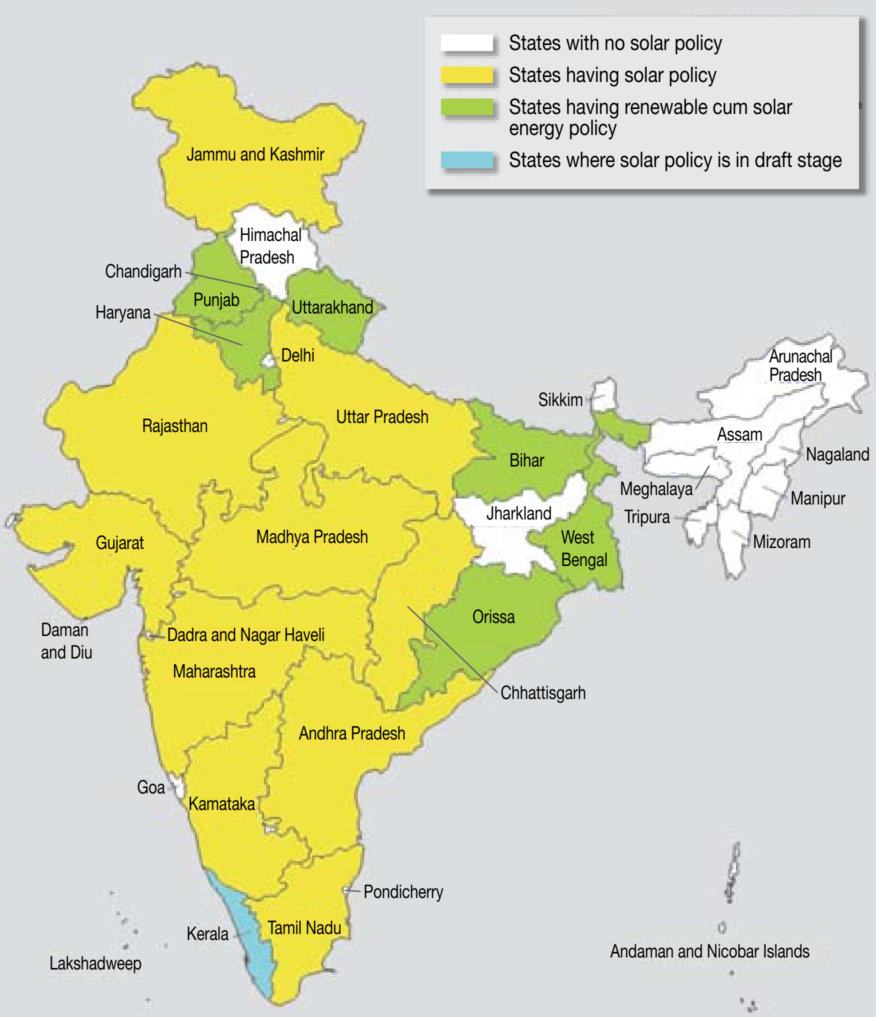
Research and development

Low levels of research and development in India have made solar energy expensive. Due to the high costs, the roadmap for achieving grid parity is not very clear. States other than Tamil Nadu, Rajasthan and Karnataka do not place any emphasis on, or offer incentives for research and development. The strain of lack of technology on costs was highlighted when solar manufacturers acting through the Indian Solar Manufacturers' Association filed a case with the Directorate General of Anti-Dumping (DGAD) against dumping by solar panel manufacturers from China, the US and Malaysia. Companies like Tata, BP Solar and Indosolar were reported to have come to a grinding halt due to dumping by foreign manufacturers.

To add to their woes, while the NSM mandates local manufacturing for solar photovoltaic developers that choose the crystalline silicon route, it puts no such condition on thin film technology. While developers raised concerns about this, producers, through the Solar Independent Power Producers Association, on the contrary have expressed worries about soaring solar power prices should the anti-dumping duty be levied on imported goods (as Indian crystalline module manufacturers rely heavily on imported raw materials).

Attempting to bolster indigenous generation of solar power through a reliance on foreign raw materials is harmful to the future India's energy infrastructure and generation. The ideal way is for Indian manufacturers to develop efficient photovoltaic cells at an affordable price. India, by virtue of being a developing country under the agreement on the Trade Related Aspects of Intellectual Property Rights could profit from assistance from developed economies, which have an obligation to foster the transfer of technology.

States with solar policies



Legal and regulatory limits

There are no restrictions on the structure for solar power projects inviting domestic investments. Hence, companies, partnerships, co-operatives, public-private partnership companies, non-government organizations and individuals are all permitted to generate power from solar energy. However, developers seeking to solicit foreign direct investment may only opt for the structure of a limited company or a limited liability partnership (LLP). Foreign institutional investors and foreign venture capital investors are not allowed to invest in an LLP. LLPs are also not eligible to raise debt through the ECB route.

Environmental clearance

As solar developers are green industries, SPV power projects and solar thermal power projects have been excluded from the ambit of the Environmental Impact Association Notification 2006 and hence no environmental clearance is required for such projects. However, because solar thermal projects occupy huge areas of land, state pollution control boards will have to ensure that the lands proposed to be used are not wetlands, agricultural lands, ecologically sensitive areas, areas rich in biodiversity, areas with large habitation or forest areas.

Further, developers are required to satisfactorily prove to the authorities that the area has the requisite quantity of water for the project. Developers must also obtain a no objection certificate or a consent to establish from the state pollution control board as per the relevant state guidelines. In addition, they must ensure that there will be no dumping of any type of waste in the site area.

Land availability

Some of the primary hurdles in the solar power sector have been the accessibility and availability of land. Tamil Nadu's solar policy, for example, requires 7.5 to 10 acres per MW for solar thermal technology, costs, research and development and skilled manpower. Other notable issues include the conversion of agricultural land to industry, lengthy governmental approvals and multiple approvals to procure permits for land use, and the right of way for setting up transmission lines to evacuate power. These processes must be simplified to lower costs and hasten the completion of projects. The Indian government is already in the process of preparing a new Land Acquisition Bill. Once finalized the bill may provide comprehensive directions on land acquisition, which will apply to solar parks.

The single window clearance systems introduced by Tamil Nadu, Uttar Pradesh, Karnataka and Rajasthan have helped developers meet these cumbersome regulatory demands. Similar systems have been introduced by the government in different areas (environmental consents, building approvals, securities market) and the ease of administration has bolstered market confidence greatly. However, only a minority of states have implemented this system.

Political power

Do we need a new solar energy law? A comprehensive solar energy law would be welcome since manufacturing industries depend heavily on solar energy, although the use of solar energy is nowhere regulated, nor sought to be. It is advisable for lawmakers to provide a consolidated framework addressing solar power processes, subsidies, and facilities. This will facilitate greater intra-state energy commerce.

The story of solar success is heavily dependent on political stability and consistency in policy implementation by the government. A lack of confidence among developers will bring the entire machinery to a grinding halt unless policy makers opt for a cleaner environment instead of politicized policies. ■

Bhavana Alexander is a senior associate and Gargi Chatterjee is an associate at Universal Legal in Chennai.

Looking in-house for IP insights

Rebecca Abraham asks in-house counsel at DuPont and JCB how they stay ahead of India's intellectual property violators

India's intellectual property (IP) protection credentials have taken a beating in recent months. In March, Roy Waldron, the chief IP counsel at Pfizer, gave a statement to the US House of Representatives Subcommittee on Trade saying that a "growing trend of anti-IP developments in India" is in effect "leading to a worldwide deteriorating trend on intellectual property".

A few weeks later there was more debate when India's Supreme Court put an end to an eight-year-long campaign by Novartis for a patent in India for its anti-cancer drug Glivec. The dismay among IP owners – especially those contending with competition from the generic drugs industry – was compounded by reports that more compulsory licences for anti-cancer drugs were on their way. In March 2012, the patent office had issued India's first compulsory licence for an anti-cancer drug patented in India by Bayer.

Despite these problems, India remains an immensely attractive market for many global IP owners.

Indeed, in his statement to the US House of Representatives Subcommittee on Trade, Waldron described India as a "critical growth market" for Pfizer. As such, Pfizer – and many companies like it – routinely expend considerable resources to protect their patent and trademark portfolios in India.

With this in mind, *India Business Law Journal* spoke to the in-house lawyers at two companies with considerable IP assets – DuPont India and JCB India – seeking their insights into what it takes to stay ahead of the country's IP rights violators.

Infringements on the rise

Sanjit Kaur Batra, a senior legal counsel at DuPont India, reports that even after a "dramatic improvement" in India's IP rights atmosphere over the last decade, the number of infringements is on the rise.

"DuPont is very patent intensive as a research and development organization, and we also have a huge trademark portfolio," says Batra, who looks after the company's trademarks in India. "In terms of infringement, yes, we have a lot of issues, be it trademark infringement or counterfeiting."

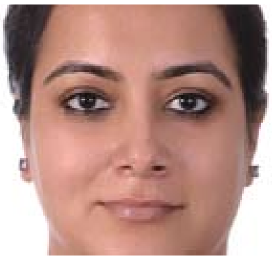
Identifying trigger points

When approaching the courts for relief, Batra says that while the location of the court is significant – Delhi High Court is considered the most IP-savvy – success in obtaining a favourable order depends greatly on how arguments are structured.

"The evidence you show the court has to be convincing enough," she says, adding that it is vital to identify "the trigger points" that can win favour with the court. "In DuPont we believe that though an infringement is an IP issue, the implications are much broader."

As such, DuPont often focuses on the public health and safety implications of a counterfeit product being used, especially when taking on the manufacturers of spurious versions of their crop protection products and seeds. Batra reports that they argue that human and animal health and the environment could be affected, as the counterfeiter's manufacturing process and DuPont's processes would have very different safety and efficacy standards.

> [When we go to court we try to argue that] though an infringement is an IP issue, the implications are much broader
> Sanjit Kaur Batra
> Senior Legal Counsel
> DuPont India



Choosing the right advocate

But not every lawyer can put forward these broader arguments effectively. Batra says it is vital to have a lawyer who understands the subject thoroughly, and reports that DuPont only uses lawyers from India's leading law firms.

However, not everyone subscribes to this view. S Ramaswamy, the vice-president, general counsel and company secretary at JCB India, says that he "could even go for somebody who is four or five notches below" a top-level IP lawyer, if he knows that the lawyer in question can deliver.

"I am already feeding the law firm with 80 to 90% of the material, it's only the filling in the paragraphs that they need to do," says Ramaswamy, adding that you need to "pick and choose the right guy who has the right authority" in a particular court. Ramaswamy says that he also uses the services of leading IP lawyers for certain matters – he names Pravin Anand, the managing partner of Anand and Anand, as one of the leading lawyers that he chooses to use.

Given the severe delays that plague India's courts Ramaswamy says it is often futile to pursue a case to its very end. "A lot of disputes end in settlement … I am a pragmatist

> I am already feeding the law firm with 80 to 90% of the material, it's only the filling in the paragraphs that they need to do
> S Ramaswamy
> Vice-President, General Counsel & Company Secretary
> JCB India

and don't want to drag cases on," he remarks.

Ramaswamy suggests that arriving at a swift settlement with an IP violator, rather than waiting for the courts to act, may be against the interests of external counsel. But he says this is one area where general counsel "need to chart their own course".

JCB India has more than 500 IP registrations in India and an annual legal budget of around ₹20 million (US$330,000). The subsidiary contributes up to 40% of JCB's global turnover and Ramaswamy describes it as "literally the jewel in the crown" for its UK-based parent company.

Halfway to justice

In mid-December 2012, DuPont won a decree against a company called Dupont Hydro Industries following action it had initiated in Delhi High Court less than three months previously. Dupont Hydro Industries acknowledged DuPont's proprietory rights to its name, trademark, logo and label, and agreed to hand over the domain name www.duponthydro.com to the American company.

DuPont had discovered the presence of Dupont Hydro Industries, which manufactured, sold and exported hydraulic

> I am a pragmatist and don't want to drag cases on
> S Ramaswamy
> Vice-President, General Counsel & Company Secretary
> JCB India

machinery and hydraulic components, a few months previously. In September 2012, it obtained an interim injunction from Delhi High Court against Dupont Hydro Industries.

As both Batra and Ramaswamy indicate, obtaining an interim injunction from an Indian court is half the battle won. IP violators who may not respond to legal notices from companies react differently when a court-appointed local commissioner visits their premises and a raid is conducted. Indeed, in some cases a temporary injunction is all that is required to make a party back down.

But the fact that many disputes are being disposed of at this halfway stage without full adjudication has been criticized by some observers, including the country's highest court. In a 2009 ruling in the case of *Bajaj Auto Ltd v TVS Motor Company Ltd*, the Supreme Court described the situation as a "very unsatisfactory state of affairs" and directed all courts and tribunals to speed up the hearing of cases so that parties would no longer have the need to turn to interim injunctions to push cases to a rapid conclusion. "The final judgment should be given normally within four months from the date of the filing of the suit," the court said.

When damages don't hurt

Courts up and down the country may not be following this direction as yet, but observers suggest that the Supreme Court's ruling, combined with the fact that at least one Indian court has begun awarding punitive damages in cases of IP infringement (Delhi High Court has awarded punitive damages in IP cases since a 2005 ruling in *Time Incorporated v Lokesh Srivastava & Anr*), indicates the protection of IP rights is receiving greater attention.

However, damages awards are typically not very substantial. "Courts in India have not reached the level where damages awarded will cripple the infringer's business," laments Ramaswamy. "Just seeking damages as almost a standard clause in a plaint does not really serve a purpose."

In the absence of significant punitive damages that could "discourage and dishearten lawbreakers who indulge in violations with impunity" as the ruling in *Time Incorporated* said

View from the inside: In-house counsel are pragmatic about IP protection.

The whole world seems to think that Teflon is a generic term … people assume there is no IP right on it

Sanjit Kaur Batra
Senior Legal Counsel
DuPont India

they should, companies have to be satisfied with obtaining a decree against individual violators.

Searching for needles in haystacks

As such, a comprehensive intelligence gathering system is vital for safeguarding IP assets in India and both Batra and Ramaswamy report that this is well-recognized by their respective companies.

"I have a very robust counterfeiting action programme within JCB on a pan-India presence," says Ramaswamy, who adds that his challenge is to always be on the lookout for "imitators or fly-by-night companies or counterfeiting companies".

Ramaswamy says that trade exhibitions, where manufacturers showcase their products, can be a useful hunting ground for IP violators and reports that he always has a ready-made lawsuit in hand while visiting such venues. He cautions, however, that the initial investigation needs to be extremely thorough if he is to get any help from the courts.

When a potential IP violation has been spotted, the technical team works out the extent of the violation: what are the exact similarities between JCB's product and the so-called imitator's product? Then they put together a pictorial representation of the two products to present to the court.

"I am fairly successful at getting my evidence accepted by the courts," says Ramaswamy.

The cost of fame

DuPont uses its in-house capabilities and an external law firm to monitor the use of its IP assets. Batra says this is a particular challenge in the case of its "hero-brands" such as Teflon, which is a registered trademark owned by DuPont in several countries including India.

"The whole world seems to think that Teflon is a generic term … people assume there is no IP right on it," remarks Batra. "We work day-in and day-out to try to spread awareness and take action against people who are using it as a generic term."

While the challenges and risks involved in protecting such iconic brands are definitely not to be understated, the fact that both companies have been in India for decades suggest that it is worth it. ■

London calling

Precedents set by English courts in banking and finance disputes are highly relevant to Indian investors and institutions

By Nicola Vinovrški

The UK remains a popular jurisdiction for the determination of disputes for parties from other parts of the world. This is the case both for disputes that have a UK connection, and for those for which a neutral territory is sought for adjudication.

Many recent disputes before English courts have involved Indian parties. These include tussles between Virgin Atlantic Airways and Jet Airways; Force India Formula One team and the Malaysia racing team; and Cruz City 1 Mauritius Holdings and Unitech. The latter was a dispute that arose from a joint venture development of slum-clearance land in Mumbai.

London's position as a major financial centre has also led many international banking and derivatives-related disputes into UK courtrooms. As a result, the UK's regulations governing financial services – and the interpretation of these regulations by the English courts – have the potential to affect transactions all over the world.

In particular, the interpretation of the International Swaps and Derivatives Association (ISDA) Master Agreement, described by Justice Briggs in *Lomas & Ors v JFB Firth Rixson Inc & Ors* as "probably the most important standard market agreement used in the financial world", has been highly significant.

As such, English case law, and the interpretation of financial regulations by the English courts, is highly relevant to financial institutions and investors from India and other countries. Moreover, for companies seeking redress for the mis-selling of financial products, or that are looking to resolve disputes regarding close-out valuations or interest rates, keeping an ear to the ground in the UK's courtrooms is essential.

This article considers some of the recent developments that are likely to have the greatest relevance to *India Business Law Journal*'s readers.

The march towards stricter regulation

Financial institutions and the markets are still dealing with the fallout from the global financial crisis. One result of the crisis has been a shift towards tighter and increasingly proactive regulation.

We are all familiar with the heavy sanctions imposed on banks by UK, European and US regulators. These may well lead to sanctions in other countries as governments come under pressure to crack down on practices that are believed to have contributed to the global financial crisis.

It is likely, therefore, that other countries will follow the UK towards steeper sanctions, higher best practice standards, increased reporting requirements (particularly in respect of derivatives trading) and perhaps overhaul their regulations with a view to creating more forward-looking systems that are designed to anticipate problems before they occur.

Interest rate hedging products

Of direct relevance to parties that have been sold interest rate hedging products (IRHPs) will be an ongoing review by the UK's Financial Conduct Authority. Following an investigation into the sale of IRHPs to small businesses that were made after 1 December 2001, serious failings were identified. IRHPs are designed to provide customers with a hedge against the risk of interest rate fluctuation and are often sold in conjunction with a loan. However the UK regulator found that many of the products ostensibly sold for this purpose were highly complicated and not really understood by the customers who entered into them. Barclays, HSBC, Lloyds, RBS, Allied Irish Bank UK, Bank of Ireland, Co-operative Bank, Clydesdale and Yorkshire Banks, National Westminster Bank and Santander UK have agreed to review their sales of IRHPs and provide redress to customers based on the principles outlined in the regulator's report.

The review is focused on the sale of IRHPs to "non-sophisticated" customers. The definition of "sophisticated" has been amended to ensure that customers that may be large in terms of balance sheet, turnover and employees but that, in reality, are unlikely to understand the risks associated with such products, are covered by the review. Therefore, it may be the case that large companies that are not focused on the trading of financial instruments will be in line for compensation if they bought IRHPs from any of the banks that are under review.

Customers excluded from the review may still commence court proceedings or, if the loss suffered is less than £150,000 (US$232,000), complain to the Financial Ombudsman Service. Such customers should be aware that, generally, they must commence court proceedings within six years from the date their cause of action arose. For those sold IRHPs in 2007, this limitation is fast approaching.

Derivatives mis-selling cases

It is fair to say that claims based on the mis-selling of derivative products have increased in recent years. The typical causes of action pleaded in mis-selling cases are that the derivative product sold was unsuitable for the customer, that the seller misrepresented the nature of the product sold, that there was an advisory relationship between seller and buyer which was breached, or claims under section 150 of the Financial Services and Markets Act 2000. Contractual estoppel remains a key defence – in other words no reliance, no representation and entire agreement clauses are usually upheld by English courts, particularly in cases where the buyer is a sophisticated investor (e.g. *Springwell Navigation v JP Morgan Chase Bank* and *Standard Chartered Bank v Ceylon Petroleum Corporation*).

Other potential defences to mis-selling claims relate to principles of causation and remoteness. For example, in *Camerata Property Inc v Credit Suisse*, it was accepted that the collapse of Lehman Brothers in September 2008 was unforeseeable. In *Rubenstein v HSBC*, it was argued that the collapse of the markets was unforeseeable. However, in the latter case, the Court of Appeal held that the loss was not too remote and that the bank's duty was to protect Mr Rubenstein from the very market turmoil which happened. Mis-selling claims are decided by English courts on a case-by-case basis and the factual matrix surrounding the transaction is of critical importance.

Close-out and valuation of derivatives

Another category of cases to emerge in recent years is disputes about valuation and close-out of derivatives and the meaning and effect of the relevant provisions of the ISDA Master Agreement. Both the 1992 and 2002 agreements contain complex close-out and valuation provisions setting out what should happen if a derivative does not run its course.

In April 2012, the Court of Appeal handed down judgment in four conjoined appeals: *Lomas v JFB Firth Rixson Inc*, *Lehman Brothers Special Financing v Carlton Communications*, *Pioneer Freight Futures Company Limited (In Liquidation)* and *Britannia Bulk Plc (In Liquidation) v Pioneer Navigation Ltd*. The court held that the non-defaulting party does not have to perform where section 2(a)(iii) of the ISDA Master Agreement is engaged but the defaulting party can cure its default at any time, even after the natural term of the swap has expired. The Court of Appeal also importantly approved Justice Briggs in the Anthracite case in respect of three key principles of close-out valuation in the 1992 agreement. Namely that "loss" and "market quotation" are aimed at the same objective, loss of bargain is to be valued "clean" (meaning the valuer assumes that the non-defaulting party will perform all its obligations for the remainder of the transaction, even if that is unlikely) rather than "dirty" and that the close-out formula is not a proxy for common law loss. *Lehman Brothers International (Europe) v Lehman Brothers Finance* considered close-out valuation under section 14 of the 2002 agreement. Justice Briggs maintained the "clean" valuation approach but this was overturned in *The Joint Administrators of Lehman Brothers International (Europe) v Lehman Brothers Finance*. The ISDA is currently issuing new precedent transaction documentation in response to such cases and market consultation.

LIBOR cases

The way in which the London Interbank Offered Rate (LIBOR) and the Euro Interbank Offered Rate (EURIBOR) are set is that panel banks answer the question; "at what rate could you borrow funds if you had to do so by asking for and accepting interbank offers in a reasonable market?" for different periods and in different currencies. The answers are submitted to Thomson Reuters on behalf of the British Banking Association. Thomson Reuters then excludes the outlying high and low figures and calculates an average to produce the published rates. These are two of the most important interest rates in the global financial markets and directly influence the value of trillions of dollars of financial deals between banks and other institutions.

LIBOR and EURIBOR affect interest rate swaps, interest rate futures, mortgages and loans, currency futures and options pricing, commodities futures and options pricing and the pricing of other derivative swaps or future obligations. Recently, it has come to light that some banks may have deliberately submitted high or low figures with a view to affecting the rates and so inflate profits or reduce losses. Barclays and other banks have already paid huge settlements to regulators for misconduct and an international investigation into the setting of interbank rates is ongoing.

A decision by the Delhi Income Tax Appellate Tribunal (ITAT) in February demonstrates the importance of the LIBOR rate in international commerce, particularly for Indian investors. Indian clothing company Cotton Naturals provided a loan for working capital to its subsidiary in the US, JPC Equestrian, because JPC did not have access to local credit. It is common for Indian companies to establish subsidiaries in foreign countries and then provide funds from India by way of an interest-bearing loan. The issue in such cases is whether the interest rate charged by the parent company is an appropriate arm's length price. This arises because the interest rates in India are quite high. The problem gets multiplied because companies must comply with the transfer pricing laws of both countries. If the parent company receives interest from the foreign subsidiary at a higher rate, revenue authorities where the subsidiary is located may raise objections. On the other hand, if the rate of interest is low (in line with LIBOR), Indian tax authorities may demand that the higher Indian interest rate should apply. The ITAT held that LIBOR should be taken as the benchmark rate for international transactions.

The first British damages claim trial over the manipulation of LIBOR – *Graiseley Properties Limited v Barclays Bank PLC* – has been delayed until next year. Barclays is being sued in a test case stemming from the wider LIBOR scandal, which is being closely watched for its impact on other possible claims against banks involved in the manipulation of the benchmark interest rate.

Graiseley-owned Guardian Care Homes alleges that Barclays mis-sold them interest-rate swaps which were pegged to the LIBOR rate. Guardian initially sued Barclays for up to £38 million for mis-selling two interest rate swaps in 2007 and 2008. The company then applied to add a claim based on LIBOR manipulation to its case against Barclays. Justice Julian Flaux allowed Guardian to amend its claims to include the allegation of false and fraudulent representation. Barclays denies all the allegations and is appealing Justice Flaux's ruling. A trial was due to begin in October but has now been delayed until April 2014 to allow Barclays' appeal to be heard by the Court of Appeal.

While Justice Flaux allowed Guardian to add a LIBOR manipulation-related claim to its case, Indian company Unitech was recently refused permission by Justice Jeremy Cooke to add LIBOR claims to its counterclaim against Deutsche Bank in *Deutsche Bank AG & Ors v Unitech Global Limited and Unitech Limited*. Deutsche Bank commenced proceedings against Unitech to recover monies pursuant to a loan and an interest rate swap sold in conjunction. Unitech made a counterclaim in those proceedings, essentially saying that the swap was mis-sold and not a proper hedge of the interest rate risk arising from the loan (which provided for the payment of interest by reference to LIBOR).

Recently, Unitech sought to amend its pleading to include a claim that it would not have entered into the loan or the swap if it had known about the manipulation of LIBOR by the banks. Deutsche Bank opposed the amendment on the basis that such a claim would have no realistic prospect of success. Justice Cooke agreed and refused permission even though the threshold test for allowing amendments is low and the amendments were sought at an early stage of the proceedings. Unitech is appealing this decision and the appeal is due to be heard in October.

Implications of court interpretation

Unitech's application and the court's treatment of it warrant further discussion because it could be relevant to others considering whether to bring a claim over losses suffered due to the LIBOR scandal. Essentially, Unitech wanted to argue that Deutsche Bank had represented that LIBOR was a genuine average of the estimated rate at which panel banks could borrow from each other in a reasonable market, that the submissions to Thomson Reuters were made in good faith, that Deutsche Bank would not in any way "undermine the integrity" of LIBOR and that it had no reason to believe that any other panel banks were doing so.

Unitech sought to plead representation by conduct or implication; it did not assert that Deutsche Bank had made an express representation about LIBOR rate manipulation. Nor did it seek to plead an implied promise not to manipulate the LIBOR rate in future, which, if broken, might cause a change in the interest payable under the loan or the swap payment obligations. The judge commented that this might have been a more logical plea but that of course the damages flowing from a breach of such an implied promissory term would be difficult to quantify because one would have to calculate the impact on the specific transactions in question.

Unitech did not argue that it had suffered loss as a result of the LIBOR manipulation. Instead it contended that it would never have entered into the loan and the swap but for the implied representation by Deutsche Bank that the LIBOR rate was genuine.

The judge commented that most implied representations arise in the context of express representations. He also noted that common implied representations are that an opinion given was honestly held or that the representor believes that facts exist which reasonably justify the opinion expressed. The judge accepted Deutsche Bank's submission that the court must consider whether a reasonable person in the position of and with the characteristics of Unitech would reasonably have understood that an implied statement was being made in the terms alleged.

In this case, as is the norm, the bank's documentation contained numerous clauses to the effect that no representations are made by the bank and that no reliance can be placed on the bank when deciding whether or not to enter into the transactions. The judge found that, because of the way Unitech's representations about LIBOR were pleaded, in order to work, "every bank participating in any panel on any one of the 150 LIBOR rates would be taken as making this representation about the whole system and the parts played by every bank within it". He thought that this was unrealistic and would not pass the reasonable representee test. The judge also

Global reach: Decisions taken in English courts are relevant to investors and financial institutions in India and other countries.

thought that determining the point at which it could be said that the integrity of LIBOR had been undermined, as asserted by Unitech, was too uncertain and so that plea also would not work.

So, where does this leave LIBOR manipulation cases? Justice Cooke did note that in cases where dishonesty is alleged, standard no representation and no reliance clauses will carry much less weight. Furthermore, he said he could believe that one could find a promise "to do nothing that would jeopardize the ordinary and proper assessment of the relevant particular LIBOR rate to which [a] transaction is linked". What he struggled with was finding "an implied representation of fact when no representation relevant to it is expressly made, whether in the contract or elsewhere, and when disclaimers or other clauses in the agreement militate against such implication" on the basis of the fact that Deutsche Bank was a panel bank and the transaction was linked to LIBOR (the only two bases identified by Unitech according to the judge).

Justice Cooke seemed to indicate that a case would be more viable if there were some relevant pre-contractual statements. In relation to Justice Flaux's decision to allow amendments to add claims for fraudulent misrepresentation against Barclays in relation to LIBOR, Justice Cooke simply said that the case before Justice Flaux was different and that it was unclear from the judgment how he applied the relevant test to the facts of the Barclays case to arrive at a different result.

It remains to be seen whether the Court of Appeal will allow Unitech to amend its case and in what form. Of course, the most interesting stage will be to see whether, if LIBOR manipulation claims are allowed in both cases, such claims ultimately succeed.

Future LIBOR cases

In terms of future cases, it seems that there is scope for several types of claim by counterparties to products pegged to LIBOR or EURIBOR. For example, if it can be shown that the rates were deliberately understated by banks and that the bank then sold products to hedge against low rates, or gave counterparties the right to receive LIBOR or EURIBOR in swaps, then it might be possible to formulate a claim.

Firstly, a counterparty could argue that it would never have entered into the transaction but for the bank's express or implied representation that interbank rates were not being manipulated. Alternatively, a counterparty might argue that it was happy to enter into the transaction but that the bank's manipulation of interbank rates was a breach of contract.

Another type of claim could be one based on conspiracy or the concerted unlawful acts of more than one bank. The Financial Services Authority Final Notice issued to Barclays would arguably satisfy the unlawful means requirement and it is currently thought that certain banks may have conspired to manipulate the rates. To succeed, a claimant would have to prove not only that conspiracy, but also that there was an intention to cause loss and that it did suffer loss.

In a case where damages are claimed (i.e. the claimant is not seeking to unwind the transaction), the court will have to assess the damages required to place the claimant in the position in which it would have been had no manipulation occurred. The starting point will be to assess the impact of the submissions by the banks involved on the published rates and then determine the effect of the LIBOR rate differential on the relevant transaction.

This would be a difficult exercise involving complicated mathematics. However, it is not impossible and there are already experts in the market capable of valuing highly complex financial products, so arguably, the tools do exist.

Practical advice for in-house counsel

In an increasingly global marketplace and in the face of complex regulation in the financial sectors, there are certain basic principles that may assist companies and their legal counsel to overcome some of the risks.

Firstly, keep good records. English case law demonstrates that international banking disputes are fact-sensitive. If you think you potentially have a claim then a complete record of the contemporaneous correspondence and records of meetings will be vital to your lawyers in advising you of your prospects of success and eventually establishing your case.

Secondly, you should regularly take stock of your potential cases and take advice about applicable limitation periods. If you have cases which should be properly brought in the UK, then, in general, you must file your claim within six years of the date on which the cause of action arose or risk losing your claim. International businesses should keep a close eye on all applicable limitation periods.

Even for domestic disputes, consider case law from other jurisdictions. While this may not be binding on the court or tribunal hearing your case, such authorities might be persuasive and arguably are relevant if the issue is the interpretation of instruments as ubiquitous as the ISDA Master Agreement.

Consider carefully what expert evidence you need and contact potential experts, through your lawyer, as early as possible. For a mis-selling case, you might need a market expert such as a banker. For a valuation dispute, you may need an expert with an entirely different skill set. Particularly in the case of complex financial derivatives, current and accurate expert opinion could be crucial to winning your case.

Get in touch with regulators – you may fall within a compensation scheme. If you do then this route is probably less expensive, will waste less management time and may ultimately be more profitable than litigation.

Think carefully about standard terms and identify any bespoke amendments that need to be made in a schedule or side letter. Be aware of the case law about interpretation of the sample document you are using and how this might affect your potential upside and downside. Think carefully about your dispute resolution clause: Where would you like any disputes heard? Would arbitration be preferable to court?

A close assessment and understanding of these points will hopefully highlight the potential strengths and weaknesses of your agreements and enable you to tailor clauses to robustly protect your business. ■

Nicola Vinovrški is a legal director in Clyde & Co's banking litigation and arbitration team based in London.

The pioneers

***India Business Law Journal* reveals the top international law firms keeping India's cross-border deals on course**

Vandana Chatlani reports

A sense of lethargy is dominating India's economic activity. Interest in deal making from domestic and international companies has faded and policy stagnation continues to threaten deals of all sizes. Of particular concern to foreign companies are changes introduced by India's Finance Acts of 2012 and 2013 and the proposed Direct Tax Code, in which many shades of grey exist. Other anxieties stem from the high cost of fundraising in India, political inconsistencies in the economic reform process, the time required to obtain judicial decisions, and difficulties in enforcing arbitral awards in India.

Corruption is another worry, not just for international companies operating in India, but equally for Indian businesses venturing outside of the country. International law firms are working to educate clients about provisions of the UK Bribery Act 2010, the US Foreign Corrupt Practices Act and similar legislation in other jurisdictions. Indian companies are increasingly looking to foreign firms for assistance with legal intelligence in relation to new and proposed laws and regulations and other changes.

Deep analysis, close observations

Against this backdrop of frustration, uncertainty and transformation, *India Business Law Journal* showcases the India-related achievements and activities of law firms around the world. Our survey, now in its seventh year, draws on an analysis of over 600 law firms from every continent that have recorded transactions or cases with an Indian connection over the past year.

Doing our best to remain objective, we attempt to provide insightful conclusions based on rigorous research, wide-ranging editorial experience, feedback from corporate counsel and Indian law firms as well as a vast network of contacts.

As in previous years, we received hundreds of submissions from law firms and painstakingly reviewed public and other records to ensure the accuracy of the information reported, with valuable inputs from Indian and international media.

As a result of our efforts, *India Business Law Journal* is delighted to reveal its selections of the top 10 foreign law firms for India-related work. We also list 10 firms that are considered key players for India-related assignments (page 39), and an additional 20 firms that are categorized as significant players, up from 15 firms last year (page 43).

As always, we pay close attention to regional and specialist firms in key economies such as Singapore, Canada and the UAE, emerging regions such as sub-Saharan Africa, and offshore jurisdictions such as the Channel Islands. We identify 25 firms in this category that are well equipped to handle India-related matters (see page 47).

We further highlight 35 "firms to watch" (page 54). Some of these firms appear poised to attract more mandates with an India connection while others may be striving to reinvigorate the burgeoning India practices they had in the past. We believe, on the evidence available, that these firms are committed to India and bullish about attracting India-related work.

All of the lists are in alphabetical order.

Our top 10 table consists of the legal heavyweights that have solidified their presence on big-ticket deals involving Indian parties, thanks in large part to their robust relationships with Indian companies, experience across practice areas, size and geographical reach. These names rarely change.

Top 10
Allen & Overy
Clifford Chance
Freshfields Bruckhaus Deringer
Herbert Smith Freehills
Jones Day
Latham & Watkins
Linklaters
Milbank
Norton Rose Fulbright
Shearman & Sterling

Allen & Overy scores high marks for its role on four of *India Business Law Journal*'s 2012 Deals of the Year. The firm advised the Export-Import Bank of the US on the US$2.1 billion financing of the expansion of Reliance Industries' petrochemical refinery in Gujarat; acted as counsel to Vedanta Resources on its acquisition of a majority stake in Cairn India for US$9.6 billion; and advised the lenders on the financing of Korean steel giant POSCO's plant in Maharashtra. The firm's current platter of capital markets, M&A and disputes suggests it is in no danger of losing work despite its separation last December from Indian best friend Trilegal. Key India advisers include James Grandolfo, Kayal Sachi, Sanjeev Dhuna, Matthew Gearing, Andrew Harrow, Barry Irwin, Amit Singh, Gautam Narasimhan and Ian Stanley.

Clifford Chance also figured in four of our 2012 Deals of the Year, including the first sale through the auction route by a private company (Wipro). The firm's Brussels office was global counsel to Pfizer on the US$11.85 billion sale of its infant-nutrition business to Nestlé, while Marc Rathbone in Singapore advised GAIL India on its US$11 billion 20-year deal with Sabine Pass Liquefaction, a subsidiary of Cheniere Energy Partners, to import liquefied natural gas from the US. Rathbone has since moved to the Singapore office of Australian firm Gadens, however work remains buoyant under the leadership of Andrew Carnegie, Rahul Guptan, Geraint Hughes, Mark Poulton and others. In January, the firm acquired Cavenagh Law in Singapore, bringing on board Harpreet Singh, Paul Sandosham and former Clifford Chance partner Nish Shetty to boost its dispute resolution offerings.

Freshfields Bruckhaus Deringer returns to the top 10 having advised on a slew of interesting deals. The firm advised BG Group on the sale of its 65.12% stake in Gujarat Gas to GSPC Distribution Networks for US$470 million and acted for Citi Venture Capital International on the acquisition of a minority stake in Prometheon Holdings (UK), a subsidiary of Cox & Kings, an international travel company listed on the Bombay Stock Exchange and the National Stock Exchange of India. Around the same time, it was counsel to French food products company Danone on its acquisition of Wockhardt's nutrition business.

With the addition of 1,200 lawyers across Australia and Singapore as a result of a merger with Freehills last October, **Herbert Smith Freehills** now has 66 partners in its India group, headed by Chris Parsons and Nimi Patel. In the past 12 months, it has counted among its clients United Breweries, Tata Communications, National Aluminium Company, Adani Mining, NTPC, Asian Development Bank and Wipro. Its achievements include advising Indian pharmaceutical company Strides Arcolab on its US$1.6 billion cash sale of a unit to Mylan and representing United Breweries on the £1.28 billion (US$2.1 billion) investment by global drinks giant Diageo in United Spirits. The firm is currently drafting and negotiating a long-term agreement for GVK Resources for the performance of contract mining services for a 30 million tonne a year coal mine, which would be the world's largest contract mining agreement. It is also known for its strength in dispute resolution. "For international arbitration, Herbert Smith is very good," says Zarir Bharucha, the managing partner at Zarir Bharucha & Partners in Mumbai.

Jones Day is another firm that had a role in four *India Business Law Journal* 2012 Deals of the Year. It advised the institutional investors on Mahindra & Mahindra Financial's qualified institutional placement, represented the underwriters in Multi Commodity Exchange of India's IPO, and was the international counsel to Qualcomm on the sale of its broadband wireless access business to Bharti Airtel. Jones Day represented a US subsidiary of Tata Technologies in its leveraged acquisition through a reverse triangular merger of Cambric Holdings, a US-based end-to-end engineering services firm. It also acted for Godrej Consumer Products and Godrej Netherlands on the financing for the acquisition of the Soft & Gentle brand from Colgate-Palmolive. Key India-focused lawyers at the firm are Sushma Jobanputra and Manoj Bhargava. New hires include Karim Mahmud from Blakes, Sumesh Sawhney from Clifford Chance and Baiju Vasani from Crowell & Moring.

Latham & Watkins has more than 50 India-focused lawyers across the firm's offices in Asia, Europe, the Middle East and the US. The firm was counsel to the underwriters in the simultaneous rights offerings by Network18 Media & Investments and its subsidiary TV18 Broadcast, adviser to Sutherland Global Services on its acquisition of Apollo Health Street, and counsel to the underwriters on ICICI Bank's US$5 billion global medium-term note programme. Other clients include Navistar, Dian Swastatika Sentosa, Orchid Chemicals & Pharmaceuticals, GTL Infrastructure and Subex. The firm's India-focused partners include Michael Sturrock, Rajiv Gupta and David Miles.

Linklaters advised on six *India Business Law Journal* 2012 Deals of the Year, more than any other foreign law firm. It was international counsel to Bharti Infratel on its US$825 million IPO; represented Vodafone on the sale of a further stake in Vodafone India to Piramal Healthcare for US$605 million; and advised CMP Asia – the Asian arm of Carlyle – on Carlyle's exit from Indian mortgage lender Housing Development Finance Corporation. It also advised the arrangers and the trustee on IDFC's medium-term note programme and represented Infosys on its US$326 million acquisition of Swiss consulting firm Lodestone. In February, the firm poached Will Kirschner, a key member of White & Case's India practice group. Sandeep Katwala heads Linklaters' India group and Arun Balasubramanian is active on India-related deals. The firm formed an alliance with South African firm Webber Wentzel in February, increasing its reach in the African market.

With 15 partners in its India team, **Milbank** is a strong contender for finance, M&A and project-related deals. In 2012, it advised the Sahara Group on its US$575 million purchase of a controlling interest in New York's Plaza Hotel and advised the underwriters on Bharti Infratel's US$825 million IPO. It has acted for Tata Steel on its offering of S$300 million (US$240 million) of 10-year Singapore dollar notes and represented Reliance Industries on a US$2 billion capital markets and loan financing supported by the Export-Import Bank of the US. Sanjeet Malik left Milbank's Singapore office in April to pursue opportunities in the renewable energy sector in India, however Naomi Ishikawa and David Zemans continue to keep the India focus alive in the city. Glenn Gerstell coordinates Milbank's India practice from Washington.

One of the world's biggest law firms, **Norton Rose Fulbright** advises its Indian clients on banking and finance transactions, corporate and energy deals and technology matters. It has also developed an active ship finance practice from Singapore. Its recent India work includes advising India's ELGI Equipments on its acquisition of Italian company Rotair; advising Axis Bank on the restructuring of its financing to PT Srinivasa for the acquisition of mining interests in Indonesia; and representing the project lenders in relation to GMR Group's divestment of its interest in its 800-MW combined cycle project to Petronas and a Philippines consortium. The firm merged with US law firm Fulbright & Jaworski this month, leading to a rechristening and creating a network of 3,800 lawyers in over 50 cities around the world. Key India contacts are Madhavi Gosavi, Sherina Petit and Raj Karia.

Shearman & Sterling continued to close private equity, M&A, finance and capital markets deals during the past 12 months, despite the general slowdown in India-related activity. It advised Tata Consultancy Services on its acquisition of the French technology services company Alti for €75 million (US$97 million); acted for Aditya Birla Group on its acquisition of Columbian Chemicals and some of its subsidiaries; and advised Jaguar Land Rover on its £500 million offering of fixed-rate high-yield bonds due in 2020. "We have had an exceptionally good experience with Shearman & Sterling," says one client from a global multi-stage fund. "They always deliver high quality work in a timely fashion and we now work exclusively with them." The firm recently promoted Sidharth Bhasin, a key member of its India team, to the partnership and hired Sriram Kilapakkam as an associate in its Hong Kong office. "Sidharth Bhasin is outstanding," says one client. "He offers excellent client service skills and great advice."

Key players
Ashurst
Bird & Bird
Clyde & Co
Davis Polk & Wardwell
DLA Piper
Gibson Dunn & Crutcher
O'Melveny & Myers
Reed Smith
Slaughter and May
White & Case

Ashurst's coordinated India practice comprises over 60 English, US, Australian and Indian-qualified lawyers. It has worked with several Indian law firms and has a non-exclusive referral arrangement with Indian Law Partners. Ashurst maintains close ties with clients such as Aditya Birla Group, GVK, Vedanta Resources, Mahindra & Mahindra, Asian Development Bank, IDFC Capital and Jubilant Energy. It was counsel to Bank of America Merrill Lynch, Citi, HSBC, Nomura, Morgan Stanley and JM Financial in connection with Oil & Natural Gas Corporation's US$2.5 billion disinvestment by offer for sale, and to GVK on its US$10 billion investment in the Alpha Coal Project in Australia. Go-to lawyers for India work are Richard Gubbins (head of Ashurt's India practice), Tony Denholder, Justin Shmith and Padmini Singla.

Bird & Bird's promotion to the key players list was prompted by its activeness on both mid-market and high-value India deals. In the past 12 months it represented a German company on its joint venture with an Indian entity, a Finnish subsidiary of an Indian company on acquisition financing, and an Indian client on a contractual dispute in Hong Kong with a multinational company. Another highlight was representing ICICI Bank on the English law aspects of a ₹42.7 billion (US$715 million) financing to Essar Power Jharkand and advising on the subsequent refinancing of this loan. Bird & Bird has hired India hands Allan Poulter and Mark Abell from Field Fisher Waterhouse as well as David Renton from Baker Botts. Nipun Gupta is the firm's primary India contact.

Clyde & Co offers expertise in the insurance, aviation, shipping, infrastructure and projects sectors. It advised Afcons Infrastructure and Marico on their investments in Saudi Arabia; assisted Dr Reddy's Laboratories in relation to its US operations; and advised Essar Oil on its dispute with United India Insurance – one of the largest disputed insurance claims in Indian history and an *India Business Law Journal* 2012 dispute of the year. Sidhant Rajagopal, an aviation specialist, rejoined the firm as an equity partner in Dubai in April after almost two years at Clasis Law, Clyde & Co's best friend firm in India.

Davis Polk & Wardwell strengthened its capabilities last December by hiring Asian litigators Martin Rogers and James Wadham from Clifford Chance. The firm's India practice has over 25 lawyers, including 10 partners and one counsel, who are involved in Indian M&A and capital markets transactions. They are based throughout Davis Polk's 10 global offices with the majority in Hong Kong where the India practice is led by Kirtee Kapoor. "Kirtee Kapoor is exceptional," says one private equity client. Kapoor was counsel to Morgan Stanley Infrastructure Partners in its acquisition of a majority stake in Continuum Wind Energy – one of the biggest private equity deals in the Indian wind energy sector. The firm counts Indiabulls Real Estate, ICICI Bank, DLF Hospitality, TPG and Warburg Pincus among its clients.

DLA Piper is flying high as international counsel to Etihad Airways on its US$600 million investment in Jet Airways – the first investment by a foreign airline in an Indian airline. In other recent cross-border acquisition assignments, DLA advised Wipro on its US$144 million acquisition of a consumer business across Southeast Asia; Jindal Group on its US$235 million acquisition of the global film business of ExxonMobil Chemical, spread across six jurisdictions; and PCM Group, on the acquisition of Rail One. "In my opinion DLA has been the best firm we have worked with during the last three to four years," says Akash Aggarwal,

DLA has been the best firm we have worked with during the last three to four years

Akash Aggarwal
Vice President of Investment Banking
Axis Capital

vice president of investment banking at Axis Capital. "The direct involvement of their capital market partner during the drafting sessions and discussion on critical points makes all the difference." Finance and capital markets lawyer Joywin Matthew left White & Case to join DLA this month, strengthening the firm's debt capital markets practice. Daniel Sharma and Biswajit Chatterjee are global heads of the India group.

Gibson Dunn & Crutcher has climbed the charts thanks to a streak of prominent India deals. The firm advised Grandway Global Holdings and Atlas Equifin in the sale of their stake in Multi Screen Media to SPE Mauritius Holdings and SPE Mauritius Investments, indirect subsidiaries of Sony Pictures Entertainment, for US$271 million. Jayesh Parekh, the managing director at Sony Entertainment Television and Apollo Television, praises the firm for "excellent coordination among all parties and good understanding of the legal, tax, compliance and regulatory issues". The firm also represented Acumen on a US$5 million equity financing of Husk Power Systems, and advised Gulf Capital on its acquisition of OCB Oilfield Services FZCO. The firm is currently assisting clients with anti-corruption and compliance in India, telecom and healthcare investments, renewable energy business and litigation. Gibson Dunn added two new associate attorneys to its India practice group to support the increase in India work over the past 18 months. Jai Pathak is a primary contact for India transactions.

O'Melveny & Myers' core India team includes Pooja Sinha, David Makarechian, Andrew Hutton, Dev Sen and Junaid Chida. Capital markets, financing and private equity form the bulk of its work. The firm offers expertise on securities offerings by Indian companies and has handled investments in sectors such as technology and consumer goods as well as insolvency and restructuring mandates. O'Melveny & Myers represented Deutsche Bank as arrangers in several rounds of restructuring of US$365 million in convertible debentures issued by the Lodha group, as well as on related derivative transactions with private equity and hedge fund investors.

Reed Smith enters the key players category for the first time on the back of its robust contentious and non-contentious India-related work, which mainly involves advising on English law or US law along with a strong focus on international arbitration. Gautam Bhattacharyya and Roy Montague-

Jones co-chair the firm's India practice, which comprises 25 partners and a team of associates. Recent highlights include advising Wockhardt and Swiss subsidiary Wockhardt Bio as borrower and guarantor on the rescheduling of a US$250 million syndicated loan advanced by Indian and international banks, and on Wockhardt's US$355 million sale of its nutrition business to Danone; acting for a bank syndicate's agent bank in English High Court litigation against a European company and its Indian parent company; and acting for New York Stock Exchange-listed Curtiss-Wright on its US$120 million acquisition of Williams Controls, which involved its Indian operating subsidiaries.

Slaughter and May has clinched roles on a slew of important deals. It advised Diageo on its US$3.8 billion acquisition of a controlling stake in United Spirits and Mylan on its US$1.6 billion acquisition of Agila Specialties, an Indian developer, manufacturer and marketer of generic injectable products. It has also acted for GlaxoSmithKline on its voluntary offer to increase its stake in its publicly listed consumer healthcare subsidiary in India, and represented an international financial institution in relation to the disposal of its Indian business. In addition, Slaughter and May is handling a range of India-related disputes including an arbitration at the International Court of Arbitration. The associate general counsel of a multinational company describes the firm as "excellent, consistent, intelligent" with "strong integrity", singling out lawyer Simon Nicholls as "hugely intelligent" and "client friendly" with "good risk radar". Palwinder Hare, head of legal - M&A/corporate at Standard Chartered Bank, says

Nilufer von Bismarck [at Slaughter and May offers] outstanding technical expertise and knowledge, high quality support and is very easy to work with

Palwinder Hare
Head of Legal - M&A/Corporate
Standard Chartered Bank

"Nilufer von Bismarck [offers] outstanding technical expertise and knowledge, high quality support and is very easy to work with". Nick Archer, Simon Hall and von Bismarck are primary India contacts at the firm.

White & Case, one of the top 10 in our 2012 rankings, moves down after a relatively quiet 12 months and the loss of Will Kirschner, formerly head of the firm's India practice, who moved to Linklaters earlier this year, and Joywin Matthew, who left for DLA Piper this month. The firm's India practice now rests in the hands of Nandan Nelivigi, George Cyriac and David Eisenberg. Over the past few years, White & Case has advised Pfizer, GMR, Wockhardt India, the Asian Development Bank and Deutsche Bank on India-related deals. Recently, the firm was counsel to GMR Infrastructure and GMR Infrastructure (Singapore) on the sale of a 70% stake in GMR Energy (Singapore) to FPM Power Holdings for S$600 million.

Significant players
Baker & McKenzie
Cleary Gottlieb Steen & Hamilton
Dorsey & Whitney
Eversheds
Field Fisher Waterhouse
Fladgate
Goodwin Procter
Hogan Lovells
Kirkland & Ellis
Lawrence Graham
Mayer Brown
Nabarro
Penningtons
Pepper Hamilton
Pinsent Masons
Ropes & Gray
Simmons & Simmons
Simpson Thacher & Bartlett
Taylor Wessing
Vinson & Elkins

Ashok Lalwani heads **Baker & McKenzie**'s India practice from the firm's Singapore office. The firm has advised Indian companies on mergers and acquisitions, joint ventures, structured financings, project development, real estate investment and dispute resolution. Baker & McKenzie partner Edward West advised Chemtura Corporation as international counsel on the acquisition of the bromine manufacturing and distribution business of Solaris Chemtech, a subsidiary of India's Avantha Group. Andrew Martin, Michael Mensik and Philippe Reich are other India contacts at the firm.

Cleary Gottlieb Steen & Hamilton acted for the brokers on three offers for sale by the Indian government, involving US$1.1 billion in shares of NMDC (National Mineral Development Corporation), US$585 million in shares of Oil India and US$2 billion in shares of NTPC (National Thermal Power Corporation). The firm has also advised B4U Television network on its planned acquisition by Bollywood film producer and distributor Eros International. Teresa Chávez Martínez, senior corporate counsel at Mexican

[Cleary Gottlieb] proved to be of invaluable help, assuring that the deal moved forward and effectively liaised with our Indian lawyer and our counterpart

Teresa Chávez Martínez
Senior Corporate Counsel
Grupo Kuo

conglomerate Grupo Kuo, which engaged Cleary Gottlieb for advice on setting up a joint venture in India, says the firm "proved to be of invaluable help, assuring that the deal moved forward and effectively liaised with our Indian lawyer and our counterpart". She adds that the firm "provides a first class service with an outstanding level of skilfulness and reliability". She praises Shreya Lal Damodaran, the firm's senior India consultant, for "valuable help with key Indian legal issues" and Nallini Puri for "excellent legal advice and an-all time availability".

Dorsey & Whitney lost a key member of its India team last November when Jamie Benson left to join Duane Morris & Selvam. However, since then John Chrisman, Dorsey's India practice group chair, was instructed to act as international counsel to India's Ministry of Steel on its offer for sale of a 5.82% stake in Steel Authority of India, which raised US$279 million. The firm also represented the book running lead managers on IndusInd Bank's US$36.8 million qualified institutional placement in January.

Eversheds is developing a flourishing arbitration practice thanks to the experience of its Singapore director Oommen Mathew. Mathew along with associate Kate Lan advised the Maldives government on a dispute between Male Airport and GMR – one of *India Business Law Journal*'s 2012 disputes of the year. The firm is also advising an Indian energy company on a claim in Singapore. In addition, the firm has advised Sequoia Capital on setting up corporate legal entities for investment into India; US and UK retailers on entry strategies into India; AZ Electronic Material on the purchase of Clariant's polysilazanes coatings and resins business in India and Germany; and United Drug on its US$61 million acquisition of the Bilcare Global Clinical Supplies business. Parmjit Singh heads the firm's India group.

Field Fisher Waterhouse is known for its active licensing and franchise practice for companies keen to enter India. The firm has assisted companies such as retailer Thomas Pink, toy company Hamleys and dim sum restaurant Ping Pong in securing franchise rights in India. It advised Indian broadcaster B4U's European arm in a copyright infringement case brought by the Indian Performing Right Society; advised Vestergaard Frandsen in the UK on an international action concerning the theft of trade secrets, which involved a case in Delhi High Court; and conducted due diligence for an Indian retail group on the potential takeover of a European fashion and clothing company. India specialists Mark Abell and Allan Poulter left the firm to join Bird & Bird. Nick Rose now runs the India practice with support from James Martin.

Fladgate has been winning work across practice areas for Indian clients since expanding its offerings. It acted for the owner of a Dubai hotel project in relation to arrangements for technical assistance from the Taj Group; advised India's Maneesh Pharmaceuticals, and Svizera Holdings, in connection with claims for the repayment of an outstanding loan and debt of US$38 million; and is representing a UAE subsidiary of Jindal Steel & Power in relation to litigation concerning an Omani gas plant. The firm's India practice is led by Sunil Sheth, who "is swift in understanding clients' needs and addressing them", according to Kanga & Co senior partner ML Bhakta. Sheth is supported by Mythily Katsaris, Rajeshwar Vyakarnam and Ashish Bhakta. Karishma Parekh, who has six years of litigation experience in India, has also been hired by the firm.

Goodwin Procter owes its steady stream of India work to its corporate and private equity expertise. The firm assisted TA Associates with follow-on investments in IndiaIdeas.com and Dr Lal PathLabs, and Bessemer Ventures with financing for Anunta Technology Management Services. Goodwin Procter acted for Bangalore-based IT services company MphasiS on its US$200 million acquisition of Digital Risk in Florida and

[Sunil Sheth at Fladgate] is swift in understanding clients' needs and addressing them

ML Bhakta
Senior Partner
Kanga & Co

represented Goldman Sachs' private equity arm during a US$54 million financing round for Nova Medical Centers, a Bangalore-based healthcare company. Yash Rana in Hong Kong chairs the firm's Asia practice, with support from Brian McDaniel, Brinda Dutta and Shantanu Mukherjee.

Hogan Lovells wins praise from clients for its contentious capital markets work. Shankh Sengupta, a counsel at Trilegal who worked with the firm on disputes arising from foreign currency convertible bonds (FCCBs) issued by companies

[Andrew Carey at Hogan Lovells] is very quick to appreciate issues which may not be his areas of expertise, such as litigation in India
Shankh Sengupta
Counsel
Trilegal

in India, says Andrew Carey "has a very good understanding of a default situation and is very quick to appreciate issues which may not be his areas of expertise, such as litigation in India." Sonali Sharma, a partner at Juris Corp who also worked with the firm on FCCB-related recoveries, lauds Carey for "his experience, clarity of thought and understanding of the law". Sengupta further praises Jill Baraclough as "a valuable resource in the team" who "handles crisis situations with ease". Hogan Lovells advised International Finance Corporation and Proparco on a US$70 million financing for an Indian company in the education sector; advised Citibank as trustee on enforcement proceedings against Moser Baer India arising out of defaults on bonds issued by Moser Baer; and represented Mattel in trademark and copyright litigation relating to its Scrabble game in India. The Mattel matter was led by senior IP partner David Latham, who sadly passed away in February.

Kirkland & Ellis has had a relatively quiet 12 months on the India front compared with the year-earlier period when it advised on headline deals such as Patni Computer Systems' delisting from the Indian stock exchanges. Nevertheless, the firm recently advised the Harbourvest and Axiom Asia Private Capital funds on their purchase with Asia Growth Capital Advisors of Credit Suisse's Asian private equity portfolio. Kirkland also represented Golden Gate Capital on the sale of Vistec Lithography Inc and Vistec Lithography BV to Raith, which included the transfer of Vistec's production facilities and its service and support centres in the US, Europe, China, India and Korea. Sarkis Jebejian, who during his time at Cravath Swaine & Moore advised Genpact on its 30% stake sale to Bain Capital for US$1 billion (an *India Business Law Journal* 2012 Deal of the Year), joined Kirkland & Ellis last December. Srinivas Kaushik is a key contact at the firm.

Lawrence Graham's strengths include its outsourcing and technology practice and its expertise in investments for high net worth individuals. The firm also focuses on banking transactions, corporate tax, employment, M&A, real estate and regulatory matters. It acted for Greenko on the sale of ₹8.2 billion worth of shares in Greenko Mauritius to the Government of Singapore Investment Corporation. Peter Brudenall, a partner experienced on IT and outsourcing transactions in India, left Lawrence Graham in March to become a legal adviser at the Abu Dhabi Investment Authority. Sunil Kakkad, who has advised clients such as Advaita Indian Energy Ventures, Satyam Computer Services and NIIT Technologies, is head of the firm's India group.

Mayer Brown demonstrated its competition law skills when it acted as Nestlé's global antitrust counsel for its acquisition of Pfizer's infant-nutrition business – a deal worth US$11.85 billion. Advising clients on India-related mergers and acquisitions, joint ventures and equity investments is a core strength of the firm's India practice. Last November, Mayer Brown was counsel to a UK subsidiary of Gulf Oil Corporation (the India-based lubricants division of the Hinduja Group) on its purchase of US industrial fluids manufacturer Houghton International for US$1.04 billion. Paul de Bernier and David Carpenter co-chair the firm's India practice. Kiran Desai and Edmund Parker are co-leaders of the group.

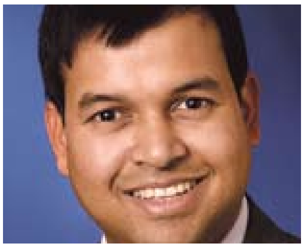
Nabarro has handled many India-related matters over the past 12 months. It is currently helping India-based businesses across sectors such as clean technology and infrastructure seek equity investments through London's AIM market. It is also advising an Indian company interested in mining opportunities in East Africa and is acting for an international equipment manufacturer in relation to corporate issues arising from a divestment in India. Nabarro's clients include Infrastructure India, Nandan Cleantech, Larsen & Toubro and OPG Power Ventures. Ian Binnie heads the firm's India initiative with the help of 10 partners and eight associates across several practice areas.

With 67 partners and 360 staff in the UK, **Penningtons** has won clients such as Tata Motors, Nihilent and Syndicate Bank. The firm provides commercial as well as legal advice on entry and exit strategies for the Indian market and investments from India into the UK and Europe. In addition to corporate and commercial services, it also advises clients on employment, immigration, dispute resolution and IP matters. Jimmy Contractor, the company secretary at Tata in London, has used Penningtons since 1995 and says "we found them economical and good in [several] aspects of law … [using them in] various sectors like IP, brands, employment and immigration law. We also have recommended them to our Indian group companies for advice on various matters." Contractor recommends Rustam Dubash, Anna Frankham and Jon Huevel "for their knowledge and advice. We have dealt with quite a few others, but these three are outstanding". Dubash jointly leads the India practice with Saionton Basu.

Pepper Hamilton takes pride in its strong dispute resolution practice. The firm has handled litigation for yeast manufacturer and distributor Lesaffre & Cie, which has a dispute with its Indian joint venture partner, and for India's NDTV, which is suing Nielsen in the US for

[Penningtons is] economical and good in [several] aspects of law ... We also have recommended them to our Indian group companies
Jimmy Contractor
Company Secretary
Tata (London)

[Pepper Hamilton] knows the Indian market very well ... James Rosener is fantastic. He is very sharp and I find him very commercial in his approach
Rohit Kumar
Deputy General Counsel
United Phosphorus



negligence and breach of contract. Other offerings include legal advice on M&A, private equity, corruption, white collar crime, tax and capital markets. Pepper Hamilton "knows the Indian market very well and I have found them more cost competitive than equivalent US law firms," says Rohit Kumar, deputy general counsel at United Phosphorus. He says the firm's lawyers are "hands-on", "commercial" and understand the needs of their clients. "James Rosener is fantastic," enthuses Kumar. "He is very sharp and I find him very commercial in his approach. He also has a technical background which makes him very relevant for someone like us." Last August, Pepper Hamilton merged with Freeh Sporkin & Sullivan, enhancing its corporate investigations, white collar advocacy and enforcement practice. Louis Freeh, a former director of the Federal Bureau of Investigation and former federal judge, is currently chairman of Pepper Hamilton. Valérie Demont is the practice leader for India.

Pinsent Masons' ties with India go back to the 1940s, when Ralph Mason, one of its founding partners, was a partner at a Calcutta law firm. The firm has maintained a solid reputation since then, advising companies on inbound and outbound investments. GMR engaged the firm for advice on its dispute with the Maldives government over its contract to operate Male International Airport – one of *India Business Law Journal*'s 2012 disputes of the year. The firm's Dubai office represented Air Works India Engineering on its acquisition of a 74% stake in Dubai-based Empire Aviation Group, while its Leeds lawyers advised Quantum Clothing Group on its acquisition by Japanese trader Itochu. Quantam is based in Nottinghamshire and employs 5,000 staff worldwide with operations in Cambodia, Sri Lanka and India. Sachin Kerur and Martin Harman focus on India-related matters.

Ropes & Gray has undertaken due diligence on eight India-related deals since July 2012; conducted more than a dozen anti-corruption training sessions in India for global private equity firms and Indian-based companies; and advised an ad hoc committee of bondholders on the restructuring of foreign currency convertible bonds issued by Suzlon Energy. The firm represented Goldman Sachs as one of the selling shareholders in Bharti Infratel's US$825 million IPO and advised Bain Capital on its US$1 billion purchase of a 30% stake in Genpact.

Energy and infrastructure is one of **Simmons & Simmons**' four core global industry sector focuses and its priority in India. The firm advised Indian petroleum company ONGC Videsh on its US$1.1 billion purchase of a 2.72% interest in the Azeri, Chirag and Guneshli (ACG) fields in Azerbaijan and a 2.36% interest in the associated BTC pipeline – ONGC Videsh's first acquisition of oil producing assets in Central Asia. Sharing his personal views, Priyank Srivastava, deputy legal adviser at ONGC Videsh, says Vivian Yang, Ian Wood and Matthew Davis demonstrated understanding and good negotiation skills. "For any transaction to be successful it is essential to capture the risks associated with it and legally safeguard the present and future interests of the organization," he says. "Simmons & Simmons were effective in fulfilling our requirements." On the infrastructure front, the firm acted for AIM-listed Ishaan Real Estate on the proposed sale of its property interests to Chalet Hotels Private and other entities connected to K Raheja Corp for approximately £70.3 million. The firm plans to open a Singapore office this year, which will target India matters.

Simpson Thacher & Bartlett is a magnet for private equity work. Its clients include Blackstone, Kohlberg Kravis Roberts (KKR), the Carlyle Group, Nalanda India Fund and One Equity Partners. It recently advised KKR on its proposed acquisition of a controlling stake in Alliance Tire Group (ATG) from an affiliate of Warburg Pincus. ATG has manufacturing plants and research and development facilities in India and elsewhere. The firm also represented Blackstone Real Estate Partners on the acquisition of a stake in Pune Dynasty Projects and the purchase of a stake in EON Kharadi Infrastructure – an owner and developer of office parks and an operator of a special economic zone in Pune. Kathryn King Sudol, Anthony King and Jin Hyuk Park lead Simpson Thacher & Bartlett's India-related M&A practice, real estate practice and capital markets

For any transaction to be successful it is essential to capture the risks associated with it and legally safeguard the present and future interests of the organization. Simmons & Simmons were effective in fulfilling our requirements
Priyank Srivastava
Deputy Legal Adviser
ONGC Videsh

practice, respectively, from Hong Kong.

Taylor Wessing's IP expertise has landed it some interesting contentious work over the past 12 months including advising Jet Airways on patent and design infringement proceedings brought against it by Virgin Atlantic Airways in relation to Jet's business class lie-flat seating. Previously, the firm advised Indian generics maker Intas Pharmaceuticals on a UK High Court case that successfully challenged an AstraZeneca patent relating to the anti-psychotic drug quetiapine. Taylor Wessing focuses on specific sectors in India – technology and communications, consumer brands, transportation and logistics, real estate, hotels and infrastructure, financial institutions and services, life sciences and healthcare. The firm's India group is led by four partners – Laurence Lieberman, Tandeep Minhas, Russell Holden and Vinod Bange. Its India reach was strengthened last August with the opening of a Singapore office.

Vinson & Elkins' client list reflects its solid reputation. With clients such as Essar Global, Reliance Industries and Cairn India, the firm attracts projects, disputes and investments with an India connection. Vinson & Elkins has been particularly active on arbitration matters before the Permanent Court of Arbitration in the Hague, Malaysian courts and the International Court of Arbitration. Partners James Loftis and Mark Beely in London, Christopher Walker in Hong Kong and Nicholas Song in Beijing lead this work. "For oil and gas disputes, Vinson & Elkins is top," says Zarir Bharucha at Zarir Bharucha & Partners in Mumbai. "Christopher Walker is an outstanding litigator with good local knowledge and understanding of Indian law and procedure."

Regional and specialist firms
Afridi & Angell (UAE)
Al Tamimi & Co (UAE)
Appleby
Arun Nigam & Associates (Hong Kong)
Bennett Jones
Blakes
BLC Chambers
Conyers Dill & Pearman
Corrs Chambers Westgarth (Australia)
DFDL
Harneys
Heuking Kühn Lüer Wojtek (Germany)
Inventus Law (US)
Kojima Law Office
Maples and Calder
McCarthy Tetrault (Canada)
Mourant Ozannes
Rajah & Tann (Singapore)
Shook Lin & Bok (Singapore)
Stikeman Elliott (Canada)
Torys (Canada)
Uteem Chambers (Mauritius)
Webber Wentzel
Werksmans
WongPartnership (Singapore)

Christopher Walker [of Vinson & Elkins] is an outstanding litigator with good local knowledge and understanding of Indian law and procedure

Zarir Bharucha
Managing Partner
Zarir Bharucha & Partners

Afridi & Angell offers services related to investments in the UAE and beyond and advises companies in the Middle East on their expansion into India. Amjad Ali Khan, the firm's co-founder and managing partner, has advised clients on investments into India, Rahat Dar has assisted with IPOs and secondary offerings in India, and Ziyad Hadi has acted for companies on cross-border transactions involving Indian parties.

Fellow UAE firm **Al Tamimi & Co** advised the shareholders of Dubai-based Empire Aviation Group on the sale of a 74% stake to Air Works India Engineering, a Mumbai-based independent provider of aviation maintenance, repair and overhaul (MRO) services. This was the first global acquisition in the area of aviation MRO by an Indian company and one of *India Business Law Journal*'s 2012 Deals of the Year. Al Tamimi's banking and finance strengths have landed it clients such as State Bank of India, Bank of Baroda, Punjab National Bank and the Export-Import Bank of India while its commercial acumen has brought mandates from Samsung India, Dabur India, Larsen & Toubro and Wipro.

With offices in Bermuda, the British Virgin Islands (BVI), the Cayman Islands, Guernsey, the Isle of Man, Jersey, Mauritius and the Seychelles, **Appleby** has positioned itself to be a legal adviser on India-related transactions with an offshore element. The firm's Cayman office recently represented State Bank of India on a US$300 million foreign currency facility for HGHL Holdings and a letter of comfort facility for HGHL Holdings and Gulf Oil Corporation to assist in the Hinduja Group's acquisition of Hill Holding Corporation in the US. In addition to its offshore locations, the firm has offices in London, Hong Kong, Shanghai and Zurich.

Hong Kong-based **Arun Nigam & Associates** focuses on work with an India connection. An increasing portion of its work involves helping Indian-run companies and Indian private and public sector banks in Hong Kong with a variety of legal matters. Since merging with Pierrepont Law Office earlier this year, Arun Nigam & Associates has taken on a rising number of disputes under the leadership of Mark Pierrepont. An Indian logistics company recently engaged the firm to aid in the recovery of money owing to its Hong Kong subsidiary. The firm is also assisting the Hong Kong branch of an Indian public sector bank with debt collection in Hong Kong and litigation, and a group of prominent Indian businessmen in connection with a loan to a South Indian film producer for a film project in Fiji.

Raj Sahni, a partner in the bankruptcy and restructuring practice group at **Bennett Jones**, chairs the firm's India Business Group. Sahni and his team assist Canadian clients in the Indian market and Indian companies with investments and acquisitions in Canada. The firm has worked with an Indian food processing company on trademark and IP issues in North America, advised an Indian engineering company on investments in a Canadian power project and offered legal advice on a host of outsourcing and technology licensing agreements involving Indian outsourcing companies. Kasi Rao is a senior adviser on India.

Blake Cassels & Graydon – now known as **Blakes** – is another Canadian firm that has been bullish about India. The firm has advised IFFCO Canada on an investment in the company by La Coop fédérée, Investissement Québec and Kisan International Trading FZE (KIT). KIT is a subsidiary of Indian Farmers Fertiliser Cooperative Limited (IFFCO), and is involved in the international trading of fertilizers and related products. IFFCO Canada is establishing a C$1.2 billion (US$1.2 billion) nitrogen fertilizer plant in Bécancour, Quebec. The first tranche of the investment closed last December and the plant's construction is expected to begin in 2014. The firm is also advising York University on opening a campus in Hyderabad.

Mauritius-based **BLC Chambers** mainly practises corporate, finance and investment funds law. It also has a strong litigation wing. BLC has assisted with the financing of a company investing in Indian real estate, and advised on investments in India's renewable energy sector through Mauritius and on a deal between a Mauritian financial entity and a financial services provider in India. The firm recently formed an association with Harneys.

With clients such as Vodafone, Vedanta and MakeMyTrip, **Conyers Dill & Pearman** is a strong contender for India mandates in offshore jurisdictions. Its India practice covers corporate, M&A, finance, banking and commercial matters. The firm's recent work includes advising on the formation of an India-related private equity fund and providing Ingredion with corporate advice on a holding structure involving India.

Australian firm **Corrs Chambers Westgarth**'s technology team is one of the key groups within Corrs pursuing India-related work. The firm represents a corporation which has been engaged to build a significant infrastructure technology system for the state of Victoria, in relation to its subcontracting arrangements with an Indian technology company. The firm is also working with State Bank of India on the restructuring and refinancing of the Abbot Point Coal Terminal. The restructuring includes a partial refinancing by a syndicate of lenders and complex priority arrangements being agreed with the syndicate in relation to the project.

Southeast Asian law firm **DFDL** has a dedicated India desk focusing on Indian outbound investment into Southeast Asia, South Asia and beyond. Its India team comprises nine members led by senior adviser Vinay Ahuja with support from partners and associates in Singapore, Bangaldesh, Cambodia, Thailand, Myanmar and Vietnam. The firm recently advised Birla Lao Pulp and Plantation – an

Aditya Birla Group company – on its pulp plantation project expansion in Laos and associated legal, tax and IP issues. DFDL has also advised Tata International on expansions in Laos and Cambodia; Export-Import Bank of India on a US$2 million loan to a Vietnamese coffee manufacturer; PepsiCo India on its setup and IP issues in Bangladesh; and Khamin Development (an Indian hospitality company) on its bid for a Thai development company in the hospitality sector. "Their experience in the Mekong region is quite superior to the others and this was evident with the services they provided to us," says a client at a large Indian multinational company. "We are not their regular clients ... but given a chance (in due course) we see them as good partners in our progress."

Offshore law firm Harney Westwood & Riegels (known as **Harneys**) practises BVI, Cayman, Cyprus and Anguilla law through offices around the world. It has 30 partners and focuses on corporate matters, funds, finance and litigation. The firm has joined forces with Mauritian law firm BLC Chambers to offer clients access to a greater array of legal and corporate services. The firm's India desk operates from London where lawyers assist with the setting up of BVI or Cayman investment funds, advise banks and financial institutions on lending arrangements and create trusts and other wealth management structures.

Heuking Kühn Lüer Wojtek has been involved in several Indo-German deals in the past 12 months, particularly in the vibrant mid-market segment. Its core practice areas for India-related work are corporate, M&A, IP, and media and technology. The firm advised Neumayer Tekfor Group on its sale to Indian automotive supplier Amtek Auto; advised a German shipping company on the sale of its shareholding in an Indian joint venture company involved in logistics and port operations; and acted for a German transport and logistics company on the formation of a joint venture with Jindal Group for the operation of two terminals at Khor Al Zubair harbour in Iraq. In addition, one of Heuking's senior partners has acted as an arbitrator in an International Chamber of Commerce arbitration on monetary claims connected with the establishment of an industrial plant in Agra. Marion Welp, senior vice president and head of group legal and compliance at Esprit, says "Heuking is always pragmatic, quick, reasonable and with an amazing

> Heuking is always pragmatic, quick, reasonable and with an amazing understanding of our business
>
> Marion Welp
> Senior Vice President and Head of Group Legal and Compliance
> Esprit

understanding of our business". She recommends Rudolf du Mesnil, "who took care of the whole organization of the legal matters with his Indian lawyers … it was easy to explain to him what kind of legal situation I would like to achieve under German standards, and he implemented everything accordingly. This made my life much easier."

Inventus Law wins praise from clients for its expertise and client service. "I feel with his India experience and knowledge of the Indian Companies Act and appreciation for Indian business culture, Anil Advani provides a unique blend of India and 'big law firm' experience (having worked at global law firms like Orrick Herrington & Sutcliffe and Cooley Godward), with the personal and responsive touch of a boutique law firm," says Vinod Kumar Menon, the general counsel at Accel Partners in Bangalore. Menon also praises Inventus' pricing model with a "greater emphasis on value-driven fixed fee arrangements". The firm assisted Willow TV on structuring its global cricket licensing business and strategic relationships; advised Myntra on its acquisition of US-based Fitiquette; and represented Singapore-based Graphic Media on an India-related venture financing, strategic licensing and partnership agreements, employment and other corporate matters. "I have worked on transactions where Inventus Law has been on the other side representing the companies Accel has invested in, and I have always been impressed with their legal acumen, integrity, work ethic, hard work and ability to get parties together on complex business and legal issues," adds Menon.

Anil Advani provides a unique blend of India and 'big law firm' experience … with the personal and responsive touch of a boutique law firm

Vinod Kumar Menon
General Counsel
Accel Partners

Tokyo-based **Kojima Law Office** trains Indian lawyers as part of its ongoing training programme and one of its associates, Hirokazu Amemiya, has spent time training with Indian law firms Economic Laws Practice and J Sagar Associates. The firm's veteran practitioners, such as Hideki Kojima and Hiromasa Ogawa, have handled Indo-Japanese transactions for years, advising on investments in Japan and India, joint venture contracts, technical collaboration agreements, acquisitions under India's Sick Industrial Companies (Special Provisions) Act, Securities and Exchange Board of India regulations, India's Companies Act, and assisting with government licences and approvals.

Offshore law firm **Maples and Calder** won the role of BVI adviser to Jindal Steel & Power (Mauritius) on the merger of Jindal BVI with Canadian and Botswana-listed coal company CIC Energy. The firm opened a Singapore office last September in a bid to boost its Asia offerings.

Canadian firm **McCarthy Tétrault** has advised Indian clients in a host of industries on their expansion into North America. The firm works with Indian and Indian diaspora broadcasters and their North American agents on Canadian market entry including licensing, distribution and regulatory compliance. Media clients have included Aastha TV, ARY Digital, Channel Punjabi, India Today Group, Sahara Filmy and UTV Movies. In addition, the firm is counsel to La Coop fédérée, as a joint venture partner with Investissement Québec and Indian Farmers Fertiliser Cooperative Limited, in its investment in IFFCO Canada and is advising an India-based consortium on its development of a hydroelectric project in Georgia. Canadian and international clients have also turned to McCarthy Tétrault for advice on entry into India.

Mourant Ozannes advised long-standing client WNS (Holdings) on its public offering of American depositary shares (ADS) on the New York Stock Exchange (NYSE).

Rajah & Tann has been the best [for India transactions] given their knowledge on all elements of India centric investment products

Alok Nanavaty
Director
Commonwealth
Centrum Advisors

WNS is a global business process outsourcing company incorporated in Jersey, with a principal executive office in India and over 22,000 professionals in 25 delivery centres in India and elsewhere. The offering included an offer of new ADS by WNS and a sale of ADS by Warburg Pincus, WNS' largest shareholder. Mourant Ozannes previously advised WNS on its IPO in 2006, which made it one of the first Jersey companies with a primary listing on the NYSE.

Singapore firm **Rajah & Tann** features prominently in India transactions. The firm advised Equis Asia Fund on its investment in a DANS hydro project – one of the first private equity investments from an overseas fund in a hydro project in northeast India. Last October Rajah & Tann acted for Religare Health Trust Trustee Manager, the trustee-manager of Religare Health Trust (RHT), and Fortis Healthcare, the sponsor of RHT, in RHT's IPO on the Singapore Stock Exchange. "Rajah & Tann has been the best [for India transactions] given their knowledge on all elements of India centric investment products," says Alok Nanavaty, a director at Commonwealth Centrum Advisors in Hong Kong. This May the firm represented Pearson (Singapore) and Pearson Overseas Holdings in the acquisition by the former of 50% of the issued shares in Educomp Higher Initiatives from Educomp Asia Pacific. Prakash Pillai is an India expert and head of the firm's South Asia practice. Pillai is also the vice chairman of the Singapore Indian Chamber of Commerce and Industry and formerly an adjunct associate professor at the National University of Singapore teaching Indian business law.

Shook Lin & Bok has a thriving India practice led by Azmul Haque with the support of dispute resolution specialists Sarjit Singh Gill, Probin Dass and Debby Lim. The firm acted for a major Indian cooperative in an arbitration involving a US$75 million claim against a US-listed company; represented Bank of India, Singapore Branch (the facility and security agent for a syndicate of banks), in relation to a US$276.4 million term loan facility extended to Armada D1, a Singapore joint venture company; and acted

> [Stikeman Elliott has] provided excellent advice which is precise and very business-oriented and they have been able to adapt themselves to work with Indian firms in jointly advising Indian clients
>
> L Viswanathan
> Partner
> Amarchand Mangaldas

> For Mauritius, I believe Uteem Chambers to be the best law firm
>
> Ravi Dubey
> Senior Associate
> Luthra & Luthra

for a claimant that was awarded US$77 million in damages in an international arbitration involving a claim against an Indian mining company for breach of two contracts of affreightment.

Canadian firm **Stikeman Elliott** is a frontrunner for India work thanks to its relationships with top Indian companies such as Tata Steel and Essar Steel. Other clients have included ICICI Bank Canada, JSW Energy, Mittal Steel and DPF India Opportunities Fund. The firm recently advised Jindal Steel & Power on its C$116 million acquisition of CIC Energy, which is developing coal and energy in Botswana, and represented a Tata Steel joint venture in its strategic joint venture agreement with Labrador Iron Mines. The parties will cooperate to develop a rail line through their respective properties in Labrador, Newfoundland; develop infrastructure at the new deep sea dock at the Port of Sept Iles; and consider potential off-take arrangements and the sharing of rail cars, repair facilities and mine camp accommodation. “I have had a fantastic experience working with Stikeman Elliott,” says L Viswanathan, a partner at Amarchand Mangaldas. “Largely, these were in relation to the Indian companies pursuing opportunities in the natural resources sector in Canada. They have provided excellent advice which is precise and very business-oriented and they have been able to adapt themselves to work with Indian firms in jointly advising Indian clients.”Amyn Abdula and Dee Rajpal and are co-leaders of Stikeman Elliott’s India practice.

Fellow Canadian firm **Torys** is equally focused on serving energy-focused Indian clients seeking acquisitions and investment in Canada’s energy sector and the industries that support or supply it. Torys enviable client list includes Hindalco Industries, Essar Steel Algoma, ArcelorMittal and Novelis. Torys advised Gujarat State Fertilizers & Chemicals on its C$45 million strategic investment in Karnalyte Resources in January through a private placement and off-take agreement for the purchase of potash from Karnalyte’s Wynyard Carnallite Project. In addition, it advised ArcelorMittal on the restructuring of its joint venture arrangement with Baffinland Iron Mines Corporation. Patricia Koval is the co-founder and co-chair of the India group.

Mauritius law firm **Uteem Chambers** is a popular choice for Indian clients, particularly for finance mandates. More than 80% of the firm’s practice involves advising international financial institutions, multilateral development banks, inter-governmental organizations, institutional investors and merchant banks. Uteem’s lean team of seven includes lawyers qualified in Mauritius, England and Wales, Malaysia and Bangladesh, with proficiency in French, Cantonese, Mandarin, Malay, Hindi, Urdu and Bengali. Ravi Dubey, a senior associate at Luthra & Luthra, says "For Mauritius, I believe Uteem Chambers to be the best law firm". He appreciates the firm's professionalism and "constant focus on promptness and improving client service." The firm was Mauritius counsel to Tiger Veda Bharat and Tattersalls, the shareholders of BSCPL Infrastructure, for BSCPL's listing to raise US$120 million, and advised on restructuring closed-end funds and collective investment schemes investing in securities or debt instruments managed by Kotak Mahindra (UK).

Robert Appelbaum leads the India practice at South African firm **Webber Wentzel**, advising Indian companies on their on their investments in South Africa and other parts of the continent. His clients have included Dr Reddy's Laboratories, ICICI Bank, Jindal Steel & Power, Infosys, JB Chemicals, JSW Energy, Kalpataru India, L&T Infotech, Lupin India, Tata Motors and Matrix Laboratories. Last December, Webber Wentzel announced a collaborative alliance with Linklaters, giving it access to the magic circle firm's 4,500 professionals across 28 offices worldwide. Linklaters' India clients can also profit from the legal knowledge now available to them across Africa through Webber Wentzel.

Werksmans, another South African firm, has handled an interesting array of matters for Indian clients. In the past 12 months, the firm has advised on three renewable energy (photovoltaic) projects, each worth at least US$110 million, for SunEdison, which has its regional head office for emerging markets in India. Other Indian clients included Nihilent and the Ritnand Balved Foundation. Indian companies with African aspirations can profit from Werksmans' affiliation with the Lex Africa network of law firms, which has members in 24 African countries. Werksmans' core strengths are corporate law including M&A, company law, tax, labour law, competition law, banking and finance.

Rachel Eng, Andre Maniam and Kah Keong Low drive Singaporean firm **WongPartnership**'s India practice. The firm specializes in M&A, joint ventures, real estate and hospitality-related investments and strategic alliances. It also supports capital raising efforts by Indian clients. WongPartnership is keen to handle disputes and India-related arbitrations seated at the Singapore International Arbitration Centre and the International Court of Arbitration as well as in Singapore courts. The firm acted for Stamford Tyres Corporation on setting up Falken Tyre India, a joint venture with Sumitomo Rubber Asia (Tyre), an Asian sales subsidiary of Sumitomo Rubber Industries. It also assisted Mahindra Satyam and SBI Hong Kong Holdings with their inaugural US$50 million joint fund aimed at investing in information and communication technology companies globally.

The firms to watch category is a mixed bag. Some of the firms have slipped in the rankings due to the loss of key India partners or a slowdown of India-related deals, while others are new to this area and keen to increase their footprint and serve Indian clients.

Among these firms, **Anderson Mori & Tomotsune** advised on Nippon Life Insurance Company's investment in Reliance Capital Asset Management and the acquisition of Netmagic Solutions by NTT Communications.

Go Airlines, Komli Media and Axis Bank are clients of **Berwin Leighton Paisner**, which has also represented Indian outsourcing companies on transactions in the UK and elsewhere and an Indian company on the sale of a majority stake to a third party. The firm's "expertise is unmatched" and it has "a wonderful and dedicated team who puts in countless hours to ensure we met our deadlines," says one Indian client. He adds that Tom Budgett and Jamie Wiseman Clarke "drove the documentation in a very cordial and effective manner" and that under Budgett's leadership "it is an unbeatable combination".

Offshore law firm **Carey Olsen** provides ongoing Jersey

Firms to watch
Akin Gump
Anderson Mori & Tomotsune
Berwin Leighton Paisner
Carey Olsen
Chadbourne & Parke
Clayton Utz
Covington & Burling
Cramer-Salamian
Cravath Swaine & Moore
Debevoise & Plimpton
Dentons
Duane Morris & Selvam
Eakin McCaffery Cox
Fichte & Co
Foley Hoag
Foley Lardner
Frost Brown Todd
Gianni Origoni Grippo Cappelli & Partners
Hassans
Ince & Co
Kelley Drye & Warren
King & Spalding
King & Wood Mallesons
Lexincorp
Nagashima Ohno & Tsunematsu
Saravia & Munoz
Sidley Austin
Skadden
Squire Sanders
Stephenson Harwood
Sullivan & Cromwell
Thompson & Knight
TLT
Weil Gotshal & Manges
Wragge & Co

legal advice to Vedanta in connection with a Jersey subsidiary. The firm has developed a dedicated Indian team made up of partners Greg Boyd (BVI), Anthony McKenzie (Cayman Islands), Tom Carey (Guernsey), and Alan Stevens (Jersey). Stevens is a former Linklaters partner who handled significant Indian business during his time at the firm.

Australian firm **Clayton Utz** acts for Indian investors looking at targets in Australia, including companies hunting for resources. The firm has worked with Adani Corporation in relation to its US$6 billion Carmichael Coal Project; International Coal Ventures on its potential acquisition of coal projects in Australia; and JSW on its coal projects in Queensland.

Cramer-Salamian's Dubai office has advised corporate clients from multinational corporations to family run businesses on India inbound and outbound investments and the effective use of double taxation avoidance treaties for tax mitigation. The firm has advised an Indian ultra high net worth individual on the structuring of a UAE-based private equity vehicle for African investment purposes.

Debevoise & Plimpton combines the "sophistication, responsiveness, and project management of a top-tier global law firm … with strong knowledge of local law and strong relationships with local law firms," according to one happy client who has worked with the firm for five years on fund formation and transactional work. "We have worked with about half a dozen global law firms on Indian matters; Debevoise is clearly the strongest," he says. The firm's Geoff Burgess is commended for being "particularly strong in his ability to lead complex transactional negotiations", while John Anderson is described as "one of the few attorneys that can synthesize the complexity and ambiguity of Indian tax matters into actionable advice". Aditya Birla Group, Morgan Stanley and Providence Equity Partners are clients.

Duane Morris & Selvam poached India specialist and capital markets expert Jamie Benson from Dorsey & Whitney. Benson, who co-heads the firm's India desk, has worked on more than 30 offerings by Indian issuers in the past eight years, including equity offerings by TBZ, Dhanlaxmi Bank, ING Vysya Bank, Ashoka Buildcon, Ramky Infrastructure, IBN18 Broadcast, Central Bank of India, Bank of Baroda, Jagran Prakashan, HT Media (Hindustan Times), IDFC, Allahabad Bank and Yes Bank. Duane Morris & Selvam is currently advising an Indian bank on setting up a Singapore-based fund for investing into India and has worked on patent and litigation matters for US subsidiaries of Indian generic drug manufacturers.

Australian firm **Eakin McCaffery Cox** focuses on litigation, IP, mining, power generation and infrastructure. It is currently advising on a million-dollar damages claim against the Indian government. Over almost two decades of litigation, many members of India's senior bar have been retained on this matter and associated cases.

Dubai-based **Fichte & Co** has acted for ship owners, operators and traders in India who have a presence in the UAE or have trade interests in Gulf Cooperation

Council countries. The firm is advising an Indian shipping company on civil and criminal proceedings before UAE courts; assisting a subsidiary of a major Indian shipping company in a commercial dispute; and filing an arbitration proceeding in London to recover damages resulting from an off-specification cargo of iron ore loaded from Indian mines.

Foley Hoag is known for its expertise on fund formation and private equity investments. "They have been a pleasure to work with," says Alok Nanavaty of Commonwealth Centrum Advisors in Hong Kong. They are "extremely prompt and totally professional in all elements of the relationship." Foley Hoag has acted as US counsel to Bay Capital Partners on its suite of India-focused investment funds; advised the Pragnya Group, a real estate investment company focused on India, in connection with its investment fund; and represented International Data Group as the sponsor and lead investor in IDG Ventures India, a family of funds formed under Mauritius law with India-based management for the purpose of investing in IT companies in India. "Meridith Haviland is a great resource as she not just can advise on the present but is also able to provide guidance in a futuristic and instinctive manner," adds Nanavaty.

Foley Lardner has served Indian clients on a variety of matters over the past 12 months. It has assisted Global Green USA in working with the Food and Drug Administration and the Environmental Protection Agency to secure the release of imports of pickles and pickle products from India. It has also represented employees of an Indian-based worldwide business technology company in federal grand jury and related investigations concerning immigration matters. Daljit Doogal is recommended for "his knowledge and connections".

[Frost Brown Todd] had to understand similarities between cooperative and community banks in India and the US to understand our technology offerings … They were very hands-on [and] thorough
Mandar Agashe
Founder
Sarvatra Technologies

Mandar Agashe, the founder of Sarvatra Technologies in Pune, approached **Frost Brown Todd** for advice related to expanding its business in the US midwest. "They had to understand similarities between cooperative and community banks in India and the US to understand our technology offerings to this sector and build suitable legal contracts," explains Agashe. "They were very hands-on as well as thorough in their work. They spent considerable amounts of time to understand our exact needs before engaging the correct lawyers to help us." Agashe singles out Joe Dehner for "his vast global experience" and applauds the firm's "deep domain expertise".

Italian firm **Gianni Origoni Grippo Cappelli & Partners** specializes in M&A and commercial matters and dispute resolution. The firm is representing Bharat Petroleum in its litigation for a credit recovery of US$21 million against Alitalia and acted for Italian company Rotair on the sale of the company to Coimbatore-based ELGI Equipments.

Ince & Co offers advice on shipping and offshore energy matters, including major shipping casualties, and works with Indian law firms to provide advice on English law. The firm has offices in Beijing, Dubai, Hamburg, Hong Kong, Le Havre, London, Monaco, Paris, Piraeus, Shanghai and Singapore.

Nagashima Ohno & Tsunematsu has advised companies from Japan on a spate of investments including the purchase of an Indian IT company, the setup of a cosmetics joint venture in India and the purchase of additional shares in an Indian insurance company. The firm currently has four associates training or working at Indian law firms and at Indian companies with a Japanese affiliation.

Skadden's India client list includes GMR Group, 3i Infotech, Kotak Mahindra, Enam Securities, ICICI and Lupin. The firm acted for UBS Investment Bank and Deutsche Bank Securities as lead underwriters in the US$100 million IPO of Amira Nature Foods (UAE). Skadden recently advised Mylan on its US$1.6 billion acquisition of Agila Specialties from Strides Arcolab and advised Rain CII InsCarbon, a subsidiary of Rain Commodities (India), on its US$914 million acquisition of RÜTGERS, a German manufacturer of specialty chemicals.

Thompson & Knight represented Oil India on its purchase of a 20% working interest in the Niobrara shale assets in Colorado of Carrizo Oil & Gas. The firm's litigation team recovered US$1.2 million from Houston-based Petroleum Pipe Americas for breaching a contract with Indian company Jindal SAW. The case was heard at the US District Court for the Southern District of Texas.

TLT's finance experience has attracted the likes of Bank of India, State Bank of India, Bank of Baroda, ICICI Bank and Punjab National Bank (International). The firm advised Bank of Baroda, Bank of India and Export-Import Bank of India on several high-profile transactions in the past 12 months. TLT also advised Bank of Baroda London on a working capital facility for Gujarat NRE Coking Coal. Richard McBride, Richard Tall and Annette Newport are key practitioners for India-related assignments.

Weil Gotshal & Manges has won new clients such as Summit Partners and Advent International and further developed its relationships with clients such as Baring Private Equity Asia and Providence Equity Partners, which has led to the expansion of its India-related work. The firm recently advised Decision Resources Group on its US$635 million sale to Piramal Healthcare and advised Providence Equity Partners on its purchase of Hathway Cable and Datacom, a publicly listed cable TV and internet provider in India. ■

Foreign airline investment takes off with Etihad deal

By Nimish Vakil, and Sneha Rao
Tyabji Dayabhai

TD
TYABJI DAYABHAI
(Established 1872)

Lentin Chambers
Dalal Street
Mumbai - 400 001
India
Tel: +91 22 2265 0342
Fax: +91 22 2265 8209
Email: nimish.vakil@tyabjidayabhai.com

Within just seven months of the government of India permitting foreign direct investment (FDI) by foreign airlines in the Indian aviation sector, Etihad, Abu Dhabi's flag carrier, has struck a deal to buy a 24% stake in India's foremost airline, Jet Airways.

Jet was among the first to enter the aviation sector when India's skies were opened up to private operators in the early 1990s. Now it has again taken the initiative to forge the first partnership between an Indian and a foreign airline – a partnership that will certainly benefit Etihad, Jet, airport infrastructure and passengers in general.

Mutual benefits

The capital infusion from Etihad will enable Jet to achieve sustainable profitability. Jet can use the sale proceeds to repay its huge debt and may even consider adding to its expansion plans, especially in the Middle East. It will be able to widen its network through "code share" alliances, whereby a seat purchased from one airline is on a flight operated by a cooperating airline under a different flight number or "code". Jet will also be looking to decrease operating costs by sharing engineering and airport services. It may also consider changing its hub to Abu Dhabi to enable it to buy fuel at cheaper prices.

Etihad on the other hand will be able to tap into India's fast growing travel market, which provides huge passenger traffic to Etihad's Middle Eastern, European and North American destinations. This will further enhance the airline's already strong and strategically well placed international presence, partly owing to its minority stakes in four other global airlines.

Together, Jet and Etihad will benefit from synergies and cost savings in areas including fleet and operations maintenance expansion, product development and training. Further advantages include opportunities for joint purchasing of fuel, spare parts, equipment and external services such as insurance and technology support.

Other gains

The alliance will bring additional traffic and revenues to tier II and III airports as well as to metro airports. This will boost growth in airport infrastructure and services as Etihad is expected to bring with it service practices on par with global standards.

Passengers will benefit from lower fares, better regional connectivity and a far greater choice of destinations. Investments in the Indian aviation sector could be on the rise as a result of the Jet-Etihad deal and others to follow.

Repercussions

How is this affecting Air India, India's national flag carrier, which has an operating deficit of about US$2.6 million a day and reported a loss of about US$1.4 billion for the financial year ended in 2012? When the cream of Air India's international revenue comes from its operations in the Gulf region, the Indian government on one hand is permitting a deal that will move passenger traffic from major Indian hubs to Abu Dhabi and on the other hand infusing funds into Air India to keep it afloat.

The long-term effect of such deals needs to be carefully evaluated by the Indian government. With a huge increase in the bilateral arrangements between India and Abu Dhabi and with Dubai and Qatar in the queue, is India helping Etihad, Emirates and Qatar Airways fortify international hubs at Abu Dhabi, Dubai and Doha at the expense of Mumbai and New Delhi and destroying its national carrier, Air India?

Conclusions

The Jet-Etihad deal could bode well for other private Indian airlines looking to partner with foreign carriers, such as Emirates, which is likely to face increased competition and therefore to seek a local partner in India. Other private Indian carriers also may see no choice but to strike similar alliances or risk losing seats on international routes.

Before embarking further on permitting FDI in the aviation sector, it would be prudent for the Indian government to focus on formulating and implementing a new national aviation policy, covering wide ranging issues including FDI, amendments to the Aircraft Act,1934, amendments to the Civil Aviation Requirements and regulations for implementation of the Cape Town Convention (which has now been ratified by India).

It is important for the government to ensure through its regulatory framework and policy formulation that Indian carriers do not lose control of flights and routes to and from the country as result of liberalization.

If the investment by Etihad in Jet is a trend-setter for the likes of Emirates and Qatar Airways looking to invest in Indian carriers, will it be a win-win situation for the partnering airlines as well as the Indian aviation sector as a whole or will the Indian aviation sector find itself in the hands of Etihad and others?

Nimish Vakil and Sneha Rao are both partners at Tyabji Dayabhai. Tyabji Dayabhai was established in 1872 and has over 25 years' experience in handling all types of aviation transactions and litigation.

Progress on India-Canada nuclear cooperation accord

Bennett Jones

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

By Raj Sahni, Bennett Jones LLP

India has announced plans to establish 12 new nuclear power reactors by 2021 to help meet its industrial growth and burgeoning energy needs. It has been estimated that such an increase in nuclear energy capacity will require some 1,500 additional tonnes of uranium each year.

Canada is uniquely positioned to work with India in helping to meet this demand. Canada is the world's second largest producer of uranium (after Kazakhstan) and produces over 10,000 tonnes of uranium per year, accounting for approximately 30% of annual global uranium production. This Canadian uranium is produced almost exclusively in Canada's mid-western province of Saskatchewan, which exports some 8,000 tonnes of uranium per year to nuclear facilities in the United States and other parts of the world.

Saskatchewan is already one of Canada's largest exporters to India (including lentils and other pulses and agricultural products) so economical shipping and trade routes are well established. In addition, Canada has several significant new uranium mines that are expected to be ready to start production within the next couple of years, further boosting Canada's uranium export capacity.

History overcome

While nuclear collaboration between Canada and India has had a troubled history – Canada ended nuclear trade with India in 1976 when India tested its first nuclear bomb using plutonium from a Canadian test reactor – economic and bilateral relations between the two countries now are at a record high. Both governments have made nuclear cooperation a renewed focal point of their trade and economic partnership discussions.

Indeed, a strong case can be made for the nuclear agenda to be front and centre in the new relationship between India and Canada. India's unprecedented and burgeoning demand for electricity is currently undersupplied, even with more than 205,000 megawatts of electricity in production. The majority of that electricity is currently produced from non-renewable sources such as coal, gas and oil, and the focus of the government's energy policy is to shift as much new production as possible to renewable and more environmentally friendly energy sources.

India's plan to establish 12 new nuclear power reactors within the next decade is a key part of that energy policy.

Can do CANDU

Many of India's existing nuclear facilities (including those designed and constructed by India) are based on Canadian CANDU nuclear reactor technology from the earlier period of collaboration between Canada and India, and India's nuclear scientists and engineers are therefore proficient in CANDU technology. This, coupled with Canada's abundant supply of uranium, makes the nuclear agenda between India and Canada a natural part of the renewed economic partnership between the two countries.

A formal agreement on nuclear cooperation between India and Canada, titled the Agreement for Cooperation in Peaceful Uses of Nuclear Energy, was signed more than two years ago, but its implementation has lagged as governmental agencies work through details.

In November of 2012, during a visit by Canadian prime minister Stephen Harper to India, prime ministers Harper and Manmohan Singh announced that they had made significant progress in clearing the final hurdles, including arrangements for the International Atomic Energy Agency (IAEA) to monitor the use of uranium to ensure non-proliferation beyond peaceful uses.

Step forward

This April marked an important step towards full implementation of the India-Canada Nuclear Cooperation Agreement. In early April, India's Department of Atomic Energy and the Canadian Nuclear Safety Commission announced that they had finalized arrangements allowing for the export of nuclear equipment and fuel from Canada to India for energy use.

These arrangements are an important milestone as they will allow Canadian companies to export controlled nuclear equipment, technology and materials (including uranium) to India for energy (and other peaceful uses) in accordance with Canada's nuclear non-proliferation policy and under safeguards applied by the IAEA.

The insertion of IAEA monitoring and safeguards will also give Indian companies comfort that neutral and globally accepted standards will be employed and should help India gain broader acceptance as a significant player in the global nuclear power sphere.

As discussions between India and Canada on an overall economic partnership continue to make significant headway, it is interesting and heartening to see that a decades old dispute between the two countries on the nuclear issue has given way to a renewed friendship and spirit of cooperation.

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

The skyscraper debacle: ruling on Palais Royale

By Vivek Vashi and Prakritee Yonzon, Bharucha & Partners

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

Palais Royale at Worli, which is planned to be Mumbai's tallest building, has attracted a lot of attention not only in Mumbai but all over India. The 320-metre, 56-storey skyscraper, showcasing more than 100 apartments, defines Mumbai's skyline and has achieved a first for India in Leadership in Energy and Environmental Design certification.

However, the legality of Palais Royale and its adjacent public parking lot (PPL) has been challenged in a public interest litigation (PIL) filed by a non-governmental organization by the name of Janhit Manch. The PIL has brought into the limelight the complex legal and factual matrix that is involved in the construction of high-rise buildings.

Facts of the case

In the case of *Janhit Manch and another v State of Maharashtra and others*, the petitioners sought to challenge the approvals and commencement certificates in respect of the building and PPL and also sought a writ of mandamus for the demolition of additional floors of the residential building. The petitioners also raised various issues regarding the refuge area and the resulting additional floor space index (FSI), the set-back areas, passages, structural columns, amenity floors and servants' toilets.

The petitioners' case was that: (a) the PPL was illegal as it had been constructed without a commencement certificate; (b) the FSI was manifestly illegal as the refuge area was 72.2% of the total habitable built-up area, whereas the Development Control Regulations (DCR) allow a maximum of 4%; (c) with respect to the other structures, incentive FSI had been misused and the structures had been constructed contrary to the DCR and the relevant notifications in the regulations.

Court's findings

The court rejected the respondent's preliminary objection that there was no public interest involved, holding that such legal issues concern several cases of multi-storey buildings in Mumbai. The case was accordingly examined on merits.

In an astounding judgment, the court held that the PPL was not illegal by upholding the principle of equity recognized in section 51 of the Maharashtra Town and Regional Planning Act, 1966. Under this section, the Municipal Corporation of Greater Mumbai ought not to invoke its power once the work has "substantially progressed", even though the builders, Shree Ram Urban Infrastructure, sought to continue on the basis of deemed permission.

The court further held that the 900 parking spaces of the PPL had been constructed in accordance with the sanctioned plans, despite the absence of a commencement certificate, and that the PPL was to be handed over to the corporation free of cost and for the use of general public. The respondent was entitled to use incentive FSI.

With respect to the main residential building, the court did not think it necessary to intervene and issue a drastic order of demolition, on the ground that the construction beyond the 46th floor exceeded the commencement certificate that had been issued, as the building plans had been sanctioned up to the 56th floor.

The court also observed that the refuge area, and the additional FSI that can be gained from it, was excessive and directed the municipal commissioner to carry out the necessary calculation. The commissioner was directed to determine the factual position in relation to the set-back areas, passages, structural columns, amenity floors, servants' toilets, and the need to obtain a no objection certificate from the high-rise committee, in six weeks from the date of the judgement, in order to resolve the issues brought to light in the case. The builder was given the right to be heard before the commissioner decided the matter.

Analysis and impact

To appreciate the judgment, it is important to note and differentiate the multiple facets involved. While the court graciously accepted the petitioner's locus to file the PIL, it also narrowed the ambit of the PIL by delegating the onerous issues to the commissioner. While this may be seen as a reasonably smart move in light of the technicalities and intricacies involved in the calculation of incentive FSI, permitted height of structural columns, set-back areas, etc., the court's hesitance to intervene and rule that the builder had not obtained the required permissions or approvals reflects not only the complicated factual and legal matters involved in the case, but also the intertwining of the judicial and executive powers in cases of construction of high-rise buildings.

Although the court may have tried to avoid overstepping the executive in exercising its functions, this should not be seen as a green signal by builders, to proceed with construction without the required approvals or sanctions until their actions are brought to the attention of the authorities concerned. With the pace at which the Mumbai skyline is rising, obtaining permissions is a small price to pay in contrast to the potential overlapping of the functions of authorities.

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

The new act: A boost for the food processing sector

By Sidhartha Srivastava and Gurmeet Kainth, DH Law Associates

D. H. LAW ASSOCIATES
ADVOCATES & SOLICITORS

Mumbai
111, Free Press House
Free Press Journal Road
215, Nariman Point,
Mumbai - 400 021
T: +91-22-6625 2222
F: +91-22-2285 5821

Delhi
510, 5/F DLF Tower – A
Jasola
New Delhi – 110 025

T: +91 11 6464 9865
F: +91 11 2652 1415

Email: contactus@dhlawassociates.com

India's fast growing food processing sector has triggered a significant increase in litigation and corporate commercial work over the past few years. The Federation of Indian Chambers of Commerce and Industry expects the sector to expand from US$40-50 billion to US$300-350 billion by 2020.

In August 2011, the numerous laws that govern the sector were replaced with the Food Safety and Standards Act, 2006, (FSSA). However, even two years after it was introduced, the FSSA is still in implementation stages with some of its provisions currently under review.

Understanding the new law

Differences between the FSSA and one of the main acts it replaced, the Prevention of Food Adulteration Act, 1956, (PFA) are detailed below:

Definition of food: The FSSA defines food as any substance intended for human consumption, whether processed, partially processed or unprocessed. It includes primary food as defined in section 3(ZK) of the act, genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used in food during its manufacture, preparation or treatment.

The PFA defined food as any article used as food or drink for human consumption other than drugs and water. It had included any article which ordinarily enters into, or is used in the composition or preparation of, human food, any flavouring matter or condiments.

Authority: The FSSA provides for the Food Safety and Standards Authority of India (FSSAI) as a single statutory body for food laws, standards setting and enforcement. Food safety is also regulated by a technology and scientific committee, central advisory committee, representatives of the food industry, consumers, farmers and retailers.

Statutory authorities for food laws under the PFA were the Central Committee For Food Standards, Central Food Laboratory, food inspectors, etc.

Licences: Under section 31 of the FSSA all food business operators need a licence or registration issued by a local authority. Temporary stall holders are exempted from this, but are required to get their business registered with the panchayat or local municipality.

Novel food, genetically modified food, etc: While the PFA set no limit on vitamins, minerals and other nutrients, such foods have been defined for the first time under section 22 of the FSSA.

Food recall: The FSSA allows for the removal of unsafe food from the market to minimize and prevent injury to consumers. It can be initiated voluntarily by the manufacturers and distributors or by the food authority. The PFA did not provide for recall of food.

Improvement notice: While the PFA was silent on this, the FSSA states that a designated officer may serve an improvement notice on a food business operator who fails to comply with the act.

Prohibition of import: The PFA prohibited import of adulterated or misbranded food. The FSSA similarly prohibits import of food which is unsafe, misbranded, sub-standard and that which contravenes any provisions of the act.

Advantages of the FSSA

The enactment of the FSSA and the introduction of food audits, improvement notices and food recall procedures make India's food laws at par with those in the US, the UK and the European Union.

While introducing laws for packaging and labelling, the FSSA imposes restrictions on food advertisements. It also prohibits unfair competition in food and provides for special courts and the Food Safety Appellate Tribunal to expeditiously hear food-related cases. This is a relief for companies and food business operators.

Keeping pace with change

The food authority issues guidelines to keep pace with developments in international food safety. One recent guideline pertains to the approval of food products. Though the new guideline does not contemplate major changes from regulations previously in force, it has streamlined the classification of ingredients of products into the following:

- Food products where safety of ingredients present are known and permitted under FSS Regulation, 2011/Codex and other regulatory bodies like EU/FSANZ/USFDA, etc.
- Food products where safety of ingredients present are known and permitted under FSS Regulation, 2011/Codex and other regulatory bodies like EU/FSANZ/USFDA, etc. and the food product contains plants or botanicals or substances from animal origin.
- Food products where safety of the ingredients is insufficient to make a safety determination.
- Food products where safety of ingredients and their conditions of use are prescribed/standardized or permitted by the FSSAI.

The new guidelines are at: www.fssai.gov.in/Portals/0/Pdf/ProductApproval%2817-05-2013%29.pdf

The FSSA is a step forward for the food industry and consumers. However, the new regime is still at a nascent stage and its effectiveness will depend on how the FSSA is implemented.

Sidhartha Srivastava and Gurmeet Kainth are partners at DH Law Associates.

Africa-bound investment: New globalization pattern

By Gautam Khaitan and Nidhi Mathur, OP Khaitan & Co

O.P. KHAITAN & CO.
SOLICITORS & ADVOCATES

Khaitan House
B-1, Defence Colony, New Delhi - 110 024, India
Tel: +91 11 4650 1000
Fax: +91 11 2433 7958, 4155 1590
Email: gkhaitan@opkhaitan.com
arihant@opkhaitan.com
Website: www.opkhaitan.com

Africa is among the world's most rapidly growing economic regions, emerging relatively unscathed from the global economic crisis. India is Africa's fourth-largest trading partner behind the EU, China and US, and a significant investor in the continent. It is estimated that more than 200 Indian companies are doing business in Africa across sectors.

Trade between India and Africa goes back to the 16th century when Indian traders sailed to the east coast of Africa in search of mangrove poles, elephant tusks, gold and gemstones. During the colonial period, many Indian immigrants were brought in to work on the railways in East Africa, and on sugar and other plantations in Mauritius, Madagascar and southern Africa.

Natural synergy

As emerging economies, India and Africa have a lot in common – rich natural resources, similar demography and large domestic markets. This provides a natural synergy for building partnerships. The relationship between India and Africa has been marked by mutual respect and sensitivity to shared compulsions and developmental needs.

India has significantly increased its economic and diplomatic footprint in Africa. India's style of doing business with Africa is multi-pronged and has gained momentum; it aims at increasing trade volumes and investment, alongside developmental activities. Bilateral trade between Indian and Africa has risen from US$3 billion in 2000 to about US$70 billion during the current financial year and is expected to touch US$90 billion by 2015.

Recent developments

Bharti Airtel's acquisition of 15 telecom operations in Africa for US$10.7 billion opened a new chapter in the history of the India-Africa relationship. India's annual foreign direct investment in Africa touched US$15 billion as some of its largest conglomerates have turned to Africa for their expansion and growth. Companies such as Tata, Vedanta, Godrej, and Jindal Steel & Power have lined up greenfield investments and Indian oil companies are geared to acquire oil and gas assets. The world's largest rose exporter, Karuturi, has also forayed in Kenya and Ethiopia.

India's engagement with African countries is driven mainly by the presence of natural resources and a search for new markets, supported by diplomatic initiatives and strategic partnerships. Apart from energy, Indian companies are investing in mining, telecommunications, agriculture, healthcare, pharmaceuticals, infrastructure and information technology. Many Indian manufacturers are also negotiating pacts to acquire back-end facilities in these sectors.

Nigeria, Angola, Algeria and South Africa have trade surpluses with India and account for 68.6% of the total Africa-India trade. Of India's top 10 trading partners in Africa, seven export oil to India. India has also executed bilateral investor protection and promotion agreements with Mauritius, Kenya, Ethiopia, Uganda and Ghana.

Mauritius offers investors a strategic platform for inbound and outbound Indian investments which is blended with institutional, cultural, geographical and geopolitical comfort. It acts as an ideal jurisdiction for locating a holding company mainly because of the following reasons: (i) uniquely favourable tax treaty with India; (ii) offers flexible choice of entities; (iii) effective tax rate is only 3% and no capital gains tax; (iv) corporate laws allow flexibility for repatriation of capital; (v) no exchange controls so repatriation of income is easy.

China story differs

While Chinese and Indian companies have similar interests in African markets, they function in different ways. Chinese companies operating in Africa are mostly state owned or controlled, while Indian ones are largely privately owned or are private-public partnerships. The Indian companies are less vertically integrated and prefer to procure both materials and labour from local governments.

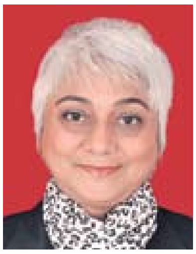
India has been seen as a counterbalance to China in Africa. Although investment is smaller in scale, a much longer historical presence of an Indian diaspora in Africa has enabled smoother and less controversial economic involvement in Africa than is the case for China.

While trade and investment between India and African countries are on a rise, India's trade relationships with Africa suffer from a few weaknesses. These include: (i) India's Africa policy lacks a strong and proactive diplomatic thrust; (ii) engaging with politically unstable yet resource-rich African countries could threaten India's interests in the long run and taint the perception of India's engagement with African countries; (iii) India sometimes appears to be emulating China's aid-for-resources strategy (by providing loans in exchange for access to the natural resources of African countries), which may not be the best long-term approach.

In the future, India could play increasingly important and diverse roles in all aspects of African life. Nevertheless, investors are advised to ensure that a detailed due diligence is conducted and proper strategies are formulated for complying with local government regulations and structuring finances.

OP Khaitan & Co is a 40-lawyer law firm, based in New Delhi. Gautam Khaitan is the firm's managing partner and Nidhi Mathur is a junior partner.

Impact of patent linkage on the healthcare industry



KRISHNA & SAURASTRI Associates

Mumbai | Delhi | Bangalore | Pune | Ahmedabad
Head Office: New Excelsior Building, 7th Floor, Wallace Street,
A.K. Nayak Marg, Fort, Mumbai – 400001 India
Dr Rachna Bharadwaj, Associate
Tel: +91 22 2200 6322 Ext 245
Fax: +91 22 2200 6326 / 66550607
Email: rachna@krishnaandsaurastri.com
Website: www.krishnaandsaurastri.com

By Dr Rachna Bharadwaj, Krishna & Saurastri Associates

The introduction of product patents for pharmaceutical products post 2005 had a tremendous impact on India's healthcare industry. Previously, the generics industry flourished and drugs were cheaper. The other factor impacting the healthcare industry is patent linkage, which delays the entry of generic drugs in the market. India's Supreme Court, in a landmark judgment in December 2010, disallowed patent linkages, upholding Delhi High Court's rejection of Bayer's petition seeking patent linkage in India for its anticancer drug Nexaver (sorafenib tosylate).

Patent linkage is a system linking drug marketing approval to the patent status of the originator's product, denying marketing approval to a generic version of a patented drug manufactured by a non-patentee prior to the expiration of the patent term, unless consented to by the patent owner.

Compulsory licensing and drug pricing of patented drugs could also impact access to healthcare. In a recent development the Intellectual Property Appellate Board (IPAB) passed an order on 4 March deciding on royalty to be granted by Natco to Bayer in relation to a compulsory licence. It will be interesting to see if the question of whether the IPAB overstepped its jurisdiction comes up when the case is heard in Bombay High Court.

Situation in US and EU

Some member states introduced patent linkage by a combined reading of article 28.1(a) and article 39.3 of the TRIPS (trade-related aspects of intellectual property rights) agreement. This requires a generics manufacturer to prove to the drug regulator that the drug for which it seeks market authorization is not covered by a valid patent, and prevents market approval for a drug while the original version of that drug is still under patent, unless by licence or assignment.

In the US, under what is known as the Hatch-Waxman Act (1984), the Food and Drug Administration provides marketing approval for pharmaceutical products. This act allows for speedier introduction of generic competition in exchange for limited periods of protection, increased rights for drug companies to recoup patent terms that have been shortened by clinical trials and regulatory delays, and a linkage system conditionally allowing registration of generic equivalents in the absence of patent claims.

In contrast, the European Union does not have a patent linkage system. A generics manufacturer can conduct testing and pre-registration activities during an eight-year exclusivity period and apply for marketing approval after completion of this period.

Situation in India

In India, the Drug Controller General of India (DCGI) gives marketing approval to drugs based on safety, efficacy and clinical trial data. The requirement of stating the patent status in form 44 is for the purpose of conducting bioequivalence studies. The DCGI is not required to look into patent validity.

In 2008 Bayer filed a writ petition against the DCGI and Cipla, stating that the DCGI had to consider the patent status of sorafenib tosylate before giving marketing approval to generic versions. The judgment of Delhi High Court in this case elucidates India's position on patent linkage.

Landmark case

Bayer based its arguments on section 2 of the Drugs and Cosmetics Act, 1940, which states that the act is in addition to and not in derogation of any "law for the time being in force", and section 48 of the Patents Act, 1970, which it interpreted as being the "law for the time being in force". Bayer contended that these two sections, read together, allowed for patent linkage and imposed a duty on the DCGI to look into the patent issue prior to granting marketing approval to drugs. This would exceed the statutory powers of the DCGI under the Drugs and Cosmetics Act.

Cipla rejected Bayer's claim, arguing that the DCGI's approval to Cipla on the basis of safety and efficacy could not be interpreted as infringement of Bayer's patented product.

Delhi High Court rejected Bayer's arguments, holding that no patent linkage regimen could be read into the existing legal provisions. The court observed that the Drugs and Cosmetics Act was a public regulatory measure for ensuring safety and efficacy of drugs, while the Patents Act provided private monopoly rights in favour of the inventor. The controller of patents evaluates the patentability of a product or process based on novelty and inventive step, and the DCGI grants market approval of drugs on the basis of safety and efficacy.

The court further observed that by establishing or decreeing a patent linkage as desired by Bayer, the court would not only make a policy choice, avoided by the parliament, but would overstep the interpretive boundaries.

The Supreme Court upheld Delhi High Court's judgment.

Experts believe that if patent linkage is allowed, it would affect the early entry of generic medication into the market, impacting access to drugs. In India patent linkage is now a settled issue, disallowing patent linkage.

Dr Rachna Bharadwaj is an associate at Krishna & Saurastri Associates and an advocate registered with the Bar Council of India.

Draft offshore wind energy policy, 2013: Will it work?

By Avirup Nag and Kaif Ahmed Siddiqui, Trilegal

TRILEGAL

New Delhi
A-38, Kailash Colony
New Delhi – 110 048
India
Tel: +91 11 4163 9393
Fax +91 11 4163 9292
E-mail: delhioffice@trilegal.com

Mumbai
One Indiabulls Centre,
14th floor, Tower One,
Elphinstone Road,
Mumbai – 400 013
Tel: +91 22 40791000
Fax: +91 22 40791098
Email: mumbaioffice@trilegal.com

India currently does not have any commercial offshore windfarms, but with a long coastline, the country has the potential to develop 1 gigawatt of offshore wind capacity, especially in states such as Tamil Nadu, Gujarat, Kerala, Karnataka and Goa.

Although the long-term prospects for offshore wind power are promising, the sector faces many challenges, particularly in terms of technology risk, evacuation risks (i.e. getting the power to a grid for distribution), impact on the local environment, lack of skilled personnel, shortage of appropriate auxiliary services (such as crane vessels), competition with other marine users, and multiplicity of clearances and approvals required from various government agencies. Therefore, if India wants to attract private investment to develop offshore wind power projects, it needs to put in place a robust policy framework that guarantees investor confidence.

This article analyses India's draft offshore wind energy policy to see if the framework proposed under the draft policy addresses the key issues that investors and project developers assess while considering an investment.

Salient features

In order to develop India's offshore wind sector, the Ministry of New and Renewable Energy (MNRE) has recently come out with a draft policy for the development of offshore wind energy. The draft policy aims to set up offshore wind projects in Indian territorial waters (i.e. up to 12 nautical miles from the coast) through private participation.

Under the draft policy, the MNRE would set up the National Offshore Wind Energy Authority (NOWA) to carry out initial wind resource assessment, allocate offshore blocks (through international competitive bidding), execute lease deeds with project developers, and assist the project developers with obtaining clearances for offshore wind projects. The draft policy also proposes to establish an Offshore Wind Energy Steering Committee to oversee the overall development of the offshore wind energy industry in India.

The draft policy further provides for fiscal incentives and concessions such as tax holiday for the first 10 years of offshore wind power generation and customs duty and excise duty exemption for procurement of technology and equipment. Service tax is proposed to be waived for services by third party consultants for the projects (such as conducting resource assessment, environmental impact assessment and oceanographic studies) and for the use of survey and installation vessels.

The power from the offshore wind projects set up under the draft policy would be sold to state distribution companies (or agencies nominated by the relevant state governments) at a regulated tariff to be fixed by the Central Electricity Regulatory Commission or the relevant state regulatory commission (as the case may be). Project developers would be required to construct the offshore evacuation infrastructure and the off-taker or designated state agency would provide the required onshore facilities for evacuating power from the offshore wind power projects.

Are the risks addressed?

In respect to addressing the key risk factors affecting development of offshore wind power projects, the draft policy has scope for improvement. While it aims to create a single window clearance for setting up an offshore wind power project (through the NOWA, which has a coordination role), the project developers are ultimately responsible for obtaining the required consents. Therefore in practice, the developers will end up visiting "multiple windows" for obtaining various clearances for their projects.

Further, the draft policy does not fully address issues related to creating reliable transmission and power evacuation infrastructure (both offshore and onshore). For project developers, having to bear sole responsibility to develop offshore transmission facilities may prove to be a disincentive. The MNRE should consider setting up separate offshore grid operators responsible for development and operations of offshore grids which feed in the electricity from multiple offshore wind projects to the onshore transmission system. This system is already used by Germany.

The high cost associated with development of offshore wind farms is a material concern, and although the draft policy envisages fiscal incentives (such as tax holidays and concession on payment of duties), these alone may not be sufficient incentives for investment in offshore wind power projects.

To provide fiscal incentives which help the bottom line and improve returns for the investors, the government should consider requiring the state electricity regulatory commissions to fix a minimum percentage of energy which distribution licensees must purchase from offshore wind projects until such time as offshore wind power achieves parity with onshore wind power.

Therefore, while the draft policy is a step in the right direction to tap the vast offshore wind potential, as to providing a simple and holistic policy framework governing the offshore power sector, there is certainly scope for improvement.

Avirup Nag is a counsel at Trilegal and Kaif Ahmed Siddiqui is an associate. Trilegal is a full-service law firm with offices in Delhi, Mumbai, Bangalore and Hyderabad.

How to choose the best way to protect a design in India

Singh & Associates
ADVOCATES AND SOLICITORS

N-30, Malviya Nagar, New Delhi -110017 India
Tel: +91 11 4666 5000, 2668 7993, 2668 0331
Fax: +91 11 2668 2883, 4666 5001
Email: newdelhi@singhassociates.in
Website: www.singhassociates.in

By Manoj K Singh,
Singh & Associates,
Advocates & Solicitors

The design of an article can be registered as a design, a trademark or a copyright. Three laws provide protection, each from a different perspective. Design owners need to understand this to maximize their protection from the commercial point of view.

Designs Act, 2000: As per section 2(d), "design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article, whether two or three dimensional or both, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye.

The term "design" does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trademark as defined in section 2(1)(v) of the Trade and Merchandise Marks Act, 1958, or any property mark as defined in section 479 of the Indian Penal Code, 1860, or any artistic work as defined in section 2(c) of the Copyright Act, 1957.

Trade Marks Act, 1999: As per section 9(3), a mark cannot be registered as a trademark if it consists exclusively of: (a) the shape of goods which results from the nature of the goods themselves; or (b) the shape of goods which is necessary to obtain a technical result; or (c) the shape which gives substantial value to the goods. A shape that does not fall into these categories can be registered as a trademark.

Copyright Act, 1957: Section 13 provides protection for the following classes of works: (a) original literary, dramatic, musical and artistic works; (b) cinematographic films; and (c) recordings. A design which is artistic in nature can get copyright protection.

Preventing misuse

The sections mentioned above show that designs are protected under the different intellectual property laws in India. The laws and the judiciary also ensure that the protection provided is not misused.

Under section 15 of the Copyright Act, as amended by the Copyright (Amendment) Act, 2012: "(1) Copyright shall not subsist under this Act in any design which is registered under the Designs Act, 2000. (2) Copyright in any design, which is capable of being registered under the Designs Act, 2000, but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his licence, by any other person."

Design owners have to be careful in applying for copyright protection as under section 15 the protection will cease once the article is produced more than 50 times.

Further, the Designs Act provides that anything which is defined as a trademark under the Trade Marks Act or any artistic work under the Copyright Act will not be considered a design under the Designs Act.

Important case

In *Samsonite Corporation v Vijay Sales* (1998), Delhi High Court dealt with the subject of confusion regarding the subject matter of design and copyright. The court addressed the effect of the absence of a specific meaning for work design, for the purposes of the Copyright Act. It held that since "design" was defined in the Designs Act the provisions had to be read together to decide the question.

The case dealt with the effect of non-registration of the design under section 15 of the Copyright Act. It was found that the design clearly fell within the definition in the Designs Act, and within the meaning of the Copyright Act, so the plaintiff could not claim copyright protection with reference to the drawings.

In relation to users of an international design, it was ruled that that the article concealed in the design should be suited to production in quantity. An article which would normally be unique or only capable of being produced singly, such as an artistic creation or architectural work, would be excluded. The court also held that the purpose and the intention of drawings would be relevant to determine whether drawings could be a design within the meaning of the Designs Act and the Copyright Act.

Conclusion

Each form of design protection has pros and cons and applicants need to understand which will best suit their requirements. For example, copyright is best if the sole motive is to protect a design's uniqueness. If the intention is to maximize commercial value by producing and selling the same design, protection under the Designs Act would be best. Finally, if the design has a distinctive shape that can identify the applicant's goods the design should be registered under the Trade Marks Act.

Manoj K Singh is the founding partner of Singh & Associates, a full-service international law firm with headquarters in New Delhi.

Higher cap needed to woo defence sector investment

By Anuj Prasad and Kanishk, Amarchand Mangaldas

amarchand mangaldas

Amarchand Towers
216 Okhla Industrial Estate - Phase III
New Delhi - 110 020
Tel: +91 11 2692 0500
Fax: +91 11 2692 4900
Managing Partner: Shardul Shroff
Email: shardul.shroff@amarchand.com

On 5 April, the government of India issued its latest annual consolidated foreign direct investment (FDI) policy. Contrary to popular expectations, norms governing the defence sector did not undergo any change. As this was probably the last consolidated FDI policy to be released by the current central government, the absence of liberalization of the defence sector acted as a dampener for major foreign original equipment manufacturers (OEMs), which have been campaigning for an increase in the FDI cap of 26% and clarity in relation to the scope of the "defence industry", which attracts various foreign investment restrictions under the current regime including the 26% cap, an industrial licence requirement, and restrictions on the composition of boards of directors and CEO appointments.

Procurement procedure

The Ministry of Defence (MoD) by way of press releases dated 20 and 29 April, announced a major overhaul of the defence procurement procedure (DPP), which broadly governs all capital procurement by the MoD and the Indian armed forces. The press releases stated that "these amendments aim at enhancing indigenization, reducing processing time and bring further clarity in the capital acquisition process" and were being carried out "with the twin objective of infusing greater efficiency in the procurement process and strengthening the defence manufacturing base in the country".

The salient features are:

1. Preference to indigenous production and categorization of various forms of procurement in decreasing order of preference: (i) Buy (Indian); (ii) Buy & Make (Indian); (iii) Make; (iv) Buy & Make with Transfer of Technology; and (v) Buy (Global). Further, a proposal to select a particular category must now state reasons for excluding all higher preferred categories.
2. Simplification of procedure for Buy & Make (Indian) category.
3. Clear definition of indigenous content.
4. Advance consultation with various stakeholders for potential "Make" cases.
5. Transfer of "power to approve deviations from the DPP" from the defence minister to the Defence Acquisition Council.

Will it succeed?

Probably driven by recent criticisms relating to impropriety in defence procurements, the government may have ignored lessons from the history of defence manufacturing in India. Until 2001, the defence sector was a public sector monopoly. As over the years the public sector failed to innovate and provide timely deliveries, by way of Press Note 4 of 2001, the government liberalized the defence sector by permitting Indian private sector participation up to 100% with FDI permissible up to 26%, both subject to industrial licensing.

The past 12 years have seen many Indian entities venturing into defence and aerospace but most remain peripheral players in low technology sectors. Only a few big players, such as Tata, Reliance and L&T, have tried to enter high-technology areas with technology transfers from and joint ventures with global leaders.

The reluctance on the part of leading foreign OEMs to share their technology with companies in which they have a mere 26% stake may be a major reason why in the past 12 years, despite low manufacturing costs in India, India has not become a major defence manufacturer or a technology leader. The much maligned export restrictions in some countries including the US might not be the leading cause for lack of transfer of technology.

Promising start

Despite no changes in the consolidated FDI policy, the MoD press release dated 20 April states that a "defence items list" has been finalized by the MoD and will soon be notified by the Ministry of Commerce and Industry. Up to now, the scope of "defence industry" which attracts the 26% cap and other restrictions was undefined and therefore confusion prevailed especially in relation to dual use items i.e. items used in both defence and civilian sectors, which invariably led to delays in approvals of investment proposals. The clarification that dual use items will not be defence items and the announcement of a "defence items list" should go a long way in clearing the prevailing confusion in this sector, which will make doing business easier.

Details of the amendments are still awaited, however, until the FDI cap is increased, defence sector joint ventures and transfer of technology agreements will be few and far between. With limited transfer of technology, the Indian industry will find it difficult to fulfil the needs of the Indian armed forces for most defence items, and the objective of strengthening the defence manufacturing base in the country may remain merely an aspiration. It is therefore hoped that the policy will be revised sooner rather than later, to enhance the FDI cap such that the revised procurement norms may be successful.

Anuj Prasad is a partner and Kanishk is a senior associate at Amarchand & Mangaldas & Suresh A Shroff and Co, New Delhi. The views expressed in this article are those of the authors and do not reflect the position of the firm.

State mining commitments: the emerging legal trend

By Ranjana Roy Gawai and Safeena Mendiratta, RRG & Associates

RRG & Associates
LAW OFFICES

C-14, Lower Ground Floor
Chirag Enclave
Greater Kailash-I
New Delhi - 110048
Tel: +91 11 4056 3742
Fax: +91 11 4100 5046
Email: contact@rrgassociates.com

Mines and minerals constitute national wealth and are vital raw material for infrastructure, capital goods and basic industries. Their conservation, preservation and intelligent use is necessary in view of the public interest involved and companies' intense drive to exploit them. To achieve this objective, certainty about the binding nature of states' commitments and a transparent regulatory regime is essential.

Indian regulatory framework

Under article 39(b) of Directive Principles of State Policy, states shall, in particular, direct their policy towards securing that the ownership and control of the material resources of the community are distributed as best to sub-serve the common good. Under article 39(c), the states must ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The public interest is writ large in the provisions of the Mines and Minerals (Development and Regulation) Act, 1957. Section 2 of the act declares that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent provided in the act. The act's preamble states that it is "an Act to provide for the development and regulation of mines and minerals under the control of the Union".

Undisputedly, state governments are the owners of the minerals located within their respective boundaries. They grant concessions subject to the provisions of the act and the rules made under it, while the regulation and development of mines and minerals remains under the control of the Union.

MOUs & state commitments

The companies proposing to undertake mining operations often execute a memorandum of understanding (MOU) with the state government, in which the latter agrees to assist and support in handing over the land subject to availability, to recommend to the central government allotment of suitable mining blocks and to assist in obtaining related clearances/approvals. Such MOUs are assurances on part of the state to encourage investments subject to its industrial policy.

Recently, there has been a series of Supreme Court rulings on the distribution of national wealth generally. A few decisions have specifically discussed the enforceability of states' commitments in such MOUs.

In *Sandur Manganese and Iron Ores Limited v State of Karnataka*, the Supreme Court while interpreting the provisions of section 11 observed that the state government had no authority under the act to make commitments to any person that it will, in future, grant a mining lease if the person invests in any project.

In *Monnet Ispat and Energy Ltd v Union of India and Ors*, the Supreme Court affirmed that the state is the "owner of minerals" within its territory and the minerals "vest" in it. It further clarified that an MOU for mining lease is not a contract as contemplated under article 299(1) of India's constitution. In these circumstances, it was of the view that the overriding public interest prevented the court from invoking the doctrines of promissory estoppel and legitimate expectation to enforce commitments in the MOU.

In contrast, in *Bhushan Power and Steel Ltd and Ors v State of Orissa and Anr*, the Supreme Court applied the principles of legitimate expectation and permitted enforcement of state commitments to a private party.

Despite some ambiguity with respect to enforceability of state commitments in the above cases, their *ratio* holds good as they were made in different factual contexts.

In addition to these rulings, the Ministry of Mines through a recent notification provided that besides other factors MOU cases where a plant/industry has already been set up on the basis of an MOU but a mineral concession is not yet granted may subject to certain conditions be construed as "special reason" for the state government to recommend a mineral concession proposal under section 11(5) of the act. Therefore, if the state itself intends to consider the execution of MOUs as a "special reason", then MOUs may altogether be declared as legally enforceable just like any other contracts.

Conclusion

In view of the above, clarity is sought as to the power of the states to execute such MOUs and whether this power springs from the fact of ownership. Additionally, any clarification by the Supreme Court as to the interpretation of the words "to the extent provided in the MMDR Act", in section 2 of the act, would be welcome to ascertain the exact parameters of control exercised by the Union as well as the states in relation to the regulation of mines and the development of minerals.

While such issues are legally settled, it will be important for the Ministry of Mines to list and clarify the above rulings rather than issuing new notifications and guidelines on MOUs thereby adding to the existing uncertainty.

Ranjana Roy Gawai is the managing partner and Safeena Mendiratta is a senior associate at RRG & Associates.

Charting the paradigm for a new drug patent regime

By Soorjya Ganguli and Pooja Chakrabarti, Udwadia Udeshi & Argus Partners

Udwadia Udeshi & Argus Partners
1st Floor, Elphinstone House
17 Murzban Road, Mumbai - 400 001
Tel: +91 22 2200 1400
Fax: + 91 22 2200 1411
Other offices: Delhi, Bangalore, Kolkata and Chennai
Email: uuargusknowledgecentre@uuargus.com

India's stand on product patents of pharmaceutical inventions has undergone considerable change since inception. The Patents and Designs Act, 1911, provided for product patent protection in pharmaceutical inventions. The Patents Act, 1970, however, did away with product patents for pharmaceutical products.

Process patents could still be obtained, which meant that minor alterations in the synthesis of a molecule could yield new process patents and drugs could be replicated through different methods. This encouraged the production of generic drugs and helped establish India worldwide as a low-cost producer.

TRIPS agreement

In 1995, the Trade-related Intellectual Property Rights (TRIPS) agreement was reached, to which India was a signatory. Article 28 of TRIPS requires member countries to provide patent protection for both products and processes, subject to requirements of novelty, inventiveness and industrial applicability. Patent owners must also have the right to assign, transfer by succession or conclude licensing contracts for their patents.

Adopting the TRIPS regime led to the removal of section 5 of the Patents Act, 1970, which barred patents for substances intended for use as food, medicine or drugs or prepared by chemical processes. By way of an amendment to the 1970 act, India agreed to 20-year patents on pharmaceutical products. This new regime effectively outlawed generic production of new medicines.

In endeavouring to restrict the effects of this new regime, section 3(d) of the 1970 act was amended so that discovery of a new form of an existing substance would not qualify for protection, unless the substance had enhanced efficacy. This in part was India's answer to "evergreening", a term used to label the practice in certain jurisdictions of effecting an insignificant change to an existing product and claiming a new invention with the intent of extending the patentee's exclusive rights over the product.

The Novartis case

Against this backdrop, India's Supreme Court recently delivered a landmark decision in an appeal by Novartis against the denial of a patent. The case involved Zimmermann's N-phenyl-2-pyrimidine-amine derivatives, including imatinib, which have had US patents since 1996. In 1998, Novartis applied for a patent on the beta crystalline form of imatinib mesylate, used for the treatment of leukemia. Novartis claimed that the beta crystal form of imatinib mesylate had beneficial flow properties, better thermodynamic stability and lower hygroscopicity than the alpha crystal form of imatinib mesylate, making it a superior product.

In considering Novartis's appeal, the Supreme Court deliberated extensively on section 3(d) and concluded that for a medicine that claims to cure a disease, the test of efficacy could only be "therapeutic efficacy", i.e. the capacity of the drug for beneficial change. A mere change of form with properties would not qualify as an enhancement of the efficacy of a known substance.

The court also dealt with "disclosure" and "coverage" of the patent. Imatinib mesylate was covered by the Zimmermann patent but not disclosed in it. The court opined that the law should not develop on lines where there may be a vast gap between the coverage and the disclosure under the patent. The court found that imatinib mesylate is a known substance from the Zimmermann patent itself. Its pharmacological properties are also known in the Zimmermann patent.

Finally, the Supreme Court held that imatinib mesylate does not qualify as an "invention" under the 1970 act.

Conclusions

The judgment will have a positive effect on affordability and accessibility of medicines as generic companies sell the anti-cancer drug at affordable prices. The decision is also a strong statement against evergreening by patentees in India. The higher standard introduced in section 3(d) ensures that no drug with a chemical modification can be patented unless it is therapeutically more effective. After the expiry of the term of patent protection, other entities can enter the market offering competitive prices. The Supreme Court has, however, left open the question of how to interpret "therapeutic efficacy", inviting further debate on this important issue.

The Novartis decision may lead pharmaceutical giants to take a conservative approach to investing in India. While a developing nation has a responsibility to provide lifesaving drugs at affordable prices, it must also uphold treaties and conventions to which it is a party, failing which it risks sanctions.

Retired Justice Markandey Katju of the Supreme Court has said that a balance has to be struck between monetary inducements for new inventions and making inventions available to the masses in underdeveloped countries at affordable prices.

The balance is both delicate and elusive.

Udwadia Udeshi & Argus Partners is a full-service law firm with offices in Mumbai, Delhi, Bangalore, Kolkata and Chennai. Soorjya Ganguli is a partner and Pooja Chakrabarti is a senior associate at the firm. The views expressed by the authors are personal and do not reflect the views of the firm.

Investing in India through non-convertible debentures

By Ganesh Prasad and Sharad Moudgal, Khaitan & Co

KHAITAN & CO
Advocates since 1911

Khaitan & Co
Simal, 2nd Floor
7/1 Ulsoor Road
Bangalore 560 042 - India
Tel: +91 80 4339 7000
Fax: +91 80 2559 7452
Email: bangalore@khaitanco.com
Bangalore | Kolkata | Mumbai | New Delhi

Indian companies are increasingly looking at alternative means of raising capital. In the past few years, the Reserve Bank of India (RBI) and the Securities and Exchange Board of India (SEBI) have taken significant steps to expand the country's debt market, which is less developed than the equity markets.

One such initiative is to allow foreign debt infusions in Indian companies through non-convertible debentures (NCDs). This has become a popular route for Indian companies to raise capital from overseas investors.

The provisions relating to issuance of debentures under the Companies Act, 1956, apply equally to NCDs. In addition, the issuance of NCDs could be treated as an issuer company accepting a "deposit" under the Companies Act. However, NCDs are typically issued in a manner that allows the issuer company to benefit from certain exemptions under the Companies (Acceptance of Deposits) Rules, 1976.

While issuance of debt instruments is common in the domestic debt market, the RBI and SEBI have encouraged debt financing from overseas entities under the NCD investment route. Under Indian foreign exchange laws, registered foreign institutional investors (FIIs) or qualified foreign investors (QFIs), or entities which maintain a sub-account with a registered FII, may invest in "listed" or "to-be-listed" NCDs issued by an Indian company.

Until recently, the regulations prescribed by the RBI and SEBI conflicted on whether FIIs could invest in to-be-listed NCDs. FIIs adopted a cautious approach and structured their investments by acquiring NCDs upon their listing via the secondary markets only. The conflict has since been remedied and FIIs and QFIs are now permitted to acquire to-be-listed NCDs directly from Indian companies provided that the NCDs are listed within 15 days from their issue and the terms of issue of the NCDs stipulate that the NCDs will be redeemed if listing is not achieved within this time.

The SEBI (Issue and Listing of Debt Securities) Regulations, 2008, deal with the listing of secured and unsecured debt securities (including NCDs) issued by way of a public issue or a private placement by both private and public companies. A public issue of NCDs resembles a public issue of shares by an Indian company, including filing a draft and final offer document, making requisite disclosures, obtaining a credit rating and obtaining requisite "in-principle" approvals.

NCDs may also be issued on a private placement basis, subject to certain conditions prescribed under the regulations, including filing an information memorandum, obtaining a credit rating and ensuring that any security created to secure the NCDs is adequate to ensure 100% asset cover sufficient to discharge the principal amount of the NCDs.

An issuer company desirous of listing NCDs must also comply with the debt listing agreement to be executed with the stock exchange on which the NCDs are sought to be listed. An issuer company must comply with the specific conditions mentioned under the debt listing agreement, including reporting requirements, ensuring timely interest/redemption payments and ensuring maintenance at all times of 100% asset cover.

Key benefits

The NCD investment route has drawn much attention from foreign investors. Key benefits include: (1) NCDs are liquid instruments which may be freely traded; (2) holders of NCDs enjoy a preferential position as creditors in the winding up of an issuer company; (3) NCDs may be secured by Indian assets; (4) no caps are prescribed on the returns from NCDs; (5) the investment conditions prescribed under the foreign direct investment (FDI) route do not apply to NCD investments; (6) returns on NCDs can be linked to identified assets of the issuer company; (7) holders of NCDs, being creditors, can negotiate quasi-equity rights with issuer companies; (8) investments can be structured to maximize capital protection by stipulating a minimum return on the NCDs acquired while also participating in the risks and rewards of the Indian company as an equity holder; and (9) NCDs can be acquired through entities established in tax beneficial jurisdictions, such as Cyprus.

Associated risks

The main risk associated with NCD investments lies in how Indian regulators may perceive them. Viewed with their accompanying rights, such investments could be re-characterized as a means of circumventing regulations on foreign investment in India. For example, investments in the real estate sector could be seen as violating FDI investment conditions as well as end-use restrictions on proceeds from external commercial borrowings. Similarly, regulators could perceive NCD investments by foreign investors in Indian companies as a means of guaranteeing returns on accompanying equity investments made by them.

While the regulations enable NCDs to be secured, Indian foreign exchange laws require that regulatory approval be obtained prior to creating any security interest in favour of non-residents. Opinions differ as to when the approval is to be obtained.

Ganesh Prasad is a partner and Sharad Moudgal is a principal associate at Khaitan & Co. The views of the authors are personal, and should not be considered as those of the firm.

Streamlining could reduce new home costs and delays

By Amitabh Chaturvedi and Utkarsh Tewari, Mine & Young

MINE & YOUNG
ADVOCATES AND LEGAL CONSULTANTS

C-346, Defence Colony
New Delhi - 110 024
India

Telephone: +91 11 2433 7572, +91 11 2433 7573
Fax: +91 11 2433 7574

Email: info@mineandyoung.com

An average real estate project from launch to possession takes about five to six years. There is usually a grace period of six to12 months. Yet at times there is further delay in possession of property.

Although details vary from state to state, a real estate builder/developer currently has to apply to 40 to 50 central, state and local departments for approval for a single project. The whole process takes about three to five years.

During this period, the cost of construction rises and so does the cost of homes. According to a 2010 report submitted to the Indian government by the McKinsey Global Institute, titled India's Urban Awakening, approvals account for 40% of a project's sale value.

Most authorities are not bound by any time limit and take up to three years to grant an approval or no-objection certificate (NOC) to a project. Clearance from certain authorities, such as the National Monuments Authority, Archeological Survey of India and Airports Authority of India could be avoided by clear demarcation of restricted and non-restricted areas.

The urban population is projected to rise from 31.2% of India's population in 2011 to 40% by 2030. There is an urgent need to meet the rising demand by speeding up the supply. Environmental clearances for affordable housing projects for the economically weaker section/low income group segment should be given special treatment.

The Real Estate (Development & Regulation) Bill, which has been cleared by the cabinet, aims to bring transparency and accountability to the sector and to protect consumers. The bill would prevent promoters from launching a project until all of the required licences and approvals are in place. The bill provides for control over the developers but not over the sanctioning authorities, which would continue to operate without any time commitments.

Instead of the much needed single-window clearance, the bill would establish a Real Estate Regulatory Authority – another addition to the list of authorities to which a promoter must apply. To meet the new law's objectives, it should cover all stakeholders.

More importantly, the approval process needs to be streamlined. This could be accomplished by a technologically equipped and competent central single window facilitation committee, with a presence in all states. Approving authorities can also take steps to speed up the approval process, and ultimately the delivery of houses.

Recommended changes

(1) Automating the building plan approval process would reduce paperwork, physical visits, human error, ambiguity, and the time taken in scrutinizing plans. This could be achieved through the websites of urban local bodies (ULBs), where building plans would be submitted in electronic format for scrutiny. Specially designed software could automatically check the building plan against building bye-laws and give the results. Online payment of the scrutiny fee on the same website would reduce corrupt practices.

(2) Bye-laws of ULBs could be standardized, updated and uploaded on the ULBs' websites. States may also consider directing ULBs to put in place a dedicated cell to act as single facilitation or clearance window.

(3) Consolidation and simplification of building bye-laws is needed to provide clear laws and guidelines. This could involve bringing together provisions under legislation governing several authorities. The resulting laws and guidelines could be publicized and made available on the websites of the authorities concerned.

(4) Approving authorities should be brought under strict time constraints for granting or refusing approval of a real estate project. If an authority fails to comply with a time constraint, the application to the authority should be deemed to be approved.

(5) With a flexible approach towards developers, an approving authority may be able to speed up the approval process. For example, approval for a project development plan could be granted without insisting on prior development of internal infrastructure, subject to an undertaking from the developer that the internal infrastructure will be completed before applying for an occupation certificate.

(6) The norm is that an environmental impact assessment (EIA) is carried for each project. This takes up to 90 days. To simplify, an EIA could be carried out when the master plan of an area is developed. The department concerned could publicize the guidelines to be followed for different types of projects and put the guidelines on its website. Responsibility for compliance could be left to the developers, and for enforcement and monitoring to the project approving authority.

(7) Online registration for selected clearances should be introduced.

The real estate sector is important. It accounted for 5% of India's GDP in 2011-12. Restrictions and hurdles are slowing its growth. By bringing in transparency and updating rules and procedures, this sector can be given the opportunity of soon becoming one of the largest and most successful in the nation.

Amitabh Chaturvedi is the managing partner of Mine & Young, where Utkarsh Tewari is a partner.

Put and call options: Light at the end of the tunnel?

By Siddharth Hariani and Davis Kanjamala, Phoenix Legal

PHOENIX LEGAL

New Delhi
Second Floor,
254, Okhla Industrial Estate,
Phase III, New Delhi-110020
India
Tel +91 11 4983 0000
Fax: +91 11 4983 0099
Email: delhi@phoenixlegal.in

Mumbai
First Floor, CS-242,
Mathuradas Mill Compound,
NM Joshi Marg, Lower Parel
Mumbai - 400 013, India
Tel: +91 22 4340 8500
Fax: +91 22 4340 8501
Email: mumbai@phoenixlegal.in

The Law Ministry is reported to have approved a proposal by the Securities and Exchange Board of India (SEBI) to permit the use of put and call options for corporate restructuring and non-speculative purposes. This development should finally bring some clarity over the use of these tools, favoured by those active in the spheres of private equity, and mergers and acquisitions.

Strategic tools

Put and call options are widely used around the world in structuring transactions to attain certain objectives. Typically, put options are granted by promoters of companies to investment funds which have a determinate term and require an alternative exit route, should a primary market offering or strategic sale not prove feasible. Call options facilitate an increase in stake at a later date, enabling consolidation by the joint-venture partner or the original promoters.

These options may also be handy in various scenarios, such as events of default, breach of contractual obligations, or even to resolve a deadlock between shareholders and investors. By linking the exercise of options to the achievement of certain milestones, put and call options can also be deployed by parties as positive or negative incentives in the management of a company.

Regulatory putdown

A notification issued by the central government in 1969 under the provisions of the Securities Contracts (Regulation) Act, 1956 (SCRA), forbade parties from entering into securities contracts other than spot delivery contracts (which involve exchange of consideration and delivery of possession of the security on the same or next day as the parties' execution of the contract for the transaction). The provisions of the 1969 notification were substantially subsumed in a central government notification in 2000, which additionally permitted derivative contracts traded and settled through a recognized stock exchange.

As evident from its stance adopted in informal guidance provided to a listed company in 2011, SEBI was of the opinion that put and call options would continue to be hit by the 2000 notification as they did not fall in either category of permissible securities contracts. Several transactions in the recent past, such as the acquisition of stakes by mining conglomerate Vedanta in Cairn India and by leading spirits multinational Diageo in United Spirits, saw this issue being raked up by SEBI, which forced deal makers to delete references to options in their agreements.

A call for change

Recently, in a dispute between MCX Stock Exchange and SEBI, Bombay High Court made a ruling that favoured the validity of put and call options. In its extensive discussion on the development of the law and judicial precedent on this issue, it rejected SEBI's contention that such options constituted forward contracts, and were therefore illegal. As options were exercisable at the prerogative of the option holder, they were akin to contingent contracts, which would only be concluded at their exercise. Provided that the exchange of consideration and delivery of securities was made on the same day or the day after the option was exercised, it could be construed as a spot delivery and therefore permissible under law. Unfortunately, SEBI's second pillar of objection to options – that these were off-market derivatives – was not taken up due to procedural grounds.

However, given that on appeal the Supreme Court permitted the parties to enter into settlement terms and prescribed that the findings of Bombay High Court would not be binding on such settlement, the value of this decision appears to have been diluted. A silver lining from these proceedings was that SEBI appears to have been given impetus to rethink its stance on options. Shortly after the settlement, SEBI was reported to have submitted a proposal to the Law Ministry to rectify the uncertainty surrounding these options, which now appears to have been accepted and is expected to be notified shortly.

Taking stock

While put and call options have been incorporated in investment agreements, there has been no certainty on whether such clauses would be enforceable in the event of a dispute between the parties. Permitting put and call options would significantly boost investor sentiment in India, especially in these choppy markets.

Currently, the fine print of the proposed change is not in the public domain, and there is speculation as to whether it will be implemented through a notification, or require an amendment of the SCRA (which would entail a longer timeline). Questions also abound as to whether the Reserve Bank of India – which has in the past objected to put and call options involving monetary outflows – is on board with this. However, the soundbites emanating from the Law Ministry and industry bodies seem to indicate that investors may finally have some valid grounds for elation.

Siddharth Hariani is a partner and Davis Kanjamala is an associate at the Mumbai office of Phoenix Legal.

Transponder payments: Are they royalty or not?

By Pranay Bhatia and Hardik Choksi, Economic Laws Practice

ELP ADVOCATES & SOLICITORS

Economic Laws Practice
1502 A Wing, Dalamal Towers
Free Press Journal Road
Nariman Point, Mumbai 400021
India
Tel: +91 22 6636 7000
Fax: +91 22 6636 7172
Email: PranayBhatia@elp-in.com
HardikChoksi@elp-in.com

Rapid and constant change in technology is creating challenges for both revenue authorities and taxpayers, in terms of the finer technical nuances of new technology, the characterization of payments relating to it, and its taxability in India. Controversy and litigation repeatedly arises when it comes to assessing the taxability of e-commerce, information technology, relaying of signals through a transponder, bandwidth and other payments, primarily because India's tax laws have not kept pace with these developments.

Among such issues, payment for transponder leasing has been matter of persistent litigation for almost a decade.

Background

In a landmark decision in 2011 in the case of Asia Satellite Telecommunications (Asia Sat), Delhi High Court held that payments by broadcasting companies to satellite operators for use of transponder capacity cannot be taxed as royalty under the provisions of the Income Tax Act, 1961, and accordingly are not taxable under the act.

The court's key observations included:

• The substance of the agreement between Asia Sat and the broadcasting company was the provision of broadband capacity available on the transponder and not the right to use any process embedded in it.

• A transponder being an inseparable part of the process of a satellite, its possession and control cannot be handed over to a broadcasting company. Thus, the broadcasting company can neither control nor operate the satellite or a transponder by themselves.

• The arrangement between Asia Sat and the broadcasting company was only for lease of the transponder capacity and not for lease of the equipment.

Legal aspects

To settle the long-standing controversy, the Finance Act, 2012, made a retrospective amendment to the definition of "royalty" by adding two explanations to section 9(i)(vi) of the Income Tax Act. As per explanation (v), royalty included any consideration in respect of any right, property or information irrespective of whether the possession or control of such right or property or information is with the payer, or whether such right, property or information is used directly by payer, or whether such right, property or information is situated in India. Explanation (vi) clarified that the term "process" in the definition of royalty, includes "transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret".

The proposed Direct Tax Code (DTC) also includes payments for "the use of or right to use of transmission by satellite, cable, optic fibre or similar technology" within the definition of "royalty". Thus, payments for transponder capacity are taxable under the DTC regime.

In contrast, the commentary on the OECD Model Tax Convention states that payments by customers under typical transponder leasing arrangements are in the nature of business profits and not royalty as there is no leasing of any industrial, commercial or scientific equipment because customers do not acquire the physical possession of the transponder, but simply its transmission capacity.

In a 2012 decision in the case of Channel Guide (I), the Mumbai Income Tax Appellate Tribunal (ITAT), reiterating the Delhi High Court decision discussed above, held that transponder fees for satellite uplink for telecasts were neither royalty nor fees for technical services. The ITAT observed that the taxpayer could not be held be liable to deduct tax in earlier years based on the subsequent amendment which is applicable retrospectively.

In a recent decision involving Zee Telefilms, the Mumbai ITAT held that payment by Zee to its non-resident subsidiary company which then made payment to a foreign satellite company for use of transponder bandwidth was liable to tax in India as the payment was a separate contractual payment. Further, even though the tribunal sent the matter back to lower authorities, it distinguished the Delhi High Court decision firstly because Zee had entered into contracts with Asia Sat through its foreign subsidiary as opposed to a direct contract and secondly because the foreign subsidiary had a business connection in India and a permanent establishment through its holding company, i.e. Zee.

Conclusion

Contrary to the globally followed principle, the legislature, through an amendment with retrospective effect, has demonstrated its intension to tax transponder payments, thereby nullifying the principles laid down by Delhi High Court in the Asia Sat case. In spite of such an unfavourable treatment of taxing foreign satellite operators under the tax laws of India, it is always imperative to take the initiative to analyse the relevant tax treaty to check the possibility of taking advantage of any beneficial provisions.

Economic Laws Practice is a full-service law firm with headquarters in Mumbai and offices in New Delhi, Pune and Ahmedabad. Pranay Bhatia is a partner at the firm and Hardik Choksi is an associate.