18th Indo-US Economic Summit

Bouncing Back - Resilient Recovery Path Post Covid-19

September 15, 2021

IACC
Apex bilateral Chamber for Indo-US business
INDO-AMERICAN CHAMBER OF COMMERCE

Knowledge Partner
KOCHHAR & CO.
ADVOCATES & LEGAL CONSULTANTS

Contents

सत्यमेव जयते

प्रधान मंत्री
Prime Minister

MESSAGE

It is a pleasure to learn about the initiative of Indo-American Chamber of Commerce to hold the 17th edition of Indo-US Economic Summit on September 14-15, 2021. The theme – 'Bouncing back – resilient recovery path post Covid-19' makes the Summit even more meaningful during the present times.

Among the largest economies of the world, India and the United States of America enjoy a vibrant partnership in trade and commerce. An Indo-US dialogue among the stakeholders in trade, commerce and business of both the nations will help enhance synergy and cooperation.

India's economy is today growing at a fast pace, with new opportunities emerging in every sector. The speed and scale of our reforms in agriculture, industry, infrastructure, manufacturing and other sectors have ensured a faster recovery than expected during the times of the pandemic. Through more efficient and efficacious delivery systems such as Direct Benefit Transfer and leveraging technology, we achieved remarkable last-mile connectivity that is critical during such a crisis.

In the post Covid-19 world, global supply chains assume a critical importance. India has the potential and capabilities to become the hub for global supply and value chains. Our Aatmanirbhar approach envisages strengthening India's position as a global manufacturing hub.

The 75th year of India's Independence is an inspiring occasion. The next 25 years are invaluable for the emergence of a new and glorious India.

The presence of business entrepreneurs, industry captains and other stakeholders at this Summit is an opportunity to take Indo-US partnership to greater heights. The deliberations at the Summit will surely look at ways to chart a visionary roadmap to enable the economies to bounce back for larger good.

Best wishes for all success of the 17th edition of Indo-US Economic Summit.

(Narendra Modi)

New Delhi
भाद्रपद 22, शक संवत् 1943
September 13, 2021

Dr. Lalit Bhasin
National Vice President
Indo-American Chamber of Commerce
Room no 403, 4th Floor, PHD House
4/2, Siri Institutional Area, August Kranti Marg
New Delhi – 110016

The 18th Indo-US Economic Summit

was inaugurated by

Hon'ble Minister of Defence

Government of India

Mr. Rajnath Singh


Summit Partner
Principal Partner
IACC
Supported by
Knowledge Partner
INDO-AMERICAN
CHAMBER OF COMMERCE
North India Council
18th Indo-US
Economic Summit
15th September 2021, Time: 01:00 pm - 6:30 pm
Inaugural Session
Live Show

Foreword

Dear Friends,

Our law firm Kochhar & Co is delighted to be the Knowledge Partner for the 18th edition of the Indo-US Economic Summit organised by the Indo American Chamber of Commerce (IACC). The recent geopolitical strains in India's neighbourhood have thrown into sharp spotlight the special, symbiotic and multifaceted relationship that the world's two largest democracies, namely the US and India, share. Ranging from our shared vision for the future of a free world, to our enduring belief in the rule of law, to business collaborations, investments, services and transfer of technology, I am delighted to note that the partnership between India and the US continues to grow at a remarkable pace. Even the Covid-19 pandemic that has ravaged our respective global economies has turned out to be a crucible for Indo-US collaboration in medicine, research and in the pharmaceuticals sectors. I truly believe that we are entering an era of closer ties than we have ever seen between the two countries in decades.

I compliment IACC, Summit Chair Dr. Lalit Bhasin and Regional President Mr. Raman Roy for taking the initiative to organize this Economic Summit which is a great platform for stakeholders representing diverse yet complementary interests to closely engage with one and another and hold free and frank deliberations on how the Indo-US bilateral trade relationship can be taken to the next level and, eventually, to much greater heights.

Kochhar & Co has traditionally represented large multinational companies (including several Global Fortune 500 cos.) doing business in India and the vast majority of our clients have been corporations headquartered in the United State of America. We, therefore, have a shared interest in simplifying the Indian regulatory landscape to faciliate these companies in their business initiatives in India.

The ebbing of the Pandemic has renewed the imperative for a stable and transparent investment climate for FDI in India. While recent years have witnessed landmark legislative developments in indirect tax (GST), bankruptcy (Insolvency and Bankruptcy Code) and the institutionalisation of the Companies Act, 2013, there continue to be numerous areas where liberalisation and stabilisation of the legal regime is required. These include taxation, exchange control and company law. Most areas of business also require an in-depth review by the government to determine how regulations can be liberalised to make it easier for foreign companies to do business with India and with Indian companies. The Economic Summit, with its galaxy of participants from business, government, services and civil society is the perfect foil to deliberate upon the measures that are required to strengthen regulation and investment concerns, and set the tone for the next decade in Indo-US business relations.

On behalf of Kochhar & Co I am honoured to serve as the Knowledge Partner to this august conclave.

Lastly, I warmly congratulate and complement Dr. Lalit Bhasin and Mr. Raman Roy for their sterling Commitment in putting together this Summit on a virtual platform amidst travel restrictions across our countries today.

Warm regards,

Rohit Kochhar
Chairman & Founding Member
Kochhar & Co

Welcome Note

Dear Members,

I am very happy to acknowledge the contribution of our Knowledge Partner, Kochhar & Co for the **18th Indo-US Economic Summit" with the theme "Bouncing Back - Resilient Recovery Path Post Covid-19"**.

I am hopeful that this report will provide valuable insights to all the participants on the sectors focused in the Summit such as Women Empowerment; Legal Services; Partner State – Uttar Pradesh; Defence & Aerospace and Land Acquisition.

We hope to actively collaborate in future and bring more of such meaningful initiatives to the fore.

Best Regards

Dr. Lalit Bhasin
Summit Chair

Disclaimer

The information contained in the articles in this publication is accurate to the best of our knowledge and belief at the time of writing. The articles are intended to provide a general guidance on the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as the information may not necessarily suit your specific business and operational requirements. It is to your advantage to seek professional advice for your specific situation.

INDO-US ECONOMIC PARTNERSHIP

Bouncing Back - Resilient Recovery Path Post Covid-19

Back and Forth on Free Trade & Protectionism

Author **Reena Asthana Khair** | reena.khair@kochhar.com

It is over 200 years since nation states are devising strategies for economic growth based on the principle of free trade. Adam Smith, in the Wealth of Nations has advocated the concept of 'laissez faire', that is markets must be free and left to regulate themselves by means of competition and self-interest. David Ricardo's theory of international trade notes that nations have comparative advantages in production of certain goods, and hence can achieve higher standards by trading in such goods.

With the dramatic increase in international trade, it became evident that international trade will not only need to be free, but also fair. The Indian Supreme Court in the case of Reliance Industries has said that the purpose of trade remedial measures under Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) is not protectionism in the classical sense (as proposed by the German economist Friedrich List in his famous book 'National System of Political Economy' published in 1841) but to prevent unfair trade practices, as an instrument of fair competition.

In the last decade, there has however, been a shift away from free trade, towards greater protectionism, owing to the aggressive domestic production and export policies of countries such as China. A prime example is the solar industry in China. The Chinese Government has over the last decade, subsidised its manufacturers and implemented incentives and tariffs to support the growth of its solar industry, to make China the leader in solar energy, with substantial economies of scale. As a consequence, solar cells, modules, or parts thereof, exported from China, attract anti-dumping, countervailing or safeguard duties in almost all large economies around the world, such as the EU, USA, India, Canada, etc.

India currently levies Countervailing Duty (CVD) on imports of textured tempered glass and EVA sheets for use in solar modules. India, further, proposes to increase the basic customs duty on solar modules from nil to 40%, and 25% on solar cells from April 1, 2022. Non-tariff barriers such as approvals from the Indian Government authorities for use of imported equipment have been introduced.

In Russia, import substitution is now a central tenet of Russian economic policy, including introduction of local content requirements for solar projects. The United States has banned import of materials used in solar panels from China, over alleged use of forced labour and human right abuses.

Recently, the WTO Panel Report ***(WT/DS562/R 2 September 2021)*** approved the US Safeguard Measure on imports of crystalline Photovoltaic Products against China. The WTO Panel has held that a significant share of imports increased as a result of the expansion of Chinese-affiliated CSPV operations in other third countries, particularly Malaysia, Thailand, and Vietnam. The imposition of safeguard duty by the United States was held to be compliant with the WTO Agreement on Safeguards.

Political compulsions and domestic interests coupled with an economic crisis brought on by the Covid pandemic has meant a more inward-looking approach, with greater emphasis on local manufacturing over imports. In late 2019, India's nodal tendering agency for renewable energy Solar Energy Corporation of India (SECI) issued a landmark project development tender for 12 GW of solar generation capacity which included a tied contract for 3 GW of domestic module manufacturing capacity. In April 2021, the Indian government introduced a Production-Linked Incentive (PLI) scheme for manufacturing solar PV cells, which offered financial incentives to manufacturers of high-efficiency solar PV modules.

No doubt free trade has brought tremendous benefits in terms of economic growth; Controlled and undemocratic economies operate under different set of conditions, and in the absence of any mechanism to ensure compliance of rules, unfettered trade can result in market distortions, destroying existing industries and the possibility of establishment of new industries in market driven democratic economies. Trade remedial measures are generally a result of an application made by domestic producers; therefore, companies will have to be vigilant about their rights and will need to encourage their governments to take quick action against unfair imports. Conditions conducive for free and fair trade in the domestic and international markets must be created, so as to promote efficiencies, and to reward innovation.

Reena Khair is a Senior Partner and heads the International Trade & Indirect Taxation Practice at Kochhar & Co

[1]Reliance Industries Vs Designated Authority reported in 2006 (202) ELT 23 (SC)

New Intermediary Rules 2021

Author **Stephen Mathias** | stephen.mathias@bgl.kochhar.com

Introduction

The Government of India issued new rules applicable to Intermediaries ("Rules") under section 79 of India's Information Technology Act, 2000 ("IT Act"). For most part, the Rules come into force immediately. The Rules are perhaps the most far-reaching attempt by a constitutional democracy to regulate the internet and more specifically, internet user generated content that is circulated through "intermediaries" such as social media, online news media and online video streaming services. This article analyses the new Rules and provide our analysis of how they work.

Understanding intermediaries and section 79

Under the Rules, an "intermediary" is defined as:

"Any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online-market places and cyber cafes".

Thus, intermediaries are essentially organizations that may transmit or store information of others. The best examples of intermediaries are web hosts and social media platforms. Most countries provide a "safe harbour" to intermediaries from liability for content of others because the content is provided by someone else and not the intermediaries. In India, section 79 of the Information Technology Act, 2000 protects an intermediary from liability, subject to conditions that the intermediary should not have been involved in the creation of the content, and that the intermediary must have exercised "due diligence" as defined by the government. By stipulating what constitutes due diligence, the new Rules have far reaching and comprehensive effect.

General rules for intermediaries

The Rules require intermediaries to provide notice to users on content that is prohibited, terms of use, privacy policy, etc, and a warning that violation of the terms of use could lead to termination or removal of content. The Rules also contain provisions on assisting the government in exercise of its already existing power to block or remove content. They also provide for the appointment of a grievance officer, publication of his name and contact details and publication of a grievance procedure. Overall, these provisions mostly reiterate the existing rules but with a few additional provisions introduced to create procedure and safeguards. Viewed within the paradigm of the existing Indian regulatory environment, there is little that is new in the Rules on intermediaries to be concerned about. It is important to note that under Section 69 of the IT Act, the Government already has the power to block or remove content. The Rules essentially create an ecosystem for intermediaries to co-ordinate with the government in this regard.

Rules relating to significant social media intermediaries

A social media intermediary is defined to mean:

"An intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services."

This largely relates to the likes of Facebook and Twitter. The government also notified that a Significant Social Media Intermediary (SSMI) is a social media intermediary which has a minimum of 50 lakh/5 million registered users in India.

With respect to SSMIs, in addition to the protections and procedures applying for "intermediaries" (set out above), the new Rules require SSMIs to have a grievance officer, with his or her name, contact details and grievance procedure to be published. An SSMI needs to appoint a Chief Compliance Officer who is responsible for ensuring compliance of the SSMI with these Rules, and a Nodal Officer (who cannot be the chief compliance officer) whose responsibility is to co-ordinate with the government agencies on takedown of content. One key concern of the security agencies relates to lack of control over foreign SSMI's since international social media platforms are actually owned by a foreign parent entity. The Indian entity generally only engages in sourcing content and marketing and has no control over content on the platform. To tackle this, the rules require all three officers referred to above to be resident in India and for the SSMI to have a physical address in India.

One main concern relates to the provision that the Chief Compliance Officer would be responsible for the failure of the SSMI to comply with these Rules, attributing personal

liability to the Chief Compliance Officer even when he may not be responsible for implementing decisions.

There is a requirement of a monthly report to be published mentioning details about the complaints received and the actions taken. This seems some what excessive regulatory control.

There are some interesting provisions such as the requirement that an SSMI enable verified users – a user can opt to have his identity verified and thereafter, there would be a mark indicating that the user's identity is verified. Paid advertisements also need to be properly identified so that users can differentiate between paid for content and content which is genuinely user generated. There is also a requirement to implement technology measures to identify content relating to rape, sexual abuse and other illegal content that has already been taken down.

Another key requirement is a notice and takedown procedure for complaints, other than orders from the government and courts. This includes sending notice to the content owner, giving him an opportunity to be heard and then deciding whether to take down the content or not. This repairs the damage caused by the much-praised Shreya Singhal judgment where the courts ruled that notice means only notice of courts or government, thereby shutting out and forcing individuals to approach courts for redressal, which is a daunting prospect in any country especially India. It should have instead prescribed a notice and take down procedure. Many countries have notice and take down procedures, the most well-known of which is under the USA's DMCA.

Perhaps the most controversial of the provisions is the requirement that a SSMI engaged primarily in messaging identify the "first originator" of a particular message. This applies mainly to Whatsapp and its competitors, but it could theoretically also apply to Telco's who carry SMS. This means that if a person sends unlawful content on Whatsapp and the same is widely distributed, then Whatsapp would have to identify who sent the message first and inform the security agencies when called upon to do so. Whatsapp would however not be required to provide the contents of any message or any other information re-lated to the originator, or any information related to its other users.

A key issue here is with implementation. Whatsapp messages are end to end encrypted and Whatsapp claims it has no access to the content. So, would it be possible to do this without knowing the contents of the message and relying only on metadata to figure out the first originator of the content? Whatsapp and its competitors would have to clarify whether that is possible. This provision is controversial. On one hand, it can be argued-if content is actually illegal, then law enforcement needs to find out who created the content and who sent out the message first. On the other hand, given our plethora of content related criminal provisions, a message meant only for a confidant could find its way to many people and could result in criminal liability which would have a significant chilling effect.

We are also concerned about a provision which states that if the first originator is outside India, then the first originator would be the first originator in India. We are not sure why a person who happens to be the first person in India to forward something is relevant.

Rules applicable to publishers

The third section of these rules relates to publishers, who are of two kinds (a) those who publish news and current affairs content; and (b) those who publish online curated content, which is defined to cover only audio-visual content. The latter essentially deals with podcasts and video streaming services but also social media sites that curate content.

The Rules apply to a publisher who is physically present in India as well as a publisher who "conducts systematic business activity of making its content available in India". The language is somewhat vague and should have referred instead to "systematically targeting Indian users". It may inadvertently cover online content not particularly focused on Indian users but available in India.

Here also, there is a requirement for appointment of a Grievance Officer and establishing a grievance mechanism with acknowledgement of a complaint within 24 hours and a decision on the complaint within 15 days. There is an appellate procedure, first to a self-regulatory body and then to the Government run Oversight Mechanism. We are not disputing the need for a grievance mechanism and the concept is clearly well conceived.

We have to face the reality that there is a plethora of outrightly false content as well as content which is biased and misleading. It can be reasonably contended that the ugly side of the internet and social media have reached a point where some action needs to be taken and it is necessary to empower users to call out bad content and insist it be removed. The key issue here is whether the process will be fair. A biased content provider is unlikely to be fair since he has an agenda tied to his content.

We have to recognize that in India, just as in the US and some other countries, there is a clear divide between the so called right and the so called left (I say so called because I have my reservations on whether either side deserve their titles of right or left!)! There can be one or more self-regulatory bodies so very likely the Right will form one self-regulatory body and the Left will form another. Will the government agree to register both? And appeals go to the government oversight mechanism which consists of bureaucrats from different ministries. Matters of free speech, accuracy of content, etc. are best decided by a group of well-regarded individuals in different areas, including law, media, and journalism rather than be left to bureaucrats. Here lies the biggest concern–that the government will use this mechanism to remove content that it does not like and retain content that is positive towards it.

There are other provisions that are somewhat troubling. A publisher is required to send notice to the Ministry of Information and Broadcasting ("Ministry") within 30 days of the effective date of these rules or within 30 days of setting up of the publisher. Would the Ministry refuse to register the publisher? It does not appear to be a registration at all – the publisher simply has to send the information and relevant documents. Further, it does not state that if the publisher does not do so, then the publisher cannot do business. If a publisher is sure its content does not violate Indian law, it need not actually be concerned about intermediary liability. Further, a publisher who has an editorial team that reviews content may not be able to use the safe harbour under section 79 anyway. The definition of a news and current affairs publisher is broad enough to cover a large amount of content which is not primarily journalistic. For example, a law firm that reviews laws (or carries an article such as this one!) would also be covered and would need to notify the Ministry.

Conclusion

The rules have been heavily criticized for infringing on the right to free speech and a further descent of India away from democracy. Our view is that the Rules present a mixed bag. The Rules present the first and meaningful manner of regulating the internet – that is allowing users to complain about bad content and requiring content or platform owners to act on such complaints and if they do not do so, be dealt with by a self-regulatory body. The US and Europe are already discussing how to do this, and it is well recognized that bad content on the internet is threatening the fabric of democracies. In fact, the rules are path breaking in the way they deal with the internet and try to strike a balance between free speech and the need to regulate with bad content. More importantly, they deliver power to the people, who can complain about content and have their complaints be heard and resolved.

There are undoubtedly ways by which the rules can be circumvented and used in a way to favour one side and attack the other side. The current enforcement and judicial environment in India does not inspire much confidence. Only time will tell how the rules will be implemented and whether courts will insist they be interpreted and implemented in a fair and balanced manner.

One unfortunate aspect about the rules is that by and large they come into force immediately with no notice to anyone. Further, no draft was released in advance for public comment. The rules provide for a fairly collaborative manner of regulating content on the internet. In that spirit, the rules should have been released in advance, been subject to several months of comments and feedback before being finalized and there should have been a preparatory period for organizations to become compliant.

It should be noted that most social media sites already have taken down policies so this should not affect them very much. One concern though, especially with news sites, is that they could be at the receiving end of "complaint carpet bombing" from people opposed to their ideology thereby requiring huge resources to deal with each and every complaint.

Stephen Mathias is the Partner in charge of the Bangalore office of Kochhar & Co. He also co-chairs the Firm's Technology Law Practice, the first of its kind in India.

Retrospective Taxation in India – Towards Legislative Finality at Last?

Authors

Pradeep Ratnam | pradeep.ratnam@kochhar.com

Samad Ali | samad.ali@kochhar.com

Overview

On 13 August 2021, the Government of India ("**GoI**") adopted the watershed Taxation Laws (Amendment) Act, 2021 ("**Amendment Act**"), endeavouring to reverse India's erstwhile fiscal and legislative policy from 2012 ("**Retrospective Tax Regime**") purporting to tax, with retrospective effect, capital gains on the international transfer of shares and assets in India. GoI's 'clarificatory' promulgation in 2012 that any transaction involving a direct or indirect transfer of underlying shares in India would be taxable, has since been a unanimous source of global concern. For investors in India such as Vodafone and Cairn GoI's decision to tax antecedent (i.e., pre-2012) sale transactions with retrospective effect, smacked of bad faith, triggering a chain of high-profile international arbitrations against GoI.

Following a recent spate of arbitral setbacks and defeats to the GoI (including the much publicized and ignominious seizure of sovereign assets of the GoI to satisfy arbitral claims), GoI has finally crossed the legislative Rubicon by rolling back the Retrospective Tax Regime through amendatory legislation. The essence and spirit of the Taxation Laws (Amendment) Act is to exempt any M&A transactions (involving the indirect transfer of assets in India) that predate 28th May 2012 ("**Cut-off Date**") from any tax liability under India's Retrospective Tax Regime ("**Eligible Transactions**"). By implication, deals involving a transfer of Indian assets after the Cut-off Date, would be subject to capital gains tax in India.

While the Amendment Act is undoubtedly a step in the right direction, its implications for companies currently in litigation/under assessment for retrospective tax, is dependent on the fine print of rules under the Amendment Act that are still in draft form ("**Draft Rules**")[1]. The devil as they say, rests in the detail. This article analyses both the Amendment Act and the Draft Rules, with our view on implications for tax settlements under the new law.

Background

The taxability of indirect transfer of Indian assets through the transfer of shares of a foreign body corporate was the subject matter of the Supreme Court of India's landmark judgment in 2012 in *Vodafone International Holdings B.V v Union of India (UOI) and Ors.* (2012 (1) SCALE 530) ("**Vodafone Judgment**"). In the Vodafone Judgment the Supreme Court held that income arising in global M&A transactions involving the indirect transfer of Indian assets is not taxable under the Indian Income Tax Act, 1961 ("**IT Act**").

However, GoI viewed the Vodafone Judgment as incompatible with the statutory objectives of the IT Act. Accordingly, it amended the IT Act in 2012 ("**FA 2012**"), clarifying that gains arising from sale of shares of a foreign company are taxable in India if such share(s), directly or indirectly, derive value from assets located in India. The FA 2012 was criticized because it was felt that the retrospective amendments work against the principle of tax certainty.

The Amendment Act seeks to nullify the contentious FA 2012, by providing that no future tax demand shall be raised on any indirect transfer of Indian assets if the transaction was carried out before 28 May, 2012 (Eligible Transactions). However, to be eligible for tax relief, the assessee must comply with certain specified conditions such as withdrawal of pending litigation against GoI, forfeiture of interest, and furnishing a 'no-litigation' undertaking protecting GoI from claims in the future.

Issues

For investors seeking tax relief, the conditions levied under the Draft Rules read with the Amendment Act present a mixed bag requiring careful commercial evaluation:

(a) **Forfeiture of Interest:** The Draft Rules read with the Amendment Act provide that for Eligible Transactions, GoI shall refund amounts collected in lieu of tax but without interest. However, this conflicts with another section of the IT Act, which entitles assessees to receive interest on refunds under the IT Act. Therefore, before signing the dotted line, investors should procure a legal opinion on the efficacy and enforceability of the interest waiver clause.

(b) **Scope of Refund:** The Amendment Act states that where any money becomes refundable to the person as a result of him satisfying the specified conditions (pertaining to

[1] On 28 August 2021, GoI notified draft Amendment Rules (2021) under the Amendment Act, stipulating various conditions for investors to be able to avail of tax exemption under the Amendment Act

withdrawal of litigation/claims), then, such sum shall be refunded. It is unclear as to the heads of payment that refunds would subsume. Would this just mean amounts paid by the assessee in protest and assets expropriated by GoI in satisfaction of its claims, or would it also include ancillary costs such as litigation expenses? If GoI has attached assets, would "refund" include a restitution of the expropriated asset or its current market value? Accordingly, the Amendment Act leaves several consequences open ended and ambiguous. Investors should therefore negotiate each of their heads of claim carefully with the GoI, by contending that all of these would fall within the ambit of "refunds".

(c) **Third Party Claims :** While it appears recently that Cairn Energy PLC has agreed to drop litigation against the GoI vis-à-vis its retrospective tax row, it appears that it is not under the obligation to cause a third party (such as Cairn Oil & Gas, Vedanta Limited) to drop such third party's ongoing similar litigation pertaining to retrospective taxation with the GoI.

Conclusion

While what the Amendment Act offers is clear in the overall intent of the legislation, the Draft Rules leave several matters to future negotiation. Given the significant amounts involved, these uncertainties may undermine an otherwise progressive legislative step towards instilling confidence amongst foreign investors in India. The silver lining is, of course, the GoI's assurance at the highest level that if the specified conditions are met (withdrawal of litigations against GoI, etc.) then the tax assessment or reassessment order, to the extent that it taxes capital gains, shall be considered to never have been made.

Ultimately, the efficacy of the Amendment Act will be determined by future clarifications issued by the relevant governmental authority(ies) regarding the scope of the refunds and whether GoI will consider rolling back its condition regarding the exclusion of interest. For instance, investors embroiled in litigation against GoI may not find forfeiting interest and court fees as a financially feasible option. Third party litigation regarding the same subject matter (of retrospective taxation) appear to be a sticking point, as a party settling its dispute with the GoI vis-à-vis retrospective taxation in accordance with the Amendment Act and the Draft Rules does not necessarily bring a third party also involved in a similar litigation to settle the litigation in a comparable manner with the GoI. However, subject to evolving clarity on some of the contentious issues above, the clarity provided by the Amendment Act regarding retrospective taxation is a welcome step in restoring global perceptions of India as a desirable investment destination.

Pradeep Ratnam is a Senior Partner in the New Delhi office of Kochhar & Co and co-chairs the Firm's Projects & Infrastructure and Banking & Finance Practice Groups.

Samad is a Principal Associate and member of the Banking, Infrastructure & Finance Practice Groups.

Would Payment for Imported Copyrighted Software Constitute Royalty? – An analysis of a Recent Ruling of the Indian Supreme Court

Authors **Shahid Khan** | shahid.khan@kochhar.com

Introduction

1. Taxability of payments made by Indian importers for import of software from non-resident suppliers has been a vexed question on which different Indian tribunals and courts had given conflicting rulings in the past. The question has now been settled finally by the Supreme Court in a recent judgement[1].

2. The Supreme Court was deciding a bunch of over 50 appeals arising from judgments of different High Courts. These cases related to import of shrink-wrapped software by Indian importers from non-resident suppliers (from Canada, Hong Kong, Japan, Singapore, UK, USA, and some other countries), and fell in following four categories:

   - Cases where software was purchased directly by the Indian end-user.
   - Cases where Indian distributors or resellers, purchased software from a non-resident supplier, and resold it to Indian end-users.
   - Cases where a non-resident distributor / vendor purchased the software from another non-resident seller and sold it to Indian distributors or end-users.
   - Cases where the software was installed on hardware and was sold by non-resident suppliers as integrated equipment to Indian distributors or users.

   The common question was whether consideration paid to the non-resident suppliers was 'royalty' on which tax was required to be with held by the Indian importer?

3. Indian Income Tax Act allows residents of countries with which India has a Double Tax Avoidance Agreement (Tax Treaty) the option to be taxed under Indian law or under the provisions of the respective Tax Treaty, whichever is beneficial to them. Under the Tax Treaties business income of a non-resident can be taxed in India only if the non-resident has a Permanent Establishment (PE) in India. One of the exception to this rule is that payment of the nature of Royalty to a non-resident can be taxed in India even if it has no PE in India. In the present case none of the non-resident suppliers had a PE in India. Therefore, the key question before the Court was whether the amounts paid by Indian importers to the non-resident suppliers come within the definition of 'Royalty'.

4. The term 'Royalty' has been defined in the Tax Treaties as consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, for use in connection with any patent, trademark, design or model, plan, secret formula or process. The stand of the Revenue was that the import of software resulted in transfer of 'copyright', and therefore the payment was 'Royalty' on which the importer ought to have deducted tax at source as withholding tax and deposited in Government account. In support the Revenue cited provisions of Copyright Act 1957 which inter-alia provided that the copyright owner has the right to reproduce the work (including storing of it in any medium by electronic means), to issue copies of it to the public, to sell or give on commercial rental or make offer for sale etc. Revenue pointed out that since in these cases import of the software included a licence to use it the consideration paid for the software was 'Royalty'.

5. On the other hand, submission of the taxpayers was that they are non-exclusive distributors who purchase off-the-shelf copies of the software from non-resident suppliers for sale to Indian end-users under Remarketer Agreements. They pointed out that they are not party to the End Users License Agreements (EULA), which were entered between non-resident suppliers and the end-users in India. Under the Remarketer Agreements, the Indian importers did not have any right, title or interest in the copyright or the intellectual property owned by the non-resident suppliers. Next, it was pointed out that there is a difference between the copyright in an original work and a copyrighted article. The taxpayers argued that under the Remarketer Agreement, no copyright was given to them, the EULA was between the non-resident suppliers and Indian end-users, and that under the EULA even the Indian end-users had only a limited licence to use the software, without any right to sub-license, lease, or make copies of it. The licence granted to the end-users

[1] Engineering Analysis Centre of Excellence vs. Commissioner, Civil Appeals 8733-8734 of 2018

was incidental and essential to enable them to use the software. Thus, the payments to the non-resident suppliers were not 'Royalty' but sale proceeds of goods, which being business income cannot be taxed in India in the absence of PE.

6. The Court in a lengthy judgment running over 200 pages examined the provisions of the Income tax Act, the relevant Tax Treaties, the Copyright Act, and the EULAs entered by various parties and came to the following conclusions:
   - The liability to withhold tax arises on the Indian importers of software only if the amounts being remitted to the non-resident suppliers are chargeable to tax in India, but not otherwise.
   - Under Indian law provisions of the Tax Treaties prevail over those of the Indian Income Tax Act. Therefore, definition of 'Royalty' has to be considered as provided under the relevant Tax Treaty.
   - Under the Indian Copyright Act, a literary work includes a computer program. This Act defines a computer program as a set of instructions in words, codes, schemes or in any other form capable of causing a computer to perform a particular task or achieve a particular result.
   - The term 'copyright' means an 'exclusive' right to do or authorise the doing of certain acts in respect of the 'work' and includes the right to reproduce the 'work' in any form, or to make its copies or translations or adaptations. Thus, the right to reproduce a computer program and exploit the reproduction by way of sale, transfer, license etc. is at the heart of the term 'copyright'.
   - When the owner of copyright in a work assigns all or any of the rights in the copyright of the said work for a consideration, the assignee of such right becomes entitled to the rights in the copyright that are assigned to him and becomes owner of assigned rights.
   - The Remarketer/Distribution agreements show that only a non-exclusive, non-transferable licence to resell computer software is granted to the distributors. It is expressly stipulated that no copyright in the computer program is transferred either to the distributor or to the ultimate end-user. Apart from a right to use the computer program by the end-user, there is no further right to sub-license or transfer, nor is there any right to reverse-engineer, modify, or reproduce the software in any manner.
   - The amounts paid by the Indian importers to the non-resident suppliers are the price of the computer program sold as goods (whether stored in a computer medium or embedded in hardware). The distributors are entitled to further resell it to the end-users in India. They do not get the right to use the software at all. Even the end-users have a mere license to use the software without any other right.
   - The difference between the right to reproduce, modify, adapt etc. a software and the right to use a software has to be recognised. The former amounts to parting of copyright by the owner while the latter does not.
   - What is 'licensed' in these cases by the non-resident suppliers to the Indian distributors and resold to the resident end-users, is in fact sale of a physical object which contains an embedded computer program and is therefore a sale of goods.
7. The Court thus held that the amounts paid by the resident Indian importers / distributors to the non-resident suppliers, as consideration for the resale/use of the computer software through the Marketer/distribution agreements and EULAs, are not payment of 'Royalty' for use of copyright in the software but sale proceeds of copyrighted articles, i.e., business receipts. In the absence of PEs of the non-resident sellers in India their business income cannot be taxed in India. Therefore, there was no liability on the Indian importers to withhold tax on these payments.

In preparing this article, Shahid Khan was assisted by Lakshay Goyal.

Shahid is a Senior Partner and Heads the Direct Tax Practice in Kochhar & Co. He is a former Indian Revenue Service officer and has worked with the Indian Income Tax Department in various capacities. Immediately prior to joining the Firm, he was a Member of Central Board of Direct Taxes (CBDT), the highest policy and decision-making body for income tax matters in the Government of India (GOI).

Lakshay is an Associate in the Corporate & Taxation Practice Group.

The Supreme Court on The Great Indian Bustard: Environmental Contestation and Implications in Solar Projects in India

Authors

Pradeep Ratnam | pradeep.ratnam@kochhar.com

Navolina Majumdar | navolina.majumdar@kochhar.com

Introduction

Recently, the Supreme Court of India ("**Court**"), in a writ petition, stayed the installation of overhead power lines and further construction of windmills and installation of solar infrastructure in priority and potential habitats identified by the Wildlife Institute of India (**WII**) as a last effort to save the great Indian bustard (**GIB**) from certain extinction. To protect the GIB from overhead power cables, the Court directed the 'undergrounding' of powerlines in the areas demarcated by the WII as the GIB's priority and potential habitat.

While the Court's order is laudable in its singular focus of protecting endangered wildlife, its financial implications for under-construction solar projects, both for the affected states (Rajasthan and Gujarat) and project developers, are likely to be catastrophic. The primary concern with replacing overhead powerlines with underground ones are:

- High cost of underground cabling;
- Right of way (ROW) issues, with farm land which undergrounding projects would need to cut through;
- Likely project delays, with financing cost implications;
- High downtime to repair failed cables;
- The requirement of high voltage transmission lines, which renders shifting of lines underground unviable;
- Non-availability of cables; and
- Increase in the number of joints with length of run.

While addressing the States' concern of lack of funds, the SC quoted the Centrally Sponsored Integrated Development of Wildlife Habitats Scheme, 2009 which provided for financial sharing between Centre and State. The Court further stated in its order that "*in the instant case the preservation is by undergrounding the powerlines and in that context if cost is incurred, it would also be permissible to pass on a portion of such expenses to the ultimate consumer subject to approval of the Competent Regulatory Authority*."

The Court further suggested the following options to meet the increased expenses:

- The cost be a part of CSR of Companies under Section 135 of the Companies Act, 2013 (if the Company meets the criteria of minimum net worth/turnover/net profit);
- Implementation of the Compensatory Afforestation Fund Act, 2016, sections 4, 5 and 6 of which provide for the utilization of the fund for measures to mitigate threats to wildlife. Further, the State of Rajasthan has already set up a Compensatory Afforestation Fund Management and Planning Authority (CAMPA) on 12.11.2009 which permit the use of the State Fund for the improvement of wildlife habitat.

The SC ruled that the undergrounding of high-voltage lines would need to be evaluated on a case-to-case basis by a special 3-member committee comprising of scientists from WII, Ministry of New and Renewable Energy and the deputy director of the Corbett Foundation ("**Special Committee**"). However, all low voltage power lines whether already laid or to be laid in the potential habitats of the GIB are to be made underground in all cases. Further, some high voltage power lines would have to be converted into underground power lines as well. The timeline for completion of undergrounding of the power lines is 12 months from the date of the Order. In all cases where it is feasible to convert the overhead power lines to underground power lines, the same shall be completed within one year.

Analysis

At the outset, the renewable energy sector (solar and wind energy) faces the following roadblocks due to the SC Order:

- The cost of developing projects would increase by around 87% which would in turn result in a 10-15% hike in tariff if the developers have to bear this entire cost[1]. In utility scale projects where the offtaker is a state power distribution company (DISCOMs), the increase in tariffs could be as high as 10-20%. As per an estimate, more than 2,500 kilometres of cables, including both high and low-voltage, have to be laid underground as per the court ruling at a very high estimated cost;
- Right of way another major concern of the developers /power companies is acquiring the land on which undergrounding needs to be done. This would involve digging through large areas of land which may be difficult due to protest by landowners. This would delay the implementation of the projects as well. Further, in the 12-

[1]https://mercomindia.com/gib-renewable-energy-save-both/

month timeline given by the SC for completing the undergrounding process, the acquisition of land itself might not be possible;

- In case land needs to be first acquired to start the undergrounding process, the land cost and comp-ensation to the landowners would drastically increase the final cost of the project. This in turn would be a burden passed on to the end consumer by way of hiked tariffs;
- For investors who have negotiated or availed funding for their projects, the increased cost would throw the financial projections in a disarray and sourcing additional funding may prove difficult.

Conclusion

As a result of the Supreme Court's ruling, two key questions emerge

- Would project companies be entitled to a change in law relief and pass-through of the increased costs of comply-ing with the Court's order? It would appear that the Court's order is 'new' law entitling an affected party to seek an increase in costs for a change in law. However, a final view would depend on various factors such as the definition of Change in Law in the PPAs pertaining to the affected projects, and 'pre-existing' local laws on GIB.
- From an M&A perspective, prospective purchasers of existing power projects would need to evaluate whether to discount the deal consideration for a possible disallowance of the pass-through of increased costs on account of the Court's order. If there is a possibility that change in law claims would be rejected, for instance, if a court or the appropriate tariff setting authority find that the environmental clearance for the project was inadequate, or that GIB was a "known risk", then the purchaser may need to negotiate an adjustment of consideration.

Further, if the project developers are of the opinion that the under grounding is unviable, the Court has re-directed them to the Special Committee, which will then decide on the fate of the project. This Special Committee shall decide (on a case-to-case basis), whether under grounding is feasible for the developer or not, thus creating further uncertainty regarding the future of the projects. This uncertainty shall prevail till the Court provides some clarification or some relief to the State and investors. Stakeholders should evaluate their options carefully.

Pradeep Ratnam is a Senior Partner in the New Delhi office of Kochhar & Co and co-chairs the Firm's Projects & Infrastructure and Banking & Finance Practice Groups.

Navolina Majumdar is an Associate in Kochhar & Co New Delhi office. She is a member of the Firm's Infrastructure, Banking and Project Finance Practice Groups.

Production Linked Incentives (PLI) – A Boon for the Next Generation of US Investments in India?

Authors

Pradeep Ratnam | pradeep.ratnam@kochhar.com

Anushka Agarwal | anushka.agarwal@kochhar.com

Introduction

The United States is one of India's largest foreign investors, with a long history of investment and joint ventures that have stood the test of time. From automobiles to heavy industry to entertainment – iconic American brands such as Ford, General Electric and Apple are household names in the Indian market today. The US is the 3rd largest investor in India, having invested $45.55 billion between April 2000 and June 2021. This represents 8.3% of the total foreign direct investment into India during this period.

However, with symbiotic factors at play - strategic geopolitical alignments, excess global liquidity and a competitive all-new 'incentive based' manufacturing regime in India - the Indo-US economic relationship in high-value manufacturing appears poised for exponential growth. This article provides an overview of India's Production Linked Incentive Schemes (**PLI Schemes**), and their significance for US investments in manufacturing in India.

Production Linked Incentives (PLI) - Key common features

Between 2020 and 2021, India announced a series of PLI Schemes aimed at accelerating domestic manufacturing in India. The bedrock of the PLI Schemes is a system of annually disbursable direct financial incentives, or 'cash-backs', from the Government of India (GoI) to eligible manufacturers under the relevant PLI Scheme.

The overarching common attributes of the PLI Schemes are:

1) Duration : The lifetime of each Scheme is for a specified block of 5 (five) financial years, (**Incentive Block**). Within an Incentive Block, a manufacturing entity or firm, is responsible for achieving annual investment, production and sales targets as specified under the relevant PLI Scheme.

2) Eligible Products : Each PLI Scheme sets out specific products that are eligible for manufacture. Most recent PLI Schemes include pharmaceutical products, air-conditioners, LED lighting products (including components and intermediates), and telecom equipment.

3) Barriers to entry : In selecting applicants, PLI Schemes ascribe weightage to factors such as the applicant group's existing manufacturing capacity (globally and in India), consolidated global revenue and net worth; apart from sector-specific achievements (such as, in the case of pharmaceuticals, the number of product registrations with recognized regulators such as USFDA). The qualification criteria above naturally weigh in favour of established multinational firms with a sectoral track record.

4) Minimum Committed Investment and Threshold Sales Growth Targets: For firms to be eligible to claim the financial incentives above, the Schemes set out certain minimum annual and cumulative investment and *year-on-year* incremental sales targets ("**Stipulated Threshold Targets" or "STTs**") that a firm must demonstrate as having achieved. The Stipulated Threshold Targets are hardcoded into the text of the Scheme Guidelines.

5) Financial Incentives: If a firm meets its annual STTs under a PLI Scheme, it will be entitled to claiming a "financial incentive". The financial incentive is calculated by multiplying "*net incremental sales of eligible product(s)*" achieved in the relevant financial year by a % "*rate of incentive*" specified in the relevant Scheme.

6) Project Management Agency: Each PLI Scheme has a nodal designated Project Management Agency, which is an entity appointed by the relevant governmental department responsible for projecting-managing the concerned PLI Scheme and verifying the firm's financial claims under the concerned PLI Scheme.

Analysis

The first generation of PLI schemes, rolled out between 2020 and the early part of 2021, covering 13 sectors, has generated considerable uptake from bidders/prospective manufacturers. Some sectors such as telecom, hardware equipment/mobile handset manufacturing have seen significant market traction and have attracted the biggest and best of global manufacturing into India[1].

[1]Apple iphone manufacturing partners, Foxconn and Winston, have increased their production in India to be on target to achieve this year's goals and gain an advantage under the production-linked incentive (PLI) scheme. As per Counterpoint Reserach, the Indian market's share of deomestically manufactured iphones increased 17% in 17% in 2018 to 76% in 2021.

However, for certain other sectors, such as electronics and the auto sector, the success has been less visible, because relocating manufacturing into India under PLI does not address the issue of intermediate components such as semiconductor chips which are still globally sourced[2].

Thus, while it is beyond debate that PLIs are a necessary step towards boosting manufacturing capability in India, import substitution, self-reliance and building an export focused ecosystem similar to our East Asian neighbours, the success of the various Schemes would depend on addressing the drawbacks and disadvantages intrinsic to manufacturing in India, such as:

- The high cost of domestic debt;
- The lack of intermediate components, domestic substitutes for cutting-edge technology and capital infrastructure such as specialist foundries (for instance, for specialty steel) in India;
- The exclusion, through Indian policy and regulation, of ancillary components originating from China;
- The reduction of the incentive period in certain sectors such as Drones, where the incentive block has been reduced from 5 years to 3 years;
- The risk of technology obsolescence: This is relevant for sectors such as PLI in photovoltaic (PV) components in the solar sector and for lithium-ion storage batteries, and drones, where the technological advancement may outpace the speed of manufacturing facilities that come up in India; and
- Sector specific risks: In the solar sector, the timeline for developing utility scale solar projects that are tendered out by various government procurement agencies, are specific. Therefore, if there are delays in manufacturing solar modules under PLI, it is likely that the project developer would face downstream delays in project implementation. For PLI sectors such as drones, their efficacy would depend on the feasibility of end utilisation of drones, e.g., use in imaging for infrastructure projects such as highways and irrigation. For a number of technical reasons, the current generation of drones are of limited utility in this regard.

Overall, it is also unclear whether the current package of financial incentives is sufficient to lure intermediate manufacturing from other cost competitive jurisdictions such as China and Vietnam. Therefore, for PLIs to succeed, it is important that the government streamlines the incentives provided within each sector and address the issues at the core of each sector rather than just promoting production.

Conclusion

From a legal perspective, PLI Schemes are a clear and transparent enunciation of the financial ince-ntives available to manufacturing firms and the conditions for claiming them. A unique/compelling feature of PLI Schemes is that the scheme based financial incentives on offer are backed by guaranteed budgetary outlays of the GoI that are provisioned into individual departmental budgets each year.

However, applicants and firms in PLI projects are advised to be mindful of the following:

1) Negotiating the disabilities of India's manufacturing ecosystem: PLI Schemes, in essence, are compensatory. Fiscal incentives in themselves do not address the intrinsic disabilities in manufacturing in India. Therefore, before committing to investments and production targets under PLI, firms should carefully evaluate and ensure the availability of adequate infrastructure, supply chains, local components and intermediates (to avoid paying basic customs duty on importing these), logistics, financing, power, design capabilities, R&D, manpower and skills.
2) Binding targets under PLIs : Aside from a "*gestation period*" of up to 2 years before commencing production, PLI schemes do not excuse firms from meeting their committed targets. Investors should mitigate manufacturing under performance and delays through watertight contractual arrangements and insurance.
3) Project planning : PLI Schemes do not underwrite or guarantee any other aspect of the project (land and approvals), which investors should tie up in advance.
4) Finite Window for Incentives : Financial incentives to SEs are only available for the duration of the Incentive Block, and against the specific financial year that such incentive pertains to. Firms do not have the option to 'bank', defer or 'catch up' on unclaimed financial reliefs on future dates.
5) Fine print : The calculation of STTs under PLI is subject to various prescriptive exclusions. As achieving the stipulated STT threshold on an annual basis is a prerequisite to claiming financial incentives, firms should be wary of expensing 'excluded items' that cannot be claimed.

[2] A global shortage of computer chips has impacted everything from automobiles to video game consoles and now smartphones. Semiconductors have been in short supply this year, due to a number of reasons including factory closures resulting from the Covid-19 pandemic and heightened demand for consumer electronics. Automakers have been especially impacted by the shortage, with companies like General Motors and Ford reducing or even halting production of certain vehicles.

6) Change of Ownership : The transfer of eligible benefits during an Incentive Block to a successor firm is subject to the approval of the relevant governmental authority.

7) Technology risks and obsolescence : This is relevant for PLIs in high-value emerging technology related areas such as Drones, Solar PV and Storage Batteries.

Thus, while PLI Schemes present an ideal opportunity for international firms with manufacturing capability, expertise and a demonstrable track record, - success in India would depend upon the strength of local production systems and partnerships, advisory support, innovation and the ability to pre-empt and mitigate some of the disabilities and complexities intrinsic to the Indian manufacturing ecosystem. In this regard, US firms as natural beneficiaries of a treasured bilateral relationship between our nations, strongly entrenched manufacturing networks, lobbies, and business experience in India, stand to gain.

In preparing this article, Pradeep Ratnam was assisted by Associate, Anushka Agarwal.

Pradeep Ratnam is a Senior Partner in the New Delhi office of Kochhar & Co and co-chairs the Firm's Projects & Infrastructure and Banking & Finance Practice Groups.

Anushka Agarwal is an Associate in Kochhar & Co New Delhi office. She is a member of the Firm's Corporate M & A Practice Group.

India's Stand on Emergency Arbitrators and Emergency Awards

Authors
Nishant Menon | nishant.menon@kochhar.com
Nikhil Bhatia | nikhil.bhatia@kochhar.com

The Supreme Court of India on 6th August, 2021 in *Amazon.com NV Investment Holdings LLC v Future Retail Limited & Others* handed down a seminal decision in relation to enforcement of an Emergency Arbitrator's ("EA") award. The ruling has great significance as it furthers India's mission of being a pro-arbitration State where there is greater ease of doing business.

Also, the judgment reaffirms the position under Indian law on the status and powers of an EA as a species of arbitrator and not a creature unlike it. Below, we briefly recount, analyse and comment upon the widely celebrated landmark judgement.

Brief Facts and Procedural History

Future Retail ("Future") and Amazon signed a Shareholder's Agreement on 12th August, 2019 ("Agreement") based on which Amazon made an investment in Future's retail assets. This Agreement included an arbitration clause which stipulated that any dispute would be resolved under the aegis of Singapore International Arbitration Centre ("SIAC") and with New Delhi as the seat.

Subsequently, Future struck a deal with Reliance on 29th August, 2020 which would entail the former's cessation and its amalgamation with the latter. According to Amazon, by agreeing to this deal Future had breached the terms of their Agreement as they asserted that,

- the deal was deemed to be violative of the 'Right of First Refusal' clause in Amazon's favour,
- Future was barred to sell their stake without Amazon's consent, and
- Reliance was demarcated as a 'restricted party', i.e., Future was not allowed to deal with the entity as part of the agreement.

In pursuance of the same, Amazon invoked emergency arbitration (which was permitted under SIAC's Rules as a means to grant interim protection) on 5th October, 2020 to restrict the Reliance deal from going through. Upon hearing both parties, the EA adjudicated in favour of Amazon on 25th October, 2020 and passed an interim order granting relief to them by restricting Future to go ahead with its deal with Reliance till the matter was resolved by a regular Arbitral Tribunal as envisaged under the Agreement.

Disappointed with this outcome and without waiting for the constitution of an Arbitral Tribunal, Future approached the Delhi High Court to vacate the EA's stay order. The interim relief sought by Future was denied at this stage as the High Court by its order of 21st December, 2020 upheld the validity of the EA order. It was also of the opinion that the other arguments advanced by Future with respect to the merger's sanctity had been or were being considered by various statutory bodies like the Competition Commission of India, the National Company Law Tribunal as well as the Securities and Exchange Board of India, and that they should continue to do so with out the Court's intervention.

Further bolstered by this outcome, an application under Section 17(2) of the Arbitration and Conciliation Act, 1996 ("Act") to enforce the award by the EA was filed by Amazon wherein the High Court on 2nd February, 2021 deemed the order to be legitimate and thus enforceable under the aforementioned section which gives an interim order of an arbitral tribunal the status of a court decree to facilitate execution.

Aggrieved by this, Future approached Delhi High Court's Division Bench in appeal which stayed the Single Judge's order for enforcement on 22nd March, 2021.

Consequently, Amazon filed a Special Leave Petition before the Supreme Court of India. While it examined the petition, on 19th April, 2021 the Supreme Court stayed proceedings of the lower courts while allowing the National Company Law Tribunal to keep working on determining the viability of the merger but instructed it to not pass any orders during the petition's pendency.

We now move towards the Apex Court's decision in the matter on August 6, 2021.

Judgment

The Supreme Court identified two core issues that were to be decided-

- Whether an award passed by the EA under the SIAC's rules could be construed as an "order" under Section 17(1) of the Act, and
- Whether an order to enforce an EA's award under Section 17(2) was appealable under the Act.

The Apex Court answered the first question in the affirmative, and the latter in the negative.

Some of the salient points noted by the Supreme Court ("Court") while coming to this conclusion are as follows:

- The Court examined the objective and scope of the Act's provisions as well as relying on numerous judgements to re-emphasize that party autonomy was one of the most crucial aspects of arbitration. Thus, parties were allowed to determine the procedure via which they wanted to resolve a dispute and that the Act did not contemplate a bar on emergency arbitration as a forum for adjudication. Furthermore, a reference to the SIAC Rules was made wherein it was clearly stated that an EA and an arbitral tribunal have the same powers.
- The Court stated that once a party has agreed to certain institutional rules and acted in pursuance of the same, in this case being bound by SIAC Rules that provide for emergency arbitration and participating in it, an argument cannot consequently be entertained that such an order or award is not bound to be followed.
- The Court noted that an emergency arbitration is a natural corollary and extension of the objectives of Section 9 of the Act, which provides for interim relief by courts prior to constitution of the arbitral tribunal, i.e., to unclog traditional forums and provide timely and efficient relief till such constitution.
- The Court quoted the B.N. Srikrishna Committee Report which had contemplated interpreting the Act in a manner that allows enforcement of EA orders in the nation. Referencing the 246th Law Commission Report, the Court opined that even though its recommendation to allow EA rulings in the country was not inserted statutorily by the Parliament, that would not tantamount to the same being unenforceable if it was determined that its enforceability was within the scope of the Act.
- With respect to the issue of appealability, the Court held that enforcement under Section 17(2) of the Act has a very limited function and clear purpose. It is a legal fiction created to uphold interim orders of an arbitral tribunal akin to an order of the court. It was only created as the tribunal itself does not have the same powers to utilize the Code of Civil Procedure *vis a vis* a court of law. On inspecting the Act's scheme, the Court noted that Section 37, which lays down the law with respect to appealability of court/arbitral tribunal orders, is complete and sufficient and thus the legislature did not envisage appeals arising from Section 17(2) as that would be incorrectly extending the aforementioned fiction.

Conclusion

This is a landmark decision of great significance for dispute resolution in India. The ruling allows for India-seated arbitrations to conduct emergency arbitrations as the courts will now treat their orders at par with those of an arbitral tribunal, without requiring intervention from the legislature. It could potentially be a big step towards making India a hub for arbitration as parties dealing commercially in India will look at domestic-seated arbitrations in a more favorable light. This is also likely to be a shot in the arm for domestic arbitrations under the aegis of institutions as only institutional arbitrations provide for emergency arbitration in their rules.

In preparing this article, Nishant Menon was assisted by Nikhil Bhatia

Nishant Menon is a Senior Partner in the Dispute Resolution Practice Group.

Nikhil Bhatia is an Associate.

Both are based in the Kochhar & Co New Delhi office.

Supplier Liability Under Civil Liability for Nuclear Damage Act, 2010

Author
Manish Dembla | manish.dembla@kochhar.com

Background

Article 10 of the Convention on Supplementary Compensation for Nuclear Damage ("**CSC**") (which India ratified in 2016) allows ratifying states, through domestic legislation, to provide that in the event of a nuclear incident, the operator shall have a right of recourse against the supplier only if: (a) it is expressly provided for by a written contract; or (b) if the nuclear incident results from an act or omission done with intent to cause damage, against the individual who has acted or omitted to act with such intent. The intention underlying the CSC was categorical. It limits liability of suppliers of nuclear technology to two narrow circumstances – i.e., if the contract between the operator and supplier explicitly provides for recourse to the supplier, or if the supplier intentionally causes harm.

India's Civil Liability for Nuclear Damage Act, 2010 ("**CLNDA**") largely replicates the aforesaid risk allocation in the CSC. However, Section 17 (b) of the Civil Liability for Nuclear Damage Act, 2010 ("**CLNDA**") extends recourse against the supplier to situations where the nuclear incident has resulted from an act of the supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services.

Issues

A. Whether Section 17(b) of the CLNDA goes beyond the provisions of the CSC?

B. Whether Section 17 establishes a mandatory statutory right of recourse to the supplier (overriding, for instance, a contrary position in a supply contract)?

Analysis

Issue A

The Ministry of External Affairs, Government of India *vide* FAQs issued by way of a press release dated February 8, 2015[1] stated the following on this issue:

"…the situations identified in Section 17(b) relate to actions and matters such as product liability stipulations/conditions or service contracts……. Thus, this provision is to be read along with/in the context of the relevant clause in the contract between the operator and supplier on product liability… Article 10(a) of the CSC Annex does not restrict in any manner the contents of the contract between the operator and the supplier including the basis for recourse agreed by the operator and supplier. Therefore, in view of the above, in so far as the reference to the supplier in Section 17(b) is concerned, it would be in conformity with and not in contradiction of Article 10(a) of the CSC Annex……"

By stating that Section 17(b) is to be read along with / in the context of the relevant clause in the contract between the operator and supplier on product liability, the Government has in effect suggested that Section 17(a) and 17(b) are connected with the word "*and*" which is not the case. In fact, a proposal to so connect Section 17(a) and 17(b) was made in the Report of the Parliamentary Standing Committee[2] but the said suggestion was not upheld by the Parliament in the final version of CLNDA. It is a well settled principle of Indian law that a provision that was expressly excluded from the statute cannot be read into the statute by interpretation and that every statute is to be interpreted in accordance with the intention of the legislature[3]. It is evident that Section 17(b) exists independently of the contract which may be entered into between the operator and supplier. In our view, even if the operator and supplier were to provide for exclusion of the liability of the supplier in their agreement, such a provision would be void as being violative of Section 17(b).

Issue B

The aforesaid FAQs also state that Section 17 permits but does not require an operator to include in the contract or exercise a right of recourse. This response also suffers from the same fallacy as the previous one. As stated above, the right of recourse against the supplier under Section 17(b) is independent of the contract and therefore, even if such a right is not included in the contract, the operator would still be entitled to the same. With respect to the option with the operator to not exercise a right of recourse, it is pertinent to mention that as per the Indian law[4], only the Central Government, an authority or corporation established by the Central Government, or a Government Company can operate a nuclear power plant in India.

[1] https://www.mea.gov.in/press-releases.htm?dtl/24766/Frequently_Asked_Questions_and_Answers_on_Civil_Liability_for_Nuclear_Damage_Act_2010_and_related_issues
[2] Parliamentary Standing Committee report available at: https://www.prsindia.org/sites/default/files/bill_files/SCR_Nuclear_Liability_Bill_2010.pdf
[3] M/s. Trutuf Safety Glass Industries vs. Commissioner of Sales Tax U.P., 2007 (9) SCALE 610
[4] Section 2(m) of CLNDA

Therefore, while it may be theoretically possible for the operator to not exercise the right of recourse, the propriety of such a waiver could be challenged before the Indian courts. The ground for such challenge being that the waiver / non-recourse / limited recourse against a negligent supplier is contrary to public interest as it entails a burden on the Indian taxpayer on account of the operator being a Government undertaking.

Conclusion

The Government of India (GoI) has provided encouraging clarifications in the FAQs. Considering that only the GoI or authorities, corporations, and companies under GoI's control can operate nuclear power plants in India, American suppliers could introduce language in their contracts restricting supplier's liability to the grounds set out in the CSC. As the FAQs have indirectly endorsed this position (albeit without direct legislative support), this may be an opportunity for global suppliers to reopen discussions in an important sector for Indo-US collaboration. In fact, India has attempted to further allay the concerns of suppliers by limiting their liability under the Civil Liability for Nuclear Damages Rules, 2011 and creating a nuclear insurance pool. Some of these additional policy measures adopted may serve to re-invigorate participation from US suppliers of components, technology, and know how in civilian nuclear technology in India.

Manish Dembla is a Partner in the Gurgaon office of the Firm. He has about 15 years' experience in diverse areas of law.

Standardization of Loan Docs

Author **Anuj Kaila** | anuj.kaila@bgl.kochhar.com

Introduction

It is fairly common among Indian corporates to incur indebtedness through a mix of debt securities and bank loans. Debt securities are usually in the form of debentures, bonds and commercial papers sourced through a public or private issuance. With the size of the Indian credit industry running into several lakh crores, it would be a welcome change if the documentation for availing credit/debt securities was regularized. Internationally, LSTA, LMA and APLMA have played a major role in standardizing documentation across US, Europe, Middle East, Asia Pacific, and Africa. These documents provide for standard terms and conditions for secondary market transactions coupled with individualized Trade Confirmation (which contain negotiated deviations between the parties)[1].

While India has no standard loan documentation practice across banks, the Indian Bank's Association (IBA) has been looking to revamp the Indian debt market by introducing standardized documentation and has circulated standard facility documentation for consortium lending, which is followed by most public sector Indian banks. Usually, lenders follow their own individual formats for bilateral financing transactions; however, the clauses across banks are similar. While traditional banks are stringent with their documentation and typically do not deviate from their standard documentation (this is primarily owing to their strict bureaucratic internal policies, which restrict them from being very flexible in negotiations), non-banking financial companies (NBFCs) are slightly more lenient in their financing terms compared to banks.

The standardization of loan documents would primarily focus on adding standard clauses to the body of the document/agreement and the deviations would be added as schedules such that the main body of the documents remains standard and unchanged for all loans. This will allow borrowers and investors to easily review and assess only the case specific deviations rather than having to compare each clause of an entire loan document.

Standard Provisions In Indian Loan Documentation

Rate of Interest

The interest is calculated by reference to a bank rate, which is the benchmark rate. The Reserve Bank of India provides the formula that a bank must use to calculate its marginal cost of funds-based lending rates (MCLR). The bank treats this as the base rate and charges a spread over and above the benchmark rate in accordance with the thresholds prescribed. NBFCs often have their own benchmark rates and spreads for calculating the interest rate and these vary with each institution[2].

Under the external commercial borrowing (ECB) regulations, the interest rate linked to a foreign loan provided in foreign currency may be linked to the six-month LIBOR rate of different currencies or any other six-month interbank interest rate applicable to the currency of borrowing (e.g., EURIBOR) to determine the all-in cost for the loan.

Yield Protection Provisions

Almost all loan documentation in India includes provisions for increased cost, prepayment premiums and withholding tax gross-up provisions. The increased cost provisions are standard clauses in a loan transaction, wherein an obligation is imposed on the borrower to make good any additional cost incurred by the lender on account of changes in the laws and regulations and compliance thereof.

Financial Maintenance Covenants

Financial covenants included in bank loan documentation usually provide for maintenance of debt service coverage ratios, regulation of cash burn, maintenance of minimum net worth, maintenance of EBITDA ratios, maintaining a minimum specified credit rating, security cover ratio and end-use restrictions on borrowed funds. These covenants are usually stricter in loans that are given to special purpose vehicles, which are very common in project financing transactions. However, the financial covenants are generally more relaxed in general corporate financing in large corporates that have multiple verticals and revenue generating streams.

[1] https://m.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=940#CHF1

[2] For example, Indiabulls Housing Finance Limited follows a benchmark rate called the "IWLR" or the Indiabulls Wholesale Lending Rate.

These financial covenants are usually tested on a periodic basis (decided on a case to case basis by each institution) to ascertain the financial health of the borrower and aids the creditor in determining its financial projections regarding such credit facility.

Mandatory Prepayment

When a borrower under debt has received an influx of money owing to the occurrence of an event - for instance, the sale of a branch of the business, the sale of property owned by the business, or proceeds of insurance - the creditor may seek for mandatory prepayment of the loan from those proceeds. The debtor is mandatorily obliged in such an event to direct the proceeds resulting from those events to the payment of the loan, albeit prior to the maturity date, and is not permitted to reinvest the same into its business. Prepayment premiums are usually not imposed upon the occurrence of a mandatory prepayment event. However, in some instances, such prepayment may result in adverse tax consequences, in which case the mandatory prepayment may not be enforced.

Indemnification

Where a creditor incurs expenditure or undertakes a liability on behalf of the borrower, the creditor may require the borrower to repay the expenditure or indemnify it for any loss caused. Those terms are generally included in the loan documentation and may include indemnification for any default and repayment of transaction costs, amendment costs, stamp duty, security agent or trustee fees, the cost of litigation, etc., in relation to the loan transaction. The obligation on the debtor is waived only when the loss or cost is incurred by the creditor owing to its own gross negligence or wilful misconduct.

Event of Default

Where the borrower defaults in making payments in line with the financing documents and agreed commercial terms, the creditor has a right to declare an event of default under the documents. Usually, apart from repayment of the borrowed amount, the borrower is also mandated to adhere to certain terms and conditions mentioned in the loan documents, viz., maintenance of financial covenants, creation, and perfection of security etc., failing which the creditor may increase the rate of interest, accelerate repayment of loan, recall undisbursed amounts, or enforce security to recover the dues. These clauses are usually highly negotiated and linked with the risk appetite of the lender, the credit rating and financial health of the borrower and such other factors.

Conclusion

A significant part of concluding a loan transaction is negotiation of terms and conditions between the concerned parties. In the Indian scenario, this may take months before a consensus is reached. A large number of deals fall through after months of negotiation when terms are not agreed upon. During such time, the parties have several rounds of reading (presumably, through each clause of the document) and incur significant expenses linked to engagement of counsels over an extended period of time and the time consumed. With standardization of loan documents, the scope of negotiation is reduced greatly as only the commercial terms (contained in separate schedules) are negotiated upon while the standard terms remain the same.

In preparing this article, Anuj Kaila was assisted by Navolina Mujumdar.

Anuj is a Partner and heads the Banking & Finance Practice at the Kochhar & Co Bangalore office.

Navolina is an Associate in Kochhar & Co New Delhi office. She is a member of the Firm's Infrastructure, Banking and Project Finance Practice Groups.

Regulatory Reform in the Indian Fintech Space : An Overview

Author **Anuj Kaila** | anuj.kaila@bgl.kochhar.com

Introduction

India has been the hub of fintech innovation over the past few years, and reports suggest there are over 2,000 fintech start-ups at present in the country. Fintech innovation is taking place across various industry verticals, which include banking, payments, insurance, asset management and brokerage. Fintech companies also focus on machine learning that analyses customer expectations and matches them with appropriate services. India has specifically taken significant strides in the payments industry and is a world leader in advance payment systems.

Regulatory Sandbox For Fintech

The Reserve Bank of India (RBI) set up an inter-regulatory working group to look into the granular aspects of fintech and its implications so as to review the regulatory framework and to respond to the dynamics of the rapidly evolving scenario of the market concerned. The working group recommended the introduction of an appropriate framework for a regulatory sandbox to provide an environment for developing fintech innovations and testing applications developed by banks and fintech companies.

Accordingly, the RBI, in August 2019, released regulations on a regulatory sandbox for fintech entities to enable and encourage innovation in the industry with minimum regulatory supervision. The innovative products permitted to be tested within the sandbox include retail payments, money transfer services, digital KYC, smart contracts, marketplace lending, financial advisory services, wealth management services, digital identification services, financial inclusion products and cyber security products. Any fintech company, including start-ups, banks, financial institutions, and any other company partnering with or providing support to financial services businesses, is eligible to apply under the regulatory sandbox. The relaxations extend to applicants dealing with liquidity requirements, board composition, management experience, financial soundness, and track record.

The Securities and Exchange Board of India, in May 2020, also released its own regulations on a regulatory sandbox for fintech companies in relation to securities markets. This sandbox deals primarily with seeking innovation in securities market-related data, which includes data from depositories (holding and KYC data), stock exchange data (transaction data, such as order logs and trade logs) and mutual fund data.

This regulatory acknowledgement of innovation comes as a boost for the industry, which has always been a few steps ahead of the regulatory framework. Many entities have already started testing their innovative products within these sandboxes.

Regulatory Bodies

While there is no universal regulatory body for fintech entities in India, by and large, fintech products and services can be considered to fall under the purview of the following regulators:

- the Reserve Bank of India (RBI);
- the Securities Exchange Board of India (SEBI);
- the Ministry of Electronics and Information Technology;
- the Ministry of Corporate Affairs; and
- the Insurance Regulatory and the Development Authority of India (IRDAI).

However, the RBI currently regulates the majority of fintech companies dealing with payment aggregation and gateways, account aggregation, peer-to-peer (P2P) lending, crypto currencies, payments, etc.

Analysis

Indian law regulates various types of fintech products, including prepaid payment instruments (e-wallets), payment systems, peer-to-peer lending, payment aggregators and account aggregators (entities which retrieve and consolidate financial information of a user). With exponential strides in the growth and adoption of Fintech in India, several conventional areas of the financial sector including consumer loans, loan trading, securitisation, and personal finance are gradually getting subsumed within Fintech. The past few years have also seen a surge in neobanking. A neobank is a completely digital bank without any branches. Indian regulations do not specifically recognise a complete digital bank and fintech players have tied up with traditional banks to provide these offerings. Neobanking has seen a significant rise in popularity since the covid-19 pandemic.

Recognising the disruptive potential of fintech, the key regulators such as RBI and SEBI have introduced a regulatory regime conducive to innovation in the industry. However, a stricter stance has been taken with payment aggregators and gateways. Payment aggregators are now required to be licensed to undertake the activity of payment aggregation. The definition of a payment aggregator is also extremely wide to cover entities and e-commerce players which traditionally would not be considered to be a payment aggregator. This was done primarily to protect small and marginal merchants who might be at the mercy of large corporations spearheading fintech.

Conclusion

In the course of the last few years, the Fintech sector in India has witnessed enormous growth, further propelled by Covid-19, causing more and more transactions to move online. Last year, the sector had attracted nearly $2.253 billion in investment[1]. As fintech takes to the skies (with the real economy including rural economy adopting technology at a scorching pace), two trends are becoming visible. Firstly, conventional sectors are being subsumed within Fintech at a rapid pace. Secondly, with increasing adoption, there is increased regulation from the Government of India, recognising that the efficacy of Fintech depends on cyber-security, data security and storage, and confidentiality. With the RBI stepping in to regulate most facets of the sector and taking a strict stance on violations (as seen with Mastercard and AmEx facing bans for flouting data localization norms), it is likely that heightened regulatory scrutiny and compliance will be the order of the day. Regulation in the fintech sector has so far been welcomed by industry and users for providing security, predictability, transparency, and stability in a rapidly evolving sector.

In preparing this article, Anuj Kaila was assisted by Navolina Mujumdar.

Anuj is a Partner and heads the Banking & Finance Practice at the Kochhar & Co Bangalore office.

Navolina is an Associate in Kochhar & Co New Delhi office. She is a member of the Firm's Infrastructure, Banking and Project Finance Practice Groups.

[1]https://www.ndtv.com/business/indias-fintech-sector-rakes-in-over-2-billion-in-first-half-of-2021-kpmg-report-2512691

Pre-packaged Insolvency Resolution Process for MSMEs - An Analysis

Authors
Navolina Majumdar | navolina.majumdar@kochhar.com

Introduction

The Insolvency and Bankruptcy Code (Amendment) Bill, 2021 (the Bill) was introduced in the Lok Sabha in July 2021, replacing the IBC Amendment Ordinance of April 2021. The Bill introduces the concept of a "pre-packaged" resolution process for stressed micro, small and medium enterprises (MSMEs) ("MSME Pre-pack").

While the term "pre-packaged" or "pre-pack" has not been defined in the Bill, the Government of India seems to have taken a page out of American and European insolvency processes where the concept is prevalent. A pre-packaged insolvency process essentially means that the resolution plan has been negotiated and agreed upon by the main stakeholders, i.e., the creditors, the corporate debtor, and its shareholders, *before* approaching the adjudicating authority (in this case, the NCLT). Once a corporate debtor approaches NCLT with a pre-packaged resolution plan, then the roadmap thereafter for the insolvency resolution process to be approved and completed stands considerably reduced (when compared to the timelines and process involved in traditional IBC proceedings). This is because the resolution plan would have already been agreed upon between the principal stakeholders ahead of presentation to NCLT.

Analysis

The outbreak of Covid-19 brought many small and local businesses to a standstill, precipitating financial defaults in the process. The MSME Pre-pack offers an efficient alternative insolvency resolution process for MSMEs by providing a cost-effective mechanism that is both speedy and value accretive, with minimum disruption to business operations of the affected company. The threshold to invoke the Pre-packaged Insolvency Resolution Process (**PIRP**) is lower (Rs.1 lakh-Rs.1 crore) than for non-MSMEs and the thrust of MSME Pre-pack is that the management of the MSME continues to be retained by the directors or partners till the resolution plan is implemented, while the creditors remain in 'overall control' through oversight and supervision of the resolution plan that has been agreed upon. Thus, the PIRP is largely aimed at providing MSMEs with an opportunity to restructure their liabilities in such fraught times, without having to cede operational control of their businesses to the resolution professional appointed, as in the case of the corporate insolvency resolution process ("**CIRP**") that is applicable to non-MSMEs.

Further, the PIRP can only be instituted by the debtor. If the debtor has defaulted amount in the range of Rs. 1 lakh to Rs. 1 crore, it can formulate a base resolution plan for initiating an insolvency resolution process and approach the board of creditors (or the creditor, if only a single creditor is involved). The PIRP can be initiated, and the resolution plan can be taken to the NCLT only if the proposed base resolution plan formulated by the debtors is approved by 66% of the creditors. Such base resolution plan will also contain the name(s) of prospective resolution professionals suggested by the debtor. The creditors, while approving the base PIRP would also agree upon a suitable resolution professional to carry out the PIRP.

Once the application for PIRP is submitted to the NCLT, the resolution process moves at a good pace, given the stringent timelines laid down in the Bill. The timelines stipulated by the Bill are as follows:

- Once the PIRP application is filed with the NCLT, it has to approve or reject the application within 14 days of receipt. Any corrections required in the application should be intimated to the debtor within 7 days or receiving the application.
- Once the application has been accepted by the NCLT, the PIRP (as approved by at least 66% of the creditors) must be submitted within 90 days by the Resolution Professional to NCLT.
- If no plan has been agreed upon by the board of creditors, within the 90-day period, the Resolution Professional must file an application with NCLT for termination of PIRP. This ensures that the application does not drag on beyond 90 days without a resolution plan in place.
- If the Resolution Plan has been submitted to the NCLT within 90 days, then the NCLT must approve the plan within 30 days.

Speaking of the PIRP's advantages over the CIRP, the first stark difference is the timelines for resolution of insolvency proceedings. One of the key criticisms of the CIRP has been the time it takes for resolution. At the end of March 2021, 79 per cent of the 1,723 ongoing insolvency resolution proceedings had crossed the 270-day threshold. A major reason for the delays is the prolonged litigation by erstwhile promoters and potential bidders. The pre-pack in contrast, is limited to a maximum of 120 days with only 90 days available to stakeholders to bring a resolution plan for approval before the NCLT[1]. Secondly, unlike the CIRP, where the responsibility of the management of the company is transferred to the resolution professional, the PIRP allows the board of directors or partners of the debtor to continue managing the affairs of the company. The transfer of management under the PIRP to the resolution professional happens only after the approval by the creditors and the adjudicating authority (NCLT).

The Bill also seems to take into account the concern that a low default threshold may incite the debtor to initiate PIRP as a means to avoid repayment of dues to its creditors. To address this concern, the Bill provides for penalty for instituting fraudulent and malicious PIRP and also for fraudulent management of the debtor during the PIRP.

The Bill also lays down a formal procedure to be followed by the debtor to file for an application before the adjudicating authority. These are as follows:

- Under Section 54A(2)(f) of the amended IBC, the debtor shall execute a declaration stating that:
  i. The corporate debtor shall file application for PIRP within 90 days of the declaration;
  ii. The PIRP is not being initiated to defraud any person; and
  iii. The name of the insolvency resolution professional proposed by the debtor and approved (by the creditors) to be appointed for the PIRP.
- Under Section 54A(2)(g) of the amended IBC, the corporate debtor shall pass a special resolution, approving the application for initiating PIRP. In case the debtor is a partnership firm, such resolution will have to be passed by at least 3/4 partners.
- While making an application to the NCLT for initiating the PIRP, the debtor shall, along with the aforementioned special resolution and the declaration, submit the name and written consent of the proposed and approved resolution professional and a declaration regarding the existence of any transactions under chapter III of the IBC (*avoidance of transactions*) and chapter IV of the IBC (*fraudulent or wrongful trading*).

Conclusion

To summarize, in essence, the PIRP for MSMEs provides a timebound resolution process with a lower threshold to aid the MSMEs in restructuring their debts while retaining control of their enterprise. While the PIRP is an opportunity for MSMEs to restructure their debts and liabilities, it is yet to be seen if the timelines provided in the Bill are practically possible to adhere to or if further amendments are rolled out to provide for extended timelines under certain conditions.

Navolina Majumdar is an Associate in Kochhar & Co New Delhi office. She is a member of the Firm's Infrastructure, Banking and Project Finance Practice Groups.

Amazon versus Future Coupons and Others – Lessons in Regulations and Contract Enforcement in India

Authors

Pradeep Ratnam | pradeep.ratnam@kochhar.com

Yaashna Thakran | yaashna.thakran@kochhar.com

Background

A recent verdict of the Indian Supreme Court (SC) in favour of the global e-commerce giant Amazon ("Amazon") against India's Future Group (FG) has been hailed as a landmark ruling affirming the enforceability, in India, of an interim arbitration award by an international "Emergency Arbitrator" (EA). In giving effect to an EA's award, the SC reinforced the principle of autonomy of the parties to an arbitration agreement, and the primacy of the arbitral terms voluntarily consented to by both parties.

By recognizing the EA, the SC has, by implication, accepted the EA's critical interim order (as further affirmed by the Delhi High Court). The EA's order has far reaching implications for complex cross border M&A transactions in regulated sectors involving groups of companies in India.

Issues

1) Structuring around regulatory restrictions: Amazon initially invested in an intermediate company of FG (Future Coupons (FC). FC, in turn, down streamed the amount invested by Amazon, into Future Retail (FR). Though Amazon did not have a direct contractual relationship with FR, the commercial understanding between the parties was that any alienation of assets by FR to 'restricted persons' (including Reliance) would require Amazon's consent. Thereafter, when a financially beleaguered FR attempted to divest its retail assets to Reliance, Amazon argued that its investment agreement prohibited FR from doing so. FG contended before the EA *inter alia* that Amazon's investment violated India's Foreign Direct Regulations and RBI regulations that restrict majority foreign investment in multi-brand retail in India, without prior consent from the Government of India. Though EA rejected this argument by holding that Amazon's indirect veto rights over FR *did not* amount to 'control' over FR (and hence did not violate Indian law), this episode has a precautionary lesson for foreign investors contemplating structured M&A transactions in India.

2) Doctrine of Group Companies: Pushed to a wall, FR argued before the EA that as Amazon's arbitration agreement was with FC, it (FR) was not bound by it. However, the EA invoked the "doctrine of group companies" and held that FR was a proper party to these proceedings. According to the EA, the facts on record clearly established "*cogent commonality, intimate interconnectivity, and undeniable indivisibility*" of the contractual arrangements between Amazon and FC on the one hand, and FC and FR on the other. Not only was FR actively involved in negotiation, it was its ultimate beneficiary of the transaction.

3) **Whether Amazon's investment was tantamount to 'control' over FR?:** Where indirect/stepdown investments in India are concerned, foreign investors need to be mindful of such investments being construed as indirect control of the ultimate beneficiary. In the present instance, FR argued that a negative covenant restricting a transfer of FR's assets to restricted persons was in effect, indirect control by Amazon over FR, thus violating Indian law.

Analysis

1) **Structuring around regulatory restrictions:** One key takeaway from the Amazon-Future dispute is that in cross border M&A transactions in India, foreign investors would be wise to evaluate the enforceability of deal structures carefully, especially where the concerned transaction is in a regulatory grey zone. A decade ago, foreign investors relying on call and put options in India (the enforceability of which was similarly suspect), found Indian sponsors reneging on their put obligations to foreign investors, using regulatory restrictions as an excuse. While in Amazon's case the EA concluded that Amazon's investment was *not* a breach of Indian law, the lesson for prospective investors is to include (to the extent feasible) clarificatory language in shareholder/investment documentation evidencing in clear terms the commercial intent of the parties involved. In the absence of commercial clarity in the documentation, under hostile circumstances, a domestic party may perversely invoke regulatory restrictions to avoid its obligations, contending that '*what cannot be done directly cannot be done indirectly*'.

   While there is no standardized antidote to such unsatisfactory outcomes, foreign investors should ensure that

structured cross border FDI transactions in regulated sectors include mechanisms for investor protection, should aspects of the transaction be held to be unenforceable in the future. Protective provisions could include, for instance:

- Guarantees from the target's foreign obligors (if possible) if the transaction were to fail in India;
- Holdbacks, deferred consideration and earnouts, payable once parties obtain regulatory clarity;
- Option-based covenants on the Indian obligor to if the transaction failed to receive regulatory approvals; and
- Indemnities from the seller if the transaction is unenforceable.

2) **Was Amazon's investment tantamount to 'control' over FR?:** In rejecting FG's contention that Amazon's investment amount to illegal control of FR, the EA reasoned as follows:

I) In the absence of control overboard of FR, Amazon could not be said to have "control" over FR;

ii) FG induced an investment from Amazon based on specific representations that the investment is in accordance with law and that the control remains with FG despite the special, material and protective rights to Amazon;

iii) Having benefited from substantial investment from Amazon, FR's argument that Amazon's veto violates law, cannot be permitted;

iv) Though the EA and DHC did not specifically invoke promissory estoppel, their rulings appear to predicate considerations of equity and specific representations from the sellers/Indian obligors, over expedient arguments of transactional illegality by the Indian obligor at a later point in time; and

v) Amazon's agreement with FC provided "*for the avoidance of doubt*" that Investor and FC have no agreement for exercising control over, FR.

3) Doctrine of Group Companies: In upholding that the EA's award against FR, another critical issue that was affirmed by the SC was privity of contract. FR had argued that it was not bound by obligations entered into between FC and Amazon, as FR did not have a direct contractual relationship with Amazon. The EA observed that given:

- the close inter-connected nature of both transactions (Amazon and FC on the one hand; and FC and FR on the other);
- simultaneous negotiations and discussions on both sets of the Agreements by a single/ common legal team; and
- the fact that Amazon's investment in FC was immediately routed to FR (which was a direct beneficiary of monies invested by Amazon), FRL is a proper party to the arbitration proceedings between FC and Amazon (doctrine of "group of companies").

4) **Incorporating investor rights into target's Articles:** Where M&A involves indirect acquisitions in India or downstream investments through intermediate companies, any special rights to the investor should be included in the ultimate downstream beneficiary entity's articles. One can speculate as to why Amazon did not insist, at the time of its investment in FC, on incorporating its protective rights into FR's articles. A plausible explanation could be regulatory uncertainty around Amazon's veto rights against FR, which may have caused Amazon to err on the side of discretion by not reflecting its rights in a public document, i.e. FR's Articles. However, the fact that FR used this to repudiate Amazon's restrictive covenant against transfer of FR's business, should serve as a warning to prospective investors.

Conclusion

This SC's verdict reaffirming the sanctity of commercial contracts against an Indian party, is a positive signal on enforcement of contractual terms and the ease of doing business in India. By virtue of the SC's ruling, both the EA and DHC's detailed interim orders in Amazon's favour reiterating axiomatic positions under Indian law on various critical and contentious matters, assume validity. These include the finding that protective rights (of Amazon) do not amount to "control" (of FR); a restriction on transfer to a strategic competitor is not a restraint of trade; and '*economic hardship alone is not a ground for disregarding legal obligations*'

The Amazon-Future battle is a sobering reminder of the inherent regulatory complexities of doing business in India. However, with FG reigned in for the moment, all eyes are now on the ongoing proceedings before the SIAC to determine the rights and obligations for the parties involved.

Pradeep Ratnam is a Senior Partner in the New Delhi office of Kochhar & Co and co-chairs the Firm's Projects & Infrastructure and Banking & Finance Practice Groups.

Yaashna Thakran is a Senior Associate in Kochhar & Co New Delhi office. She handles litigation matters, both civil and criminal as well as arbitration matters.

KOCHHAR&CO.
ADVOCATES & LEGAL CONSULTANTS

Principal office: New Delhi
Other offices in India: Mumbai, Bangalore, Chennai, Gurgaon and Hyderabad
International offices: Dubai, Singapore and Chicago

About Us

Kochhar & Co ("The Firm") is one of India's pre-eminent corporate law firms. With a full-service presence in six (6) prominent cities namely New Delhi, Mumbai, Bangalore, Chennai, Gurgaon and Hyderabad and three (3) overseas offices – Dubai, Singapore and Chicago, Kochhar & Co has a reputation for cutting edge legal expertise, clear and commercially driven advice, and an unwavering commitment to our clients' needs through delivering bespoke, sustainable and innovative legal solutions. We pride ourselves on adapting technology and international best practices to a deeply Indian business ethos; with an advisory philosophy that places sustainable legal solutions for our clients at its centre and core.

Kochhar & Co is the preferred law firm for some of the largest multinational and blue-chip corporations from North America, Europe and Asia including 65 of the Fortune Global 500 corporations. The Firm has an enviable domestic footprint and acts as counsel to several large and iconic Indian corporations across both the private and public sectors.

Kochhar & Co's commitment to internationalism also draws from its foundational alliances with leading global law firm networks, defining its ability to provide seamless cross-border advice across all practice areas.

Key Practice Areas

Arbitration & ADR; aviation; banking & finance; bankruptcy & insolvency; capital markets; competition & antitrust; corporate & commercial; defence; e-commerce; fintech, blockchain & cryptos; environment; infrastructure; intellectual property; international trade & bilateral investment treaties; mergers & acquisitions; labour & employment; litigation; power & energy; private equity, venture capital & funds; privatisation & disinvestments; project finance; real estate; shipping & maritime; sports & entertainment; startups; taxation; technology, media and telecommunication; white-collar crime.

UAE Presence

Kochhar & Co Inc. Dubai is a leading full-service law firm in the UAE advising clients on both UAE and DIFC Laws. Our Dubai presence assumes significance as Kochhar & Co is the first full-service law firm from the Indian sub-continent to have been granted a license by the Dubai Legal Affairs Department to practice local law in the UAE.

The Dubai team comprises of senior partners and lawyers with several decades of rich and diverse experience on the UAE, English and Indian law matters and specialises in providing a wide range of legal services in the areas of corporate & commercial laws, banking & project finance, dispute resolution and IPR. Within a short span, Kochhar Dubai has established itself as one of the preferred counsels for numerous banks & financing corporations, multinational and Indian companies doing business in the UAE.

Awards & Recognition

Kochhar & Co has been one of the most decorated Indian law firms and conferred with numerous awards including the National Bar Award, International Council of Jurists Award conferred by the Prime Minister, Rashtriya Gaurav Award (National Pride) Award and the ICCA Excellence Award (Global Explorer).

In its first ever India Legal Powerlist recently published by FORBES Magazine, ten (10) of the Firm's senior partners were featured amongst India's 'Top 100 Lawyers'. FORBES has also acknowledged Kochhar & Co as India's 'Top Law firm' across various practice areas including White Collar, Technology Law, Real Estate & Construction, Labour & Employment and Arbitration. Mr. Rohit Kochhar has been acclaimed as one of the 'Top Managing Partners' in the country.

Among other practice areas, the Firm has been recognised as India's 'Top-Tier Firm' in corporate and M&A, dispute resolution, labour & employment, fintech, TMT, aviation & defence, and white-collar crime by leading publications including the Asia Pacific Legal 500 and India Business Law Journal.

ROHIT KOCHHAR

Chairman & Managing Partner
E-mail : rohit@kochhar.com
Regional Vice President, IACC-NIC

Rohit Kochhar is the Founding Member & Managing Partner of Kochhar & Co ("Firm"). In addition to his pivotal role as the Managing Partner of the Firm, Rohit is actively involved in advising leading multinational and large domestic corporations on a wide range of legal matters.

Rohit has rich and diverse professional experience of over 34 years and his practice areas include complex corporate and transactional matters, mergers and acquisitions, high-stake commercial litigation, and white-collar crime.

Rohit heads the anti-corruption and white-collar crime practice of the Firm. Over the years, he has represented numerous Indian and multinational companies on some of the most complex and high-profile disputes as well as white-collar crime cases and fraud that have been reported in corporate India. Rohit is regarded as one of India's master strategists in such cases that involve the dual dimensions of criminal and civil remedies to be pursued by the aggrieved clients. Prior to setting up Kochhar & Co in the year 1994, Rohit practiced as a criminal lawyer for seven years.

Rohit regularly advises numerous Fortune Global 500 corporations including prominent companies from North American, Europe, Middle East, and Japan on a host of complex law issues and is also a board member of the Indian subsidiaries of many such multinational clients.

He is a frequent speaker at various international and domestic conferences. He also conducts workshops, trainings and townhall sessions for clients on workplace discrimination & POSH, anti-corruption & anti-bribery matters. He also regularly writes for business and financial newspapers and is invited as an eminent panellist on legal issues of national importance by leading news channels.

Rohit is one of the founding members and currently serves as the Honorary Secretary of the Society of Indian Law Firms (SILF).

Awards & Recognitions

- Recognised amongst 'Super 50 Lawyers India' 2021 by ASIAN LEGAL BUSINESS (Thomson Reuters)
- Acclaimed as one of the 'Top Managing Partners' in India by FORBES Legal Powerlist 2020
- Recognised among India's 'Top 100 Lawyers' by FORBES Legal Powerlist 2020; felicitated for expertise in White Collar Crime
- Conferred the Inspiring Entrepreneurs of India Award 2020 by The Economic Times
- 'Top 50 Legal Icons' of India by Indian Business Law Journal (IBLJ) 2021; listed among India's 'Top 100 lawyers - The A-List' by IBLJ (2017 – 2020)
- Named in the 'Hall of Fame' for Corporate M&A by Legal 500 Asia Pacific 2021; Elite Leading Lawyer for Corporate M&A by Legal 500 Asia Pacific (2016 – 2020)
- Legal 500 Asia Pacific 2021 Recommended Lawyer for White Collar Crime, Dispute Resolution, Labour & Employment, Aviation (including Aerospace & Defence)
- Litigation Star for White Collar Crime by Benchmark Litigation 2021
- Recognised among 'India's Distinguished Legal Minds' by Legal Era 2020-21

- Recipient of the International Council of Jurists Award conferred by the Hon'ble Prime Minister of India for his distinctive accomplishments in the areas of corporate law
- Conferred the prestigious Bharat Shiromani Award for Excellence in Legal domain
- Recipient of the distinguished Pride of India Award (Rashtriya Gaurav Award) for his outstanding achievements in the legal field
- Kochhar & Co. was conferred the National Bar Award by the All-India Bar Association for being 'The Most Dynamic and Progressive Indian Law Firm' by the Chairman of the Law Commission of India
- Conferred the Rajiv Gandhi Award for being the Young Achiever & Entrepreneur in legal services. He is the first and only practicing lawyer in India to have been conferred the Rajiv Gandhi Award since its inception
- Conferred the National Law Award for Excellence in Corporate law
- Recipient of the National Citizens Award for his unique contribution in the field of Youth Affair

STEPHEN MATHIAS

Senior Partner & Co-Chair Technology Law Practice
E-mail : stephen.mathias@bgl.kochhar.ocm

Stephen Mathias is the Head of the Bangalore office and Co-Chair of the Firm's Technology Law Practice. Stephen is a graduate of the prestigious National Law School of India University where he did an Honours degree in Arts and Law. He is also a British Chevening Scholar and has done a diploma in European and English Law at the College of Law York and worked briefly at a leading law firm in London. He is also a solicitor on the rolls of the Law Society of England and Wales.

Stephen began his career working in the Tax and Regulatory Division of multinational accounting firm Arthur Andersen, doing Mergers and Acquisitions, Foreign Investments, Joint Ventures, Securities law and strategic investment work.

Stephen has spent most of his career representing many of the largest companies in the world with regard to their operations in India. His expertise covers areas such as outsourcing, licensing, telecom, internet & e-commerce, privacy, and intellectual property. He is particularly adept at advising businesses on legal issues associated with unique digital products and solutions. Stephen is known for his unique expertise in the voice over IP arena, including advising large offshore operations in India on legally compliant telecom configurations, and advising companies involved in unified communications, conferencing, and cloud-based PBX services.

He does substantial Data Privacy work, mostly assisting multinationals in understanding data privacy law implications in the way they deal with personal data. He has also led teams investigating and taking enforcement actions in cases of data theft.

Stephen counsels' clients on a wide variety of issues including risks relating to regulatory compliance, negotiations, dispute related strategies, employee retention and financing. In doing so, Stephen combines a vast expertise in areas such as M&A, financing, employment, litigation, and compliance.

More recently, Stephen has been involved in conducting investigations of cases of corporate fraud by senior management including guiding clients on evaluation of evidence, industry standards, remedial measures and management exits.

Awards & Recognitions

- Listed in Euromoney's Expert Guides for Information Technology
- Recognised as Global Leader for Data - Information Technology and Labour & Employment 2021 and Thought Leader India 2020 by Who's Who Legal (WWL)
- Named in the Legal 500 Asia Pacific 'Hall of Fame' for TMT 2021 and recognized as Elite Leading Lawyer for TMT (2015-2021): Recommended Lawyer for Data Protection 2021
- Most recognised practitioner under TMT practice area, 2020 (Asia-Pacific region) by Chambers & Partners; Ranked as Band 1 Lawyer for TMT by Chambers & Partners (2015-2021)
- Listed in 'India's Top 100 lawyers and 35 legal icons' by India Business Law Journal's A-List
- Recognised among India's 'Top 100 Lawyers' by FORBES Legal Powerlist 2020; felicitated for expertise in Technology, Telecommunication and Fintech
- Selected by the Confederation of Indian Industry (CII), as one of India's Young Achievers to meet and interact with British Prime Minister, Tony Blair during his visit to India in 2002

ALOK TEWARI

Senior Partner & Head-Real Estate Practice
E-mail : alok.tewari@kochhar.ocm

Alok is Senior Partner and Head of the Firm's Real Estate practice. He is also a key member of the Corporate Practice group.

Over the last 21 years Alok has extensively advised and represented numerous Indian and foreign companies, including major real estate developers, funds, and construction companies, on a wide spectrum of issues relating to Real Estate and Construction laws in India. He also regularly advises clients on foreign direct investment (FDI) issues, acquisition and sale of commercial/industrial real estate, government incentives, sale and leaseback transactions, all aspects of commercial leasing, land zoning issues, joint development agreements, etc.

Alok's practice includes advising clients in the IT & ITeS, manufacturing, warehousing, retail, banking, education, hospitality, and construction sectors. He is actively involved in setting up of data centres and in this regard advises on data centre policies and incentives offered by various states, drafting and negotiating transactional documents, assisting in availing stamp duty exemption, etc.

Alok also advises clients on mergers & acquisitions (M&A), joint ventures (both entry and exit), foreign collaborations, technology transfers, asset sales (slump sales), etc. and has been the lead attorney in successfully representing several Indian and foreign companies in multiple transactions within India. He also regularly advises on issues pertaining to business formation, company laws, exchange control & foreign investment laws, employment laws, and data privacy.

Awards & Recognitions

- Recognised among India's 'Top 100 Lawyers' by FORBES Legal Powerlist 2020; felicitated for expertise in Real Estate & Construction
- Named in the 'Hall of Fame' for Real Estate & Construction by Legal 500 Asia Pacific 2021
- Band 1 lawyer since 2015 for Real Estate by Chambers & Partners

REENA KHAIR

Senior Partner
E-mail : reena.khair@kochhar.com

Reena is a Senior Partner and Head of the International Trade & Indirect Taxation Practice at the Firm.

She is a lawyer of eminence with more than 25 years of work experience and specialisation in the areas of international trade and indirect taxation. She represents clients regularly before the Customs, Excise, and Service Tax Appellate Tribunal, as well as before various High Courts and the Supreme Court of India. She has extensive court room experience with more than 300 reported cases argued by her.

In the domain of international trade, Reena has represented clients comprising domestic and foreign industries, as well as user industries in India before the Designated Authority, Directorate General of Trade Remedies, and higher forums. She has also successfully argued the highest number of anti-dumping and anti-subsidy cases before the Tribunal. She has also assisted clients in trade remedial investigations in foreign jurisdictions.

She has been regularly providing advisory services and has been involved in dispute resolution for high-profile matters relating to customs, excise, service tax, FEMA, and GST. Critical issues handled by her include classification under the Harmonized System Nomenclature, valuation, export promotion schemes, drawback, EOUs, SEZs, inverted duty structure, admissibility of credits, transitional issues in GST, export refunds.

She regularly assists clients in the transition to the GST regime.

She has also conducted Internal Management audits for optimization of tax liability, identifying issues/risks for potential disputes with departmental authorities and restructuring of transactions undertaken for various clients including some of India's major conglomerates and multinational corporations in the oil & gas, specialty materials and chemicals, steel, and manufacturing sector.

Awards & Recognitions

Recognised among India's 'Top 100 Lawyers' by FORBES Legal Powerlist 2020; felicitated for expertise in Anti-Dumping.

PRADEEP RATNAM

Senior Partner & Co-Chair Infrastructure, Banking and Project Finance Practice
E-mail : pradeep.ratnam@kochhar.com

Pradeep Ratnam is a Senior Partner in the New Delhi office of the Firm and Co-Chair of the Firm's Infrastructure, Banking and Project Finance Practice.

Pradeep obtained a B.A, LL.B. (Hons.) from the prestigious National Law School of India, Bangalore and is a British Council Chevening Scholar with an LL.M (with Distinction) from the University of Warwick, U.K. Prior to joining Kochhar & Co. Pradeep, who is dual qualified in India and the UK, worked in Herbert Smith LLP, Allen and Overy LLP and White and Case LLP in London and in Singapore. Since his return to India, Pradeep has served as Director (Legal) in IDFC Alternatives (the alternative assets platform of Global Infrastructure Partners) and as Group General Counsel at Infrastructure Leasing and Financing Services Limited (IL&FS).

Pradeep has over 24 years of multi-jurisdictional work experience in the areas of infrastructure and finance, public law and PPP, and advises on transactions in banking, projects & structured finance and restructuring, as well as M&A and private equity investments in infrastructure.

Pradeep's clients comprise of domestic and international banks and other financial institutions, infrastructure companies, project developers, EPC and O&M contractors, asset reconstruction companies, credit funds and private equity. With practice experience of over two decades in diverse jurisdiction – the UK, Singapore and in India, Pradeep advises on the legal aspects of cross border transaction structuring in India, investment regulation, complex due diligence, financing, project development, M&A and exits. He is currently involved in various transactions in conventional power, health and IT, renewable energy, power transmission, roads, telecom, water, ports, housing, and social and urban infrastructure.

Awards & Recognitions

Recognised among India's 'Top 100 Lawyers' by FORBES Legal Powerlist 2020; felicitated for expertise in Banking & Finance.

CHANDRASEKHAR TAMPI

Senior Partner
E-mail : chandra.tampi@kochhar.com

Chandrasekhar Tampi is a Senior Partner and Key member of the Firm's Corporate, M&A and Private Equity practices. He has 20 years of experience in representing domestic and international clients in M&A deals in India.

Chandrasekhar focuses on public and private M&A, cross-border and domestic investment, Restructuring, Capital Markets and Anti-Trust advisory.

He has represented many renowned multinational and Indian companies in their cross-border and domestic M&A transactions and has acted for foreign & domestic funds and companies, in their private equity financing and venture capital investment projects in India. He provides diverse support on such transactions and projects, including deal structuring, legal due diligence, drafting and reviewing transaction documents, leading negotiations, and advising clients from the standpoint of anti-trust and exchange control laws.

Awards & Recognitions

- Notable Practitioner for Private Equity, Venture Capital and Corporate M&A by IFLR 1000 (2019-2021)
- Recommended Lawyer for Competition and Anti-Trust by Legal 500 Asia Pacific 2021

ANUJ KAILA
Partner
E-mail : anuj.kaila@bgl.kochhar.com

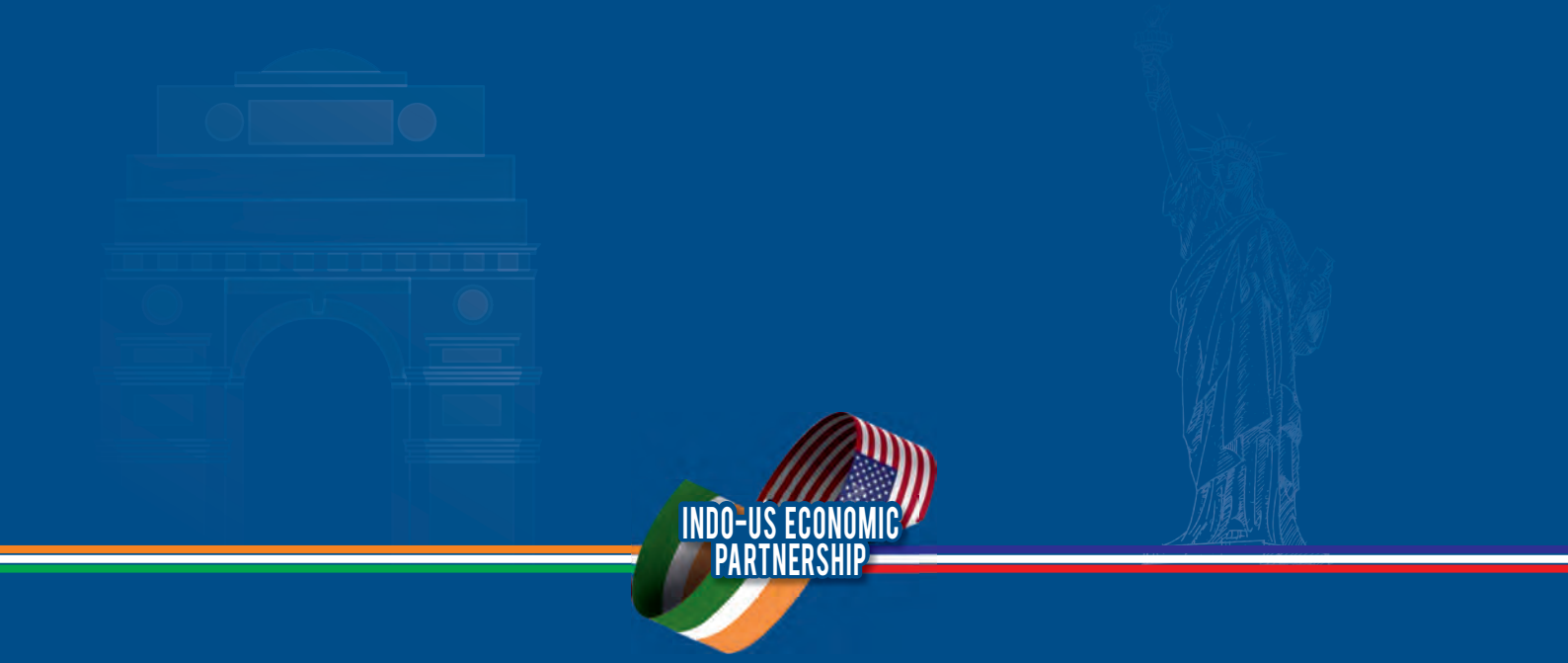
Anuj is a seasoned Banking & Finance, Corporate and Fintech lawyer and heads the Banking & Finance practice at the Firm's Bangalore office. He has vast experience in structuring, preparing, and negotiating banking & finance documents for various types of banking transactions including bilateral and syndicated funded and unfunded credit facilities, external commercial borrowings, project finance, acquisition finance, guaranteed credit facilities to overseas subsidiaries of Indian entities, construction finance, trade finance, and derivative transactions. Anuj also advises clients on retail banking products and insolvency proceedings.

Anuj also has substantial experience in exchange control regulations, foreign investments, joint ventures and mergers and acquisitions. His work includes structuring, conducting due diligences, assistance with regulatory and exchange control approvals, contract preparation, negotiations and closing assistance. Anuj also advises clients on various other general corporate matters.

Anuj also actively advises fintech companies in the payments space and virtual currencies and is an industry expert on payment regulations in India. He has assisted clients on digital lending (including P2P lending), e-KYC, payment instruments, payment aggregator and payment gateway regulations, account aggregator regulations, online gaming / betting regulations, Aadhaar related matters, securities trading, insurance, data and privacy, crypto currencies, outsourcing regulations in the financial sector, e-commerce issues, and SAAS products in the fintech industry to name a few.

Before joining the Firm, Anuj worked as an in-house counsel in the corporate legal group of ICICI Bank Limited at Mumbai and Bangalore.

He regularly authors articles and is quoted by various publications on matters relating to banking and fintech.



INDIA OFFICES

NEW DELHI (Head Office)
Suite # 1120-21,11th Floor, Tower -A,
DLF Towers, Jasola District Center,
Jasola, New Delhi-110025
Tel: +91-11- 41115222,43129300
Fax: +91-11- 40563813
Email: delhi@kochhar.com

GURGAON
3rd Floor, Tower-B,
Ocus Technopolis Building,
Sector 54, DLF Golf Course Road,
Gurgaon-122011, Haryana
Tel: +91-124- 4545222, Fax: +91-124 -4375596
Email: gurgaon@kochhar.com

MUMBAI
17th Floor, Nirmal Building,
Nariman Point, Mumbai-400 021,
Maharashtra
Tel: +91-22- 61120700
Fax: +91-22 -66559705
Email: legal@mumbai.kochhar.com

BANGALORE
201, Prestige Sigma,
3 Vittal Mallya Road, Bangalore-560 001,
Karnataka
Tel: +91-80- 4030 8000
Fax: +91-80- 4112 4998
Email: legal@bgl.kochhar.com

CHENNAI
Suite 305,3rd Floor, Delta Wing
Raheja Towers#177, Anna Salai,
Chennai-600 002, Tamil Nadu
Tel: +91-44- 4040 5200-04
Fax: +91-44 -2860 7588
Email: legal@chennai.kochhar.com

HYDERABAD
Plot No.1263-A/1,
Road No.63A,
Jubilee Hills, Hyderabad-500 033
Telangana
Tel: +91-40-4011 5222
Email: legal@hyderabad.kochhar.com

OVERSEAS OFFICES

DUBAI, UAE
Kochhar & Co Inc.
Suite 1406 to 1410, Citadel Tower, Burj District,
Near Marriot Marquis Hotel Dubai, United Arab Emirates
Tel: +971-4 -277 6075, Fax: +971-4 -277 6071
Email: info@kochhardubai.com

SINGAPORE
Level 30,
Six Battery Road,
Singapore-049909
Tel: +65-6725 6480
Email: singapore@kochhar.sg

CHICAGO
Kochhar & Co. LLC
20, West Kinzie Street,
17th Floor Chicago IL USA 60654
Tel: +1-224-554 9095
Email: chicago@usa.kochhar.com

www.kochhar.com
www.kochhardubai.com

Connect with us on: