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LEGAL MEDIA GROUP

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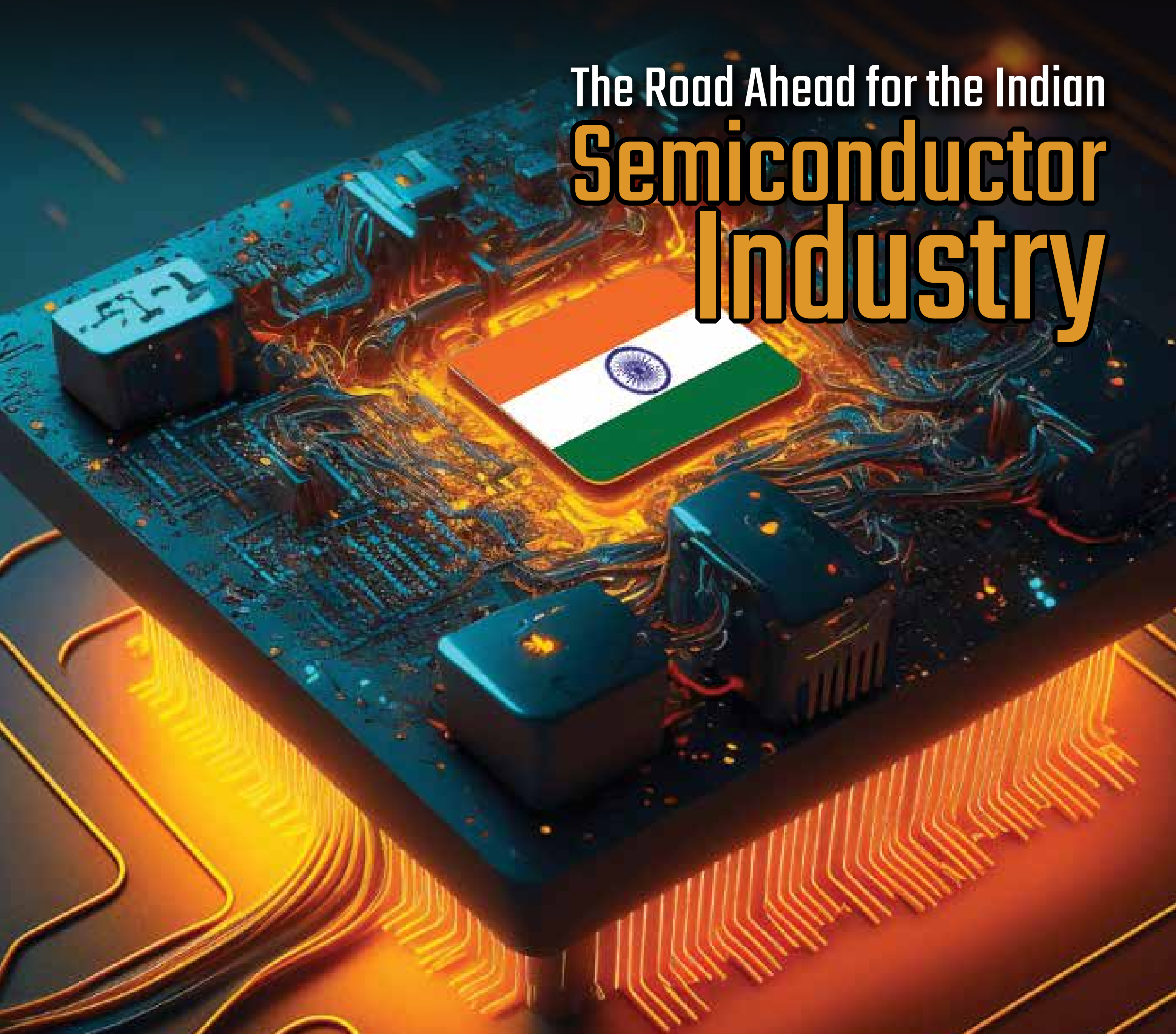
The Road Ahead for the Indian Semiconductor Industry



To Tie Or Not To Tie: Digital Markets And Competition Law

Mandate for Self-Declaration Certificate in the Health and Pharma Sector

Earnout Alchemy: The Art of Unlocking Value in Business Transfers

Balancing Act Local Sourcing Mandates In India's Evolving Retail Landscape


Sunfeast
ITC
Enduring Value
END YOUR DAY,
THE FANTASY WAY.
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Choco Fills
ORIGINAL FILLED COOKIE
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> "Legal Era aims at Initiating, Integrating & Innovating ways and means to establish thought-provoking seminars with a vision to proliferate knowledge and optimise business opportunities."
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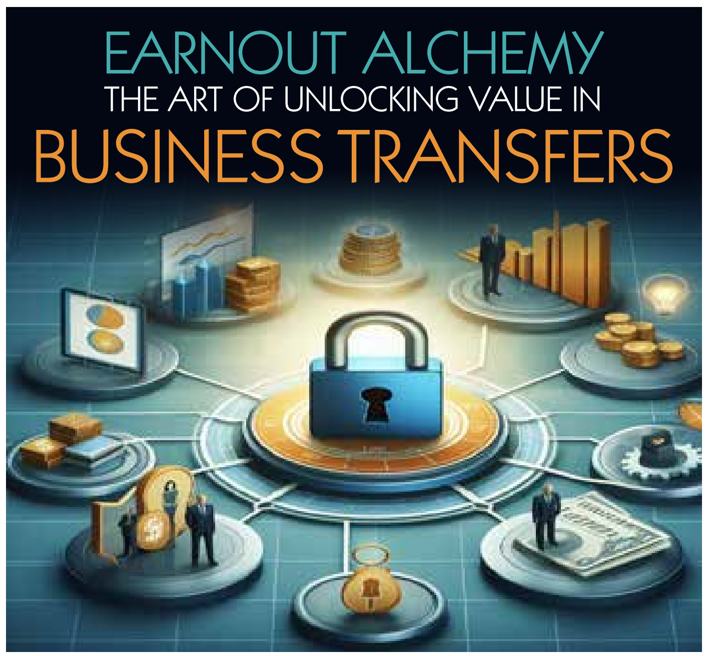

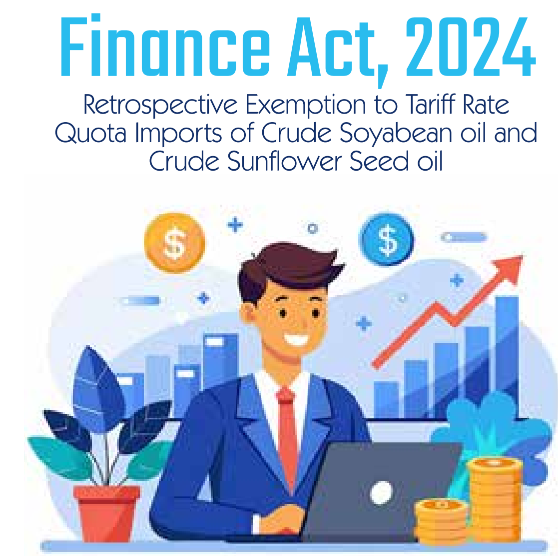

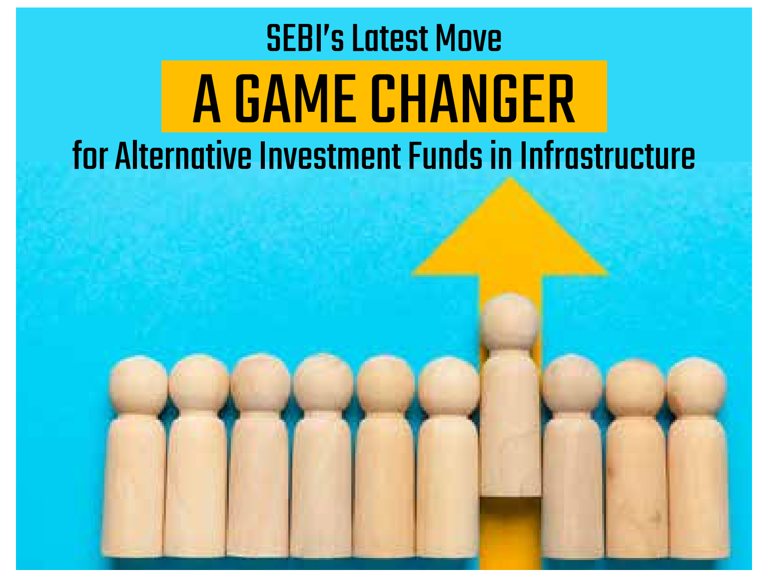

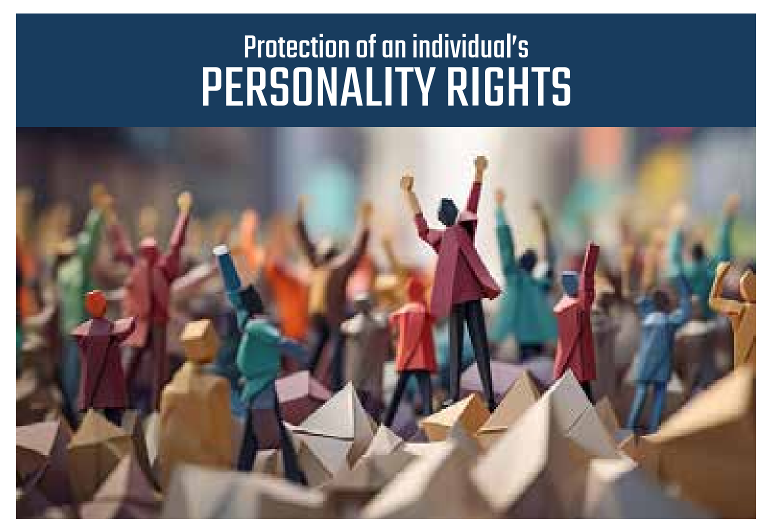

CONTENTS

REGULARS

DSK LEGAL ADVISED MANDALA CAPITAL ON FULL EXIT FROM EDWARD FOOD RESEARCH AND ANALYSIS CENTRE

DSK Legal advised Mandala Capital with respect to its full exit from Edward Food Research and Analysis Centre (EFRAC). Mandala Capital's exit from EFRAC was implemented through primary and secondary investments by QIMA (UK) Limited ("QIMA").

Mandala Capital is a private equity firm specialising in investments across the food and agriculture value chain in South and South-East Asia. Mandala Capital works closely with its portfolio companies to enhance their operational value, drive growth, and build industry leaders to transform existing food systems.

EFRAC is one of the largest integrated laboratory testing providers in India, and is engaged in the business of providing testing services for over 500 commodities, serving a wide range of verticals including food, agri, drugs and cosmetics.

DSK Legal assisted Mandala Capital in inter alia:

I. reviewing, revising and finalising the share purchase and subscription agreement (SPSA);

II. drafting, reviewing, revising and finalising of documents ancillary to the SPSA, including closing documents; and

III. assisting in the closing of the transaction.

The DSK Legal team representing Mandala Capital comprised Hemang Parekh (Partner), Saumya Malviya (Senior Associate) and Sharmishtha Bharde (Senior Associate).

JSA acted as the legal advisor for QIMA. Fox Mandal acted as the legal advisors for EFRAC and the promoters of EFRAC.

CYRIL AMARCHAND MANGALDAS ADVISED VEDANTA ON QIP OF ₹ 8500 CR EQUITY SHARES

Cyril Amarchand Mangaldas (CAM) advised Vedanta Limited on a qualified institutional placement (QIP) of its equity shares, aggregating to ₹8500 crores. The QIP was undertaken by Vedanta in compliance with Chapter VI of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (SEBI ICDR Regulations) and Section 42 of the Companies Act, 2013.

The QIP launched on July 15, 2024, and closed on July 19, 2024. The QIP was subscribed nearly 3 times.

The allotment was completed on July 20, 2024.

Vedanta is a globally diversified natural resource group engaged in exploring, extracting, and processing minerals and oil and gas, having operations in India, Namibia, Ireland, South Africa, Liberia, and UAE.

CAM played a crucial role, providing comprehensive legal counsel and strategic guidance to ensure the successful execution of the transaction.

The Capital Markets team of Cyril Amarchand Mangaldas advised on the matter.

The transaction was led by Senior Partner, Yash Ashar with support from senior Associate, Sanjana Ravjiani and associates Harshvardhan Lahiri, Arikta Shetty, Devansh Raheja, Hitesh Nagpal, and Zeb Burk.

Other parties and advisors to the transaction included Citigroup Global Markets India Private Limited, which acted as book running lead manager to the issue; JM Financial Limited, which acted as book running lead manager to the issue; Nuvama Wealth Management Limited, which acted as book running lead manager to the issue; and Linklaters Singapore Pte. Ltd., which acted as international legal counsel for book running lead managers.

Other parties and advisors to the transaction included Citigroup Global Markets India Private Limited, JM Financial Limited, and Nuvama Wealth Management Limited acting as book running lead managers for the issue.

Additionally, Linklaters Singapore Pte. Ltd. served as the international legal counsel for the book running lead managers.

The transaction was signed on May 20, 2024, and closing was done on July 20, 2024.

CYRIL AMARCHAND MANGALDAS ADVISED AKUMS DRUGS AND PHARMACEUTICALS ON ₹ 18,567.37 MILLION IPO

Cyril Amarchand Mangaldas (CAM) advised Akums Drugs and Pharmaceuticals Limited (the Company) as its legal counsel as to Indian law on the initial public offering of 27,368,151 equity shares (Equity Shares) aggregating to ₹18,567.37 million (the Offer).

The Offer consisted of a fresh issue of 10,037,716 Equity Shares aggregating to ₹6,800 million and an offer for sale of 17,330,435 Equity Shares aggregating to ₹11,767.37 million by the Promoters of the Company and Ruby QC Investment Holdings Pte. Ltd (Quadria Capital). The Equity Shares commenced trading on BSE Limited and National Stock Exchange of India Limited on August 6, 2024.

The Offer received overall subscription of close to 63 times, with the portion reserved for qualified institutional buyers subscribed more than 90 times.

CAM's role encompassed advising the Company on regulatory compliance, preparing necessary documentation, and ensuring the smooth execution of the IPO process.

The Capital Markets team of Cyril Amarchand Mangaldas advised on the matter. The transaction was led by Yash Ashar, Senior Partner; Gokul Rajan, Partner & Regional Head Markets Practice (Northern Region); with support from Nayan Jain, Principal Associate; Chinar Gupta, Senior Associate; Rajshree

Agarwal, Associate; Shreya Jain, Associate; Tara Thakur, Associate; Vatsala Parashar, Associate; and Waleed Latoo, Associate.

Other parties and advisors to the transaction included ICICI Securities Limited, Axis Capital Limited, Citigroup Global Markets India Private Limited, and Ambit Private Limited, all acting as book running lead managers to the issue; Sidley Austin LLP, as International legal counsel for book running lead managers to the issue; Induslaw, as the Indian legal counsel for book running lead managers to the issue; and Shardul Amarchand Mangaldas & Co, as the Indian legal counsel for Quadria Capital.

The transaction was signed on September 1, 2023, and closing was done on August 6, 2024.

LUTHRA AND LUTHRA LAW OFFICES INDIA ADVISED SBI IN FINANCING DEAL FOR BLUPINE ENERGY'S SOLAR PROJECT

Luthra and Luthra Law Offices India acted for and advised State Bank of India in a financing transaction aggregating up to ₹4.36 Billion sanctioned to Solarcraft Power India 21 Private Limited (a SPV of BluPine Energy) for its 120 MW solar project at Panshina and Radhanpur District in the State of Gujarat, India.

Once operational, the plant is expected to generate approximately 298,000 MWh of energy annually, offsetting an estimated 270,000 tonnes of CO_2 emissions each year and supplying power to around 270,000 households.

The transaction team from Luthra and Luthra was led by Partner Girish Rawat, Managing Associate Varun Chauhan, and Associate Radha Murali.

The due diligence aspect of the transaction was managed by Senior Associate Sakshi Mishra.

SHARDUL AMARCHAND MANGALDAS & CO. ADVISED OIL AND NATURAL GAS CORPORATION ON LANDMARK MASTER LNG SALE AND PURCHASE AGREEMENTS

Shardul Amarchand Mangaldas & Co. advised Oil and Natural Gas Corporation (buyer) in relation to the master LNG sale and purchase agreements with Gunvor Singapore Pte. Ltd. and Emirates National Oil Company (Singapore) Pvt. Ltd. (collectively, sellers). The agreements were signed on August 7, 2024 and August 9, 2024, with Emirates and Gunvor, respectively.

The MSPAs executed are the first ever MSPAs executed by ONGC and provide impetus to Government of India's ambition to increase natural gas usage to 15% by 2030. The deals mark a significant step in LNG marketing and strengthen ONGC's vision of integrating across the energy value chain.

The transaction team at Shardul Amarchand Mangaldas & Co. was led by Prashant Sirohi, Partner;

Varnika Mohan, Principal Associate; Suranjan Shukla, Senior Associate; and Siddharth Jain, Associate.

CYRIL AMARCHAND MANGALDAS ADVISED ADANI ENERGY SOLUTIONS ON ₹ 8,373.10 CR QIP

Cyril Amarchand Mangaldas advised Adani Energy Solutions Ltd. (previously known as Adani Transmission Limited) (Company) on its recent qualified institutional placement (QIP) of equity shares aggregating to ₹8,373.10 crores (the Issue).

The Issue opened on July 30, 2024, and closed on August 2, 2024, and the allotment pursuant to the Issue was completed on August 3, 2024.

SBI Capital Markets Limited, Jefferies India Private Limited and ICICI Securities Limited acted as book running lead managers to the Issue.

This is Company's first equity fund raise since its demerger and listing. Further, this is one of the largest equity fund raise by way of a QIP by any company in India's power sector as well as one of the largest fund raise by way of a QIP in India.

Cyril Amarchand Mangaldas Capital Markets team advising on the transaction included Partners Yash J. Ashar and Devaki Mankad, Senior Associates Jhalak Shah and Rishav Buxi, and Associates Hitesh Nagpal, Arikta Shetty, and Lajja Mehta.

DSK LEGAL ADVISED ON EBP GLOBAL AG'S ACQUISITION OF 100% STAKE IN STEP

DSK Legal advised and assisted EBP Global AG (Purchaser) and promoters of STEP (Sellers) as a transaction counsel in relation to transfer of 100% shareholding of STEP (referred to as the "Transaction").

EBP Global AG is a consultancy firm that focusses and specialises in retail, omni-channel environments, supply chain, operations, sourcing and logistics offers an unparalleled ability to serve a wide range of industries.

STEP focusses on and specialises in high-end consulting services within the environmental and sustainability sector. STEP offers a range of solutions, including waste treatment, resource conservation, sustainability, environmental, social and governance (ESG), environment due diligence, site assessment studies and capacity development programmes to diverse industry sectors.

DSK Legal was, inter alia, involved in (i) legal due diligence of STEP; (ii) drafting, reviewing, negotiating and revising the share purchase agreement with respect to transfer of shares of STEP; (iii) advising on the completion of conditions precedent and providing legal assistance with respect to the formalities and requirements to be fulfilled for the closing of the Transaction; and (iv) advising in requisite filings required to be made under the applicable laws. The DSK Legal team advising on the transaction comprised Mr. Ajay Shaw (Partner), Mr. Gaurav Mistry (Partner), Ms. Akanksha Tiwary (Associate Partner), Ms. Priyashi Chhajer (Associate) and Ms. Nidhi Chokshi (Associate).

TRILEGAL ADVISED BOOK-RUNNING LEAD MANAGERS ON ₹ 12,526 MILLION CEIGALL INDIA IPO

Trilegal advised the book-running lead managers on the initial public offering (IPO) by Ceigall India Limited (Company), aggregating to ₹12,526 million.

The Company is an infrastructure company with experience in specialised structure works such as flyovers, elevated roads, railways over bridges, highways, expressways, runways and tunnels. The Company proposes to utilise the issue proceeds for purchase of equipment and repayment of debt of the Company and its subsidiary.

The syndicate of book-running lead managers comprised ICICI Securities Limited, IIFL Securities Limited and JM Financial Limited.

The issue was oversubscribed 14.01 times, and the equity shares were listed at a premium of 4.5%.

The Trilegal Capital Markets team was led by Partner Richa Choudhary and included Avanti Kale, Counsel; Sanya Chaudhari, Senior Associate; and Aman Bahl and Shivayana Balodia, Associates.

KHAITAN & CO ADVISED FALFURRIAS CAPITAL PARTNERS ON ACQUISITION OF BRAINVIRE AND ITS SUBSIDIARIES

Khaitan & Co advised and assisted Falfurrias Capital Partners V, LP (US-based private equity investment firm) on acquisition of 100 per cent stake in Brainvire Pte. Ltd. (a Singapore based information technology company) along with its subsidiaries, including its Indian subsidiary - Brainvire Infotech Private Limited.

Brainvire is a global digital transformation and engineering company with offices in the US, Canada, the United Arab Emirates, Singapore, and India. The company specialises in providing software engineering solutions across various industries.

Khaitan & Co assisted Falfurrias Capital Partners V, LP for conducting legal due diligence on Brainvire Infotech Private Limited, Indian subsidiary of the target entity, reviewing and finalising the transaction documents. Khaitan & Co also provided assistance on signing, closing and post-closing actions in relation to the Indian subsidiary. The core team at Khaitan & Co consisted of Tanvi Kumar (Partner), Nimisha Trehan (Counsel), Govinda Toshniwal (Counsel) Aayushi Tiwari (Senior Associate), Hardik Adlakha (Associate) with assistance from the following:

Intellectual Property aspects relating to the Indian subsidiary including legal due diligence and review of transaction documents and closing documents from an IP perspective.: Nirupam Lodha (Partner), Shivangi Narang (Principal Associate) and Vanshika Thapliyal (Associate)

Advising on Indian tax matters including reviewing the transaction documents and assisting on closing and post-closing matters.: Ritu Shaktawat (Partner), Sneh Shah (Principal Associate) and Prabhanu Sikaria (Senior Associate).

SHARDUL AMARCHAND MANGALDAS & CO. ADVISED BARENTZ ON ACQUISITION OF ANSHUL LIFE SCIENCES

Shardul Amarchand Mangaldas & Co. advised Barentz in its acquisition of Anshul Life Sciences.

Barentz is a leading global specialty ingredients solutions provider. With this acquisition, Barentz establishes a leading life science distribution platform in India and reinforces its commitment to providing innovative solutions and technical expertise pan-India.

The Shardul Amarchand Mangaldas & Co. team was led by Partners Roopal Kulsrestha, Neelam Pathak, and Meghna Nachappa, with support from Associates Aparna R, Sandra Anil Varkey, Pranav Bajaj, and Sidharth Chamarthy.

AZB Partners advised Anshul Life Sciences and its promoters.

CLIFFORD CHANCE ADVISED EMIRATES NBD CAPITAL AND STANDARD CHARTERED BANK ON ESTABLISHMENT OF A SUKUK PROGRAMME

Global law firm Clifford Chance has advised Emirates NBD Capital and Standard Chartered Bank in their roles as arrangers and dealers for the establishment of Albaraka MTN Ltd.'s Shari'a-compliant trust certificate (Sukuk) issuance programme (the Programme). Albaraka Türk Katılım Bankası A.Ş. (Albaraka Türk) serves as the obligor for this pioneering initiative.

Albaraka Türk, the first interest-free Islamic bank established in Türkiye and listed on the Borsa Istanbul, has launched the first-ever international public Sukuk Programme by a Turkish participation bank. The Programme, now listed on the London Stock Exchange's International Securities Market, allows for the issuance of Sukuk in the form of senior unsecured Sukuk or subordinated Tier 2 capital Sukuk, marking a significant milestone in Türkiye's financial landscape. Additionally, the Programme enables the issuance of sustainable Sukuk in line with Albaraka Türk's sustainable finance framework.

Emirates NBD Capital and Standard Chartered Bank were arranging and managing this groundbreaking Programme.

The Clifford Chance team was co-led by Partners Sait Eryılmaz (Istanbul) and Stuart Ure (Dubai), with significant contributions from Senior Associates Ali Altıparmak (Istanbul) and Nader Koudsi (Dubai), Associates Bilgesu Cakmak (Istanbul), Sophie Larsen (Dubai), and Saby Mahmud (Dubai), as well as Trainee Solicitors Aykan Karpuzcu (Istanbul) and Zeena Sa'di (Dubai).

Partner Stuart Ure commented, "We are thrilled to have advised Emirates NBD and Standard Chartered Bank on Albaraka Türk's landmark project, which represents a significant development in the Turkish Sukuk market. This marks the first instance of establishing a debt capital markets funding platform in Türkiye. The successful launch of the Programme highlights the dedication of all stakeholders, particularly the management team at Albaraka Türk."

LATERAL MOVES | LE

ARYA TRIPATHY JOINS CYRIL AMARCHAND MANGALDAS AS PARTNER IN CORPORATE AND TECHNOLOGY LAW PRACTICE

Arya Tripathy Joins **Cyril Amarchand Mangaldas** as Partner in Corporate and Technology Law Practice

Arya Tripathy has joined Cyril Amarchand Mangaldas as a Partner in the firm's Corporate and Technology Practice. She will be based in the Delhi-NCR office.

Arya brings over a decade of experience in General Corporate, M&A, Technology, and Data Protection laws, having advised both international and domestic clients across a range of sectors, including technology, healthcare and life sciences, heavy manufacturing, and social impact. She is a Certified Information Privacy Professional/Asia (CIPP/A) from the International Association of Privacy Professionals and currently serves as the Co-Chair of the Delhi KnowledgeNet Chapter. Arya has been at the forefront of advising clients on the evolving landscape of data protection and privacy rights, with a specific focus on the EU, American, and Asian markets, helping them build robust data management and lifecycle processes.

In addition to her professional expertise, Arya chairs I-WIN, the women technology lawyers committee of ITechLaw Association, and co-chairs the Next Generation Committee for the Inter-Pacific Bar Association. She is actively involved in policy discussions, publications, public speaking, and advocacy work. A strong advocate for pro-bono services, Arya frequently advises tech4good charities and social impact organisations.

Cyril Shroff, Managing Partner, Cyril Amarchand Mangaldas, said, "I am thrilled to welcome Arya to the Firm. Her impressive experience in corporate and technology aligns perfectly with our practice. I'm confident she will be a great asset to the practice and the firm and contribute significantly to our success."

Arun Prabhu, Partner (Head – Technology), Cyril Amarchand Mangaldas, added, "The addition of Arya's strong and diverse capabilities to the practice adds significantly to our thought leadership and execution capabilities at what is a pivotal moment for technology regulation in India."

Arya graduated from Hidayatullah National Law University in 2011. On her joining, Arya Tripathy said, "I am delighted with the opportunity to be part of CAM and contribute to its technology and data protection practice areas. I look forward to combining my expertise with the Firm's prowess as India's leading law firm and learning from the best legal minds in the country."

NISHA KAUR UBEROI JOINS JSA AS CHAIR OF COMPETITION PRACTICE WITH 25-MEMBER TEAM

Nisha Kaur Uberoi joins JSA as the Chair of the Competition Practice, along with her team of over 25 attorneys including 2 Partners, Harshita Singh Parmar and Pranav Satyam. Nisha leads one of the largest competition law teams in India and is widely regarded as one of India's foremost competition lawyers.

Nisha brings with her an extensive expertise in complex areas like merger control, cartels, abuse of dominance, and the digital economy, she represents clients before the Competition Commission of India (CCI), NCLAT, and the Supreme Court. Nisha's reputation extends globally & she has been recognised by various global publications like Chambers & Partners, ILFR & Legal Era. She has also been honoured as GCR Global

Nisha Kaur Uberoi Joins **JSA** as Chair of Competition Practice with 25-Member Team

Dealmaker of the Year, Legal Era Competition Lawyer of the Year and in prestigious lists like GCR 100 Women in Antitrust.

With more than two decades of experience, prior to Trilegal, Nisha led the competition practice at Cyril Amarchand Mangaldas, and AZB & Partners, where she co-headed the competition practice. She is an alumni of the National Law School of India University, Bangalore and National University of Singapore. Amit Kapur & Vivek K. Chandy, Joint Managing Partners, at JSA Advocates and Solicitors said "We are thrilled to welcome Nisha and her team to JSA. This move will greatly enhance and consolidate the firm's existing domain in Competition Law, and further bolster our market leading Corporate and Disputes practices. We look forward to leveraging Nisha's insights and experience to deliver exceptional value to our clients. The addition of Nisha and her team to our existing practice in JSA, is a testament to our commitment to meeting the complex antitrust and competition needs of our clients globally."

Nisha Kaur Uberoi in a statement said, "I am delighted to join JSA, which is renowned for its excellent corporate and disputes practices. An inclusive and equitable platform, JSA's professional structure was a big draw. I look forward to working with our 5 partner and 35 lawyers' strong market leading practice of Vaibhav, Equity Partner and Retained Partners Ela, Pranav and Harshita to further consolidate our Competition Law presence, to achieve new heights and deliver exceptional results." The recent high-profile additions to its equity partnership, as also junior partners, is a testament to the JSA's meritocratic and equitable yet fully transparent, institutional partnership structure.

MOHIT GOGIA JOINS CYRIL AMARCHAND MANGALDAS AS PARTNER IN CORPORATE PRACTICE

Cyril Amarchand Mangaldas has announced the appointment of Mohit Gogia as a Partner in its Corporate Practice, based in New Delhi.

With over 18 years of experience, Mohit is recognized for his expertise in Mergers and Acquisitions (M&A), private equity, cross-border investments, and general corporate matters.

Before joining Cyril Amarchand Mangaldas, Mohit was an Equity Partner at S&R Associates in New Delhi and also worked at Skadden, Arps, Slate, Meagher & Flom LLP in New York. He is admitted to practice law in both India and New York. Mohit has been widely acknowledged for his work in Corporate/M&A and Private Equity.

Cyril Shroff, Managing Partner of Cyril Amarchand Mangaldas, commented "Mohit brings a wealth of experience that will undoubtedly enhance our firm's capabilities and commitment to excellent client service and drive continued success. His skills and values perfectly align with firm's values. I am delighted to welcome him to the firm."

Ajay Sawhney, Partner (Head Northern Region), Cyril Amarchand Mangaldas added, "I am delighted to welcome Mohit to the firm. Mohit's experience and expertise will be vital to our growth strategy and will augment our corporate practice in North India. His addition emphasizes our commitment to deliver exceptional value to our clients."

Mohit Gogia, who graduated from Campus Law Centre, Delhi University in 2005 and completed his LL.M. from New York University School of Law in 2006, expressed his enthusiasm: "I am excited to start a new professional journey at Cyril Amarchand Mangaldas and add my almost two decades of experience of working on mergers and acquisitions and private equity matters to their already market leading corporate practice and continue to offer quality legal services to both domestic and international clients."

In addition to his legal practice, Mohit is also an Honorary Adjunct Professor of Law and Professor of Corporate Legal Practice at Jindal Global Law School and previously been a visiting faculty at National Law University Delhi where he taught a seminar course on "Transactional Mergers and Acquisitions".

DHANANJAY SHAHI JOINS DELOITTE AS GENERAL COUNSEL, SOUTH ASIA

Dhananjay Shahi Joins **Deloitte** As General Counsel, South Asia

Dhananjay Shahi, a seasoned in-house counsel with over two decades of experience, has joined Deloitte as General Counsel for South Asia.

Shahi, a graduate of Delhi University, earned his LLM from the University of San Diego School of Law in 2002. Throughout his illustrious career, Shahi has held leadership positions at several prominent organisations, including Religare, Flipkart, and Bharti Enterprises.

Before joining Deloitte, Shahi served as the Head of Corporate Legal at Bharti Enterprises for nearly three years, further solidifying his reputation as a veteran in the field.

JAY PARIKH JOINS CYRIL AMARCHAND MANGALDAS AS PARTNER IN CORPORATE PRACTICE

Mr. Jay Parikh has joined Cyril Amarchand Mangaldas as a Partner in its Corporate Practice with his team. He will be working out of Mumbai & Ahmedabad offices. Jay has over 18 years of considerable experience in M&A, Joint Ventures, Private Equity, Banking & Finance, Restructurings & Insolvency, Capital Markets and General Corporate advisory.

His core practice area is Corporate Finance & M&A that involves structuring, negotiating and documenting financing transactions at all business stages, including seed, angel, venture capital, bridge, convertible, debt, private placements, public offerings and strategic M&As/JVs, including those involving stressed assets. Jay also advises Private Equity funds on investment transactions including those involving listed companies.

He has received numerous awards and recognitions for his work in Corporate & M&A, Restructuring & Insolvency, Real Estate, PE & Investment Funds.

Mr. Cyril Shroff, Managing Partner, Cyril Amarchand Mangaldas said, "I am delighted to welcome Jay back to the Firm. His legal expertise will be a great asset, further elevating our practice and enhancing our capabilities to serve our clients."

Welcoming Jay on board Ms. Paridhi Adani, Partner (Head – Ahmedabad) added, "Jay's experience and expertise will be invaluable as we pursue our growth objective. Together, we will continue to

Jay Parikh Joins **Cyril Amarchand Mangaldas** As Partner In Corporate Practice

drive exceptional value for our clients. I am excited to welcome him and looking forward to achieving new milestones."

Jay graduated from NUJS, Kolkata in 2006 and had started his career at erstwhile Amarchand & Mangaldas & Suresh A. Shroff & Co. (AMSS), Mumbai. On his joining, Jay Parikh, Partner, Cyril Amarchand Mangaldas, said, "I am thrilled to join Cyril Amarchand Mangaldas and collaborate with such a distinguished team of legal professionals. As CAM continues to expand its horizons, I look forward to contributing my experience of almost 2 decades in that direction with an aim to achieve outstanding results for our clients. My team and I will continue to uphold the firm's tradition of excellence and innovation."

AVIKSHIT MORAL TO JOIN S&R ASSOCIATES AS PARTNER IN MUMBAI, DEPARTING FROM INDUSLAW

In a significant move, Avikshit Moral, a Real Estate Partner at IndusLaw, is set to join S&R Associates as a Partner in Mumbai.

Moral will be bringing along a team of five lawyers to his new firm.

Moral, a graduate of Mumbai University from the class of 2008, boasts over 15 years of experience in advising on various matters, including conveyancing, real estate financing, title diligence, joint ventures, succession planning, investor protection laws, structured transactions, and related commercial laws.

The departure comes amid a wave of exits from IndusLaw. Recently, the entire Capital Markets team, led by Partner Manan Lahoty, resigned to join Cyril Amarchand Mangaldas.

Additionally, Disputes Partner Padmaja Kaul and her team left last month to join JSA.

Avikshit Moral To Join **S&R Associates** As Partner In Mumbai, Departing From IndusLaw

Partners Avik Biswas and Vaibhav Bhardwaj also departed recently, joining Khaitan & Co as Partners in the Employment, Labour, and Benefits practice along with their teams.

JONES DAY STRENGTHENS SINGAPORE PRESENCE WITH APPOINTMENT OF PARVEET SINGH GANDOAK

Jones Day Strengthens Singapore Presence with Appointment of **Parveet Singh Gandoak**

U.S. law firm Jones Day has announced the appointment of Parveet Singh Gandoak as a Partner in its corporate practice in Singapore. Gandoak joins from King & Spalding, bringing nearly two decades of experience in corporate transactions, including private equity, mergers and acquisitions, joint ventures, and capital markets across diverse industries.

Before joining King & Spalding in 2021, Gandoak was a Counsel at Skadden, Arps, Slate, Meagher & Flom. He has also worked at Debevoise & Plimpton and Dechert.

Jones Day, which holds a Qualifying Foreign Law Practice licence in Singapore, aims to capitalise on Gandoak's extensive expertise to enhance its presence in the region's competitive legal market.

"Parveet has been involved in some of the most significant cross-border corporate transactions from South Asia in recent years. His addition will greatly boost our ability to handle complex international deals," stated Sushma Jobanputra, partner-in-charge of Jones Day's Singapore Office.

With Gandoak's appointment, Jones Day now has five partners in Singapore, while King & Spalding has ten.

CYRIL AMARCHAND MANGALDAS EXPANDS CORPORATE PRACTICE WITH ADDITION OF ALOK SONKER

Cyril Amarchand Mangaldas Expands Corporate Practice With Addition Of **Alok Sonker**

Alok Sonker has Joined Cyril Amarchand Mangaldas as a Partner in its Corporate Practice along with his team. They will be working out of Mumbai, Ahmedabad, and GIFT City offices. Alok has over 15 years of experience and focusses on general corporate advisory and transactional matters, which mostly include Private Equity (fund set-up and transactions) and M&A transactions. Alok has a keen interest in economics and geo-strategy and has spent the majority of his time in sharpening his knowledge and skills in relation to the same.

Alok has received numerous accolades for his expertise in Private Equity and Investment Funds, including recognition as a leading lawyer in the field. He has been acknowledged among top legal professionals and emerging leaders in the industry, reflecting his significant contributions and achievements in the legal domain. Cyril Shroff, Managing Partner, Cyril Amarchand Mangaldas said, "I am delighted that Alok is joining us. He has vast experience and will be a great addition to our Corporate Practice."

Paridhi Adani, Partner (Head – Ahmedabad), Cyril Amarchand Mangaldas added, "I welcome Alok to the Firm. His experience and approach align perfectly with our vision for the growth and excellence of our GIFT City and Ahmedabad offices. I look forward to exciting opportunities that lie ahead."

Alok graduated in 2006 from Lucknow University and completed LL.M. in 2008 from National Law School of India University, Bangalore.

On his joining, Alok Sonker, Partner, Cyril Amarchand Mangaldas, said, "I am thankful for the opportunity and really excited to work with new and existing clients towards the growth of CAM's already strong corporate practice. I relate very closely with CAM's client-centric focus. I'm also looking forward to seamless collaboration with lawyers and experts that this platform has to offer."

SONY PICTURES NETWORKS INDIA NAMES RITESH KHOSLA AS NEW GENERAL COUNSEL

Sony Pictures Networks India (SPNI) has announced the appointment of Ritesh Khosla as its new General Counsel, effective September 1, 2024. Khosla succeeds Ashok Nambissan, who is retiring after a distinguished tenure with the company.

Ritesh Khosla brings over two decades of legal experience to his new role, having begun his career as a practicing lawyer before joining SPNI. For the past six years, he has served as Deputy General Counsel at SPNI. His expertise spans mergers and acquisitions (M&A), joint ventures (JVs), regulatory frameworks, compliance, corporate governance, complex litigation, and intellectual property rights (IPR) protection and enforcement.

In his new position, Khosla will oversee SPNI's Corporate Relations, Legal and Regulatory Affairs, Secretarial, and Standards & Practices functions. He will be responsible for managing the company's legal risks, providing strategic legal guidance, and serving as

Sony Pictures Networks India Names **Ritesh Khosla** As New General Counsel

the company's Ombudsperson. He will report directly to the Managing Director & CEO of Sony Pictures Networks India.

Khosla will also spearhead initiatives to enhance SPNI's compliance framework, particularly in digital and intellectual property rights, and will strengthen the company's legal infrastructure in international markets. Additionally, he will oversee SPNI's Corporate Social Responsibility (CSR) initiatives, ensuring alignment with legal and ethical standards. His dedication to mentoring and developing emerging legal talent within the organisation further underscores his commitment to the company's future.

Known for his strategic thinking and decisive legal skills, Khosla has demonstrated exceptional leadership in complex legal matters, significantly contributing to SPNI's growth and compliance efforts.

Reflecting on his appointment, Ritesh Khosla stated, "I am deeply honoured to become General Counsel at SPNI. My journey here has been incredibly enriching, and I am eager to continue working with our talented team. This role offers a unique opportunity to build on the strong legal foundation established under Ashok Nambissan's leadership. I am committed to upholding the highest standards of legal and ethical conduct and advancing SPNI's mission to deliver exceptional content and experiences to our audiences."

CLYDE & CO ANNOUNCES JENNY THORNTON'S RETURN AS MANAGING PARTNER

Clyde & Co has announced the return of Jenny Thornton as the Managing Partner of its Perth office, a move aimed at driving the global law firm's strategic growth in Australia.

Simon McConnell, Chair of the APAC Board and Partner at Clyde & Co in Hong Kong, emphasised the firm's robust plans for expansion in the Australian market. He noted, "Our key sectors align well with the Australian economy and its evolving regulatory landscape. Jenny's extensive experience and connections are crucial to our growth strategy for the Western Australian market and beyond."

Jenny Thornton originally established Clyde & Co's Perth office in 2012, serving as its Managing Partner until her departure in 2017 to join Quayside Chambers. Her previous experience includes roles as a partner in the commercial litigation departments of Parker & Parker, Freehills (now Herbert Smith Freehills), and Allens Arthur Robinson (now Allens).

Thornton's return is expected to strengthen Clyde & Co's expansion efforts in Perth and across its core

Clyde & Co Announces **Jenny Thornton's** Return as Managing Partner

sectors, including insurance, aviation, energy, marine, and projects and construction. Her responsibilities will also include global disputes, regulatory matters, investigations, and corporate and advisory practice groups.

This appointment comes on the heels of Clyde & Co's recent promotion of 27 lawyers this year.

ZOOM IN | LE

TO TIE OR NOT TO TIE

DIGITAL PRODUCTS AND COMPETITION LAW

Tying arrangements can raise competition concerns where the tying and tied products are only sold as a bundle and are not available for purchase separately…

Imagine if you had to separately purchase Nestle's Maggi noodles and its spicy seasoning sachet, or individually purchase access to every television channel that you may want to watch. How inconvenient and inefficient would that be? Tying arrangements, essentially, allow consumers to eliminate (or, at least, reduce) this inconvenience by offering for purchase a bundle of products or services. Not only do tying arrangements enhance convenience, but they can also reduce costs. However, in certain instances, tying arrangements can raise competition concerns. In this article, I discuss how competition authorities including the Competition Commission of India("**CCI**") have examined 'technical tying' (technological integration) arrangements.

A tie-in or tying arrangement is where the purchase of one (tying) product is made conditional on the purchase of another (tied) product. Tying arrangements can raise competition concerns where the tying and tied products are only sold as a bundle and are not available for purchase separately, or where it is commercially advantageous for consumers to purchase the products as a bundle instead of purchasing the products separately.

Under Indian competition law, tying arrangements can be examined in two ways: as a vertical restraint under Section 3(4) of the Competition Act, 2002 ("**Competition Act**") and as an abuse of dominance conduct under Section 4 of the Competition Act. Tying can amount to an abuse of dominance if the arrangement is a "supplementary obligation" unrelated to the subject-matter of the main agreement or is a "leveraging" abusive conduct where dominance in one market is used to gain an unfair advantage in another market.

For a tying arrangement to be considered as a vertical restraint or an abuse of dominance, (a) there must be separate and distinct demand for the two products or services in question (i.e., the tying and tied products), and (b) the concerned enterprise must have market power or dominance in the market for the tying product or service. Additionally, a "*substantial amount of commerce*" must be affected[1]. In other words, the tying arrangement must be capable of foreclosing competition in the tied product market[2].

Globally, there have been some significant decisions analysing tying arrangements as an anti-competitive conduct. Decisions specific to digital markets include Microsoft tying its Internet

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[1] Sonam Sharma vs. Apple Inc. and Others, Case No. 24 of 2011.
[2] Harshita Chawla vs. WhatsApp Inc. and Facebook Inc., Case No. 15 of 2020.

LAGNA PANDA
Counsel

P&A
LAW OFFICES

Explorer (browser) and Windows Media Player with its Windows operating system ("**OS**") and Google tying its search engine and Google Chrome browser with its Play Store application.

Recently, the European Commission ("**EC**") initiated an investigation[3] against Microsoft for tying its Teams software (messaging and video conferencing application) with Office 365 (SaaS productivity application suite for professional use). This investigation has, once again, drawn the attention of competition authorities across jurisdictions to the complex issue of tying arrangements. An important question that will have to be answered is whether there is a separate and distinct demand for Microsoft Teams software application. In fact, this is a key question in modern competition law enforcement: in cases of 'technical tying' or 'technological integration,' what is the standard for assessing whether a product or service is separate and distinct?

In the earlier *Microsoft decision*[4] of the EC, which was confirmed by the Court of First Instance ("CFI"), one of the allegations against Microsoft was illegal tying of Windows OS with Windows Media Player. The EC and the CFI, after observing that Windows OS is a system software and Windows Media Player is an application software, considered the availability of competing independent media players in the market to conclude that Windows Media Player is a separate product.

In the *Android decision*[5], the EC found that Google's Chrome browser is a distinct product from Google's Play Store and search engine applications. The EC's reasoning was based on several considerations including distinct functionalities offered by the Chrome browser, availability of independent web browsers in the market on a standalone basis, marketing of Chrome browser by Google for other operating systems (desktop and mobile), and availability of the option to download Chrome browser from the web and through other app stores.

Similar allegations were also made against Google in an information filed with the CCI ("**Android Decision**")[6]. Google's conduct of tying its Chrome browser with its Play Store application was assessed by the CCI as a leveraging conduct. The CCI's analysis was premised on the existence of "two markets". The CCI found that the Chrome browser is not 'tied' to a specific OS (for example, Apple's mobile web browser only works on iOS) and there are independent browser providers that do not offer app store applications. Based on this, the CCI found that there exists a separate relevant market for "non-OS mobile web browser". While the CCI did not expressly answer whether Google's Chrome browser is a separate and distinct product or not, the CCI's reasonings indicate that Google's Chrome browser was considered as a distinct product. The CCI's decision even suggests that the Chrome browser used in personal computers may, possibly, be distinct from the Chrome browser used in mobile phones.

[3] See: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3446.
[4] See: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= OJ:L:2007:032:0023:0028:EN:PDF.
[5] See: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.
[6] See: https://www.cci.gov.in/antitrust/orders/details/1070/0.

> **"Assessing anti-competitive effects of tying of technologically integrated products where the product markets are multi-sided, is significantly more complex than contractual tying of physical products**

The test of whether a 'tied' product has a distinct functionality was previously applied by the CCI in *Harshita Chawla vs. WhatsApp Inc. and Facebook Inc.* ("**WhatsApp Decision**"). The CCI had observed that WhatsApp Messenger and WhatsApp Pay are separate products with "distinct functionalities" even though WhatsApp Pay is embedded in the WhatsApp Messenger application. Ultimately, the CCI, in its prima facie order, concluded that since end-consumers were not compelled to use WhatsApp Pay exclusively, there are no competition concerns.

In the *Android Decision and WhatsApp Decision*, the CCI assessed tying as an abuse of dominance conduct. In other cases, particularly those not involving digital products, the CCI has assessed tying as a vertical restraint. To analyse tying as a vertical restraint, the CCI employs the 'rule of reason' standard as per Section 19(3) of the Competition Act, which requires consideration of both pro-competitive and anti-competitive factors.

To meet the evidentiary burden of proof under the 'rule of reason' analysis, the CCI must analyse whether and how a tying obligation is likely to affect price and/or output. One way to discharge the burden of proof is to rely on counterfactuals i.e., in the absence of the tying obligation, would there be greater competition in the 'tied' product market and will those suppliers be able to offer lower prices? However, the CCI has not adopted this approach while assessing tying arrangements as vertical restraints.

In Android Decision, even though tying was assessed as an abuse of dominance conduct, the investigation included counterfactual analysis for assessing the anti-competitive effect of tying of Google's Chrome browser with Play Store application: whether competition in the concerned relevant markets would have been greater absent the tying?

Assessing anti-competitive effects of tying of technologically integrated products where the product markets are multi-sided, is significantly more complex than contractual tying of physical products. As competition law jurisprudence in India continues to evolve, it remains to be seen how the CCI will develop factors for assessing whether a tied product or service is distinct and the theories of harm in relation to 'technical tying'.

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Lagna Panda is an attorney in the Delhi office of P&A Law Offices. She has 12+ years of experience in advising clients on competition law and data protection matters. Some of the clients she has advised in the past include Intel, Indorama, Clariant, HP, Trident, and ITC.

She represents clients before the Competition Commission of India, the appellate tribunal and the Supreme Court of India in enforcement proceedings. She has successfully secured approval of the Competition Commission of India in various merger control matters. She also has extensive experience in conducting internal antitrust compliance investigations for companies. She regularly advises clients on distribution agreements, sales and marketing practices, and information sharing. She has also represented clients in administrative and due process challenges before various writ courts in India. She has a wealth of experience in preparing policy submissions for clients on competition law and data protection draft legislations, regulations and policies. Lagna has also assisted the advocacy division of the Competition Commission of India in preparing a training module on competition law for administrative and judicial training academies in India. She regularly writes on competition law, data protection and tech-related policies.

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Securitisation of STRESSED LOANS

By transforming illiquid assets into tradable instruments, securitisation facilitates improved asset management and contributes to financial stability apart from helping Indian banks to clean up their balance sheets and recover value from distressed loans

Securitisation of stressed assets is a financial innovation allowing banks and financial institutions to convert non-performing or distressed loans into marketable securities. Securitisation of financial stressed assets such as vehicle loans, two-wheeler loans, microfinance loans and distressed corporate loans is largely undertaken in the industry. It involves the sale of non-performing assets (NPAs) by an originator to a Special Purpose Entity (SPE). Further, SPE issues securitisation notes / security receipts (SRs) to the investors. SPE can be set up in the form of Company or trust or society or limited liability partnership or any other distinct entity and is generally constituted as a trust in India.

Investors are paid by SPE, based on the recovery from underlying assets according to the waterfall mechanism, which depends on the seniority of the tranches. Investors include institutional investors, hedge funds, and high-net-worth individuals. A servicing agent is appointed to manage the underlying assets, collect payments, and distribute them to investors. Continuous monitoring of the performance of securitised assets is essential to ensure timely payments and mitigate potential losses.

SWETA MEHTA
Associate Partner

SALONI SHAH
Associate

SNG & PARTNERS
Advocates & Solicitors
ESTD 1962

Securitisation process helps institutions manage risk, improve liquidity, and free up capital for new lending. By transforming illiquid assets into tradable instruments, securitisation facilitates improved asset management and contributes to financial stability. Also, it helps Indian banks to clean up their balance sheets and recover value from distressed loans.

Regulatory framework

Currently, the Reserve Bank of India (RBI) has issued the framework for Securitization of Standard Assets (SSA) in September 2021 which is silent on the securitisation of NPAs. As on date, there is no corresponding mechanism for securitisation of NPAs through the SPE route.

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) does provide for securitisation of NPAs but such securitisations have to be undertaken by Asset Reconstruction Companies (ARCs) licenced under the Act, in terms of the specifically laid down statutory/regulatory norms. RBI proposes to introduce a framework for securitisation of stressed assets in addition to the ARC route, similar to the framework for SSA and has issued a discussion paper on securitisation of stressed assets framework ("Discussion Paper") in January 2023.

Pursuant to the Discussion Paper, the following key points are important for our understanding:

1. Coverage of Financial Assets: whether both retail and wholesale loans should be covered within the ambit of these regulations.
2. Coverage of Stressed Assets: whether only NPAs should be covered or even standard assets should be included as there is already an existing framework for securitisation of standard assets. The government mentioned in the budget that it will extend credit support through a credit guarantee from government supported fund to special mention accounts of MSMEs.
3. Minimum Risk Retention: whether minimum risk retention should be removed altogether as the originator intends to remove such assets from their books of account in entirety.
4. Role of Resolution Manager: whether separate resolution manager is to be appointed for resolution, recoveries of stressed assets and would these securitisation guidelines be linked to the provisions of the Insolvency and Bankruptcy Code, 2016.

In a more recent development, the Securities and Exchange of Board of India (SEBI) has introduced Special Situation Funds, a sub-category under Category I AIF, which shall invest only in 'stressed assets' such as (i) stressed loans available for acquisition in terms of RBI (transfer of loan exposures) directions; (ii) Security Receipts issued by ARC; (iii) Securities of Companies in distress; (iv) any other asset / security as may be prescribed by SEBI.

Challenges and Risks faced while undertaking Securitisation transaction:

1. Accurate valuation of stressed assets is a challenging task due to their distressed nature. Incorrect valuations can lead to mispricing of securities and potential losses for investors.
2. Securitisation involves complex legal and regulatory considerations that vary across jurisdictions. Compliance with these regulations is crucial to ensure the legality and success of the transactions.
3. The Securitisation Directions and Transfer Directions require transaction documents to be executed on an arm's-length basis. Therefore, investors should not impose onerous obligations on the originator or facility providers.
4. The stamp duty payable in states which have a nexus to the transaction may be higher than what the originator is willing to bear. Since, underlying assets are stressed assets, poor servicing can be expected which can lead to increased defaults and losses, undermining the benefits of securitisation.

Conclusion:

Securitisation of stressed assets is a powerful financial tool that helps banks and financial institutions manage risk, improve liquidity, and free up capital for new lending, also saves litigation costs and provisioning requirements. While the process offers significant benefits, it also poses challenges related to asset valuation, investor appetite, legal documentation, stamp duty implications and regulatory compliance. Effective securitisation requires robust legal and regulatory frameworks, transparent disclosure practices, and diligent asset management. With the continuing need for liquidity by financial institutions, the growing appetite of investors and the developments on the regulatory front, securitisation is an important tool available to the lending institutions.

The RBI's 2021 circular on "Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances – Clarifications" has made upgrading NPA accounts to standard assets more stringent. This has led to an increase in NPA numbers and highlights the need for a framework to deal with the securitisation of NPAs or secondary market for NPAs. The RBI's Discussion Paper aims to address this need by proposing a framework similar to that for standard assets. If the purpose of such framework is the resolution of NPAs, it is better to strengthen resolution mechanisms by modifying the Insolvency and Bankruptcy Code, 2016 and SARFAESI. By addressing these challenges, it can develop the market to bolster investor and assignee confidence and appetite for securitisation and assignments across asset segments.

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Sweta Mehta is an Associate Partner at SNG & Partners and part of the Banking & Finance team. Sweta specializes in banking and finance, FEMA Regulations, and corporate laws. With over 12 years of legal experience, including 9 years as an in-house counsel, she has worked with both domestic and multinational financial institutions in India and overseas. Sweta has abundantly advised clients on various corporate transactions, products and different kinds of lending and borrowing. She has worked on the standardisation of finance and security documentation, various banking products and services for Banks, Non-Banking Finance Companies.

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Saloni Shah is an Associate at the Mumbai office of SNG & Partners and part of the Banking and Finance team. She has worked on corporate lending transactions, standardisation of finance documentation for banks and non-banking financial institutions, creation and enforcement of security, loan restructuring and general corporate advisory matters. Along with Banking and Finance matters, she has also worked on Private Client matters such advising individuals and families on estate and succession planning, business succession structures, family settlements and family governance and drafting of wills, gift deeds, trusts, and family settlement agreements. Previously, Saloni has contributed in SNG with Civil litigation matters as well.

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EARNOUT ALCHEMY

THE ART OF UNLOCKING VALUE IN BUSINESS TRANSFERS

Earnouts, although are often a valuation troubleshooter in a business transfer, they require in-depth commercial negotiations and careful drafting in the transaction documents, to grease the wheels of a business transfer.

CHIRAG JAIN
Associate Partner

SNIGDHA PRAKASH
Senior Associate

DSK Legal
True Value, True Values

Business valuation is paramount for dealmakers in business transfers, and is often, if not always, a bone of contention between a purchaser and a seller. Such valuation is not only based on past performance, assets, and regulatory compliance of the 'undertaking' but is also reliant upon prospective factors such as market demand, growth potential, competitive advantages, and other aspects to the extent of producing lucrative output for the principals. In reference to these factors, often, there are divergent views on the future performance of the assets being transferred, thereby tugging the valuation to various corners, and postulating multiple uncertainties.

As an instrument to bridge the gap between such divergent views of the parties on the valuation and to hedge against the uncertainties arising out of transfer of undertaking, parties frequently use 'earnout' as a mechanism to provide additional consideration to the seller, post-closing of the transaction, which may be tailored to be made contingent to the occurrence of various conditionalities such as future performance of the transferred asset or achievement of agreed milestones.

Constructing Earnouts: A Pacifier to Parties

Depending on the structural alignment between the parties and the tax implications thereof, earnouts may or may not form part of the documented '*purchase consideration*' of the business undertaking being transferred and would alternatively, be paid out as additional remuneration to the seller and other senior management being absorbed by the purchaser.

In this context, typically, earnouts are structured as a function of achievement of milestones, which may be either revenue based or non-revenue based outcomes. Where 'revenue based' outcomes are opted for, the milestones pertain to the transferred undertaking attaining targeted EBITDA, revenues, earnings per share, business expansion, etc. In such cases, it is vital for the seller to negotiate appropriate post-closing control and oversight over the operations and management of the business undertaking to accordingly steer and navigate it towards the desired outcomes. To this effect, defining clear and precise standstill provisions (for the duration of the earnout period) is crucial to establish the required control over the undertaking and to ensure suitable co-operation from the buyer as well. Here, alignment and documentation of the principles on which such milestones would be accounted and computed upon their achievement is imperative, since any ambiguity thereto could be a guaranteed catalyst for initiating a dispute.

Non-revenue based milestones are opted for in cases where the parties are more focussed on achieving qualitative outcomes from the seller and its senior management, such as regulatory approvals, development of some intellectual property, research and development, etc. Such milestones are more commonly used for start-ups or where the business is pillared on human skill, especially where employees possess specialised knowledge about operations, marketing, or networking (such as businesses involved in healthcare delivery and diagnostics). Here, it may be prudent for the parties to frame explicit and unambiguous criteria for determining the performance quality in fulfilling the milestones, where for a faster churn, such milestones could be broken down into smaller stages which are required to be completed in a time-bound manner.

Walking the Legal Tightrope

Any discourse on earnouts requires bearing in mind that receipt of such earnouts has corresponding tax implications on the seller. Depending on the construct of the earnouts, the same may either be taxed as profits in addition to salary (where the earnouts are being paid as part of the seller's remuneration)[1] or be subject to capital gains tax, where the earnouts are documented as part of the purchaser consideration.

The tax incidence and the implicated quantum thereof are one of the key considerations for sellers and buyers to re-structure their transaction, to avoid additional monetary leakage.

Moreover, commercial considerations may become slightly more complicated in case the prospective buyer is a non-resident person/ entity, since they are not permitted to operate business in India without establishing an Indian place of business. To clarify, although a non-resident entity may open a branch office, a liaison office, or a project office (with the prior approval of the Reserve Bank of India), for a limited and short-term purpose which would be subject to certain conditionalities, conducting full-fledged business operations would require setting up of a permanent Indian entity.[2] Owing to this, interested non-resident buyers would require to either collaborate with or set up an Indian entity to consummate a business transfer, as per the norms and sectoral caps of the extant Foreign Direct Investment (FDI) Policy. Consequently, the conventional routes for providing earnouts (as stated above) to the seller management may not always be commercially the most desirable course of action, and therefore, calls for seeking alternate and unconventional mechanism to achieve the same outcomes.

The Road Less Taken

Transactions where the conventional earnout payments are not commercially feasible or as attractive as an approach, the parties may mutually discuss to consider issuance of equity-linked instruments to the seller in the buyer's entity. In such a scenario, although the parties may decide to issue equity shares, in our experience, instruments like compulsorily convertible preference shares (CCPS) give greater flexibility to the parties in terms hedging against risks and ensuring achievement of milestones.

The key aspect which may provide CCPS an edge against equity share is that the terms of issuance of a CCPS could be tailored to be made as specific to the transaction as may be required. Basis discussions amongst the stakeholders, the parties may derive a formula whereby the conversion ratio of a CCPS to an equity share may be made subject to various contingencies such as timely achievement of the agreed targets, any indemnity claims arising on the purchaser, and provisions such as good leaver and bad leaver.

For instance, if the performance of the seller is such that the earnout milestones are either not attained or attained well below the targets, then

AKANSHA JAIN
Associate

"It is vital for sellers to negotiate appropriate post-closing control and oversight over the operations and management of the business undertaking to accordingly steer and navigate it towards the desired outcomes, thereby achieving maximum earnouts.

1 In re: Anurag Jain, (2005) 277 ITR 1 (AAR).
2 Section 6(6), Foreign Exchange Management Act, 1999, read with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016.

the conversion ratio of the CCPS to equity can be customised to be reduced from the usual 1:1 ratio. Alternatively, where the seller has outperformed in relation to his targets, the conversion formula can be used to reward the seller by providing a higher conversion ratio. Such conversion would have a direct impact on the amount of consideration the seller may receive against the sale of the said CCPS, thus, incentivising the seller to work towards completion of the targeted goals for achieving an upside in the share valuation.

Wrapping Up

Earnouts, although are often a valuation troubleshooter in a business transfer, they require in-depth commercial negotiations and careful drafting in the transaction documents, to grease the wheels of a business transfer. Too cumbersome and practically unattainable milestones may not be in the best interest of either of the parties, and therefore, parties should pay heed to the fact that earnouts in business transfers should be built with the intent of retaining the management and building the composite value of the purchaser, which now subsumes the seller's business.

> *"Although the parties may decide to issue equity shares as earnout payments, instruments like CCPS give greater flexibility to the parties in terms of hedging against risks and ensuring achievement of milestones and are a great alternative to conventional earnouts.*

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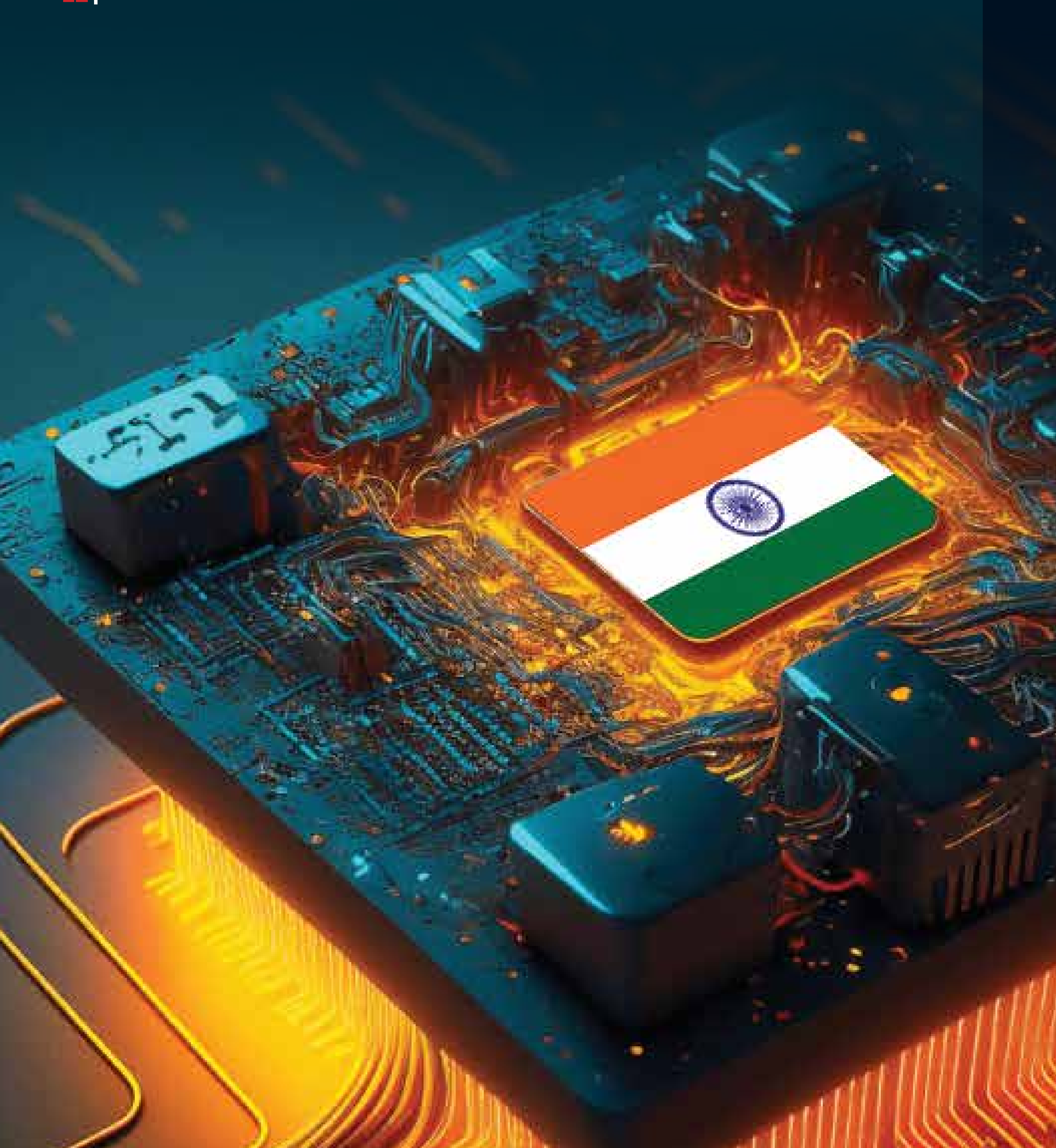

The Road Ahead for the Indian Semiconductor Industry

Consistent and robust policymaking, constant interface with stakeholders, investment in building a talented workforce, and a focus on developing an end-to-end supply chain will yield long-term returns

Semiconductors are the backbone of electronic devices, with a diverse range of applications, ranging from consumer electronics and communications to defence, automotive, healthcare, and national security systems. They serve as the lifeline of any modern economy and are indispensable in securing strategic autonomy. Currently, the global semiconductor landscape is dominated by South Korea, Taiwan, China, the United States and Japan. However, supply chain disruptions caused by the Covid-19 pandemic and the ensuing wave of protectionism, exposed vulnerabilities in the existing global semiconductor supply chain. The tangible shift in the geopolitical climate, fears over the potential weaponisation of semiconductor chips, and the rapidly evolving technological landscape has compelled countries to endeavour towards developing domestic semiconductor manufacturing capabilities to reduce reliance on foreign sources.

Traditionally, India has been heavily reliant on imports for semiconductor materials and chips. However, in recent years, India has made concerted efforts to reduce this dependency and expand its presence in the global semiconductor market by developing indigenous design and manufacturing capabilities. The semiconductor market in India is projected to be worth USD 55 billion by 2026, with nearly 60% being driven by three key industries: smartphones & wearables, automotive components, and computing & data storage.[1] India's strategic geographic location, stable political environment, a rapidly growing economy with an expanding consumer base, and an existing strength in semiconductor chip design (India accounts for nearly 20% of the world's chip design talent[2]) make it an attractive destination for investment in semiconductor manufacturing. To leverage these advantages and to achieve the goal of an '*Atma Nirbhar*' (self-reliant) semiconductor industry, the Indian government has implemented various initiatives and policy measures. This article provides an overview of the regulatory framework, government initiatives, challenges, and the road ahead for India's semiconductor aspirations.

The Indian Regulatory Landscape:

Foreign investment: Enabling access to open markets is crucial for integrating with global semiconductor supply chains. Under current

1 'India set to enter an era of revolution in live sports, semiconductor chips, AVOD, and 5G', Deloitte's 2023 TMT Predictions, Available at: https://www2.deloitte.com/in/en/pages/technology-media-and-telecommunications/articles/deloitte-2023-tmt-predictions-press-release.html.

2 'Semiconductor Chip Designing and Manufacturing', Ministry of Electronics & IT, Available at: https://www.pib.gov.in/PressReleasePage.aspx?PRID=1814029.

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foreign investment rules, foreign direct investment (FDI) up to 100% is permitted under the automatic route in the 'manufacturing' sector, which includes electronics and semiconductors. However, entities from countries sharing a land border with India, or where the beneficial ownership is based or is a citizen of any such a country, can invest only after receiving approval from the relevant government ministry. This provision aims to safeguard strategic interests while attracting foreign capital and expertise.

Protection of intellectual property: The unique, distinctive, and complex nature of semiconductor layout designs necessitates specialised intellectual property protection beyond existing patent, design, trade secret, and copyright-related laws. Consequently, there is a need for a sui generis legislation, which incentivises investment of financial and technological resources in creating unique layout designs. In the absence of any such intellectual property protection, original chip designs run the risk of being replicated, causing significant monetary and reputational harm to legitimate companies. To address this, India enacted the 'Semiconductor Integrated Circuits Layout-Design Act, 2000' (SICLD), a sui generis legislation incentivising investment in creating original layout designs. Under the SICLD, creators can apply for registration of their layout designs with the Semiconductor Integrated Circuits Layout-Design Registry. Registered layouts receive exclusive rights for 10 years. Infringement of the provisions of the SICLD shall be punishable with imprisonment for a term of up to 3 years, or with a fine which may extend to ₹10,00,000, or with both. Certain acts, such as reproducing layouts for scientific evaluation, research, or training purposes, are exempt from infringement. As India aims to become a semiconductor hub, the SICLD will play a crucial role in promoting innovation and growth in the sector. In the 2022-23 annual report, the patent office noted a nearly 700% increase in SICLD application filings compared to the previous year, reflecting rising industry interest.[3]

Compliance with environmental statutes: Establishing semiconductor manufacturing units requires obtaining various permits and authorisations under environmental laws. For instance, units generating hazardous waste must comply with the Hazardous and Other Wastes (Management & Transboundary Movement) Rules, 2016. If any plastic, e-waste, or battery waste is generated as part of the manufacturing process, relevant authorisations will need to be obtained under the Plastic Waste Management Rules, 2016; E-Waste (Management) Rules, 2022; and the Battery Waste Management Rules, 2022. Further, the establishment of any industrial plant or process will require consents to be obtained from the State Pollution Control Boards, under the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of **Pollution) Act, 1974.**

Compliance with labour laws: As a labour-intensive industry,

[3] Annual Report 2022-23, The Office of the Controller General of Patents, Designs, Trademarks and Geographical Indications, Government of India, Ministry of Commerce and Industry, Department for Promotion of Industry & Internal Trade.

> *The semiconductor market in India is projected to be worth USD 55 billion by 2026, with nearly 60% being driven by three key industries: smartphones & wearables, automotive components, and computing & data storage*

semiconductor manufacturers will be required to comply with various labour laws. This includes obtaining registration certificates under the state-specific Shops and Establishments Acts for units employing more than the prescribed number of workers. Employers will also need to ensure minimum wage payments as per the Minimum Wages Act, 1948, and the Payment of Wages Act, 1936. Manufacturing units will need to be compliant with the safety standards prescribed under the Factories Act, 1948. Manufacturing units employing women workers must provide paid maternity leave as per the Maternity Benefit Act, 1961. Additionally, engaging contract labour will require registration and compliance under the Contract Labour (Regulation and Abolition) Act, 1970.

Initiatives implemented by the central government: The National Policy on Electronics 2019 (NEP 2019), unveiled by the Ministry of Electronics and Information Technology, highlighted the need to develop manufacturing capabilities across the electronics sector, including semiconductor and display fabrication facilities. Following the NEP 2019, the government established the 'India Semiconductor Mission' (ISM) to serve as the nodal agency catalysing the Indian semiconductor ecosystem across manufacturing, packaging, and design. The ISM's key objectives include developing long-term strategies, encouraging technology transfer, promoting intellectual property generation, collaborative research, and skill development.

The Union Cabinet also approved the 'Semicon India Programme' (Programme) in 2021, with a financial outlay of ₹76,000 crore for the development of a semiconductor and display manufacturing ecosystem.[4] Four schemes have been introduced under the Programme as on date: (1) the Modified Scheme for setting up Semiconductor Fabs in India offers fiscal support of 50% against the eligible project cost on a pari-passu basis for setting up semiconductor fabs[5]; (2) the Modified Scheme for setting up Display Fabs in India, offers fiscal support of 50% against the eligible project cost on a pari-passu basis for setting up display fabs[6]; (3) the Modified Scheme for setting up of Compound Semiconductors/ Silicon Photonics/Sensors Fab/ Discrete Semiconductors Fab and Semiconductor Assembly, Testing, Marking and Packaging (ATMP)/ Outsourced Semiconductor Assembly and Test (OSAT) facilities in India, offers fiscal support of up to 50% of the capital expenditure, on a pari-passu basis[7]; and (4) the Design Linked Incentive Scheme (DLIS) offers financial incentives and design infrastructure support across various stages of development and deployment of semiconductor design for integrated circuits, chipsets, system on chips. Fiscal incentives offered under the DLIS include reimbursement of upto 50% of the eligible expenditure subject to a ceiling of ₹15 crore (under the product design linked incentive) or incentives of 6% to 4% of net sales turnover over 5 years, subject to a ceiling of ₹30 crore (under the deployment linked incentive).[8]

Benefits under the schemes detailed at serial numbers (1), (2) and (3) above, are available to all private or public limited companies, and the benefits under the DLIS are available to domestic companies (i.e., where more than 50% of the share capital is beneficially owned by resident Indian citizens and/or Indian companies, which

[4] 'India Semiconductor Mission', Ministry of Electronics & IT, Available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1885367.
[5] Modified Scheme for setting up of Semiconductor Fabs in India (issued by the Ministry of Electronics & IT vide notification dated October 4, 2022).
[6] Modified Scheme for setting up of Display Fabs in India (issued by the Ministry of Electronics & IT vide notification dated October 4, 2022).
[7] Modified scheme for setting up of Compound Semiconductors / Silicon Photonics / Sensors Fab/ Discrete Semiconductors Fab and Semiconductor Assembly, Testing, Marking and Packaging (ATMP)/ Outsourced Semiconductor Assembly and Test (OSAT) facilities in India (issued by the Ministry of Electronics & IT vide notification dated October 4, 2022).
[8] Design Linked Incentive (DLI) Scheme (issued by the Ministry of Electronics & IT vide notification dated December 21, 2021).

are ultimately owned and controlled by resident Indian citizens), start-ups (as defined under the notification dated February 19, 2019 issued by the Department for Promotion of Industry and Internal Trade or existing norms) and micro, small and medium enterprises (as defined per the notification dated June 1, 2020 issued by the Ministry of Micro, Small and Medium Enterprises). Further, while the ISM functions as the nodal agency for the schemes detailed at serial numbers (1), (2) and (3) above, the nodal agency for the DLIS is the Centre for Development of Advanced Computing (C-DAC), a premier R&D organisation of the Ministry of Electronics and Information Technology (MEIT).

Moreover, the Semiconductor Laboratory (SCL) which serves as an integrated device manufacturing facility for strategic and defence purposes, has been identified as an autonomous institution under the MEIT. Efforts are underway to modernise and upgrade the Mohali-based SCL through collaborations with private players. In the interim budget announced on February 1, 2024, the government allocated ₹6903 crore for the semiconductor and display manufacturing industry, a nearly 200% increase over the previous fiscal year's budget.[9]

These reforms aim to build infrastructure facilities and create a conducive regulatory environment for the semiconductor industry. Recently, the Union Cabinet (2.0) approved the establishment of three new semiconductor manufacturing facilities in partnership with international companies: (i) Dholera, Gujarat (a collaboration between Tata Electronics Private Limited and Powerchip Semiconductor Manufacturing Corporation, Taiwan); (ii) Morigaon, Assam (an initiative of Tata Semiconductor Assembly and Test Private Limited); and (iii) Sanand, Gujarat (a partnership between CG Power, Renesas Electronics Corporation, Japan; and Stars Microelectronics, Thailand).[10] Reports also suggest that Israel-based Tower Semiconductor has submitted a proposal to set up a USD 8 billion chip manufacturing facility in India[11], demonstrating the country's potential as a global semiconductor manufacturing hub.

> **"** *Investments in new technologies, innovative and environmentally-friendly waste management processes, sustainable material usage, and encouraging reuse and recycling can promote a sustainable semiconductor industry*

Initiatives implemented by state governments: To attract semiconductor investments, various states have implemented comprehensive policies and incentive packages. For instance, Odisha introduced the 'Odisha Semicon Fabless Policy (2023)' to establish an end-to-end semiconductor ecosystem within the state. The policy offers a range of benefits, including a 25% capital investment subsidy, single-window clearance for project approvals, exemptions on stamp duty payments and electrical duty for 10 years from commercial production, reimbursement of power tariffs, water supply incentives, and workforce training programmes.

Similarly, Gujarat has also unveiled the 'Gujarat Semiconductor Policy (2022),' offering incentives such as reimbursement of stamp duty and registration fees, access to quality water and waste disposal systems, power tariff subsidies, exemption from payment of electricity duty and facilitating land procurement. Gujarat also envisions the establishment of the 'Dholera Semicon City' with projects set up in the region being offered 75% subsidy on the purchase of the first 200 acres of land. Further, the government of Uttar Pradesh, under the 'Uttar Pradesh Semiconductor Policy (2024)' has announced capital subsidies, land rebates, exemptions on stamp duty and registration fees, exemptions on payment of electricity duty, establishment of skills development and training programmes, investment in research and development (including establishment of a centre of excellence to promote research and innovation in the semiconductor sector), reimbursement of patent registration fees, access to reliable power and water facilities and exemption from generic inspection under certain statutes. Coupled with the initiatives undertaken by the central government, the measures implemented by the state governments offer lucrative benefits to semiconductor manufacturers.

[9] 'Budget 2024: Rs 6,903 cr allocation for semiconductor scheme could mean more plans in pipeline', Nidhi Singal, Available at: https://www.businesstoday.in/technology/news/story/budget-2024-rs-6903-cr-allocation-for-semiconductor-scheme-could-mean-more-plans-in-pipeline-416076-2024-02-03.

[10] 'PM Narendra Modi Virtually Inaugurates the 3 New Semiconductor Units on March 13', Archana Rao, Available at: https://www.india-briefing.com/news/indias-semiconductor-sector-welcomes-three-new-manufacturing-units-31434.html/.

[11] 'Israeli chipmaker Tower closes in on $8 billion fabrication plant in India', Soumyarendra Barik, Available at: https://indianexpress.com/article/business/israeli-chipmaker-tower-closes-in-on-8-billion-fabrication-plant-in-india-9155159/.

The Road Ahead

In a recent report titled '*Assessing India's Readiness to Assume a Greater Role in Global Semiconductor Value Chains*', released by the Information Technology & Innovation Foundation in February 2024, it was highlighted that India's ability to substantially contribute to global semiconductor value chains hinges on the government upholding its investment policies, maintaining a conducive regulatory and business environment, and avoiding measures that create unpredictability.[12] Given the semiconductor industry's complex and capital-intensive nature, manufacturers evaluating potential sites must assess parameters like access to reliable power, water, and logistics infrastructure. While government initiatives facilitate such infrastructure access, specific challenges around land acquisition, reliable power supply, water infrastructure and logistics for semiconductor operations will need to be addressed.

Further, critics argue the incentives currently being offered may not be commensurate with those provided by other countries like the US and EU.[13] Thus, the government must focus on offering more attractive incentive packages, minimising infrastructural constraints, and providing greater policy clarity on taxation, imports, customs, labour, and land acquisition. Continuous policy review and recalibration based on evolving technological and geopolitical landscapes will be crucial. Additionally, India's regulatory framework can seem daunting and unfamiliar to semiconductor manufacturers. While engaging experienced advisors can help navigate the complex legal system, streamlining administrative processes and regulations will further enable India to attract semiconductor investments.

Another significant challenge is India's ability to create and sustain a business and policy environment that promotes a vibrant and innovative semiconductor ecosystem encompassing all aspects of production, from research and development to design, fabrication, assembly, testing, and packaging (ATP)[14]. In addition to chip fabs, efforts will be needed to develop an ecosystem for other critical semiconductor components like PCBs, passives, electro-mechanical components etc. required in electronic systems. Therefore, alongside incentives for setting up semiconductor fabs and facilities, India will need to develop a domestic supply chain for critical inputs like semiconductor manufacturing equipment, materials like silicon wafers, chemicals, gases etc. to strengthen its semiconductor ecosystem. Holistic policies are essential as the industry's success depends on entire supply chains operating efficiently to avoid delays or shortages.

While the semiconductor market in India is projected to be driven by key verticals like smartphones, automotive, and computing, India could highlight specific high-growth application focus areas like mobility, IoT, AI hardware etc. that it aims to target.

Furthermore, ready access to a skilled workforce is critical for semiconductor manufacturers. While India has introduced various technical courses and programs like Chips-to-Startup (C2S) to train 85,000 engineers[15], it is crucial to design curricula that bridges the gap between industry demands and skill sets. Continuous collaboration between industry players, stakeholders, and universities on developing vocational training programmes and a

[12] 'Assessing India's Readiness to Assume a Greater Role in Global Semiconductor Value Chains', Stephen Ezell (February 2024), Information Technology and Innovation Foundation (ITIF).

[13] 'India's valiant chip-making efforts leave a lot to be desired', Gagandeep Kaur, Available at: https://www.fierceelectronics.com/electronics/indias-valiant-chip-making-efforts-leave-lot-be-desired.

[14] 'Assessing India's Readiness to Assume a Greater Role in Global Semiconductor Value Chains', Stephen Ezell (February 2024), Information Technology and Innovation Foundation (ITIF).

[15] 'AICTE launches courses in Semiconductor to make India self- reliant in chip manufacturing', Puniti Pandey, Available at: https://www.educationtimes.com/article/higher-education-subject-wise/98440606/aicte-launches-courses-in-semiconductor-to-make-india-self-reliant-in-chip-manufacturing; 'MeitY invites applications under the Chips to Startup (C2S) Programme from academia, R&D organisations, startups and MSMEs', Ministry of Electronics & IT, Available at: https://digitallearning.eletsonline.com/2023/09/aicte-moe-embarks-on-a-mission-to-enhance-indias-semiconductor-capabilities/.

focus on STEM education can help generate the required talent pool.

Incorporating sustainability principles in semiconductor manufacturing is also imperative. Investments in new technologies, innovative and environmentally-friendly waste management processes, sustainable material usage, and encouraging reuse and recycling can promote a sustainable semiconductor industry.

Developing a robust intellectual property regime is also vital for the growth of the semiconductor industry. While the SICLD provides a legal framework to prevent unauthorised copying of layout designs, additional measures such as simplifying procedures, strengthening enforcement mechanisms, and facilitating accessibility for designers and stakeholders can further strengthen IP protection.

International cooperation and concerted efforts from private players will be essential for developing a comprehensive semiconductor ecosystem. The recent memorandums with the US[16], Japan[17], and the EU[18] to collaborate on information sharing, technology transfer, and research are positive steps. Further, public-private partnerships can result in efficient resource sharing, economies of scale, and access to expertise.

Conclusion

Building a domestic semiconductor supply chain from the ground up requires substantial investment in terms of time, money, effort, and resources. The global semiconductor landscape is constantly evolving with technological advancements and changing consumer demands. India faces stiff competition from other global players. Consistent and robust policymaking, constant interface with stakeholders, investment in building a talented workforce, and a focus on developing an end-to-end supply chain will yield long-term returns. Resilience will be key as India embarks on its journey to become a significant player in the global semiconductor market. With the right strategies, incentives, and ecosystem support, India can leverage its strengths to establish itself as a semiconductor manufacturing hub and contribute substantially to global semiconductor value chains.

[16] 'MoU on semiconductor Supply Chain and Innovation Partnership between India and US signed following the Commercial Dialogue 2023', Ministry of Commerce & Industry, Available at: https://www.pib.gov.in/PressReleasePage.aspx?PRID=1905522.

[17] 'Cabinet approves Memorandum of Cooperation between India and Japan on Japan-India Semiconductor Supply Chain Partnership', Ministry of Electronics & IT, Available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1970784.

[18] 'Memorandum of Understanding on semiconductors with India', European Commission, Available at: https://digital-strategy.ec.europa.eu/en/library/memorandum-understanding-semiconductors-india.

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Foreign Investment in India

from Bordering Countries: A Case for Review

While the stated objective of PN3 was to prevent opportunistic takeovers by investors from Bordering Countries (specifically China) due to the COVID-19 pandemic, the result has been that investments from China accounted for 0.37% of the total FDI inflow reported in India between April 2000 and March 2024

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On April 17, 2020, the Department for Promotion of Industry and Internal Trade ("**DPIIT**") issued the Press Note No. 3 (2020 Series) ("**PN3**") with the primary objective of "curbing opportunistic takeovers and acquisitions of Indian companies due to the COVID-19 pandemic". PN3 amended the Consolidated Foreign Direct Investment Policy of India, 2017 ("**FDI Policy**") and made government approval a mandatory requirement for foreign direct investments ("**FDI**") originating from countries sharing land border with India. This marked a significant deviation from India's previous FDI policy and came against the backdrop of the economic and political challenges posed by the COVID-19 outbreak and the border conflict with China in 2020. However, as things stand today, there is a need to reflect on PN3's impact on India's FDI landscape and consider whether this framework needs modifications.

Key Amendments

Paragraph 3.1.1 of the FDI Policy was amended pursuant to PN3 to mandate prior government approval for (i) investments made by entities incorporated in countries sharing land border with India; or (ii) where the "beneficial owner" of the investment in India is situated in or is a citizen of such country.

Further, it was mandated that a direct or indirect transfer of ownership of existing or future FDI resulting in the beneficial ownership falling under the above restrictions will also require prior Government approval. For the purpose of PN3, India recognizes Pakistan, Afghanistan, Nepal, Bhutan, China (including Hong Kong), Bangladesh and Myanmar as countries sharing land border with India ("**Bordering Countries**").

In 2022, the Ministry of Corporate Affairs ("**MCA**") introduced certain amendments pursuant to PN3:

1. **Incorporation:** The Companies (Incorporation) Second Amendment Rules, 2022 introduced a revised format for the declaration made by the subscribers and first directors of companies in the Form INC-9 (Declaration by Subscribers and First Directors). Such persons need to confirm applicability of the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019, as amended ("**NDI Rules**") in Form INC-9 and obtain prior government approval, if applicable, under the NDI Rules before subscribing to the shares of the company.
2. **Transfer of shares:** The Companies (Share Capital and Debentures) Amendment Rules, 2022 introduced a new declaration regarding applicability of the NDI Rules and FDI approval in the Form SH-4 (Securities Transfer Form). Accordingly, an investing entity from the Bordering Countries need to obtain prior government approval for acquiring shares of an Indian company and submit such approval along with the Form SH-4.
3. **Allotment of securities:** The Companies (Prospectus and Allotment of Securities) Amendment Rules, 2022 mandated prior government approval under the NDI Rules for allotment of securities to citizens or legal entities from the Bordering Countries.

> ***"In 2023, the DPIIT revised the standard operating procedure (SOP) for processing FDI approval applications, requiring extensive information regarding beneficial ownership from Bordering Countries.***

Further, a new declaration regarding applicability of the NDI Rules has been added in the Form PAS-4 (Private Placement Offer cum Application Letter) and the government approval is required to be submitted along with the Form PAS-4.

4. **Appointment of directors:** Pursuant to the Companies (Appointment and Qualification of Directors) Amendment Rules, 2022, the nationals of any of the Bordering Countries seeking appointment as a director of an Indian company or applying for a director identification number in India, are required to obtain necessary security clearance from the Ministry of Home Affairs. Further, additional declarations regarding applicability of national security clearance have been included in the relevant consent letters and application forms to be submitted therein.
5. **Merger or Amalgamations:** The Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022 introduced a new Form CAA-16 for submitting the declaration regarding applicability of the NDI Rules and FDI approval in case of a compromise or an arrangement or merger or demerger being undertaken between an Indian company and a company or body corporate which has been incorporated in a country sharing land border with India.

In 2023, the DPIIT revised the standard operating procedure for processing FDI approval applications in India ("SOP"). The SOP seeks extensive information in the applications regarding beneficial ownership from the Bordering Countries, which inter alia includes: (i) entity wise details of the existing shareholders, investors, directors, key managerial personnel, etc., of all upstream entities until the ultimate beneficial owner, and (ii) details of shareholders belonging to or having beneficial ownership in the Bordering Countries, along with the ownership structure, place of incorporation or citizenship details of such entities and individuals.

For the non-PN3 proposals, a broad declaration is required to be submitted confirming that none of investors or shareholders of the Indian investee company and the foreign investor, including their respective beneficial owners (regardless of their shareholding), belong to the Bordering Counties.

Key Shortcomings

Procedural aspects

While the DPIIT prescribes an indicative timeline of up to 12 weeks in the SOP, decisions on PN3 proposals have generally taken far longer. In many cases, PN3 proposals have remained pending without a decision for several years.

For example, in April 2024, media reports quoting an anonymous source noted that out of a total 526 proposals received under PN3 since its introduction, 124 proposals were approved, and 201 proposals were rejected. The remaining 200 proposals remained pending, in some cases for several years.

One key procedural shortcoming has been that there is no regular public data on PN3 proposals, or indeed any FDI proposals. Data in the public domain on PN3 applications has largely been based on responses to questions in Parliament or media reports quoting anonymous sources.

It is imperative that decisions are issued one way or another on PN3 rather than keeping them pending. Pending proposals without any decision leads to lack of clarity on the objectives sought to be achieved. It is also critical that the rationale for decisions on PN3 proposals be made public so that this can inform future applications under PN3.

As a broader point (not limited to PN3 proposals), the authors recommend:

1. time-bound decision making in respect of FDI proposals where the SOP is followed in letter and spirit; and

2. a process for periodic public dissemination of decisions on FDI proposals, including any key points emerging from such decisions.

Substantive aspects

PN3 covers investments where the "beneficial owner" is situatedlocated in or is a citizen of one of the Bordering Countries. The term "beneficial owner" has not been defined under PN3 and has different meanings under different laws in India.

For example, the Companies Act, 2013, as amended, defines a "significant beneficial owner" as someone with a direct or indirect shareholding of 10% or more in the investing entity whereas the Prevention of Money Laundering Act, 2002 ("PMLA") defines "beneficial owner" as the owner or holder of ultimate control over the investing entity. The rules framed under the PMLA earlier referred to a 25% threshold for ascertaining "control" – this threshold was revised to 10% in March 2023.

The absence of any formal guidance under PN3 for ascertaining "beneficial ownership" has resulted in the authorized dealers bank adopting an inconsistent approach while identifying restricted investments under PN3. This significantly impacts foreign investors, private equity or venture funds and listed entities, where entities or individuals from the Bordering Countries might have miniscule or passive participation and still attract the restrictions of PN3 as a technical matter.

The authors recommend that it be clarified that any investment of less than 10% in an investing entity from a person or entity in a Bordering Country will not be considered relevant from a PN3 perspective.

> *"PN3 covers investments where the "beneficial owner" is located in or is a citizen of one of the Bordering Countries*

Existing investors from the Bordering Countries may also have call or put options over shares of Indian investee companies or may seek to participate in bonus or rights issue of such companies to maintain their existing shareholding.

However, pursuant to PN3, these would trigger prior government approval and any additional investments made by such investors in their existing wholly owned subsidiaries in India would also trigger such approval requirement.

The authors recommend an exception for (i) investments by persons or entities from Bordering Countries in existing wholly owned subsidiaries in India, and (ii) participation by such persons or entities in bonus or rights issuances to maintain existing shareholding in Indian companies.

The Economic Survey

While the stated objective of PN3 was to prevent opportunistic takeovers by investors from Bordering Countries (specifically China) due to the COVID-19 pandemic, the result has been that investments from China accounted for 0.37% of the total FDI inflow reported in India between April 2000 and March 2024. It is undeniable that national security concerns in relation to China have not abated; however other circumstances that prompted introduction of PN3 have changed significantly as the COVID-19 pandemic has abated and Indian companies have overcome the uncertainty brought by the global pandemic.

In this backdrop, recently the Economic Survey for 2023-2024 ("**Economic Survey**") has proposed a contrasting approach to the government's current stance on FDI investments from China.

The Economic Survey, which is annually published by the Ministry of Finance and prepared under the guidance of the chief economic advisor to the Government, has advocated softening of the stance on FDI inflows from China. It highlights the two choices India has to benefit from the China plus one strategy being pursued by many international companies: integrating into China's supply chain or promoting FDI from China.

The Economic Survey favors choosing FDI as a strategy to benefit from the China plus one approach rather than relying on trade. The Economic Survey notes that China is India's largest import partner, and the trade deficit with China has been rising.

Further, with the western markets shifting their immediate sourcing away from China, it is more effective to have Chinese companies invest in India and then export products to the western markets.

This is in contrast with India's current practice of importing from China, adding minimal value, and then re-exporting such products.

Way Forward

The authors submit that there is a strong case to take a nuanced approach towards Chinese FDI, particularly in sectors in which such FDI could potentially assist in growth of Indian industry.

It has been suggested that the Government consider notifying a list of sectors and industries where it may permit Chinese investment without prior approval. Such a list would focus on sectors that would help indigenize manufacturing and not undermine national security concerns. Investment in these sectors would be permitted without scrutiny under PN3.

Other commentators have suggested that while a prior approval requirement be retained in all cases of investments from China, consideration of PN3 proposals be substantially expedited and approvals be issued as a matter of course for investments in sectors which do not raise national security concerns – this approach could achieve a similar result.

Irrespective of the approach that is followed (or indeed a combination of such approaches), it is evident that a recalibration of the PN3 restrictions is imperative to help diversify supply chains and encourage domestic industry without, in any way, undermining or compromising national security concerns.

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Mandate for Self-Declaration Certificate in the Health and Pharma Sector

Watershed Moment in the Indian Advertising Regulatory Landscape

> Advertising is one of the core expressions of commercial speech, and it is important to preserve this expression to the fullest extent, whilst ensuring that truthful and responsible claims are conveyed to the public

In May 2024, the Supreme Court of India passed a series of directions, seeking to lend teeth to the extant advertising regulations and create a measure of responsibility amongst advertising, ad agencies, publishers and other relevant stakeholders. Pertinently, the Supreme Court has mandated submission of a Self-Declaration Certificate [**SDC**] before publication or broadcasting of any advertisements. This Self-Declaration seeks assurance from Advertisers that advertisements of their products do not contain any misleading claims or references. At present, the said requirement has been limited to the *food and health sector*. However, this itself is a significant development in India's advertising regulatory framework.

i. Genesis of the Issue:

This development stems from a Petition filed by the Indian Medical Association [**IMA**], against Patanjali Ayurved, a leading Indian herbal/natural product company. IMA contends that Patanjali has been publishing/broadcasting misleading ads claiming their natural/herbal/ayurvedic supplements as a cure for COVID-19 and as well as cures for other specific diseases and conditions, violating the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954.

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During the course of the hearing, the Supreme Court scrutinised the larger issue of misleading advertisements and their potential for adversely affecting health and safety of citizens, notably vulnerable citizens. The Court also opined that advertisers/advertising agencies and endorsers are equally responsible for issuing false and misleading advertisements and must conduct due diligence when involved in endorsing a product.

ii. Directions & Current Mandate:

In view of the aforesaid, the Supreme Court deemed it appropriate to issue, inter alia, the following directions on 07.05.2024:

i. Before printing/airing/displaying of any advertisement, an SDC shall be submitted by the advertiser/advertising agency as contemplated under Rule 7 of the Cable Television Networks Rules, 1994;
ii. The Ministry of Information & Broadcasting [**MIB**] was directed to create a dedicated portal for advertisements printed, published, displayed in the Press/Print Media/Internet.
iii. Proof of uploading the SDC shall be made available by the advertisers to the concerned Broadcaster/Printer/Publisher/TV Channel/ Electronic Media.
iv. It is the responsibility of the Broadcaster/Publisher to ensure that advertisers have submitted the requisite SDC, authenticity of which may be verified through the portal.
v. No advertisements shall be permitted to be run on the relevant channels and/or in the print media/internet without uploading the SDC as directed.

Subsequently, on 3 June, 2024, the MIB issued a press release introducing the portals to enable submission of SDCs. It is pertinent to note that the Supreme Court only spoke of SDC against misleading claims, the form introduced by the MIB seeks adherence with all relevant regulatory guidelines, such as Rule 7 of the Cable Television Networks Rules, 1994, and the Norms of Journalistic Conduct of the Press Council of India. Further, the Press Release states that non-compliance with the requirement may lead to violation of the Supreme Court's order, prompting punitive action under the Cable TV Networks Regulation Act, 1995, and other applicable statutes.

Almost immediately, stakeholders conveyed grave concerns of portal crashing, feasibility and confidentiality, and industry associations duly filed intervention applications before the Apex Court, seeking an opportunity to address the Court.

In any event, after multiple stakeholder meetings, by way of advisory dated 3 July, 2024, the MIB clarified that the requirement for filing SDC will be limited to the food and health sector. Additionally, while previously each advertisement required an SDC, it now seems that advertisers even in the abovementioned sectors are only required to file an annual SDC.

iii. Challenges and Concerns:

The mandate of the SDC has emerged following the Supreme Court's anguish that the extant mechanisms have failed to create appropriate deterrence against misleading advertisements. The Supreme Court particularly noted that misleading claims have a critical impact on the Right to Health, a fundamental right encompassed within the right to life. There is no doubt that misleading advertisements can undermine the right to health by promoting ineffective or harmful products, leading to public health risks, and compromising informed consumer choices. However, industry stakeholders are concerned that the blanket directions overlook the practical realities of how advertising (*in particular, digital advertising*) functions.

At the outset, the lack of specificity in terms of what is sought to be declared as well as the consequences of non-compliance are issues that require to be addressed. The current regime accounts for specific and exhaustive kinds of misleading ads under the Misleading Guidelines 2022, which is being followed on a best-effort basis by entities. However, there are concerns that any *perceived* lack of compliance may result in punitive actions, under the dint of the Supreme Court order, without any meaningful opportunity of being heard. For instance, law allows a trader to puff up its products, but could that per se constitute misleading claims?

This concern is particularly heightened due to the current requirement of an Annual SDC, which possibly cannot account for all the possibilities of advertisements that a company may wish to launch in the coming year.

Since advertisements need to be self-declared before they are published, there are concerns about the confidentiality of the submitted information and its impact on fair market competition.

The Self-Declaration mandate also does not account for the diverse type of advertisements and advertising models, especially in the digital realm. Compliance issues arise due to the need for details such as script, URL, file size, and the ultimate platform of publication, which are often unknown or non-existent prior to publication. There are also other forms of advertisements which do not fall into the straitjacket buckets. Programmatic advertisements involve a real-time automated process where the final platform is uncertain, making it difficult to comply with the Self-Declaration mechanism. Influencer advertisements are organic and unpredictable, lacking predefined scripts or URLs. Topical advertisements rely on current events and require quick publication. Similarly, livestream advertisements on digital platforms, often spontaneous, would be hindered by the need for prior self-declaration.

Another aspect is that the requirement of ad publishers verifying the SDC prior to the advertisement being aired, needs to be harmonised with other extant laws. Advertising platforms are often intermediaries and are required by law not to select or verify information prior to its upload, in order to avail of the safe harbour provisions under the Information Technology Act, 2000. The obligation of pre-verification must be interpreted meaningfully, to reconcile the various responsibilities and restrictions under other laws.

iv. Concluding Observations:

As noted, the Supreme Court was disconcerted by not only the widespread non-compliance with the extant regulations but also lack of enforcement thereof by the authorities. The SDC has been envisaged to create a sense of personal responsibility in the authorised representatives and

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" Advertising platforms are often intermediaries and are required by law not to select or verify information prior to its upload, in order to avail of the safe harbour provisions under the Information Technology Act, 2000. The obligation of pre-verification must be interpreted meaningfully, to reconcile the various responsibilities and restrictions under other laws

encourage due diligence and introspection prior to pushing out advertisements. While the intent of this directive is commendable, in the absence of clear objectives and defined obligations, the SDC regime may not serve its intended purpose. The need of the hour is the implementation of extant laws and provisions which address the niche issues in the food and health sectors, such as, The Guidelines 2022; the Food Safety and Standards (Advertising and Claims) Regulations, 2018; the newly unveiled revised Uniform Code of Pharmaceutical Marketing Practices and the ASCI self-regulation Code.

It is pertinent to note that when the Supreme Court heard the Petition on 9 July, 2024 and *prima facie* observed that the object of the directions was not to cause inconvenience to the industry, but to curb the menace of misleading advertisements. The matter is yet to conclude and further developments are likely. The Supreme Court has impleaded all stakeholders and authorities, and it is hoped that a holistic solution is found that addresses the very relevant issues raised by all parties. Advertising is one of the core expressions of commercial speech, and it is important to preserve this expression to the fullest extent, whilst ensuring that truthful and responsible claims are conveyed to the public. The Supreme Court shall doubtless find the correct balance between the competing Right of Speech, Right to Know and Right to Health.

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CRIMINAL LAWS
New versus Old

The enactment of new criminal laws represent a significant stride in modernising India's legal system and addressing longstanding issues within criminal justice

In December 2023, the Indian government enacted sweeping revisions to its criminal legislation with the introduction of three new laws: the Bharatiya Nyaya Sanhita (BNS), the Bharatiya Nagarik Suraksha Sanhita (BNSS), and the Bharatiya Sakshya Adhiniyam (BSA). These legislative changes, effective from July 1, 2024, mark a significant departure from the older legal frameworks. This article aims to provide a comparative analysis between the new criminal codes and their predecessors, examining the modifications introduced, and exploring the challenges and implications of these reforms.

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The BNS replaces the long-standing Indian Penal Code, 1860 (IPC) and brings about several structural changes in its legal framework and arrangement of provisions. Unlike the IPC, where offences related to women, children, and crimes against the human body were scattered, the BNS consolidates these categories under specific sections. This consolidation has streamlined the legal framework, reducing the total number of sections from 511 in the IPC to 358 in the BNS.

In comparison, the Code of Criminal Procedure, 1973 (CrPC) has seen fewer alterations in terms of content. While the CrPC originally consisted of 484 sections, 2 schedules, and 56 forms, the BNSS now includes 533 sections but retains the same number of schedules and forms. This increase in sections aims to address procedural complexities and enhance the clarity of the criminal justice system.

The BSA, which replaces the Indian Evidence Act, 1872 (IEA), encompasses 169 sections, with certain provisions removed to adapt to technological advancements and societal changes over the years. This modernisation aligns the legal system with contemporary realities, ensuring that evidence laws remain robust and effective in facilitating fair trials.

These legislative changes mark a transformative moment in India's legal history, aiming to purge colonial-era legacies by updating terminology and aligning legal texts with current technological and societal contexts. The elimination of terms such as "British India," "Queen," and "British calendar" represents a deeper effort to modernise legal language and adapt it to contemporary norms.

However, despite these progressive changes, the implementation of the new codes presents significant challenges and ambiguities that need to be addressed for a smooth transition. One major concern is the uncertainty surrounding the application of the new laws to ongoing investigations, cases, trials, and enquiries. While the Repeal and Savings Section of the BNSS aims to ensure continuity for existing cases under the old CrPC, ambiguities remain. For instance, it is unclear which legislation would govern if litigation is revived after the acceptance of a closure report or in cases involving proclaimed offenders who are absent from trial, where trial in absentia is permitted under the new codes. These ambiguities have already led to legal challenges, with pleas filed before the Hon'ble Supreme Court of India and the Hon'ble Delhi High Court seeking clarity on the viability and implementation of the new codes, particularly for cases arising before their enactment.

Moreover, the new laws seek to address systemic issues by extending police custody durations, which raises concerns about balancing law enforcement needs with civil liberties. Despite efforts to define and limit these provisions, there remains a concern over potential overreach and misuse.

Section 57 of the BSA's recognition of electronic records as primary evidence and provisions for the electronic presentation of oral evidence are significant steps towards aligning India's legal framework with its digital transformation. However, realising these efficiencies requires addressing existing challenges such as high vacancy rates, judicial overload, and the need for comprehensive infrastructure development and personnel training, particularly for forensic experts and the audio-video recording of statements.

The successful implementation of these reforms hinges on overcoming structural challenges, clarifying legal procedures, and striking a balance between law enforcement priorities and civil liberties. To achieve these objectives, clear guidelines must navigate the complexities of the legal landscape, complemented by substantial investments in infrastructure and training. Effective reforms are not only morally imperative but also crucial for fostering a more equitable and responsive society, where justice is delivered fairly and experienced consistently by all citizens.

In conclusion, the enactment of new criminal laws represents a significant stride in modernising India's legal system and addressing longstanding issues within criminal justice. These reforms are designed to enhance fairness, transparency, and accountability while safeguarding individual rights. However, their successful implementation requires navigating complexities with clear guidelines and making substantial investments in infrastructure and training. Ultimately, these reforms are pivotal in shaping a justice system that is more responsive to contemporary challenges and ensures equal access to justice for all citizens.

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Finance Act, 2024

Retrospective Exemption to Tariff Rate Quota Imports of Crude Soyabean oil and Crude Sunflower Seed oil

The Finance Act, 2024 has granted retrospective exemption to TRQ imports of the products from 1st April 2023 to 30th June 2023

Tariff Rate Quota ("**TRQ**") is a mechanism that allows a set quantity of specific products to be imported at lower custom duty rates than the much higher duty rate normally applicable to that product under the First Schedule to the Customs Tariff Act, 1975. The TRQ is primarily introduced for agricultural products such as cereals, meat, fruit and vegetables, and dairy products are the most common.

In India, TRQ is a scheme formulated by the Director General of Foreign Trade ("**DGFT**") under Para 2.60 of the Handbook of Procedure. It is implemented by the Ministry of Finance ("**MoF**") by way of exemption notifications, to permit duty-free import of certain specified goods up to limited quantities.

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SINCE 1985
exceeding expectations

The Finance Act, 2024 has granted retrospective exemption for TRQ imports of Crude Soya-bean oil and Crude Sunflower Seed oil ("the products") made during the period between 01st April 2023 and 10th May 2023 in an attempt to align the Customs Exemption Notification with the Public Notices issued by DGFT and rectify the anomaly created last year.

Introduction:

The products attract a high rate of Basic Customs Duty ("**BCD**") under the First Schedule to the Customs Tariff Act, 1975. However, a general exemption from payment of BCD is available to the products under Notification No. 48/2021-Cus. dated 13.10.2021. For Agriculture Infrastructure and Development Cess ("**AIDC**") on the products, Notification No. 49/2021-Cus. dated 13.10.2021 provides a concessional rate of 5%. The sequence of events leading to the proposal in the recent Budget is captured below.

Tariff Rate Quota for the products:

Vide Public Notice No. 10/2015-20 dated 24.05.2022, DGFT formulated 'Tariff Rate Quota Scheme' ("**TRQ scheme**") for the products. Further, it was provided[1], *inter alia*, that TRQs issued for the financial year 2022-23 shall be valid for clearance of import of the products for a period of one year or till 30th June 2023, whichever is earlier.

Issuance of Notification No. 30/2022-Cus. dated 24.05.2022 by MoF to provide duty exemption to the products imported under TRQ scheme:

To implement the TRQ scheme, the MoF issued Notification No. 30/2022-Cus. dated 24.05.2022, providing for exemption to the products from whole of AIDC, *inter alia*[2], when imported against TRQ authorisation. At the time of issuance, the Notification specifically provided that the exemption will be available for imports made up to 31.03.2024.

Issuance of Public Notice No. 60/2015-20 dated 01.03.2023 by DGFT confining the TRQ scheme for the products for the FY 2022-23:

Thereafter, DGFT issued Public Notice No. 60/2015-20 dated 01.03.2023 stating that import of products under the TRQ Scheme would be permitted only in cases where the Bill of Lading is dated on or before 31.03.2023 and the Bill of Entry for import is filed on or before 30.06.2023. Till this point, the Public Notices issued by DGFT were aligned with the Customs Exemption Notifications.

Issuance of Notification No. 15/2023-Cus. dated 03.03.2023 by MoF curtailing the period of exemption for TRQ imports of Crude Sunflower Seed Oil from March 31, 2024, to March 31, 2023:

However, in March 2023, the MoF issued Notification No. 15/2023-Cus. dated 03.03.2023 curtailing the period of exemption for TRQ imports of Crude Sunflower Seed Oil from March 31, 2024, to March 31, 2023.

> *The Finance Act, 2024 reaffirms that in matters relating to Foreign Trade Policy, the Ministry of Finance and the Ministry of Commerce & Industry must act in unison.*

Disjunction between Public Notice No. 60/2015-20 dated 01.03.2023 issued by DGFT and Notification No. 15/2023-Cus. dated 03.03.2023 issued by MoF:

Thus, while Public Notice No. 60/2015-20 dated 01.03.2023 issued by DGFT permitted TRQ imports of Crude Sunflower Seed Oil till 30.06.2023 (where Bill of Lading is dated on or before 31.03.2023), Notification No. 30/2022-Customs dated 24.05.2022 as amended[3] by the MoF curtailed the period of exemption for TRQ imports of Crude Sunflower Seed Oil by a full year from March 31, 2024, to March 31, 2023.

This resulted in a scenario where importers were extended the benefit of importing the products under the TRQ licence up to 30.06.2023 (where Bill of Lading is dated on or before 31.03.2023) but the corresponding Customs Exemption Notification No. 30/2022-Cus. granted exemption only up to 31.03.2023.

Issues faced by importers for TRQ imports of the products and payment of AIDC at 5%:

As a result, even for TRQ imports of the products in April 2023 till 10th May 2023, importers were constrained to discharge AIDC at 5%[4] as against a complete exemption from payment of the same. For BCD however, importers could claim alternative exemption under Notification No. 48/2021-Cus. dated 13.10.2021 which provided a complete exemption from payment of BCD for the products.

Issuance of Notification No. 37/2023-Cus. dated 10.05.2023 to provide duty exemption to the products imported under TRQ scheme from May 11, 2023, till June 30, 2023:

Subsequently, in May 2023, the MoF issued Notification No. 37/2023-Cus. dated 10.05.2023 to provide for exemption to the products from the whole of BCD and AIDC. However, the Notification was issued with a stipulation that the Notification would come into force prospectively from 11th May 2023 and that it would not apply to imports after the 30th of June 2023.

This led to unintended withdrawal of duty-exemption for TRQ imports of the products during the period between 1st April 2023 and 10th May 2023 even in cases where Bill of Lading was filed before 31st March 2023.

Our comments:

This anomaly has been rectified by the Finance Act, 2024 which has granted retrospective exemption to TRQ imports of the products from 1st April 2023 to 30th June 2023. Section 105(1) of the Finance Act, 2024 states that Notification No. G.S.R.356(E) i.e., Notification No. 37/2023-Cus. dated 10.05.2023 shall be deemed to have come into force with effect from 1st April 2023 and remain in force during the period from 1st April 2023 till 30th June 2023.

Section 105(4) of the Act states that refund shall be made of the whole of duty and cess, which has been collected, but which would not have been so collected, had the Exemption Notification been in force during the afore-mentioned period.

Most importantly, the proviso to Section 105(4) of the Act states that the person claiming the refund of such duty and cess must make an application in this behalf to the jurisdictional Assistant/ Deputy Commissioner of Customs on or before 31st March 2025.

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1. Public Notice No. 15/2015-20 dated 14.06.2022
2. Notification No. 30/2022-Cus. dated 24.05.2022 provided exemption to TRQ imports of the products from whole of BCD and AIDC. However, since Notification No. 48/2021-Cus. dated 13.10.2021 also provides complete exemption from BCD to the same products, specific reference is made to grant of exemption from AIDC.
3. as amended by Notification No. 15/2023-Cus. dated 03.03.2023
4. In terms of Notification No. 49/2021-Cus. dated 13.10.2021

Way Forward:

The retrospective exemption and refund of duties & cess proposed in the Finance Bill, 2024, for TRQ imports of the products, has come into force on 16th August 2024 with the passing of the Finance Act, 2024.

Be that as it may, it would be worthwhile to note that the Karnataka High Court in Union of India v. Yokogawa Bluestar Limited [2001 (129) E.L.T. 598 (Kar.)], held that any delay in issuing Customs Exemption Notification would not come in the way of claiming duty-exemption in terms of the Export Import Policy and further held that that the Ministry of Commerce cannot challenge the decision of the Court when it is their policy that is being implemented by extending duty-exemption.

The Kerala High Court in M Far Hotels Limited v. Union of India [2011 (270) E.L.T. 158 (Ker.)] held that benefit of duty-credit under the Foreign Trade Policy would be available even in the absence of a Notification issued under the Customs Act, 1962.

Generally, in cases deemed fit, retrospective amendments have been introduced in the past vide various Finance Acts to rectify anomalies, for example the exemption provided for import of "Polytan in powder or granule form in Section 133 of Finance Act, 2001 and to import of barge mounted power plants in Section 130 of Finance Act, 2002. It is important to note that in the case of barge mounted power plants, retrospective exemption was granted without making the refund claim subject to the provisions of unjust enrichment under section 27 of the Customs Act, 1962.

Thus, in cases concerning retrospective exemption (including the present amendment), any excess duty paid by importers becomes refundable and they can claim a refund of the same without seeking modification of the assessment, as mandated in in ITC Ltd. v. CCE [2019 (368) E.L.T. 216 (S.C.)]. This is primarily due to the fact that the entitlement to a refund in these cases would be by virtue of the Finance Act.

Having said that, it remains to be seen how the provisions relating to unjust enrichment would be satisfied by importers claiming refunds.

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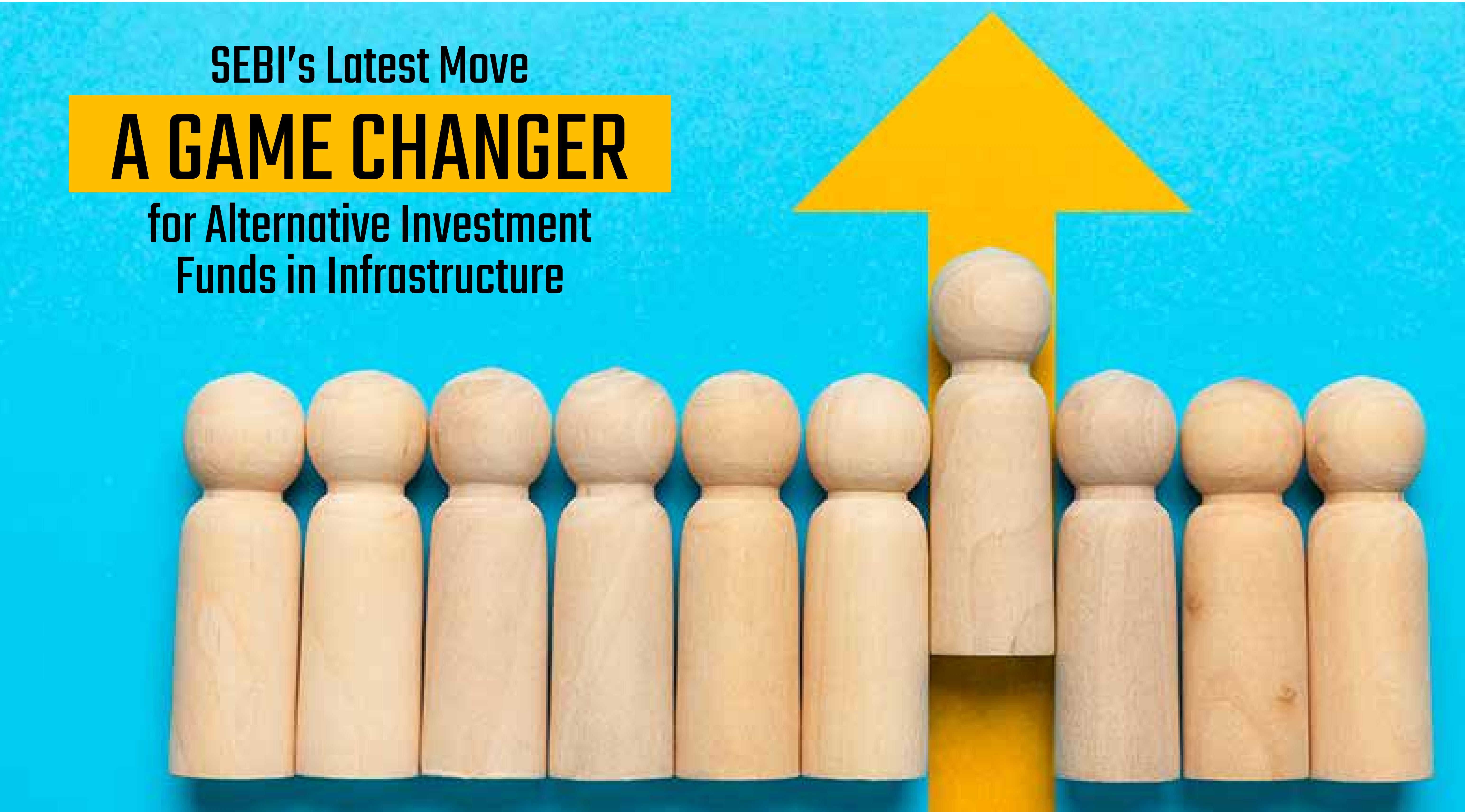
VIEWPOINT | LE

SEBI's Latest Move A GAME CHANGER for Alternative Investment Funds in Infrastructure



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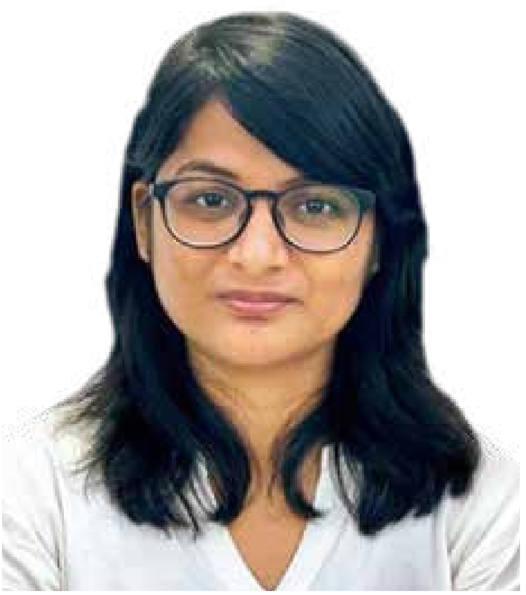

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In a move to consider the concerns of the Investee Companies wherein the Alternative Investment Funds (AIFs) are also one of the equity holders, the Securities and Exchange Board of India (SEBI) permitted that such AIFs to create encumbrance on equity holdings in favour of lenders to respective investee companies. AIFs are private pooled investment vehicle that collects funds from Investors for deploying them in accordance with a defined investment policy (scheme) for the benefit of its investors.

At the moment permission accorded by SEBI is w.r.t Infrastructure Investee Companies (except foreign investee company) that too by only creating pledge on the equity investments held by Category I and II AIFs. Category I and II AIFs shall not give any form of guarantee for the investee company.

From long, the concern was raised by Investee Companies who have AIFs as their investors that since AIFs are not permitted to create encumbrance directly or indirectly on the investment held in their companies, such Investee Companies remains deprived of funding from banks and other lending entities. The banks and other lending entities remains reluctant if additional comfort of having pledge on the equity of the shareholders of such entities. Such pledging enables lenders to assume control over the entity in the event of default on debt by Borrowers.

Now, the amendment made of enabling of encumbrance on equity holdings by AIFs will lead to greater confidence to lenders at the time of financing the infrastructure projects. While it is risky as these projects are usually capital-intensive and have long gestation period and in case a default occurs (which is very likely with infrastructure projects), AIFs will lose control over their investments which expose AIF investors to a great risk. However, looking at the bigger picture and allowing mobilisation of funds indirectly in infrastructure sector, SEBI's move will prove to be a game changer for not only AIFs invested in the infrastructure sector but growth of infrastructure projects in India.

The approval given by SEBI is with proper check and balances so that it does not result in any arbitrage therefore conditions have been prescribed which can be summarised as follows:

a) Category I and Category II AIFs may create encumbrance on equity of the investee company, which is in the business of development, operation or management of projects in any of the infrastructure sub-sectors listed in the Harmonised Master List of Infrastructure issued by Central Government.

b) Explicit disclosure with respect to creation of such encumbrance by AIFs and risk associated be mentioned in the Private Placement Memorandums (PPMs). These are for those AIFs who have yet to onboard investors.

c) In case where encumbrances were created prior to the current amendment however duly made disclosure in PPM of the Scheme, such encumbrance will continue.

d) Where the encumbrances have been created by Category I and Category II AIFs however the disclosure qua same is given in the PPMs then they will seek consent of investors of the scheme by October 24, 2024 (i.e. within six months of the amendments coming into effect). In case no consent is sought by October 24, 2024, the encumbrances shall be required to be removed latest by January 24, 2025 (i.e. within three months of expiry of six months from the date of amendments).

> "Now, the amendment made of enabling of encumbrance on equity holdings by AIFs will lead to greater confidence to lenders at the time of financing the infrastructure projects.

e) Where the encumbrances have been created on securities of investee company which is in other sector than mentioned in para (a) above, such encumbrances on securities of the investee company need to be removed latest by October 24, 2024.

f) The borrowings made by Investee Companies where encumbrances have been created on the holding of Category I and Category II AIFs shall be used only for the purposes of development, operation or management of investee company and shall not be utilised otherwise including to invest in another company.

g) The duration of encumbrance created on the equity investments shall not be greater than the residual tenure of scheme.

h) The Category I and Category AIF II shall make sure that such mechanism is in place so that in case of default by the Investee Company (borrower), the funds or its investors of AIFs Scheme are not subject to any liability over and above the equity on which encumbrance is created.

The amendments dated 25 April 2024 read with Circular dated 26 April 2024 are aimed to broaden avenues to promote robust infrastructure and economic growth by granting greater flexibility to Category I and II AIFs to leverage as well as to investee companies to secure debt financing. It is well known that AIFs have been successful in mobilising funds from global institutions into infrastructure funds which has greatly contributed to infrastructure development of India.

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VIEWPOINT | LE

Protection of an individual's PERSONALITY RIGHTS

Personality rights are an individual's right to prevent others from using specific attributes such as name, image, voice, or likeness without due permission and consent of the concerned individual

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In the era of technological advancement and easy accessibility to the internet, the commercial exploitation of an individual's personality per se image, voice, persona, similarity or likeliness has increased. The lack of full understanding of its potential and threats, along with a lack of legal awareness and stringent legal provisions has resulted in increased unauthorised use of someone's personality rights without consent, thereby infringing on one's rights. This also sabotages the guaranteed fundamental rights such as right to privacy, right of freedom and right to life. In India the recognition and enforcement of personality rights is still evolving. The courts are deriving principles from Article 21 (protection of life and personal liberty), and other specialised intellectual property rights. However the lack of direct statutes or legislation specifically safeguarding the Personality Rights of the citizens leaves them open to exploitation.

It is pertinent to understand what exactly personality right is and how it is related to one's personal liberty. Personality rights are an individual's right to prevent others from using specific attributes such as name, image, voice, or likeness without due permission and consent of the concerned individual (The Right). In the Indian legal domain, the closest protection corresponding to the personality right has been dealt under Article 21 of the Constitution (Right to life). However, considering the changing times, market space and growing competition it becomes pertinent to protect the commercial aspects related to one's personality in relation to the economic benefit one derives from the Rights and also balancing with one's right to privacy. In the absence of any specific right, the right to one's personality/ publicity cannot be an absolute and only be a qualified right in India. The Indian Judiciary has taken sources from the statutory provisions of rights relating to Intellectual Property Rights such as Trademarks, Copyright laws. However the rights under these statutory provisions are also not absolute and carry exemptions.

Publicity Right used interchangeably with Personality right has been dealt with by the Courts under multiple Jurisdiction. In countries such as the U.K. and Australia, the tort of passing off is sufficient to deal with wrongs relating to misappropriation of goodwill and reputation of a celebrity, including use of names and likeness of celebrities. For a party to establish the tort of passing off, there has to be a misrepresentation by other party of use of a celebrity's name/image in such a manner that consumers are misled to believe that the celebrity is endorsing the defendant's goods or services or is otherwise affiliated or associated with the other party's goods.

In the absence of any legislation, the basis for any action for violation of publicity rights has to be in relation to the tort of deceit, passing off, unfair competition, misuse.

It was in the case of ***ICC Development v. ARVEE Enterprises and Anr.***, (2003) 26 PTC 245 (Del) when the case pertaining to Right of publicity/ personality was before the Hon'ble High Court of Delhi. In the instant case, the International Cricket Council (ICC), which was organising the Cricket World Cup, filed a suit against the defendants restraining them from publishing any advertisement associating themselves with the ICC and Cricket World Cup on grounds of passing off, unfair trade practice

> *"In the absence of any legislation, the basis for any action for violation of publicity rights has to be in relation to the tort of deceit, passing off, unfair competition, misuse*

and misappropriation of publicity rights. The Hon'ble Court recognised that ***'the publicity rights only vest with an individual and such an individual alone is entitled to profit from it. The Court also held that such a right cannot vest in an organiser of an event, such as the ICC'***.

It was then in the case of ***D.M. Entertainment Pvt. Ltd. v. Baby Gift House and Ors.***, [MANU/DE/2043/2010], wherein the Hon'ble High Court of Delhi upheld the significance of personality/publicity rights in India. In the instant case, the defendants were in the business of selling dolls that were imitations of a famous singer/artist, Daler Mehndi, which also sang lines of the artist's famous compositions. The suit was filed on the grounds of misappropriation of the artist's persona and likeness and the invasion of his exclusive right to market his personality. The Hon'ble Court held that, ***'to avail the right against the infringement of right to publicity, the plaintiff must be "identifiable".***

'As a secondary consideration, it is necessary to show that the use must be sufficient, adequate or substantial to identify that the defendant is alleged to have appropriated the persona or some of its essential attributes. The right of publicity protects against unauthorised appropriation of an individual's very persona which would result in unearned commercial gain to another'.

Thus, we observe that, when the intent behind fusing the celebrity's identity with the product publicity value or goodwill in the artist's persona into the product is to gain such wrongful economic benefits or for the commercial exploitation then it may be said that, such practice infringes publicity right of such person. However, it is also pertinent to note the caution laid by the Hon'ble High Court of Delhi in the case ***D.M. Entertainment Pvt [Supra], wherein it was ruled that, 'In a free and democratic society, where every individual's right to free speech is assured, the over emphasis on a famous person's publicity rights can tend to chill the exercise of such invaluable democratic right. Thus, for instance, caricature, lampooning, parodies and the like which may tend to highlight some aspects of the individual's personality traits, may not constitute infringement of such individual's right to publicity. If it were held otherwise an entire genre of expression would be unavailable to the general public***.

Also it was in the case of ***Digital collectives*** wherein the Hon'ble Delhi High Court held ***that the violation of the right of publicity in India has to be considered on the touchstone of the common law wrong of passing off, as also weighed against the 'right to freedom of speech and expression' enshrined under Article 19(1)(a) of the Constitution***. The Hon'ble court held that the fundamental principle behind passing off and violation of personality right would be similar as both lead to misleading the general public of the association of a person with a product by using his/her image, voice, without their consent. Mere identification of a celebrity or the commercial gain of the person using such public information would not take away one's personality right. there has to be misappropriation of goodwill and reputation of a celebrity in selling a good/service.

The Hon'ble Court observing the importance of Article 19(1)(a) of the Constitution of India, allowed the use of celebrity names, images for the purposes of lampooning, satire, parodies, art, scholarship, music, academics, news and other similar uses/ purposes.

However, a strict observation was allowed in the case of ***Anil Kapoor v Simply Life India & Ors*** [CS(COMM) 652/2023] wherein Celebrity Actor Mr. Anil Kapoor filed the suit seeking protection of his own name, image, likeness, persona, voice and various other elements of his personality against any kind of misuse on internet. In the instant case, Hon'ble High Court of Delhi ***'restrained the defendants from utilising the Plaintiff-Anil Kapoor's name, likeness, image, voice, personality or any other aspects of his persona to create any merchandise, ringtones, ring back tones, or in any other manner misuse the said attributes using technological tools such as Artificial Intelligence, Machine Learning,***

deep fakes, face morphing, GIFs either for monetary gains or otherwise to create any videos, photographs, etc., for commercial purposes'.

The instant case rightly places the importance of correct balance of right to freedom guaranteed under Article 19(1)(a) of the Constitution of India and the rights of a person to livelihood, right to privacy, right to live with dignity within a social structure, etc. Though the right of free speech in terms of a well-known person is protected in the form of right to information, news, satire, parody that is authentic, and also genuine criticism however, such right shall not go surpass to an extent of tarnishing, blackening or jeopardising someone's individual personality rights.

The case rightly argued about how the images, voice of celebrities has been morphed and uploaded on pornographic websites, and how they are prone to deep fakes. But then such protection should not only be restricted to celebrities but also to the general public. One such protection granted to the general public is under the recent ***Digital Personal Data Protection Act, 2023*** which ensures to protect the image, voice of any individual from any misuse against the free will of the concerned person. This has widened the scope of Right to Personality in the Indian domain.

Therefore, in the rapidly growing technology-driven world, it becomes even more important to protect the Personality Rights of the individual as people can be subjected to various losses including but not limited to commercial losses. It is often seen that, in the garb of freedom of speech and creativity, people take undue advantage and subject the victim to irreparable loss of reputation and livelihood. Therefore, the Legislature must find ways to bridge the lacuna in the existing legal system, until then it is left to the judiciary for interpretation of existing statutes for the protection of Personality Rights of the individual.

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OUTLOOK | LE

Power of Arrest
Need for a balanced act

The power of arrest is in a fiscal statute such as GST laws and is provided as a mechanism for investigation of tax evasion and enforcement of the law. The CGST Act[1] provides for powers for conducting inspection, search, and arrest. While fiscal offenses are typically resolved through fines and penalties, the question arises as to whether arrest provisions are necessary in specific offences of tax evasion with clear intention to de-fraud the government exchequer. It is absolutely clear that intention of the legislature while enacting the GST laws which includes powers of arrest, was not to focus on provisions that were punitive in nature, but the emphasis has always been on preventive provisions.

Section 132 of the CGST Act provides for specific criminal offences, both bailable and non-bailable thereunder, for which prosecution can be launched and the offender is punishable with imprisonment which may extend up to five years in specified cases subject to reasonable discretion of the authorities.

[1] The Central Goods and Services Tax Act, 2017.

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Section 69 of the CGST Act outlines the power of the Commissioner to order arrest of a person whom he has reasons to believe, to have committed an offence, which is cognisable and non bailable. It is important to note here that the term "reason to believe" which forms basis of powers conferred under Section 69 of the CGST Act has not been defined. Thus, it is always debatable whether or not such power of arrest is arbitrary in nature in violation of Article 21 of the Constitution.

In this regard, the Apex Court in the case of ***N Nagendra Rao & Co. v. State Of AP***[2] emphasised that the expression 'reason to believe' has to be interpreted by the Court to mean that even though formation of opinion may be subjective but it must be based on material on the record. It cannot be arbitrary, capricious or whimsical. Further, the High Court in ***Vimal Yashwantgiri Goswami v. State of Gujarat***[3] has held that the words 'reason to believe' contemplate an objective determination based on intelligence, care and deliberation involving judicial review as distinguished from a purely subjective consideration. Thus, 'Reasons to Believe' cannot be wielded arbitrarily; it must not rest solely on the officer's subjective satisfaction. Furthermore, these reasons must be documented when issuing notices or forming opinion so as to ensure that decisions are fair and based on substantiated grounds, especially on matters as grievous as "arrest".

In recent years we have witnessed a surge in high profile investigations led by the investigative wing of the GST department, there has been concerning trend of prosecution and arrests being initiated under GST laws even before the issuance of a show cause notice or the completion of the adjudication. While there may not be an express bar in law, this practice has been questioned by the judiciary quiet often. The alleged offenders during investigations are often made to deposit huge part or all of the contended tax involved at the investigation stage itself just to avoid the chances of arrest. The Hon'ble Supreme Court in the case of ***Radhika Agarwal vs Union of India***[4] while hearing a bunch of matters orally instructed the authorities from employing "threat and coercion" tactics during search and seizure operations aimed at recovering GST. The bench emphasised that the law does not grant authorities the power to use force to collect outstanding dues.

The judiciary has consistently held that arrest is an exception to the rule and needs to be reserved strictly for the culprits or person attempting to abscond or flee the country. In this regard, the Hon'ble Punjab and Haryana High Court in the case of ***Akhil Krishan Maggu v. DGGI***[5], has emphasised that arrests should only be made in specific circumstances during an investigation, such as when there is evidence of significant tax evasion, non-compliance with summons, or a risk of the individual fleeing the country. It has been held that no arrest should be made without assessment or adjudication. The Hon'ble court further prescribed the exceptional circumstances for arrest stating that power of arrest should not be exercised at the whims and caprices of any officer or for the sake of recovery or terrorising any businessman or create an atmosphere of fear, whereas it should be exercised in exceptional circumstances during investigation, such as:

- The alleged offender is involved in evasion of huge amount of tax and is having no permanent place of business.
- The alleged offender is not appearing before the investigative authorities in spite of repeated summons and is involved in huge amount of evasion of tax.
- The alleged offender is a habitual offender and has been prosecuted or convicted on earlier occasion.
- The alleged offender is originator of fake invoices i.e. invoices without payment of tax
- Direct evidence is available of active involvement of a person in tax evasion.

Similar position has been affirmed by the Apex court in ***Sidhharam Satlingappa Mhetre v. State of Maharashtra***[6], Delhi High Court in ***Make my Trip v. UOI***[7], Bombay High Court in ***Mahesh Devchand Gala v. Union of India***[8] wherein it has been emphasised that arrest is a serious matter and cannot be made in a routine manner on a mere allegation of commission of an offence, inasmuch as, an arrest can cause incalculable harm to the reputation of a person.

Pursuant to decision of the Hon'ble Supreme Court in the case of Siddharth v State of UP[9], the CBIC[10] vide Instruction dated August 18, 2022[11] regarding arrest and bail for offences under the CGST Act. The instruction provided guidelines and criteria required to be followed by the Commissioner before issuing order for arresting someone. This includes considering of evidence or reliable information to classify the offence as non-bailable, if the arrest is necessary for investigation, and if there is a risk of evidence tampering or witness interference. Arrest should only be made when the intention behind the actions is clear and should not be used as a solution in technical tax interpretation disputes. Further even the procedure of arrest has been specified including the compliance while issuing arrest memo as stipulated in ***D.K. Basu v the State of West Bengal***[12].

It would not be wrong to state that the provision for power of arrest has been a matter of controversy especially in a fiscal statute such as GST laws. While it is expected that departmental officers should strictly adhere to the laws and guidelines set forth, there have been instances where these provisions have been disregarded in the field inspite of clear guidelines by the CBIC, which needs to have reasonable checks.

Arrest as an action has grievous ramifications directly affecting the liberty and freedom of a person. The judiciary has always played a crucial role in balancing the integrity of law and liberty of an individual. However, the judicial precedents and the principles set therein must be followed diligently. It is also clear that the provisions under the GST laws regarding arrest are certainly not absolute, and accordingly the CBIC must ensure that the provisions and the legal principles are fairly followed so that confidence of the assessee regarding protection of his/her liberty in re-enforced.

[2] 1994 AIR 2663.
[3] [2021] 84 G S.T.R. 347.
[4] Writ Petition(s)(Criminal) No(s). 336/2018.
[5] 2019-VIL-565-P&H.
[6] (2011) 1 SCC 694.
[7] (2016) 73 Taxman 31.
[8] 2024 (5) TMI 607.
[9] (2022) 1 SCC 676.
[10] The Central Board of Indirect Taxes and Customs.
[11] Instruction No. 2/2022-23dated August 18, 2022.
[12] (1997) 1 SCC 416.

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OUTLOOK | LE

BALANCING ACT

LOCAL SOURCING MANDATES IN INDIA'S EVOLVING RETAIL LANDSCAPE

As India continues to liberalise its FDI policies, maintaining a balance between global competitiveness and local economic development will be crucial for sustained growth and mutual benefit

The regime governing the Single Brand Retail Trading sector ('SBRT') in India includes the Foreign Exchange Management Act, 1999 and subordinate rules made under it such as the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ('NDI Rules') and various Press Notes issued by the Government of India ('Government'). SBRT refers to the business model wherein products are sold under a single brand name, both domestically and internationally. Brands such as Zara, Uniqlo, and Apple operate under this framework in India.

At the heart of these regulations lie local sourcing norms ('LSN'), which are applicable to SBRT entities receiving foreign direct investment beyond 51%. The LSN are designed to integrate global brands into India's economic fabric while bolstering local industries. This article explores the evolution, implications, and strategic considerations of local sourcing norms within India's SBRT sector.

Evolution of Local Sourcing Norms

The journey of LSN in India's SBRT sector has been marked by progressive amendments aimed at balancing the influx of foreign capital with support for local industries:

- Initial Conditions: Introduced in 2012[1], SBRT entities were required to mandatorily source 30% of the value of products sold from Indian small industries[2] or village and cottage industries, etc. In 2013[3], SBRT entities were required to mandatorily source 30% of the value of products purchased (as opposed to the previous quantum being in respect of total value of goods sold) to be done preferably from Micro, Small and Medium Enterprises ('**MSME**'s)[4] or village/ cottage industries, etc.
- Liberalisation: In 2017[5], the LSN were relaxed for entities undertaking SBRT of products that have 'state-of-the-art' and 'cutting-edge' technology wherein local sourcing is not possible. Such companies were exempted from compliance with LSN for 3 years from commencement of the business (opening of its first store). This relaxation could be availed by a company by obtaining approval of a committee of the Secretary of DIPP, representatives from NITI Aayog, relevant sectoral administrative ministry and independent technical expert(s).

In 2018[6], the LSN were amended to be met by the SBRT entities by averaging their total purchases over 5 years from when they started their business (date of opening of the first store), and then on an annual basis. Further, the SBRT entity

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1 Vide Press Note 1 of 2012 and Press Note 4 of 2012, incorporated in the Consolidated FDI Policy of 2012
2 'Small industries' here is defined an industry in which the total investment in plant and machinery does not exceed USD 1 million (without providing for depreciation) at the time of installation or at any point in the lifecycle of such industry.
3 Vide the Consolidated FDI Policy of 2013.
4 Section 7(9)(1) of the Micro, Small and Medium Enterprises Development Act, 2006 defines each of the distinct categories of industries as micro, small, and medium if: (i) the investment in plant, machinery, and equipment does not exceed ₹1 crore, ₹10 crore, and ₹50 crore, respectively; and additionally (ii) the turnover of these industries does not exceed ₹5 crore, ₹50 crore, and ₹250 crore, respectively.
5 Vide the Consolidated FDI Policy of 2017.
6 Vide Press Note 1 of 2018.

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was permitted to 'set off' its incremental sourcing[7] of goods for the purposes of meeting LSN from its global operations during the initial 5 years, against the mandatory sourcing requirement of 30% of purchases from India. After completion of this 5-year period, the entity was required to meet 30% sourcing norms directly towards its India operations on an annual basis.

In 2019[8], only a change in the 'set off' of LSN was made and all procurements made from India by the SBRT entity for that single brand would be counted towards local sourcing, irrespective of whether the goods procured are sold domestically or exported. The SBRT entity was required to continue to comply with the set-off norms after completion of the 5-year period.

- **Current Framework**: The current framework is basis the Consolidated FDI Policy of 2020 read with the NDI Rules, the salient features of the current framework are below:
  - o <u>30% sourcing requirement:</u> The SBRT entity is required to ensure that 30% of the value of their goods is procured from India. Preference should be given to MSMEs, cottage industries and local artisans for this procurement. During the first five years of the SBRT business (whether through physical stores or e-commerce), this 30% procurement requirement is averaged over the five years starting from the beginning of the financial year in which the business commenced in India (i.e. opening of the first store or start of online retail, whichever is earlier).[9] After this period, the 30% procurement requirement is applied annually. For calculation purposes, all procurements from India by the SBRT (for domestic sale or export) are considered.[10]
  - o <u>Set-off of sourcing requirement:</u> If the business sources goods from India for global operations[11] (either directly, through group companies, or via third parties under an agreement), such sourcing can count towards meeting the 30% requirement.[12]
  - o <u>Relaxation for 'high tech' products:</u> The sourcing norms have been relaxed for entities undertaking SBRT of products that have 'state-of-art' and 'cutting-edge' technology wherein local sourcing is not possible. Such companies are exempted from compliance with the sourcing norms for 3 years from commencement of the business (i.e., opening of its first store). This relaxation could be availed by a company by obtaining approval of a committee of the Secretary of DIPP, representatives from NITI Aayog, relevant sectoral administrative ministry and independent technical expert(s). After the completion of the 3-year period, the sourcing norms will be applicable.

It is pertinent to note that the terms 'state-of-the-art' and 'cutting-edge' technology have not been defined by the extant foreign exchange regulations. The NDI Rules suggests that applications will be considered on a case-to-case basis. As per news reports, Apple India, Acer, Dyson, Lenovo (India) and OPPO Mobiles have previously sought this relaxation. However, Apple India's application was rejected in 2016 on the grounds that the technology employed by it is not 'cutting edge'.[13] Subsequently, Xiaomi withdrew its application.[14] There is no publicly available information on the status of the applications of any of the other brands that applied for this relaxation.

> *The journey of LSN in India's SBRT sector has been marked by progressive amendments aimed at balancing the influx of foreign capital with support for local industries*

Conclusion

India's SBRT sector presents a complex yet promising landscape for global brands. Navigating local sourcing norms requires strategic foresight, regulatory compliance, and proactive engagement with local stakeholders. As India continues to liberalise its FDI policies, maintaining a balance between global competitiveness and local economic development will be crucial for sustained growth and mutual benefit.

The current position of law is still riddled with ambiguities that hinder the overall purpose of the Government.[15] Thus, while relaxations have been provided on paper, their practical benefit still sees challenges on account of lack of institutionalised framework and legislative ambiguity. Introducing clear-cut definitions of terms such as 'single brand' and 'cutting-edge technology' can go a long way in increasing ease of business. Further, currently the relaxation to the 'state-of-the-art' technology is provided on a case-to-case basis which is determined by an ad hoc committee. This further detracts from the purpose of the relaxation by increasing opacity.

As the regulatory landscape evolves, maintaining a balance between global competitiveness and local integration will be key to unlocking India's vast retail potential. Ironically, the very norms intended to increase business for local industries from large corporates may cause international brands to establish operations elsewhere.

7 'Incremental sourcing' is defined as the increase in terms of value of such global sourcing from India for that single brand (by value) in a particular financial year over the preceding financial year, by the non-resident entities undertaking SBRT entity, either directly or through their group companies.

8 Vide Press Note 1 of 2019.

9 Entry 15.3.1(e) of the Table, Schedule I, NDI Rules.

10 Entry 15.3.1(f) of the Table, Schedule I, NDI Rules.

11 In this context, 'sourcing of goods from India for global operations' is defined as the value of goods sourced from India in a particular financial year by the SBRT entity, either directly or through their group companies.

12 Supra. at footnote 9

13 Asit Ranjan Mishra, 'Apple's technology not cutting-edge for India govt', Livemint, aaccessed at: https://www.livemint.com/Companies/mdj84IoYp7cE9p2dVAMCMK/Apple-said-to-hit-setback-in-push-to-open-retail-stores-in-I.html

14 'Xiaomi withdraws request seeking complete exemption from sourcing norms', Indian Express, accessed at: https://indianexpress.com/article/technology/tech-news-technology/xiaomi-withdraws-request-seeking-complete-exemption-from-sourcing-norms-2828562/

15 FDI in SBRT aims at attracting investments in marketing, production, encouraging increased sourcing of goods from India, improving the availability of goods for the consumers and enhancing the competitiveness of Indian enterprises through access to global technologies, designs and management practices.

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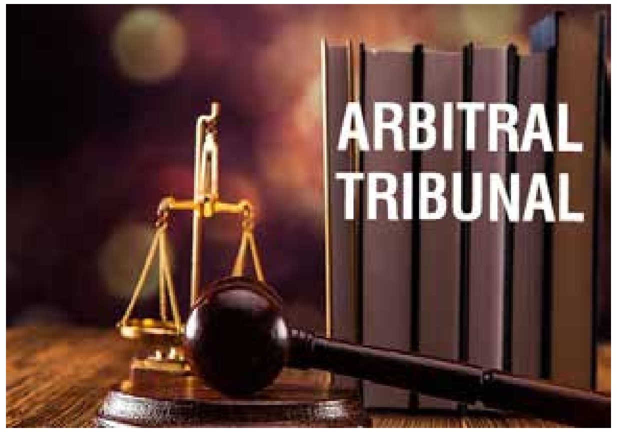
SUPREME COURT RULES ARBITRAL TRIBUNALS AND COURTS CANNOT GRANT INTEREST ON INTEREST



The Supreme Court has ruled that an Arbitral Tribunal does not have the authority to grant interest upon interest in its awards, as the Arbitration & Conciliation Act, 1996, does not explicitly provide for such a provision.

The bench, consisting of Justices P.S. Narasimha and Pankaj Mithal, emphasised that ordinarily, courts are not permitted to grant interest on interest unless specifically authorised by statute or stipulated in the contract terms.

“In the light of the above legal provisions and the case law on the subject, it is evident that ordinarily courts are not supposed to grant interest on interest except where it has been specifically provided under the statute or where there is specific stipulation to that effect under the terms and conditions of the contract. There is no dispute as to the power of the courts to award interest on interest or compound interest in a given case subject to the power conferred under the statutes or under the terms and conditions of the contract, but where no such power is conferred ordinarily, the courts do not award interest on interest.”.

The Court further clarified that neither the Arbitration Act nor Section 34 of the Civil Procedure Code (CPC) empowers an arbitrator or court to award interest upon interest.

Section 3(3) of the Interest Act also specifically prohibits such grants.

In the case at hand, the arbitrator had awarded interest for two periods: (i) 12% per annum from the date of completion of the work up to the date of the award, and (ii) 15% per annum from the date of the award until payment or the court decree.

The issue was whether the 15% interest per annum should be applied to the principal sum plus the 12% interest for the pre-award period.

The petitioner argued for 15% interest per annum on the total amount awarded, including the pre-award interest.

The Court ruled that once interest has been granted for the pre-award period, additional interest cannot be granted on the award amount for the post-award stage.

The Court reasoned that the Arbitral Tribunal is not empowered to grant interest upon interest because

"Section 29 of the Act provides that the court may, in the decree, order interest at the rate deemed reasonable to be paid on the principal sum as adjudged by the award, meaning thereby, in drawing the decree, the court may order payment of interest on the principal sum as adjudged by the award. In other words, the court cannot order payment of interest on interest but only on the principal sum adjudged." the Court clarified.

The judgement explained that the arbitral award’s two parts, pre-award interest at 12% and post-award interest at 15%, both refer to the principal amount of ₹ 21,56,745.

The award did not specifically contemplate granting 15% interest on the principal amount inclusive of the pre-award interest, and there was no contractual provision or statutory basis for such an arrangement.

Ultimately, the Supreme Court dismissed the special leave petition, choosing not to interfere with the concurrent findings of the Civil Court and High Court.

Justice P.S. Narasimha’s judgement underscored that there was no provision in the statutes or the contract for granting 15% interest per annum on the amount awarded, including the pre-award interest.

SUPREME COURT RULES ON METHOD FOR CONVERTING FOREIGN CURRENCY ARBITRAL AWARDS TO INDIAN CURRENCY

In a landmark decision on International Commercial Arbitration, the Supreme Court has addressed two crucial issues regarding the enforcement of arbitral awards expressed in foreign currency and their conversion to Indian rupees.

The Court's first question was regarding the appropriate date to determine the foreign exchange rate for converting an award amount from foreign currency to Indian rupees. The Court held that the relevant date for determining the conversion rate is when the arbitral award becomes enforceable, which is from the date on which objections against its enforceability are finally resolved. The bench, comprising Justices PS Narasimha and Aravind Kumar, stated:

“The statutory scheme of the Act makes a foreign arbitral award enforceable when the objections against it are finally decided. Therefore, as per the Act and the principle in Forasol (supra), the relevant date for determining the conversion rate of a foreign award expressed in foreign currency is the date when the award becomes enforceable,” the bench comprising Justices PS Narasimha and Aravind Kumar answered.

The Court referred to the case of Forasol v. Oil and Natural Gas Commission, where it was established that the proper date for determining the currency exchange rate is when the arbitral award becomes enforceable.

“Hence, the date on which the objections are finally decided and dismissed would be the proper date for determining the exchange rate to convert an amount expressed in foreign currency,” the court said, referring to the Forasol case.

The second question concerned the date of conversion when the award debtor deposits an amount before the court during the pendency of proceedings challenging the award. The Court ruled that if the award holder withdraws a deposited amount, the conversion of the award from foreign currency to Indian currency should be based on the date of the deposit.

“When the award debtor deposits an amount before the court during the pendency of objections and the award holder is permitted to withdraw the same, even if against the requirement of security, this deposited amount must be converted as on the date of the deposit,” the court answered. the Court ruled.

However, the Court clarified that once the award

holder withdraws the deposited amount, the exchange rate for the remaining award amount to be paid in the future will be determined based on the date when the arbitral award becomes enforceable.

“After the conversion of the deposited amount, the same must be adjusted against the remaining amount of principal and interest pending under the arbitral award. This remaining amount must be converted on the date when the arbitral award becomes enforceable, i.e., when the objections against it are finally decided,” the Court explained.

In the case at hand, the respondent/award holder had not withdrawn the partial award amount of ₹ 7.5 crores deposited in 2010. Therefore, it claimed that the currency exchange rate should be determined based on the date of enforcement of the award for the entire amount, not on the date of the deposit.

Rejecting this argument, the Court held that regardless of the respondent's failure to withdraw the deposited amount, the conversion rate for the ₹7.5 crores should be based on the date of deposit (22.10.2010).

“We therefore hold that the deposit of ₹ 7.5 crores stands converted as on the date of deposit (22.10.2010), when the rate of exchange as submitted by the appellants is 1 euro = ₹ 59.17. We also reject the submission by Mr. Mahajan that the respondent was unable to furnish a bank guarantee of an Indian bank. This argument is only to serve its own interest to be able to benefit from a higher exchange rate but does not address the principle that operates while enforcing a sum expressed in foreign currency," Justice PS Narasimha said.

“It is important to appreciate the consequence and effect of deposit during the pendency of proceedings to understand the need to convert this amount on that date. Through a deposit, the award debtor parts with the money on that date and provides the benefit of that amount to the award holder. Provided that the award holder is permitted to withdraw this amount, it can convert, utilise, and benefit from the same at that point in time. Considering that the deposited amount is to the benefit of the award holder, it would be inequitable and unjust to hold that the amount does not stand converted on the date of its deposit," the court added.

SUPREME COURT UPHOLDS ACQUITTAL IN CHEQUE DISHONOUR CASE, CITES COMPLAINANT'S CONTRADICTORY STATEMENTS AND FINANCIAL INCONSISTENCIES

The Supreme Court upheld an acquittal in a cheque dishonour case, highlighting contradictions in the complainant's statements and his inability to demonstrate the financial capacity to advance the loan, as well as the lack of acknowledgement of the loan in his Income Tax Returns.

Even though the accused's signature on the cheque was confirmed, the Court ruled that the presumption under Section 139 of the Negotiable Instruments Act, 1881 (NI Act), did not apply in this case.

In the complaint, the complainant initially claimed that the accused issued the cheque at the time of borrowing the amount. However, during cross-examination, he provided a different account, stating that the cheque was given six months after the loan was made, following a demand for repayment.

"Furthermore, there was no financial capacity or acknowledgement in his income tax returns by the appellant to the effect of having advanced a loan to the respondent." Even further, the appellant has not been able to showcase as to when the said loan was advanced in favour of the respondent, nor has he been able to explain as to how a cheque issued by the respondent allegedly in favour of Mr. Mallikarjun landed in the hands of the instant holder, that is, the appellant," the court stated.

Raising doubts about the complainant's case, a bench of Justices BV Nagarathna and Augustine George Masih said:

"Admittedly, the Appellant was able to establish that the signature on the cheque in question was of the Respondent, and in regard to the decision of this Court in Bir Singh (supra), a presumption is to ideally arise. However, in the above-referred context of the factual matrix, the inability of the appellant to put forth the details of the loan advanced and his contradictory statements, the ratio therein would not impact the present case to the effect of giving rise to the statutory presumption under Section 139 of the NI Act. The respondent (accused) has been able to shift the weight of the scales of justice in his favour through the preponderance of probabilities."

Section 139 of the NI Act presumes that a cheque received by the holder was issued by the drawer to discharge a specific liability. This provision shifts the burden to the drawer/accused, allowing them to present evidence to rebut the presumption.

In this case, the appellant claimed to have lent ₹ 1.2 lakhs to the respondent/accused, with the expectation of repayment within six months from the date of the agreement. The appellant further asserted that he received a signed blank cheque from the accused as security. However, the appellant failed to provide details of the loan transaction or clarify when the signed blank cheque was received.

Applying the settled principle of law, the judgement authored by Justice Masih said:

"The liability of the defence in cases under Section 138 of the NI Act is not that of proving its case beyond reasonable doubt. An accused may establish non-existence of a debt or liability either through conclusive evidence that the concerned cheque was not issued towards the presumed debt or liability or through adduction of circumstantial evidence via the standard of preponderance of probabilities. Since a presumption only enables the holder to show a prima facie case, it can only survive before a court of law, subject to the contrary not having been proved to the effect that a cheque or negotiable instrument was not issued for consideration or for discharge of any existing or future debt or liability."

The Court also observed that since the respondent had been acquitted by both the trial court and the High Court, it would be impermissible for the appellate courts to overturn the acquittal and impose a conviction unless the lower courts' decisions were based on a fundamentally flawed approach.

Determining that the decisions of the lower courts were reasonable and did not warrant interference, the Court dismissed the appeal and upheld the concurrent findings that led to the respondent/accused's acquittal.

SUPREME COURT URGES COURTS TO ENCOURAGE COMPOUNDING IN CHEQUE BOUNCE CASES

The Supreme Court has recently reaffirmed that the primary objective of criminalising cheque bounce under the Negotiable Instruments Act, 1881 (NI Act) is to ensure the reliability of cheques. The Court emphasised that the compensatory aspect of the remedy should take precedence over the punitive aspect in such cases. The ruling encourages courts to facilitate settlements in cases of cheque dishonour.

A bench comprising Justices Sudhanshu Dhulia and Ahsanuddin Amanullah noted that dishonour of cheques, while a regulatory offence, was intended to protect the public interest by maintaining the trustworthiness of cheques. The Court expressed concern over the backlog of cheque bounce cases and underscored that the compensatory element of the remedy should be prioritised over punitive measures. The judges highlighted the need for courts to promote settlement or compounding of such offenses when both parties agree.

The Supreme Court revisited the conviction of M/s New Win Export and its Partner, P. Kumarasamy, who were involved in a cheque bounce case. The dispute began in 2006 when Kumarasamy borrowed ₹5,25,000 from A. Subramaniam, the respondent, and issued a cheque from M/s New Win Export. The cheque was dishonored due to insufficient funds, leading Subramaniam to file a complaint under Section 138 of the NI Act.

Initially, the Trial Court convicted the appellants on October 16, 2012, sentencing them to one year of simple imprisonment. The Appellate Court later acquitted them, but this decision was overturned by the High Court on April 1, 2019, which reinstated the Trial Court's conviction.

Before the Supreme Court, the parties reached a settlement on January 27, 2024. Under this

agreement, the appellants paid ₹5,25,000 to the complainant, who confirmed the settlement and had no objection to setting aside the conviction.

The Supreme Court observed that Section 147 of the NI Act permits the compounding of offenses, and Section 320(5) of the Criminal Procedure Code (CrPC) allows for compounding after conviction with the court's permission. The Court highlighted the importance of validating settlement documents at the appellate stage.

Given the complainant's affidavit confirming the settlement and lack of objection to overturning the conviction, the Supreme Court found no purpose in upholding the conviction. The Court ruled that the settlement constituted a valid compounding of the offence.

The Supreme Court allowed the appeal, overturning the High Court's order from April 1, 2019, and the Trial Court's order from October 16, 2012. As a result, the appellants were acquitted, and Kumarasamy, who had previously been exempted from surrendering, was not required to do so.

COLLEGIUM RECOMMENDS SHARDUL AMARCHAND MANGALDAS & CO. PARTNER TEJAS KARIA AS DELHI HIGH COURT JUDGE

The Supreme Court Collegium recommended the name of advocate Tejas Dhirenbhai Karia for appointment as a judge of the Delhi High Court.

Tejas Karia is currently a Partner in the firm's Dispute Resolution Practice and leads its Arbitration Practice. His legal expertise encompasses international and domestic commercial arbitration, corporate and securities litigation, general corporate advisory, and various aspects of information technology law, including data privacy and confidentiality.

With extensive experience in handling complex and high-value disputes, both internationally and domestically, Tejas frequently advises clients across industries such as oil and gas, real estate, construction, and private equity. He has represented clients in arbitrations before prominent institutions like the LCIA, ICC, ICADR, ICA, and SIAC, and has appeared before the Supreme Court of India and various High Courts.

He is well-regarded for his contributions to policy formulation in the arbitration domain, which gives him a comprehensive understanding of the issues at hand. His insights have proven invaluable in presenting effective resolutions for his clients. Notably, Tejas has played a key role in advising on amendments to significant legislation, including the Indian Arbitration and Conciliation Act 1996 and the Commercial Courts, Commercial Division, and Commercial Appellate Division of High Courts Bill, 2015. Additionally, he has been a member of the high-powered committee set up by the Government of India to institutionalise arbitration in the country.

SUPREME COURT: INSOLVENCY RESOLUTION OF CORPORATE GUARANTOR DOES NOT PREVENT CORPORATE DEBTOR'S FROM INITIATING CIRP FOR REMAINING DEBT

In a significant ruling, the Supreme Court has determined that the insolvency resolution of a corporate guarantor does not preclude a creditor from initiating a separate insolvency process against the corporate debtor for any remaining debt.

The Court clarified that the resolution of the corporate guarantor does not absolve the corporate debtor from the remaining liability.

In this case, the financial creditor had initiated the Corporate Insolvency Resolution Process (CIRP) against the corporate debtor due to a default on a debt of ₹ 100 crores. The corporate debtor is a subsidiary of M/s. Assam Company India Limited (ACIL), which provided a corporate guarantee for the debtor.

The financial creditor also initiated a CIRP against the corporate guarantor, with the appellant (resolution applicant) proposing a resolution plan of ₹ 38.87 crores for the corporate guarantor. This plan was accepted by the creditor as a full and final settlement of the guarantor's liability on behalf of the corporate debtor.

After completing the CIRP for the corporate guarantor, the financial creditor then proceeded to initiate a CIRP against the corporate debtor for the remaining debt.

The issue at hand was whether the acceptance of the resolution plan for the corporate guarantor precluded the creditor from initiating insolvency proceedings against the corporate debtor for the outstanding amount.

The bench, comprising Justices Abhay S. Oka and Pankaj Mithal, stated:

"Where a company furnishes a corporate guarantee for securing a loan taken by another company, and if the CIRP of the corporate guarantor ends in a resolution plan, it will bind the creditor of the corporate guarantor. The corporate guarantor's liability may end in such a case by operation of law. However, such a resolution plan of the corporate guarantor will not affect the liability of the principal borrower to repay the loan amount to the creditor after deducting the amount recovered from the corporate guarantor or the amount paid by the resolution applicant on behalf of the corporate guarantor as per the resolution plan."

The key question before the Supreme Court was: "Whether the second application under Section 7 of IBC is not maintainable against the corporate debtor as for the same debt and default, CIRP has already been taken place against the corporate guarantor, and the financial creditor has accepted the amount in full and final settlement of all its dues?"

The Court answered in the negative, affirming that a creditor can initiate a CIRP against the corporate debtor even if a CIRP has already been conducted against the corporate guarantor.

The Court explained: "If the creditor recovers a part of the amount guaranteed by the surety from the surety and agrees not to proceed against the surety for the balance amount, that will not extinguish the remaining debt payable by the principal borrower. In such a case, the creditor can proceed against the principal borrower to recover the balance amount. Similarly, if there is a compromise or settlement between the creditor and the surety to which the principal borrower is not a consenting party, the liability of the borrower to the creditor will remain unaffected. The provisions regarding the discharge of the surety discussed above show that involuntary acts of the principal borrower or creditor do not result in the discharge of surety."

The Court ruled that under Section 140 of the Indian Contract Act of 1872, a corporate guarantor has the right to step into the creditor's position to recover the loan amount paid on behalf of the corporate debtor.

Justice Oka explained: "If the surety pays the entirety of the amount payable under guarantee to the creditor, Section 140 provides a remedy to the surety to recover the entire amount paid by him in the discharge of his obligations. Therefore, the surety gets invested with the rights of the creditor to recover from the principal debtor the amount which was paid as per the guarantee."

The Court further clarified that if the surety pays only part of the amount due to the creditor, its equitable right under Section 140 will be limited to the portion of the debt cleared.

"If the surety pays only a part of the amount payable to the creditor, the equitable right the surety gets under Section 140 will be confined to the debt he cleared," the court added.

Additionally, the Court clarified that subrogation applies only to the extent of the amount recovered by the creditor from the surety.

"Notwithstanding the subrogation to the extent of the amount paid on behalf of the corporate guarantor by the resolution applicant, the right of the financial creditor to recover the balance debt payable by the corporate debtor is in no way extinguished," the judgement stated.

The Court also addressed the issue of whether a subsidiary company's assets can be included in the resolution plan of its holding company.

"A holding company and its subsidiary are always distinct legal entities. The holding company would own shares of the subsidiary company. That does not make the holding company the owner of the subsidiary's assets. In the case of Vodafone International Holdings BV, this Court took the view that if a subsidiary company is wound up, its assets do not belong to the holding company but to the liquidator. As mentioned in the decision, the reason is that a company is a separate legal persona, and the fact that the parent company owns all its shares has nothing to do with its separate legal existence. Therefore, the assets of the subsidiary company of the corporate debtor cannot be part of the resolution plan of the corporate debtor," the court said.

HIGH COURT & TRIBUNAL NEWS AROUND THE NATION

DELHI HIGH COURT

DELHI HIGH COURT RULES THAT ACCEPTED RESOLUTION PLANS SHIELD CORPORATE DEBTORS FROM PAST LIABILITIES

Justice Sanjeev Narula of the Delhi High Court has determined that once a resolution plan is approved, stakeholders cannot impose penalties or claim dues from a corporate debtor based on past liabilities.

OCL Iron and Steel Limited (Petitioner), established in 2006 in Orissa, had executed a coal mine development and production agreement with the Ministry of Coal (Ministry) on March 2, 2015. This agreement required a performance security bank guarantee of ₹92.25 crores, valid until the coal mine achieved peak capacity. The agreement also stipulated that this guarantee could be forfeited if the agreement was terminated by the Ministry.

On September 20, 2021, the National Company Law Tribunal (NCLT), Cuttack Bench, initiated the Corporate Insolvency Resolution Process (CIRP) against OCL Iron and Steel Limited at the behest of Indian Bank, triggering a moratorium under Section 14 of the Insolvency and Bankruptcy Code (IBC). On December 31, 2021, the Ministry terminated the coal mine agreement due to the lapsed bank guarantee, demanding ₹92.25 crores from the petitioner.

The Resolution Professional challenged the termination before the NCLT, citing the COVID-19 pandemic as a reason for the inability to renew the guarantee. The NCLT issued interim directions restraining the Ministry from enforcing the termination order. However, the NCLT dismissed the challenge on February 7, 2023, leading to an appeal by the resolution professional and successful resolution applicant. On May 8, 2023, the NCLAT restored the interim order, staying the termination order.

The Resolution Professional invited claims from the public, but the Ministry's claims for ₹92.25 crores and ₹9.21 crores (incremental fixed cost) were not recognised as financial debts under the IBC. The resolution plan, approved on March 20, 2023, included a waiver of the Ministry’s claims.

Subsequently, on May 22, 2024, the Ministry barred the petitioner from participating in coal mine auctions due to unpaid dues. The petitioner challenged this decision in the Delhi High Court, arguing that past dues addressed in the resolution plan should not impact their current eligibility.

The Ministry contended that the petitioner was ineligible for future auctions due to outstanding dues, citing relevant statutes and documents. They argued that the resolution plan did not exempt them from these claims and that the petitioner was not entitled to relief contrary to the plan's provisions.

The High Court noted that the Ministry had not contested the resolution plan or its categorisation, thus accepting the final outcomes of the resolution process. It was observed that the approved resolution plan extinguished unsubmitted or rejected claims, including statutory dues.

The Court held that the Ministry’s attempt to enforce past claims contradicted the principles of the IBC, which aim to give corporate debtors a fresh start. The High Court emphasised that the resolution plan’s approval is binding and ensures that the new management is not burdened by unresolved past debts. The Court also highlighted the Supreme Court's stance on resolving all claims during CIRP to prevent unexpected claims post-approval.

Consequently, the High Court ruled that the Ministry could not impose penalties or claim dues from the petitioner based on past liabilities, aligning with the IBC’s objective of offering a clean slate to corporate debtors and ensuring fairness in the resolution process.

FILING OF PENDING COMPULSORY LICENCE APPLICATION DOES NOT PERMIT COPYRIGHT INFRINGEMENT: DELHI HIGH COURT

Justice Mini Pushkarna of the Delhi High Court has issued an interim injunction against Al-Hamd Tradenation, prohibiting the company from using sound recordings copyrighted by Phonographic Performance Limited (PPL). Despite Al-Hamd's application for a compulsory licence, which was pending approval, the court ruled that they were not entitled to use PPL's sound recordings without securing a licence and paying the requisite fee. Phonographic Performance Limited, an Indian collective rights management organisation, controls the public performance rights for 317 music labels.

Phonographic Performance Limited filed a suit to prevent Al-Hamd Tradenation from infringing on its copyright to sound recordings. PPL asserted that there was an imminent threat of infringement as Al-Hamd planned to use its copyrighted sound recordings for an event at a restaurant called 'Lutyens' on Mehrauli Gurgaon Road, New Delhi, on July 14, 2024.

PPL, which holds public performance rights through assignments from various owners under Section 18 of the Copyright Act, 1957, informed Al-Hamd through the restaurant that a licence was required for the use of its sound recordings. Al-Hamd, however, refused to obtain a licence at the current tariff, offering to pay a lower amount and threatening to seek a compulsory licence under Section 31(1)(a) of the Copyright Act, 1957. PPL maintained that the licence fee was ₹55,440/-, while Al-Hamd was only willing to pay ₹16,500/-.

Aggrieved by this, PPL filed for an interim injunction against Al-Hamd in the Delhi High Court. PPL argued that Al-Hamd's unauthorised use of its copyrighted works would damage PPL's licensing activities and allow

Al-Hamd to benefit from PPL's investments. In defence, Al-Hamd contended that its petition for a compulsory licence was pending and that it should not be compelled to pay the fee demanded by PPL.

The High Court held that PPL had established a prima facie case, warranting interim relief to prevent Al-Hamd from exploiting or using any sound recordings copyrighted by PPL. The court emphasised that to avoid copyright infringement, Al-Hamd and any parties acting on its behalf must be restrained from using the impugned sound recordings at any premises.

After reviewing the evidence, the court concluded that the balance of convenience was in PPL's favour and that failure to protect PPL's Copyright would result in irreparable damage. Consequently, the court ordered that Al-Hamd must obtain a licence from PPL and pay the required fees to use the sound recordings. In the absence of a valid licence, Al-Hamd was prohibited from using the sound recordings for its event.

DELHI HIGH COURT RULES ON NON-SIGNATORY’S INCLUSION IN ARBITRAL PROCEEDINGS

Justice C Hari Shankar

Justice C. Hari Shankar of the Delhi High Court clarified that including a non-signatory in arbitral proceedings is not solely dependent on their association with the same group of companies as the signatory. The bench emphasised that a non-signatory may be included if there is a contractual relationship that makes them partially or wholly responsible for obligations towards the claimants.

The dispute originated between RBCL Piletech Infra (the petitioner) and Bholasingh Jaiprakash Construction Ltd. (BJCL), stemming from a work order executed between them. National Thermal Power Corporation

(NTPC) and Bharat Heavy Electrical Ltd. (BHEL) were also involved. NTPC was the site owner, while BHEL contracted BJCL for construction work at NTPC's site. BJCL subcontracted part of the work to the petitioner.

The petitioner claimed it incurred costs, including idling charges and damages, which it argued were owed by the respondents. The work order provided for arbitration by a sole arbitrator appointed by mutual consent. The petitioner issued a notice under Section 21 of the Arbitration Act, requesting the appointment of an arbitrator. BJCL agreed to arbitration, but NTPC and BHEL opposed their inclusion, claiming no direct contractual relationship with the petitioner.

The High Court held that non-signatories could be included in arbitration based on their contractual obligations towards the claimant, beyond mere corporate group affiliations. Citing the Supreme Court's decision in Ameet Lalchand Shah v. Rishabh Enterprises and O.N.G.C. v. Discovery Enterprises Pvt Ltd., the Court reinforced that inclusion can be justified by a contractual relationship linking the non-signatory to the obligations in dispute.

The Court examined the clauses in the contract between BJCL and BHEL and found that Clauses 21 and 28 of the Work Order provided a prima facie case for including BHEL in the arbitration.

Clause 21 linked the petitioner's payment to BJCL's receipt of payment from BHEL, and Clause 28 indemnified BJCL from paying the petitioner if BHEL withheld payments due to the petitioner's actions.

Regarding NTPC, the Court found no prima facie case for including NTPC based on the contract clauses, except for Clause 12, related to water supply, and left the decision open for the arbitral tribunal.

The High Court referred the dispute to arbitration and appointed Anant V. Palli as the arbitrator, while directing that the matter proceed with respect to the inclusion of BHEL.

The Court did not find sufficient grounds to include NTPC at this stage but allowed the possibility for the petitioner to argue its case before the tribunal.

JHARKHAND HIGH COURT

JHARKHAND HIGH COURT: DISTRICT MAGISTRATE MUST ASSIST SECURED CREDITORS IN ASSET POSSESSION UNDER SARFAESI ACT

In a recent ruling, the Jharkhand High Court emphasized the responsibility of district magistrates to assist secured creditors in taking possession of secured assets under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. The court clarified that the District Magistrate does not serve as the adjudicating authority under this Act. Justice Ananda Sen stated, "It is the duty of the District Magistrate to assist the secured creditor in taking possession of the secured assets. The timeframe has been mentioned, which is 30 days. Any delay at the instance of the District Magistrate will frustrate the provisions of this Act. Further, the District Magistrate is not the adjudicating authority under the aforesaid Act. His duty is only to assist the secured creditor in taking possession of the property, i.e., to give assistance so that possession can be taken peacefully, and if someone obstructs, appropriate action can be taken against him."

This ruling came in a case where the petitioner had filed an application under Section 14 of the SARFAESI Act, which had been pending with the Deputy Commissioner/District Magistrate since July 8, 2022. The court noted that the delay in processing the application was undermining the intent of the law.

The court observed, "By delaying the disposal of this application, the District Magistrate is frustrating the intent of the law, which should not be."

Consequently, the court directed the Deputy Commissioner/District Magistrate of East Singhbhum to take immediate steps within two weeks to process and dispose of the petitioner's application in accordance with Section 14 of the SARFAESI Act. The writ petition was thus disposed of, with clear directives to expedite the application process to uphold the intent of the SARFAESI Act.

KERALA HIGH COURT

KERALA HIGH COURT RULES PROPERTY SALE GAINS KEPT FOR INVESTMENT TO BE TAXED AS CAPITAL GAINS

The Kerala High Court has ruled that gains from selling property held for investment purposes should be classified as 'Capital Gains' not as 'income from adventure in the nature of trade.'

A bench comprising Justices A.K. Jayasankaran Nambiar and Syam Kumar V.M. stated that the onus is on the Department to prove that a transaction is an adventure in the nature of trade. The mere profit from a transaction does not automatically categorise it as such if the original intention was to hold the property for investment.

The respondent, who operates a medical shop and partners in other medical shops under the name "SEVANA," had their premises searched by tax authorities. In response to a notice, the respondent filed income returns for the assessment years 2011–12 to 2014–15.

The assessing officer (AO) had previously reclassified the income from the sale of land from 'capital gains' to 'business income,' citing the systematic purchase and sale of large land parcels over several years. The AO's decision was contested before the Commissioner of Income Tax (Appeals), who ruled in favour of treating the income as 'capital gains.'

The department appealed the CIT(A)'s decision to the Income Tax Appellate Tribunal (ITAT). The ITAT concluded that there was no evidence that the respondent had converted the land into stock for trade or engaged in real estate business. The ITAT noted that the respondent's treatment of the land as a capital asset supported their intention to invest rather than trade.

The department argued that the ITAT misunderstood the scope of 'business' as defined in Section 2(13) of the

Income Tax Act, 1961, which includes any adventure or concern in the nature of trade. They contended that even a single transaction could qualify as an adventure in the nature of trade if driven by a profit motive.

However, the assessee argued that whether an activity qualifies as an adventure in the nature of trade depends on the facts and circumstances of each case. They emphasised that their land transactions were not conducted as a business venture but as a long-term investment, with no evidence of commercial activity or advertisement.

The court upheld the ITAT's findings, confirming that the respondent held the land as an investment. It concluded that the sale of the property did not transform it into an adventure in the nature of trade.

As a result, the court dismissed the department's appeal, affirming that the income from the sale of the property should be treated as 'capital gains' rather than 'business income.'

NCLAT

NCLAT DELHI RULES: RESOLUTION APPLICANT NOT ON INITIAL RESOLUTION APPLICANTS LIST CANNOT BE SUBSTITUTED LATER

The National Company Law Appellate Tribunal (NCLAT) Delhi bench, comprising Chairperson Justice Ashok Bhushan and Technical Member Mr. Barun Mitra, has ruled that a resolution applicant who did not participate in the Corporate Insolvency Resolution Process (CIRP) from the beginning and was not included in the list of prospective resolution applicants cannot be substituted to implement the resolution plan for the corporate debtor.

The CIRP of the corporate debtor began, and the resolution professional invited applicants to submit their resolution plans. Initially, only one applicant submitted a plan, while another requested an extension.

The NCLT Ahmedabad directed the Committee of Creditors (CoC) to consider a plan from JSPL. Subsequently, the CoC allowed other applicants to amend and resubmit their plans.

The CoC approved the resolution plan from Invent Assets Securitization & Reconstruction Private Limited (Invent Assets) with 72.97% votes. However, the Reserve Bank of India's (RBI) circular restricted Invent Assets from engaging in activities beyond asset reconstruction without prior approval, rendering it ineligible as a resolution applicant.

Invent Assets then sought permission to substitute its name with 'Westend Investment and Finance Consultancy' (Westend Investment).

The NCLT allowed this substitution, and the CoC approved the modified plan with Westend Investment as the new resolution applicant. The Resolution Professional filed an affidavit for the modified plan, which was subsequently approved by the NCLT.

Swan Energy Ltd. (Swan Energy), another resolution applicant, challenged the substitution before the NCLAT, Delhi.

Swan Energy argued that substituting Westend Investment was contrary to the Insolvency and Bankruptcy Code (IBC) and CIRP Regulations 2016. It contended that a new Form-G should have been issued for fresh resolution applications rather than substituting a non-participant.

The CoC countered that Westend Investment was a sponsor of Invent Assets and that the substitution was permissible. They also argued that Swan Energy, as an unsuccessful applicant, lacked the standing to challenge the CoC's decision.

The NCLAT upheld Swan Energy's appeal, ruling that Swan Energy was indeed an aggrieved party under Sections 61(1) and 61(3) of the IBC. The Tribunal noted that Swan Energy had previously challenged the resolution plan but withdrawn its application, thereby limiting its ability to question the approved plan.

The NCLAT found no provision in the Request for Resolution Plan (RFRP) allowing the substitution of resolution applicants post-approval.

Regulations 39(1)(B) of the CIRP Regulations stipulate that only those on the final list of prospective resolution applicants may have their plans considered.

Westend Investment had not submitted a plan and was not on the list, making the substitution improper.

Citing the case of SREI Multiple Asset Investment Trust Vision Fund v. Deccan Chronicle Marketeers and Ors., the NCLAT ruled that the CoC does not have the authority to modify an approved resolution plan, except in cases of non-compliance with Section 30(2) of the IBC.

Consequently, the NCLAT set aside the NCLT's order approving the amended resolution plan and directed the Resolution Professional and CoC to issue a new Form-G, inviting resolution applicants and completing the process within 90 days.

NCLAT RULES RP NOT PERSONALLY LIABLE FOR LUMP SUM PAYMENTS TO JET AIRWAYS ASSET PRESERVATION TEAM

The National Company Law Appellate Tribunal (Appellate Tribunal) Delhi, comprising Mr. Justice Ashok Bhushan (Chairperson) and Mr. Barun Mitra (Technical Member), has ruled that the Resolution Professional (RP) is not personally liable for the lump sum payments made to 103 employees of Jet Airways who were part of the Asset Preservation Team (APT). This decision comes after dismissing an appeal filed by the Jet Aircraft Maintenance Engineers Welfare Association.

The Association had challenged the payment arrangement for these 103 employees, who were involved in preserving and managing Jet Airways' operations amid the Corporate Insolvency Resolution Process (CIRP). The appeal sought payments for all workmen and employees of Jet Airways, arguing that the lump sum payments to these 103 individuals were unfair and unreasonable. On June 20, 2019, CIRP proceedings were initiated against Jet Airways (India) Ltd. The Interim Resolution Professional (IRP) formed an Asset Preservation Team comprising 103 employees, who were granted lump sum payments due to uncertainties surrounding their employment. The Committee of Creditors (CoC) approved these payments, but the employees later departed from the team.

The Resolution Professional later included the claims of these 103 employees as NIL in the third list of creditors, despite their previous inclusion in the second list. This led the appellant to file MA No. 3387 of 2019, demanding that the RP clarify the settlements, justify the payments, and be held personally liable for any alleged illegal payments. The appellant contended that the lump sum payments were arbitrary and that all employees and workers should be compensated similarly. The NCLT Mumbai, on September 26, 2023, rejected the appellant's appeal, deeming it meritless. The appellant subsequently appealed to the NCLAT.

The NCLAT reviewed the respondent's affidavit, noting that the 103 employees were paid lump sums because they were deemed essential for preserving Jet Airways' assets and operations during CIRP. This decision was approved by the CoC on July 19, 2019, as part of the operational budget.

The Appellate Tribunal concluded that the RP's actions were properly explained in the respondent's affidavit and previous adjudication. Therefore, there was no ground for holding the RP personally liable for the payments. As a result, the NCLAT upheld the NCLT Mumbai's decision and dismissed the appeal.

NCLAT RULES: NO AUTOMATIC RIGHT TO WITHDRAW AND REFILE SECTION 9 APPLICATIONS UNDER IBC

The National Company Law Appellate Tribunal (NCLAT), Principal Bench, New Delhi, comprising Justice Ashok Bhushan (Chairperson), Barun Mitra (Technical Member), and Arun Baroka (Technical Member), has ruled that an applicant does not have an inherent right to withdraw an application filed under Section 9 of the Insolvency and Bankruptcy Code (IBC) at any stage and subsequently request permission to file a new application.

The decision arose from two appeals challenging orders from the National Company Law Tribunal (NCLT), Ahmedabad. These appeals involved Section 9 applications filed by Florex Tiles (Appellant) under the IBC.

In the first appeal, the Appellant sought to recover an operational debt of ₹3,51,72,942 from M/s Greenstone Granite Pvt. Ltd. The NCLT had initially registered the application and issued a notice to the Corporate Debtor. The Corporate Debtor contested the application, alleging that the Appellant had submitted false evidence. The Appellant's counsel later requested to withdraw the application, which the Corporate Debtor opposed. The NCLT allowed the withdrawal but imposed a cost of ₹50,000 to be paid to the Respondent. The Appellant appealed this decision to the NCLAT, arguing that the NCLT should have granted permission to file a new application.

The NCLAT addressed the interpretation of Order 23 Rule 1, which governs the withdrawal of suits and the conditions under which a new suit may be filed.

The Appellant's claim that permission to file a new suit should be automatic upon withdrawal was deemed inconsistent with Order 23 Rule 1, sub-rule (3), which requires court satisfaction for allowing a fresh suit.

The NCLAT emphasised that withdrawing a suit does not automatically entitle the plaintiff to file a new one. The adjudicating authority must be convinced that there are sufficient grounds to permit a fresh suit. The NCLAT highlighted that IBC proceedings are bound by strict timelines, and the Appellant had delayed their application without valid reasons.

The NCLAT referenced Supreme Court decisions in K.S. Bhoopathy & Ors. v. Kokila & Ors. and V. Rajendran & Anr. v. Annasamy Pandian (Dead) through legal representatives Karthyayani Natchiar, which affirm that the right to withdraw a suit with permission to file a new one is not automatic but subject to court discretion based on the conditions specified.

In conclusion, the NCLAT upheld the NCLT's decision to allow the withdrawal of the application without granting the liberty to refile, noting the need to maintain procedural integrity and timelines under the IBC. However, the NCLAT found the ₹50,000 cost imposed by the NCLT to be unnecessary and thus not warranted.

NCLT

NCLT RULES INTER-CORPORATE DEPOSIT IN BALANCE SHEETS NOT SUFFICIENT TO ESTABLISH FINANCIAL DEBT WITHOUT DOCUMENTATION

The National Company Law Tribunal (NCLT) Principal Bench in New Delhi, led by Chief Justice (Retd.) Ramalingam Sudhakar (President) and Avinash K. Srivastava (Technical Member), has ruled that simply recording a transaction as an "Inter-Corporate Deposit" in balance sheets is not adequate to prove it as financial debt without supporting documentation.

The bench emphasised that for a Financial Creditor (FC) to initiate a Corporate Insolvency Resolution Process (CIRP) against a Corporate Debtor (CD) under Section 7 of the Insolvency and Bankruptcy Code (IBC), there must be clear evidence of 'debt' and 'default.' The application under Section 7 must be filed in Form-1 with the necessary documents as prescribed by the CIRP Regulations, 2016.

The bench highlighted that Regulation 8 of the CIRP Regulations 2016 allows proof of debt through various documents such as records with information utilities, financial contracts, court orders, or financial statements. However, the existence of debt must be demonstrated with relevant documentation, not just balance sheet entries.

The ruling referenced previous decisions, including Agarwal Polysacks Ltd. v. K.K. Agro Foods & Storage Ltd. and PV Potluri Ventures (P) Ltd. v. Benita Industries Ltd. In these cases, it was established that financial debt can be evidenced through various documents, not exclusively through written contracts.

The case at hand Involved Proplarity Infratech Private Limited (FC) claiming a short-term loan of ₹2,00,00,000 from Sky High Technobuild Private Limited (CD). The FC alleged non-repayment of the loan and interest, leading to an outstanding amount of ₹4,70,00,000. The FC argued that the transaction was acknowledged in the CD's financial statements and auditor's reports.

The CD contended that there was no formal loan agreement, and the amount was recorded as an "Inter-Corporate Deposit" rather than a financial debt. The CD argued that the FC did not meet the requirements of Sections 5(7) and 5(8) of the IBC, and no default occurred as per Section 3(12) of the Code.

The NCLT noted that the mere listing of the amount as an "Inter-Corporate Deposit" without detailed documentation or a formal loan agreement was insufficient to establish financial debt. The absence of a loan agreement and supporting documentation weakened the FC's claim. Consequently, the NCLT dismissed the petition, reaffirming that proper documentation is essential to substantiate claims of financial debt under the IBC.

NCLT KOLKATA STRESSES LIQUIDATION AS LAST RESORT, EMPHASISES BROADER PUBLIC INTEREST IN CORPORATE INSOLVENCY RESOLUTION

The National Company Law Tribunal (NCLT) Kolkata bench, consisting of Bidisha Banerjee (Judicial Member) and Balraj Joshi (Technical Member), has emphasised that liquidation should be considered only as a measure of last resort. The Tribunal underscored that the Insolvency and Bankruptcy Code (IBC) aims to address a broader public interest in resolving corporate insolvencies, extending beyond mere debt recovery to maximising asset value.

The case involved Nandini Impex, a corporate debtor admitted to the Corporate Insolvency Resolution Process (CIRP). Following the admission, an appeal to the NCLAT Delhi was disposed of. A public announcement and invitation for Expressions of Interest (EOI) were issued, attracting interest from several applicants. However, only Mideast Pipeline Products submitted a resolution plan, which was found inadequate by the Committee of Creditors (CoC) and required revision.

Despite multiple opportunities to revise the plan, Mideast's proposals were rejected, and the CoC decided to move towards liquidation. Mideast later attempted to submit a revised plan after the decision to liquidate was made. The Resolution Professional (RP) contended that Mideast's submission was delayed and argued against reconsideration, citing the time-bound nature of the insolvency process.

The NCLT referred to the Supreme Court's decision in Ebix Singapore Private Limited v. Committee of creditors of Educomp Solutions Limited, highlighting the need for resolution plans to be credible and time-

bound without undue speculation. It also referenced the Ahmedabad Bench's ruling in M2K Developers Pvt Ltd v. Ramchand Choudhary RP of Anil Mega Food Park Pvt Ltd, which noted that conditional resolution plans are not permissible under the IBC.

Additionally, the NCLT considered the Supreme Court's view in Kridhan Infrastructure Pvt. Ltd. v. Venkatesan Sankaranarayan & Ors., which emphasised liquidation as a last resort and the IBC's focus on maximising asset value.

The NCLT concluded that proceeding with liquidation for Nandini Impex would not align with the broader objectives of the IBC. The Tribunal directed the CoC to renegotiate with Mideast Pipeline Products regarding its revised offer, ensuring that any conditions that could impede the resolution process are removed.

LEGAL UPDATES FROM ACROSS THE GLOBE

United States of America

MUSIC AI STARTUPS SUNO AND UDIO CRITICIZE UNIVERSAL, WARNER AND SONY IN US COURTS FOR STIFLING COMPETITION

This year, the two raised millions in funding for their AI systems, which create music in response to user text prompts.

Responding to the copyright lawsuits filed by music labels Universal Music Group, Warner Music Group and Sony Music over their music-generating Artificial Intelligence (AI) systems, AI startups Suno and Udio have stated that the use of copyrighted sound recordings to train their systems qualifies as fair use under the Copyright Law of the US.

In the UMG Recordings Inc v. Suno Inc in the U.S. District Court for the District of Massachusetts, and UMG Recordings Inc v. Uncharted Labs Inc d/b/a Udio.com in the US District Court for the Southern District of New York, the AI startups maintained that the lawsuits attempted to stifle independent competition.

Suno remarked, “Where we see musicians, teachers, and common people using a new tool to create original music, the labels see a threat to their market share.”

A spokesperson for the Recording Industry Association of America stated, "There's nothing fair about stealing an artist's life's work, extracting its core value, and repackaging it to compete directly with the originals.”

To this, Sumo responded that the lawsuit was "fundamentally flawed on both the facts and the law."

The Cambridge, Massachusetts-based Suno and New York-based Udio raised millions in funding this year for their AI systems, which create music in response to user text prompts.

A few months ago, the labels sued the startups alleging they copied hundreds of songs from some of the world's most popular musicians to teach their systems to create music that would "directly compete with, cheapen, and ultimately drown out" human artists.

These were the first lawsuits targeting music AI following several cases brought by authors, news outlets and others over the alleged misuse of their work to train models powering chatbots like OpenAI's ChatGPT.

The AI companies argued that their systems used copyrighted material justly. Fair use promotes freedom of expression by allowing the unauthorised use of copyright-protected works under certain circumstances, with courts often focussing on its transformative use.

Udio mentioned, “We have used existing sound recordings as data to mine and analyse for the purpose of identifying patterns in the sounds of various musical styles to enable people to make their new creations - a quintessential fair use.”

The startups also called the labels' protests a "familiar refrain from incumbents in the music industry." It cited the past concerns about vinyl records, synthesisers and drum machines replacing human musicians.

Moez Kaba and Robert Klieger of Hueston Hennigan and Jonathan King of Cowan Liebowitz & Latman represented the record labels.

Andy Gass, Britt Lovejoy, Steven Feldman and Sy Damle of Latham & Watkins appeared for Suno and Udio.

US DISTRICT COURT OBSERVES STRONG ANTI-FRAUD SAFEGUARDS IN NOVARTIS SETTLEMENT OVER EXFORGE

Numerous improper claims were detected in a $30 million payment. The US District Court - Southern District of New York has held that there were ‘robust’ safeguards in place to ward off fraudulent distributions by Novartis.

In the Novartis and Par Pharmaceutical antitrust litigation case, the US Magistrate Judge Stewart Aaron was handed over the charge to review the process after thousands of improper claims were detected in a $30 million settlement with the medicine company. Thus, Judge Aaron said that the Novartis claims process administered by the Angeion Group "has integrity and has been carried out in a diligent and thorough manner."

Last year, consumers and health plans settled the antitrust claims against Novartis over its hypertension drug Exforge, but the company denied any transgression.

Recently, Judge Alvin Hellerstein said that nearly 15,000 settlement fund checks were never cashed and that out of 132,000 consumer claims submitted to the settlement administrator, only 22,000 were allowed.

Justice Hellerstein asked Justice Aaron to investigate the claims distribution process. Justice Aaron's review came amid a rise in fraudulent claims in court settlements.

Angeion identified 109,850 consumer claims that were either invalid or deficient. While most of these were fraudulent, others were duplicative or sought compensation above $28,000, the maximum amount for determining the validity of claims.

The judge’s report noted that Angeion employed a fraud detection system that uses artificial intelligence (AI) to identify potentially suspicious browser traffic. The system also includes behavioural analysis tools, IP address monitoring and email verification. As of June, the report showed that consumer claim checks accounting for 50 percent of the distributed funds were cashed. While stating, “prudent and necessary steps to address the fraudulent claims were submitted,” the judge directed Angeion to send emails or postcards to class members with uncashed checks as a ‘reminder notice’. The step would provide an additional opportunity to the consumers with uncashed checks to receive the payment.

Greg Asciolla of DiCello Levitt and Robert Eisler of Grant & Eisenhofer appeared for the plaintiffs. Novartis was represented by Evan Chesler of Cravath, Swaine & Moore.

US COURT OF APPEALS REVIVES BNIC’S ‘COGNAC’ TRADEMARK FIGHT WITH COLOGNE & COGNAC ENTERTAINMENT

Sends the matter back to the Patent and Trademark Office for reconsideration.

The US Court of Appeals for the Federal Circuit has revived a complaint from the Bureau National Interprofessionnel du Cognac (BNIC), the French union of cognac makers, against music label Cologne & Cognac Entertainment over the use of ‘cognac’ in its name.

The court returned the matter to the Patent and Trademark Office (PTO) to reconsider the agency's ruling that the hip-hop and R&B label's name should not confuse consumers into thinking it was affiliated with the spirit.

BNIC represents growers, producers, and sellers of cognac, the grape brandy made in the Cognac region of France. It opposed Cologne & Cognac's attempt to register a federal trademark at the PTO, arguing that the customers could be misled by the label being affiliated with the alcohol brand.

However, the PTO had ruled that the name could not be confused when used in music production.

The three-judge bench of the Federal Circuit sent the case back to the trademark office for reconsideration.

The US Circuit Judge Alan Lourie held that the PTO miscalculated how famous 'cognac' was and should have considered "whether or not [BNIC's] mark was famous as an indicator of its geographic origin like Florida oranges, Georgia peaches, or Darjeeling tea. But it did not do so."

The judge observed that the PTO made a mistake in analysing the marks' similarity and the relatedness of the goods and services. He noted that several hip-hop artists partnered with cognac brands and used 'cognac' in song titles and lyrics.

US DISTRICT COURT FINES STERLITE TECH $96 MILLION AGAINST PRYSMIAN GROUP IN TRADE-SECRETS CASE

Numerous documents were found in possession of its executives. The US District Court for the District of South Carolina has awarded $96 million (₹ 806 crore) in damages to Italy's Prysmian Group after finding Sterlite Technologies (STL), an optic fibre manufacturer, guilty. STL was accused of illegally possessing Prysmian's trade secrets, including customers, new products and expansion plans.

Numerous documents were found in the possession of executives at Ankit Agarwal-headed STL's global headquarters in Pune, India. After a three-year legal battle, the verdict includes a $200,000 award against former Prysmian executive Stephen Szymanski, now working with STL.

Backed by Anil Agarwal-led Vedanta Group, STL plans to challenge the ruling. Recently, the company reported a loss of ₹ 82 crore in Q1 FY2025 on revenue of ₹ 1,140 crore.

In a statement, Prysmian said, "The jury found that Sterlite was unjustly enriched by taking Prysmian's trade secrets and awarded $96,500,000 in damages against Sterlite Technologies. It found that Stephen Szymanski had been unjustly enriched by misappropriating Prysmian's trade secrets and awarded $200,000 against Mr. (Stephen) Szymanski, personally." Szymanski ran Prysmian's optical fibre cable business in North America and joined its competitor Sterlite in August 2020.

Andrea Pirondini, Prysmian's North America CEO stated, "This case came down to the basic principle of right versus wrong, and we are pleased that the jury came to this decision. It was clear that we had a solid case, and the decision confirms how America looks at the protection of trade secrets."

STL's statement to the US stock exchanges read, "We will aggressively appeal the verdict, which was not supported by evidence and testimony. STL reiterated its commitment to the US market, employees, distributors, sales agents, and customers, several of whom testified for STl in the trial". Besides being imposed with one of the largest fines on an Indian company, the verdict may affect STL's ability to participate in the US-funded $42.45 billion Broadband Equity, Access, and Deployment (BEAD) project.

Meanwhile, Prysmian and STL have made significant investments in the US to capitalise on the growing broadband market.

Prysmian invested $30 million in its Jackson, Tennessee factory and undertaken a $50 million multi-year modernisation project at its Claremont, North Carolina fibre facility.

On the other hand, STL announced compliance with Build America, Buy America (BABA) provisions of the US laws required for eligibility in the BEAD project. It also made a manufacturing investment of $56 million in the Palmetto Plant, inaugurated in 2023 by the Governor of South Carolina. However, STL's Managing Director Ankit Agarwal denied that the ruling would have any impact, stating, "We do not intend for this verdict to interrupt our plans to grow our US presence."

France

IOC CONFISCATES COUNTERFEIT GOODS AS PARIS OLYMPICS COMMENCE

It detected and intercepted fake products before they reached the market.

As the 2024 Summer Olympic Games began, the International Olympic Committee (IOC) has intensified efforts to tackle counterfeits.

It is acting against IP infringements, including counterfeit Olympic-branded merchandise with help from the Paris Organising Committee.

It is being supported by certain actors and concerned authorities, including the French anti-counterfeiting and IP rights protection association UNIFAB.

The IOC observed that the commonly identified items were apparel and products featuring the official mascots of the games – the Olympic Phryge. It is modelled on a Phrygian hat chosen as a symbol of freedom.

The unlawful resale of tickets and hospitality packages is also being targeted.

The Committee strengthened its efforts to detect and intercept counterfeit goods before they reached the market.

In 2023, it enhanced its partnership with the World Customs Organisation and joined the Memorandum of Understanding of the European Commission on the Sale of Counterfeit Goods on the Internet. The prompt move bolstered its ability to combat online sales of fake merchandise.

The IOC regularly trains law enforcement authorities worldwide to detect Olympic counterfeit products. In preparation for the games, over 20,000 law enforcement officials were trained.

Thus, even before the Olympics began, Paris officials were in action mode. In April, in the Saint-Ouen flea market, close to where athletes are competing, the police shut down 11 stores selling fake bags and shoes. Over 63,000 fake garments, shoes and leather goods of brands including Louis Vuitton and Nike, were confiscated.

The IOC relies heavily on the sponsorship of global brands like Coca-Cola and LVMH to help fund the staging of the Games. Being an official sponsor, exclusive rights are granted to commercially exploit certain marks and symbols related to the Olympic movement and the rights enforced strictly.

In recent years, there's been a marked increase in the sponsorship of sporting events by luxury and fashion brands.

In the present Olympics, French fashion house LVMH has spent $165 million.

The Committee stresses that imitations undermine official merchandise and the rights of commercial partners and can be risky to consumers due to substandard materials and manufacturing processes.

Anne-Sophie Voumard, the managing director of IOC television and marketing services, explained that the sale of officially licenced products supports efforts "in giving back 90 percent of revenue to athletes and sports development worldwide.

This amounts to $4.2m daily. The contribution is important in regions that solely depend on solidarity funding from the IOC."

Its anti-counterfeiting program includes advanced authentication and traceability technological measures, allowing buyers to easily verify the authenticity of Olympic and Paralympic-branded merchandise.

The measures are designed to be "consumer-friendly, ensuring that every purchase supports athletes and upholds the high standards of the Olympic movement."

About 206 countries are represented in the Summer Olympics and over 10,000 athletes travelled to Paris to compete. Over 15 million tourists are expected to visit the city.

Malaysia

ASIAN INTERNATIONAL ARBITRATION CENTRE APPOINTS FORMER JUDGE MARY LIM THIAM SUAN AS DIRECTOR

Asian International Arbitration Centre Appoints Former Judge **Mary Lim Thiam Suan** as Director

The Asian International Arbitration Centre (AIAC) in Kuala Lumpur has appointed Mary Lim Thiam Suan, a recently retired Federal Court of Malaysia judge, as its new director.

Lim's appointment follows the departure of former director Sundra Rajoo and is part of a broader restructuring of the AIAC. This restructuring includes the formation of a new board of directors and plans to establish an independent arbitration court.

Lim will also chair the Protem Committee for AIAC's new Court of Arbitration, a role she assumed in early June.

The committee comprises prominent practitioners and retired judges, including Chan Leng Sun SC and Jern-Fei Ng KC from Singapore's Duxton Hill Chambers, Kamilah Kasim from Malaysia's Rahmat Lim & Partners, and Zeyad Khoshaim from Saudi Arabia's Khoshaim & Associates.

The committee is tasked with developing protocols and operational frameworks for the new arbitration court, which is expected to be established following amendments to Malaysia's Arbitration Act.

AIAC officials stated that the restructuring is designed to bolster the centre's standing as a leading arbitration institution in Asia and globally.

Japan

RIMON EXPANDS ASIAN PRESENCE WITH NEW TOKYO OFFICE

Rimon, a US law firm, has expanded its presence in Asia by opening a new office in Tokyo, increasing its regional branches to five, which also include offices in Seoul, Shenzhen, Singapore, and Sydney.

The Tokyo office launch follows the establishment of a Japan practice in November last year, aimed at providing cross-border legal advice to Japanese companies.

Intellectual Property Partner Eric Kirsch, Formerly the IP Chief Counsel at Nikon Corporation and head of litigation and licensing at RYUKA International IP Law Firm, is currently the only Rimon lawyer registered and based in Japan, according to the Japan Federation of Bar Associations website.

Kirsch, a registered foreign lawyer in Japan, previously served as the Tokyo office managing partner at IP boutique Davidson Berquist Jackson & Gowdey, which Rimon acquired last year.

The Tokyo-based IP partner will be supported by a Japan practice team comprising lawyers David Case, Michael Fogarty, Nicolas Lafont, Harold Nathan, Takashi Saito, and Tomoki Tanida. Saito, Tanida, and Fogarty joined Rimon from McDermott, Will & Emery last year.

David Case, who also joined the firm last year, was previously an IP Partner at the Tokyo offices of Orrick, Herrington & Sutcliffe and White & Case. Nathan, another addition to Rimon last year, was formerly a Partner at Schiff Hardin, specialising in corporate M&A, Capital Markets, and Banking and Finance, with a background in commercial law practice in Japan.

Nicolas Lafont began his role at Rimon as a Corporate M&A Partner in April this year, also from McDermott.

Asia

AARON WHITE TAKES CHARGE AS HEAD OF TMT AT HERBERT SMITH FREEHILLS ASIA

Leading International Law Firm Herbert Smith Freehills has appointed Partner Aaron White as head of Tech, Media, and Telecoms (TMT) in Asia, effective August 1, 2024.

Aaron White Takes Charge As Head Of TMT At **Herbert Smith Freehills Asia**

A Partner since 2020, Aaron White brings over 20 years of experience advising clients globally on tech, media, and telecoms corporate and commercial transactions and projects. He has particular expertise in advising private capital clients on digital infrastructure investments. In addition to his new role, White will continue serving as the firm's global head of telecommunications.

"I'm delighted to take on this role," said Aaron. "Herbert Smith Freehills has a significant presence in the region and our exceptionally talented people advise clients across the full range of specialist areas on their regional and international activities. We have an extremely strong foundation on which to build."

"The opportunity is immense – Asia is a global hub for tech innovation and trade, developing world-leading solutions and greatly increasing its investment in digital infrastructure."

White highlighted the immense opportunities in Asia, noting its status as a global hub for tech innovation and trade, which is developing world-leading solutions and significantly increasing investment in digital infrastructure.

Herbert Smith Freehills provides comprehensive advice on a wide range of TMT and related business in Asia, from early investment and public offerings to transactions and projects, as well as regulatory, cybersecurity, and disputes.

"Tech and telecoms are interwoven with every growth sector of Asia business, and particularly in our priority areas of energy transition and private capital," said Asia managing partner Graeme Preston.

"Aaron's understanding of both cutting-edge technology and the businesses driving its future in Asia and internationally make him the ideal choice to lead and expand our team."

With White at the helm, Herbert Smith Freehills aims to strengthen its leadership and expand its influence in the TMT sector across Asia.


Enduring Value
fiama
Happy Naturals
Shower Gels &
Perfume Mists
New
fiama
HAPPY
naturals
PERFUME MIST
fiama
HAPPY
naturals
SHOWER GEL
plum blossom & ylang