KHAITAN & CO

Advocates since 1911

India Update

February 2019

India currently maintains its record-high 77th position in the Ease of Doing Business rankings of the World Bank, evidencing that despite the short-term disruptions caused by measures such as 'demonetisation' and the introduction of the new goods and services tax (GST), the long-term reform agenda of the government is working.

Sectors like telecommunications, banking, insurance, other financial services, and pharmaceuticals are expected to see further growth and may also see activity on the regulatory side.

This update sets out certain highlights from the past few months for foreign practitioners and investors looking at transactions in India.

FOREIGN INVESTMENT

FDI in e-commerce

December 2018 saw major amendments in India's FDI Policy overhauling the e-commerce sector. Select key changes include:

- Ownership and control over inventory: If more than 25% of a seller's inventory is purchased from the marketplace entity or its group companies then such marketplace entity will be deemed to have control over the inventory sold by such seller.

- Equity participation and control over inventory: Sellers will not be permitted to sell their products on platforms run by a marketplace entity if such marketplace entity or its group companies have equity participation in the sellers or control over the inventory.

- Fair dealings: Marketplace entities will have to ensure that any services provided by them to the sellers carrying out e-commerce activities on their platforms are fair and non-discriminatory and, on an arms-length basis. Additionally, cashback offers provided to buyers by group companies of the marketplace entities will have to be fair and non-discriminatory.

- Exclusivity arrangements: Marketplace entities will be prohibited from requiring the sellers to sell their products exclusively on their platforms.

New norms for reporting foreign investment

The RBI through a notification dated 7 June 2018 has introduced the Single Master Form (SMF) with the objective of integrating the extant reporting structures of various types of foreign investment in India. The SMF will have to be filed online on the portal provided by the RBI along with existing forms including, Form FC-GPR and Form FC-TRS. Prior to the implementation of SMF, RBI provided an interface to Indian companies and limited liability partnerships (LLPs) that have existing foreign investment, to input data on total foreign investment received. Indian entities not complying with this prerequisite will not be able to receive foreign investment (including indirect foreign investment) and will be considered as non-compliant under Indian exchange control regulations.

COMPANY LAW AMENDMENTS

The Companies Act 2013 has taken effect in a phased manner and, in addition to the notification of few pending provisions, certain existing provisions are also being amended pursuant to the recommendations of the Company Law Committee. Select recent developments are discussed below.

Companies (Amendment) Ordinance 2018

- Compounding of Offences: The pecuniary jurisdiction of regional directors for compoundable offences has been increased from INR 5 lakh to INR 25 lakh.

- Significant Beneficial Ownership: A significant beneficial owner must approach the NCLT, for relaxation of restrictions imposed by NCLT on the transfer and suspension of his rights, within one year only.

- Re-categorisation of miscellaneous reporting offences: Certain offences have been recategorized as civil liability only in order to rationalise the penalty provisions of the Companies Act 2013 and bring them within the purview of the compounding procedure.

Additional exemptions for private companies under Companies Act 2013

A start-up is not required to include cash flow statements in its financial statements or have quarterly board meetings every year. Further, annual return of small companies only needs to show the aggregate of remuneration drawn by directors, and not key managerial personnel. A one-person company or a small company, or with a company that has (a) less than INR 500 million turnover as per its latest audited financial statement; or (b) aggregate borrowings of less than INR 250 million from any bank, financial institution or body corporate, at any point of time during the financial year; need not attach the report of the auditor on the adequacy of the company's internal financial control system to their financial system.

Provisions relating to registered valuers

Section 247, which deals with valuation by registered valuers, was notified by the MCA on 18 October 2017, along with the Companies (Registered Valuers and Valuation) Rules, 2017. The rules provide for the process of registration of valuers. Three 'asset classes' (plant and machinery; land and building; and securities and financial assets) have been introduced by the rules. Each asset class is required to be valued by a separate set of valuers for valuation as per the valuation standards and policies which are prescribed by a committee. Until such time that the valuation standards are prescribed, any internationally accepted valuation standards may be followed by registered valuers.

Additional compliance requirements for beneficial interest holders

The Companies (Significant Beneficial Owners) Rules 2018, based on the Companies Amendment Act 2017, has reduced the threshold for disclosure of beneficial interest from holding at least 25% beneficial interest to 10%. Failure to comply with the filing requirements could result in prohibition on transfer of subject shares, suspension of voting rights or other prescribed rights.

Mandatory dematerialisation of shares for unlisted public companies

The Companies (Prospectus and Allotment of Securities) Third Amendment Rules 2018 now make it mandatory for every unlisted public company to (i) issue their securities only in dematerialised form, and (ii) facilitate the dematerialisation of all its existing securities. These amendment rules also make it mandatory for holders of securities of public unlisted companies to dematerialise their securities if they intend on either transfer securities or subscribe to additional securities. This will now require unlisted public companies as well as holders of securities to incur additional expenses to set up demat accounts.

New private placement norms

On 7 August 2018, the Central Government notified the amending provisions of Section 42 of the Companies Act 2013 and the Companies (Prospectus and Allotment of Securities) Rules, 2014 relating to private placement norms for issue of securities. The key changes are as follows:

- Issuer is not permitted to utilise any monies raised through private placement till the allotment is complete and the return of allotment (PAS 3) is filed with the Registrar of Companies (ROC) within 15 days of allotment.

- Offer Letter in Form PAS-4 and record of persons to whom the Offer Letter is issued in Form PAS-5 are required to be maintained by the Company and are no longer required to be filed with the ROC.

- The amended PAS Rules permit issue of NCDs pursuant to a board resolution so long as it is within limits for raising debt as approved by the company under Section 180(1)(c) of the Act.

- Companies are permitted to undertake simultaneous issue of different securities.

- If return of allotment in Form PAS-3 is not filed within 15 days from the date of allotment of securities, the Company, its promoters and directors shall be liable to a penalty of INR 1,000 for each day of default and is capped at INR 2.5 million. Further, for a non-compliance of the private placement provisions, now the penalty is capped at the amount raised through the private placement process or INR 20 million, whichever is lower.

DEBT INVESTMENTS

RBI revises ECB norms

RBI announced a new framework for external commercial borrowings (ECB) on 16 January 2019 liberalising the current ECB policy. The key highlights are as follows:

- The bifurcation of ECBs into three distinct 'tracks' under earlier regulations has been reclassified and track I and track II have been merged as FCY denominated ECB" and merging of Track III and Rupee Denominated Bonds (Masala Bonds) framework as "INR denominated ECB".

- The revised ECB framework has expanded the borrowers list and provides that all entities eligible to receive FDI as per the extant FDI policy are eligible to raise ECB from persons resident outside India.

- The revised ECB framework eases the classification of 'recognised lenders' to bring it in line with the regime provided for Masala Bonds. The Revised ECB framework states that in order to qualify as a 'recognised lender', such lender should be a resident of a Financial Action Task Force (FATF) or International Organization of Securities Commission (IOSCO) compliant country. Further, multilateral and regional financial institutions where India is a member country will also be considered as recognised lenders. Additionally, individuals are also permitted as 'recognised lenders'.

- The revised ECB framework prescribes a common negative list for all forms of ECBs including INR-denominated bonds, with a modification that ECBs for working capital/general corporate purposes and for repayment of rupee loans can only be availed from foreign equity holder.

- Under the revised ECB framework, all eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year which replaces the existing sector wise limits.

- Entities undergoing restructuring or if corporate insolvency resolution process has commenced under the provisions of the Insolvency and Bankruptcy Code 2016, such entities will be eligible to raise ECBs only if it is expressly permitted under the resolution plan.

FPI investment in debt securities

The RBI and SEBI have issued various circulars over the last couple of weeks, which have introduced extensive changes in the legal framework governing FPIs which will impact investment through the debt route. The overall limit for FPI investment in corporate bonds has now been fixed at 9%. The FPI limit in corporate bonds would further increase to INR 2,890 billion in the second half of fiscal 2019. Further, existing sub-categories under corporate bonds (i.e. credit enhanced bonds, unlisted corporate debt securities and long-term investor category) have been discontinued and replaced with a single limit for FPIs investment for all types of corporate bonds.

Under the extant framework, FPIs were permitted to invest in corporate bonds with a minimum residual maturity of three years, which has now been reduced to one year. Additionally, FPI investment in all three categories of debt, i.e., government securities, state development loans and corporate bonds are now subject to concentration limits (i) in case of long-term FPIs, the concentration limit is 15% of the prevailing investment limit for that category and (ii) in case of other FPIs, the concentration limit shall be 10% of the prevailing investment limit for that category.

The RBI and SEBI have also introduced exposure norms under which exposure of an FPI (including related entities of such FPI) in a single corporate bond issuance cannot exceed 50% of the amount of such issuance.

In March 2019, a 'Voluntary Retention Route' (VRR) for FPI investments was introduced by the RBI. VRR participation will be voluntary and investments through this route will be free of the macro-prudential and other regulatory norms generally applicable to FPI debt investments, provided certain minimum percentage of investments are maintained in India.

INSOLVENCY CODE AND DISTRESSED M&A

The Insolvency and Bankruptcy Code 2016 (IBC), which introduced a new insolvency regime in India, constitutes one of the most significant legal developments in India in recent times. It has filled a vacuum and has introduced a sophisticated and creditor-friendly regime, replacing the earlier "debtor-in-possession" model that was not viewed as a success in the Indian context. An initial push from the RBI led to the insolvencies of an initial list of 12 corporate debtors and this, in turn, has led to several other restructurings and insolvencies involving some of the largest Indian corporate groups, with the prospect of more to follow (in particular, a number of insolvencies are expected in the infrastructure sector).

The main developments in the IBC space over the last 18 months are as follows:

- There have been a large number of corporate insolvencies and the market has embraced the corporate insolvency process, with Electrosteel Steels Limited becoming the first of the "dirty dozen" to be resolved under the IBC. The IBC process has led to the development of a large distressed M&A market, with many Indian groups bidding for insolvent companies.

- There has been significant interest from international investors in distressed debt and special situations opportunities in India and this is leading to the evolution of a secondary debt trading market.

- There have been a number of efforts to address the "teething" problems of the IBC by market participants, and also by regulators. In this regard, there have been various amendments to the IBC clarifying areas of ambiguity, streamlining the process of resolution and furthering the objective of the IBC to promote resolution over liquidation. SEBI has also carried out changes to securities laws to support the implementation of the IBC.

- With respect to Section 29A, that aims at putting safeguards in place to prevent unscrupulous and undesirable persons (who have wilfully defaulted, are associated with non-performing assets, or are habitually non-compliant) from misusing or vitiating the provisions of IBC, the Supreme Court (*Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta and Ors*, 4 October 2018) has clarified that the ineligibility under Section 29A gets attached at the time of submission of the resolution plan by the resolution applicant, and not the date of commencement of the corporate insolvency resolution process of the corporate debtor.

- With the recent amendment to the IBC and pronouncement of the judgement by the Supreme Court (*Chitra Sharma v. Union of India*, Supreme Court of India, 9 August 2018), any amount raised from an allottee under a real estate project is deemed to have the commercial effect of borrowing and is categorised as "financial debt". This will allow home buyers to initiate insolvency process in case of default as well as give them a seat on the committee of creditors. The amendment also provides for the class of homebuyers to be represented by an authorised representative who will vote on behalf of the homebuyers.

- Rules for operational creditors have also been changed recently. Earlier, payment of liquidation value to operational creditors in priority was required. Now, the amount due to operational creditors under the resolution plan shall be paid in priority over financial creditors and the aspect of liquidation value being guaranteed has been deleted.

- A recent amendment to the IBC along with the Supreme Court judgement (*State Bank of India v. V. Ramakrishnan and others*, Supreme Court of India, 14 August 2018) has clarified that the moratorium under the IBC will not apply to guarantors and guarantees provided by personal and corporate guarantors can be enforced during the corporate debtor's insolvency process. The impact that this has on the guarantor's right to step into the shoes of the lender (i.e. subrogation) is yet to be decided.

- Recent orders have considered the treatment of claims arising out of guarantees enforced after the insolvency commencement date and the courts have held that such claims should not be rejected by the resolution professional solely on the ground that they had not crystallised as of the insolvency commencement date. Further, if such claims have not been filed with the resolution professional, they cannot be extinguished automatically without consideration under the resolution plan and may be asserted against the debtor once the moratorium is lifted. While the impact of this is yet to be seen in practice, admission of claims which are based on uncrystallised debt is likely to dilute the recovery for the existing lenders. The National Company Law Appellate Tribunal (*Andhra Bank v. F M Hammerle Textile Limited*, NCLAT, 13 July 2018). has also stated that the contingent liability claimant may choose to step out from the insolvency resolution process and not file a claim. This would put such a claimant in a superior position in comparison to the other financial creditors.

- One of the key practical issues faced by the market has been whether all the legal steps involved in the implementation of a resolution plan, e.g. mergers, issuances of capital, reductions of capital, etc. would require their own separate processes or whether the approval of the National Company Law Tribunal

(NCLT) would provide a single consolidated approval for such actions. Judicial precedent appears to support the latter approach, which will encourage faster implementation of resolution plans (*Monnet Ispat & Energy Limited*, NCLT Mumbai, 24 July 2018 and *Kalyanpur Cements Limited*, NCLT, Kolkata, 31 January 2018).

- Until recently, the write-down of debts would create tax liability on the part of the debtor in the form of minimum alternate tax (MAT). Recent changes in law have provided relief in the context of insolvent companies.

- Previously, any decision taken by the committee of creditors required the consent of at least 75% of the financial creditors (by value) which was a high threshold and obtaining such a high level of consent proved difficult in certain cases. To address this, the IBC was amended to reduce the voting threshold from 75% to 66% for critical items such as approval of resolution plans, raising interim finance, appointment or replacement of resolution professionals, decision to liquidate the corporate debtor, among others. Withdrawal of an application for insolvency commencement by an applicant is now permitted if approved by a 90% vote by the committee of creditors.

- NCLT, New Delhi (*Nikhil Mehta& sons (HUF) & Ors v M/s AMR Infrastructure Ltd*, 29 September 2018) has held that the 66% voting share threshold for decision of the committee of creditors with respect to Section 22(2) and other cognate provisions is not mandatory where prospective buyers of real estate (commercial and residential) alone constitute the committee of creditors.

- The RBI published guidelines on 12 February 2018, outlining a process for the resolution of the debts of companies by creditor arrangements outside of the IBC. These guidelines required companies in default as at 1 March 2018 to have restructured themselves by 27 August 2018, failing which banks would be compelled to initiate insolvency proceedings against the relevant corporate debtors. Ordinarily, most of these companies would now be undergoing insolvency proceedings. However, the Supreme Court has granted a stay on initiation of insolvency against the defaulting companies and the decision on the 12 February 2018 guidelines is currently pending before the Supreme Court.

- A recent committee report has recommended to the Government a five-pronged strategy called "*Project Sashakt*" for the implementation of pre-insolvency restructuring of stressed assets which are divided on the basis of the total loan exposure.

- Various aspects of high-profile cases are subject to litigation. On the whole, judicial precedents demonstrate the courts' inclination to favour value maximisation over procedural non-compliances and reluctance on their part to substitute their judgment for that of the committee of creditors. Frequent litigation has chipped away from the statutory timelines set under the IBC for insolvency resolution with courts willing to grant "clock stops".

- The Supreme Court (*Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta and Ors*, 4 October 2018) has recently clarified that if the NCLT, the NCLAT, or the Supreme Court take time to decide an application beyond the period of 270 days, the time taken in legal proceedings to decide the matter cannot possibly be included, as otherwise a good resolution plan may have to be shelved, resulting in corporate death, and the consequent displacement of employees and workers.

- The Supreme Court (*BK Educational Services Private Limited v Parag Gupta and Associates*, 11 October 2018) has also clarified that the Limitation Act, 1963 is applicable to applications filed under Sections 7 and 9 of the IBC, from the inception of the IBC. "The right to sue" accrues when a default occurs and if the default has occurred over three years prior to the date of filing of the application, the application would be barred under Article 137 of the Limitation Act, save and except in those cases where, in the facts of the case, Section 5 of the Limitation Act, 1963 may be applied to condone the delay in filing such application.

- Between 31 May to 1 June 2018, the Securities and Exchange Board of India (SEBI) amended a number of securities regulations to provide certain dispensations for listed companies undergoing the CIRP under the IBC and they are as follows:

  - The amendment to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 allows the buyer in an IBC resolution plan to acquire more than 75% of the relevant listed company.

  - The delisting procedure under the SEBI (Delisting of Equity Shares) Regulations 2009 (Delisting Regulations) will no longer apply to any delisting of equity shares pursuant to an IBC resolution plan, if the plan sets out a specific delisting procedure or the plan provides an exit option to the existing public shareholders at a price not less than the liquidation value.

- Listed companies undergoing the CIRP do not have to comply with the provisions of the LODR regulations dealing with the composition and roles and responsibilities of the board of directors and board committees.

- The stock exchange pre-clearance requirement under LODR regulations will not apply to any schemes of arrangement under an IBC resolution plan.

- Certain provisions of the LODR Regulations dealing with promoter reclassification (e.g. the restriction on promoters having post-reclassification special rights) will not apply if reclassification is contemplated under an IBC resolution plan and the promoter and promoter group being reclassified as public shareholders do not remain in control of the company.

- A number of IBC-related and CIRP-related disclosures under LODR regulations will need to be made by the listed company (without applying any judgment as to the materiality of the information). The disclosable matters include application filings and admission, appointments and replacements of the resolution professional, notification of meetings of the committee of creditors and salient features (not involving commercial secrets) of resolution plans. These additional disclosure requirements are a positive step and will enhance transparency of the CIRP, in particular, for the listed company's shareholders.

- In the case of *Swiss Ribbons Private Limited and Ors. v. Union of India and Ors.*, Supreme Court of India, upheld the constitutionality the IBC in entirety. The Supreme Court observed that IBC has been largely successful as the total flow of resources to the commercial sector in India has increased. The Court gave a significant message that it will not encourage a litigious approach unsettling the Code which is principally premised on speed.

- The IBBI introduced certain amendments in the CIRP regulations directing resolution applicant to mandatorily provide performance security at the time of submission of plan. The nature of the security as well as value, duration and source, will be as prescribed by Committee of Creditors taking into account the nature of resolution plan and business of the corporate debtor. Further, the amendment now enables a creditor, who is aggrieved by non-implementation of a resolution plan approved by the Adjudicating Authority, to apply to the Adjudicating Authority for appropriate directions.

DIRECT TAX

India's interim budget

The key highlights of the interim budget on the direct tax front are as follows:

- No change in tax rate, surcharge or education cess for all taxpayers, with the highest slab rate of tax being 30%.

- SMEs tax rate of 25% remains unchanged provided their turnover in FY 2017-18 is a maximum of INR 2500 million as against FY 2016-17.

- Tax rebate to small taxpayers (individuals) and salaried employees.

- Tax on 'notional rent' to be triggered only if more than two houses are owned which is presently triggered upon owning more than one house.

- Relief to real estate sector (a) Tax levy on 'notional rent' on unsold inventories held by all real estate developers after two years from their project completion as against the present one year; (b) extending the sunset clause from 31 March 2019 to 31 March 2020 with respect to claiming tax holiday on real estate projects.

- Benefit of exemption to individuals from payment of long-term capital gains (LTCG) on sale of residential property expanded from re-investment in one residential house to two residential houses (subject to conditions).

GST AND CUSTOMS

India's interim budget

Key changes in the GST made effective from 1 February 2019 are listed as below:

- Out-and-out sales and high sea sales are outside the ambit of GST.
- Reverse charge on procurements from unregistered dealers.
- Scope of input tax credit has been widened.
- Assesses can obtain multiple registrations in one state irrespective of the business qualifying as distinct business verticals or not.
- Permitting issuance of a single debit/credit note against multiple invoices.
- Simplification of GST returns as a single monthly return in place of the existing 3 monthly returns. However, this will come into effect whenever the new system of returns is ready.
- The place of supply of transactions of transportation of goods to a place outside India will be the destination of goods in terms of Section 13 of Integrated Goods and Services Tax Act 2017.

DISPUTE RESOLUTION

Delhi High Court's decision on BIT

In May 2018, the Delhi High Court pronounced its judgment in *Union of India v. Vodafone Group PLC United Kingdom & Anr*. dismissing the Indian Government's prayer seeking a declaration that the arbitration proceedings initiated under the India-UK Bilateral Investment Treaty (BIT) were an abuse of process of law and consequently null and void. The judgment of the Delhi High Court is one of the first to exhaustively deal with BIT disputes, primarily, with the system of law governing arbitration disputes arising out of such treaties. Further, the Court also had an occasion to examine whether, and in what circumstances, the Indian courts could put a restraint on BIT arbitration. This judgement bodes well for investment arbitration in India and is in line with the recent trend of Indian courts of honouring the jurisdiction of international tribunals. It is pertinent to note that an appeal against this decision is pending before a Division Bench of the Delhi High Court.

Non-stamping of foreign arbitral awards would not render it unenforceable

In September 2018, in *M/s Shriram EPC Limited v Rioglass Solar SA*, the Supreme Court of India held that foreign arbitral awards are not liable to stamp duty under the Indian Stamp Act, and consequently, non-payment of stamp duty would not render a foreign award unenforceable. In not holding the enforcement of foreign awards hostage to the pre-condition of stamping, the Supreme Court has reiterated India's desire to be considered an arbitration-friendly jurisdiction which considers it crucial to ease the process of enforcement of foreign awards in India.

Interplay between the Arbitration and Conciliation Act, 1996, and Insolvency and Bankruptcy Code

The Supreme Court in its recent decision in *K Kishan v M/s Vijay Nirman Company Private Limited*, has held that the initiation of corporate insolvency resolution process is barred in respect of a claim for operational debt when an application under Section 34 of the Arbitration and Conciliation Act, 1996 has been filed by an award debtor against the arbitral award, and when such application has not been finally adjudicated upon. This decision of the Supreme Court is notable in as much as it has overturned the position assumed by the NCLT and the NCLAT that proceedings pending under Section 34 of the Act do not imply the existence of a dispute and that an arbitral award that has been challenged does not constitute a record of the operational debt. This decision has harmoniously construed two legislations, keeping in mind the ramifications of a situation where a corporate debtor is put under the resolution process before final adjudication of a challenge to an award under the Act, and will go a long way in instilling faith of corporates in the market-driven and commercially viable approach of the Supreme Court.

Composite reference to arbitration of interconnected agreements

Paving the way for composite reference to arbitration, the Supreme Court, in *Ameet Lalchand Shah v Rishabh Enterprises*, permitted a composite reference to arbitration, referring the parties to arbitration under each of the four contracts, even though one of the contracts did not contain an arbitration clause. Further, the Court held that parties shall not be permitted to wriggle out of arbitration clauses by levelling "routine" allegations of fraud that are unsupported by any evidence. In doing so, the Court has taken a very pragmatic view, and ensured that due weight be given to the commercial understanding of the parties, with an intent to further a "sense of business efficacy".

Designation of seat of arbitration

In September 2018, a three bench of the Supreme Court of India, in *Union of India v Hardy Exploration and Production (India) Inc*, set aside the decision passed by the division bench of the Delhi High Court which had held that Indian courts would not have jurisdiction to entertain an application under Section 34 of the Indian Arbitration Act, when the award had been signed and passed outside of India (with the venue designated as Kuala Lumpur and governing law of the contract as Indian). The Supreme Court held that in cases where the agreement between the parties only prescribes the place/venue of arbitration, and no seat has been prescribed, the place/venue cannot ipso facto assume the status of seat. It was further clarified that venue could become a seat only if something else was added to it as a concomitant. A key takeaway from this decision is that parties must expressly designate the seat of arbitration in order to avoid any jurisdictional challenges after the award is rendered.

PRIVACY & DATA PROTECTION

India released draft Data Protection Bill

The key highlights of the draft Data Protection Bill 2018 are as follows:

- Extra-territorial applicability: Applicable not only to processing of personal data by Indian entities but also to foreign entities, if such personal data is processed for offering goods or services or for profiling individuals within India.

- Purpose limitation: Processing of personal data has to be fair, reasonable and restricted to the purposes of processing.

- Notice: Clear notice to be provided while collecting personal data, containing details such as purpose of processing, individuals' rights over their personal data, time period for retaining personal data, etc.

- Individual rights: Individuals have been given wide rights pertaining to their personal data including, the right to access, correct, to be forgotten, etc.

- Grounds of processing: Limited grounds for processing of personal data have been prescribed. Such grounds include taking consent from individuals, complying with law, in relation to employment, etc.

- Wider definition of sensitive personal data: The definition of sensitive personal data has been broadened to include categories of personal data such as genetic data, transgender status, intersex status, caste or tribe, sexual orientation, sex life, religious or political belief or affiliation, etc.

- Personal data of children: Enhanced safeguards have been included for the processing of personal data and sensitive personal data of children.

- Enhanced security principles: Principles like privacy by design, transparency and adoption of cyber-security and technological safeguards have been incorporated to increase accountability and security of personal data.

- Establishment of a dedicated data protection authority: The Data Protection Authority of India (Authority) to be constituted by the Central Government, will be responsible for implementation of the provisions of the Bill as well as imposing penalties thereunder.

- Personal data breach notification: Any breach of personal data which is likely to harm individuals is required to be notified to the Authority as soon as possible and not exceeding the time period which may be specified by the Authority. The Authority may also require a notification to be made to the individuals affected by such personal data breach.

- Localisation of personal data: At least one copy of personal data to be stored on a server or data centre located in India. Personal data which may be deemed as critical by the Central Government will have to be mandatorily processed in a server or data centre located in India.

- Conditions for cross-border transfer of personal data: Personal data other than critical personal data may be transferred outside India on the basis of standard contractual clauses or intra-group schemes approved by the Authority, to countries or to sectors within a country or to international organisations who have been approved by the Central Government, etc.

- Heavy penalties: Heavy penalties, which may extend up to the higher of Rs. 150 million or 4% of total worldwide turnover of the preceding financial year, have been prescribed for the contravention of certain obligations such as those pertaining to the processing or transfer of personal data, etc.

Supreme Court's verdict on the constitutional validity of Aadhaar scheme

Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (Act) was enacted in March 2016 to enable the citizens of India to avail certain subsidies, benefits and services from the Government of India. Aadhaar scheme provides for a unique identity to citizens of India by collection of certain biometric and demographic information of individuals. In recent times, Aadhaar was made mandatory for opening of bank accounts, admission of children in schools etc. The constitutionality of the Aadhaar scheme was challenged as violative of the fundamental right to privacy. On 26 September 2018, a five-judge constitution bench of the Supreme Court upheld the Act by a 4:1 majority in the case of *Justice KS Puttaswamy (Retd) v Union of India & Ors*. Despite upholding the constitutionality of the Act, several provisions of the Act have been struck/read down to accommodate the apprehensions that had been raised by the petitioners, particularly with respect to the threat to privacy and data protection.

EMPLOYMENT AND LABOUR

Board of Director's Report to include a statement on compliance with the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 (SH Act)

The Central Government has notified the Companies (Accounts) Amendment Rules, 2018, with effect from 31 July 2018. According to the amended rules, all companies, other than one-person companies or small companies, are required to include a statement in their board's report, confirming that the company is compliant with the provisions relating to the constitution of an Internal Committee under the SH Act. The provisions of the SH Act require employers to establish an Internal Committee for each office having 10 or more employees.

Failure to do so or including an incorrect statement is punishable by way of a monetary fine ranging from INR 50 thousand to INR 25 lakh or imprisonment for a prescribed term or both.

COMPETITION AND ANTITRUST

Competition Commission of India Issues amendments to the Combination Regulations

The CCI notified the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018 on 9 October 2018 (Amendment Regulations). The Amendment Regulations provide clarifications regarding the computation of the 210 day period within which the CCI must give its approval, noting that the period is extendable based on the number of times a request for information is issued by the CCI. Additionally, the Amendment Regulations formalise the practice of parties being allowed to withdraw and re-file notice in case the proposed transaction undergoes a significant change. Furthermore, parties are now allowed to offer modifications (prior to a formal Phase II process) immediately after the CCI has formed its prima facie opinion under Section 29(1) of the Competition Act, in response to the show-cause notice issued by the CCI just before initiating a Phase II investigation. Largely, the Amendment Regulations are a welcome step as they simplify the filing procedures and formalize the existing practice of the CCI. Further, they seek to align the applicable procedures closer to the international best practices.

OTHER KEY DEVELOPMENTS

Specific Relief (Amendment) Act 2018

The Amendment Act has been introduced with the primary intent of introducing greater certainty in enforcement of contracts and enabling faster and easier enforcement of contracts and resolution of contractual disputes. The changes introduced include:

- Mandatory enforcement of contract by specific performance: It is now mandatory for a court to grant specific performance of a contract unless: (i) a contract was made by a trustee in excess of his powers or in breach of trust; (ii) the contract falls within the category of contract which cannot be specifically enforced; or (iii) specific performance is to be enforced in favour of a person who falls within the category of persons listed in Section 16.

- Contracts which cannot be specifically enforced: Certain contracts, like: (i) contracts where an aggrieved party has obtained substituted performance, (ii) where the contract involves performance of a continuous duty which cannot be supervised by the court, (iii) where the contract is dependent on personal qualifications of an individual, and (iv) the contract is determinable by its nature; cannot be specifically enforced.

- Persons in favour of whom specific performance can be enforced: The amendments provide that specific performance cannot be enforced in favour of certain persons specified in Section 16.

- Substituted Performance: A party is now permitted to have the contract performed by a third-party or through its agent and recover the costs and expenses incurred in substituting such performance.

- Infrastructure Projects: Courts are not permitted to grant an injunction in respect of infrastructure projects, if such injunction would cause an impediment or delay in the progress or completion of the project or interfere with related facility or services that are part of such a project.

- Limited Liability Partnerships: An LLP formed by amalgamating two LLPs is now included as a party in favour or against whom specific performance may be granted.

- Mandatory Time Period for Disposal: Suits filed under the SRA are required to be disposed of within a period of 12 months from the date of service of summons, extendable for an aggregate period of 6 months for reasons to be recorded in writing.

Indian Courts create a strong deterrent against IP infringement by imposing heavy costs

In two separate decisions relating to IP infringement, passed by the: Bombay High Court, and the Delhi High Court in *Glenmark Pharmaceuticals Ltd v Galpha Laboratories* and *Skechers v Pure Play Sports* respectively, the said Courts have passed strong decisions imposing heavy costs on the infringers. The Bombay High Court has imposed heavy costs of INR 1.5 crores (INR 15 million- a little over USD 200,000) in view of habitual infringement on the part of Galpha, and the Delhi High Court imposed costs of about INR 87 lakhs (INR 8.7 million- a little over USD 1,17,623) on Pure Play Sports.

These decisions are important since they deal with the menace of infringement differently and send out a strong message to infringers by hitting them where it hurts the most (i.e. monetarily), unlike in the past where merely injunctions were granted. In the Bombay High Court decision, the Court also directed the infringers' Directors to remain present in Court, and directions were considered to other enforcement agencies to take a concerted action against the infringers.

Kotak Committee recommendations on corporate governance

SEBI in its board meeting dated 28 March 2018 accepted several recommendations (a few with modifications) of the Committee on Corporate Governance, headed by Mr. Uday Kotak (Kotak Committee). The Kotak Committee was constituted in June 2017 to prepare recommendations for SEBI, in relation to improving the standards of corporate governance in Indian listed entities. In the board meeting, SEBI also decided on certain other changes to the legal regime regulating securities markets.

Key recommendations that were accepted include:

- The Kotak Committee has stated that independent directors play a critical role in a good governance framework, and that one of the most important elements of such a role is their "independence". The Kotak Committee felt that the evaluation of such "independence" should entail both objective and subjective assessments, and has accordingly recommended the following revisions to the eligibility criteria for a person to be appointed as an independent director – (i) to specifically exclude persons who constitute the 'promoter group' of a listed entity; and (ii) "board inter-locks" arising due to common non-independent directors on boards of listed entities (i.e. a non-independent director of a company on the board of which any non-independent director of the listed entity is an independent director, cannot be an independent director on the board of the listed entity). For instance, if Mr. A is an executive director on Co. A (being a listed entity) and is also an independent director on Co. B, then no non-independent director of Co. B can be an independent director on the board of Co. A.

- The Kotak Committee has recommended that every listed entity shall disclose in its annual report, a chart or a matrix setting out the skills/expertise/competence of the board of directors, specifying (i) list of core skills/expertise/competencies identified by the board of directors as required in the context of its business(es) and sector(s) for it to function effectively, and those actually available with the board, with effect from financial year ended March 31, 2019; and (ii) names of directors who have such skills/expertise/competence, with effect from financial year ended March 31, 2020. The recommendation of Kotak Committee in this regard is aimed at ensuring that the shareholders are fully apprised of the ability and capability of the board. Such recommendation has been accepted by SEBI in its board meeting.

- The Kotak Committee has made certain recommendations regarding the role of audit committees, nomination and remuneration committees, and risk management committees, which have been accepted by SEBI in its board meeting. The role of the audit committee shall be enhanced to include the review of the utilisation of loans and/or advances /investment by the holding company in the subsidiary (including foreign subsidiaries), which exceeds INR 1 billion, or 10% of the asset size of the subsidiary, whichever is lower. Further, all payments made to senior management, in whatever form, shall be recommended by the nomination and remuneration committee to the board of the listed entity to ensure that the spirit of good governance is not undermined while remuneration is being paid to the senior management.

- SEBI in its board meeting has agreed to the recommendation of the Kotak Committee to make it mandatory for a listed entity to appoint one independent director on its board of a foreign material subsidiary, in addition to the Indian material subsidiary, with effect from March 1, 2018. Further, it has recommended that the threshold for determining material subsidiaries should be 10% (instead of present threshold of 20%) of the consolidated income or net worth respectively, of the listed entity and its subsidiaries in the immediately preceding accounting year. Confirmation of compliance in relation to enhanced obligations on the listed companies with respect to their subsidiaries shall be disclosed in offer documents

- Currently, the Companies Act, 2013 requires a secretarial audit only for listed entities and unlisted entities above a certain threshold. However, there is no specific provision for a secretarial audit under SEBI's listing regulations. The Kotak Committee has recommended to make secretarial audits mandatory for all listed entities and their material subsidiaries. The same has been agreed by SEBI in its board meeting. Confirmation of compliance of secretarial audit obligations by the listed companies shall be disclosed in the offer documents.

Changes in rates and payment mechanism of stamp duty on issuance and transfer of 'securities' in India

- All issuance and transfers of 'securities' will be subject to stamp duty (i.e. exemption on transfer of dematerialised securities has been removed).

- Stamp duty will be calculated on an ad valorem basis on: (i) actual trade price for listed securities; or (ii) price identified in instrument of transfer. More importantly, unified stamp duty schedule across India meaning it is not linked to or varied with the state of execution.

- On payment of stamp duty on the issuance / transfer of the security, no additional stamp duty payable on any other document entered in connection with such issuance / transfer. Therefore, no separate stamp duty payable on: (i) security subscription / purchase agreements, (ii) security certificates, and /or (iii) allotment letters.

- Stamp duty on securities to be collected by stock exchanges/clearing exchange/depositories at the time of the transaction and remitted to applicable state governments. For transactions not on the depositories or on the floor of the exchange, stamp duty must be paid by issuer / transferor (as applicable).