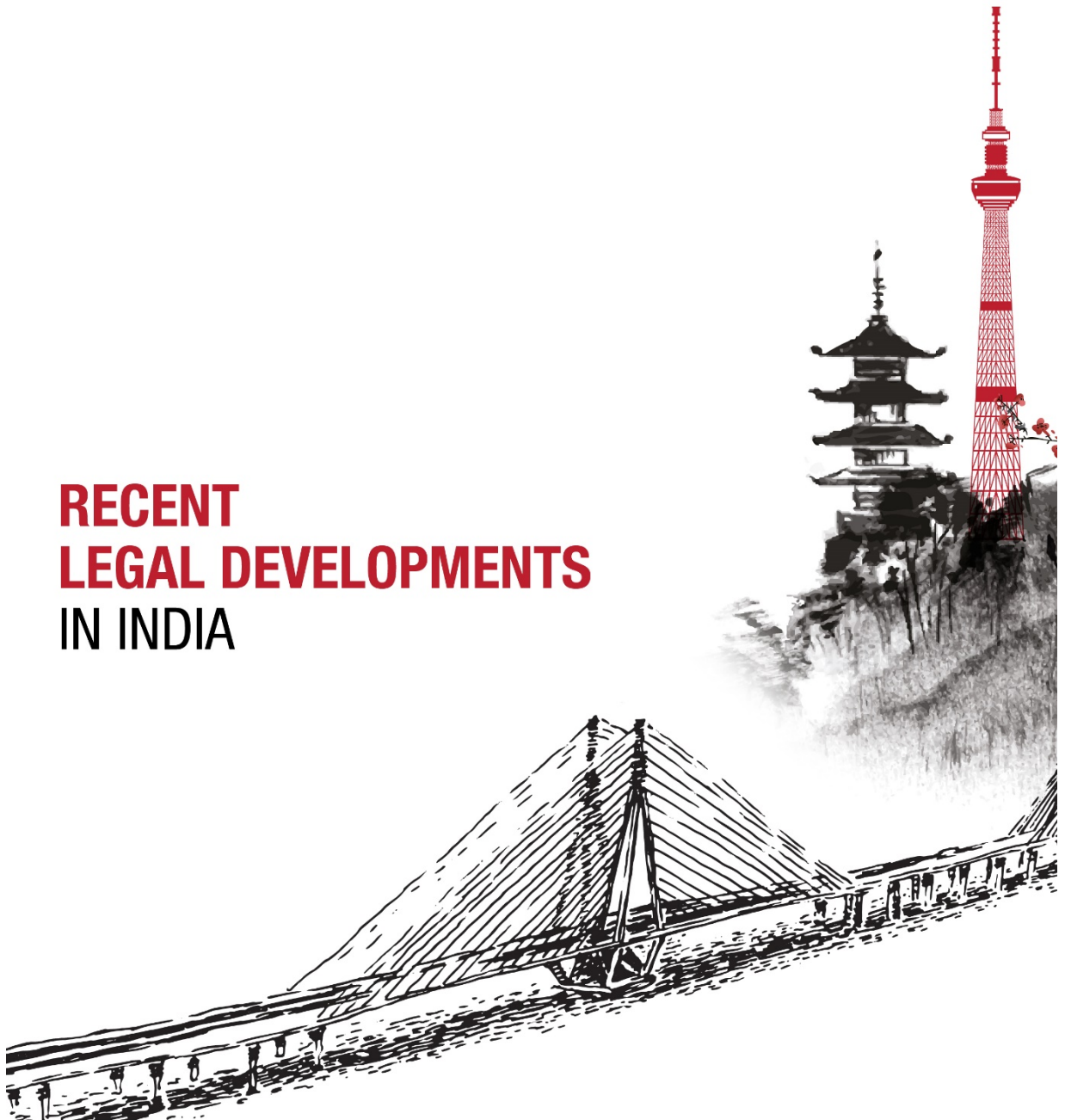


INDUSLAW MONTHLY NEWSLETTER

June 2016



RECENT LEGAL DEVELOPMENTS IN INDIA



The IndusLaw Monthly Newsletter brings you the key regulatory and legal developments in various sectors in India.

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INDUSLAW is a multi-speciality Indian law firm with 15 partners and over 85 lawyers across four offices in Bangalore, Delhi, Hyderabad and Mumbai.

We advise foreign and domestic clients with respect to transactions, dispute resolution, business strategies and operations from the perspective of Indian laws and regulations.

Our clients are spread across several industry verticals and geographies. Our clients are typically financial institutions, investment funds, foreign multinationals operating in India, domestic corporations, growing Indian companies, start-ups, social enterprises and not-for-profit entities. These organizations usually look to us for sophisticated corporate & financial transactions and complex litigation & dispute resolution proceedings. We work with clients across various sectors including bio-tech, education, financial services, healthcare, hospitality, infrastructure, manufacturing, micro-finance, real estate & construction, rural services, retail including online retail, technology, travel & tourism, telecom and trading.

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A. Foreign Direct Investment – Notifications by DIPP¹ and RBI²

1. RBI

Corrigendum to the notification FEMA 362 / 2016-RB - Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2016:

The Reserve Bank of India, Foreign Exchange Department has published a corrigendum dated April 12, 2016 to the notification FEMA 362 / 2016-RB, dated February 15, 2016. Briefly, the corrigendum has amended the definition of control and foreign investment. Further, the corrigendum also has substituted the schedule relating to defence industry, single brand product retail trading and duty free shops.

Introduction of definition of e-commerce in Foreign Trade Policy (2015-2020):

The Directorate General of Foreign Trade vide Notification No.02/2015-2020 dated 11th April, 2016 has introduced the definition of e-commerce in Para 9.17 A of Chapter 9 of the Foreign Trade Policy (2015-2020).

“9.17A : e-commerce means buying and selling of goods and services including digital products, conducted over digital and electronic network. For the purposes of merchandise Exports from India Scheme (MEIS) e-commerce shall mean the export of goods hosted on a website accessible through the internet to a purchaser. While the dispatch of goods shall be made through courier or postal mode as specified under the MEIS the payment for goods purchased on e-commerce platform shall be done through international credit/debit cards and as per the Reserve Bank of India Circular (RBI/2015-16/185) [AP (DIR Series) Circular No. 16 dated September 24 2015] as amended from time to time”.

Foreign Exchange Management (Remittance of Assets) Regulations, 2016:

¹ Department of Industrial Policy and Promotion or **DIPP** is the nodal government authority having the primary responsibility to promote foreign direct investment in India.
² Reserve Bank of India or **RBI** is the central bank of India. Its primary responsibility is to regulate the monetary policy of the Indian economy.

The Reserve Bank of India has notified the Foreign Exchange Management (Remittance of Assets) Regulations, 2016 with effect from April 01, 2016. Accordingly, the Foreign Exchange Management (Remittance of Assets) Regulations, 2000 has been repealed.

The salient features of the Remittance of Assets regulations are given as under:

1. In terms of regulation 4(1), *ibid*, ADs may allow remittance of balance amount, held by a foreign student in a bank account in India, after completion of his/her studies/training in India.
2. In terms of regulation 4(3), *ibid*, ADs may allow remittances by Indian companies under liquidation on directions issued by a Court in India.
3. In terms of regulation 5, *ibid*, ADs may also allow Indian entities to remit their contribution towards the provident fund/ superannuation/ pension fund in respect of their expatriate staff resident in India but “not permanently resident” in India.
4. In terms of regulation 6, *ibid*, ADs may permit remittance of assets on closure or remittance of winding up proceeds of branch office/ liaison office (other than project office) as per Reserve Bank’s directions from time to time.
5. Any transaction involving remittance of assets under these regulations are subject to the applicable tax laws in India.

FIIIs/RFPIs can now invest up to 60 per cent under PIS in M/s Yes Bank Limited

The Reserve Bank of India (“**RBI**”) has notified that Foreign Institutional Investors (“**FIIIs**”)/Registered Foreign Portfolios Investors (“**RFPIs**”) can now invest from existing 49 per cent up to 60 per cent of the paid up capital of [M/s Yes Bank Limited](#) under the Portfolio Investment Scheme (PIS).

The Reserve Bank further notified that the total foreign investment from all sources i.e. Global Depository Receipts (GDR)/American Depository Receipts (ADR)/Foreign Direct Investment

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(FDI)/Foreign Institutional Investors (FI)/ Registered Foreign Portfolios Investors (RFPIs)/Non-Resident Indians (NRI)/Persons of Indian Origin (PIO) in the company shall not exceed 60 per cent.

The notification has been appended herein for your perusal and can be accessed at https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=36857.

Transactions in derivatives by regulated institutional entities on electronic platforms

RBI had been seeking to modify the existing guidelines on OTC derivatives in order to make participation in OTC derivative markets through electronic platforms more broad-based. Accordingly, RBI decided to enable any institutional entity regulated by the RBI, Securities and Exchange Board of India (SEBI), the Insurance Regulatory and Development Authority of India ("IRDAI"), the Pension Fund Regulatory and Development Authority (PFRDA) and the National Housing Bank (NHB) to trade in interest rate swaps (IRS) on electronic trading platforms. A copy of the notification is appended herewith and can be accessed at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?id=10384&Mode=0>.

RBI has released the "Reserve Bank of India (Ownership in Private Sector Banks) Directions, 2016".

The Reserve Bank of India has reviewed the extant guidelines on ownership in private sector banks which envisaged diversified shareholding in private sector banks by a single entity/corporate entity/group of related entities. The guidelines have been reviewed against the background of the guidelines on licensing of new banks in the private sector issued in February 2013. The need for additional capital for the banks consequent to the implementation of Basel III capital regulations and to rationalize the ownership limits. It has stipulated the certain specific principles for shareholding by promoters, other entities and individuals in private sector banks after the review. The text of the Directions can be viewed at: <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/24MDE80433C3AC4E44EAB8B8973CC2438810.PDF>

2. ECB

Issuance of Rupee denomination bonds overseas:

The RBI has issued circular no. 60 dated April 13, 2016 with respect to issuance of Rupee denomination bonds overseas. The major highlights of the circular are as follows:

1. Modification of the amount of borrowing:

The maximum amount which can be borrowed by an entity in a financial year under the automatic route by issuance of these bonds will be Rs. 50 billion and not USD 750 million as given in the circular No. 17 dated September 29, 2015. Proposals to borrow beyond Rs. 50 billion in a financial year will require prior approval of the Reserve Bank.

Minimum maturity period for Rupee denominated bonds issued overseas has been reduced to three years in order to align with the maturity prescription regarding foreign investment in corporate bonds through the Foreign Portfolio Investment (FPI) route.

2. Modification in criteria for investors and location for issuance:

The Rupee denominated bonds can only be issued in a country and can only be subscribed by a resident of a country that is a member of Financial Action Task Force (FATF) or a member of a FATF- Style Regional Body; whose securities market regulator is a signatory to the International Organization of Securities Commission's (IOSCO's) Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with SEBI for information sharing arrangements; and should not be a country identified in the public statement of the FATF as:

- i. A jurisdiction having a strategic anti-money laundering or combating the financing of terrorism deficiencies to which counter measures apply; or
- ii. A jurisdiction that has not made sufficient progress in addressing the

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deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies.

3. FDI

Foreign Direct Investment in Asset Reconstruction Companies:

The Government of India has liberalized the foreign direct investment limits for asset reconstruction companies. Accordingly, Paragraph 6.2.18.1 of the 'Consolidated FDI Policy Circular of 2015', effective from May 12, 2015 is amended to provide for investment up to 100% under the automatic route subject to the following conditions:

- a) Investment limit of a sponsor in the shareholding of an Asset Reconstruction Company (**ARC**) will be governed by the provisions of Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), as amended from time to time. Similarly, investment by institutional / non-institutional investors will also be governed by the said Act, as amended from time to time.
- b) The total shareholding of an individual FII/FPI shall be below 10% of the total paid up capital.
- c) FII/FPI can invest in the security receipts (SR) issued by ARCs registered with RBI. FIIs / FPIs may be allowed up to 100% of each tranche in SRs issued by ARCs, subject to directions / guidelines of the RBI.
- d) All investments would be subject to provisions of the SARFAESI, as amended from time to time.

The RBI has notified the **Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Third Amendment) Regulations, 2016**.

The following definitions have been added to Regulation 2:

“(iiA) ‘Category I Alternative Investment Fund (Cat-I AIF)’ means an Alternative Investment Fund registered under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations,

2012 which raises money and invests in such funds or sectors or activities or areas in accordance with the said Regulations.”

“(xA) ‘startup’ shall mean an entity, incorporated or registered in India not prior to five years, with an annual turnover not exceeding INR 250 million in any preceding financial year, working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property,

Provided that such entity is not formed by splitting up, or reconstruction of a business already in existence.

For this purpose, ‘entity’ shall mean a private limited company (as defined in the Companies Act, 2013), or a registered partnership firm (registered under section 59 of the Partnership Act, 1932) or a limited liability partnership (under the Limited Liability Partnership Act, 2008).

The expression ‘turnover’ shall have the same meaning as assigned to it under the (Indian) Companies Act, 2013.

An entity is considered to be working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property if it aims to develop and commercialize (a) a new product or service or process; or (b) a significantly improved existing product or service or process that will create or add value for customers or workflow.

Provided that it will not include the mere act of developing (a) products or services or processes which do not have potential for commercialization; or (b) undifferentiated products or services or processes or (c) products or services or processes with no or limited incremental value for customers or workflow.”

In Regulation 5, which deals with Permission for purchase of shares by certain persons resident outside India, sub-regulation (v) has been substituted, and currently, a Foreign Venture Capital Investor registered with SEBI may make investment in the manner and subject to the terms and conditions specified in Schedule 6. Schedule 6 has been substituted with a new schedule.

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Establishment of Branch Office (BO)/ Liaison Office (LO)/ Project Office (PO) in India by foreign entities - procedural guidelines

RBI has consolidated and outlined the salient provisions of the procedure for a person resident outside India to open a branch office or a liaison office or a project office. The text of the procedure can be viewed at <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10256&Mode=0>

FDI in Credit Information Companies:

The Reserve Bank of India has, in supersession of its directive dated November 29, 2013, revised its directions, allowing higher FDI limits in Credit Information Companies (CICs) to entities which have an established track record of running a Credit Information Bureau in a well regulated environment, as under:

- a. up to 49% if ownership of the investor company is not well diversified;
- b. up to 100% if ownership of investor company is well diversified, or if not well diversified, subject to conditions relating to composition of the Board of Directors of the investee CIC. Investment of Foreign Institutional Investors (FII)/Foreign Portfolio Investors (FPI) should directly or indirectly hold below 10% equity.

At present, investments, directly or indirectly by any person, whether resident or otherwise are limited to 10% of the equity capital of a CIC. However, investments under FDI were permitted up to 74% subject to the conditions stipulated in the Reserve Bank's directive [\(DBOD.CID.BC.No.74/20.16.042/2013-14](#) and its [Press Release No.1100 dated November 29, 2013](#)). The Reserve Bank of India, [\(Notification No. FEMA 362/2016-RB dated February 15, 2016\)](#) revised the foreign investment limits in CICs from 74 per cent to 100 per cent under automatic route, subject to certain conditions.

B. Relevant MCA Circulars, notifications etc.

Appointment of Inspectors for inspection of books and papers of a Company:

In exercise of the powers conferred by sub-section (1) of section 458 of the Companies Act (18 of 2013), the Central Government being satisfied that circumstances warrant, delegates the powers to appoint Inspectors for inspection of books and papers of a company under sub-section (5) of section 206, as ordered by Central Government to the Regional Directors.

Clarification with regard to Corporate Social Responsibility (CSR) under Section 135 of the Companies Act, 2013:

The Ministry of Corporate Affairs in continuance with its circular dated January 12, 2016 has clarified that companies undertaking CSR activities under the Companies Act, 2013, shall not contravene any other prevailing laws of the land including Cigarettes and Other Tobacco Products Act, 2003.

C. Arbitration & Competition – Notifications and Case Law Updates

The Competition Commission of India (“CCI”) had, on 11.03.2014, passed an order against the Bengal Chemist and Druggist Association (“BCDA”) for adopting anti-competitive practice of directly or indirectly determining the sale price of drugs and controlling the supply of drugs in a concerted manner in violation of Section 3(3)(a) and 3(3)(b) of the (Indian) Competition Act, 2002 (“Act”), and thereby imposing a penalty of INR 183.8 million on BCDA and its office bearers.

The verdict came upon a complaint filed by Director of Drugs Control, West Bengal. It was observed by the CCI that BCDA, which is an association of wholesalers and retail sellers of drugs consisting of approximately 34,000 members, directed its retailer member not to give discount on the maximum retail price (MRP) in the sale of medicines to consumers and in order to ensure strict compliance of its directives, BCDA had been carrying out vigilance operations to identify the retailers defying the directions issued by it, and had even forced the defiant members to shut their shops as a punishment measure. It was further observed that the conduct of BCDA had curtailed the freedom of trade for the retailers and resulted into directly or indirectly determining, the sale prices of drugs by prohibiting its retailer members from giving discounts on MRP and controlled and limited the production/supply of medicines and the market of provision of services by

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forcing them to close their business and adversely affected the interest of retailers and consumers.

The CCI, therefore, held BCDA guilty of anti-competitive practices and abuse of dominant power observed that the activities of the BCDA were in conflict with the objects of the competition law as they cause restraint of trade, stifle competition and harm the consumers. After giving due consideration on the issue, the CCI decided to impose a penalty upon BCDA and its office bearers - @10% and on the executive committee members @7%, of their respective turnover/income/receipts, and also directed them to seize and desist from indulging in practices found to be anti-competitive in terms of the provisions of the Act. . As per the order, BCDA was supposed to pay INR 1.3 million and the rest INR 183.7 million was to be borne by the executive committee members of the BCDA.

This verdict of abuse of dominance and anti-competitive conduct against the BCDA was upheld by the Competition Appellate Tribunal (“COMPAT”) vide its orders dated 10.05.2016, in Appeal Nos. 34/2014 and 37/2014 against the CCI order. However, the penalty upon BCDA was reduced from 10% to 1% of average of its turnover for the last three preceding financial years in light of its remedial conduct for its anti-competitive actions, and the penalty against the office bearers has been set aside entirely for insufficiency of investigation into the exact role of the office bearers as Section 48 dictates that only those officers in charge of the affairs of the company at the time of contravention of the Act may be prosecuted against.

The two orders of the COMPAT may be retrieved at:
<http://compat.nic.in/upload/PDFs/judgement-orders-2016/FINAL%20ORDER-%20Shib%20Sankar%20Nag%20Sarkar.pdf>
<http://compat.nic.in/upload/PDFs/judgement-orders-2016/FINAL%20ORDER-%20appeal%20no%2037%20of%202014.pdf>

D. Infrastructure Sector Updates

Report of the Committee on Free Governor Mode Operation of Generating Units:

The Central Electricity Regulatory Commission had constituted a Committee under the chairmanship of Shri A. Velayutham to look into the issues relating to the implementation of Free Governor Mode Operation (FGMO) of generating units with manual intervention

and to suggest measures for implementation of FGMO with suitable modification/amendments to the Indian Electricity Grid Code and other relevant regulations.

The Committee report, the dissent report of NTPC Limited and the observations of the Chairperson of the Committee have been released, and comments from interested persons/stakeholders have been invited on the Committee report by May 25, 2016.

The Committee report, the dissent report of NTPC Limited and the observations of the Chairperson of the Committee can be accessed at
<http://www.cercind.gov.in/2016/whatsnew/PN.pdf>

Karnataka Electricity Regulatory Commission (KERC) allows gross-metering for domestic consumers under

KERC has passed an order dated May 2, 2016 revising tariff for solar rooftop and small photovoltaic projects. According to the latest tariff, rooftop units up to 10 kW set up by availing subsidy will get Rs 6.03 per unit, while those without government subsidy will get Rs 7.08 per unit. The Tariff Order also allows gross metering for domestic, hospital and educational institutions, in addition to the existing net metering regime. Gross metering allows the entire energy generated by the solar rooftop plant to be injected into the grid without reckoning the consumption by the domestic consumer's installation.

The order can be found at
http://www.karnataka.gov.in/kerc/Downloads/COURT-ORDERS-2016/TARIFF_FY-17/Solar_Tariff_2016/Solar_Rooftop_Photovoltaic_Tariff-ORDER-dated-02.05.2016.pdf

Union Cabinet grants ex-post facto approval to the MOU between India and Japan for low-carbon thermal power development in India

The Union Cabinet granted ex-post facto approval to the memorandum of understanding (MOU) between India and Japan on 25 May 2016, aimed at promoting sustainable and low-carbon thermal power development in India.

According to the press release by the Ministry of Power, "the signing of the MOU will help India to address issues and barriers in promoting sustainable, stable and low-carbon thermal power

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development that have been identified through the preceding Pre-Primary Study and the on-going cooperation towards Energy Efficient Renovation & Modernization as well as new power development, by means of diagnostic activities to support Renovation and Modernization (R&M) materialization and implementation, knowledge and technology exchange activities to support Clean Coal Technology (CCT) for thermal power plants such as Ultra Super Critical (USC) and other environmental technologies, all of which will be conducive to overall power development for India."

Following are the activities contemplated to be undertaken in terms of the proposal:

- I Update on the current and future policy trends in Indian power sector with wide coverage from R&M and Life Extension (LE) to new power development in India and consideration of the identified barriers to find out those which could be addressed through mutual collaboration by the Central Electricity Authority (CEA) and Japan Coal Energy Centre (JCOAL).
- I Identification of issues regarding both existing and upcoming facilities including operation and maintenance issues.
- I Implementation of full-fledged diagnosis and/or other available and effective measures including Residual Life Assessment (RLA) and Conditional Assessment (CA) study with priorities on, but not limited to the target power stations under the Pre-Primary Study and the Cooperation.
- I Consideration of possibilities for acquisition of carbon credits with bilateral/multilateral offset schemes.
- I Implementation of an annual workshop in India and CCT Transfer Programme in Japan for bilateral knowledge exchange and holding of annual joint meeting to discuss issues already arisen or may arise in the course of implementation of the proposal.

E. Intellectual Property Rights Updates

Chitra Jagjit Singh V. The Indian Performing Right Society Limited and Others :

Recently, the Hon'ble High Court of Delhi held that the Indian Performing Right Society Limited (IPRS) was incompetent to grant licenses as per Section 33 of the Copyright Act, 1957.

The court, in its above judgement, found that IPRS, by its own admission, failed to renew its registration as a copyright society under the Copyright Act, 1957. Hence, IPRS was restrained from granting any license in respect of the works of the plaintiff and also of Late Shri. Jagjit Singh.

The judgement was drawn pursuant to the case filed by the plaintiff, Mrs. Chitra Jagjit Singh, wife of Late Shri Jagjit Singh, objecting (1) to the issuance of public performance licenses by IPRS in relation to Late Shri Jagjit Singh's copyrighted works and (2) to the organisation of a concert being publicised as "Ek Ehsaas Jagjit Singh Live in Concert" and "Jagjit Singh sings again for charity". Mrs. Chitra Singh claims all copyright and moral rights over her husband's work post the death of her husband.

The event was being organized in Delhi on the occasion of Late Shri Jagjit Singh's 75th birth anniversary for charitable purposes. The advertisement published by the defendant for the event contained a picture of the singer prominently with the above captions. In this regard, the court agreed with the plaintiff that such advertisements mislead the public into believing that the late singer, who is no more alive, was performing live. The court held that this was a case of breach of privacy rights and other intellectual property rights of the late singer. The organizers of the event were restrained from using advertisements containing Late Shri. Jagjit Singh's image or name and the said captions. However, the court allowed the concert to be conducted as tickets were already sold and it was an event for charity.

<http://blog.sconline.com/post/2016/04/22/iprs-forthwith-restrained-from-granting-any-licencereceiving-licence-fee-in-respect-of-chitra-singh-jagjit-singhs-works/>

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National IPR Policy, India - May, 2016

Recently, the Indian government took measures to strengthen the future roadmap of intellectual property rights (“IPR”) protection in India, by approving the National IPR Policy (“the **Policy**”). The Policy, being TRIPS and WIPO compliant, aims at setting in place an institutional mechanism for a dynamic, vibrant and balanced IPR system in India. The new Policy also aims to create awareness among all sections of society about the economic, social, and cultural benefits of IPR. The Policy lays down the following seven objectives:

- I IPR Awareness: Outreach and Promotion – the Policy aims at creating public awareness about the economic, social and cultural benefits of IPRs among all sections of society.
- I Generation of IPRs – The Policy supports generation of more IPRs and protection of the same.
- I Legal and Legislative Framework – The Policy is brought into effect in order to have strong and effective IPR laws, which balance the interests of rights owners with larger public interests.
- I Administration and Management – with the new Policy, the government aims at modernizing and strengthening service-oriented IPR administration in India.
- I Commercialization of IPRs – Commercialisation through IPR is another major objective of the Policy.
- I Enforcement and Adjudication – The Policy aims to strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements. The government also plans to set up new IPR cells in every government and state government departments to coordinate with DIPP for the Policy implementation.
- I Human Capital Development – the Policy also aims at building an increased number of skilled IPR experts in order to strengthen and expand human resources, institutions and capacities for teaching, training and research in IPR.

In addition to the above, the Policy has addressed the topics of compulsory licensing and ‘invention’ under Section 3 (d) of the Patents Act. The Policy will also allow compulsory licensing with restrictions in case of a public health emergency such as epidemics and it is compliant with the World Trade Organization’s guidelines.

Approval and implementation of the same will enable faster actions to foster creativity, innovation and promote entrepreneurship.

Patent (Amendment) Rules, 2016:

An amendment to the Patent rules was published for comments from the public in October 2015 and had received severe objections. Taking into consideration the objections and suggestions received from the public, the government has recently amended and notified the Patent (Amendment) Rules, 2016 (herein after “Rules”).

With the amended Rules, the Patent Office has made several technical and procedural amendments. For example, the Rules recognise a new entity called ‘Startup’. Under the Rules, a ‘Startup’ is *“an entity, incorporated or registered in India for not more than five years, with an annual turnover not exceeding INR 250 million in any financial year, and is working towards innovation, development, deployment or commercialization of new products, processes or services driven by technology or intellectual property. However, an entity formed by splitting up or reconstruction does not qualify to be a Startup”*.

Also, the words ‘*or courier service*’ and ‘*or courier*’ have been omitted from the Rules. Instead, it is specified that *‘a patent agent shall file, leave, make or give all documents only by electronic transmission duly authenticated, including scanned copies of documents that are required to be submitted in original’*.

In addition to the above, the following amendments are noteworthy:

- I The Rules require a Patentee to provide email address along with an address for service, and a Patent Agent is required to furnish a mobile no. registered in India.
- I The Patent Office will henceforth accept authenticated documents by electronic

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transmission provided that the original document is submitted within a period of 15 days.

- | Online fees paid twice will be refunded at the discretion of the Controller.
- | The Rules also explicitly mention that, where no form is specified for a particular action, Form 30 of the Patent Rules, 2003, may be used.
- | With an aim of making the patenting process in India smoother, the Rules now allow hearings to be held through video conferencing or audio-visual communication devices; documents pertaining to the same are to be submitted within 15 days from the date of hearing. Any requests for adjournment of hearings can be filed three days prior to the set hearing date.

The Rules are available at the link:

[http://www.ipindia.nic.in/IPActs_Rules/Patent_\(Amendment\)Rules_2016_16May2016.pdf](http://www.ipindia.nic.in/IPActs_Rules/Patent_(Amendment)Rules_2016_16May2016.pdf)

F. Tax Updates

The Protocol for amendment of the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains between India and Mauritius was signed by both countries on 10th May, 2016 at Port Louis, Mauritius.

With this Protocol, India gets taxation rights on capital gains arising from alienation of shares acquired on or after 1st April, 2017 in a company resident in India with effect from financial year 2017-18, while simultaneously protection to investments in shares acquired before 1st April, 2017 has also been provided. Further, in respect of such capital gains arising during the transition period from 1st April, 2017 to 31st March, 2019, the tax rate will be limited to 50% of the domestic tax rate of India, subject to the fulfilment of the conditions in the Limitation of Benefits Article.

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Featured Article

The Real Estate (Regulation and Development) Act, 2016

Siddharth Marwah & Ray Vikram Nath

India has one of the largest middle class populations in the world. The dream to possess one's own house has always driven people to earn and save more. Despite the overall demand seeing an upward trend, the real estate sector in India until recently remained highly unregulated.

The Real Estate (Regulation and Development) Act, 2016 ("Act") finally came into force on May 1, 2016 setting in motion the process of making necessary operational rules and creation of institutional infrastructure for protecting the interests of consumers and promoting the growth of real estate sector in an environment of trust, confidence, credible transactions and efficient and time bound execution of projects.

Ministry of Housing & Urban Poverty Alleviation ("MHUPA") has notified 69 of the total 92 sections of the Act bringing the Act into force from May 1, 2016 culminating the eight long years' effort in this regard. A proposal for a law for Real Estate was first mooted at the National Conference of Housing Ministers of States and Union Territories in January, 2009.

The rules for giving effect to the provisions of the Act are to be formulated and notified within a period of 6 (six) months from the date of commencement of the Act by the respective State Governments (for each State), MHUPA (for Union Territories except Delhi and Puducherry), Ministry of Urban Development (for Delhi) and the Union Territory Government (for Puducherry).

The Act is expected to modify traditional practices and bring out a more professional approach amongst developers. With a focus on improving the transparency, governance and accountability in the sector, the Act is expected to segregate the quality and time-focussed developers from casual operators. The Act seeks to introduce measures to safeguard the interest of consumers in commercial as well as residential real estate markets in India, by imposing certain obligations on real estate developers and

agents. It also holds the promoters accountable for not registering their projects with the RERA (as defined below) or for providing insufficient information regarding their project. In addition to the promoter and allottees, the Act also brings real estate brokers who facilitate the sale and purchase of units in a project within its ambit.

Some of the key provisions within the ambit of the enforcement notification include the following:

1. Real Estate Regulatory Authorities

All states and union territories must establish state level regulatory authorities, called Real Estate Regulatory Authorities ("RERAs") within 1 (one) year of the Act coming into force. Two or more states or union territories may set up a common RERA. A state or union territory may also establish more than one RERA. The functions of a RERA include: (a) ensuring that residential projects are registered, and their details uploaded on the RERA website, (b) ensuring that buyers, sellers, and agents comply with obligations under the Act, and (c) advising the government on matters related to the development of real estate.

In the interim, the appropriate Government (i.e., the Central or State Government) shall designate any other regulatory authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority.

2. Registration with the Regulatory Authority

The Act requires mandatory registration of real estate projects with the RERA where the total area of land proposed to be developed exceeds 500 square meters or where more than 8 (eight) apartments are proposed to be developed inclusive of all phases (where phase-wise development is proposed). The Act also requires every phase of a project to be registered separately as a standalone project. Projects cannot be advertised, booked or sold in any form prior to registration and obtaining the necessary construction approvals. The RERA is required to either grant or reject registration applications within 30 (thirty) days.

3. Disclosures by Promoters:

While filing an application for registration of a real estate project, promoters are required to provide disclosures with respect to all the details of the project and give declaration with respect to completion schedule and title of the land for the project. The period within which a promoter undertakes to complete the project under its application of registration is the period for which the registration for the said project shall be valid under the Act.

4. 70% of realisation from allottees in a separate bank account:

The Act mandates that a promoter shall deposit 70% of the amount realised from the allottees, from time to time, in a separate account to be maintained in a scheduled bank. This is intended to cover the cost of construction and the land cost and the amount deposited shall be used only for the concerned project. The promoter shall be entitled to withdraw the amounts from the separate account, to cover the cost of the project, in proportion to the percentage of completion of the project. However, such withdrawal can only be made after it is certified by an engineer, an architect and chartered accountant in practice that the withdrawal is in proportion to the percentage of completion of the project. The provision seeks to address the practice of builders using money from an existing project for other projects, resulting in delays in completion.

5. Defects liability:

The promoter is responsible for structural defects or other deficiencies for a period of 5 (five) years from the date of delivery of possession.

6. Real Estate Agents:

The Act prohibits real estate agents from facilitating any sale or purchase of plots/apartments in projects without obtaining registration with the RERA. The agents are required to facilitate access of project information to consumers at the time of booking and refrain from making false

statements, misleading representations and indulging in unfair trade practices.

7. Advertisement or prospectus issued by the promoter

The advertisement or prospectus issued or published by the promoter should prominently mention the website address of the RERA, where all details of the registered project have been entered and include the registration number obtained from the RERA and other similar details.

Where any person makes an advance or a deposit on the basis of the information contained in the notice, advertisement or prospectus and sustains any loss or damage because of any incorrect, false statement included in these, he shall be compensated by the promoter in the manner as provided under the Act. Also, if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, intends to withdraw from the proposed project, his entire investment (along with interest at such rate as may be prescribed and compensation in the manner provided under the Act), will be returned to him.

8. Agreement with Buyers

The Act mandates the promoters to first enter into a written agreement for sale with the buyers and register the said agreement before accepting any advance payment or application fee (not exceeding 10% percent of the cost). Further, the said agreement for sale shall be in the prescribed form in order to prevent promoters from drafting one-sided agreements in their favour.

9. Sale based on carpet area

The Act states that developers have to now sell only on the basis of the carpet area so that a buyer will get to know how much he/she is paying for each sq. foot that he/she will get for their use. The Act defines the "carpet area" as the net usable floor area of an apartment, excluding the area covered by the external walls, areas under services shafts, exclusive balcony or verandah area and exclusive open terrace area, but includes

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the area covered by the internal partition walls of the apartment.

commercial and residential units/projects and timely completion of projects by the promoters.

10. **Incomplete projects**

There are many cases where construction work has come to a standstill or the developer has left without completing the project. The Act also covers such issues. In case a developer leaves a project half way, the association of allottees will have the right to refusal and get back their money along with interest. The allottees can also demand that a government authority get the project completed either through another developer or some other means.

However, it is pertinent to note that good legislation doesn't necessarily lead to good outcomes. The challenge before the Central and State Governments would be to establish the RERA's (or any other authority, in the interim) within the timeline prescribed under the Act in order to start implementing the provisions of the Act.

11. **Penalties:**

The Act imposes monetary penalties on the promoter of up to 5% of the 'estimated cost of the project' (as determined by the RERA) for disclosure related defaults, and up to 10% for not registering its project with the RERA, along with a maximum imprisonment of 3 (three) years.

The Act also imposes a fine of up to 10% of the apartment cost or imprisonment up to 1 (one) year, on the consumers (allottees) for non-compliance with the orders of the real estate appellate tribunal.

With the step-by-step liberalization of Foreign Direct Investment ("FDI") norms in construction and development over the past 2 (two) years, and with the advent of the Act, robust growth of India's real estate sector seems very likely.

However, the Central Government has, as of now, has notified only 69 out of the total 92 sections under the Act. The sections that are yet to be notified, such as prior registration of real estate projects; registration of real estate agents; duties/obligations of promoters, are essential for regulating the activities of promoters and achieving the key objective of bringing transparency in the real estate sector.

Overall, the Act is a step in the right direction and shall help increase transparency and accountability in the real estate sector, by providing mechanisms to facilitate and regulate the sale and purchase of

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