India Update

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Chadha&Co.

Advocates and Legal Consultants

America Móvil may be eyeing India entry

America Móvil, the world's third-largest telecom company by subscriber base, might already have taken its first step towards an India entry. The Mexico-headquartered telco's bankers appear to have been sounded out for preliminary discussions with leading Indian telecom companies for a strategic tie-up.

GE Healthcare to make India hub for low-cost devices

The healthcare division of General Electric will start shipping ultra low-cost medical devices made in India to emerging markets globally shortly.

Three manufacturing facilities in Bangalore will start manufacturing an extended line of products, including ultrasound machines, ECG units, maternal and infant care equipments, to markets in Africa, parts of Europe, Latin America, and Asia. These products will be up to 40% cheaper and is expected to address 10-15% of the global healthcare equipment market.

According to Anders Wold, president and CEO of the company's global ultrasound division, India offers the ideal template to custom-make products for other emerging markets globally. Given the huge demand-supply gap and the issue of affordability of healthcare, India is perfectly poised to benefit from frugal innovation, which is what healthcare manufacturers are seeking to leverage.

The global market for medical and diagnostic devices is expected to reach $362 billion by 2015, according to market researcher Global Industry Analysts.

GE Healthcare has three manufacturing plants in Bangalore, two in China and one in Japan. The company has invested $500 million in its Bangalore R&D facilities so far.

Cadbury loses fight for Chocolate Eclairs trademark over 'non-use'

After Kellogg's and Bata, it is now the turn of Cadbury to lose a trademark for non-use, 'eclairs' in this case.

The Intellectual Property Appellate Board (IPAB), India's patent appeals board, recently ordered the removal of three trademarks of Cadbury Eclairs, following a case initiated by rival ITC.

The dispute itself is a decade old. It started when ITC started marketing eclairs confectionery along with its 'Candyman' trademark, something that Cadbury got an injunction against.

Eventually, ITC moved IPAB, making a case that the trademark hasn't been used since 1994. Cadbury, in defence, said the Cadbury's Chocolate Eclairs was registered as a trademark in India in 1974, and that it has been continuously used since. They also have trademarks for Cadbury Chocolate Eclairs and Chocolate Eclairs Pop.

But the IPAB judgement, delivered by V Ravi and S Usha, said there isn't "a single evidence" to prove it. "Just the registration alone will not help the respondents to prove their use," the judgement went. Further, it said, "The board in various matters on the issue of non-user has held that if the respondent does not appear to rebut the ground of non-user, it goes without saying that they have not used the mark even after several years of registration and the mark shall be cancelled for non-user."

What this episode highlights is that non-use is becoming a major reason, of late, for brands losing trademarks. Kellogg's got its trademark POPS removed last year in a case against Chennai-based Pops Food Products, which makes chewing gums and dairy products. Bata lost its Sparx trademark in a case against Relaxo Footwears in 2013.

IT companies in Karnataka spared of standing orders rule

The Karnataka government has exempted the information technology sector from from complying with the provisions of the Industrial Employment (Standing Orders) Act, 1946 for another five years.

In the absence of exemption, IT firms would have had to define wages, number of contract employees, average work hours and other conditions of employment and display it prominently near the main entrance.

For over a decade, software companies in Bangalore enjoyed exemption from the law, but in 2012, the government decided to bring this sector under the legislation. Software industry heads campaigned against it calling it a retrograde step as the law was initially designed for the manufacturing sector. Industry representatives also feared that the legislation would lead to unionisation in the software industry which unlike the manufacturing sector, has so far been largely free of influential labour groupings.

RBI opens doors to M&As for foreign banks in India

Reserve Bank of India has opened the doors for mergers and acquisitions in the banking space.

The principles of reciprocity and single mode of presence will determine the need for a foreign bank to locally incorporate, but many of the parameters are not provided in black and white in the framework released by RBI.

Banks with complex structures, banks which do not provide adequate disclosure in their home jurisdiction, ones which are not widely held, banks from jurisdictions having legislation giving a preferential claim to depositors of home country in winding-up proceedings, etc, would be mandated entry into India only in the WOS (wholly-owned subsidiary) mode.

The guidelines mark the third attempt in the past decade by RBI to ring-fence operations of systemically important foreign banks. International banks operating as branches have been averse to incorporate since that would reduce the leeway they get in using the funds which are quite fungible. In fact, during the 2008 credit crisis, a US bank chief executive requested his Indian operations head to transfer funds to the US to help tide over the crisis.

Conversion is also desirable from the financial stability perspective since it ensures that there is a clear delineation between assets and liabilities of the domestic bank and those of its foreign parent and clearly provides for ring-fenced capital and assets within the host country. The proposed guidelines also attempt to prevent foreign banks from getting bigger in India.

The rules also say the CEO must be a resident of India, and that the 40% lending for small and medium-sized companies and the farm sector must be fulfilled.

Guidelines at a glance

- Subsidiarisation not mandatory but foreign banks with complex structures and concentrated shareholding will have to create wholly-owned subsidiaries (WOS)
- Foreign banks opting for branch presence must convert into WOS when it becomes systemically important
- Foreign banks creating subsidiaries to be permitted to acquire local banks
- Restrictions to be placed on entry of new WOS and capital infusion when capital & reserves of WOS and foreign bank branches exceed 20% of the banking system's capital & reserves
- Rs 500 crore[1] prescribed as initial minimum paid-up voting equity capital for a WOS
- Priority-sector lending requirement for WOS to be on a par with Indian banks — 40%
- Corporate governance norms for WOS to be stringent; two-thirds of directors must be non-executive

Sebi likely to put a cap on CEO salaries

The Securities and Exchange Board of India (Sebi), is considering a proposal to make it mandatory for companies to get remuneration packages of promoter directors approved by a majority of minority

[1] *1 crore – 10,000,000*

shareholders. Companies that are not promoter-driven may have to get pay packages passed through a special resolution. The new rules may also make it compulsory for the remuneration committee to justify pay levels of promoter directors.

The move is part of the regulator's continuing initiative to protect the interests of small shareholders and comes as companies have been seeking to maintain profitability in a trying economic environment.

Earlier this year, the regulator had proposed several overarching principles of corporate governance to align the current rules with best global practices and the new Companies Act.

Sebi is also planning to make it compulsory for listed companies to form a remuneration committee and to disclose compensation policy in annual reports. Setting up a remuneration committee is currently a non-mandatory requirement under clause 49 of the listing agreement. The clause states that to avoid conflicts of interest, the remuneration committee determining the pay of executive directors should comprise at least three non-executive directors, with the chairman being an independent member of the board.

The average annual managing director remuneration in FY12 for Sensex companies was Rs 10.9 crore. For top 100 and 500 BSE listed companies, the annual remuneration was about Rs 6.2 crore and Rs 3.6 crore, respectively. In some companies, there is a wide disparity between the compensation paid to professionals and to promoter directors.

Why is India slipping in ease of doing business rankings?

Even after two decades of economic reforms, India continues to falter on various Ease of Doing Business sub-indices such as starting a business, dealing with construction permits, getting electricity, registering property, paying taxes, trading across border, enforcing contracts or resolving insolvency. This year's annual study of the regulatory environment for small and medium-sized businesses from 189 countries, by the World Bank Group, is no different.

India figures at the bottom of the pile in most indicators. Its overall rank in Ease of Doing Business has dropped from 131st position in 2013 to 134th in 2014 (to some extent on account of expansion in a number of countries under study).
Against the key parameter of starting a business, India is worst off among the BRIC economies. It is in 179th position, while Russia is at 88th, Brazil at 123rd and China at 158th. In terms of the number of procedures and time required to start a business, India is below average among South Asian economies (eight countries).

The average number of procedures for starting a business is seven among South Asian economies, it is twelve for India. The average time taken to start a business in South Asia is 16.4 days, while it is 27 days for India. An entrepreneur in India has to deal with 35 procedures to get a construction permit, while in South Asia it is less than half that, at 16. An SME businessman in India would take 1,420 days to enforce a contract. The South Asia average is 1,075 days.

Even though several countries, including India and China, have expressed concerns about the country ranking in the report, an independent review panel appointed by the World Bank has suggested changes in the methodology adopted. Nevertheless, faced with criticism, Indian government has appointed a committee - headed by former Sebi Chairman M Damodaran - to suggest regulatory measures to ease the regulatory environment.

CORRECTIVE ACTION

Twenty-point Recommendations of the Committee for Reforming the Regulatory Environment for Doing Business in India (headed by former Sebi Chairman M Damodaran)

LEGAL REFORMS
1) Review of laws and regulations
2) Encouraging arbitration to resolve contractual disputes

REGULATORY ARCHITECTURE
3) Carving out clear mandate for a new regulatory authority
4) Appointments in and supervision of regulatory authorities
5) Autonomy of regulatory authorities
6) Self-evaluation by regulatory organisations

BOOSTING EFFICACY OF REGULATORY PROCESS
7) Ensuring effective consultation through a two-stage process
8) Allocating priority to systemic issues
9) Putting in place consent mechanism for matters of low significance
10) Drafting regulation
11) System of advance ruling
12) Setting up of regulatory review authority
13) Reviewing the proposed regulations
14) Regulatory Impact Assessment

ENABLING MSMES
15) Setting up a overarching body to enable policy and process coordination for MSMEs
16) Single window mechanism
17) Time-bound decision making

ADDRESSING STATE LEVEL ISSUES
18) Information facilitation through nodal point
19) Incentivising regulatory reforms amongst states
20) Building an appellate process by design

Navi Mumbai airport project crosses last major hurdle

The last major hurdle for kick starting the Navi Mumbai international airport project has been removed.

After months of discussions, the project-affected persons (PAPs) have agreed to the state government's offer of 22.5 per cent developed land for every hectare of land acquired. The PAPs have also withdrawn their demand for cash compensation. The agreement for acquisition of a total 671 hectares of such land, including 292 hectares in the core aeronautical area, will pave way for the City and Industrial Development Corporation (Cidco), the nodal agency for the project, to invite requests for qualification (RFQs).

The PAPs, who had earlier pressed for compensation of Rs 20 crore per hectare, had first insisted on allocation of 40 per cent and then 35 per cent of developed land.

After hectic negotiations, it was decided they would get one floor space index (FSI) for 12.5 per cent of developed land and 2.5 per cent FSI for another 10 per cent of developed land. Government and Cidco officials indicated the valuation of two FSIs came to Rs 25 crore per hectare. Further, the PAPs would get three times more land to the current residential plot they occupy.

Of the 2,268 hectares required for the airport project, 1,572 hectares (government and private) are already in Cidco's possession.

The airport project cost, originally envisaged at Rs 4,766 crore in 1998 for handling 40 million passengers annually, has risen over three times to Rs 14,573 crore. The airport is now projected to handle 60 million passengers a year.

PE funds ordering investigations to test claims of portfolio companies

Poor corporate governance standards, suspicion of fraud and a general environment of distrust are forcing several global private equity funds to order investigations into their portfolio companies.

Known as 'post investment due diligence', these investigations revolve around the financial, legal and corporate aspects of a company. At least three acrimonious confrontations have spilled out into public glare recently. PE funds General Atlantic and India Equity Partners, which had together invested $114 million in Fourcee Infrastructure, a logistics firm, dragged the promoters to the Company Law Board on account of fraud after a six-month investigation. India Equity Partners and Barings India had carried out a special audit at South India-based gold loan lender Manappuram Finance with the help of KPMG. Institutional investors in MCX and NSEL have also ordered such a probe.

One PE fund observed that an investee company's clients suddenly stopped paying and receivables kept mounting. The order book seemed to be dwindling. With help from a corporate investigator, they realized that many of the clients projected by the company were related parties and there was no real income. The fund is now negotiating a quiet and amicable exit by selling the shares back to the promoters.

In most cases where there is need for post investment due diligence, the PE fund has restricted access to good quality information on the performance of the target company. A large proportion of PE investments in India are minority stakes where post-deal access to good quality information is an issue.

An increasing number of PE funds have gone through the ordeal of seeing financials shared during initial pre-investments change dramatically post investment.

Of the 3,500 investments PE funds have made over the past decade, only about 500 have seen exits. Many investments still waiting for exits may have governance issue.

H&M gets FIPB approval, plans to invest INR 720cr

The Foreign Investment Promotion Board (FIPB) has cleared Swedish clothing major H&M's Rs. 720 crore proposal to set up single brand retail stores in India

H&M plans to open 50 retail stores in India. Earlier this year, the government had approved a bigger investment by another Swedish retailer IKEA.

The government had last year raised the FDI limit in single-brand retail to 100% from 51%, subject to certain minimum sourcing from local vendors.

Drug regulator set to conduct routine inspection of Chinese suppliers

The Indian drug regulator is set to conduct routine inspections at the manufacturing facilities of Chinese and other foreign companies supplying active pharmaceutical ingredients (APIs) to domestic pharmaceutical firms. The move follows a spate of international regulatory enforcements on Indian drug firms, which import more than 80 per cent of their API or raw material requirement for manufacturing finished formulations, mainly from China and Italy.

The drug regulator, along with the commerce ministry, has expedited talks with the Chinese government, regulator and industry to conduct these inspections on a routine basis.

The regulator anticipates more stringent checks by international regulators, especially on API sourcing. Lately, a number of API manufacturing facilities from India, as well as China, have come under the scanner of the US Food and Drug Administration (FDA). This has led to import alerts barring their supplies of medicines to the US.

In the past, the regulator has conducted inspections in China, but these have been sporadic and have often faced resistance. In 2011, a three-member delegation, comprising inspectors from DCGI's office, was sent back by a Chinese bulk drug exporter to India. The regulator again visited China the following year, inspected some facilities and came back to cancel licences of various Chinese bulk drug exporters. According to the health ministry, around 10 Chinese bulk drug manufacturing firms were inspected in 2011 and 2012 and 16 import licences, besides the registration certificate of one firm, were cancelled. For over a year, the regulator has also been planning to open an office in China to facilitate inspections. However, nothing concrete has happened in that direction so far.

Government mulls tweaking policy to let developers sell equity on exiting road projects

The Ministry of Road Transport and Highways is looking to tweak an exit policy announced for highway projects in 2013. The policy failed to excite developers as it did not transfer the perks to the new operator. The Union ministry is considering a proposal by the National Highways Authortity of India that allows a developer to sell or transfer their stake in a special purpose vehicle (SPV) formed for a project.

Road projects in India are undertaken through SPVs, made up of the concessionaire (operator), lenders and the highways authority, and the project is usually awarded for 20-25 years. The construction is usually done in three years and the tolling period starts once the project is completed. The current policy does not allow transfer of equity but only substitution of a concessionaire, following which a new vehicle has to be then formed. The exit policy announced in July 2013 found no takers, as the new SPV did not get the perquisites offered to the original vehicle, including a tax holiday of 10 years.

Road projects in India have been struggling in the past few years largely as private developers have stayed away. Lenders have also been reluctant to fund road projects over various concerns.

India eyeing economic corridor with Mekong

As part of India's Look-East Policy and its economic integration with the Association of Southeast Asian Nations (Asean), the government is promoting India-Mekong economic cooperation. Both sides are also planning a Mekong-India economic corridor, which will form an integral part of India-Asean connectivity.

For long, India has been promoting the Mekong-Ganga cooperation initiative, which includes India, Cambodia, Laos, Myanmar, Thailand and Vietnam. Initially, this was part of the Bay of Bengal initiative for multisectoral, technical and economic cooperation.

The Mekong-India economic corridor will be a network of land and sea infrastructure. Currently, the proposal is being studied by the Ministry of External Affairs. The corridor envisages the linking of vibrant emerging economies in the Asean region with India.

Mekong-India connectivity is currently being addressed as part of the Asian Highway Network and Trans-Asian Railways being promoted by the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP).

FIPB eases defence FDI norm

The Foreign Investment Promotion Board (FIPB) has decided not to reject proposals from a foreign company only because it or any of its group companies or their parent is under investigation in the country or abroad. The move is expected to pave the way for many foreign companies in the defence sector to make a comeback. They had not pushed plans in India for a joint venture or had even withdrawn from one because of the earlier bar.

No Relaxation of norms for CSR initiatives and rotation of auditors

The corporate affairs ministry has rejected the industry's demand for a relaxation in the norms on mandatory corporate social responsibility (CSR) spending and rotation of auditors outlined in the new Companies Act.

The new Companies Act of 2013, which replaces the Companies Act of 1956, requires firms above a certain threshold to spend 2% of their average net profit on so-called corporate social responsibility (CSR) initiatives. The Act also requires companies to rotate the auditors they use periodically.

The corporate affairs ministry is of the view that rules under the new Companies Act have been carefully drafted and, therefore, do not require any significant change.

Auditor rotation rules have been prescribed but they do not seem to consider the size of companies based on turnover or any measure of profit and loss account, but on the basis of balance sheet items.

The other major concern is the threshold of 2% CSR spend by companies in a year. According to the Companies Act, 2013, companies with a net worth of Rs. 500 crore or more, a turnover of Rs. 1,000 crore or more, or a net profit of Rs. 5 crore or more in a financial year are mandated to spend 2% of their profit towards corporate social responsibility. Industry had also sought relaxation and clarity on corporate governance; restriction on layers of subsidiaries; constitution of National Financial Reporting Authority, its oversight; appointment of auditors including mandatory firm rotation, limits on the number of audits; clauses on independent directors and the manner of their selection; power to compromise or make arrangements with creditors and members; merger and amalgamation of companies.

The retrospective implementation of the clause pertaining to rotation of auditors has particularly irked the industry.

The new law mandates companies to rotate their auditor after five years in case of an individual auditor and after two terms of five years each in case of an audit company.

Competition panel to probe Ericsson on Micromax complaint

The Competition Commission of India (CCI) had decided to commence an investigation into the company for possible violation of the country's Competition Act rules.

CCI will investigate whether the royalty payments that the Swedish company charges for its cellphone technology are too high and discriminatory..

The probe emanates from a complaint by Micromax Informatics, that Ericsson was charging higher royalties from some mobile phone makers than others and is abusing its monopoly position. Micromax was paying around 1.25% to 2% of the price of each handset sold as royalty fees.

Ericsson, the world's largest mobile network infrastructure player, holds patents on technology that is used in low-cost handsets, smart phones and tablet computers by Indian as well as multinational handset makers who in turn pay royalties. Handset makers enter into licence agreements with Ericsson on Fair, Reasonable and Non-discriminatory (FRAND) terms.

In March 2013, Ericsson sued Micromax for patent infringement in the Delhi High Court claiming about Rs. 100 crore in damages after three years of negotiations failed to yield a licence agreement on 'standards-essential' patents. on FRAND terms.

Micromax challenged Ericsson's fees in the Delhi High Court. Since talks between the two companies to reach an amicable solution failed, Micromax has filed a complaint to the CCI.

The CCI has now decided to refer the case to the Director General for an in-depth investigation.

No final timelines have been divulged on the duration of the probe by either company. However, the result of the probe could have a large impact on handset makers that depend on Ericsson's technology to compete with multinational players in the world's second-largest telecom market. It may significantly undermine the low cost business strategy of several domestic handset and tablet companies. It may also mark the beginning of a spate of litigation that may impact the Indian telecom handset and tablet space in the near future.

M&A rules for telecom cleared

In a move likely to encourage consolidation in the telecom sector, an empowered group of ministers

(EGoM) has cleared the final merger & acquisition (M&A) guidelines for the sector.

The EGoM has also decided to increase the quantum of 1,800-MHz spectrum to be put up for auctions in January to 403 MHz, an addition of 118 MHz, or 41.4 per cent, to what it had proposed earlier. The addition also means that an average 18 MHz of spectrum will be up for sale in each circle - enough for three to four operators.

An acquirer will have to pay the differential between the auction-determined market price and the administrative price for anything beyond 4.4 MHz in the GSM band and 2.5 MHz in CDMA, if an acquired company has got spectrum after paying administrative price. The M&A guidelines will now be sent to the Union Cabinet for its approval.

The ministers have also agreed to increase the earlier-proposed 35 per cent cap on market share (in revenue, as well as user base) for merged entities in a circle to 50 per cent. However, if a merged entity breaches this 50 per cent ceiling in any circle, the companies will get a year to lower the share to below 50 per cent.

On the three-year lock-in period during which companies are not allowed to transfer equities, the ministerial panel decided to maintain the status quo for now.

If an incumbent telco acquires another incumbent operator, it will not have to pay for the 4.4 MHz GSM spectrum, or 2.5 MHz CDMA spectrum, the acquirer had got as part of its licence agreement. It will only have to pay market price for the spectrum being acquired. But, if a new operator which has already bought spectrum through auctions decides to acquire an incumbent telco, it will have to pay market-determined price for the spectrum held by the company it is acquiring. On the other hand, if an incumbent operator buys a new operator, it will not have to pay anything for the spectrum it gets after acquisition.

The 50 per cent market share ceiling also gives incumbent operators more leeway to acquire other telcos; that would not have been possible under the 35 per cent rule.

Dongfang looks to buy Trichy-based power company

Chinese manufacturing major Dongfang is known to be in talks to takeover a Trichy-based power manufacturer called Cethar. The acquisition could help the Chinese manufacturer have a domestic presence which will not just help control its costs but also comply with the increased localisation needs that is being pushed for by the government.

Cethar, which was earlier known as Cethar Vessels, can manufacture both sub-critical and super-critical boilers, used in power plants. Apart from that, it can also design and construct thermal power plants up to a capacity of 800 MW. In 2010-11, it clocked in sales of around Rs 2,430 crore. The valuation of this company is around Rs 500-600 crore.

Cethar was founded by K Subburaj, who started it in Trichy as a sub-contractor to Bharat Heavy Electricals (BHEL). He had also worked for Indian Space Research Organisation (ISRO) before he started on his own. The company expanded into power manufacturing and then into a construction company for power plants.

Fallout of new US labeling norms

Indian pharmaceutical companies may have to brace themselves for a possible surge in lawsuits from patients and consumer groups in the United States if the regulator there goes ahead with its plan to grant generic drugmakers the freedom to update “newly acquired” safety warnings on their product labels.

The US Food & Drug Administration (USFDA) is currently inviting public comments on a proposal to allow generic drugmakers to independently update safety warnings on product labels, which it says can speed up dissemination of safety information to doctors and patients in the country. Additionally, generic drugmakers will have to inform the innovator drug firm making the branded drug about the change in label.

Under the current norms, generic drugmakers are not meant to change their product labels until the innovator drug firm updates safety warnings on the label of its corresponding brand name product. In effect, generic companies have no control over the labelling of their products and therefore cannot be held accountable for alleged inadequacies in those labels, a position that has been upheld in the US courts.

Currently, generic manufacturers are required by law to have the identical label as the reference brand.

Uniform safety information avoids confusion among patients, doctors, pharmacists and nurses, and assures all healthcare practitioners that they can rely on consistent information to inform their decisions and patient conversations.

Hitachi to invest Rs 4,700 cr in India by 2016

Hitachi has announced that it would invest another Rs 4,700 crore in India by 2016.

The aim is to expand capacities across business verticals such as construction machinery, information technology (IT) services, transport and power equipment. The move is part of a bigger strategy to expand its global footprint.

The expansion is aimed to triple the sales of Hitachi India Ltd to Rs 20,000 crore and raise local headcount by 5,600 over the period. The expansion will comprise providing services in the construction machinery and IT segments, apart from engaging in supplying urban transport equipment for the metro trains or monorails in India.

India currently accounts for only one per cent – Rs 6,700 crore – of Hitachi's global sales. The expansion will raise local sales to three per cent of the overall figure by 2016.

The company is looking at an opportunity to supply nuclear power plants in India, as part of another JV with US-based GE. India is part of the company's nuclear business interest outside of Japan, through GE-Hitachi Nuclear Energy.

It is also hoping to bid for supplying railway signalling systems, on the Dedicated Freight Corridor project which aims to connect Delhi with Mumbai and Kolkata through an only-cargo rail network.

Going forward, Hitachi plans to develop India as a base for exports to expand presence in Africa and West Asia/North Africa.

The company has so far invested Rs 2,300 crore in India, including a desalination plant at Dahej in Gujarat and a solar power generation project at Neemrana in Rajasthan.

Hitachi currently operates through 24 companies, with facilities across seven states, employing 7,508 people in India. The overall employee number is set to rise to 13,000 by March 2016.

RBI to relax norms for takeover of infrastructure loans

The Reserve Bank of India will soon relax norms for the takeover of infrastructure loans, allowing them to be treated as standard assets even if they are rescheduled during the process. Under the current rules, any rescheduled loan is treated as a non-performing loan (NPL) for which banks have to make provisions.

The new rules are expected to give a boost to refinancing by newly established infrastructure debt funds (IDFs).

IDFC has raised $1 billion while IL&FS has a Rs. 750 crore IDF ready for deployment.

The directive is expected to spell out that an infrastructure loan taken over by an IDF would be treated as standard asset and not as a rescheduled loan. IDFs were launched in 2011 to facilitate the flow of long-term funds to the infrastructure sector, but have seen little traction in the last two years.

India allows two types of IDFs – one of them operates as a mutual fund and is supervised by Securities and Exchange Board of India and the other kind operates as a non-banking financial company and is regulated by the Reserve Bank of India. IDFs have been facing difficulty in lending due to stringent norms governing the refinancing of loans.

The RBI directive will help ease lending by them. IDFs will act as vehicles for refinancing existing debt of infrastructure companies, thereby creating fresh headroom for banks to lend to new infrastructure projects. Typically, IDFs take over loans extended to infrastructure projects that are created through the public private partnership (PPP) route that have successfully completed one year of commercial production. This also helps clean up books of banks and prevents asset-liability mismatches that banks face in funding long-term projects from shorter tenure deposits of three-five years. Banks also have restrictions on how much they can lend to an individual project or a group. Credit enhancement by way of refinance through IDFs would ease some pressure on banks.

India had allowed take-out financing in the 2009-10 budget.

Winding-up plea not valid in case of damages

A lender cannot file a winding up petition against another entity to recover a claim arising out of 'damages' that remains unpaid, clarified the Bombay High Court in a landmark judgement.

The Bombay High Court, in the case between Solysnch Technologies and Maxx Moblink, clarified that a claim, if it is in nature of damages, then the lender cannot file a winding up petition for the recovery of its dues. If it is to be converted into a debt on the ground that the amount is admitted, the admission needs to be unequivocal and clear. It cannot be left to inference.

By its judgement, the Bombay High Court has expressed the view that a claim in damages, by its very nature, is capable of being disputed and therefore, cannot be treated as a crystallised debt. Hence, a claim in damages that remains unpaid cannot result in a legal action seeking the winding up of the debtor company. It is a very significant judgement as now companies will be restricted from using Section 434 of the Indian Companies Act to recover vague amounts as damages.

Solysnch Technologies entered into an agreement with Maxx Moblink in April 2011 for providing SAP application management services to the mobile phone maker. The agreement allowed for termination of services either by cause, change of control or convenience. However, in January 2012, Maxx Moblink terminated Solysnch's services by sending them an email, which was accepted. However, Solysnch demanded that Maxx pay them Rs. 58 lakh[2] as damages since the contract was terminated for convenience. But, Maxx Moblink maintained that contract was terminated for cause and hence, and hence they were not liable to pay them damages, following which Solysnch filed a winding up petition against Maxx Moblink.

The Bombay High Court makes it clear that the Companies Act cannot be used to recover money, unless it is a specific debt.

Damages are the financial consequences that arise from a breach of a contract or commitment, and include losses and expenses. The question of whether or not a breach of contract has occurred is capable of being disputed, since it depends upon the facts and circumstances of each case. As a result, a claim for damages is a disputable claim, and cannot form the basis for a winding-up action against the debtor company.

Bitcoin fails to gain currency with RBI

Reserve Bank of India (RBI) has raised a red flag, cautioning users, holders and traders of Bitcoins against the potential financial, operational, legal, customer protection and security-related risks they are exposing themselves to.
Bitcoin is a virtual currency, or crypto-currency, used only for online transactions. Though not backed by any central bank in the world, the currency is traded on a number of exchanges or swapped privately.

"The creation, trading or usage of virtual currencies (VCs), including Bitcoins, as a medium for payment, is not authorised by any central bank or monetary authority. No regulatory approvals, registration or authorisation is stated to have been obtained by the entities concerned for carrying out such activities," as per RBI.

According to RBI, since VCs are in a digital form and stored in electronic wallets, these are prone to losses arising out of hacking, loss of password, compromise of access credentials, malware attack, etc. Since these were not created by or traded through any authorised central registry or agency, the loss of e-wallet could result in a permanent loss of VCs.

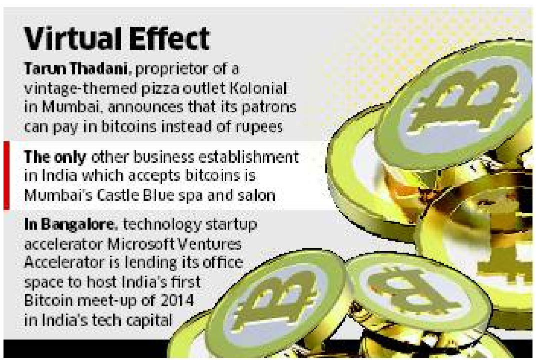
RBI has highlighted several risks from such

[2] *1 lakh = 100,000*

transactions. For example, since Bitcoins are used for peer-to-peer transactions without an authorised agency regulating payments, there is no established framework for recourse before customers. Also, there is no underlying or backing of any asset for VCs and their value seems to be a matter of speculation.

RBI said that since VCs were being traded on exchange platforms set up in various jurisdictions without a clear legal status, traders of such currencies were exposed to legal and financial risks.

At present, the Indian banking regulator is examining the issues associated with the usage, holding and trading of VCs under the extant legal and regulatory framework of the country, including Foreign Exchange and Payment Systems laws and regulations.



Mauritius tightens norms to check proxy tag on its investments

Long accused of being a route for avoiding taxes for foreign investments into India, Mauritius says it has put additional safeguards in place to thwart such wrong perceptions and to boost its image as a preferred global financial centre.

Mauritius' integrated financial sector regulator, Financial Services Commission (FSC), has put in place greater substance requirements for global business companies operating from its jurisdiction to ensure their substantial presence there, and not just a 'proxy address' to benefit from tax treaties with India and other nations. These additional requirements being imposed on Global Business Licence 1 (GBL-1) companies are expected to lead to the creation of more economic nexus between those companies and the economy of the island.

To further ring-fence its jurisdiction from any attempts of round-tripping and money laundering activities, Mauritius has agreed to include a limitation of benefits (L0B) clause in its revised tax treaty with India.

While specific details of this clause in the India-Mauritius tax treaty are being ironed out, LoB clauses are typically aimed at preventing 'treaty shopping' or inappropriate use of tax pacts by third-country investors. The LOB clause limits treaty benefits to those who meet certain conditions including those related to business, residency and investment commitments of the entity seeking benefit of a Double Taxation Avoidance Agreement (DTAA). Besides, a Tax Information and Exchange Agreement between India and Mauritius has been finalised. n.

India's share in the number of investments made by global companies through Mauritius has almost halved in the past two years because of uncertainties surrounding treaty benefits.

Cyprus may no longer be a tax haven for funds

After blacklisting Cyprus for not sharing information on tax evaders, India is now looking to take away the favourable tax treatment available to investors from the European tax haven under the bilateral tax treaty between the two countries.

India is looking to amend a clause in the 19-year old tax treaty that offers benefits akin to India-Mauritius double taxation agreement — exemption from tax on capital gains and a lower rate of 10% tax on interest, royalties and fees for technical services

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Cyprus is seventh on the list of countries sending foreign direct investment (FDI) to India as it is a tax-efficient route. India received $296 million as FDI from Cyprus in the April-September 2013 period out of cumulative flows of $7.19 billion.

India had, in November 2013, declared Cyprus as a non-cooperative jurisdiction and suspended tax benefits available under the treaty.

The non-cooperative jurisdiction tag meant that all payments made to Cyprus attracted a 30% withholding tax and Indian entities receiving money from there were required to disclose the source of funds and forego deductions of expenditure and allowances arising on account of a transaction with any entity from Cyprus.

Cyprus was the first tax jurisdiction to be dubbed non-cooperative under stringent penal provisions in the

2011-12 Budget to deal with countries that do not share information on tax evasion.

India subsequently softened and agreed to drop the tag after Cyprus included a detailed tax information exchange agreement in the bilateral tax treaty for active exchange of information.

India is keen to revisit the tax benefits available under the treaty just as it is doing with Mauritius. Mauritius has already indicated its willingness to incorporate a 'limitation of benefit' clause in the treaty to ensure only genuine investors benefit from favourable tax treatment offered by the pact. India's concerns stem from the alleged misuse of the treaty by investors from other countries that route their investments into the India to take advantage of the tax exemption.

Environmental clearance norms eased

The environment ministry has eased the environmental clearance process for industry, particularly at the state level. In some projects relating to mining of minor minerals, river sand mining, thermal power plants with less than 5MW capacity, the ministry has done away with the mandatory environmental impact assessments and public hearings.

The new guidelines follow the recommendations of an expert committee, set up in January 2013 under the chairmanship of the National Environmental Engineering Research Institute director to suggest ways to speed up clearances at the state level.

Projects that require clearances at the state level are referred to as "category B" projects with two sub-categories. Sub-category B1 refers to projects that require an environmental impact assessment and public consultation before clearance by the state authority or its counterpart in the Union Territories. While projects categorised as B2 are assessed for clearance on the basis of an application and a pre-feasibility report.

The new guidelines will mean that developers of brick earth and ordinary earth mining projects, with lease areas between 5 and 25 hectares would not be required to hold public hearings or undertake environmental impact assessment for their projects to be cleared. In June 2013, the environment ministry had exempted brick earth and ordinary earth mining in leases of less than 5 hectares from this mandatory requirement.

Minor minerals mining projects with a lease area of less than 25 hectares have been categorised as B2 and will also enjoy this exemption from assessment reports and public consultation.

In the case of sand mining, the ministry has said that the authorities should not consider any lease of less than 5 hectares for environment clearance. Sand mining projects with a lease of 5 to 25 hectares should be considered for clearance on the basis of a pre-feasibility report and the prescribed application form. Additionally, the ministry has set out six conditions for sand mining projects—mining must be manually done, maximum permissible depth of mining is three meters below the water level, mining in areas close to embankments, bridges can be undertaken only after a safety zone is worked out, no in-stream mining will be permitted, developers to provide replenishment plans. The environmental clearance for river sand mining project would be for a maximum period of 5 years.

However, if any case these mining projects are in a cluster, that is the maximum distance between leave boundaries is 1 km, then these projects will be categorized as B1 or projects that require environmental impact assessment and public hearings as part of the clearance process.

Similarly, the environment ministry has re-categorised projects like small thermal power plants, mineral beneficiation plants, cement plants, metallurgical industries, leather and hide processing industries.

Thermal power plants using coal, lignite, naphtha and gas, with generating capacity of 5 MW or less will not require environmental impact assessments and undertake public hearing to be considered for clearance. Similarly, all new units or expansion projects of leather production without tanning located within a notified industrial area or estate will enjoy the same exemption.

Tesco receives FDI approval

The government has approved Tesco Plc's plan to invest $110 million to buy 50 per cent stake in Tata Group's Trent Hypermarket Ltd (THL). With this, Tesco will become the first foreign player to open multi-brand retail stores in India.

The approval given by the Foreign Investment Promotion Board (FIPB) is expected to open the doors for future investments by foreign retailers.

According to the extant FDI policy, Tesco has to invest a minimum 50 per cent of the $110 million in creating new back-end infrastructure. Back-end infrastructure refers to packaging, logistics, storage and warehouse, among others.

Tesco wants to initially focus on Karnataka and Maharashtra where it already has 16 stores with partner Trent Hypermarket Ltd under different banners. For back-end infrastructure also, the company might focus on these two regions. The JV will operate in India through a chain of stores under various banners, including Star Bazaar, Star Daily, Star Market. Their tag line will say 'A Tata and Tesco Enterprise'. It has plans to open three to five stores every financial year.

According to another official, Tesco will not open any stores before the general elections, likely in May 2014.

Put and call options permitted for foreign investors

The Reserve Bank of India (RBI) has allowed foreign investors to use 'call' and 'put' options to structure their investments in India.

RBI has amended the foreign exchange management regulations to state that shares or convertible debentures containing an options clause but without any option/right to exit at an assured price shall be reckoned as eligible instruments to be issued to a person resident outside India by an Indian company.

A 'call' option allows a holder to buy shares in an entity at an agreed price while a 'put' option allows an investor to sell.

These instruments had remained out of RBI's favour as it was worried that they bring in foreign debt disguised as equity.

Put options, which give special rights to foreign investors to sell back equity if certain conditions such as timely listing are not fulfilled by the Indian company, were seen largely as facilitating debt flows that would go out after a certain period. The issue has been hanging fire since 2011 when the Department of Industrial Policy and Promotion (DIPP), through a press note, banned these instruments but soon retracted under intense lobbying pressure.

In 2013, RBI, the finance ministry, Securities and Exchange Board of India (Sebi) and DIPP reached an understanding to allow them with a one-year lock-in, after which Sebi announced changes in regime for listed companies in October.

Per the RBI notification, in the case of a listed company, the share price would be the basis of valuation, in the case of unlisted company, RBI has specified that the exit cannot be at a price in excess of that arrived at on the basis of return of equity as per the latest audited balance sheet.

The notification comes into effect from December 30, 2013.

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Chadha & Co. is a law firm based in New Delhi, India, with a strong Corporate and Commercial practice. The Firm has a specialized inbound practice in advising domestic and foreign corporations doing business in India on all Indian laws and regulations that are relevant to their business.

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