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Indian law firms are grappling with a flood of new legislation as they attempt to capitalize on the resurgent economy

By Vandana Chatlani

In recent weeks resurgent monsoon rains have brought chaos to India's capital city as it prepares to host the Commonwealth Games. India's legal professionals, however, face resurgence of a more welcome kind as they respond to increased business activity. With Indian corporates once again bullish about expansion, confidence among lawyers is on the rise. Now that the hard work of dismantling, rebuilding and reorganizing is drawing to a close, lawyers have begun to structure new deals, recruit new talent and get to grips with a plethora of new laws that will dramatically alter the country's legal landscape.

Legislative makeover

Legislative and judicial reform dominates the agenda as a stream of new bills are drafted and discussed by parliament. "Every major law is being changed and updated," says Aaron Solomon, managing partner of Solomon & Co in Mumbai.

Lawyers are wrestling with new legislation that will modify everything from the tax system, education and competition, to litigation, takeovers, securities and the price of shares issued to non-residents.

As part of new rules for listed companies, the government recently raised the minimum threshold for non-promoter public shareholding from 10% to 25%. "The impact is direct. It forces companies to determine whether they want to stay listed or go private because capital-raising is expensive," says Rajat Sethi, a partner at S&R Associates in New Delhi. "The squeeze-out provision is notoriously difficult for minority shareholdings in India. The government needs to provide an alternative."

While many of the moves have been broadly welcomed, opinions differ on the speed of implementation. "Reform of company law should be a priority," argues Rajan Gupta, a partner at SRGR Law Offices, referring to the Companies Bill, 2010, which is still pending before parliament.

Another development that is being anxiously watched is a master circular on foreign investment. The circular consolidates a deluge of press notes that came before it, but creates uncertainties of its own. "The intent to simplify has got lost and created confusion," notes Rabindra Jhunjhuwala, a partner at Khaitan & Co. "It's bit of a dampener for practitioners like me. There are multiple places where ambiguity exists."

"People wanted clarity on grey areas," says Aparajit Bhattacharya, a partner at Hemant Sahai Associates. But "the Department of Industrial Policy and Promotion hasn't sorted out these issues".

Other legislative changes signal a greater delegation of powers. "The last few years have seen the evolution of regulatory regimes in India; the Petroleum and Natural Gas Regulatory Board, the Central Electricity Regulatory Commission, the Airports Economic Regulatory Authority," says Vinod Dhall, founding partner of Dhall Law Chambers. "The liberalization of the economy has seen traditional regulators giving up their power."

All of this suggests that "the future lies in regulatory practice," says Ranji Dua, managing partner at Dua Associates. As a result he believes the "courts will go through a major overhaul with quasi-judicial bodies, tribunals, niche areas, etc."

Unclogging India's courts

Recognizing that the government is the country's dominant litigant, the law minister recently announced India's first national litigation policy (NLP), which aims to transform the government into a responsible and efficient litigant. In addition the government plans to focus on welfare legislation and weaker sections of society (see **News**, page 9).

Even before these changes come into effect, some lawyers are noticing improvements to India's infamously backlogged court system. "Litigation has become quicker in Delhi High Court where there's urgency on a matter," explains Bhattacharya. "Urgencies were disregarded earlier and they used to just give any convenient calendar day."

Pravin Anand, the managing partner of Anand and Anand, believes that "the dramatic reduction in the lifespan of litigation" is largely due to changes in the Civil Procedure Code. Highlighting improvements in case management by high court judges, he notes that "it is now realistic to finish a complex law suit within a year."

To reduce the number of pending cases, Delhi High Court recently launched its own arbitral institution, which has reportedly received 40 arbitrations in the last six months. "This is a neutral body that is not expensive like the London Court of International Arbitration. It is attracting domestic disputes, even if there's no arbitration clause," says Sumeet Kachwaha, the managing partner of Kachwaha & Partners.

As a result, Kachwaha says that trust in the arbitral process is growing. "The culture of arbitration is still evolving," he remarks. "We can't borrow from Hong Kong. We have to see what fits in with our ground realities. It has to be home grown."

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Aaron Solomon
Managing Partner
Solomon & Co



The future lies in regulatory practice

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Managing Partner
Dua Associates



Suman Khaitan, the managing partner of Suman Khaitan & Co, is even more enthusiastic about India's arbitration offerings. "Now India can compete with London, Paris, Singapore and Hong Kong as an arbitration venue," he says.

Not everyone, however, is convinced. Many observers believe that India has a long way to go before it can outdo Singapore. Nishith Desai, the managing partner of Nishith Desai Associates, says that "in some cases it's faster, better and cheaper to fly down to Singapore with your team and go to court there than going to Delhi and filing a case. They have user-friendly technology and the courts send you SMS messages. In some cases, counsel fees are also cheaper."

Although quasi-judicial bodies such as tribunals and arbitration centres may reduce the burden on the courts, some litigators are concerned. Ramni Taneja, a veteran in the field, is critical of what she calls the "tribunalization" of the judiciary. "There are a plethora of tribunals [which result in] disconnect and disharmony in the judicial cycle," she says.

Another concern is enforcement, and Manish Desai, the managing partner of Vidhii Partners, argues there is little desire to improve it. "Most lawyers are comfortable blaming the system," he says. "We thrive on it. It's easier to tell clients the system has failed."

"It's high time things should be done in the judicial system," says MP Bharucha, a senior partner at Bharucha & Partners. "Pay the damn judges more. [Otherwise] dedication wanes, leading to mediocrity."

Regulating competition

As M&A activity intensifies, lawyers are closely monitoring the development of India's new Takeover Code. These revisions, along with the Securities and Exchange Board of India's delisting guidelines, and the eventual notification of the Competition Act's merger control provisions will dramatically reshape how companies acquire strategic assets.

"General takeover activity, which increased over the past year, has slowed down in anticipation of the new code taking effect," says Feroz Dubash, a partner at Talwar Thakore & Associates. "Companies are waiting to see what the final version looks like," he adds.

"It seems to suit everyone to defer the regulations," notes Lalit Bhasin, the managing partner of Bhasin & Co.

However he cautions, "This is not a good signal. It introduces uncertainty to foreign and domestic investors."

Over the last year the Competition Commission of India (CCI) has settled into its role as India's new competitions watchdog. "Forty cases have now been filed with the CCI. Orders have been passed in eight cases," says Dhall of Dhall Law Chambers, who is a former acting chairman of the CCI.

Anand Pathak, the managing partner of P&A Law Offices, warns that staff recruitment and training are problems for the CCI. "It's going to take time for them to come up to speed with complex cases," he says. "A lot of the staff at the CCI are ignorant of economics and law. We can't expect them to pick it up overnight."

Tax changes raise red flags

India's new Direct Tax Code (DTC), which has been hotly debated over the last year, is expected to be in place by April 2011. "There will be some amount of bloodshed in the market," suggests Hemant Sahai, the managing partner of Hemant Sahai Associates. "It's radical. Conceptually it's a good idea, but a lot of people have serious reservations," he says.

"The way in which the DTC draft came was a disaster," says Desai at Nishith Desai Associates, accusing authorities of adopting a casual approach towards international treaties. "Tax laws are becoming more territorial ... There is a tendency to introduce retrospective amendments in large numbers whenever a new budget comes in. This risks upsetting transactions that have been settled."

"The DTC is raising red flags," agrees Attreyi Mukherjee, a senior associate at Paras Kuhad & Associates. "There were assumptions that the DTC would prevail over double tax avoidance agreements [DTAAs], but the government has clarified that DTAAs will prevail over the DTC."

Investor jitters have also been prompted by the Indian government's re-examination of the India-Mauritius DTAA. "Nearly 43% of FDI [foreign direct investment] in India comes from Mauritius," says Anand Kumar, a partner at private equity boutique Sand Hill Counsel. Kumar is concerned that any change to the capital gains exemption under the India-Mauritius treaty will not only impact the structuring of investments into India through Mauritius, but also those routed through Singapore. "The Singapore-India DTAA provides for similar capital gain exemptions," he says. "If the benefit under India-Mauritius treaty goes, the benefit under Singapore treaty also goes."

Pay the damn judges more

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The new goods and services tax (GST), which will take effect at the same time as the DTC, is another change lawyers are grappling with. "We're advising on loopholes; it's like a fresh piece of cake," says Badri Narayanan, a partner at Lakshmikumaran & Sridharan. "We're not able to fathom how it will turn out. It may be closer to the European GST which is origin-based taxed (i.e. where products originate) or a destination-based principle where rich states will get lower taxes. We have a team dedicated to examining these changes."

Calls for deregulation

Over the past year foreign investors have increasingly pressured the Indian government to liberalize its tightly regulated defence, retail, education and insurance sectors.

While the Foreign Educational Institutions Bill could lead to increased participation from overseas investors, observers point to the political challenges that it could throw up. Sawant Singh, a partner at Phoenix Legal, says there are major concerns about education becoming inaccessible to low-income groups. "The commercialization of education is something people try and steer clear from," he says.

Some observers believe the government should focus on upholding educational standards rather than controlling foreign participation. "[At present] if you want to invest in education, you have to be a trust, society or charity. You cannot attract foreign investors with that," says Premnath Rai, the managing partner of PRA Law Offices. "Why not corporatize? It's been done elsewhere. The government needs to set standards, not regulate who can participate!"

"Any sort of move to open up any sector is viewed as a sell-out," explains Singh. "The nuclear story was the same, multibrand retail is the same, banking is the same and insurance."

Despite this, lawyers continue to see activity in these sectors, with increased collaborations and joint ventures. "I see defence exploding," says Priti Suri, the proprietor of PSA. "There will be consolidation and more discussions, sharing and optimization of resources between companies."

Lira Goswami, a partner at Associated Law Advisers, is similarly upbeat. "There's a lot of interest, not just from tier-one companies, but tier-two companies as well. There's a 30% offset obligation in the defence sector and joint

ventures qualify as offsets, so this is an attractive route where even the foreign collaborator has a share in the pie," she says.

While foreign investors continue to monitor the insurance sector for signs of higher FDI caps, law firms in India are ramping up their insurance capabilities. "We've seen a lot more liability claims, a new spike which has exceeded US\$1.5 billion," explains Rajat Taimni, a partner at insurance boutique Tuli & Co. "There are new products in the Indian market and there are no precedents on how to deal with these products in the Indian context," he adds.

Awash with private equity

"Private equity and structured finance deals have picked up again," says Huzefa Nasikwala, a partner at Juris Corp. Indeed, resurgent investors are pouring funds into sectors as diverse as real estate, healthcare, microfinance, green technology and regulated areas such as education and retail.

"Many private equity funds have become sector-agnostic," notes Desai at Nishith Desai Associates.

"Private equity is looking at anything they can grow in three to five years – pipes and fittings, organic foods, fashion designing, etc.," concurs Vishal Gandhi, managing partner at Gandhi & Associates.

"We're seeing acquisitions on conventional and renewable projects and the return of private equity to roads, infrastructure, etc.," says Akshay Jaitly, a partner at Trilegal. "Proposals are going out ... people are putting their toes in the water and asking regulatory questions."

Moving beyond the metros

Investors are increasingly looking outside India's teeming metros for opportunities. Infrastructure and real estate developments are booming in smaller cities such as Ahmedabad, Agra, Jaipur, Jodhpur, Lucknow and Pune.

"We have acted as legal advisers for the Kandla port project and the container terminal in the New Mangalore port", says Suchitra Chitale, a partner at Chitale & Chitale Partners. "We have also assisted the Asian Development Bank in vetting the transmission agreement for the Jhajjar Power Transmission project; completed legislative drafting for the Meghalaya Infrastructure Development Act and the

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