

2020 VISION*Law firm leaders talk strategies***P.2****LANDMARK VERDICT***Breaking down the Essar Steel judgment***P.10****IN-HOUSE INSIGHT***GDPR: Key lessons learnt***P.12****ASIAN LEGAL BUSINESS****INDIA****E-magazine****Volume No. 6 / 2019****NEW YEAR BRINGS NEW PLANS**

At the time the e-magazine hits your inbox, it might still be too early to say Happy New Year, but the fact remains that the bulk of 2019 is well and truly behind us. And you will agree it has been an eventful year – both at the macro-level in terms of the legislative, regulatory and political events of 2019, as well as at the micro-level, where law firms have seen their industry and practices evolve and transform. And it is to make sense of the year gone by that this issue features a roundtable of law firm leaders, where they discuss the obstacles they have been facing, and their strategies for 2020.

Like those law firm leaders, we here at ALB are using this period to further refine the India e-magazine. When we sent out the first issue in February this year, we had no idea that it would be so well-received by the market, and now that we are six issues in, we look forward to making this publication increasingly relevant for a fast-changing market. For that purpose, we look to you, our dear readers, to let us know what you liked and what you didn't like, and what we can do to make this e-magazine even more indispensable to you. Please use the email address on the right to let me know. – **RANAJIT DAM**

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CONSTANT EVOLUTION

The Indian legal market appears to be always in a state of flux, evolving and throwing up new opportunities and challengers for lawyers, and 2019 was no different. As another eventful year comes to an end, leaders at four Indian law firms discuss their challenges and how they overcome them, and also look ahead to 2020. **BY APARNA SAI**

What were some of the challenges your firm faced during the year? What were some of the important lessons you learnt as a law firm leader?

AJAY SAHNI, managing partner, Ajay Sahni & Associates: Key challenges included continuously innovating to keep up in an increasingly diverse and competitive legal marketplace and the ability to retain young talent. One of the most important lessons is to understand that the dynamics of the legal industry are constantly evolving and if you don't shape up, you will ship out very swiftly.

SHIVANI SHAH, partner, Kay Legal & Associates: The major challenge was to retain the pool of talent and resources. The firm has invested in retaining and training these young lawyers and is working hard to keep them.

Change and learnings are the only constants in life. The past year has made me analyse and introspect on the way I want to lead the firm in the future. I believe that people matter and teamwork is of utmost importance. My endeavour is to deliver practical solutions and focus on learning and cultivate specialized practices within the firm to keep up with the changing environment.

KUNAL THAKORE, partner, TT&A: In terms of challenges, I think managing talent was an important theme through 2019, and one that we think will continue



AJAY SAHNI



SHIVANI SHAH



KUNAL THAKORE



ABHISHEK TRIPATHI

Profile



KAY LEGAL & ASSOCIATES LLP

Kay Legal & Associates LLP is a full-service law firm, established in 2011 having offices in Mumbai, Pune and Delhi. Being an energetic and dynamic firm, it is founded on the simple yet effective principles of trust, integrity and hard work. The stimulating work environment brings together the best legal brains at the Firm to take care of the legal needs of our clients. A strong team of lawyers consists of experienced, dynamic, enterprising and innovative legal experts having outstanding academic and professional records. The Firm has a well-established corporate practice that offers a broad range of transactional and advisory services to institutions, entrepreneurs as well as public and private companies. Our key areas of practice include Dispute Management & Commercial Litigation; Corporate & Commercial; Intellectual Property Rights, Compliance, Insolvency & Bankruptcy; Regulatory Affairs; Intellectual Property, Family Law, Testamentary laws, Employment & Labour laws and Banking Laws. Under the able guidance of the Partners who are leading experts in various areas of law, highest standards of services are maintained and seamlessly delivered



Ms. Shivani Shah

Partner

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to clients. With host of national & international affiliations with best-in-class Law Firms & Legal Networks, we cater to the service requirements of a global market & reach for our client's businesses. A fair mix of experience and youthful exuberance sets apart Kay Legal & Associates LLP from other law firms in the country. We are committed to earn the trust of the client, and more diligent to maintain and preserve it. By always putting our clients' first, we build genuine long-lasting relationships based on traditional values and the principles. We as a Firm strive to be unique and distinguished where clients deserve a highly skilled,

ethical and reasonable representation. We endeavour to make use of cutting - edge legal and business technologies and methodologies to assure quality legal services. An ambition to be a leading law firm underlines our business strategy. We strive to achieve this aim through sustained investment in effective technological resources, knowledge management, relation management, communication networking and vast research on recent developments in economic and legal spheres. We incorporate in our vision a strong belief in covering that extra mile to aid a client in achieving the desired results. So, with the exigencies of the modern business and increased competition, prompt execution of work is our main concern.

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Medico Legal Consultants**

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to be in the years to come. This relates to managing expectations and attrition rates in general. Expanding in-house teams as a result of expanding regulation and the evolution of the in-house legal role in India more generally has meant that lawyers now have a number of options. Casting the net wider, there is also increased realization of the skillset that lawyers have as a result of their education and experience, which they can use to contribute (even when fresh out of law school) in areas unconnected to the law. All this has resulted in talent being difficult to find, particularly at the junior and middle level. Our response has been to increase recruitment especially through our internship programme and then investing in our team. Everyone understands this is a hard profession – but we have implemented a number of changes and tried to ease things for associates to the extent we can: moving to a more casual workplace; for instance, enabling people to work from home. All of this seems to resonate.

“CLIENTS TODAY ARE COMPARATIVELY CONSCIOUS ABOUT THEIR RIGHTS AND LAW PER SE YET FAIL TO UNDERSTAND THE UNCERTAINTIES INVOLVED IN LITIGATION. CLIENTS ARE NOW LOOKING BEYOND JUST LEGAL ADVICE AND WANT THE FIRM TO STRATEGISE AND ORGANISE THEIR BUSINESS, MAKING US GO THAT EXTRA MILE TO PROVIDE THEM WITH SOLUTIONS BEYOND LAW.”

– Shivani Shah, partner, Kay Legal & Associates

ABHISHEK TRIPATHI, managing partner, Sarthak Advocates and Solicitors:

Some of the challenges that we faced in 2019 are as follows:

- *Recovery of invoices:* Due to general slowdown in the infrastructure sector and the economy, we have seen an increase in our recovery cycle and credit period. This has increased the need for prompt billing, and invoicing, to avoid piling up of massive outstandings.
- *Automation:* We have implemented a new ERP and accounting system

in our firm, to improve automation and have more efficient counsel time management. The process had significant learnings for us both in the process of its implementation as well as in the results that it has delivered. The process has made us ever more convinced of the need to automate our processes and introduce AI in our service delivery.

- *Hiring:* Hiring the right talent to fit the firm's requirements both in terms of capability as well as the ability to gel in the firm's culture has been a

“CLIENTS EXPECT COUNSELS TO UNDERSTAND BUSINESS FROM THEIR PERSPECTIVE AND DELIVER RELEVANT, BUSINESS-FRIENDLY SOLUTIONS. TO MEET CHANGING DEMANDS, WE HAVE CONSCIOUSLY TAKEN TO REASSESSING HOW WE PERCEIVE ISSUES FACED BY CLIENTS AND TAILOR BESPOKE SOLUTIONS AROUND IT – BECAUSE A ONE-SIZE-FITS-ALL APPROACH DOESN’T WORK ANY LONGER.”

– Ajay Sahni, Ajay Sahni & Associates

challenge. We have succeeded in some cases, and failed in others, learning along the way. Some of our hires have come from newer law schools, and their capabilities have come as a pleasant surprise for us.

What were some of the changes you have witnessed in the industry in terms of the legal work on offer, as well as what clients require from their external counsel?

SAHNI: Globalisation, digitalisation and an increased focus on cost optimization demand a new approach to address heightened expectations of clients. The new approach entails having a composite blend of 3 Ts – technology, transformation and trust. All three must coincide, alongside the drive to deliver value to clients anchored on 3 Es – effective, efficient and ethical. Clients expect counsels to understand business from their perspective and deliver relevant, business-friendly solutions. To meet changing demands, we have consciously taken to reassessing how we perceive issues faced by clients and tailor bespoke solutions around it – because a one-size-fits-all approach doesn’t work any longer. Among the many changes, minimisation of litigation, single-window solutioning, extensive use of technology both as a service delivery platform and as a tool to optimize routine work such as compliance management, are a few that are gaining popularity. All law firms are trying hard to adapt to changing needs, while juggling with competitive price points and stiff competition.

SHAH: The past few years have witnessed a significant overhaul in the legislation with regards to litigation. With the coming of Insolvency and Bankruptcy Code, 2016 (IBC) and the Real Estate (Regulation and Development) Act, 2016, the litigation practice has seen a massive change. Clients today are comparatively

conscious about their rights and law per se yet fail to understand the uncertainties involved in litigation. Clients are now looking beyond just legal advice and want the firm to strategise and organise their business, making us go that extra mile to provide them with solutions beyond law. A basic more for less is what every client is looking for. Based on the client, we provide innovative pricing models and efficient processes for delivering legal services. Our strength lies in ability to be more adaptable to change and provide timely and cost-effective solutions.

THAKORE: In terms of trends in workflow, we have witnessed an increasing emphasis on compliance. This is across the industry spectrum and applies to regulations that are industry specific (financial regulation for instance) and those which have a more broad-based impact (such as anti-trust and data protection). We had to focus more on these areas as a result, but the same is equally true for our clients who are actively investing to ensure that they have an internal resource that is focused on issues affecting them and their industry. We think this is a positive for us actually, perhaps counter-intuitively, because this translates into a higher level and value add discussion with our clients, ultimately resulting in a much more meaningful and involved engagement with them. Expanding regulation also translated into more structured and complex transactions. These tend to be fewer but require us to be much more involved at

all stages, which we believe plays to our strengths and allows us to support our clients in the way we know best.

TRIPATHI: There is greater emphasis on legal and regulatory compliance, which has grown the stature, size and competence of the in-house legal teams. External counsels are, therefore, expected to provide more specialist advice. Also, with increasing emphasis on legal compliance, the clients are more proactively looking for a lawyer, whether in in-house role or on secondment from law firms to sit and oversee legal affairs from within the client’s office. Secondment as a practice is on the rise, and is likely to rise further.

What are some of the trends you expect to see in the Indian legal market in 2020? Where do you feel are the big opportunities for firms like yours?

SAHNI: On the law firm side, there is an increasing shift towards ‘uberisation’ of employees, skills, workplaces and infrastructure. While cost seems to be the main factor driving this, other factors such as ‘ease of doing business’ and a ‘no-frills, no-formality’ hands on approach to business play a significant role. Clients are no longer willing to pay a premium for expensive workplace and infrastructure, rather the focus is on delivering value and expertise in a timely and accessible manner.

On the client side, there is a shift towards maximizing work that can be executed in-house. Companies are expanding their in-house legal teams and hiring more subject matter experts and specialists. Therefore, there is a change in the kind of role clients expect an external counsel to play. With many companies doing compliance/regulatory work almost entirely in-house, there is demand for counsels with deep, focused expertise who can troubleshoot with ease. There is also increased ask for assurance services such as internal audits and compliance

“WITH INCREASING EMPHASIS ON LEGAL COMPLIANCE, THE CLIENTS ARE MORE PROACTIVELY LOOKING FOR A LAWYER, WHETHER IN IN-HOUSE ROLE OR ON SECONDMENT FROM LAW FIRMS TO SIT AND OVERSEE LEGAL AFFAIRS FROM WITHIN THE CLIENT’S OFFICE. SECONDMENT AS A PRACTICE IS ON THE RISE, AND IS LIKELY TO RISE FURTHER.”

– Abhishek Tripathi, managing partner, Sarthak Advocates and Solicitors

The Parity Conundrum: CCI to show the light?

The Competition Commission of India (CCI) recently had its first brush with parity clauses, more commonly known as ‘most-favoured nation’ (MFN) clauses.

In a complaint filed by the Federation of Hotel & Restaurant Associations of India against MakeMyTrip (MMT), Go-Ibibo and OYO, it was alleged that hotels listed on the MMT platform were prohibited from offering lower prices, both on the hotel’s website and also on competing platform. It was similarly alleged that hotels are mandated to provide same-quality rooms for listing on MMT’s platform, as listed on other competitor platforms.

In its preliminary analysis, the CCI noted that MFN clauses are typically categorized as wide and narrow. Narrow MFN clauses require a seller to maintain parity between prices & other terms offered to a platform vis-à-vis the seller’s website. On the other hand, wide MFN clauses require a seller to offer a platform the same/more favorable terms than those on the seller’s website as well as on any other sales channel. Thus, wide MFNs typically impose more significant restrictions on a seller’s ability to compete on price and quality.



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The CCI observed that the use of wide MFNs is potentially anti-competitive, as it lowers a platform’s incentive to compete on commissions and also results in higher prices for end-consumers. Further, if a platform is dominant, wide MFNs could amount to imposition of unfair and exploitative terms on vertically-related entities. The use of MFNs could increase market concentration and raise entry barriers, and therefore merit review by competition authorities. Given this, the CCI noted that MMT’s use of wide MFN clauses with hotel partners required investigation.

While there is generally some

consensus that wide MFNs may raise competition concerns and require regulatory intervention, the position on narrow MFN clauses is less clear. A German Court recently ruled that narrow MFN clauses were necessary for platforms to protect investments made on their websites, to prevent ‘free riding’. The UK competition authority has similarly found that narrow MFN clauses do not infringe competition rules. However, narrow MFN clauses have been expressly prohibited in other antitrust jurisdictions (Italy, France, Belgium and Austria). One proposed approach for the assessment of narrow MFN clauses has been to link its usage with an entity’s market shares. Given this divergence of views across different competition authorities, it will be interesting to note how the CCI sets out its assessment of (wide and narrow) MFN clauses in its final order in the MMT, Go-Ibibo and OYO case.

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health-checks. Dispute resolution and litigation, though, continue to remain in the exclusive domain of law firms. For specialized law practices like ours, the opportunity lies in delivering quick, efficient and expert assistance to clients that complement their in-house teams.

SHAH: The current trends are reshaping the legal sector and we as a small-sized firm need to position ourselves to survive the booms and busts of the economy. We feel that corporate litigation is thriving currently, and the trend does not seem to change in the near future. Due to a steady economy and flat demand, we have to embrace innovative solutions and strategies to drive new revenue and acquire new clients. Opportunities are galore for a young firm like us but to sustain and deliver constant and positive results to clients is what we aspire for.


THAKORE: 2020 will see us continue to focus on the areas discussed above,

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— Kunal Thakore, partner, TT&A

which combined with our shape and size (with good dose of patience) makes us confident to face what promises to be an exciting year ahead.

TRIPATHI: 2020 may offer newer opportunities for younger and smaller law firms, particularly with the clients facing financial difficulties and becoming more cost conscious. With larger players in the infrastructure sector facing the brunt of insolvency, emerging players provide opportunities for newer breed of lawyers and law firms. We hope to leverage our expertise

and experience in power and infrastructure sector with the newer and younger entrants. Automation and use of AI in delivery of legal services too may see rise, and early movers may have an advantage. It also appears that 2020 will see greater tie-ups between firms in tier-1 and tier-2 cities. Firms, like ours, that are willing to do tie-ups to increase their pan-India footprint, may be able to bag better client mandates. 2020 may also see increase in institutional arbitration, which opens opportunities for firms like ours which have a special focus on arbitrations. 

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THE BATTLE FOR TALENT

One of the biggest challenges that India law firms are facing today is attracting and retaining the best lawyers. Recruiters say that there has been considerable demand for corporate lawyers this year, with many choosing mid-tier outfits over more established firms. **BY APARNA SAI**

WHAT WERE THE MAJOR TRENDS IN INDIA WHEN IT CAME TO THE RECRUITMENT OF PRIVATE-PRACTICE LAWYERS IN 2019? DO YOU EXPECT THESE TO CONTINUE IN 2020?



IGNATIUS

Lee Ignatius
co-founder and head of Private Practice Group, Vahura

We've witnessed a good year of expansion for most law firms - be it capacity expansion at top law firms, practice and geographical expansion for mid-sized law firms, as well as specialist expansion across boutique or break away practices, each seeking to draw deep client value according to their strengths. This expansion has created a considerable demand for mid to senior level (two to eight years) professionals across firms, and a slight imbalanced supply of professionals for more sophisticated M&A, PE, and complex high-value disputes practices, or economy-driven specialist practice areas like IBC and white-collar disputes amongst others. In the next year, we expect to see more expansion in defensive practices like litigation, forensics, and compliance, in addition to growth practices like M&A and PE.



SHARMA

Dinesh Sharma
founder, Personnel Junction

The year 2019 has been the year of some very interesting trends in terms of recruitment within the legal arena. We often come across candidates who want to shift from larger firms to mid-tier ones - either eyeing a better and senior role (where they expect their presence and work to be recognised, which sometimes doesn't happen in larger firms), or trying to strike a work-life balance, or both.

It mostly is a win-win situation for the not-so-large law firms as well, as they give them much-needed brand value in this

ever-competitive sector, and as a result, they may pitch-in for larger clients and better quality work.


Law firms are focusing on poaching teams rather than a single hire, to build, expand, and strengthen their practice. Other than this, we've also seen the merging of smaller firms with bigger firms or the coming together of two firms of more-or-less equal stature, to become more competitive. I strongly believe these trends will continue at least for the next few years.

Sarabjeet Kaur
founder, Yellow Wire Consulting

The recruitment trends of private-practice lawyers can be seen from two lenses - hiring at the partner and the associate level.

Law firms these days prefer to hire mid-level lawyers who can be groomed easily, and eventually put on the partnership track. Also, lateral hiring at the partner level (with more preference being given to partners having their book of business) is popular as it allows firms to expand their practice areas, or further strengthen existing practices. GCs are also shown a keen interest in joining law firms so they can head a practice.

The struggle to hire quality associates remains, and this can be attributed to law firm interns not being given quality work to do during internships. Law colleges and law firms need to do a better job in this regard.

We have also seen experienced lawyers continue to set up specialised practices instead of trying to launch full-service offerings. Soon, we can expect to breakaway firms integrating with other firms to build scale. 



KAUR

India's privacy bill seeks access to users' data from companies

Changes to India's privacy bill could cause trouble for Facebook, Google and others as proposals include government powers to request user data to help forge policies.

The Personal Data Protection Bill, circulated to parliament members recently and reviewed by Reuters, was keenly awaited by top technology companies as it could affect the way they process, store and transfer Indian consumers' data.

The bill's latest version introduces a provision empowering the government to ask a company to provide anonymized personal data, as well as other non-personal data, to help target the delivery of government services or formulate policies.

The bill defines "personal data" as information that can help identify a person and has characteristics, traits and any other features of a person's identity. Any other data is non-personal, the bill said, without elaborating.

"For companies, even non-personal data is wealth and such a legal provision

is likely to cause panic at big technology companies," said Supratim Chakraborty, a partner specializing in data privacy at Khaitan & Co.

Defending the move, a senior Indian government official said such data was "also wealth for the society", citing an example that data from a company like ride-hailing business Uber could help the government understand public transport constraints and further develop the local train network.

"The bill doesn't say this data will need to be given free ... subsequent rules will offer clarity on payment for such data," the official added.



The bill will be presented in parliament soon and a panel will likely review it further, Reuters had reported earlier.

The bill also said large social media platforms should be required to offer a mechanism for users to prove their identities and display a verification sign publicly, a move that would raise a host of technical issues for companies including Facebook, WhatsApp and Chinese app TikTok.

"Sensitive personal data", which includes financial and biometric data, could be transferred outside India for processing, but must be stored locally, the bill said.

The privacy bill is part of India's broader efforts to tightly control the flow of data and is seen helping government agencies for investigations. U.S. firms have lobbied against such data rules around the world, fearing increased compliance costs.

Internet company Mozilla Corp. said the bill's exceptions for government to use data and proposed verification of social media users represented "new, significant threats to Indians' privacy".

"If Indians are to be truly protected, it is urgent that the parliament reviews and addresses these dangerous provisions before they become law." ^{AP}

Appointments



**Vivek
AGARWAL**

LEAVING
Shardul Amarchand
Mangaldas

JOINING
DMD Advocates

PRACTICE
Competition

LOCATION
Delhi

POSITION
Partner



**Bharat
BUDHOLIA**

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**Sanjay
GUPTA**

LEAVING
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PRACTICE
Dispute Resolution

LOCATION
Delhi

POSITION
Partner



**Joseph
JIMMY**

LEAVING
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Mangaldas

JOINING
Trilegal

PRACTICE
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LOCATION
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POSITION
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**Zubin
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**Dhruv
SINGHAL**

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PRACTICE
Corporate

LOCATION
Mumbai

POSITION
Partner

THE ESSAR STEEL VERDICT

Touted as a landmark judgement, the recent verdict of the Supreme Court in the Essar Steel insolvency case brings to an end to the biggest stressed-asset case under the Insolvency and Bankruptcy Code 2016 (IBC). What remains to be seen is if the ruling, which upheld the rights of secured creditors, is likely to set precedence for similar cases in the future. **BY APARNA SAI**

Why is the Essar Steel verdict important?

The insolvency case of Essar Steel, one of India's original "Dirty Dozen" referred by the Reserve Bank of India to the National Company Law Tribunal for a corporate insolvency resolution process under the IBC, spanned nearly three years. It culminated in the Supreme Court of India rejecting the National Company Law Appellate Tribunal's (NCLAT) decision, and ruling in favour of the Committee of Creditors (CoC) on how the funds from the 420-billion-rupee (\$5.9 billion) offer by winning bidder ArcelorMittal would be distributed among the creditors. The ruling supported the rights of secured creditors by going along with the CoC's decision on a resolution plan that gave secured creditors 92 percent of their claims.

The NCLAT's suggestion, on the other hand, gave secured creditors only 60 percent of their claims.

Lawyers tout the judgment as a landmark one. Atul Sharma, managing partner of Link Legal, believes that the judgment has recognised the overall supremacy of the CoC formed under the IBC, and the clear distinction between the secured and operational creditors. "In effect, as per this judgment, the adjudicating authority may not be empowered to interfere with the commercial decision taken by the Committee of Creditors including the distribution of funds amongst various creditors," he says. "The clear message conveyed by way of this judgment is that the unsecured creditors including operational creditors can't be equated with secured financial creditors."

What is the expected impact on distressed assets?


According to Sharma, ever since the IBC was introduced, the Indian distressed debt

market has seen an enormous amount of interest from funds, with investors keen on acquiring such assets. "Before this verdict, there were uncertainties with respect to the resolution amount and distribution mechanism between the financial and operational creditors. With this, the rights of financial creditors over the unsecured/operational creditors has been restored. This will make the cost of acquisition of assets by resolution applicants for funds attractive," he says.

How can the IBC be made more effective?

When it was passed in 2016, India's IBC was hailed as a landmark reform; however, since then the results have been mixed. Cases are mired in litigation, timelines have not been adhered to, and the law itself has been amended a couple of times. Lawyers feel that more could be done to ramp up the bankruptcy infrastructure for quicker and effective resolution.

Sharma wants further steps to be taken, particularly in relation to cross-border insolvency, group insolvency and pre-pack settlements. While there has been some success, he says, the process is slow and regular intervention of the adjudicating authority and resultant appeals have, to an extent, reduced the enthusiasm. "The recent Notification of the Rules of Resolution process in relation to the personal guarantors might give a small fillip to the process of restructuring," notes Sharma.

In August, India's parliament passed the Insolvency and Bankruptcy Code (Amendment) Bill 2019, in which one of the key amendments sought to tighten the deadlines for resolution under the IBC. A mandatory timeline of 330 days was set, including any interim litigation period. 



ATUL SHARMA

\$1.08 BLN

ADIA, NIIF, and PSP's acquisition of stake in GVK Airport Holdings

Deal Type: M&A

Firms: AZB & Partners;

Cyril Amarchand Mangaldas

Jurisdiction: India

\$692 MLN

Essel Group's sale of stake in Zee Entertainment to OFI Global China Fund and others

Deal Type: M&A

Firm: Cyril Amarchand Mangaldas

Jurisdictions: India, China

\$650 MLN

Zurich Airport's winning bid for a proposed international airport at Jewar, Uttar Pradesh

Deal Type: Projects

Firm: DSK Legal

Jurisdictions: India, Switzerland

\$450 MLN

Muthoot's U.S. dollar-bond issue

Deal Type: DCM

Firms: AZB & Partners; Khaitan & Co

Jurisdictions: India, Singapore

\$191 MLN

Blackstone Group's investment in Aakash Educational Services

Deal Type: M&A

Firms: S&R Associates;

Shardul Amarchand Mangaldas;

Trilegal

Jurisdictions: India, U.S.

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Companies Who Attended this Year's India In-House Legal Summit 2019

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18 MONTHS OF GDPR: KEY LESSONS FOR CORPORATE ORGANIZATIONS

BY SUBHRARAG MUKHERJEE



This article highlights certain important lessons that organizations can draw based on a review of certain key GDPR breach incidents and resultant investigation and imposition of penalties by the data protection authorities since the GDPR came into effect on May 25, 2018.

IMPORTANT INSTANCES OF GDPR BREACHES AND RESULTING FINES


- **Marriott International, Inc. (UK):** A cyber incident related to guest records (which included 30 million EU resident records) of Starwood hotels was compromised in 2014. The exposure of customer information was discovered much later by Marriott following its acquisition of Starwood hotels in 2018. The data protection authority sent a notice in July 2019 indicating its intention to fine the company approximately 110.3 million euros (\$123 million) for breach of Article 32 of GDPR.
- **British Airways:** A cyber incident, believed to have begun in June 2018, was notified in September 2018. The cyber incident involved user traffic to the British Airways website being diverted to a fraudulent site leading to unauthorised harvesting of the details of approximately 500,000 customers by the attackers. The data protection authority sent a notice in July 2019 indicating its intention to levy a fine of approximately 204.6 million euros for breach of Article 32 of GDPR.

- **Google (France):** Complaints were filed by two organizations relating to the way consent was taken by Google while creating a user account during the configuration of a mobile phone using the Android operating system. The data protection authority noted that the consents obtained were generic and was ambiguous. A fine of 50 million euros was imposed in January 2019 for breach of Articles 4, 5, 6, 13 and 14 of GDPR.
- **Delivery Hero (Germany):** Accounts of 10 former customers had not been deleted, even though the data subjects had not been active since many years. In addition, eight former customers had previously complained about unsolicited advertising emails. A data subject who had expressly objected to the use of his data for advertising purposes had received 15 advertising e-mails even after his objection to such unsolicited contact. A fine of 195,000 euros was imposed in September 2019 for breach of Articles 15, 17 and 21 of GDPR.

LESSONS FOR BUSINESS ORGANIZATIONS, LEGAL COUNSELS AND INFORMATION SECURITY TEAMS

Some of the organizations enlisted hereinabove have recently filed an appeal against the decision, and in some other cases, the organizations may be evaluating the various legal options available to them. Irrespective of the final position on the claim of GDPR breach and

imposition of penalties on these various incidents, they provide valuable lessons for business, legal and information security teams that want to minimize the risks of GDPR breach:

- (a) Lawyers handling M&A transactions need to incorporate necessary language in the governing contracts to mitigate the risk of either a deliberate non-disclosure of a data incident, or negligent oversight of weak data security processes and policies, of the target company.
- (b) Upon acquisition of the target company, the acquirer needs to review and update the information security processes and policies of the target organization, and notify data security breaches/incidents (if any) at the earliest possible opportunity.
- (c) The data subject's consent needs to be "specific" and "unambiguous." Using pre-check boxes or grouping of many purposes and processing activities together in the consent declaration may be seen as improper consent under the GDPR requirements.
- (d) Acts or omissions like non-deletion of accounts of former customers, or unsolicited contact with existing or former customers, are seen as a serious breach of the data subject's privacy rights. 



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