

KEY LEGAL DEVELOPMENTS OF 2018

JANUARY 2019

The year 2018 has witnessed significant legal developments. Our Newsletter, which is a summary of key legal developments in the last 12 months, covers some of the major changes brought in 2018. The changes are vast & therefore, we focus on some of the key changes, which broadly impact the corporates for their “Way of Doing Business in India”.



This Newsletter identifies the key legal developments & issues, we expect to be on the legal agenda of the corporates for the year 2019.

Sector

Update



Investment in India

1. **Single Master Form:** On June 7, 2018, the Reserve Bank of India (the "**RBI**") issued a circular RBI/2017-18/194 A.P. (DIR Series) Circular No. 30 (the "**Circular**"), introducing a single master form (the "**SMF**") to integrate the existing reporting norms for various types of foreign investment in India with an objective- To subsume all foreign investments related reporting requirements, irrespective of the mode or instrument through which the foreign investment is made. **All Indian entities which do not comply with this pre-requisite will not be permitted to receive any foreign investment (including indirect foreign investment) going forward and will be declared non-compliant with FEMA.**
2. **Cross Border Mergers:** The Reserve Bank of India has notified The Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("**Regulations**") w.e.f. March 20th, 2018. With notification of S.234 of the Companies Act, 2013, both inbound and outbound mergers are been permitted, as earlier only inbound merger was permitted under Companies Act, 1956. Government has also amended the Companies (Compromise, Arrangement and Amalgamations) Rules, 2016 and inserted Rule 25 A which deals with cross border mergers. The notification of these Regulations along with amendments in the Companies Act, 2013 has opened door for cross border mergers in India. This will now give flexibility and options for MNCs in structuring their merger deals involving Indian companies as India has allowed outbound mergers. The provision of automatic approval of RBI subject to compliance with requisite conditions will save time and fasten the restructuring process which will in turn help in achieving the commercial objectives. Outbound merger which has now permitted can also be seen as a better option for MNCs to exit India instead of going for liquidation of its Indian JV/WOS. Such exit also such MNCs to continue to treat the Indian office as its branch office if it so desires.

Sector

Update



Company Matters

1. **Commencement of Business-** At present, there is no minimum paid up capital requirements for incorporating the private as well as public companies in India. Also, it is now mandatory for every company having share capital to file a declaration that the subscribers have paid the value of shares subscribed by them within 180 days from the date of incorporation along with a verification of its registered office. No company is now permitted to commence its business or exercise its borrowing powers without complying with this requirement.
2. **Significant Beneficial Ownership-** With the implementation of Section 90 of the Companies Act, 2013, the Central Government has also issued new Companies (Significant Beneficial Owners) Rules, 2018 ("**SBO Rules**") to implement the provisions of Section 90. The SBO Rules define the expression 'Significant Beneficial Owner' to mean every individual, who acting alone or together with one or more persons or trust, including a trust and persons resident outside India, holds beneficial interest, of at least 10%, in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in Section 2(27) of the Companies Act, 2013, but whose name is not entered in register of members of a company as the holder of such shares. SBO Rules have been made applicable even to cases where the shareholders/members of the Indian company are persons other than individuals and natural persons. The term 'Beneficial Interest' in a share has been defined to include the right or entitlement of a person (without being a registered owner of such a share) to (i) exercise or cause to be exercised any or all the rights attached to the share; or (ii) receive or participate in any dividend or other distribution in respect of such a share. Further, the definition provides that such rights may arise out of any contract, arrangement or otherwise and may be exercised by such a person directly or indirectly, either alone or together with any other person.

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Company Matters

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3. **Maternity Leaves for female employees-** The maternity leave to eligible female employees under the Maternity Benefit Act, 1961 has been extended from 12 weeks to 26 weeks. The Act is applicable on establishments having 10 or more employees. Also, the Ministry of Labour & Employment is working on an incentive scheme wherein 7 weeks' wages would be reimbursed to employers who employ women workers with wage ceiling upto Rs.15,000/- and provide the maternity benefit of 26 weeks paid leaves, subject to certain conditions.
4. **Daycare Facilities-** In establishments where 50 or more employees are employed, employers must provide daycare facilities for employees' children.
5. **Remuneration of Independent Directors-** Earlier any person having any pecuniary relationship with the company cannot be appointed as Independent Director which has been revised that an independent director cannot have any pecuniary relationship with the company other than (i) remuneration payable to such person, and (ii) transactions with the company, which do not exceed 10% of his total income.
6. **Corporate Social Responsibility-** With the recent amendments to the provisions governing Corporate Social Responsibility (CSR) which is mandatory for prescribed classes of companies to spend at least 2% of their 3-year annual average net profit on social activities. Prior to the amendment, if the company fails to spend the requisite amount, it can specify the reason for the same and no further action was requisite. However, with the amendment, the amount which are to be allocated towards CSR activities, but which remain unutilized in a given financial year is required to be transferred a special account called "Unspent CSR Account" to be opened by the company with any scheduled bank and the amount therein will have to spent by the company within a period of 3 financial years from the date of such transfer.

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Company Matters

7. *Changes in Penal Provisions of the Companies Act, 2013:*

- *Non- compliance with provisions relating to issue of shares at discount would amount only to a penalty, instead of imposition of fine, imprisonment or both;*
- *Furnishing false/incorrect information at the time of creating charge would be liable to action for fraud under Section 477 of the Companies Act, 2013;*
- *Failure to file an annual return would result in a penalty instead of a fine or imprisonment.*

8. *Additional Ground for disqualification for appointment of Director-* Under S.164 of the Companies Act, 2013, provides the conditions for the disqualifications for a person to be appointed as director:

- a. The person is of unsound mind;*
- b. He/she is an undischarged insolvent and*
- c. And order disqualifying him/her for appointment as a director has been passed by a court or tribunal and the order is in force.*

Further under S.165, a director is not permitted to hold office for more than 20 companies for private limited companies (10 companies for public limited companies) at the same time. With the amendment, the additional ground to be inserted in S.164 is - if the person holds office as director, including any alternate directorship, in more than 20 companies for private limited companies (10 companies for public limited companies) at the same time, that person would be ineligible to be appointed as a director of a company.

9. *With the amendment to the Companies (Prospectus & Allotment of Securities) Rules 2014 effective from October 2nd, 2018, it makes mandatory for every unlisted public company to (i) issue the securities only in dematerialized form and (ii) facilitate the dematerialization of all its existing securities.*

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Specific Relief

With effective from August 1st, 2018, the civil dispute resolution under Specific Relief Act, 1963 has been changed. Some of the major changes which will impact your business are highlighted below:

- Courts must grant specific performance of a contract when claimed by a party unless such remedy is barred under the limited grounds contained in the statute.
- If a contract is broken due to non-performance of a promise by a party, the party suffering the breach has the option of substituting performance through a third party or through its own agency.
- A suit filed under the Specific Relief Act must be disposed of by the court within 12 months from the date of service of summons to the defendant. Such period can be extended by 6 months after recording written reasons by the court.

No injunction can be granted by the court in relation to an infrastructure project if such injunction would cause delay or impediment in the progress or completion of the infrastructure project.



E-Pharmacies

A Delhi High Court has put a stay on the online sale of medicines by e-pharmacies. And, in subsequent development, at first a Single Judge Bench of Madras High Court put a ban on sale of medicines by e-pharmacies, however, the same was revoked by a Double Judge Bench of Madras High Court which leads to allow the sale of medicines by e-pharmacies and Central Government has been asked to frame the rules for the operations of e-pharmacies. Central Government has already issued draft rules for operation of e-pharmacies, where it is a requisite to acquire only one license to operate in the country and they cannot sell tranquillisers, psychotropic drugs, narcotics and habit-forming drugs. However, the two different rulings on the same issue by two different High Court has created a confusion which would be clear once the rules for e-pharmacies are in place by the Central Government.

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Data Protection

1. *EU's General Data Protection Regulation (GDPR) effective from May 25, 2018 to impact companies doing business in Europe, which includes the corporates from India doing business in Europe. The liability is 4% of annual global revenue or € 20 millions, whichever is greater. For a detailed note, which is available on our website at Knowledge Centre, please click on the following link:*
<http://www.equicorplegal.com/uploads/knowledge/EU-General-Data-Protection-Regulations-and-Impact-on-Your-Business>
2. *Following on the lines of EU's GDPR, India has also proposed its own Data Protection Bill, 2018 prepared by the SriKrishna Committee- to protect the autonomy of individuals in relation with their personal data, to specify where the flow and usage of personal data is appropriate, to create a relationship of trust between persons and entities processing their personal data, to specify the rights of individuals whose personal data are processed, to create a framework for implementing organizational and technical measures in processing personal data, to lay down norms for cross-border transfer of personal data, to ensure the accountability of entities processing personal data, to provide remedies for unauthorized and harmful processing, and to establish a Data Protection Authority for overseeing processing activities.*

For a detailed note, which is available on our website at Knowledge Centre, please click on the following link:

<http://www.equicorplegal.com/uploads/knowledge/755EquiCorp-%20India's%20Data%20Protection%20Law%202018-%20Future%20Road%20Ahead.pdf>

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E- Commerce

Update

1. E-commerce players to get GST registration for each state in India of their operations.
2. With effective from October 1st, 2018, E-commerce players shall be liable to:
 - i. Tax Deducted at Source (TDS) at the rate of 1% from the payment made or credited to supplier of taxable goods or services or both, where the total value of such supply, under a contract, exceeds INR 2,50,000/-;
 - ii. Tax Collected at Source (TCS) at such rate not exceeding 1%, of the net value of taxable supplies made through it by other suppliers where the consideration with respect to such supplies is to be collected by the operator. However, no TCS liability would accrue in respect of the E- commerce entities based outside India.
3. W.e.f February 1st, 2019, the FDI policy for e-commerce shall be revised and it shall impact the way of doing business of Ecommerce in India, which mainly covers:
 - i. Related entity can no longer sell on an ecommerce platform;
 - ii. Ecommerce platform cannot discriminate among vendors including giving favourable treatment to big vendors;
 - iii. Single Vendors cannot sell more than 25% to one ecommerce portal;

The new revised norms in FDI for ecommerce could impact-exclusive launches or sale of products; cashback/ big & deep discounts; faster delivery at sites.

The purpose of the revised norms to ensure: - level playing field for brick & mortar retail; smaller domestic ecommerce players can compete with big Ecommerce giants; smaller sellers on ecommerce platforms to get equal treatment with big sellers/vendors.

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Usage of Aadhar Card as E-KYC

Update

On September 26, 2018, a 5 judge bench of Supreme Court upheld the validity of Aadhaar, however impose certain restriction on the corporates to use the 12 digit number to validate the identities of customers, which may force the corporates to going back to old ways for customer verification and may impact on the financial viability of the business models especially for startups in financial & technology services Moreover, this judgement has now questioned electronic signatures (eSigns) validation through Aadhaar and now eSigns used by consumers to sign legal documents digitally could be stopped. For a detailed note, please click on the following link:

<http://www.equicorplegal.com/uploads/knowledge/Decoding-Supreme-Court-Judgement-on-Aadhaar-and-Impact-on-Your-Business>

The Central Government is considering to amend telegraph and other applicable laws, to allow QR code as offline mechanism for KYC. This move would ease the pressure on Fintech & telcos post-Aadhaar judgement, however, it's advisable to wait till further actions are implemented in place to resolve the issue.

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