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Guide to Doing Business

India

Prepared by Lex Mundi member firm,
Shardul Amarchand Mangaldas & Co

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Introduction

When Prime Minister Narendra Modi came to power in 2014, he envisioned India in the Top 50 in the World Bank Ease of Doing Business rankings. Three years down the line, it appears that the country is inching closer to that magical number, having jumped 30 places over last year to rank 100 amongst 190 countries that have been adjudged on various parameters of ease of doing business. India's improvement on the World Bank's index has come on the back of a slew of structural reforms carried out by the government in the last one year.

India's turnaround story, as per the World Bank report, has several bright spots. India is one of the top 10 improvers in this year's assessment, having implemented reforms in 8 out of 10 Doing Business indicators. India is the only large country this year to have achieved such a significant shift. On the "distance to frontier metric," one of the key indicators in the survey, India's score went from 56.05 in Doing Business 2017 to 60.76 in Doing Business 2018. This means last year India improved its business regulations in absolute terms – indicating that the country is continuing its steady shift towards best practice in business regulation, according to the World Bank.

The report also notes that India has adopted 37 reforms since 2003. Nearly half of these reforms have been implemented in the last four years. The report captures reforms implemented in 190 countries in the period between June 2, 2016 to June 1, 2017.

This year, some of the indicators on which reforms were implemented in Delhi and Mumbai, the two cities covered by the report include: getting credit, protecting minority investors (among the top 5 ranked countries and best in South Asia), paying taxes, and resolving insolvency. Add to this, two big- ticket reforms - the roll out of the Goods and Service Tax and the implementation of the Insolvency and Bankruptcy Code (**I&B Code**) – and you have an economy that is ready to catapult to the next phase of growth and development.

The easing of regulatory bottlenecks and improving investor sentiments are mirrored on a range of other economic indicators. The flow of foreign direct investment (**FDI**) into India jumped to an all-time high of USD 60 billion in 2016-17, a near 100 percent increase over USD 36 billion in 2013-14. India's foreign exchange reserves soared to a whopping USD 376 billion in 2016-17. India is one of the fastest growing economies in the world having expanded at over 7 percent annually in the last three years. India implemented General Anti Avoidance Rule in April 2017 and moved swiftly to revise the Direct Tax Avoidance Agreements with several countries to plug the loopholes in international taxation.

To bring in greater accountability and streamline policy-making, the government had earlier replaced the age-old model of 5-year planning with a new thought process aimed at unleashing India's entrepreneurial energy and supporting the growth of its small and mid-size enterprises. Thus, a new organisation – the Niti Aayog – was set up to chalk out the agenda for India's development that aims to bridge the gap between the government and India Inc. Similarly, to instil confidence among foreign investors, the government, earlier this year, abolished the Foreign Investment Promotion Board that vets foreign investment proposals and instead asked concerned government ministries to vet FDI proposals. The move is aimed at reducing the red tape in government and bringing in transparency in decision-making, which is paramount for foreign investors.

The Modi government has also moved swiftly to improve the state of India's banking system, which has been reeling under massive non-performing assets and had been reporting a dip in profitability. The rollout of the IBC is proving to be a game-changer for the economy. The government has also announced a planned capital infusion of USD 32 billion over a four-year period in an effort to revive credit growth.

India has also witnessed a spike in deal activity as investments of all hues including private equity and venture capital investments have hit an all-time high. Private equity investments in the first half of calendar year 2017 have touched a record USD 11.3 billion. India's in-bound M&A activity in January-September increased by 20.5 percent to USD 16.8 billion, from USD 14 billion a year ago. M&A deals worth USD 80 billion were recorded across a range of sectors. Over the next 12 to 18 months, transactions could reach USD 100 billion, representing over 5 percent of India's market capitalisation.

The government has been facing criticism over slowing economic growth rate in the last quarter, seen as after-effects of demonetisation, GST and the crackdown on non-performing assets. However, the fundamentals of the Indian economy are stronger than ever. The pace of economic reforms will only pick up in the years to come. With the government rolling out a red carpet for foreign investors, the country is bound to witness a surge in greenfield and brownfield investments that will further create jobs and put India on a high-growth trajectory.

General

What are the business related laws in India?

India has codified uniform commercial laws that include legislations relating to contracts, corporations, exchange control, competition, taxation, employment etc. Statutes are supplemented by policy pronouncements, press notes, notifications, regulations, and rules by Governmental ministries, departments and regulators.

The key business related legislations in India are the:

- Companies Act, 2013 which primarily governs the incorporation, management, restructuring and dissolution of companies;
- Indian Contracts Act, 1872 which lays down general principles relating to the formation and enforceability of contracts;
- Foreign Exchange Management Act, 1999 which provides for India's foreign exchange management regime and regulates inflow and outflow of foreign exchange and investment into and from India. This Act is one of the principal legislations governing foreign investment into India;
- Insolvency and Bankruptcy Code, 2016 which governs the reorganisation and insolvency resolution of corporate persons, partnership firms and individuals;
- Goods and Services Tax, 2017 which subsumes several existing indirect taxes, with one single tax removing multiplicity of taxes and compliances;
- Securities and Exchange Board of India Act, 1992 which governs the functions and powers of India's securities market regulator;
- Securities Contract (Regulation) Act, 1956 which governs the listing and trading of securities on stock exchanges in India;
- Competition Act, 2002 which regulates combinations (merger control) and anti- competitive behaviour; and
- Income Tax Act, 1961 which prescribes the income tax treatment on income of individuals and corporations.

In addition, there are several sector specific legislations (e.g. the Indian Telegraph Act, 1885, the Drugs and Cosmetics Act, 1940, the Press Council Act, 1978, the Banking Regulation Act, 1949, the Insurance Act, 1938, the Food Safety and Standards Act, 2006 and various labour legislations (such as the Industrial Disputes Act, 1947, the Factories Act, 1948 etc.) that must also be considered depending on the nature and type of activity being undertaken.

What are the types of business entities that can be set up in India? What is the process, time and cost for setting up each?

Business ventures can be carried on in India through sole proprietorships, partnerships (including limited liability partnerships (**LLP**) or through companies incorporated in India. Additionally, non-residents can carry on certain limited business activities through a branch office, liaison office or a project office.

- **Sole Proprietorship**
  This is the simplest form of business entity. No business registration is required under Indian law for the establishment of sole proprietorship. The owner of a sole proprietorship is personally entitled to all profits and responsible for all losses arising from the business.

- **Partnership**
  Partnerships in India are regulated under the Partnership Act, 1932. Partners of a firm are jointly entitled to all profits and are also jointly responsible for all liabilities arising from the business. While it is not mandatory to have a partnership deed, most partners do enter into a partnership deed to govern their inter-se relationship as partners. A partnership does not have a corporate character distinct from its members. A partnership may even have corporations as its members.

- **LLP**

  LLPs are a hybrid corporate entity with characteristics of both a limited liability company and a partnership. The nature of an LLP is that of a body corporate with perpetual succession which has a legal entity separate from its partners. Two or more persons (including a body corporate, i.e. a company incorporated outside India) can incorporate an entity as a LLP under the LLP Act, 2008 and there is no maximum limit on the number of partners that an LLP may have. Foreign direct investment (**FDI**) is permitted in an LLP, in those sectors or activities where 100% FDI is allowed, through the Automatic Route and there are no FDI-linked performance related conditions.

  An Indian company or an LLP, having foreign investment, is also permitted to make downstream investments into other companies or LLPs in sectors in which 100% FDI is allowed under the Automatic Route and there are no FDI-linked performance conditions. FDI in LLPs is subject to compliance with the LLP Act, 2008.

- **Company**

  A company may be incorporated in India either as a private company (including a one person company, a new category of company under the Companies Act, 2013) or a public company. While, at present, there are no minimum capitalisation norms prescribed under the Companies Act, 2013 foreign investment in certain sectors such as white label ATMs are subject to minimum net worth requirements according to the Foreign Exchange Management Act, 1999. Foreign investment into an Indian company, engaged only in the activity of investing in the capital of other Indian companies or LLPs, will require prior Government approval, regardless of the amount or extent of foreign investment.

- **Branch offices (BO) or liaison offices (LO) or Project offices (PO)**

  If the principal business of an entity resident outside India falls under sectors where 100% FDI is allowed, then such entity may set up a BO, LO or PO in India by applying to an (authorized dealer) bank. Such authorized dealer banks are allowed to grant permission for the setting up of an LO, BO or PO under powers delegated to them by the Reserve Bank of India (**RBI**) i.e. the central bank of India. Applications to set up a BO, LO or PO must be made directly to the RBI in certain cases, for instance, where the principal business of the applicant is in the defence, telecom, private security or broadcasting sectors. Additionally, applications for setting up BOs or LOs in India by foreign banks and insurance companies must be made to the RBI and the Insurance Regulatory and Development Authority, respectively. General permission has been given by the Reserve Bank for establishment of project offices that meet specified conditions. Foreign companies i.e. companies or body corporates incorporated outside India, which establish a place of business in India through a BO or through electronic mode must be registered with the Registrar of Companies (**RoC**) and have to comply with certain provisions of the Companies Act, 2013 including requirements to file certain information and key documents like charter documents, accounts etc. with the ROC. The Companies Act, 2013 Act has expanded the meaning of a place of business in India in respect of foreign companies, to include physical or electronic mode of existence in the country.

No approval of the RBI is required for foreign companies to establish branch offices in Special Economic Zones (**SEZs**) to undertake manufacturing and service activities, subject to satisfaction of certain conditions, including that that the BO must be functioning in sectors where 100% FDI is allowed.

Are there any fetters on the kind of business activities that can be carried on by business organizations in India?

Yes, the kind of business activity that can be carried on by a business organisation depends on how it is set up in India.

A BO may enter into contracts on behalf of the non-resident parent and may generate income. However, a BO are restricted to:

- representing the parent company, exporting and importing goods;
- rendering professional or consultancy services;
- carrying on research work in which the parent company is engaged;
- promoting technical or financial collaborations between Indian companies and the parent or overseas group company;
- representing the parent company in India and acting as buying or selling agent in India;
- rendering services in information technology and development of software in India and rendering technical support to the products supplied by parent or group companies.

An LO is not permitted to carry on business in India. Its activities are restricted to:

- representing the parent company or group companies;
- promoting export from or to India;
- promoting technical or financial collaborations between parent or group companies and companies in India;
- gathering information for the parent company and acting as a communication channel between the parent company and Indian companies.

A PO is usually set up for execution of large projects such as major construction, civil engineering and infrastructure projects.

An Indian company (even if wholly foreign owned) has no such fetters on its ability to carry on business in India except as may be set out in its Memorandum of Association (i.e. its charter document) or by way of sectoral regulations.

Companies

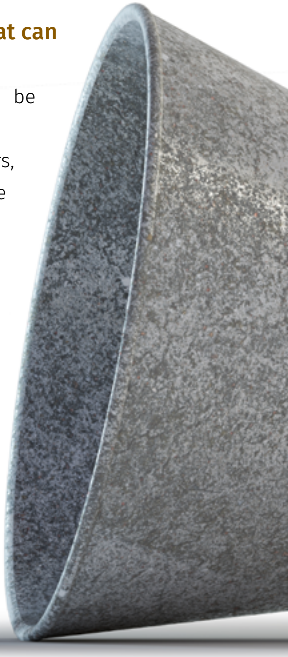
How are companies regulated in India?

The Companies Act, 2013 (**New Companies Act**) is the main legislation for governing companies in India. The provisions of the New Companies Act have been notified and implemented by the Central Government in a phased manner and have substantially replaced the provisions of the erstwhile Companies Act, 1956 (**Previous Companies Act**). Some provisions of the New Companies Act have not yet been notified, such as for the constitution of a national financial reporting authority.

The New Companies Act has, among other things, introduced enhanced corporate governance standards particularly in relation to independent directors, audit, corporate social responsibility (**CSR**), mandatory valuation for private placement of securities, cross-border mergers including merger of Indian companies into foreign companies and class action suits. The Central Government is empowered to prescribe additional requirements via subordinate rules, which are ancillary to and have to be read along with the main provisions of the New Companies Act.

Listed public companies are governed by the provisions of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**Listing Regulations**) as also, the New Companies Act.

What are the different types of companies that can be incorporated in India?



Under the New Companies Act, companies may be incorporated in India as:

- private companies having two or more members, or with one member to be formed as a one person company; or
- public companies having seven or more members.

The concept of a one person company has been introduced under the New Companies Act, and allows a natural person who is an Indian citizen and also resident in India to set up a company, with the aim of benefitting small entrepreneurs,

since these companies are, exempt from certain filing requirements and requirements in relation to meetings, etc.

While a private company is required to have a minimum of two directors, a public company is required to have a minimum of three directors. A one person company can be incorporated only with one person acting as the member and director of the company. Every company can have a maximum of 15 directors. However, a company may appoint more than 15 directors after passing a special resolution at a general meeting of its shareholders. Pursuant to recent amendments, companies are no longer required to maintain a minimum share capital.

Companies may be:

- limited by shares;
- limited by guarantee (in which case, the company may or may not have share capital); or
- unlimited (i.e. a company which has no limit on the liability of the members).

Further, a company may be a listed company (where its securities are listed on a recognized stock exchange in India), or an unlisted company. Based on control and holding structure, a company (in connection with another company) may be categorized as a holding company, a subsidiary company or an associate company. Other types of companies that receive mention in the New Companies Act are foreign companies, small companies, government companies, nidhi companies, banking companies, producer companies and dormant companies.

The most commonly used form of company in India is a company limited by shares. Unlisted private companies have greater flexibility and less stringent rules in respect of various matters including composition of board of directors, holding of shareholders meetings, number of directors, determination of kinds of share capital and voting rights, determination of managerial remuneration, etc.

What is the incorporation process?

Indian companies (whether private or public, limited or unlimited) are incorporated by making an application for registration with the appropriate RoC. The relevant documents, in respect of such application, can be filed online.

Under the newly introduced integrated eForm INC-32 (also known as 'Simplified Proforma for Incorprating Companies Electronically' or **SPICe**), applicants can make a single application for the following simultaneously:

- reservation of name of a new company,
- incorporation of a new company,
- application for allotment of Director Identification Number (**DIN**) for up to three directors of the new company;
- application for permanent account number (**PAN**) for the company; and
- Tax deduction and collection account number (**TAN)** for the company.

This eForm must be accompanied by supporting documents including details of directors and subscribers, memorandum and articles of associations. Once the eForm is processed and approved, the company would be registered and a corporate identification number would be allocated to the company.

However, the SPICe form cannot be utilised for all kinds of companies, including companies formed with more than 7 subscribers. Such companies, as also companies which choose to not file through the SPICe form can apply for incorporation by following the existing process, viz. applying for digital signatures and DIN, and then making an application for reservation of name of the company, followed by making an application for incorporation of the company with the name permitted to be used.

How are minority shareholders protected under Indian law?

The term 'minority shareholders' is not defined under the New Companies Act. However, in terms of the provisions relating to prevention of oppression and mismanagement under the New Companies Act:

- 100 members of the company or 10% of the number of members of the company, whichever is less, or any member(s) holding not less than 10% of the issued share capital, in case of a company having a share capital; or
- 20% of the number of members, in case of a company not having a share capital, are considered as 'minority shareholders'.

In a paradigm shift from the Previous Companies Act, minority shareholders have been given more powers and remedies under the New Companies Act, with an aim to protect their rights. Some of these protections are as follows:

- For important actions such as substantial disposal of the undertaking of a company, an ordinary resolution approved by a simple majority of shareholders would have sufficed under the Previous Companies Act. However, under the New Companies Act, such decisions, require a special resolution except in case of a private company,.
- In the event an acquirer becomes a registered holder of 90% or more of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, the minority shareholder is permitted to offer its shares to the acquirer at a price determined on the basis of a valuation of a registered valuer.
- Minority shareholders have also been empowered with the option of approaching the National Company Law Tribunal (NCLT) against oppression of the minority and mismanagement of the company and also in case the affairs of the company are or will be conducted in a manner prejudicial to the interest of members or class of members.
- The New Companies Act permits class action suits that may be instituted against the company, if the minority shareholders are of the opinion that the management and/or the conduct of affairs of the company is prejudicial to the company, members and/or depositors. Such class action suits allow direct claims to be made against third parties (such as experts, advisors or consultants) for incorrect statements made to the company or for damages or compensation for fraudulent, unlawful or wrongful act or conduct or any likely act or conduct.

Shareholders holding more than 25% of the voting capital of a company would also be protected from actions of majority shareholders to the extent that they can block resolutions on matters which require special resolutions. Such matters include amendments to the charter documents (i.e. the memorandum of association and articles of association of the company), reduction of share capital, disposal of an undertaking of the company.

How does one fund a subsidiary in India?

A foreign company may fund an Indian company, in the following manner:

- By subscribing to instruments such as
  - equity shares;
  - fully, compulsorily and mandatorily convertible debentures; and
  - fully, compulsorily and mandatorily convertible preference shares, subject to pricing guidelines and valuation norms prescribed under the Foreign Exchange Management Act, 1999 and the regulations framed thereunder (please refer to the chapter on Foreign Investment for further details); and

- By subscribing to other types of preference shares and/or debentures i.e. non-convertible, optionally convertible or partially convertible and/or loan from foreign shareholders subject to compliance with external commercial borrowings norms (please refer to the chapter on Foreign Investment for further details).

What types of shares can a company issue?

Under the New Companies Act, a company limited by shares may issue the following types of shares:

- **Equity shares:** with voting rights, or with differential rights as to dividend, voting or otherwise subject to fulfilment of conditions under the Companies (Share Capital and Debentures) Rules, 2014; and
- **Preference shares:** which carry a preferential right in respect of: (a) payment of dividend; and (b) repayment, in case of winding up. Preference shares do not carry voting rights, except in certain circumstances.

Who can be appointed as a director of a company in India? Can a non-resident be appointed as a director of an Indian company?

The New Companies Act provides that no body corporate, association or firm can be appointed as a director of a company, and only an individual can be so appointed. A person appointed as a director of a company is required to give his consent to hold the office as a director. Such person is also required to hold a DIN. A person cannot hold office as a director, including alternate directorship, in more than 20 companies at the same time. The maximum number of public companies in which a person can be appointed as a director is 10.

Yes, a non-resident can be appointed as a director of an Indian company. However, the New Companies Act makes it mandatory for every company to have at least one director who has stayed in India for a total period of 182 days in the previous calendar year, to be known as a resident director.

What are the liabilities and obligations of a director under Indian law?

The New Companies Act has codified the statutory duties of directors, which include:

- the duty to act in accordance with the articles of association;
- the duty to act in good faith to promote the objects of the company for the benefit of the members as a whole, and in the best interests of the company, its employees, the shareholders, the community and the protection of the environment;
- the duty of reasonable care, skill and diligence;
- the duty to exercise independent judgment; and
- the duty not to involve in a situation of conflicting interests with the company and duty not to achieve any undue gain or advantage.

Independent directors have additional duties which have been codified under the New Companies Act.

Other than the fiduciary duties, a director has other duties including attending Board meetings and disclosing any conflict of interest. Any director who commits a breach of his duties may be liable for both civil and criminal consequences depending upon the nature of the breach and the statutory provisions.

Are there any corporate social responsibility norms in India?

Yes, the New Companies Act requires every company, having:

- a net worth of at least INR 500 crores (approx. USD 7.75 million); or
- a turnover of at least INR 1000 crores (approx. USD 15.5 million); or
- a net profit of at least INR 5 crores (approx. USD 775,675),

to spend at least 2% of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy. The New Companies Act follows the 'comply or explain' approach and reporting on CSR spending is mandatory.

Are there any corporate governance norms?

Yes, the New Companies Act provides for an elaborate mechanism for companies to comply with in relation to corporate governance. These include:

- mandatory appointment of independent directors and a woman director on the board of certain classes of companies;
- appointment of small shareholders' directors on boards of listed companies;
- constitution of nomination and remuneration committee, stakeholders relationship committee, and audit committee for certain classes of companies;
- mandatory vigil mechanism systems have been prescribed for certain companies which allow directors and employees to report genuine concerns, and adequate safeguards against victimisation;
- mandatory appointment of key managerial personnel such as MD, CEO and CFO for certain classes of companies;

A person cannot hold office as a director, including alternate directorship, in more than 20 companies at the same time. The maximum number of public companies in which a person can be appointed as a director is 10.

- stringent policy for related party transactions and inter-corporate transactions;
- accounting standards;
- mandatory rotation of independent directors and auditors; and
- varied minority protection measures (such as those described previously in this chapter).

Further, the Listing Regulations also requires public listed companies to appoint a specified number of independent, non-executive directors and constitute separate committees of the Board for functions such as audit and remuneration.

Are there any exemptions available for private companies under the New Companies Act?

Yes, key exemptions provided to private companies are as follows:

- The holding company, subsidiary company or associate company of a private company, or the subsidiary of a holding company to which a private company is a subsidiary, will not be considered as related parties of such private company – thereby ensuring that they are exempt from restrictions on related party transactions that such private company can undertake.
- A private company can issue shares with differential voting rights without compliance with the Companies (Share Capital and Debentures) Rules, 2014 if it is allowed to do so under its charter documents.
- A private company can issue further shares to employees under an employee stock option plan scheme by passing an ordinary resolution at a meeting of its shareholders, and is not required to obtain a special resolution for the same.
- Provisions under the New Companies Act on giving of notice of general meetings, statements to be annexed to such notice, quorum for general meetings, chairman, proxies, restrictions on voting rights, voting by show of hands and demand for poll will not apply to a private company so specified in the articles of association of the company.
- Provisions under the New Companies Act which require the board of a company to take actions with respect to certain matters only with the approval of the company by a special resolution do not apply to private companies.

Can voting rights be exercised by proxy?

A member of a company who is entitled to attend and vote at a meeting of the company can appoint another person (whether or not a member) as his/her proxy to attend and vote at a meeting instead of him/her, subject to certain compliances. However, in case of companies having a share capital, a proxy is not entitled to speak at the meeting and vote except on a poll. In case of companies without a share capital, the articles of association may prescribe restrictions that may be applicable to proxies.

Can statutory meetings be held through electronic means?

Under the New Companies Act, a company is permitted to conduct a Board meeting through video conference or other audio visual means, provided the procedures prescribed in the New Companies Act are complied with. However, there are certain matters which cannot dealt with by the board in a meeting conducted through video conferencing.

Further, in order to ensure wider shareholder participation in the decision making process of companies, every listed company or a company having not less than one thousand shareholders, must provide to its members, a facility to exercise their right to vote at general meetings by electronic means.

Foreign Investment

How is foreign investment regulated in India?

Foreign investment in India is primarily regulated by:

- the consolidated foreign direct investment policy (**FDI Policy**) issued by the Department of Industrial Policy & Promotion (**DIPP**) from time to time;
- the Foreign Exchange Management Act, 1999 (**FEMA**); and
- the regulations and directions issued by way of notifications by the Reserve Bank of India (**RBI**) under the FEMA including in particular the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 (**FEMA 20 (R)**).

Who are the key regulators that monitor foreign investment in India?

- The DIPP:
  - which is responsible for making policy pronouncements on foreign direct investment (**FDI**); and
  - instrumental in administering the applications falling under the Approval Route, including referring these to the competent Ministry or Department of the Government of India (**Competent Authority**), and holding joint reviews on pending proposals.

    The DIPP's concurrence is mandatory for a Competent Authority to reject applications made under the Approval Route, and also for imposing additional conditions not provided in the FDI Policy or sectoral laws or regulations.

- The Competent Authority:
  - which considers applications for approval of foreign investment in the sectors over which they exercise oversight and monitors foreign investment in such sectors, in accordance with the FDI Policy. Previously the task of granting approvals to applications for foreign investment was entrusted to the Foreign Investment Promotion Board, which was abolished in June 2017.

- The RBI:
  - which regulates foreign investment for the purposes of exchange control in accordance with the provisions of FEMA.

What are the different routes through which a foreign investor may invest in India?

A foreign investor may invest in India including *inter alia* through the following routes, namely:

- FDI, either under the Automatic Route or the Approval Route;
  - under the Automatic Route, the foreign investor or the Indian company does not require any approval from the Government of India or the RBI

to make or receive the FDI, and

- under the Approval Route prior approval of the Government of India (that is, the Competent Authority) or RBI is required.

  Foreign investors do not require any prior registration with a regulatory authority in India for undertaking FDI;

- Investment as a foreign portfolio investor, subject to prior registration with the Securities and Exchange Board of India (**SEBI**);
- Investment as a foreign venture capital investor, subject to prior registration with the SEBI;
- Investment as (i) a non-resident Indian (**NRI**) or an overseas citizen of India (**OCI**) on a recognized stock exchange on repatriation basis, or (ii) an NRI or OCI, including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, on a non-repatriation basis;

What are the different instruments available for investment in India under the FDI Policy?

- As per the FDI Policy, a foreign investor can invest in:
  - equity shares (including partly paid equity shares);
  - fully, compulsorily and mandatorily convertible preference shares;
  - fully, compulsorily and mandatorily convertible debentures; and
  - warrants.
- Partly paid shares issued to non-residents should be fully called-up within 12 months of such issue. Furthermore, 25% of the total consideration amount (including share premium) in respect of such shares should be received upfront. In case of share warrants at least 25% of the consideration should

be received upfront and the remainder should be received within 18 months of issuance of share warrants. For convertible instruments the price or conversion formula should be determined upfront at the time of issue of the said instruments.

- Issuance of preference shares or debentures that are non-convertible, optionally convertible or partially convertible are considered as external commercial borrowing (**ECB**) and would be subject to compliance with extant regulations pertaining to ECB.
- An eligible foreign investor may invest in the units of an Investment Vehicle.
- A foreign investor may make a capital contribution or acquire the profit share of a limited liability partnership (**LLP**) in which FDI is permitted, in accordance with the FDI Policy and FEMA 20(R).

Is FDI prohibited in any sector or business?

FDI is prohibited in the following sectors:

- Lottery business including Government or private lottery, online lotteries;
- Gambling and betting including casinos;
- Chit funds;
- Nidhi company;
- Trading in transferable development rights;
- Real estate business or construction of farm houses;
- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes; and
- Activities or sectors not open to private sector investment for example atomic energy and railway operations (that is, other than the permitted railway infrastructure).
- Additionally, FDI is not permitted in the agriculture sector or activity except as specifically permitted (such as in cultivation of vegetables and mushrooms, development and production of seed and planting material etc.).

Are there any pricing guidelines that a foreign investor has to comply with while investing into any of the instruments of an Indian entity?

The RBI has prescribed pricing guidelines for both the subscription to, and the acquisition of, shares by non- residents.

- **Issue of Shares**
  - Where shares of the Indian company are listed on a recognized stock exchange in India, the price of shares issued to a non-resident shall not be less than the price worked out in accordance with the SEBI guidelines.
  - Where shares of the Indian company are not listed on a recognized stock exchange in India, the price of shares issued to a non-resident shall not be less than the value of shares to be determined as per any internationally accepted pricing methodology for valuation on an arm's length basis and certified by a merchant banker (registered with the SEBI) or a chartered accountant or a practicing cost accountant.
  - Where the issue of shares is pursuant to a rights issue:

    - of a listed company, the issue price shall, subject to SEBI (Issue of Capital and Disclosure) Regulations, 2009, be a price determined by the company; and
    - where the investee company is not listed, the issue price shall not be less than the price at which shares are offered on rights basis to resident shareholders.

However, where non-residents (including NRIs) are making investments in an Indian company by way of subscription to its memorandum of association (subject to such non-resident's eligibility to invest under the FDI Policy), such investments may be made at face value.

- **Transfer by Resident to Non-resident**
  - Where shares of the Indian company are listed on a recognized stock exchange in India, the price of shares transferred, by way of sale under a private arrangement, shall not be less than the price at which a preferential allotment of shares can be made under the SEBI guidelines.
  - Where shares of the Indian company are not listed on a recognized stock exchange in India, the price of shares transferred, by way of sale, shall not be less than the value of the shares determined pursuant to any internationally accepted pricing methodology for valuation on arm's length basis duly certified by a merchant banker (registered with the SEBI) or a chartered accountant or a practicing cost accountant.

- **Pricing of optionality clauses**
  - Agreements with foreign investors having optionality clauses in respect of equity shares, compulsorily and mandatorily convertible preference shares and debentures, and warrants, are considered permissible under the extant FDI Policy and the FEMA 20(R).
  - The optionality clause is required to oblige the buy-back of securities from the foreign investor at the price prevailing or value determined at the time of exercise of the optionality/exit.
  - However certain prescribed conditions would have to be satisfied, including the following:
    - The exercise of the optionality/exit is subject to completion of, the higher of, the minimum lock-in period of one year or minimum lock-in period as prescribed under the FDI Policy for the concerned sector;
    - Pricing guidelines have also been prescribed for exit by the foreign investor - The guiding principle being that the non-resident investor is not guaranteed any assured exit price at the time of making such investment and shall exit at the fair price determined at the time of exit in accordance with such pricing guidelines.

- **Pricing for LLPs**

  Further, investments by foreign investors in LLPs are also subject to the applicable pricing guidelines as provided in Schedule 6 of the FEMA 20(R).

What are the ways for a foreign investor to invest in an Indian company?

FDI in India can be undertaken through the following ways:

Issuance of permissible instruments by a company:

Subject to compliance with the FDI Policy and the FEMA 20 (R), an Indian company may issue permissible instruments under the FDI Policy to a non-resident investor.

Acquisition by way of transfer of existing shares:

Subject to FDI Policy and the FEMA 20 (R), non- resident investors can also invest in Indian companies by purchasing or acquiring existing permissible instruments under the FDI Policy from Indian shareholders or from other non-resident shareholders in the following manner-

- Non-resident to Non-resident: A person resident outside India (other than an NRI or an OCI or an erstwhile OCB) can transfer, by way of sale or gift, the shares or convertible debentures or warrants of an Indian company or units of an Investment Vehicle to any person resident outside India.
- Resident to Non-resident: A person resident in India can transfer, by way of sale, shares or convertible debentures or warrants or units of an Investment Vehicle to a person resident outside India, subject to compliance with the conditions under FEMA 20(R) and the FDI Policy (which includes sectoral caps, pricing guidelines, documentation and reporting requirements). Gift of such instruments by a resident to a person resident outside India will require the prior approval of the Reserve Bank.
- Non-resident on the Stock Exchange: A person resident outside India can sell the shares and convertible debentures or warrants of an Indian company or units of Investment Vehicles (in case the same are listed), on a recognized stock exchange in India in the manner prescribed by the SEBI.

Further, a non-resident investor who has already acquired and continues to hold the control of an Indian company, in accordance with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011, can acquire shares of the listed Indian company on the stock exchange through a registered broker under FDI scheme, subject to the FDI Policy and the FEMA 20 (R).

Purchase and sale of shares of convertible debentures or warrants of an Indian Company or units of Investment Vehicles by an NRI or an OCI, on non-repatriation basis, is deemed to be domestic investment at par with the investment made by residents. Further, a company, trust, and partnership firm incorporated outside India and owned and controlled by NRIs can invest in India under the special dispensation available to NRIs under the FDI Policy.

Are there any instances of transfer by way of sale which require prior approval from the Reserve Bank of India or the Government of India (that is, the Competent Authority)?

Indicative instances where the prior permission of the RBI is required for

Pursuant to the Government of India's stated objective of promoting the ease of doing business and contributing to an eco-system conducive for growth of entrepreneurship, the Reserve Bank has brought about necessary amendments to FEMA 20 to enable start-up initiatives, irrespective of the sector in which they are engaged, to receive foreign venture capital investment.

transfers, by way of sale of, shares or convertible debentures or warrants from residents to non- residents are as follows:

- For transfer of shares or convertible debentures of an Indian company engaged in the financial services sector, if fit and proper or due diligence requirement as stipulated by the respective financial sector regulator, and the provisions of FDI Policy and the FEMA 20 (R) (including, sectoral caps, conditionalities, amongst others), are not complied by the foreign investor.
- In cases where the transfer is to take place at a price that is not determined in accordance with the pricing guidelines prescribed by the RBI and does not fall under the exceptions that have been provided in this regard.
- In cases where the non-resident investor proposes to defer payment of the amount of consideration or seeks indemnity from the seller, otherwise than as permitted under the FEMA 20 (R).

The following indicative instances of transfer of shares from residents to non-residents, by way of sale or otherwise, requires prior permission of the Competent Authority, or the RBI, as the case may be:

- The transfer of shares or convertible debentures or warrants of companies engaged in sectors falling under the Approval Route including where such transfer *inter alia* results in change or transfer of control or ownership of the existing Indian company from resident Indian citizens and Indian companies, which are owned and/or controlled by resident Indian citizens, to non-residents;
- The transfer of shares or convertible debentures or warrants resulting in foreign investments in the Indian company, breaching the applicable sectoral cap or other conditions specified under the FEMA 20 (R) and FDI Policy;
- Transfer of shares by way of a gift from a resident to a non –resident; and
- Transfer of shares from an NRI to a non-resident, requires prior approval of the RBI under the FDI Policy.

Has any relaxation been provided to start-ups to attract foreign investment?

Pursuant to the Government of India's stated objective of promoting the ease of doing business and contributing to an eco-system conducive for growth of entrepreneurship, the RBI has brought about necessary amendments to the

FEMA 20 (R) to enable start-up initiatives, irrespective of the sector in which they are engaged, to receive foreign venture capital investment. Foreign venture capital investors registered under the SEBI (Foreign Venture Capital Investors) Regulations, 2000, have now been permitted to invest in equity, equity linked instruments or debt instruments issued by eligible start-ups, irrespective of the sector in which such start-up is engaged, without seeking any prior approval of the RBI. Further, foreign venture capital investors have been permitted to acquire from, or transfer any security or instrument held by them to, any resident or non-resident at a price mutually acceptable to the parties.

Further, FEMA 20(R) enables foreign investors (not being entities or persons who are registered in or are citizens, as applicable, of Pakistan and Bangladesh) to purchase convertible notes issued by eligible start-up companies (that is, duly formed private companies recognized as start-ups by the DIPP) for an amount of INR 25 lakhs (approx. USD 38,783.7) or more in a single tranche. Issue of shares against such convertible notes would have to be in accordance with Schedule I of FEMA 20(R). Acquisition or transfer by way of sale of convertible notes by a person resident outside India to or from another person resident in or outside India, would take place as per pricing guidelines prescribed by the RBI. If such eligible start-up companies are engaged in sectors which are in the Approval Route, prior approval from Government would have to be obtained for such issuance or transfer of convertible notes.

What are the ECB norms in India?

Foreign investment in partially or optionally or non-convertible preference shares, bonds, debentures, is construed as an ECB and would be subject to the ECB norms under the FEMA. ECBs may be accessed under two routes: (a) automatic route, in respect of which the cases are examined by AD Banks; and (b) approval route, in respect of which applications made through the AD Banks are examined by the RBI. Pursuant to a review of the existing framework on ECB, the RBI has formulated a revised regime to liberalise the various aspects of ECB including:

- to permit long-term foreign borrowings with fewer restrictions, amongst others, on end-uses, higher all-in-cost ceiling, to make repayments more sustainable and to minimize the roll-over risks for the borrower;
- to provide for a more liberal regime in respect of INR denominated ECBs where the currency risk is borne by the lender; and
- to expand the list of foreign investors and recognised investors to include long term lenders such as, insurance companies, pension funds and sovereign wealth funds.

The revised framework for raising loans through ECB comprises of the following three tracks:

- Track I: Medium term foreign currency denominated ECB with minimum average maturity of three or five years.
- Track II: Long term foreign currency denominated ECB with minimum average maturity of ten years.

- Track III: INR denominated ECB with minimum average maturity of three or five years.

Stipulations concerning eligible borrowers, recognised investors, all-in costs, end-use prescriptions, and minimum average maturity period, have been provided separately for each of the three Tracks.

Eligible borrowers in respect of:
- Track I are companies in manufacturing and software development sectors, shipping and airlines, Small Industrial Development Bank of India, units in SEZ, Export Import Bank of India (in respect of which ECB can be raised only under the approval route), companies in infrastructure sector, NBFC - infrastructure finance companies, NBFC – asset finance companies, holding companies and core investment companies.
- Track II are all eligible borrowers under Track I, real estate investment trusts and infrastructure investment trusts coming under the regulatory framework of the SEBI.
- Track III are all eligible borrowers listed under Track II, all NBFCs coming under the regulatory purview of the RBI, NBFC-micro finance institutions (NBFC-MFI), not for profit companies registered under the Previous Companies Act or the New Companies Act, trust and cooperatives (registered under specified laws) and NGOs engaged in micro-finance activities, companies engaged in miscellaneous services such as research and development, training (other than educational institutes), companies supporting infrastructure, companies providing logistics services, developers of SEZs and national manufacturing and investment zones.

Recognised lenders and investors under:
- Track I are international banks, international capital markets, multilateral financial institutions (such as, amongst others, IFC, ADB etc.), regional financial institutions and government owned (either wholly or partially) financial-institution, export credit agencies, suppliers of equipment, foreign equity holders, overseas long term investors such as prudentially regulated financial entities, pension funds, insurance companies, sovereign wealth funds, financial institutions located in international financial services centres in India, overseas branches or subsidiaries of Indian Banks.
- Track II are all entities listed under Track I, excluding overseas branches or subsidiaries of Indian banks.
- Track III are the same as in Track II. However in case of NBFC-MFIs, other eligible MFIs, not for profit companies and NGOs, ECB may be availed from overseas organisations and individuals who satisfy the prescribed conditions.

While all-in-cost ceiling in respect of Track I and Track II have been prescribed based on the minimum average maturity period, no maximum spread has been prescribed for Track III and all-in-cost should be in line with the market conditions for Track III. The RBI has stipulated minimum average maturity period in respect of Track I and Track II, basis the ECB limits availed, the concerned eligible borrowers, and the form of the borrowing. End-use prescriptions have been provided by the RBI for each of the Tracks. These end-use prescriptions set out the permitted utilisations of the ECB under the various Tracks, and a small negative list of end-use restriction for Track II and Track III have been prescribed under the revised framework. ECB cannot be used for purposes in which the end-use is restricted and may be utilized only for the permissible purposes.

Rupee Bond Framework

In addition to the above, the Reserve Bank has permitted eligible Indian entities to raise funds in accordance with the framework for issuance of Rupee denominated bonds overseas (also referred to in common commercial parlance as 'masala bonds') (**Rupee Bond Framework**). Only plain vanilla Rupee denominated bonds may be issued overseas in a Financial Action Task Force (**FATF**) compliant financial centres, under the Rupee Bond Framework. Any proposal of borrowing by eligible Indian entities for issuance of these bonds will be examined by the RBI and all such requests are required to be forwarded through an authorized dealer bank only.

These bonds may either be privately placed or listed on exchanges as per host country regulations and are required to have a minimum maturity of (i) three years where the Rupee denominated bonds are raised upto USD 50 Million (in INR) per financial year and (ii) five years where the Rupee denominated bonds are raised in excess of USD 50 Million (in INR) per financial year. The issuance of Rupee denominated bonds overseas is required to be within the aggregate limits prescribed for foreign investment in corporate debt.

Any corporate or body corporate is eligible to issue such bonds. Real estate investment trusts and infrastructure investment trusts coming under the regulatory framework of the SEBI are also eligible.

Rupee denominated bonds can (i) be issued overseas only in a country, and, (ii) only be subscribed by a resident of a country, that is a member of FATF or a member of a FATF- style regional body, satisfying the other eligibility conditions under the Rupee Bond Framework.

ECB for Start-Ups

Eligible start-ups (entities recognized as a start-up by the Government of India), have been permitted to raise ECB under a separate framework. The salient features under this framework include the following:

a) Recognised Lender

Eligible start-ups may raise ECB under this framework from recognized money lenders who are residents of a country which is either a member of FATF or a member of a FATF-styled regional bodies and has not been identified by FATF as (i) a jurisdiction having strategic Anti-money laundering or Combating of

Financing of Terrorism deficiencies to which counter measures apply, or (ii) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies. However, overseas branches or subsidiaries of Indian banks and overseas wholly owned subsidiaries or joint ventures of Indian companies are not considered as recognized lenders under this framework.

b) Amount, All-in-Costs, End-Use Restrictions etc.

ECB raised under this framework should not exceed USD 3 million per financial year and may be raised in any freely convertible currency or INR or combination of both. No all-in-cost ceiling has been prescribed and can be mutually agreed upon between the lender and the borrower and ECB under this framework may be raised for any expenditure in connection with the business of the borrower.

Are there any limitations on repatriation of dividend or royalty or consultancy fees?

There are no restrictions specific to non-residents on the remittance of dividends. However, as noted above, restrictions do exist on the ability of a company to declare a dividend under the New Companies Act. The dividends (net of applicable taxes) declared on foreign investments can be remitted freely through normal banking channels.

The rate of dividend payable on compulsorily convertible preference shares is restricted to 300 basis points over the prime lending rate of the State Bank of India as on the date of the Board meeting approving the issue of such shares. Non-convertible or optionally convertible preference shares and bonds are treated as an ECB and the rate of interest has to be within the limits provided in the ECB policy.

All remittances for royalty fall under the Automatic Route. Remittances of consultancy fees exceeding USD 1 million per project for any consultancy services procured by an Indian entity from outside India (other than consultancy services rendered in respect of infrastructure projects, where the limit is USD 10 million per project) requires the prior approval of the RBI. However, this rule does not apply if payments are made out of funds held in a resident foreign currency account of the remitter or Exchange Earners' Foreign Currency account of the remitter.

Acquisition of Shares

What are the various modes of acquisition of shares of an existing company?

Typically, shares or instruments convertible into shares, of an existing company may be acquired by way of: (i) allotment of newly issued shares by the company; or (ii) a secondary sale of existing shares from a shareholder of the company.

For Indian companies, issuance and allotment and/or sale of shares has to be undertaken in compliance with the provisions of the New Companies Act, the rules made thereunder and other applicable laws. In respect of Indian companies listed on a stock exchange, additional requirements under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and the Securities and Exchange Board of India (Substantial Acquisition of shares and Takeovers) Regulations, 2011 have to be duly followed and complied with.

Are there pricing restrictions applicable to subscription / acquisition of shares? Are there special restrictions applicable to foreign investors?

Please refer to the chapter on Foreign Investments, for a discussion on special restrictions applicable to foreign investors.

In addition , it is pertinent to note that the New Companies Act has introduced the concept of a "registered valuer" in an attempt to provide a proper mechanism for valuation of various assets and liabilities related to a company and to standardize the procedure thereof. The registered valuer is to be appointed by the audit committee or in its absence by the board of directors of the company.

Matters such as (i) further issue of shares of a company, other than rights issue; (ii) non-cash transaction involving directors; (iii) preparation of valuation report for a scheme of compromise or arrangement; and (iv) purchase of minority shareholding, require valuation to be completed by a registered valuer.

Accordingly, any property, stocks, shares, debentures, securities or goodwill or any other assets requiring valuation under the provision of the New Companies Act, have to be evaluated by a registered valuer. A registered valuer is, among other things, required to make an impartial, true and fair valuation of any assets which may be required to be valued and not undertake valuation of any assets in which the registered valuer has a direct or indirect interest at any time during or after the valuation of the assets.

Pursuant to an amendment made by the RBI in 2013, optionality clauses have been allowed in equity shares and compulsorily and mandatorily convertible preference shares and debentures to be issued to a person resident outside India under the FEMA and the FDI policy with certain restrictions and conditions.

In October this year, the Government of India has notified the provisions pertaining to registered valuers under the New Companies Act, and has issued the Companies (Registered Valuers and Valuation) Rules, 2017 (**Companies Registered Valuer Rules**), among other things, setting out the framework for the registration and regulation of registered valuers, their conduct, and other matters connected thereto. The Insolvency and Bankruptcy Board of India has been specified as the "authority" for the purposes of the Companies Registered Valuer Rules. Registered valuers are required to undertake valuations in accordance with the valuation standards notified by the Government of India based on the recommendations of a committee constituted in accordance with the provisions of the Companies Registered Valuer Rules, 2017, to advise on valuation matters. Further, the Companies Registered Valuer Rules provide for a transitional arrangement, pursuant to which any person who may be rendering valuation services under the Companies Act, on the date of commencement of the Companies Registered Valuer Rules, may continue to render valuation services without a certificate of registration under said rules upto March 31, 2018. As on the date of commencement of the Companies Registered Valuer Rules, 2017, a valuation report could be made by an independent merchant banker registered with the SEBI, or, an independent chartered accountant in practice having a minimum experience of 10 years, under the New Companies Act.

Further in case of listed companies, pricing requirements as per the SEBI ICDR Regulations, 2009 and SEBI Takeover Regulations, 2011, as applicable, will have to be complied.

Can parties enter into put and call options for the sale and purchase of shares?

After long deliberation and debate on the permissibility of the put and call options, in a major move to facilitate an investor friendly atmosphere, in October 2013, SEBI sanctioned pre-emptive provisions such as right of first refusal, tag along rights, drag along rights to be included in investment agreements or the articles of association of a company.

Further, the New Companies Act provides that any contract or arrangement between 2 or more persons in respect of transfer of securities is enforceable as a contract. While the exact extent of this provison is yet to be labored upon in case law, prima facie, it appears that, in the context of a public company, put options and call options may be enforced if there exists a contract to that effect between the option-holder and the other shareholders of a public company.

Additionally, pursuant to an amendment made by the RBI in 2013, optionality clauses have been allowed in equity shares and compulsorily and mandatorily convertible preference shares and debentures to be issued to a person resident outside India under the FEMA and the FDI policy with certain restrictions and conditions.

Please refer to our chapter on Foreign Investments for further discussion.

Can the acquirer enter into an agreement with the other shareholders of the company on governance and transfer related aspects?

In practice, an acquirer enters into a shareholders' agreement with the other shareholders of the company for setting out terms and conditions of operation and management of a company. As is standard practice globally, a shareholders' agreement, typically, records and sets out *inter alia* the mutual rights and obligations inter se the shareholders; the manner in which the company would be managed and governed including matters concerning the right to appoint directors, affirmative voting rights; restrictive covenants and transfer restrictions on the shares held by the parties to the agreement. As an additional step to make such agreements binding and enforceable on the company, provisions of such agreements are also incorporated into the articles of association of the company.

Competition Law

What are the laws governing competition/ anti-trust in India?

Competition law in India is governed by the Competition Act, 2002 (**Competition Act**) and associated rules, regulations and guidance notes. The Competition Act aims to prevent anti-competitive practices, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in markets.

What is the scope of the Competition Act?

The Competition Act prohibits anti-competitive practices, which cause or are likely to cause an appreciable adverse effect on competition in India (**AAEC**). It primarily seeks to regulate the following:

- anti-competitive agreements (Section 3);
- abuse of dominance (Section 4); and
- combinations (Sections 5 and 6).

What is the institutional framework for governing the Competition Act?

The Competition Act provides for the establishment of the Competition Commission of India (**CCI**), the nodal authority for monitoring, enforcement and implementation of competition law in India. Orders passed by the CCI may be appealed to the National Company Law Appellate Tribunal (**NCLAT**[1]) and the orders passed by the NCLAT may be appealed to the Supreme Court of India.

1 The orders of the CCI were initially appealable to the Competition Law Appellate Tribunal (**COMPAT**). On May 26, 2017, the COMPAT merged with NCLAT, and the appellate functions of the COMPAT were conferred on the NCLAT.

What is meant by "relevant market" under the Competition Act?

The Competition Act defines the relevant market as the market which may be determined by the CCI with reference to the "relevant product market" or the "relevant geographic market" or both. "Relevant product market" is defined as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. "Relevant geographic market" is defined as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

What are "anti-competitive agreements"?

Section 3 of the Competition Act prohibits and renders agreements entered into between enterprises or persons or associations of persons with respect to the production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an AAEC in India, void. Under the Competition Act, horizontal agreements (i.e. any agreements between competitors), including cartels, are presumed to have an AAEC. This presumption however, is rebuttable. There is no presumption of an AAEC in vertical agreements (i.e. agreements between enterprises, which are engaged at different levels of the production or supply chain).

What is an abuse of a dominant position?

Section 4 of the Competition Act prohibits the abuse of a dominant position by an enterprise or a group. A "dominant position" is defined to mean a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market or to affect its competitors or consumers or the relevant market in its favour.

A group or an enterprise is presumed to be abusing its dominant position if it:

- imposes unfair prices (including predatory pricing) or unfair conditions on sale or purchase;
- limits or restricts production or technical development so as to detrimentally affect consumers;
- denies market access to other players in the market;
- makes conclusion of contracts subject to acceptance of supplementary obligations which have no connection with the subject of such contracts; or
- uses its dominant position in one relevant market to enter into, or protect, another relevant market.

What are the factors that the CCI may take into consideration while determining the AAEC in cases involving anti-competitive agreements and abuse of dominant position?

Section 19(3) of the Competition Act sets out certain factors that the CCI is to consider in determining whether an agreement has an AAEC under Section 3, including creation of entry barriers, foreclosure of competition or removal of competitors, accrual of benefits to consumers, improvements in production or distribution of goods or services, and promotion of technical, scientific and economic development.

Section 19(4) of the Competition Act sets out certain factors that the CCI is to consider while determining whether an enterprise enjoys a dominant position under Section 4, including market share, size and resources of the enterprise and its competitors, economic power including commercial advantages over competitors, extent of vertical integration, dependence of consumers, entry barriers (regulatory and otherwise), countervailing buyer power, market structure and size, social obligations and social costs and relative advantage by way of contribution to economic development by the dominant enterprise.

What are the penalties for contravention of the antitrust provisions of the Competition Act?

If an enterprise is found to be in breach of Section 3 of the Competition Act (anti-competitive agreements), the CCI may order a number of remedies. These include requiring the enterprises concerned to "cease and desist" from the illegal activity and imposing penalties. The "standard" penalty is up to 10% of the average turnover of the enterprise for the last three financial years. In the case of cartels, the CCI may alternatively impose upon each participant in the cartel, a penalty of up to three times of its profit or 10% of its turnover (whichever is higher) for each year of continuance of such agreement.

If an enterprise is found to be in breach of Section 4 of the Competition Act (abuse of dominance), the CCI may order the enterprise to discontinue such an abuse and impose a penalty which may be up to 10% of the average turnover for the last three financial years. It may also order division of an enterprise enjoying a dominant position to ensure that such enterprise does not abuse its dominant position.

Further, a failure to furnish information or providing false information can result in a penalty between INR 50 lakhs (approx. USD 77,570) and INR 100 lakhs (approx. USD 155,135).

Individuals may also be fined where an enterprise has breached the provisions of the Competition Act.

Every person, who at the time of the contravention was in charge of, and was responsible to, the company for the conduct of its business, shall be deemed to be guilty and punished accordingly. However, such a person will not be liable to any punishment if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the breach. In addition, where any director, manager, secretary or other officer of the enterprise has connived at or consented to the breach, or the breach is attributable to his neglect, such person shall also be deemed to be guilty of the contravention and be punished accordingly.

Section 46 of the Competition Act provides for imposition of lesser penalty on a member of a cartel who makes full, true and vital disclosure in respect of the cartel. Under the CCI (Lesser Penalty) Regulations, 2009 the first party to make such disclosure to the CCI can benefit from a reduction in penalty of up to 100%, if the disclosure enables the CCI either to (a) form a *prima facie* opinion regarding the existence of a cartel, or (b) establish a cartel in a matter under investigation where the Director General (**DG**) or CCI did not have sufficient evidence to do so at the time of the application. Subsequent applicants for lesser penalty may also secure up to 50% or 30% reductions, respectively, if they disclose evidence that provides significant added value to the evidence already in possession of the CCI or DG. A leniency applicant must co-operate until the completion of the proceedings before the CCI or DG, in order to secure a reduction in penalty. Both individuals as well as enterprises may avail of these leniency provisions.

What is the merger control regime in India?

From June 1, 2011, any acquisition, merger or amalgamation, where the parties or their groups cross the jurisdictional thresholds (based on assets or turnover) specified in the Competition Act must be pre-notified to the CCI. These transactions – referred to as “combinations” - are subject to Sections 5 and 6 of the Competition Act which prohibit a combination which causes or is likely to cause an AAEC in the relevant market in India and treat such combinations as void. The merger control regime in India is mandatory and suspensory, and transactions subject to review by the CCI cannot be concluded until merger clearance in India has been obtained or a review period of 210 calendar days has passed, whichever is earlier. The CCI in its orders has made it clear that even global transactions with an Indian element cannot be concluded without obtaining clearance from the CCI.

If an enterprise is found to be in breach of Section 3 of the Competition Act (anti-competitive agreements), the CCI may order a number of remedies. These include requiring the enterprises concerned to “cease and desist” from the illegal activity and imposing penalties.

What are the transactions that require notification to the CCI?

Section 5 of the Competition Act covers three broad categories of combinations.

First, the acquisition by one or more persons of control, shares (including convertible instruments), voting rights or assets of one or more enterprises, where the parties or the group to which the target will belong post-acquisition meet specified assets or turnover thresholds (see below). It should be stressed that acquisitions not involving a change of control can be caught.

Second, the acquisition by a person of control over an enterprise where the person concerned already has direct or indirect control over another enterprise engaged in the production, distribution or trading of similar or identical or substitutable goods, or in the provision of a similar or identical or substitutable service, where the parties, or the group to which the target will belong post-acquisition, meet specified assets or turnover thresholds (see below).

Third, mergers or amalgamations, where the enterprise remaining, or enterprise created, or the group to which the enterprise will belong after the merger or amalgamation, meets specified assets or turnover thresholds (see below).

The CCI seeks to capture innovative structuring of transactions designed to avoid notifications to the CCI. The CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 (**Combination Regulations**) provide that a notification requirement must be assessed with respect to the substance of the transaction and that any structure of a transaction, comprising a combination, which has the effect of avoiding a filing requirement will be disregarded by the CCI. The scope of this anti-avoidance provision is unclear and it remains to be seen how the CCI will assume jurisdiction over transactions which, strictly speaking, do not trigger a notification obligation. However, parties will now have to ensure that transaction structures are not devised in a manner which has the effect of avoiding a filing requirement.

What are the jurisdictional thresholds under the Competition Act?

The jurisdictional thresholds are prescribed in Section 5 of the Competition Act for the Parties and the Group, and are set out in detail below. It should be noted that there is currently little formal guidance from the CCI on the calculation of assets and turnover in order to assess whether the thresholds are met.

Thresholds

Parties Test:

- the Parties have combined assets in India of INR 2,000 crores (approx. USD 310 million) or combined turnover in India of INR 6,000 crores (approx. USD 931 million); or
- the Parties have combined worldwide assets of USD 1,000 million including combined assets in India of INR 1,000 crores (approx. USD 155 million) or

combined worldwide turnover of USD 3,000 million including combined turnover in India of INR 3,000 crores (approx. USD 465 million); OR

Group Test:

- the Group has assets in India of INR 8,000 crores (approx. USD 1,241 million); or turnover in India of INR 24,000 crores (approx. USD 3,723 million); or
- the Group has worldwide assets of USD 4,000 million including assets in India of INR 1,000 crores (approx. USD 155 million) or worldwide turnover of USD 1,2000 million including turnover in India of INR 3,000 crores (approx. USD 465 million).

The Government of India has also issued a *de minimis* target based filing exemption (**Target Exemption**), under which acquisitions, mergers and amalgamations where the target has **<u>either</u>** Indian assets of less than INR 350 crores (approx. USD 54.3 million) **<u>or</u>** Indian turnover of less than INR 1,000 crores (approx. USD 155 million) do not need to be notified to the CCI.
Further, for the purposes of assessing whether the Target Exemption applies, and for assessing the jurisdictional thresholds specified in Section 5 of the Competition Act, only the value of assets of, and turnover attributable to, the portion, division or business being transferred will be counted as regards the target, and not the entire assets or turnover of the selling entity.

The CCI has clarified that a de-merger of assets or business undertaking, which takes place through a court approved scheme, will be treated as an acquisition under Section 5(a) of the Competition Act, and the Target Exemption would be available in this case. The Target Exemption is presently available only till March 27, 2022.

Is there any time period within which the CCI must be notified?

The CCI previously required the parties to notify a proposed transaction within 30 calendar days of a “trigger event”. However, this requirement has now been done away with and the parties are now required only to notify and seek approval of the CCI prior to the consummation of the transaction.

What is the trigger event that requires a filing?

Under the Competition Act, the trigger event for the notification of a proposed transaction to the CCI is:

- final approval of the proposed merger or amalgamation by the boards of directors of the enterprises concerned; or
- execution of any agreement or other document for acquisition or acquiring of control.

The Combination Regulations clarify that the “other document” referred to above shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets. Where a public announcement has been made under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the date of such announcement will be deemed to be the date of execution of the "other document" for acquisition.

In the event of a hostile acquisition, the "other document" means any document executed by the acquirer conveying a decision to acquire.

Are internal restructurings notifiable?

Among the various types of transactions that are ordinarily exempt under the Combination Regulations, intra-group acquisitions are explicitly exempt from notification to the CCI except where the acquired enterprise is jointly controlled by enterprises that are not part of the same group. In respect of intra-group mergers and amalgamations, the Combination Regulations, exempt those transactions that take place: (i) when one enterprise holds more than 50% of the shares or voting rights in the other enterprise; and/or (ii) where enterprises within the same group hold more than 50% of shares or voting rights in each of the parties to the merger or amalgamation. It should be noted, however, that the exemption will not apply where the merger or amalgamation results in the transfer from joint control to sole control.

What is the process of merger filing?

The Combination Regulations prescribe three forms for filing a merger notification:

- Form I (i.e., short form) – All notifications are ordinarily required to be filed in Form I. The parties are required to provide basic information in relation to the combination, with a filing fee of INR 15 lakhs (approx. USD 23,270).
- Form II (i.e., long form) – The parties are free to file the merger notification in Form II along with a filing fee of INR 50 lakhs (approx. USD 77,570). The Combination Regulations recommend that Form II be filed for transactions where:
    - the parties to the combination are competitors and have a combined market share in the same market of more than 15%; or
    - where the parties to the combination are active in vertically linked markets and the combined or individual market share in any of these markets is greater than 25%.
- Where parties have filed Form I and the CCI believes that it requires information in Form II, it may require parties to file notice in Form II. In such a case, the time periods mentioned in the Competition Act and the Combination Regulations will restart.

- The CCI also has the power to invalidate a notification form if it is of the opinion that the notification is not complete, or is not in conformity with the requirements of the Combination Regulations.
- Form III is a post-completion application form, which must be filed within 7 days of an acquisition, share subscription or financing facility entered into by a public financial institution, registered foreign institutional investor, bank or registered venture capital funds under a covenant in a loan agreement or an investment agreement.
- The obligation to notify the CCI lies with the acquiring company in case of an acquisition and jointly with the parties, in case of a merger or amalgamation.

How long will the CCI review process take?

- Phase I Investigation

  On receipt of a notification, the CCI is required to form a *prima facie* opinion on whether a combination causes or is likely to cause an AAEC within the relevant market in India within a period of 30 working days. If the CCI requires the parties to remove defects in the notification or to provide additional information, it "stops the clock" until the additional information is provided. This means that it can take much longer than 30 days for the CCI to reach an opinion.

  At this stage, the parties are also free to propose modifications to the combination up front in order to satisfy the CCI that the combination will not cause an AAEC in the relevant market in India. In such a case, the CCI will get an additional 15 (fifteen) days to evaluate the proposed modification.

- Phase II Investigation

  If the CCI forms a *prima facie* opinion that a combination is likely to cause an AAEC, a detailed investigation will follow and the parties cannot complete the transaction until the earlier of:
  - a final decision by the CCI; or
  - a lapse of 210 days from the date of notification to CCI.

  During the Phase II Investigation, if the CCI is of the opinion that the combination has or is likely to have an AAEC, but such adverse effect can be eliminated by suitable modification(s) to the combination, it may propose appropriate modification(s) to address such concerns.

The CCI has stated that it will endeavour to clear combinations within 180 calendar days of filing a notice.

Are there any exemptions from mandatory pre-notification?

In addition to the transactions that can avail of the Target Exemption, transactions falling under the following two categories are generally exempt from prior notification under the Competition Act:

- Transactions expressly exempt under the Competition Act: Acquisitions, share subscriptions or financing facilities entered into by public financial institutions, registered foreign institutional investors, banks or registered venture capital funds, under a covenant in a loan agreement or an investment agreement, are exempted from obtaining prior clearance from the CCI, but a post facto filing in Form III within 7 days of completion of acquisition is required.
- Transactions that are "ordinarily" exempt under the Combination Regulations: Transactions set out in Schedule I of the Combination Regulations are presumed not to cause an AAEC in India, and normally do not require to be notified. Such transactions are:
  - acquisition of shares or voting rights which do not entitle the acquirer to hold 25% or more of the target company, made solely for investment purposes or in the ordinary course of business, not leading to control. The Combination Regulations clarify that an acquisition of less than 10% of total shares or voting rights will be treated solely as an investment if: (a) the acquirer is able to exercise only the rights of ordinary shareholders; (b) the acquirer does not have a seat on the board; and (c) the acquirer does not intend to participate in the management of the target;
  - an acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to the acquisition, already holds 25% or more shares or voting rights of the enterprise, but does not hold 50% or more of the shares or voting rights of the enterprise, either prior to or after such acquisition. This exemption is not available if the acquisition results in the acquisition of sole or joint control of such enterprise by the acquirer or the group;
  - acquisition of shares or voting rights where the acquirer already holds 50% or more of the shares or voting rights in the target enterprise, except in the cases where the transaction results in a transfer from joint control to sole control;
  - acquisition of assets not directly related to the business of the acquirer or made solely as an investment or in the ordinary course of business, not leading to control of the target enterprise, except where the assets represent substantial business operations of the target enterprise in a particular location or for a particular product or service, irrespective of whether such assets are organised as a separate legal entity or not;
  - intra-group reorganisation (as described above);
  - acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business;
  - acquisition of shares or voting rights pursuant to a buyback or a bonus issue or a stock split or consolidation of face value of shares or subscription to rights issue, not leading to an acquisition of control;
  - amended or renewed tender offer where a notice has been filed by the party making such an offer;
  - acquisition of shares, control, voting rights or assets by a purchaser

approved by the CCI (for instance, in case of a divestiture); and

- acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stockbroking.

Foreign to foreign transactions satisfying the standard assets and turnover thresholds under the Competition Act and not covered by any of the above exemptions, will have to be notified even if there is no local nexus and effect on markets in India.

Is it possible to have pre-notification discussions with the CCI?

It is possible to have substantive and procedural pre–notification consultations with the CCI. However, such consultations are oral and non-binding on the CCI.

What are the factors that the CCI may take into consideration while determining the AAEC of a combination in India?

Section 20 of the Competition Act sets out certain factors that the CCI shall consider, while determining if a combination causes or is likely to cause an AAEC in the "relevant market" in India, including the actual and potential level of competition through imports in the market, entry barriers to the market (regulatory and otherwise), degree of countervailing power in the market, availability of substitutes in the market, market shares of each of the parties to the combination (individual and combined), likelihood of foreclosure/removal of competitors and extent of vertical integration in the market. The CCI is also required to consider the positive effects that a combination could potentially give rise to such as the possibility of saving a failing business, the nature and extent of innovation and the relative advantage through contribution to economic development brought about by the combination.

What orders can be passed by the CCI in case of merger control?

The CCI can pass an order approving the combination if the combination does not cause an AAEC in the relevant market in India. In the event that the CCI considers that the combination results in an AAEC, it may block such a combination and/or it can propose suitable modifications to the same. The parties to the combination also have the option of submitting amendments to the modifications proposed by the CCI, which may be approved or blocked by the CCI. The CCI may also issue interim orders (by way of a temporary injunction) restraining any party from carrying on any act which is or is likely to be in contravention of Section 6 of the Competition Act.

What are the penalties for failure to notify a notifiable transaction with the CCI?

In case of failure to notify the proposed combination which exceeds the prescribed thresholds in time or at all, the CCI can impose a penalty up to 1% of the total turnover or assets of a combination, whichever is higher.

Intellectual Property

What is the law relating to protection of intellectual property rights in India?

Intellectual property is protected under various legislations in India as well as at common law. As a signatory to the TRIPs Agreement and keeping in line with India's obligations, amendments have been made in the existing legislations for compliance, such as the introduction of the Patents (Amendment) Act, 2005 and the Patents (Amendment) Rules 2016 and a new trade mark law regime.

The important legislations governing intellectual property in India are:

- Patents
  - Patents Act, 1970 as amended by the Patents (Amendment) Act, 2005
  - Patent Rules,2003, as amended by the Patents (Amendment) Rules, 2016
- Designs
  - Designs Act, 2000
  - Designs Rules, 2001 as amended by Designs (Amendment) Rules, 2014
- Trademarks
  - Trade Marks Act, 1999 as amended by Trade Marks (Amendment) Act, 2010
  - Trade Marks Rules 2017
- Copyrights
  - Copyright Act, 1957 as amended by the Copyright (Amendment) Act, 2012
  - Copyright Rules, 2013
- Geographical Indications
  - Geographical Indications of Goods (Registration & Protection) Act, 1999
  - Geographical Indications of Goods (Registration & Protection) Rules, 2002
- Plant varieties
  - Protection of Plant Varieties and Farmers' Rights Act, 2001
  - Protection of Plant Varieties and Farmers' Rights Rules, 2003 as amended by Protection of Plant Varieties and Farmers' Rights (Third Amendment) Rules, 2009
- Semiconductor integrated circuits
  - Semiconductor Integrated Circuits Layout- Design Act, 2000
  - Semiconductor Integrated Circuits Layout- Design Rules, 2001
- Biodiversity
  - Biological Diversity Act, 2002
  - Biological Diversity Rules, 2004

How are computer software and programmes protected in India?

India recognizes and protects computer programmes, tables and compilations including computer databases as 'literary works' under the Copyright Act, 1957 (**Copyright Act**). Both the object and the source codes can be protected as literary works under the Copyright Act. The protection provides for rights to sell or offer to sell, give on commercial rental any copy of the computer programme, provided the programme itself is an essential object of the rental. Also, under the Copyright Act, the owner of a copyright work is entitled to protect his work against unauthorized use and misappropriation of whole of his work or a substantial part thereof and obtain relief from a court of law including injunction, damages and rendition of accounts of profits.

The Patents Act, 1970 (**Patents Act**) prohibits patentability of "*computer programme per se*", which the Patent Office, in most cases, treats as an absolute preclusion on computer implemented method claims. Essentially all computer programmes need to be in combination with some novel hardware to avoid this preclusion. Inventions directed at computer programmes coupled with a novel hardware, enabling the hardware to perform a certain function may be allowable, if such an invention meets all other conditions of patentability.

The rights provided by the Patents Act bestow on the patentee the exclusive right to prevent third parties from the acts of using, offering for sale, selling or importing for those purposes, the patented product or product obtained directly by a process patented in India.

System claims on the other hand are routinely allowed, subject to meeting the requirements of novelty and inventiveness. The rights provided by the Patents Act bestow on the patentee the exclusive right to prevent third parties from the acts of using, offering for sale, selling or importing for those purposes, the patented product or product obtained directly by a process patented in India.

What patent protection is available to a biotechnology company?

Inventions in the field of biotechnology would be subject to the same criteria as any other invention relating to product and process. Patents may not however be secured in respect of plants and animals in whole or part, including seeds, varieties and species and biological processes for production or propagation of plants and animals (some of which are presently protectable under other legislations such as the Protection of Plant Varieties and Farmers' Rights Act, 2001.) The preclusion in patentability of plants and animals does not however extend to microorganisms that are subjected to modification. However, microorganisms that are naturally occurring are statutorily precluded from patentability.

How are trademarks and service marks protected in India?

Under the Trade Marks Act, 1999 (**Trade Marks Act**), a trade mark is defined as a mark that is capable of both: a) a graphical representation, and b) distinguishing the goods or services of one undertaking from another. The definition of mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

Registration under the Trade Marks Act confers exclusive rights to use the mark in respect of goods or services, subject to any conditions imposed, and if these rights are infringed to take action to restrain unauthorised users.

Apart from or in addition to registration, a person can also obtain rights in an unregistered mark. By virtue of use of a trade mark, a proprietor acquires valuable goodwill which is protectable at common law by way of a passing off action. The protection also extends to unauthorised use in relation to trade names and domain names.

The civil remedies or reliefs available to trade mark owners, among others, include an injunction, damages or rendition of account of profits with or without any order of delivery-up of the infringing labels and marks for destruction and erasure. One can seek interlocutory *ex parte* orders against the misusers and seek appointment of local commissioners to seize the infringing goods.

How does one protect confidential information and trade secrets in India?

Confidential information and trade secrets are protected in India under principles of equity and the law of contracts. The protected information must be such, the release of which would be injurious to its proprietor or of advantage to third parties, it must be confidential or secret, that is, it is not already within the public domain, and the proprietor should have taken reasonable steps to maintain its secrecy or confidentiality. The methods usually used to protect confidential information are confidentiality clauses in employee contracts, non-disclosure agreements with third parties in the course of a business venture, and internal security mechanisms to restrict access and dissemination of trade secrets and confidential information within an organization.

Legal recourses available include, amongst others, injunctions restraining disclosure or use of information, return of confidential proprietary information on termination of a contract, and damages and account of profits arising out of unauthorized disclosure or use.

Can the employees of an Indian company be required to sign confidentiality agreements?

Yes. Confidentiality provisions may be included in the employment terms to bind the employee to keep the information received during the course of employment confidential. Such terms may also include requirements for personnel to return all confidential information and material to their employer at the time of termination of their employment. Additionally, requirements preventing such personnel from utilizing such confidential information in their new job may also be imposed.

What is the protection available in case of infringement of intellectual property rights?

All the relevant statutes on intellectual property have provisions relating to remedies and reliefs available to an owner in case of infringement including injunction, damages or rendition of accounts. In addition to civil remedies, the owner is also, in some cases, entitled to criminal remedies for infringement of copyright and trade marks. There are detailed provisions relating to such offences which are punishable with imprisonment and fine.

Does Indian law recognize transactions carried out electronically?

The Information Technology Act, 2000 (**Information Technology Act**), provides for, amongst others, legal recognition of transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce". Such communication maybe an alternative to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and for connected or incidental matters.

The Information Technology Act provides legal recognition to electronic records if the information or matter is (a) rendered or made available in an electronic form, and (b) accessible so as to be usable for a subsequent reference. The Information Technology Act also provides legal recognition for electronic signatures where information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.

How can a company outsourcing its activities to India safeguard intellectual property which is created in the course of performance of an outsourcing contract?

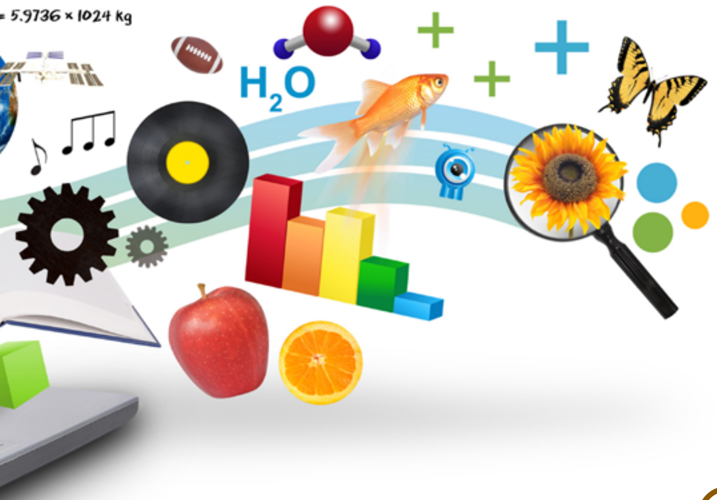
Indian law permits for assignment of rights in intellectual property, either partially or wholly and, in cases of some intellectual property such as copyright, for whole or any part of the duration of protection granted under the relevant legislation. In a case where a company outsources its work to a third party contractor or vendor, it is essential to ensure that the contract mentions ownership and terms of use of intellectual property. In case of a pre-existing intellectual property, generally ownership lies with the party who created it, however, the third party contractor or vendor may be afforded rights to use the intellectual property through a negotiated license agreement. The license agreement should contain appropriate terms of use and may be exclusive or

non-exclusive. In case of a newly created intellectual property, it is essential to identify who will have ownership of the intellectual property in the contract itself, and whether the vendor will have certain rights regarding its usage or will it be jointly held. The intellectual property related terms and conditions must comply with the requirements and provisions as laid down under the respective intellectual property legislations.

What are the relevant data protection laws in India?

The Information Technology Act contains provisions relating to data protection and imposes civil liability for negligent handling of "sensitive personal data or information" and criminal liability in cases of disclosure of information in breach of a lawful contract. The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 lay down directions to be followed by a body corporate for the protection of personal information including sensitive personal information or data, procedure to be followed for collection of such data and further disclosure of such collected data. The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 are applicable to body corporates or any person located within India. Unauthorized disclosure is punishable with imprisonment up to 3 years and a fine upto INR 500,000 (approx. USD 7,760) or both.

Additionally, the Information Technology Act empowers the government to direct any of its agencies to intercept, monitor or decrypt any information in the interest, amongst others, of sovereignty, integrity, defense and security of India. Further, the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, provide that the government may exercise power to issue directions to block an internet site. However, the reasons for blocking have to be recorded in writing and are amenable to judicial scrutiny.



Employment Law

What is the general frame work of employment laws in India?

The Indian parliament as well as the legislature of the relevant State has power to concurrently legislate on the subject of labour. Broadly, the key labour legislations in India can be grouped as follows:

- Group I

  Laws to provide basic protection to industrial workers:
  - Factories Act, 1948 (**Factories Act**);
  - Contract Labour (Regulation and Abolition) Act, 1970 (**CLRA Act**);
  - Employees' Compensation Act, 1923 (**Compensation Act**);
  - Employer's Liability Act, 1938 (**Liability Act**);
  - Fatal Accidents Act, 1855 (**Accidents Act**); and
  - Apprentices Act, 1961 (**Apprentices Act**).

- Group II

  Laws for promoting industrial peace, harmony, conciliation and adjudication of industrial disputes:
  - Industrial Disputes Act, 1947 (**Industrial Disputes Act**);
  - Industrial Employment (Standing Orders) Act, 1946 (**Standing Orders Act**); and
  - Trade Unions Act, 1926 (**Trade Union Act**).

- Group III
  Laws dealing with wages of employees:
  - Equal Remuneration Act, 1976 (**Equal Remuneration Act**);
  - Minimum Wages Act, 1948 (**Minimum Wages Act**);
  - Payment of Wages Act, 1936 (**Wages Act**); and
  - Payment of Bonus Act, 1965 (**Bonus Act**).

- Group IV
  Laws providing social security and welfare of employees:
  - Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (**EPF Act**);
  - Employees' State Insurance Act, 1948 (**ESI Act**);
  - Payment of Gratuity Act, 1972 (**Gratuity Act**);
  - Maternity Benefits Act, 1961 (**MB Act**); and
  - Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (**Sexual Harassment Act**).

- Group V
  General Laws:
  - Constitutional provisions relating to fundamental rights enshrined in the Constitution of India; and
  - Indian Contracts Act, 1872 (**Contract Act**).

- Group VI
  State Laws:
  - Shops and Establishments Acts (**S&E Acts**) in force in various States;
  - Industrial Establishments (National and Festival Holidays and Other Holidays) Act (**N&F Holidays Act**);
  - State specific Labour Welfare Fund Acts (**LWF Acts**); and
  - State Amendments to Central laws and State Rules to Central laws.

Certain big ticket reforms have been proposed by the Ministry of Labour and Employment, Government of India (**MoLE**) to consolidate, simplify and make the labour legislations investor friendly. Some of these reforms include:

- Labour code on Wages Bill (**Wages Bill**) which aims to consolidate multiple laws on the subject of wages i.e. Wages Act, Minimum Wages Act, the Bonus Act, and the Equal Remuneration Act. The Wages Bill was introduced in Lok Sabha on August 10, 2017. The key highlights of the Wages Bill include:
  i) Universal Minimum Wage – Under the existing law, the State Governments have the power to fix the minimum wage limit, however, the Wages Bill provides that the Central Government shall now have the power to fix minimum wage limit across all States and the State Governments are required to adhere to the said minimum wage limit, although, they may provide for a higher limit than fixed by the Central Government;
  ii) Definition of 'wages' – The Wages Bill has retained the definition of 'wages' as provided under the Wages Act for the purposes of minimum

wages and payment of wages, although, it provides for a separate definition of 'wages' for the purposes of payment of bonus;

iii) Registers and Returns – The Wages Bill provides for maintenance of a single register, preferably in electronic form, containing the details of persons employed, wages and other details prescribed by appropriate Government. Employers are also required to file annual returns under the Wages Bill;

iv) Facilitators – The Wages Bill provides for facilitators, in place of the earlier provision for appointment of inspectors, with powers of inquiry, investigation and advising employers and workers regarding effective means of complying with the law; and

v) Adjudication of Claims – The Wages Bill requires the State Governments to appoint one or more authorities and an appellate authority to hear and decide claims arising out of non-payment of wages, deduction in wages made in contravention of the Wage Bill, payment of wages below the minimum wages, non-payment of wages for leave period, non-payment of over time, non-payment of equal remuneration to employees etc.

- Labour code on Industrial Relations which seeks to consolidate the Industrial Disputes Act, the Trade Union Act and the Standing Orders Act into one single piece of legislation. The Labour Code on Industrial Relations is presently pending discussion. The key highlights include:

  i) Industrial Disputes – The threshold above which it is necessary to obtain government approval for termination of employment or closure of an establishment is proposed to be increased from 100 to 300 workmen. For employers employing less than 50 workmen, the requirement to provide a minimum of 1 months' notice and retrenchment compensation is sought to be removed. Retrenchment compensation for workmen is sought to be increased to an amount equivalent to 45 days' average salary for every year of service from the current 15 days' average salary for every year of service. Taking of casual leave by 50% or more of the workers employed in an industry on any given day shall be treated as a 'strike'. The monetary penalties for non-compliance is proposed to be enhanced;

  ii) Trade Unions – At least 10% of the members of the establishment or industry must be members of the trade union seeking registration. The trade union will be deemed to have been registered in case of non-communication of the decision of the Registrar within 60 days; and

  iii) Standing Orders – Applicability of the Standing Orders chapter cannot be extended to establishments or undertakings employing less than 100, even by notification. Matters to be covered by the Standing Orders have been increased. The procedure for drafting and certification of Standing Orders, while remaining largely similar, has been slightly more streamlined.

- Labour Code on Social Security and Welfare consolidates a total of 15 labour laws including EPF Act, ESI Act, MB Act, Gratuity Act, Compensation Act, Unorganised Workers' Social Security Act, 2008, and various Welfare Cess /LWF Acts. The draft Labour Code on Social Security and Welfare was made available on the MoLE website on March 16, 2017. The key highlights of the said Code include:
    i) Applicability – (a) workers that are employed by any entity; (b) worker who may also be the owner or the proprietor of an entity or a self-employed unit; international workers; and (c) an Indian citizen, working outside the territory of India, who opts to become a member of social security schemes under the Code. Extends to both organized as well as unorganized sector;
    ii) Constitution of National Social Security Council of India - For reviewing and monitoring the implementation of the Code;
    iii) Claims and objections for the unclaimed amount of the preceding financial year within a period of minimum six months, following which the amount will be confiscated;
    iv) Aadhar-based registration service for registration of workers and providing a portable Social Security account, to be named as Vishwakarma Karmik Suraksha Khata (VIKAS), which will be linked to Aadhar number of the worker; and
    v) Unless an employer is registered under the Code, once enforced, it cannot employ any workers, after the expiry of such period as may be stipulated from the date on which the entity was liable to be registered.

- Labour Code on Occupational Safety, Health and Working Conditions to consolidate the law already covered under the Factories Act. While the said Code has been proposed, there is no draft available on public sources.

- Ease of Compliance to Maintain Registers under various Labour Rules, 2017 with effect from February 5, 2017 whereby registers under various labour laws have been combined to facilitate easier compliance, maintenance, and inspection and making the information easily accessible, electronically.

Some of the other major reforms that have been proposed in the labour and employment law regime include:

- amendments proposed to the Factories Act to increase the overtime limit from 50 hours to 100 hours in a quarter. The Bill for amendment has been passed by the Lok Sabha on August 9, 2017;
- amendments proposed to the CLRA Act providing for changed definitions of 'contract labour' and 'contractor', changed 'licensing of contractor' provision, information to be given by contractor to the appropriate government regarding work order, enhanced penalty, i.e. increase of fine from INR 500 (approx. USD 7.75) to INR 5,000 (approx. USD 77.5) for obstructing inspector or refusal to produce documents, etc.;

- amendment proposed to the Gratuity Act to increase the ceiling limit of gratuity from INR 10 lakhs (approx. USD 15,514) to INR 20 lakhs (approx. USD 31,027); and
- the Paternity Benefit Bill, 2017 (**Paternity Bill**) proposed to provide paternity benefit for 15 days of which not more than 7 days shall precede the date of expected delivery provided that paternity benefit shall be availed up to 3 months from the date of delivery of child. The Paternity Bill also provides to a father, similar benefits including crèche facilities, protection from dismissal during absence etc. that are provided to women under the MB Act. It provides for formulation of Paternal Benefit Scheme and Paternal Benefit Scheme Fund by Central Government.

Introduced Changes:

Some of the other major reforms that have been introduced in the labour and employment law regime include:

- amendment to the MB Act has increased maternity leave from 12 weeks to 26 weeks, while providing for maternity benefit for adopting and commissioning mothers and providing for crèche facilities;
- the monthly wage threshold for the applicability of Wages Act has been increased from INR 18,000 (approx. USD 279) to INR 24,000 (approx. USD 372);
- the monthly wage threshold for the applicability of the ESI Act has been increased from INR 15,000 (approx. USD 232) to INR 21,000 (approx. USD 325);
- introduction of Rights of Persons with Disabilities Act, 2016 providing for enhanced protection to persons with disabilities;
- amendments have been made to the Compensation Act to enhance the penalties thereunder;
- amendments have been made to the Bonus Act raising the employee eligibility threshold to INR 21,000 (approx. USD 325) per month from the earlier limit of INR 10,000 (approx. USD 155) and have further increased the wage ceiling limit for computing the bonus from INR 3,500 (approx. USD 54) to INR 7,000 (approx. USD 108); and
- introduction of Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017 (**Maharashtra Shops Act**). The Maharashtra Shops Act has extended the period within which registration is required to be done from 30 days to 60 days, while making the registration procedure online. The Maharashtra Shops Act also provides that opening and closing hours of different classes of establishments

Different legislations aim to protect the rights of different categories of employees or workers depending upon the nature of work undertaken by them, the type of industry, location and the remuneration received by them.

shall be prescribed by the State Government by notifying separate rules. The penalties for violations of the provisions have also been enhanced.

What are the registrations which are required under labour laws for starting up a business?

An employer is required to apply for registration of its commercial establishment or shop as applicable within a specified number of days of its coming into existence under the state specific S&E Act. Manufacturing units are required to obtain registration under the Factories Act. Further, if any construction work is being undertaken for setting up of the establishment, registration would be required under the Building and other Construction Workers Act, 1996. Depending on the number of employees, the nature of industry and the salary thresholds, registrations would be required under the EPF Act and ESI Act within the prescribed timeline for contribution towards the social security benefits.

What are the different categories of workers or employees which are protected under labour and employment laws? How are such workers or employees distinguished?

Different legislations aim to protect the rights of different categories of employees or workers depending upon the nature of work undertaken by them, the type of industry, location and the remuneration received by them. The major categories under which employees or workers can be distinguished are: permanent employees, fixed term employees, part term employees, casual workers, contract workers, and apprentices. A few of the major labor legislations dealing with the rights of such workers or employees are as follows:

- The Factories Act aims to protect workers working in factories against exploitation by their employers. It is applicable to all factories employing more than 10 workers working with the aid of power and to all factories employing more than 20 workers working without the aid of power. It aims to regulate the health, safety, welfare and service conditions of such workers. The state governments are free to make their own set of rules for the implementation of the said legislation.
- The respective state S&E Acts are applicable to employees or workers employed in the shops and commercial establishments located in such state. It aims to regulate the service conditions of such persons including hours of work, holidays and leaves etc., and further lays down the standards for regulating the health and safety of such persons. In certain states, persons holding positions of management are excluded from protections available under the S&E Act.
- The Industrial Disputes Act aims to protect the employees/workers falling under the category of 'workmen' which includes persons employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. An employee employed in a managerial or administrative capacity; or in a supervisory capacity drawing wages exceeding INR 10,000 (approx. USD 155) per month is excluded from the scope of 'workman'.

- Contract workers are provided protection under the CLRA Act. It deals with the registration of the principal employer, licensing of contractors, payment of wages, facilities to be provided to contract workers etc. The state governments are free to make their own set of rules for the implementation of the said legislation.

Are there any restrictions on employment of foreign nationals in India?

Employment of foreign nationals is permitted in India subject to possession of a valid employment visa by such foreign national.

Employment visa is not granted for jobs for which qualified Indians are available or for routine, ordinary, secretarial or clerical jobs. It is granted to highly skilled/ qualified professionals or to persons engaged or appointed on contractual or employment basis.

A foreign national being sponsored for an employment visa in any sector should draw a salary in excess of USD 25,000 per annum. However, this condition of an annual floor limit on income will not apply to: (i) ethnic cooks, (ii) language teachers (other than English language teachers) or translators, (iii) staff working for the concerned Embassy or High Commission in India, and (iv) foreigners, eligible for 'E' visa for honorary work with non-governmental organisations registered in the country, without salary.

Foreign nationals are eligible for an employment visa if they are coming to India: (i) as consultants on a contract for which the Indian company pays a fixed remuneration, (ii) as self-employed foreign nationals coming to India for providing skilled services as independent consultants, (iii) to provide technical support or services, transfer of know-how or for which the Indian company pays fees or royalty to the foreign company, (iv) as engineers or technicians coming to install and commission equipment, machines or tools in terms of a contract for the supply of such equipment, machines or tools.

If the employment visa is issued for a period of more than 180 days, a registration with the concerned 'Foreigners Regional Registration Office' is required within 14 days of arrival.

The duration for which an employment visa is granted varies from 2-5 years, depending upon the purpose for which the foreign national is coming to India.

No change of employer shall be permitted during the currency of the employment visa. In cases where the foreign national desires to change the employment to another company or organization, he or she will have to leave the country and apply for a fresh employment visa.

Can the foreign nationals be granted business visa?

Yes, business visa can be granted to foreign nationals. However, foreign nationals on business visa are not allowed to take full time employment in India. Furthermore, foreign nationals will be granted business visa only under specific conditions such as that the foreign national should be a person of assured financial standing and have expertise in the field of his business. A business visa is granted in case the foreign national is coming to India: (i) to explore the possibility of setting up or actually establishing a business venture in India, (ii) to transact business related to the purchase or sale of goods, (iii) for attending meeting or board meetings or other general meetings for providing business service support, (iv) for coming to recruit manpower, and (v) to participate or for consultations in exhibitions, trade fairs or business fairs.

Is the employer obligated to put down the terms and conditions of the employment in writing?

The S&E Acts of a few states in India mandate that the employer issues an appointment letter setting out the basic information with regard to employee details such as remuneration, employers address, etc. However, as a matter of practice most employers issue employment letters and execute employment contracts capturing the terms and conditions of the employment in detail.

Can there be any implied terms under the employer and employee relationship?

Yes, certain terms and conditions can be considered as implied due to custom, usage and practice prevalent in the relevant industry or business. Few courts in India have acknowledged the obligations of an employee with regard to confidentiality and non-disclosure towards the employer as part of implied terms of an employer-employee relationship. Therefore, it is recommended that all terms and conditions of employment are encapsulated in the employment contract. It is pertinent to note that under certain legislations the employer needs to comply with certain procedural requirements before changing the terms of employment.

Does the law prescribe any minimum employment terms and conditions which the employer has to necessary comply with?

Yes, labor legislations such as the Industrial Disputes Act, Factories Act, Standing Orders Act and S&E Act, lay down the minimum standards with regard to the employment terms such as the working hours, wages, leaves, notice and termination. Further, there are certain industry specific laws for persons working in cinema, docks, building which also prescribes the minimum terms of employment which are required to be complied.

What are the statutory working hours prescribed and is there a requirement to pay overtime wages?

Indian labour legislations typically provide for a maximum of 9 hours of working each day and 48 hours a week.

Employment of women employees during night hours is restricted in India. However, special exemptions have been made available to IT/ITES industries. IT/ITES companies are also permitted to have 24 x 7 operations subject to the satisfaction of the conditions prescribed by the respective state government.

Employees who work in excess of the normal working hours are entitled to over-time wages, typically at the rate of twice the ordinary rate of wages. Further, in some states, employees working on national holidays are provided compensatory off in addition to overtime payment.

What are the statutory requirements for grant of leave or public holidays?

The Factories Act as well as the state-specific S&E Acts provide for certain number of days as annual leave with wages that the employees are entitled to. Unavailed annual leaves are typically allowed to be carried forward to the next year subject to a prescribed cap. Some of the state-specific S&E Acts also provide for sick and casual leaves.

In addition to the weekly holidays and compensatory holidays prescribed under the N&F Holidays Act and the S&E Act of the relevant state, the employees are also entitled to national holidays such as Republic Day (January 26), Independence Day (August 15) and Gandhi Jayanthi (October 2). Employees are further entitled to 5 to 7 holidays from a list of holidays notified by the respective state governments for each calendar year under the Negotiable Instruments Act, 1881.

Are employees entitled to maternity/paternity leave?

Pursuant to the recent amendment to the MB Act, women employees are entitled to 26 weeks of paid maternity leave, if they have worked for at least 80 days in the 12 months preceding the expected delivery date.

Paternity leave are not statutorily recognized in India. However, the proposed Paternity Bill once passed, will provide for 12 weeks of paid paternity leave. Although, the industry practice in India, especially in the IT/ITES sector, is to give a paternity leave of 5-7 days, it can be solely upto the discretion of the employer and may be granted in accordance with its policies.

Do foreign nationals have to make social security contributions while working in India?

The Indian government has extended the applicability of EPF and the Employees Pension Scheme, 1995 to all international workers. The definition of international workers covers all those employees who work in an establishment in India covered under the EPF Act and hold other than an Indian passport besides Indian employees working overseas.

Every employer who is covered under the EPF Act is required to contribute

24% (12% each for the employer and the employee's share) of the employee's monthly pay towards the provident fund and pension scheme. The employee's share of such contribution can be recovered by the employer from the employee.

However, international workers who are contributing to a social security program in their home country with whom India has entered into a social security agreement (**SSA**) are not required to contribute to the provident fund in India on the satisfaction of specified conditions set out in such SSAs.

An international worker can withdraw the full amount in his or her provident fund account only at the time of retirement or when reaching the age of 58 years, whichever is later, or on account of permanent and total incapacity. However, with respect to members covered under an SSA, the withdrawal from provident fund is possible on the termination of assignment in India, subject to the conditions of the SSA.

Can employees of the Indian company be granted employee stock options in a foreign company?

A foreign company can issue employee stock options to employees of (i) its office or branch in India, (ii) its subsidiary in India, and (iii) an Indian company in which it has equity, direct or indirect (through a special purpose vehicle or step-down subsidiary), irrespective of the percentage of the direct or indirect equity stake in the Indian company, provided that the shares under the employee stock option scheme are offered (a) globally on a uniform basis, and (b) an annual return in the prescribed format, is submitted by the Indian company to the Reserve Bank of India through an authorized dealer bank giving details of remittances and beneficiaries.

Indian employees are permitted to subscribe to equity shares of a foreign company under a cashless employee stock option scheme subject to the condition that it does not involve remittance from India.

The Reserve Bank of India had announced a Liberalised Remittance Scheme (**LRS**) in February 2004 as a step towards further simplification and liberalization of the foreign exchange facilities available to resident individuals. The LRS is amended from time to time and the remittance limits are changed. As per the latest amendment, resident individuals may remit up to USD 250,000 per financial year for any permitted capital and current account transactions or a combination of both.

Can employment contracts contain restrictive covenants like non-compete?

Any agreement in restraint of trade is void under the provisions of the Contract Act. Restrictive covenants operative during the period of the contract of employment when an employee is bound to serve his or her employer exclusively are generally not regarded as restraint of trade and therefore do not fall under section 27 of the Contract Act. A restrictive or negative covenant that the employee would not engage himself in a trade or business, or would not get himself employed in any other manner, or perform similar or substantially similar duties for another, is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one-sided. However, any such restraint which extends beyond the terms of this contract is void and not enforceable. The Supreme Court of India has held that agreements restraining an employee from carrying on the activities that are similar to that of his or her employer upon the termination of such employment would be void and unenforceable, whereas agreements that impose a restraint during the course of employment could be enforceable.

Can the employer carry out pre-employment background checks on prospective employees?

Yes, the employer is allowed to carry out such verification checks provided the employer takes express consent from the prospective employee in this regard. Also, if the employer collects or deals with employee's sensitive personal data or information in conducting such checks then it has to mandatorily comply with the requirements laid down under the Information Technology Act, and the relevant rules thereunder.

How can the services of an employee be terminated?

The applicability of labour legislations pertaining to termination in India are dependent on various factors which *inter alia* include the nature of the establishment, the category of employees (whether workman or non-workman), and the location of the establishment. While the Industrial Disputes Act provides for the termination of workmen category employees, the termination of non-workmen category is regulated by the state-specific S&E Acts, along with the terms of his or her employment contract and company policies. The relevant laws prescribe the minimum notice period, payment in lieu of notice and severance payments to be given to the employee at the time of termination. Termination for misconduct or gross misconduct will need to be preceded by a domestic enquiry following the principles of natural justice. A full and final settlement will have to be done by the employer by making payment of all the statutory and contractual dues to the employee.

Are severance payments statutorily required to be paid in India?

Termination of employees and the associated severance payments would depend on whether such employees are classified as workmen or non-workmen. Under the provisions of the Industrial Disputes Act, a workman with at least one year of continuous service is entitled to compensation equal to 15 days average pay for every completed year of continuous service or part thereof in excess of 6 months, if his or her services are terminated for any reason, except on account of disciplinary proceedings, voluntary retirement, superannuation, nonrenewal of employment contracts or on the ground of continued ill health. Statutory compensation is also payable to workmen in the event of lay off or closure of an undertaking. The S&E Acts in certain states also provide for payment of severance compensation to employees covered under the legislation on termination of their employment. The Gratuity Act entitles an employee to a gratuity payment upon termination of his or her service after the completion of 5 years of continuous employment, of an amount equivalent to 15 days wages for each completed year of service.

Is there a mandatory requirement to engage apprentices?

As per the Apprentices Act and the rules framed thereunder, an employer is required to engage apprentices in the band of 2.5-10% of its total strength of 'workers' within a financial year. The term 'worker' has been defined under the Apprentices Act to include any person working in the premises of the employer, who is employed for wages in any kind of work either directly or through any agency. The requirement to engage apprentices has been made mandatory for an establishment where the number of workers exceed 40. The employer has an option to engage the prescribed number of apprentices either under the notified designated trades or optional trades.

Taxes

What is the law relating to taxation in India?

The Constitution of India empowers the Central, State and local authorities to levy taxes over specified subject matters. Presently, the Central Government levies direct taxes – personal income tax, corporate tax and indirect taxes – customs duty, central goods and services tax, integrated goods and services tax, central excise duty, and central sales tax (for certain specified products such as petroleum crude, high speed diesel, petrol, aviation turbine fuel etc.). Indian States are empowered to levy state goods and services tax, value added tax (on specified products such as alcoholic liquor for human consumption, petroleum crude, etc.). Some local authorities are also empowered to levy municipal taxes on entertainments and amusements.

The Central Government and the State Governments enact their respective Finance Acts annually to establish modified tax rates for the particular fiscal year. At the Central Government level, taxes are administered through the Ministry of Finance and at the state and local levels, taxes are administered by the state or local authorities comprising state tax commissions and revenue departments.

What is the legislation which governs the levy of income tax in India?

The law relating to income tax is incorporated under the Income Tax Act, 1961 (**IT Act**). The IT Act undergoes changes every year with amendments brought out through an annual Finance Act passed by the Indian Parliament. The Indian financial year runs from April 1 to March 31. The said period is commonly referred to as 'Fiscal Year' (**FY**) or 'Previous Year'. The year following the Previous Year is known as 'Assessment Year' (**AY**).

What are the income tax rates in force for individuals in India?

Taxability in India is governed by tax residency of an individual during a fiscal year, which is based on the number of days an individual is physically present in India in a fiscal year and previous fiscal years. Tax residency can be categorized as Ordinarily Resident (**ROR**), Not Ordinarily Resident (**NOR**) and Non Resident (**NR**). Subject to any tax treaty benefits, NOR and NR are generally taxed on Indian sourced income. ROR are taxed on their worldwide income in India.

The following table provides the income tax rates applicable for individuals in relation to fiscal year (FY) 2017-2018 or assessment year (AY) 2018-19. The effective tax rates in case of individuals are as under:

Total Income	Tax Rate	Effective Tax Rate*
Upto INR 250,000**	Nil	Nil
INR 250,001 to INR 500,000	5%***	5.15%
INR 500,001 to INR 1,000,000	20%	20.60%
INR 1,000,001 and above	30%	30.90%*

Note:

* *The rates are inclusive of applicable education cess and secondary and higher education cess, which is 3%. A surcharge at the rate of 15% of income tax will be levied, in case total income of an individual exceeds INR 1 crore (approx. USD 155,135). An Indian resident whose total income does not exceed INR 5 lakhs (approx. USD 7,757) is eligible for a rebate of 100 %of income tax, subject to a maximum amount of INR 5000 (approx. USD 78).*[1]

** *The exemption limit for resident individuals above 60 years of age and below 80 years is INR 3 lakhs (approx. USD 4,654). In case of a resident individual of age of 80 years or above, the basic exemption limit is INR 5 lakhs (approx. USD 7,757).*

*** Vide Finance Act 2017, for AY 2018-19, the marginal rate of tax in the income bracket between INR 2.5 lakhs (approx. USD 3,878) to INR 5 lakhs (approx. USD 7,757) has been reduced from 10% to 5%. Consequently, a rebate of INR 12,500 (approx. USD 194) will be available to a taxpayer across all income ranges.

How are Corporations taxed in India?

A Corporation is regarded as a resident in India if:

- It is incorporated in India; or
- It is not incorporated in India but its place of effective management (i.e. a place where the key management and commercial decisions that are necessary for the conduct of the business of any entity as a whole are, in substance, made), during the relevant fiscal year, is in India.

In the context of implementation of the concept of place of effective management (**POEM**) based residence rule, the Central Board of Direct Taxes (**CBDT**) has issued guidance to determine POEM of a foreign company.

1 *Vide* Finance Act, 2017, the rebate of INR 5,000 *(approx. USD 78)* available to resident individual's whose total income does not exceed INR 5 lakhs (approx. USD 7,757) has been reduced to INR 2,500 (approx. USD 39) and only available in case of resident individuals whose total income does not exceed INR 3.5 lakhs (approx. USD 5,430).

Corporations resident in India are taxed on their worldwide income arising from all sources.

Moreover, the IT Act imposes an additional tax on a domestic company buying back its shares (not being listed company shares) from its shareholders (**Buy Back Tax**). Such Buy Back Tax is applicable on the income distributed by the company on account of a buyback of unlisted shares and is payable on the difference between the consideration paid by the company on buyback shares and the amount, which was received by the company for issue of such shares, determined in the manner as prescribed. Furthermore, income in respect of such buy back by the company is tax exempt in the hands of the shareholders.

In addition to the corporate income tax, a dividend distribution tax (**DDT**) is imposed on a domestic company, which declares, distributes or pays any dividend to its shareholders. The IT Act also provides for the removal of the cascading effect of DDT in multi-tiered corporate structures, subject to certain conditions. Such dividend income, which has suffered DDT, is exempt in the hands of the shareholders. However, in the case of all shareholder(s) (except domestic companies and certain specified funds, trusts, universities or hospitals or any approved educational or medical institutions) who are a resident of India where the dividend so received, exceeds INR 10 lakhs (approx. USD 15,513), an additional 10% tax on the dividend income, which exceeds INR 10 lakhs (approx. USD 15,513), is levied in the hands of such shareholders. The determination of meeting the threshold of INR 10 lakhs (approx. USD 15,513) should be made having regard to the aggregate dividends received by the taxpayer in a financial year.

NR corporations are essentially taxed on the income earned from a business connection in India or from other Indian sources. If a tax treaty exists between India and the country of residence of the taxpayer, the provisions of the IT Act or the tax treaty, whichever is more beneficial, will apply. Accordingly, the taxability of NRs in India, if any, under the IT Act, may be restricted or modified and lower tax rates may apply, having regard to beneficial provisions of a tax treaty. NR corporations are not subject to DDT or Buy Back Tax.

In general, India's tax treaties provide that residents of other countries are subject to Indian tax on business profits derived from a business in India only if the NR has a permanent establishment (**PE**) in India.

What are the income tax rates in force for Corporations in India?

The effective tax rates applicable to Corporations have been summarized below:

Particulars	Tax Rate	Effective Tax Rate*
Corporate Tax Rate		
Domestic Company Taxable income up to INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	30% in all cases	30.90% 33.06% 34.61%
Foreign Company Taxable income up to INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	40% in all cases	41.20% 42.02% 43.26%
DDT		
Domestic Company	15%	20.36%**
Buy Back Tax		
Domestic Company (unlisted)	20%	23.07%
Minimum Alternative Tax (MAT)* **		
Domestic Company Taxable income upto INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	18.5% in all cases	19.06% of the book profits 20.39 % of the book profits 21.34% of the book profits
Foreign Company Taxable income upto INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	18.5% in all cases	19.06% of the book profits 19.44% of the book profits 20.01% of the book profits

Note:

* *Including applicable surcharge and education cess. Domestic companies with total income in excess of INR 100 million are subject to a surcharge at the rate of 12% of income tax. In case the total income of the domestic company is in excess of INR 10 million but less than INR 100 million, a surcharge of 7% of the income tax is levied. However, a surcharge of 12% is imposed on DDT and Buy Back Tax in all cases, irrespective of the amounts distributed. Moreover, in all cases, domestic companies are subject to 'education cess' and 'Secondary and Higher Education cess' of 3% per cent on the amount of income tax as increased by the surcharge payable by such company.*

In case of a foreign company with total income in excess of INR 100 million, a surcharge at the rate of 5% of income tax will be levied. A surcharge of 2% will continue to be levied on foreign companies with total income in excess of INR 10 million but which does not exceed INR 100 million. In all cases, 'education cess' and 'Secondary and Higher Education cess' is levied at the rate of 3%.

** Effective tax rate after grossing up of the dividend income and after the levy of applicable surcharge and cess

*** Under the MAT regime, corporations are subject to a presumptive tax on their book profits (i.e. profits shown in their financial statements), if the tax payable as per the regular provisions of the IT Act is less than 18.5% of the corporation's book profits. MAT provisions do not apply to the foreign companies which do not have a PE in India, in terms of the tax treaty. The taxpayer can carry forward the MAT credit for 15 AYs.

There is no change in base corporate tax rate under the Finance Act, 2017. However, the corporate tax rate has been reduced to 25% in case of a domestic company whose total turnover or gross receipts in FY 2015-16 does not exceed INR 50 crores (approx. USD 7.75 million).

Further, the IT Act provides for special tax rates in the following cases:

- Base corporate tax rate in case of a domestic company with total turnover not exceeding INR 50 crores (approx. USD 775,675) is 29%;
- A newly setup domestic company engaged exclusively in the business of manufacture may opt to pay tax at the rate of 25% subject to satisfaction of the certain conditions, for example:
  - It has been setup and registered on or after March 1, 2016;
  - While computing its total taxable income it does not claim any other specified tax benefits, such as benefits under Special Economic Zone Scheme, benefit of accelerated depreciation, benefit of additional depreciation, investment allowance, expenditure on scientific research and other specified deductions under Chapter-VI-A of the IT Act; and
  - The Income Tax Authorities are intimated by the taxpayer of availing this option, before the due date of furnishing of return of income.

What are the withholding tax rates applicable to non-resident corporations in India?

NRs are taxed on their business income if they have a PE in India to the extent the income is attributable to the PE. In addition, NRs are taxed on interest, royalties and fee for technical services (**FTS**) sourced in India on a gross basis, at specified rates. However, where royalties and FTS are attributable to the NR's PE in India, the same are subject to tax as business profits on a net basis under the IT Act.

The applicable withholding tax rates for foreign companies are as follows[2]. The tax rates are subject to any beneficial rates available under the applicable tax treaty.

Particulars	Tax Rates	Effective Tax Rates
Dividends*	Nil	Nil
Interest Taxable income up to INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	40% or 20% or 5%** in all cases	41.2% or 20.6% or 5.15%42.02% or 21.01% or5.25% 43.26% or 21.63% or 5.41%
Royalties and FTS*** Taxable income up to INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	10% on gross basis in all cases	10.3% 10.51% 10.82%

Note:

* Presently, there is no incidence of withholding tax on the payment of dividends, where DDT is paid.

** NRs are subject to income tax on interest income at the rate of 40% (plus applicable surcharge and cess). However, NRs may avail of special rates of 20% or 5% applicable to interest income under the IT Act in certain cases.

*** Royalties and FTS, received by an NR which carries on business in India through a PE in India (in case of a foreign company) or performs professional services from a fixed pace of profession in India (in case of an NR other than foreign company), and the right, property or contract in respect of which such royalty or FTS is paid is effectively connected with such PE or fixed place of profession, the royalty or FTS is taxable as business income on a net income basis (instead of gross basis) at the normal rates applicable to foreign corporations.

How are Capital Gains taxed in India?

Capital gains earned by the seller of a capital asset (being the sale consideration less the cost of acquisition, cost of improvement and sale-related expenses), are subject to capital gains tax. Capital gains can be classified into (a) short

2 Under the IT Act, the recipient of income or payee (whether resident or NR) is required to furnish PAN to the payer, at the time of remittance. In case of an NR, in the absence of PAN, the NR is required to furnish prescribed information or documents such as its address, contact coordinates; tax residency certificate issued by its country of residence; tax identification number in the country of residence, to the Indian Income Tax Authorities. Failure to furnish PAN or the information, stated above, may lead to higher tax deduction at source or tax withholding in India.

term or (b) long term, depending on the period of holding.

Nature of Gains	Period of Holding security (other than a unit) listed on a recognized stock exchange in India, unit of the Unit Trust of India, unit of an equity oriented fund or a zero coupon bond	Period of Holding (unlisted shares of a company and any immoveable property)	Period of Holding (all other assets)	Applicable Rates# (excluding applicable surcharge and cess)*
Long Term	>1 year	> 2 years	> 3 years	20%**
Short Term	≤ 1 year	≤ 2 years	≤ 3 years	40%*** (30% in case of a domestic company)

Note:

In case of transfer of listed securities on market, where securities transaction tax (**STT**) is payable, long term capital gains tax is exempt. The Finance Act, 2017 provides that the exemption will be available only if the acquisition of shares is chargeable to STT or the acquisition of shares falls under the category of transfers that are specifically notified by the Central Government. The type of transfers that are likely to be specifically notified include IPO issuances, rights or bonus issue etc. and short term capital gains tax is 15% (plus applicable surcharge and cess). The requirement of payment of STT is done away with in case the transaction is undertaken on recognized stock exchange located in any International Financial Services Centre (**IFSC**) and where the consideration for such transaction is in foreign currency.

* Domestic companies with total income in excess of INR 10 crores (approx. USD 1.55 million) are subject to a surcharge at the rate of 12%of income tax. In case the total income of the domestic company is in excess of INR 1 crore (approx. USD 155,135) but less than INR10 crores (approx. USD 1.55 million), a surcharge of 7% of the income tax is levied. Moreover, in all cases, domestic companies are subject to an education cess of 3% on the amount of income tax as increased by the surcharge payable by such company.

In case of a foreign company with total income in excess of INR 10 crores (approx. USD 1.55 million), a surcharge at the rate of 5% of income tax will be levied. A surcharge of 2% will continue to be levied on foreign companies with total income in excess of INR 1 crore (approx. USD 155,135) but which does not exceed INR 10 crores (approx. USD 1.55 million). In all cases, education cess is levied at the rate of 3%.

** Rate of 10% is applicable in case of listed security and zero coupon bonds where benefit of indexation is foregone by the taxpayer. Further, in case of an NR, long term capital gains on unlisted securities or shares of a closely held company is taxable at the rate of 10% subject to conditions;

*** The stated tax rate of 40% in the case of a foreign company is subject to rates provided under the relevant tax treaty, to the extent that the tax treaty is more beneficial.

Does India have General Anti Avoidance Rules?

The IT Act contains General Anti Avoidance Rules (**GAAR**), which codify the 'substance over form' doctrine. With a view to check tax evasion and avoidance, anti-avoidance provisions in the form of GAAR were introduced by Finance Act 2013, as in Chapter X-A of the IT Act. The implementation of GAAR was repeatedly postponed after its introduction; however, the rules have finally been made effective from FY 2017-18 onwards. GAAR empowers the Income Tax Authorities to determine the tax consequences for a taxpayer, after disregarding or re-characterizing an arrangement or transaction, including any step therein (by declaring the same as 'impermissible avoidance arrangement'), if such arrangement or transaction or a step therein, has been entered into by the taxpayer for the main purpose of obtaining tax benefit and lacks commercial substance, amongst others. GAAR provisions apply on domestic as well as cross-border transactions and have an overriding effect on all the other provisions of the IT Act. In case of an abuse of a tax treaty, GAAR provisions can also override the provisions of the tax treaty.

GAAR provisions do not apply to the following transactions or taxpayers:

- Transactions where tax benefit does not exceed INR3 crores (approx. USD 465,405);
- Foreign Institutional Investor (**FII**) or Foreign Portfolio Investor (**FPI**) who is an assessee under the IT Act, and does not seek tax treaty benefit and who has invested in listed or unlisted securities with prior approval of competent authority;
- NR who has made investment in the FII or FPI by way of offshore derivative instruments;
- Income arising to any person from transfer of investments made before April 1, 2017.
- Transactions where tax benefit is obtained prior to April 1, 2017.

The onus of proving that a transaction falls within the purview of GAAR is on the Income Tax Authorities.

Are there transfer pricing restrictions in India?

Under India's transfer pricing regulations, any international transaction and/ or a specified domestic transaction between two or more associated enterprises (**AE**), including Pes, must be at an arm's length price. Transfer pricing regulations require the application of the most appropriate amongst the following prescribed methods, for determination of the arm's length price:

- Comparable uncontrolled price method;
- Resale price method;
- Cost plus method;
- Profit split method;
- Transactional and net margin method; or
- Any other method as may be prescribed by the CBDT[3]

Taxpayers, who enter into international transactions and / or specified

3 CBDT has prescribed a sixth method for determination of arm's length price. The sixth method allows the taxpayer to adopt any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction between unrelated parties, under similar circumstances.

domestic transactions[4], are required to maintain prescribed documents and furnish an accountant‘s report, which includes prescribed details. Under the transfer pricing regulations, if the international transaction or specified domestic transaction is not at the arm’s length, the difference between the arm’s length price and the actual transfer price or transaction price is taxed in the hands of the taxpayer. Further, vide Finance Act, 2017, ‘Secondary Transfer Pricing adjustment’ has been introduced, in addition to the primary transfer pricing adjustment in the hands of the taxpayer. Secondary adjustment means an adjustment in the books of accounts of the taxpayer and its AE to reflect that the actual allocation of profits between the two are consistent with the transfer price determined as a result of primary adjustment. Where a primary transfer pricing adjustment results in an increase in total income or reduction in loss of the taxpayer, the excess money (difference between arm’s length price determined in the primary transfer pricing adjustment and actual price at which international transaction has been undertaken) which is available with the AE will be deemed to be an advance made by the taxpayer to the AE. If such excess money is not repatriated to India within the prescribed time then interest on such advance will be computed. The primary adjustment not exceeding INR 1 crore (approx. USD 155,135) would not be subject to secondary transfer pricing adjustment.

What are precautions to be taken to avoid transfer pricing disputes in India?

Advance Pricing Arrangement (APA)

The IT Act empowers the CBDT to enter into an APA to determine the arm‘s length price or the manner of determining the arm‘s length price in relation to international transactions to be entered into by a person for a period specified in such APA, not exceeding five consecutive years. The Finance Act, 2014 also introduced roll-back mechanism under which an APA may also apply up to four previous years prior to the first effective year of such APA.

- **Safe Harbour Rules**

  In addition to APAs, the IT Act also provides for safe-harbour rules, which broadly cover the following business transactions:
  - Software development services;
  - KPO services;
  - Contract research and development services;
  - Manufacture and export of core and non-core auto components;
  - Intra group loans; and
  - Corporate guarantees.
  - Transfer Pricing Documentation and Base Erosion and Profit Shifting (**BEPS**)

India has been one of the active member of BEPS initiative by Organisation

4 The domestic transfer pricing rules will only apply in situations where one of the parties is claiming specified tax incentives.

for Economic Co-operation and Development (**OECD**). The BEPS Report by the OECD recommends that countries should adopt a standardised approach to transfer pricing documentation. A three-tiered structure has been mandated which comprises:

- A master file containing standardized information relevant for all multinational enterprises (MNE) group members;
- A local file referring specifically to material transactions of the local taxpayer;
- A country by country (**CbC**) report containing specific information regarding global allocation of MNE's income in accordance with the economic activity of the MNE.

In line with OECD report on Action 13 of BEPS, a new section 286 has been inserted in the IT Act in order to implement the international consensus and it now provides for a specific reporting regime in respect of CbC reporting and also the master file. The new provisions have taken effect from FY 2016-17. The reporting regime requires furnishing of exhaustive information (prescribed in the said provision) pertaining to the multinational group and the information is required to be furnished in the prescribed manner either by the overseas parent company of the multinational group or an Indian entity which is part of the group and designated to provide such information in this regard. It is further provided that CbC guidelines will not be applicable to an international group for an accounting year if total consolidated group revenue, based on consolidated financial statements, does not exceed the amount as may be prescribed.

Does India have Thin Capitalisation Norms?

'Thin Capitalisation Norms' have been introduced in India with effect from financial year 2018-19 in line with recommendation of OECD BEPS Action Plan 4. It is now proposed that where an Indian company or a PE of a foreign company in India pays interest in respect of any debt issued by an NR AE exceeding INR 1 crore (approx. USD 155,135), which is otherwise a deductible business expenditure, the interest expense so deductible will be restricted to 30% of its earnings before interest, taxes, depreciation and amortization or actual interest whichever is less.

Further, in case of debt provided by a lender (other than an AE) will also *de facto* be considered as debt provided by an AE if such debt is implicitly or explicitly guaranteed by the AE or the AE deposits corresponding and matching amount of funds with the lender. However, the carry forward of the aforementioned disallowed interest expense is permitted up to eight AYs immediately succeeding the AY for which the disallowance was first made and is allowed as a deduction against the profits and gains, if any, of any business or profession carried on by the taxpayer to the extent of maximum allowable interest expenditure.

It is relevant to note that the thin capitalization norms will not apply to an

Indian company or a PE of a foreign company which is engaged in the business of banking or insurance.

What are some direct tax incentives available in India?

To give an impetus to India's economy, the IT Act provides tax incentives such as, tax holidays, deductions and rebates. These incentives are aimed at encouraging exports and research activities, setting up of new industrial undertakings, development of infrastructural facilities, software industry, research activities and development of backward areas. Examples of some tax incentives follow.

- Tax Holidays for SEZ[5]

Nature of business undertaken	Quantum of Deduction
Undertaking located in SEZ and engaged in manufacture or production of articles or things or provision of service	100% deduction in respect of export profits for a period of 5 years. For subsequent 10 years, deduction of 50% profits is allowed (for last 5 years, deduction subject to transfer of profits to investment reserve), provided that the manufacturing operation commences on or before March 31, 2021.
Offshore Banking Units and IFSCs located in SEZs	100% deduction of its income for 5 years and 50% for the next 5 years

- Investment-linked incentives

  Investment linked incentives are provided on:
  - specified businesses; and
  - research and development.

The investment-linked tax incentives for specified business are provided by way of allowing deductions, ranging between 100% and 150%, in respect of the expenditure of capital nature incurred wholly and exclusively, for the purposes of such 'specified businesses'. 'Specified businesses' includes setting up of cold chain facility, warehousing facility, building and operating of hotels, hospitals (as prescribed by Central Government), laying and operating a cross-country natural gas or crude or petroleum pipeline, developing and building housing project, developing or maintaining and operating or developing,

5 SEZs are especially delineated duty free enclaves deemed to be foreign territory for the limited purposes of trade operations and duties and tariffs. Under the SEZ scheme, the Government of India aims to promote export-led growth of the economy, supported by integrated infrastructure for export production and a package of incentives to attract foreign and domestic investment. Though a tax holiday is enjoyed by units in a SEZ, they are required to pay MAT on book profits and DDT on income distributed as dividend.

maintaining and operating a new infrastructure facility etc. This deduction is provided in the FY in which such expenditure is incurred and is provided subject to satisfaction of certain conditions provided in the IT Act, including that the asset in respect of which the deduction is provided is used only for the purpose of 'specified business' and is used for eight years beginning from the year in which such asset was acquired or constructed.

Similarly, investment-linked tax incentives for Research & Development are provided by way of allowing deductions, ranging between 100% and 150%, in respect of the expenditure of capital nature incurred wholly and exclusively, for the purposes of certain 'research & development' during the FY in which such expenditure is incurred. Such investment linked tax incentives are also provided if the payment is made to a research association/university, college or other institution for scientific research; or payment is made to an Indian company to be used for scientific research and development that fulfills certain conditions etc.

- Tax incentives for State of Andhra Pradesh, State of Bihar, State of Telangana and State of West Bengal to encourage the setting up of industrial undertakings in the notified backward areas of the State of Andhra Pradesh, the State of Bihar, the State of Telangana and the State of West Bengal, the IT Act provides for the following incentives:
  - In addition to the investment allowance presently available under the IT Act, an additional investment allowance of an amount equal to 15% of the cost of new assets acquired and installed will be provided, subject to prescribed conditions.
  - Currently, the IT Act provides for an additional depreciation of 20% (over and above the general depreciation) on the cost of plant and machinery acquired and installed. It further provides for a higher depreciation at the rate of 35% (instead of 20%) if the new plant and machinery (other than a ship and aircraft) is acquired and installed, between April 1, 2015 and March 31, 2020, for setting up manufacturing

units in the notified backward areas of the State of Andhra Pradesh, the State of Bihar, the State of Telangana and the State of West Bengal.

Does India provide any special tax incentives to Start-ups?

The IT Act provides tax incentives for start-ups, incorporated either as a company or as an LLP, on or after April 1, 2016 but before April 1, 2019, and engaged in a business involving innovation, development, deployment or commercialization of new products, process or services which is driven by technology or intellectual property, subject to satisfaction of prescribed conditions. The start-ups which qualify for the tax incentive are as follows:

- Whose total turnover (of the business) does not exceed INR 25 crores (approx. USD 3.87 million) in any of the previous years starting April 1, 2016 and ending March 31, 2021; and
- Which hold a certificate of eligible business from the Inter-Ministerial Board of Certification as notified in the Official Gazette by the Central Government.

Subject to satisfaction of the certain conditions provided under the IT Act, the following tax incentives are provided:

- deduction of 100% from business profits of such start-ups for any three consecutive AYs out of seven AYs beginning from the year in which such start-up is incorporated;
- exemption from long term capital gains tax if the gains arising from transfer of the long term capital asset are invested in units of such specified fund (as may be notified by the Central Government in this behalf) subject to the condition that the amount remains invested for three years, failing which the exemption will be withdrawn. The investment in the units of the specified fund are allowed up to INR 50 lakhs (approx. USD);
- exemption from long term capital gains in case of an individual or a Hindu undivided family in respect of sale of a long term asset, being residential property, if the net sale proceeds are invested in at least 50% shares of a 'start-up' and such 'start-up' utilizes such investment amount to purchase a new asset on or before the due date of filing of return of income by the investor. The exemption is provided subject to certain conditions,

The IT Act provides tax incentives for start-ups, incorporated either as a company or as an LLP, on or after April 1, 2016 but before April 1, 2019, and engaged in a business involving innovation, development, deployment or commercialization of new products, process or services which is driven by technology or intellectual property.

including, *inter alia*, that the transfer of residential property occurs on or before March 31, 2019.

- Additionally, an eligible start-up can carry forward previous years' losses for a period of seven years from its incorporation, even where there is a change in its shareholding (whether or not in excess of 49%) provided that the old shareholders continue in the company.

What tax incentives does India give to IFSCs?

With a view to incentivize the growth of IFSCs, the IT Act contains the following tax incentives:

- Exemption from long term capital gains tax arising from transaction undertaken in foreign currency on a recognized stock exchange located in IFSC irrespective of payment of STT on the same.
- Concessional short term capital gains tax rate of 15% will be available to the transactions undertaken in foreign currency through a recognized stock exchange located in an IFSC, even where no STT is payable.
- A unit located in IFSC and deriving its income solely in convertible foreign exchange, is chargeable to MAT at the rate of 9%. Even existing units can avail a lower MAT rate of 9% (subject to fulfillment of other conditions).
- Tax on distributed profits is not charged in respect of the total income of a company being a unit located in an IFSC, deriving income solely in convertible foreign exchange, either in the hands of the company or the person receiving such dividend.

Does India tax capital gains arising on the indirect transfer of underlying assets situated in India?

Where an NR earns capital gains from the transfer of shares or interest of a company or an NR entity incorporated or registered outside India, such capital gains will be taxable in India if such shares or interest derive their value substantially, whether directly or indirectly, from assets located in India.[6] A share or interest will be deemed to derive its value "substantially" from assets (whether tangible or intangible) located in India, if on the specified date, the value of Indian assets, exceeds the amount of INR 10 crores (approx. USD 1.55 million) and represents at least 50% of the value of all the assets owned by the company or entity, as the case may be. The following may be noted in this respect:

- Value of an asset means the fair market value of such asset without reduction of liabilities, if any, in respect of the asset.
- The specified date of valuation means the date on which the accounting period of the company or entity, as the case may be, ends preceding the date of transfer. However, if the book value of the assets of the company

6 The Finance Act, 2017 provides that NRs will not be subject to capital gains tax on the transfer (whether by way of sale or redemption) of investment, held directly or indirectly, in SEBI registered Category-I and Category-II foreign portfolio investments. Further, it also provides that transfer of rupee denominated bonds issued outside India from an NR to another NR outside India will also be exempt from capital gains tax.

on the date of transfer exceeds by at least 15% of the book value of the assets as on the last balance sheet date preceding the date of transfer, then instead of the date mentioned above, the date of transfer will be the specified date of valuation.

- The manner of determination of fair market value of the Indian assets and the global assets of the foreign company has been prescribed in the Income Tax Rules, 1962 (**IT Rules**).
- The taxation of gains arising on transfer of a share or interest deriving, directly or indirectly, its value substantially from assets located in India will be on proportionate basis. The method for determination of proportionality has been prescribed in the IT Rules.

Further, the following exemptions have been provided in respect of taxation of indirect transfers:

- Exemption to transferor in case company or entity, whose share or interests are transferred, directly owns Indian assets: An exemption is available to the transferor of a share of, or interest in, a foreign entity if he along with his AEs, at any time in the 12 months preceding the date of transfer - (i) neither holds the right of control or management; (ii) nor holds voting power or share capital or interest exceeding 5% of the total voting power or total share capital, in the foreign company.
- Exemption to transferor in case company, whose share or interests are transferred, indirectly owns Indian assets: An exemption is available to the transferor if he along with his AEs, at any time in the 12 months preceding the date of transfer - (i) neither holds the right of management or control in relation to such company or the entity; (ii) nor holds any rights in such company which would entitle it to either exercise control or management in the company or entity that directly holds Indian assets or entitle it to voting power exceeding 5% in the company or entity that directly holds Indian assets.
- An exemption has also been provided for transfer of shares in an offshore amalgamation or demerger subject to certain conditions.[7]

What are the advantages of the India's Double Taxation Avoidance Agreements (DTAAs) with Mauritius, Singapore, etc.? Do NRs require a tax residency certificate to avail of any tax treaty benefits?

Typically, investments into India are routed through an intermediate holding company set up in such tax jurisdictions which have a tax friendly regime under the respective DTAA with India. The India-Mauritius DTAA, up to FY 2016-17, provided an exemption from tax in India on capital gains earned by a tax resident of Mauritius from the alienation of shares of an Indian company. However, after protracted negotiations, the governments of India and Mauritius have signed a protocol amending the India-Mauritius DTAA which now provides for phasing out

7 The Finance Act, 2017 provides that the cost of acquisition and period of holding of the shares of the Indian company in the hands of the resulting foreign company will be the same as the demerged foreign company.

of the aforesaid capital gains tax exemption in India, in the following manner:

Particulars	Tax Consequences in India under the India-Mauritius DTAA
Investments in shares prior to April 1, 2017	Capital gains exemptions will continue for shares acquired before April 1, 2017, irrespective of their date of transfer.
Concessional tax rate from April 1, 2017 to March 31, 2019	Capital gains from shares (acquired after April 1, 2017) transferred before March 31, 2019, will be taxed at 50% of the domestic tax rate of India subject to fulfilling the conditions stipulated in the 'Limitation of Benefits' (**LOB**) clause. The concessional tax rate will however, be subject to GAAR.
Transfer of shares (acquired after April 1, 2017) after March 31, 2019	Taxable in India at full domestic tax rate

Similarly, India has also renegotiated the India-Singapore DTAA bringing the DTAA at par with the India-Mauritius DTAA providing for capital gains tax on capital gains from shares acquired after April 1, 2017.

Both India-Mauritius and India-Singapore DTAA provide for an LOB clause which contains certain conditions for conferring the benefits of the respective DTAAs on tax residents of Mauritius and Singapore.

The Indian Government has recently entered into a revised DTAA with Cyprus which has replaced the existing India-Cyprus DTAA signed between the two countries on June 13, 1994. The new India-Cyprus DTAA provides for source based taxation of capital gains arising from the alienation of shares (similar to the India-Mauritius DTAA), instead of residence based taxation provided under the previous India-Cyprus DTAA. For investments made prior to April 1, 2017, a grandfathering clause has been introduced according to which all the investments prior to April 1, 2017 will be taxed only in the country in which the taxpayer is a resident.

In order to avail tax treaty benefit, NR taxpayers are required to furnish a tax residency certificate (**TRC**) and a self-declaration in the prescribed form, in some cases. Income tax authorities may ask a taxpayer for additional documents to substantiate a claim for tax treaty benefits.

Is prior permission of Indian income tax authorities required before transferring assets?

Section 281 of the IT Act states that where a taxpayer during the pendency of any proceeding under the IT Act or after the completion thereof, but before the service of notice of recovery, transfers any of his assets in favour of another person, such transfer is void as against any claim in respect of any tax or any other sum payable by such taxpayer as result of the completion of the said proceeding or otherwise. However, such a transfer will not be void if:

- the transfer is for an adequate consideration and the transferee does not have notice of the pendency of any proceeding or, as the case maybe, of such tax or other sum payable by the assessee; or
- it is undertaken with the previous permission of the Assessing Officer.

This section only applies to cases where the amount of tax or other sum payable or likely to be payable exceeds INR 5,000 (approx. USD 78) and the assets charged or transferred exceed INR 10,000 (approx. USD155) in value.

What are the major tax registrations and compliances to be followed by corporations in India?

A company doing business in India must obtain a PAN and a TAN.

It is mandatory to quote PAN on returns of income and all correspondence with any income tax authority. For enforcing the requirement to obtain PAN registrations, the IT Act provides that in case the taxpayer does not provide PAN, the deductor will withhold tax at the higher of, rates in force (including treaty rates) or at the rate of 20%. As per recent amendments to the IT Act, an NR deductee is not subject to higher tax in respect for payments for interest, royalty, FTS, and transfer of capital assets, where the NR deductee has furnished TRC and tax identification number in the country of residence along with the name and address of the NR deductee.

Furthermore, the provisions of the IT Act make it mandatory to quote TAN in all tax deducted at source, tax collection at source, or annual information returns, payment challans and certificates to be issued by persons under an obligation to deduct tax at source.

The key compliances to be followed by corporations under the IT Act are as follows:

Filing of corporate tax return	September 30
Filing of tax audit report	September 30
Filing of transfer pricing report	November 30
Filing of tax deducted at source return	Quarterly

Corporate tax liability is required to be estimated and discharged by way of advance tax in four installments on June 15, September 15, December 15 and March 15.

What is the ordinary appellate dispute resolution channel in India?

The ordinary appellate dispute resolution procedure in India includes the following forums:

- Commissioner of Income Tax (Appeals)
  A taxpayer may file an appeal before the Commissioner Income Tax (Appeals) within a period of 30 days against any order passed against such taxpayer by the Assessing Officer in the course of assessment proceedings.

- Dispute Resolution Mechanism (**DRP**)
  The IT Act has constituted a DRP for eligible taxpayers' viz. taxpayers with transfer pricing disputes and all foreign companies, irrespective of the nature of their dispute. The assessing officer is required to forward a copy of the draft assessment order to the eligible taxpayer if it is proposed to make a variation in the income/loss of the eligible taxpayer, which is prejudicial to such taxpayer.

- Income Tax Appellate Tribunal (**ITAT**)
  An appeal may be filed against the order of the Commissioner of Income Tax (Appeals) or the final assessment order after directions from DRP are issued before the ITAT on any question of fact or law both. The ITAT is a fact finding authority.

- High Court
  An appeal may be filed before the High Court against the order of the ITAT within 120 days, where the same is relates to a substantial question of law.

- Supreme Court
  The Supreme Court of India is the final appellate authority. An appeal may be filed before the Supreme Court against an order of the High Court.

What are other dispute resolution alternatives available to taxpayers?

- Authority for Advance Rulings (**AAR**)
  An advance ruling, which is issued by an independent adjudicatory body called the AAR, is binding on the person seeking it in relation to the specific transaction and the revenue authorities cannot challenge the same unless there is a change in facts or applicable law. An advance ruling is only binding on the parties to whom it applies, although it does have a persuasive value for other transaction. Furthermore, the scope of the AAR has been widened to include applications made by resident and NRs on questions relating to GAAR. The AAR mechanism has also been extended to residents in respect of their own tax liability for transactions with value in excess of INR 100 crores (approx. USD 1.55 million).

  Though statutorily no appeal can be preferred from the ruling of an AAR, remedies under the Constitution of India, such as writ petitions can be

availed to challenge an AAR ruling.

- Settlement Commission
  The Settlement Commission is a statutory body and deals with the settlement applications filed by the assessee under the IT Act.

  An assessee can approach the Settlement Commission at any stage of the proceedings for assessment pending before an assessing officer, subject to certain prescribed conditions.

  The Settlement Commission has the power to grant immunity from prosecution from any offence under IT Act also from imposition of penalty under the IT Act or under the Indian Penal Code, 1860 or any other Central Acts, in cases where the applicants make a full and true disclosure of their income or wealth and fulfills certain other prescribed conditions.

  The order passed by the Settlement Commission is conclusive as to the matters stated therein and no appeal lies to any authority against the order passed by the Settlement Commission.

- Mutual Agreement Procedure (**MAP**)
  MAP is a dispute resolution mechanism provided for under the DTAAs.
  MAP can be invoked by the taxpayers where an action of any one of the Contracting States to the DTAA results in or will result for him in taxation, which is not in accordance with the DTAA.

  Further, recourse to MAP does not deprive the taxpayer from ordinary legal remedies available under the domestic law. There is no time limit prescribed within which the Competent Authorities of the DTAA are to arrive at a conclusion in respect of the MAP application.
- Bilateral Investment Protection Agreements (**BIPA**)
  The objective of BIPA is to promote and protect the interests of investors

of either country in the other country. Such agreements increase the comfort level of investors by assuring a minimum standard of treatment in all matters and provide for justifiability of disputes with the host country.

Off-late, foreign investors have been invoking BIPAs to resolve their disputes with the Indian Government in the sphere of income tax.

What is Black Money Law? What are its tax implications?

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (**Black Money Act**) levies tax on undisclosed assets held aboard by a person who is resident of India at a rate of 30% of the value of such assets, provides for a penalty of 90% of the value of such assets, and also provides for rigorous imprisonment of 3 to 10 years for willful attempt to evade tax in relation to a undisclosed foreign income or asset. The residency of a person, for the purpose of Black Money Act, is to be determined in accordance with the provisions of the IT Act.

Indirect Taxes

With Goods and Services Tax (**GST**) being introduced in India with effect from July 1, 2017, while each State has a separate GST Act, at present all States have adopted a uniform tax rate for the current fiscal year.

GST has revamped the complicated and multi-layered indirect tax regime by subsuming and consolidating most Central and State indirect taxes into a single 'Goods and Services Tax'. Till the introduction of GST, different taxable events in the Indian supply chain attracted different taxes. For instance, manufacturing of goods attracted excise duty, sale of goods attracted Value Added Tax (**VAT**) or Central Sales Tax (**CST**) depending upon situs of sale whereas provision of services attracted service tax. Most of such taxes could not be cross-utilized to offset tax liability of other Central or State taxes thereby leading to cascading effect of taxes i.e. payment of tax on tax.

Under GST, consolidation of taxes with seamless flow of credits and cross-utilizations would allow for greater supply chain efficiency and facilitate creation of a single market across the country.

What are the GST legislations passed by the Parliament in India?

The Parliament has passed the following legislations in order to implement

With Goods and Services Tax (GST) being introduced in India with effect from July 1, 2017, while each State has a separate GST Act, at present all States have adopted a uniform tax rate for the current fiscal year.

GST in India:

- Central Goods and Services Tax Act, 2017 (**CGST Act**);
- Integrated Goods and Services Tax Act, 2017 (**IGST Act**);
- Union Territory Goods and Services Tax Act, 2017 (**UTGST Act**); and
- Goods and Services Tax Compensation Cess Act, 2017 (**GSTC Cess Act**)

Further, all States have also passed relevant State GST legislations (**SGST Acts**).

What are the indirect taxes applicable in India?

GST

Under the GST regime, both the Centre and the States would have concurrent powers to tax goods as well as services and levy GST on a common base. The supplies under GST are classified as intra-state supply and inter-state supply. Intra-State GST/ Central Goods and Services Tax, State Goods and Services Tax and Union Territory Goods and Services Tax

Intra-State supply of most goods and services attracts Central GST (**CGST**) and State GST (**SGST**) or Union territory GST (**UTGST**). A transaction is treated as an intra-state transaction when the supplier of service and the place of supply are in the same State or union territory. Detailed rules have been prescribed under the CGST Act, the SGST Act and the UTGST Act for determining place of supply and location of supplier in respect of goods and services.

Inter-State GST/ Integrated Goods and Services Tax

Inter-State supply of most goods and services attracts Integrated GST (**IGST**). The IGST is a sum total of the Central GST and State GST, which would have been applicable on the intra-State supply of such goods or services. A transaction is treated as an inter-state transaction when the supplier of service and the place of supply are in different States. Detailed rules have been prescribed under the IGST Act for determining place of supply and location of supplier in respect of goods and services. Further certain supplies have been deemed to be an inter-state supply e.g., imports, supply of goods and services to an SEZ etc.

In addition to the above, certain supplies of goods and services also attract a GST Compensation Cess which has been levied specifically to fund the compensation payable to States on account of any losses which the States may suffer post the implementation of GST. Such GST Compensation Cess would be applicable for a period of 5 years and is applicable on select goods such as motor vehicles, tobacco, coal etc.

Customs Duty

Customs duty is imposed on the import of goods into India and export of goods outside India. Every person proposing to engage in import of goods into India or export of goods from India is required to obtain an Importer Exporter Code (**IEC**) from the Director General of Foreign Trade, Ministry of Commerce and Industry. Customs duty is levied in terms of the Customs Act, 1962 and Customs Tariff Act, 1975 (**Customs Tariff Act**) on the transaction value of goods. Under the present law in addition to basic customs duty, IGST, customs cess, GST Compensation Cess (applicable only on specified products), Countervailing Duty (**CVD**) (applicable only on specified products) and Special Additional Duty paid (**SAD**) (applicable only on specified products) are also levied at applicable rates. It is important to note that the IGST that is applicable on import of goods is levied as a duty of customs. However, the same is creditable against domestic output IGST liability. The effective rate of customs duty in case of most non-agricultural products is 29.85% (approximately).

The rates of customs duty for each item is specified under the Customs Tariff Act and is dependent on the classification of the goods determined under the First Schedule of the Customs Tariff Act, which is aligned with the Harmonized System of Nomenclature (**HSN**) provided by the World Customs Organization. In order to encourage exports, export duty is levied on very few items, mentioned under the Second Schedule of the Customs Tariff Act.

Excise Duty

Excise duty is imposed on the manufacture of goods in India. The power to levy excise duty primarily remains with the Central Government, though the power to levy excise duty on alcoholic products and other intoxicants has been conferred upon State Governments. With the introduction of GST, the power to levy Central excise duty has been restricted to specified product *viz.* petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel, and tobacco and tobacco products.

Central Excise Duty

Central excise duty is levied on the goods manufactured in India under provisions of the Central Excise Act, 1944 and the Central Excise Tariff Act, 1985. Central excise duty is a modified VAT (also known as Cenvat) wherein a manufacturer is allowed to take credit of the excise duty paid on locally sourced goods, and CVD and SAD on imported goods. The Cenvat credit so availed can be utilized for payment of excise duty on the clearance of dutiable final specified products manufactured in India, if any, applicable in accordance with the Cenvat Credit Rules, 2004.

State Excise Duty

State Governments have the power to regulate movement of liquor and other intoxicants and to levy tax on manufacture or production of liquor and other intoxicants by virtue of the Constitution of India. As a result, movement and sale of liquor and other intoxicants is dependent upon the excise policy of the respective States, which is revised annually.

The scope of the State excise policies and regulations includes amongst others regulating import, export, transport, possession and sale of liquor within the concerned State. State excise legislations also empower the State Governments to issue licenses by way of tender, auction, and tender-cum-auction or by any other prescribed mechanism. State excise policies often contain rules governing filing of statutory returns and other compliances which vary from State to State.

Sales Tax

Sale of specified moveable goods *viz.* petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel, and tobacco and tobacco products in India is chargeable to a levy of VAT or CST. Import of these goods into or export of goods outside India or sale in the course of import or export of goods are not exigible to the State VAT or CST. Under the federal structure of India, tax on sale of goods may be imposed by the Central Government or the State Government depending upon the *situs* of the sale.

Intra-state Sales Tax/ Value Added Tax

The power to levy sales tax on intra-state sale of specified moveable goods *viz.* petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel, alcohol for human consumption, and tobacco and tobacco products is conferred upon State Governments under the Constitution of India. In the event that a sale takes place within a particular State of India, the same would qualify as a local sale or intra-state sale, and would be chargeable to VAT at the applicable rates under the relevant State VAT legislation. With the introduction of GST, limited products attract this levy.

Under the VAT regime, the VAT paid on goods purchased from within the State is eligible for input VAT credit. The input VAT credit can be utilized against the VAT or CST payable on the sale of goods subject to fulfilment of conditions in this regard. It is, thus, ensured that cascading effect of taxes is avoided and value addition alone is taxed.

VAT rates are dependent on the relevant State VAT Legislation. Every dealer engaged in sale or purchase of goods over and above the specified threshold limit in a particular State is required to obtain VAT or CST registration in each of such States and undertake necessary compliances in this regard.

Rules concerning filing of VAT returns vary from State to State. Statutory returns are normally filed on a yearly, quarterly or monthly basis (depending upon the taxable turnover of the dealer). These returns are filed with the jurisdictional VAT officer.

Central Sales Tax

CST is levied on inter-state sale of goods of specified moveable goods *viz.* petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel, and tobacco and tobacco products. Where goods move from one State to another pursuant to a contract of sale, or a sale is affected by the transfer of documents of title during the movement of goods from one State to another, such a sale is known as an inter- state sale. With the introduction of GST, limited products attract this levy.

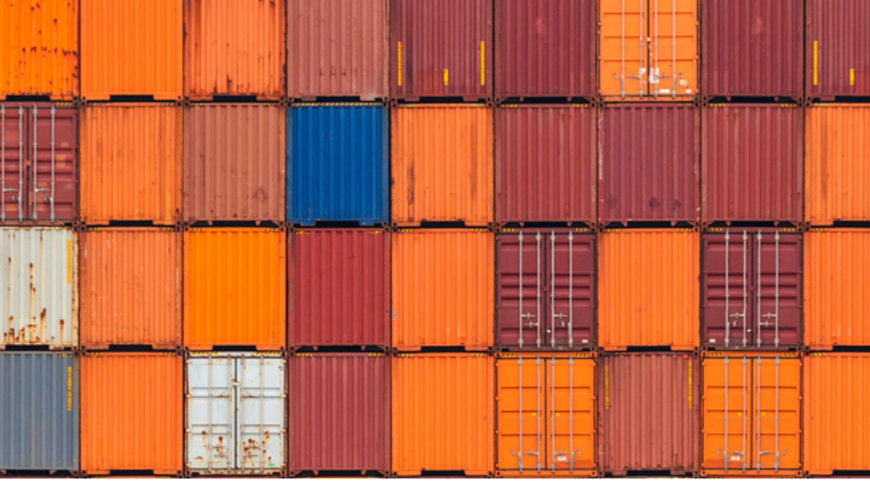
The power to levy CST is conferred on the Central Government by the Constitution of India. The levy of CST is governed by the Central Sales Tax Act, 1956 (CST Act). CST is chargeable at the concessional rate of 2% on submission of requisite statutory form (Form C), in specified cases *viz.* telecommunication, mining, generation or distribution of electricity, resale or manufacture of goods for sale. In case Form C cannot be furnished, then CST would be levied at the applicable VAT rate.

The power to collect CST is in the hands of the State governments. Further, the CST Act provides that amongst others, the provisions relating to returns, provisional assessment, advance payment of tax, registration and penalties etc. under the local VAT law in a particular State shall also be applicable for compliances under the CST Act.

Professional Tax

Certain States in India also levy a tax on every person engaged in any profession, trade, calling or employment in the said State. Every person liable to pay professional tax is required to obtain an enrolment certificate under the professional tax laws and undertake necessary compliance in this regard.

Further, every company is also required to withhold professional tax on behalf of its employees and deposit the same with the Government exchequer. The rate of withholding tax is dependent on the number of employees and their monthly salaries. Every such company is also required to obtain a registration certificate in its capacity as an employer and also obtain an enrolment certificate. The rate slabs of professional tax vary from State to State subject to the maximum of INR 2,500 (approx. USD 39) per annum.



What is the concept of 'supply' under GST?

The taxable event under GST is 'supply' of goods or services. The term 'supply' has been defined broadly to cover all forms of supply of goods or services or both and includes sale, transfer, barter, exchange, license, rental, lease etc. As a general rule, such supplies should be made for a consideration and must be made in the course or furtherance of business. However, in certain exceptional cases such as supplies between related parties or distinct persons, free supplies where credit has been availed on goods supplied, etc. 'supplies without consideration' have also been made taxable. Such supplies have been enumerated in Schedule I of the CGST Act. In view of the deeming provisions, self-supplies of goods or services inter-se between two offices of the same company may also be exposed to GST liability.

All taxes paid on procurement of inputs, input services and capital goods are allowed to be offset against output liabilities except in so far as the credit on particular goods and services is restricted under the GST laws.

What is the rate structure under GST?

Inter-State supply or intra-state supply of goods and services attracts GST at a uniform rate pan-India. While in terms of GST laws, the maximum rate of GST (excluding compensation cess) can go up to 40%, four major rates have been prescribed currently – 5%, 12%, 18% and 28 %. However, there is a rate of 3% and 0.25% stipulated for semi-precious and precious metals. Additionally, GST Compensation Cess is also levied at prescribed rates, which may go upto 15%.

Who is a 'taxable person' under GST?

Under GST laws, a taxable person is any person who is registered or liable to be registered in terms of CGST Act. This includes a person with aggregate turnover above the prescribed threshold and also persons who are mandatorily required to obtain registration such as persons liable to pay tax under reverse charge etc.

What is the registration requirement under GST?

The GST laws require businesses to take a registration and undertake compliances in each State from where supply of taxable goods or services is made.

Accordingly, a taxable person is required to be mandatorily registered with the authorities if the aggregate turnover of such taxable person on a pan-India basis exceeds INR 20 lakhs (approx. USD 31,027) or INR 10 lakhs (approx. USD 15,513.5) (in case of a special category States as specified in sub-clause(g) of clause(4) of Article 279A of the Constitution such as North Eastern States etc.). Further, certain additional category of persons such as persons liable for paying tax under reverse charge etc., are mandatorily required to obtain registration irrespective of the prescribed threshold criterion.

What is the concept of Anti-Profiteering under GST?

The GST laws mandate that every business must pass on the benefits to its customers that may accrue to it on account of reduced rates or increase in credits. Such benefit is to be passed by way of proportionate reduction in prices. An authority has been constituted for the said purposes in accordance with GST laws, to ensure that businesses pass on the benefits of GST to the end customer. However, a detailed cost-benefit analysis is to be undertaken by businesses to determine the correct pricing of goods and services being offered to customers to ensure compliance with the GST laws.

What are some of the indirect tax incentives available in India?

Customs and Central Excise

There are various schemes and incentives available under customs and central excise laws for various sectors including power, oil and gas, transportation, fertilizers, renewable sources of energy etc. Further, India has also signed Free Trade Agreements with various countries for exemptions from import duty on various specified goods.

GST

Under GST laws, exports, supplies to an SEZ and deemed exports are zero rated and suppliers are entitled to claim refund subject to fulfilment of conditions and compliances.

Foreign Trade Policy, 2015-2020 (FTP)

The current FTP which has come in to effect from April 01, 2015 provides for a suite of export promotion schemes such as the Merchandise Exports from India Scheme, the Service Exports from India Scheme, the Export Promotion Capital Goods Scheme, recognition of Star Export Houses as 'Status Holders' etc. Incentives are also extended to Exported Oriented Units, Software Technology Parks etc.

SEZ

Subject to conditions prescribed in this regard, developers of an SEZ and units established in an SEZ are entitled to various indirect tax benefits *inter-alia* including:

- Exemption from payment of import duties on imported goods;
- Exemption from payment of excise duty on domestically procured goods;

- Supplies to SEZ are zero rated under GST laws, i.e. the supplier is entitled to claim refund of taxes paid;
- Exemption from excise duty on goods manufactured by an SEZ;
- Drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the domestic tariff area into an SEZ or unit;
- Exemption from CST on the sale or purchase of goods if such goods are meant to carry on the authorized operations; and
- Exemption from VAT on supply of goods to an SEZ developer or unit or sale of goods by an SEZ developer or unit. This is subject to the respective sales tax/VAT legislation of the State in which the SEZ is set up.

What is the ordinary appellate dispute resolution channel for indirect taxes in India?

Customs and Excise Laws

The ordinary appellate dispute resolution procedure in India includes the following forums:

- Appeals to Commissioner of Customs/Central Excise (Appeals):- This is the first level of appellate mechanism. An appeal in this regard can be filed within 60 days from the date of receipt of the order passed by an adjudicating authority lower than the rank of Commissioner.
- Appeal to the Appellate Tribunal – Customs Excise and Service Tax Appellate Tribunal (CESTAT):- An appeal to CESTAT can be filed against an order of the Commissioner (Adjudication) or Commissioner (Appeals). Such appeals have to be filed within 3 months from the date of receipt of the order.
- High Court - An appeal may be filed before the High Court against the order of the CESTAT within 180 days, where the appeal relates to a substantial question of law. However, appeals against a CESTAT order on the issues of classification or valuation are not admissible before High Court and are required to be filed directly before Supreme Court.
- Supreme Court - The Hon'ble Supreme Court of India is the final appellate authority. An appeal may be filed before the Supreme Court against the order of the CESTAT (only in matters of valuation and classification) or against the order of High Court.

The ordinary appellate dispute resolution channel with respect to VAT and other local levies may depend on local VAT legislation which may vary from State to State

GST Laws

The ordinary appellate dispute resolution procedure in India includes the following forums:

- Appeals to Appellate Authority: - This is the first level of appellate mechanism. An appeal in this regard can be filed within 3 months from the date of communication of the order passed by an adjudicating authority

- Appeal to the Appellate Tribunal: - An appeal to Appellate Tribunal can be filed against an order of the appellate authority or order in revision passed by revisional authority, by any person aggrieved by such an order. There are two tiers of tribunals that are envisaged under the GST laws – National or Regional Bench and the State Bench or Area Bench. Such appeals have to be filed within 3 months from the date of receipt of the order.
- High Court - An appeal may be filed before the High Court against the order of State Bench or Area Bench of the Appellate Tribunal within 180 days from the date of receipt of order where the same relates to a substantial question of law.
- Supreme Court - The Hon'ble Supreme Court of India is the final appellate authority. An appeal may be filed before the Supreme Court against the order of the National Bench or Regional Bench or against the order of High Court.

What are other dispute resolution alternatives available to indirect taxpayers?

Apart from the above, with respect to central levies i.e. customs, GST and excise laws, the following two dispute resolution alternatives are available:

Settlement Commission

The basic objective of setting up of the Settlement Commission is to expedite payments of custom and excise duties involved in disputes by avoiding costly and time consuming litigation process and to give an opportunity to tax payers to come out clean. Eligible assessees can make an application in such form and in such manner as may be prescribed by the Commission and containing "full and true" disclosure of his duty liability which has not been disclosed before the proper officer having jurisdiction subject to fulfilment of conditions prescribed in the regard.

Authority for Advance Rulings

The Central legislations governing levy of customs, GST and excise, provide for a scheme of Advance Ruling where specified categories of NR or foreign investors and certain specified categories of residents proposing to undertake business in India may approach the authority for ascertaining their tax liability in relation to central excise, customs and GST in India.

Insolvency and Bankruptcy in India

Overview of the insolvency and bankruptcy regime in India

The I&B Code has overhauled the existing legal regime in relation to insolvency and bankruptcy processes in India. The I&B Code consolidates the law in relation to insolvency of companies, LLP (**Corporates**), and bankruptcy of unlimited liability partnerships and individuals. Most of the provisions of the I&B Code in respect of Corporates have been brought into effect on December 1, 2016. The I&B Code is being viewed as one of the most significant legislative reform towards "ease of doing business in India" – one of the chief objectives of legislative and policy reforms by the central government.

The I&B Code is a significant legislation not only in terms of its content, but equally in view of its background and context and the challenges in the Indian economy it seeks to address. The legislation has been enacted at a time when stress in the Indian banking sector has been evident and critical to be addressed to ensure stability and health of Indian economy.

One of the major shortcoming in the pre-existing legal framework governing insolvency and bankruptcy processes in India has been the availability of multiple and overlapping remedies. Over a period of time, India has seen different enactments in this segment with its own unique philosophy, processes and adjudicating authorities. For instance the New Companies Act and the Previous Companies Act, provide for schemes of arrangement and winding up of companies. In addition, distress to industrial companies in the 1980s led to the enactment of a special purpose legislation dealing with revival and rehabilitation of struggling industrial companies namely the Sick Industrial Companies (Special Provisions) Act, 1985 (**SICA**). Subsequently, in view of long delays in recovery proceedings before civil courts, the Parliament passed a special law for recovery of debts to banks and financial institutions in the form of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (**RDDB Act**). With limited success of the RDDB Act, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**) was passed to enable banks and financial institutions to enforce their security outside court process. This apart, the RBI, has also come up with various guidelines and mechanisms for debt restructuring outside statutory framework. Clearly, the existing laws were scattered and overlapped with each other leading to delays and increased costs.

In this context, the I&B Code assumes even greater significance and is being seen as a precursor to serious and far-reaching reforms in this segment.

What is the Adjudicating Authority under the I&B Code?

The adjudicating authority for corporate insolvency processes is the NCLT and its appellate authority, the NCLAT. The adjudicating bodies for individual bankruptcy processes is an existing specialised tribunal dealing with recovery claims of banks and financial institutions – the Debts Recovery Tribunal (**DRT**) and its appellate authority, the Debts Recovery Appellate Tribunal (**DRAT**).

How does the I&B Code regulate insolvency and bankruptcy processes?

A sector regulator in the form of an Insolvency and Bankruptcy Board of India (**I&B Board**) has been set up under the I&B Code, to perform the role of a regulator for insolvency and bankruptcy matters. The I&B Board has been empowered to frame regulations and guidelines on matters relating to insolvency and bankruptcy as required under the I&B Code and is also to perform executive and quasi-judicial functions, to enable robust insolvency and bankruptcy processes in India. The I&B Board also has regulatory oversight over the professionals and agencies that operate in this segment – such as "Insolvency Professionals" and "Information Utilities".

Insolvency Professionals under the I&B Code refer to specialized professionals who manage insolvency resolution and liquidation processes under the I&B Code. These Insolvency Professionals will act as "Resolution Professionals" during the "Corporate Insolvency Resolution" process (**CIR Process**) to steer the CIR Process intended to revive or rehabilitate the Corporate; and as liquidators of the Corporate debtor (**Liquidator**) during the liquidation process for the actual winding up of the Corporate. These professionals are drawn from the professions of law, finance and management and are required to qualify an examination for being registered as Insolvency Professionals.

Information Utilities are institutions to be set up for maintaining records of financial information in relation to Corporates and individuals including details of debt repayment, recovery and default etc. Under the provisions of I&B Code, the records of Information Utilities can be used to inter alia prove default or security interest of a secured creditor on assets of a borrower and hence, is intended to reduce the judicial time spent on adjudicating claims of default, or disputes with respect to validity and priority of security interest etc.

What is the CIR Process prescribed under the I&B Code?

The I&B Code provides for a time bound CIR process for all Corporates prior to liquidation, during which creditors have the ability to consider measures to resolve the financial distress of the Corporate and to maintain and preserve its continued business operations by framing a plan referred to as a resolution plan (**Resolution Plan**). Only upon the failure of the CIR Process can the Corporate be liquidated under the I&B Code. The CIR Process is required to be concluded within 180 days from the date of admission of the application before NCLT (**Insolvency Commencement Date**). This time period is extendable, once, by 90 days beyond which the NCLT is not vested with any discretion to extend the period.

Who can initiate action under the I&B Code?

The CIR Process under the I&B Code can be triggered if a Corporate has committed a default of INR 100,000 (approx. USD 1,550) or more on repayment of a debt. The CIR process may be initiated by filing an application before the NCLT by either:

- financial creditors, being creditors to whom financial debts (i.e. debts which are disbursed against the consideration for the time value of money) are owed (**Financial Creditors**);
- operational creditors, who are owed money in lieu of provision of goods or services (**Operational Creditors**); or
- the Corporate itself.

A Financial Creditor or the Corporate itself can trigger the I&B Code simply on the occurrence of a default of INR 100,000 (approx. USD 1,550). However, an Operational Creditor has to qualify an additional step of issuing a demand notice, in the prescribed form, to the Corporate Debtor to be able to trigger the I&B Code. The Corporate Debtor, in reply to the demand notice, has to, within 10 days, show either that the amount demanded has been repaid or highlight the existence of a pre-existing dispute, failing which the Operational Creditor can file an application for initiating the CIR Process.

What is the process upon admission of the insolvency application?

The CIR Process begins with the appointment of an Insolvency Professional as an interim insolvency professional (**IRP**) by the NCLT for a period of 30 days. The IRP is required to manage the affairs of the Corporate (**Corporate Debtor**) and to drive the CIR Process, while the powers of the board of directors of a company and/or managers of an LLP are suspended. The IRP is also tasked with the formation of a committee of creditors (**CoC**) comprising the Financial Creditors of the Corporate Debtor. The CoC at any time during the CIR process, can resolve to liquidate the Corporate or approve any Resolution Plan. The CIR Process is described in brief below.

- Moratorium: Immediately on commencement of CIR Process, a moratorium is declared, which entails:
  - a prohibition on institution or continuation of litigation against the Corporate Debtor;
  - *status quo* of the assets to be maintained by the Corporate Debtor ;
  - creditors are refrained from foreclosing, recovering or enforcing any security interest including under the SARFAESI;
  - supply of essential goods or services for the Corporate Debtor shall not be terminated;
  - prohibition on recovery of any property in possession of the Corporate Debtor by owner or lessor.

The moratorium is lifted at the end of the CIR Process.

- Public announcement: Upon the commencement of the CIR Process, a public announcement is required to be made in the prescribed form by the IRP within 3 days of his appointment. The public announcement *inter-alia* is required to invite claims from the general public.
- Determination of liquidation value: The IRP appoints two registered valuers within 7 days of his appointment, to determine the liquidation value of the Corporate Debtor as on the Insolvency Commencement Date. The valuers are required to submit a report of valuation in accordance with internationally accepted valuation standards after physical verification of the inventory and fixed assets of the Corporate Debtor. If the estimates of the two valuers vary substantially then a third valuer is required to be appointed. The average of the two closest estimates is considered to be the liquidation value of the Corporate Debtor.

The CIR Process begins with the appointment of an Insolvency Professional as an interim insolvency professional (IRP) by the NCLT for a period of 30 days. The IRP is required to manage the affairs of the Corporate (Corporate Debtor) and to drive the CIR Process, while the powers of the board of directors of a company and/or managers of an LLP are suspended.

- Submission of claims: Proof of claims are required to be submitted in the prescribed formats within 14 days from the appointment of the IRP. It is also permissible for a creditor to submit his proof of claims beyond the 14 day period but before the passing of the Resolution Plan, however any decision taken by the CoC will not be affected on account of a financial creditor being made a member of the CoC pursuant to proof of claim submitted at a later date.
- Verification of claims: The IRP is required to verify all claims within 7 days from the last date of submission of claims. All claims are required to be verified within 21 days from the appointment of the IRP.
- Information Memorandum: The IRP is required to prepare an information memorandum containing all prescribed details of the Corporate Debtor before the first meeting of the CoC, except for the liquidation value which is to be provided within 14 days from the date of the first meeting of the CoC. The information memorandum is required to be kept confidential by the recipients and is aimed at assisting the stakeholders in determining the current state of the Corporate Debtor and to assist in formulation and assessment of a Resolution Plan.
- Committee of Creditors:
  - First meeting: The IRP is required to submit a report certifying constitution of the CoC within 30 days of his appointment to the NCLT (**CoC Report**) and convene the first meeting of the CoC within 7 days of submission of such report. During the first meeting the CoC is required to either confirm the present IRP or choose to appoint any other IRP.
  - Subsequent meetings: Meetings of the CoC may be convened as and when the IRP deems necessary or when 33% of the Financial Creditors in worth request for the same. Seven days' notice must be given for calling a meeting of the CoC, although this period can be curtailed to minimum of 24 hours upon the consent of the CoC.
  - Quorum of meeting: Minimum 33% of members of the CoC in worth are required to constitute the requisite quorum. If the requisite quorum is not available, the meeting shall stand adjourned to the same time next day and the members attending the meeting on subsequent day shall constitute requisite quorum. All members of the CoC must be given the option to attend the meeting through video conferencing or audio/video means.
  - Voting: Voting can only be done at a CoC meeting if all members of the CoC are present, in the alternative the minutes of the meeting of the CoC shall be circulated and voting shall be conducted through electronic means. All decisions of the CoC are required to be passed by 75% of majority in worth.
- Approval of Resolution Plan: Any person, even unrelated party to the Corporate Debtor can propose a Resolution Plan. The CoC may approve the Resolution Plan with 75% of majority in worth. The Resolution Plan is eventually required to be approved by the NCLT in reference to the statutory *de-minimis* criteria (see below for details). In the event, the

plan is approved, it is binding on the Corporate Debtor, its employees, its members, creditors, guarantors and other stakeholders involved in the Resolution Plan.

At the end of the CIR Process, if no Resolution Plan is approved, the Corporate Debtor would automatically be liable to be liquidated under the provisions of the I&B Code.

What is the process for screening and preparation of a Resolution Plan?

Any entity or person, including a third party, may propose a Resolution Plan. The IRP is required to screen proposed Resolution Plans and submit Resolution Plans which are compliant with the minimum statutory parameters to the CoC for their approval. A Resolution Plan needs to provide the following statutory *de-minimus* parameters:

- payment of insolvency resolution process costs in priority of repayment of other debts;
- payment of liquidation value (payments receivable in liquidation process) to Operational Creditors in priority to any Financial Creditor which shall in any event be made before the expiry of thirty days after the approval of a Resolution Plan by the NCLT;
- liquidation value due to dissenting Financial Creditors and provide that such payment is made before any recoveries are made by the Financial Creditors who voted in favour of the Resolution Plan;
- management of the affairs of the Corporate Debtor after the approval of Resolution Plan;
- implementation and supervision of the Resolution Plan;
- must not contravene any law in force.

When is a Corporate Debtor liable to be liquidated under the provisions of the I&B Code?

Under the I&B Code, a Corporate Debtor is liable to be liquidated upon failure of CIR Process i.e. when no Resolution Plan is presented for approval and/or rejected by the NCLT or where the Corporate Debtor has contravened an approved Resolution Plan. The Corporate Debtor may also be liquidated, if the CoC resolves to liquidate the Corporate during the CIR Process before the confirmation of the Resolution Plan. In such scenarios, the NCLT is required to pass an order for liquidation of the Corporate Debtor.

What is the process of liquidation under the I&B Code?

Once an order of liquidation is passed by the NCLT, the IRP appointed during the CIR Process is required to act as a Liquidator. Subject to the directions of the NCLT, the Liquidator is required to control and carry out the liquidation process. Upon commencement of the liquidation process, the powers of the board of directors and key managerial personnel of the Corporate cease to have effect and the same vest with the Liquidator. The Liquidator has extensive

powers, including the power to carry on the business of the Corporate Debtor for its beneficial liquidation, settle claims of creditors and sell assets.

Can a secured creditor stand outside the liquidation process under the I&B Code?

The I&B Code duly recognises the rights of a secured creditor to stand outside the liquidation process and realise its security for recovery of its dues irrespective of the commencement of the liquidation process. During a liquidation process, secured creditor(s) may either choose to either relinquish their security interest to the liquidation estate and receive proceeds from the sale of assets by the Liquidator as per the waterfall mechanism set out in the I&B Code or stand outside of the liquidation process and enforce, realise, settle, compromise or deal with the secured assets in accordance with ordinary civil remedies, subject to verification of the security interest by the Liquidator.

What is the distribution waterfall under the I&B Code?

The I&B Code has introduced a new waterfall mechanism for priority of debts and changed the long-established priority, for sovereign debts. The government in a significant move, has taken a policy decision to allow priority of all financial claims (both secured and unsecured) above its own dues. Additionally, the insolvency resolution process costs and the liquidation costs have been accorded a first priority, incentivising availability of interim finance for stressed companies. The waterfall mechanism prescribed under the I&B Code is as follows:

i) the insolvency resolution process costs and the liquidation costs to be paid in full;
ii) debts owed to a secured creditor in the event such secured creditor has relinquished security and workmen's dues for the period of 24 months before liquidation;
iii) wages and any unpaid dues owed to employees other than workmen for the period of 12 months before liquidation;
iv) financial debts owed to unsecured creditors;
v) dues to the Governments and debts owed to secured creditors for unpaid amounts following the enforcement of security interest outside liquidation;
vi) any remaining debts;
vii) preference shareholders, if any; and
viii) equity shareholders or partners, as the case may be.

Liquidator's fees are required to be deducted proportionately from proceeds payable to each class. Unlike the CIR Process, the I&B Code does not prescribe a time frame for liquidation of a Corporate, however, there is a proposal in the draft regulations requiring the liquidation to be concluded within a period of 2 years.

What are the avoidance rules under the I&B Code?

The avoidance rules under the I&B Code retain the recognised concepts of fraudulent preference and undervalued transactions, however, adds one more category of "extortionate credit transactions". In summary:

- preferential transactions are those transactions that put any person in a better position than they would have been in the distribution priority provided under the I&B Code in the event of a liquidation and which are not in ordinary course of business;
- undervalued transactions: transactions in which the debtor has gifted or transferred the property to a person for a value which is significantly less than the value of consideration provided by that person; and
- extortionate credit transactions: this is intended to cover transactions where credit has been extended on extortionate terms, although the transactions where debt has been extended by a person providing financial services in compliance with law, have been exempted. The exact definition is to be prescribed by the I&B Board through regulations.

The NCLT is vested with wide powers to remedy the effect of such transactions including the power to reverse the transactions, supplanting obligations and directing payment of adequate consideration. At the same time, interests of persons who acquire property in good faith and for adequate value have been safeguarded under the I&B Code.

For 'preferential transactions' and 'undervalued transactions', the look back or suspect period under the I&B Code is 2 years preceding the Insolvency Commencement Date with related parties; and 1 year preceding the Insolvency

Commencement Date when entered into with persons other than related parties. Notably, the definition of 'related party' under the I&B Code is even broader than the definition provided under the new Companies Act, and includes directors, partners, key managerial persons, shareholders having ownership beyond 20% and persons who are involved with the policy making process of the Corporate, amongst others. 'Extortionate credit transactions' entered into by a Corporate within 2 years preceding the Insolvency Commencement Date are liable to be set aside.

Does the I&B Code provide for Cross Border Insolvency issues?

The I&B Code contains enabling provisions for the central government to enter into bilateral arrangements for recognition and enforcement of provisions of the I&B Code. Pursuant to such bilateral arrangements, the IRP and/or the Liquidator may make an application to the NCLT, which may then issue a letter of request to the relevant foreign court or authority for necessary assistance. Bilateral arrangements are the only basis for granting assistance or recognition to foreign insolvency processes under the I&B Code.

What are the recent changes made in the provisions of the I&B Code?

The Central Government has played a proactive role in monitoring the implementation and execution of the provisions of the I&B Code. During the implementation of the I&B Code, a concern has been raised about wilful defaulter promoter groups effectively buying back their companies at a 'discounted rate' by proposing a resolution plan. In order to address the dangers of abuse of the provisions of the I&B Code by unscrupulous promoters, the Central Government, promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 dated November 23, 2017, (**I&B Ordinance**) amending the provisions of the I&B Code to make it more secure and less susceptible to such abuse.

The I&B Ordinance incorporates an additional Section 29A to the Code which lists the persons barred from submitting a resolution plan during the CIR Process. The following class of persons (including corporates) have been sought to be barred from submitting a resolution plan under the newly incorporated Section 29A:

i) Undischarged insolvents;
ii) Wilful defaulters as per RBI guidelines under the Banking Regulation Act, 1949;
iii) Persons whose accounts have been classified for the past one year or more, as non -performing assets (under Banking Regulation Act, 1949) and have not made payment of all overdue amount, interest and other charges related to such non -performing assets before submitting the resolution plan;
iv) Persons convicted for any offence punishable with imprisonment for two years or more;

v) Persons disqualified to act as a director under Companies Act, 2013;
vi) Persons prohibited by SEBI from trading in securities or accessing the securities market;
vii) Persons having been found to have indulged in preferential, undervalued or fraudulent transactions as per an order passed under the I&B Code;
viii) Persons who have executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor under insolvency resolution process or liquidation process, under the I&B Code.

The I&B Ordinance further amends Section 25 (h) of the I&B Code and vests with the Resolution Professional the powers and discretion to lay down the criteria for invitation of prospective resolution applicants, having due regard to the complexity and scale of operations of the business of the corporate debtor concerned and such other conditions as may be specified by the Board, with the approval of the CoC.

Further, Section 30(4) of the Code, has also been amended to the effect that the CoC may approve a resolution plan by 75% majority, after considering its feasibility and viability, thereby vesting with the CoC the obligation to consider the resolution plans on the newly added two parameters also.
The I&B Ordinance also amends the I&B Code to secure the abuse of the liquidation provisions which come into effect after the completion or upon the failure of the CIR Process under the I&B Code by including a provision prohibiting the liquidator to sell the immovable and movable property or actionable claims of a corporate debtor in liquidation to any person not eligible to be a resolution applicant under Section 29A.

Further, while the I&B Code contains multiple provisions for violations of its provisions, a further Section 235A has been incorporated to the I&B Code, which provides for a fine not less than INR 100,000 (approx. USD 1,550) and extending to INR 2 crores (approx. USD 310,270), in cases of contravention of the I&B Code or of the rules/regulations made under it, where no penalty/ punishment has been provided in the I&B Code.

Therefore, by way of the above I&B Ordinance, the Central Government has further strengthened the provisions of the I&B Code so that the processes under the same are not abused by unscrupulous promoters seeking to reap benefits to the detriment of creditors.

Miscellaneous

Are there any restrictions on foreign ownership of land?

A non-resident is not permitted to acquire immoveable property in India (other than through a lease for a term of less than five (5) years) without the prior permission of the RBI. However, a person who has established a branch office or other place of business (other than a liaison office) can acquire immoveable property in India which is necessary for or incidental to the activity carried on by such office in India. A declaration in relation to the acquisition to be filed with the RBI. An Indian subsidiary, joint venture or LLP set up by a company resident outside India would be considered an Indian resident and is permitted to acquire movable and immoveable property incidental to its business.

What are the anti-money laundering standards applicable in India?

Pursuant to the Prevention of Money Laundering Act, 2002 (which was brought into effect on July 1, 2005), SEBI and the RBI have issued detailed guidelines on anti-money laundering standards which apply to every banking company, financial institution and other intermediaries (including merchant bankers, underwriters, portfolio managers, trustees and other market intermediaries registered with SEBI). The detailed guidelines are in line with international requirements in relation to prevention of anti-money laundering. The guidelines include maintaining detailed records of all cash transactions of the value of more than INR 10 lakhs (approx. USD 15,513) or the equivalent in foreign currency. All suspicious transactions (whether or not in cash and including non-monetary transactions) have to be recorded and reported.

Does India have anti-corruption laws?

Yes, the Prevention of Corruption Act, 1988 is the principal anti-corruption legislation in India. This, together with the Indian Penal Code, 1860, which is a substantive criminal code of India, deals with bribery and corruption related offences in India. There also exist special statutes like the Representation of People Act, 1951 (which regulates the conduct of elections) and a vast body of subordinate legislation formulated as service rules which are applicable to various categories of public servants. These rules, *inter alia*, seek to regulate the giving and the acceptance of gifts and hospitality by public servants (including elected representatives).

Does India have anti-dumping laws?

Yes, India does have anti-dumping measures in place. The use of anti-dumping measures as an instrument of fair competition and to establish fair trade is permitted by the World Trade Organization (**WTO**). In particular, anti-dumping measures are provided for by the WTO in the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994".

In India, this Agreement has been ratified and given effect to by the Customs Tariff Act, 1975 and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (**Anti-Dumping Rules**). The Customs Tariff Act, 1975 and the Anti-Dumping Rules, contain the entire framework for anti-dumping in India.

What laws exist in India to ensure recovery of bad debts by secured creditors without recourse to courts?

To speed up the process of recovery from non-performing assets, the SARFAESI Act was enacted for regulation of securitization and reconstruction of financial assets and enforcement of security interest by secured creditors. The SARFAESI Act empowers banks and financial institutions to recover their non-performing assets without the intervention of courts.

The SARFAESI Act provides following methods of recovery from non-performing assets:

- Securitization of Financial Assets;
- Reconstruction of Financial Assets; and
- Enforcement of Security Interest.

In furtherance of the foregoing mechanism, the SARFAESI Act, *inter alia*, prescribes the following framework:

- setting-up and registration of asset reconstruction companies;
- various measures available to secured creditors in order to recover bad debts from defaulting borrowers;
- the exercise of such measures for recovery of bad debts including the limitations, procedures and modalities of the application of such measures;
- grievance redressal mechanism available to any person (including the borrower) in relation to the action taken by secured creditors.

In addition to the SARFAESI Act, the RBI has also issued guidelines governing, *inter alia*, asset reconstruction companies, asset classification norms and the exercise of measures by secured creditors. The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 was passed recently to amend the SARFAESI Act; RDDB Act; Indian Stamp Act, 1899; and Depositories Act, 1996. The Amendment Act aims to ensure easier and effective recovery of debt, along with timely resolution of disputes.

What are Government regulations with respect to E-Commerce?

The Information Technology Act, 2000 regulates the basic acts of e-commerce. The Act is based upon the UNCITRAL Model. E-commerce laws and regulations are also supplemented and complemented by different laws as applicable to the field of e-commerce. For instance, e-commerce with respect to pharmaceuticals, healthcare, traveling, etc. are governed by the respective sectoral laws. 100% FDI under the Automatic Route is permitted in market place model of e-commerce but FDI is not permitted in inventory based model of e-commerce. E-commerce entities with FDI are allowed to engage in business-to-business e-commerce and not in business-to-consumer e-commerce.

What are the Environmental Regulations in India?

The Ministry of Environment and Forests (**MoEF**) is the apex administrative government body for the regulation, formulation, conservation, planning, promotion, co-ordination and overseeing the implementation of environmental and forestry programmes. The MoEF is the nodal agency for the implementation of the United Nations Environment Programme. The responsibility of prevention and control of industrial pollution is upon the Central Pollution Control Board (CPCB), which is a statutory authority, attached to the MOEF.

- The relevant environment related laws in India are as follows:
- The Air (Prevention and Control of Pollution) Act, 1981;
- The Water (Prevention and Control of Pollution) Act, 1974;
- The Water (Prevention and Control of Pollution) Cess Act, 1977;
- The Environment (Protection) Act, 1986 and the Hazardous Waste (Management and Handling) Rules, 1989;
- The Biological Diversity Act, 2002;
- The Forest Conservation Act, 1980;
- The Indian Forest Act, 1927;
- The Protection of Plant Varieties and Farmers' Rights Act, 2001;
- The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006;
- Wildlife Protection Act of 1972;
- The National Green Tribunal Act, 2010;
- The National Environment Appellate Authority Act, 1997;
- The National Environment Tribunal Act, 1995; and
- The Public Liability Insurance Act, 1991.

What are the visa and registration requirements for foreign nationals working in India?

All foreigners including foreigners of Indian origin visiting India are required to obtain a visa. All foreigners coming to India on a long term basis (i.e. more than 180 days) are required to get themselves registered with the relevant foreigners regional registration office or the foreigners registration office, within 14 days of arrival in India.

The Ministry of Home Affairs, (**MHA**) has set out conditions for the purpose of issuing employment visas to foreign nationals, which *inter alia* include that the employee should draw a salary of a minimum of USD 25,000 per annum (except for certain kinds of employees, such as, ethnic cooks, staff working for the concerned embassy/high commission in India etc. For the purpose of calculating this USD 25,000 limit, the salary and all other allowances paid to the foreign national in cash and perquisites such as rent free accommodation etc. are taken into consideration. According to the MHA's conditions, a business visa can be granted to foreign nationals for prescribed purposes including those who wish to visit India to establish industrial or business ventures or to explore possibilities to do so, or for technical meetings or discussions, board meetings, recruitment of manpower etc.

Do companies require an industrial license?

Except for the industries falling within the following categories, all industrial undertakings are exempt from obtaining an industrial license:

- industries reserved for the public sector. These are limited to atomic energy and railway transport;
- industries retained under compulsory licensing. These include distillation and brewing of alcohol, hazardous chemicals, etc; and
- a non-micro, small and medium enterprise (**MSME**) unit manufacturing items reserved for the MSME sector (at present, there is a list of 20 (twenty) items reserved for manufacturing by the MSME.

Are there any industry-specific licenses that are necessary?

Yes, examples of industry-specific licenses are:

- license from the Department of Telecommunications for telecom operating companies;
- license from the Insurance Regulatory Development Authority for insurance companies;
- registration from the RBI for banks and NBFCs;
- registration with SEBI for mutual funds and venture capital funds.

Are there any general registrations required for activities not falling under the industries specified above?

Yes, businesses do require certain general registrations regardless of the industry in which they operate. Illustratively, some of the standard registrations for an establishment proposing to undertake business activities would include:

- Income Tax registration;
- VAT / Sales Tax registration; and
- license under the Shops and Establishment Act of the relevant State in which the establishment is located.

A manufacturing unit would ordinarily also require registration under the Factories Act, 1948, the different environmental protection legislations, etc. depending on the nature and location of the unit.

Glossary

AAEC	Appreciable adverse effect on competition in India
AAR	Authority for Advance Rulings
Accidents Act	Fatal Accidents Act, 1855
AE	Associated Enterprise
Anti-Dumping Rules	Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995
APA	Advance Pricing Arrangement
Apprentices Act	Apprentices Act, 1961
AY	Assessment Year
BEPS	Base Erosion and Profit Sharing
BIPA	Bilateral Investment Protection Agreements
Black Money Act	Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
BO	Branch office
Bonus Act	Payment of Bonus Act, 1965
CbC	Country by country
CBDT	Central Board of Direct Taxes
CCI	Competition Commission of India
CGST	Central GST
CGST Act	Central Goods and Services Tax Act, 2017
CIR Process	Corporate Insolvency Resolution process
CLRA Act	Contract Labour (Regulation and Abolition) Act, 1970
CoC	Committee of creditors
Combination Regulations	CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011
Companies Registered Valuers Rules, 2017	Companies (Registered Valuers and Valuation) Rules, 2017
COMPAT	Competition Law Appellate Tribunal
Compensation Act	Employees' Compensation Act, 1923
Competition Act	Competition Act, 2002
Contract Act	Indian Contract Act, 1872
Copyright Act	Copyright Act, 1957
CSR	Corporate social responsibility
CST	Central sales tax
Customs Tariff Act	Customs Tariff Act, 1975

CVD	Countervailing duty
DDT	Dividend distribution tax
DG	Director General
DIN	Director identification number
DRAT	Debts Recovery Appellate Tribunal
DRP	Dispute resolution process
DRT	Debts Recovery Tribunal
DTAA	Double Taxation Avoidance Agreements
EPF Act	Employees' Provident Funds and Miscellaneous Provisions Act, 1952
ESI Act	Employees' State Insurance Act, 1948
Equal Remuneration Act	Equal Remuneration Act, 1976
Factories Act	Factories Act, 1948
FY	Financial year
FDI	Foreign direct investment
FII	Foreign Institutional Investor
FPI	Foreign Portfolio Investor
FTP	Foreign Trade Policy 2015-2020
FTS	Fees for technical services
GAAR	General Anti Avoidance Rules
Gratuity Act	Payment of Gratuity Act, 1972
GST	Goods and services tax
GSTC Cess Act	Goods and Services Tax Compensation Cess Act, 2017
HSN	Harmonized System of Nomenclature
I&B Board	Insolvency and Bankruptcy Board of India
I&B Code	Insolvency and Bankruptcy Code, 2016
I&B Ordinance	Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017
IEC	Importer exporter code
IFSC	International financial services centre
IGST	Integrated GST
IGST Act	Integrated Goods and Services Tax Act, 2017
Industrial Disputes Act	Industrial Disputes Act, 1947
Information Technology Act	Information Technology Act, 2000
IT Act	Income Tax Act, 1961
ITAT	Income Tax Appellate Tribunal
IT Rules	Income Tax Rules, 1962

Liability Act	Employer's Liability Act, 1938
Listing Regulations	SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
LLP	Limited liability partnership
LLP Act	Limited Liability Partnership, 2008
LO	Liaison office
LOB	Limitation of benefits
LRS	Liberalised Remittance Scheme
LWF Acts	State specific Labour and Welfare Fund Acts
Maharashtra Shops Act	Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017
MAP	Mutual Agreement Procedure
MAT	Minimum Alternative Tax
MB Act	Maternity Benefits Act, 1961
MHA	Ministry of Home Affairs
Minimum Wages Act	Minimum Wages Act, 1948
MoEF	Ministry of Environment and Forests
MoLE	Ministry of Labour and Employment
MSME	Micro, Small and Medium Enterprise
OECD	Organisation for Economic and Co-operation Development
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
N&F Holidays Act	State specific Industrial Establishments (National and Festival Holidays and Other Holidays) Act
New Companies Act	Companies Act, 2013
NOR	Not ordinarily resident
NR	Non resident
PAN	Permanent Account Number
Patents Act	Patents Act, 1970
Paternity Bill	Paternity Bill, 2017
PE	Permanent establishment
PO	Project office
POEM	Place of Effective Management
Previous Companies Act	Companies Act, 1956
RBI	Reserve Bank of India
RDDB Act	Recovery of Debts Due to Banks and Financial Institutions Act, 1993

RoC	Registrar of Companies
ROR	Ordinarily resident
SAD	Special Additional Duty paid
SARFAESI	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
S&E Acts	Shops and Establishment Acts
SEBI	Securities and Exchange Board of India
SEBI ICDR Regulations	SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009
SEBI Takeover Regulations	SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011
Sexual Harassment Act	Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
SEZ	Special economic zone
SGST	State GST
SGST Acts	State GST legislations
SICA	Sick Industrial Companies (Special Provisions) Act, 1985
SPICe	Simplified proforma for incorporating companies electronically
SSA	Social security agreement
Standing Orders Act	Industrial Employment (Standing Orders) Act, 1946
STT	Securities transaction tax
TAN	Tax deduction and collection account number
Trade Marks Act	Trade Marks Act, 1999
Trade Union Act	Trade Union Act, 1926
TRC	Tax Residency Certificate
UTGST	Union territory GST
UTGST Act	Union Territory Goods and Services Tax Act, 2017
VAT	Value Added Tax
Wages Act	Payment of Wages Act, 1936
Wages Bill	Labour Code on Wages Bill

The foreign exchange rate used in this Guide is 1 USD = INR 64.46, which is the average spot rate of the last six months as on October 31, 2017, as provided by the Reserve Bank of India.

Notes

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Notes

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OUR OFFICES:

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