A GUIDE TO DOING BUSINESS IN INDIA

UNDAUNTING INDIA

A FINCHAM INDIA Publication

Co-authored by DUA ASSOCIATES Advocates & Solicitors & KPMG

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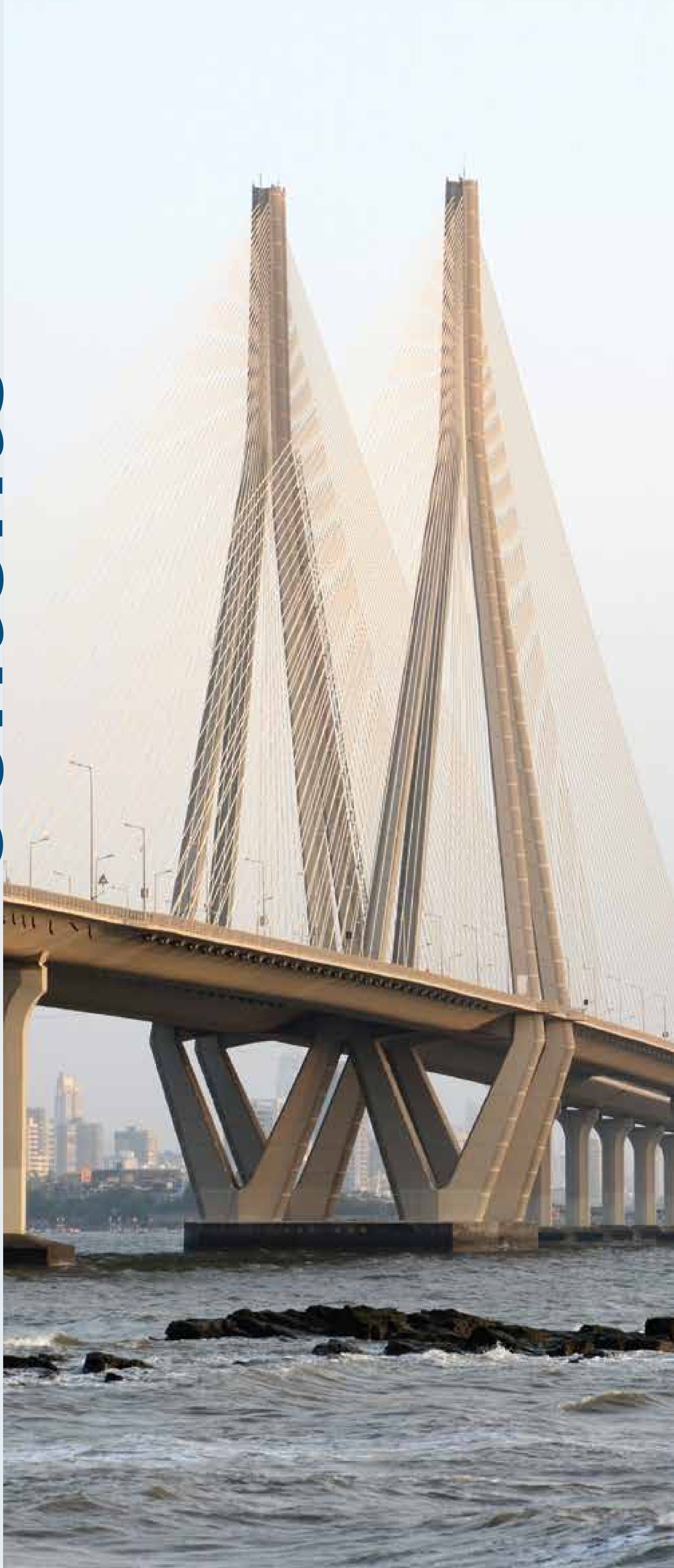

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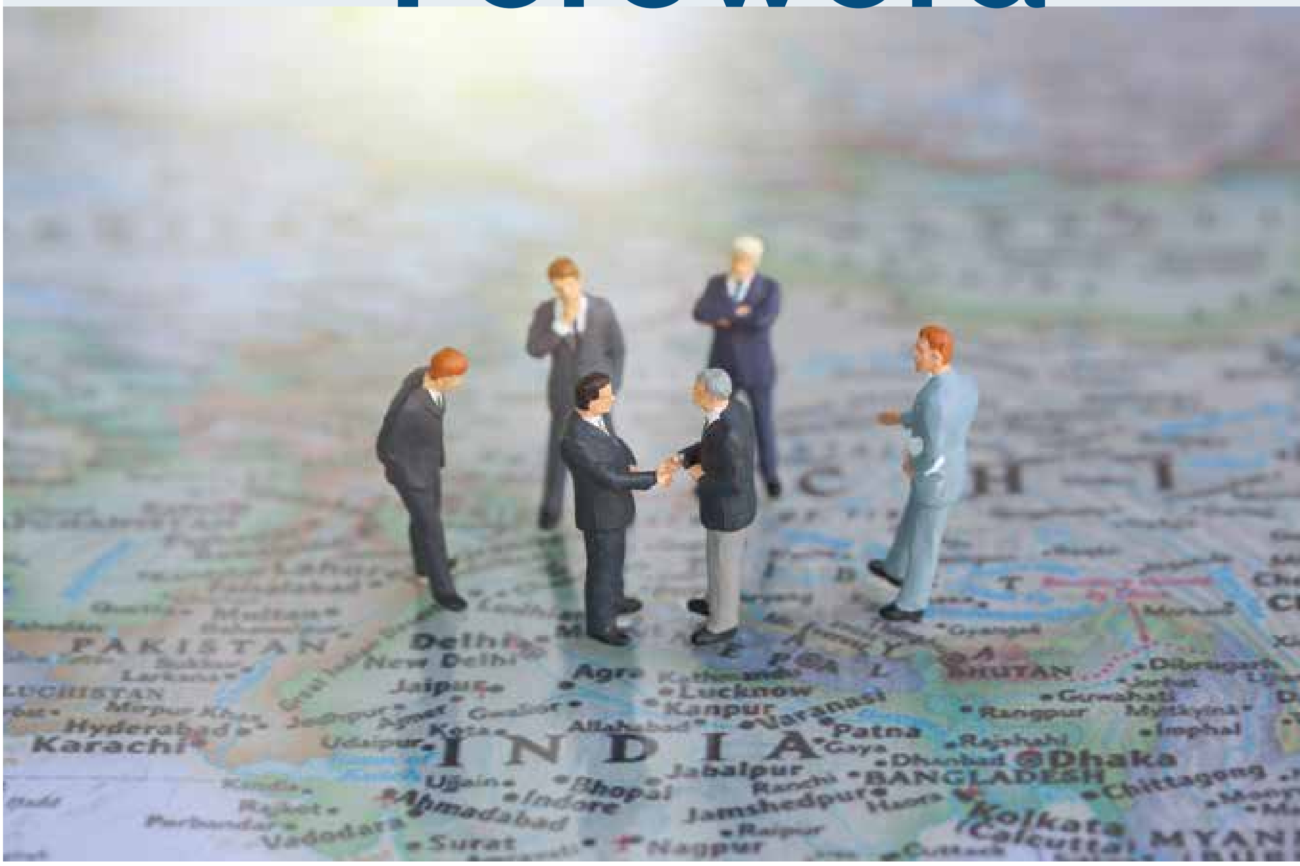
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Foreword

As they say in business, sharing experiences along with continuous improvements leads to excellence, and so is the origin of this intriguing book that derives from the need of unlearning and learning continuously in the ever-changing environment in which businesses operate. India is a promising business destination due to a large domestic market and favourable FDI policies. It has improved remarkably in the 'ease of doing business' in the business climate and continues to strive towards being an attractive destination for foreign investment. This overall improvement in the business environment is drawing the attention of global players.

While India provides various promising conditions with a large domestic market, availability of low-cost skilled labour, announcements of 'Digital India' and 'Make in India' schemes and other reforms such as the regulatory set up, multiple tiers of governance, a complex tax regime, interpretation of laws and regulations, can often be perceived as daunting for a foreign company exploring the Indian market. Under such circumstances, it becomes imperative for the businesses already operating in the country and those looking for setting up their business in India, to have an overall understanding of the latest provisions of various legislations applicable to them.

With this in mind, the Finland Chamber of Commerce in India (FINCHAM India) undertook the initiative to create this comprehensive business guide and ready reference for foreign companies looking to set up a business in India, to provide a holistic overview of the corporate, financial, legal and regulatory landscape in the country.

This book provides a valuable window of information on perspective to enter the Indian market and how businesses operate in India. It will help them get an overall view of what lies ahead. There are certain requirements that need to be followed in case a foreign company wants to start operations in the country. This book explains in detail how foreign companies can invest and start operating in the country.

My heartfelt thanks to the co-authors of this book, KPMG in India and Dua Associates for their expert insights to put together this body of work which we are pleased to share with the readers. However, we could not have accomplished this endeavour without the cooperation and support from H.E. Ritva Koukku-Ronde, Hon'ble Ambassador of Finland in India and her team, as well as FINCHAM India's Board Members and Honorary Board Members.

It is our sincere hope that our readers find the information in this publication beneficial while setting out to explore India as a business destination.

Sincerely,

Amit Gossain

Chairperson, Finland Chamber of Commerce in India
Managing Director, KONE Elevator India

List of Commonly Used Abbreviations

AD	Authorized Dealer
AE	Associated Enterprise
BCD	Basic Customs Duty
BO	Branch Office
CBDT	Central Board of Direct Taxes
CCD	Compulsory Convertible Debenture
CCPS	Compulsorily Convertible Preference Shares
CIF	Cost, Insurance and Freight
CIT	Commissioner of Income Tax
CPS	Committed Portfolio Size
CST	Central Sales Tax
CGST	Central Goods and Services Tax
DPIIT	Department for Promotion of Industry and Internal Trade
DTAA	Double Taxation Avoidance Agreement
ECB	External Commercial Borrowings
ETR	Effective Tax Rate
FATF	Financial Action Task Force
FCNR	Foreign Currency Non Resident (account)
FDI	Foreign Direct Investment
FEMA	Foreign Exchange Management Act
FMV	Fair Market Value
FPI	Foreign Portfolio Investment
FVCI	Foreign Venture Capital Investment
FY	Financial Year
GAAR	General Anti-Avoidance Rule
HC	High Court
ICT	Information and Communication Technologies
IGST	Integrated Goods and Services Tax
INR	Indian Rupee
IOSCO	International Organization of Securities Commissions
IT	Information Technology
JV	Joint Venture
LIBOR	London Inter-bank Offered Rate

LLP	Limited Liability Partnership
LO	Liaison Office
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
NCD	Non-Convertible Debentures
NCLT	National Company Law Tribunal
NCPS	Non-Convertible Preference Shares
NRE	Non-Resident External
NRI	Non-Resident Indian
NRO	Non-Resident Ordinary
OCD	Optionally-Convertible Debentures
OCPS	Optionally Convertible Preference Shares
PAN	Permanent Account Number
PE	Permanent Establishment
PO	Project Office
PLI	Production Linked Incentive
RBI	Reserve Bank of India
ROC	Registrar of Companies
SC	Supreme Court
SBI	State Bank of India
SEBI	Securities and Exchange Board of India
SEZ	Special Economic Zone
SGST	State Goods and Services Tax
SWS	Social Welfare Surcharge
UTGST	Union Territory Goods and Services Tax
VAT	Value-Added Tax
VRR	Voluntary Retention Route

Conversion of Numbers (units of currency)

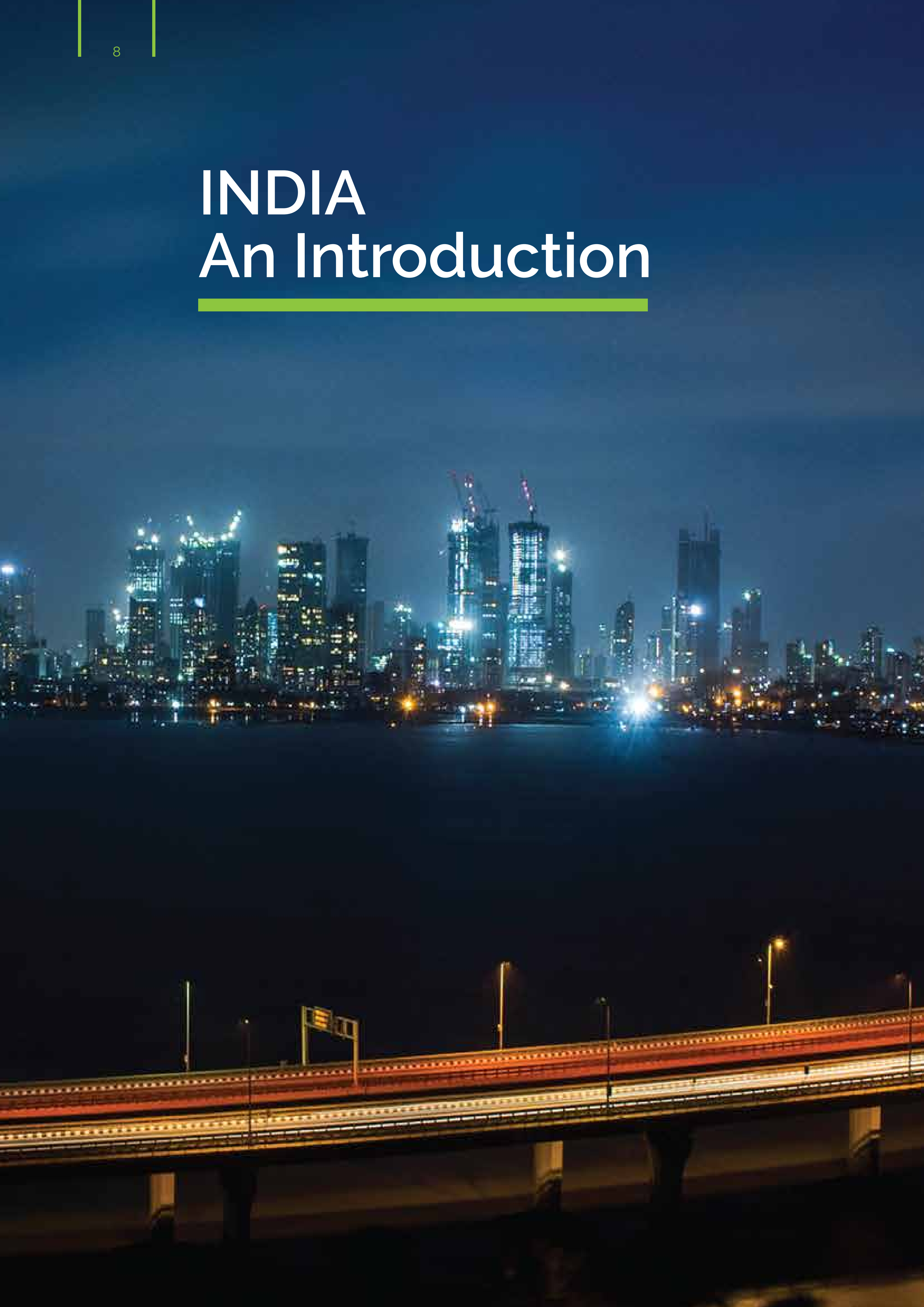
1 Lakh = 100 Thousand

10 Lakh = 1 Million

1 Crore = 10 Million

10 crore = 100 Million

INDIA
An Introduction



INDIA
An Introduction

One of the oldest civilizations in the world and the largest democracy in the world, India is home to a population of nearly 1.38 billion. India is the second most populous country in the world, after China, the seventh largest in terms of land area and has a long coastline of 7,516.6kms. The geography of the country lends it a very unique position in the South Asia region.

The capital of India is New Delhi. India follows a parliamentary form of government and is divided into administrative units comprising of 28 States and 8 Union Territories.

Constitution Of India

The Constitution of India came into force on 26th January, 1950, when India became a Republic. The day is celebrated as Republic Day every year. The Constitution is the country's fundamental governing document and inter alia lays down the framework for the government's structure, powers, procedures, duties as well as the fundamental rights and directive principles.

Division Of Power

The functions of the Government are divided between the following three branches:

Executive: The President of India is the head of the State. The Prime Minister of India is the head of the Government who runs office supported by a Council of Ministers constituting the Cabinet.

Legislative: The Legislature is formed by the two Houses of Parliament, namely, the Lower House or Lok Sabha (House of the People), and the Upper House or Rajya Sabha (Council of States).

Judicial: The Supreme Court of India is the apex court of the country. Along with the High Courts and other subordinate courts, these constitute the Indian judiciary.

Federal System Of Government

India follows a federal system of government, i.e., the powers of the government to legislate on various subjects are divided between the Centre and the States as specified in Constitution.

The Union List specifies matters on which the Union Government can legislate.

The State List empowers the State Governments to make laws on subjects prescribed under their jurisdiction.

The Concurrent List includes topics on which both the Centre and the State can legislate.

Governance is also carried out at a third tier by local bodies. These are Panchayati Raj Institutions (PRIs) in the villages, and Urban Local Bodies (ULBs), such as Municipal Corporations, in the urban areas.

Economy

Since achieving independence in 1947, the country has made significant socio-economic progress and has integrated itself as a major player in the global economy. The Indian economy valued at approx. USD 2.9 trillion and India is ranked as the 7th largest economy by nominal GDP and the third largest by Purchasing Power Parity[1] . With domestic private consumption accounting for nearly 60% of the GDP, India is fast emerging as one of largest consumer markets in the world.

Facts & Figures:

GDP	USD 2,875.14 Bn (2019)
GDP per capita	USD 2,104.1 (2019)
GDP per capita, PPP	USD 7034.2 (2019)
GDP Growth (Annual %)	5.0 (2019)
Trade (% of GDP)	40 (2019)
Export of Goods & Services (% of GDP)	18.7 (2019)
Current account balance (% of GDP)	-1.04 (2019)
Fiscal Year	1st April to 31st March
Currency	Indian Rupee (INR)
Consumer Price Index	158.40 (October 2020)[2]
Inflation, consumer prices (Annual %)	7.7 (2019)

Source: World Bank Data

Key Sectors

India has primarily been an agrarian economy. Nearly half of the country's working population continues to depend on agriculture as a source of livelihood. However, with the adoption of the New Economic Policy in 1991, industrial growth witnessed a boom and paved the way for foreign investments. The said policy also resulted in exponential development of the services industry in fields including banking and finance, insurance, business process outsourcing and information technology. Presently, the services sector is the highest contributor to India's GDP. The Indian Government is taking steps to augment the manufacturing sector through reforms and policies aimed at enhancing infrastructure, technology, investments and employment.

Agriculture

16.5% of GDP
Source of livelihood for nearly 50% population

Manufacturing

Approx. 18% of GDP

Services

Approx. 60% contribution to GDP

1. Source: Invest India (https://www.investindia.gov.in/team-india-blogs/indian-economy-overview)
2. Source: Ministry of Statistics and Programme Implementation (MOSPI)

Foreign Trade

India's overall exports for the period April 2019 to March 2020 are estimated at USD 528.45billion[3], and overall imports are USD 598.61billion .

	Exports (USD billion)	Imports (USD billion)
Merchandise	314.31	467.19
Services	214.14	131.41
TOTAL	528.45	598.6

India's principal export commodities in FY 2019-20[4] were :

- Engineering Goods
- Petroleum Products
- Gems & Jewellery
- Drugs & Pharmaceuticals
- Organic & Inorganic Chemicals
- RMG of all Textiles
- Electronic Goods
- Cotton Yarn/ Fabrics/Handloom Products
- Plastic & Linoleum
- Marine Products

India's principal import commodities for FY 2019-20[4] were:

- Petroleum, Crude & Products
- Electronic Goods
- Machinery (electrical & non-electrical)
- Gold
- Transport Equipment
- Pearls, precious & semi-precious stones
- Coal, Coke & Briquettes, etc
- Iron & Steel
- Artificial resins, plastic materials, etc
- Non ferrous metals

3. Ministry of Commerce & Industry: Press Release dated 15April 2020 https://pib.gov.in/PressReleasePage.aspx?PRID=1614754
4. Source: Directorate General of Commercial Intelligence and Statistics

Ease Of Doing Business

Every year, 190 economies are analysed by the World Bank Group against ten primary indicators to assess the efficiencies and ease of doing business. India improved its ranking by 14 places from 77th in 2018, to 63rd in 2019.

Based on an evaluation undertaken across 17 cities, the country reflects improvement in six of the ten parameters for starting and doing business, which is further based on topical scores (0-100) secured against each indicator. The table below shows how India has performed against each of the prescribed parameters over the last two years.

	Ranking on Parameters	2020 Score	2019 Score	Change
Starting a Business	136	81.6	81.0	+ 0.6
Dealing with Construction Permits	27	78.7	72.1	+6.6
Getting Electricity	22	89.4	89.2	+0.2
Registering Property	154	47.6	47.9	-0.3
Getting Credit	25	80.0	80.0	--
Protecting Minority Investors	13	80.0	80.0	--
Paying Taxes	115	67.6	65.4	+2.2
Trading across Borders	68	82.5	77.5	+5.0
Enforcing Contracts	163	41.2	41.2	--
Resolving Insolvency	52	62.0	40.8	21.2

5. Source: Directorate General of Commercial Intelligence and Statistics

Subsequently, the Department for Promotion of Industry and Internal Trade (DPIIT), which operates under the Ministry of Commerce & Industry, has announced focussing on reforms to improve India's performance on six parameters, namely, (i) enforcing contracts; (ii) resolving insolvency; (iii) starting a business; (iv) registering property; (v) paying taxes; and (vi) trading across borders, to aid growth and development of the economy. State level reforms, including incentives, are also being implemented to attract foreign investments.

Make In India & Atmanirbhar Bharat

With the objective of encouraging investments, fostering innovation, developing skills and high-quality manufacturing infrastructure, the Government announced the 'Make in India' campaign in 2014. This has been followed by reforms and policies to aid the objective of developing India as a global manufacturing hub. New sectors such as defence manufacturing, railways, space have been opened up for private investments.

The Make in India scheme focuses on the following 25 sectors:

Automobile	Automobile components	Biotechnology	Chemicals	Construction
Defence Manufacturing	Electrical machinery	Electronic Systems	Food Processing	IT & BPM
Leather	Media & Entertainment	Mining	Oil & Gas	Pharmaceuticals
Ports & Shipping	Railways	Renewable Energy	Roads & Highways	Space
Textiles & Garments	Thermal Power	Tourism & Hospotality	Wellness	

The COVID 19 pandemic exposed vulnerabilities in the global supply chains and their impact on economies. In this context, the Hon'ble Prime Minister of India, announced the vision for a self reliant economy, Atmanirbhar Bharat. This vision seeks to give greater impetus to the 'Make in India, Make for World' campaign.

Several policy reforms have been announced in 2020 in aid of promoting foreign investments, capacity building, technology to incentivise growth of the domestic manufacturing sector. Some of the recently introduced reforms are:

- To mainstream Micro, Small and Medium Enterprises (MSMEs), which are considered the backbone of the Indian economy, re-classification of eligibility criteria has been made effective from 1st July 2020 as follows, as part of a series of measures announced to facilitate 'Atmanirbhar Bharat':

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	Old Criteria	New Criteria
Micro	• Services: Investment upto INR 10 Lakhs • Manufacturing: Investment upto INR 10 Lakhs	• Investment in P&M and Equipment upto INR 1 Crore • Turnover upto INR 5 Crore
Small	• Services: Investment upto INR 2 Crore • Manufacturing: Investment upto INR 5 Crore	• Investment in P&M and Equipment upto INR 10 Crore • Turnover upto INR 50 Crore
Medium	• Services: Investment upto INR 5 Crore • Manufacturing: Investment upto INR 10 Crore	• Investment in P&M and Equipment upto INR 50 Crore • Turnover upto INR 250 Crore

• To strengthen the Electronics System Design and Manufacturing ecosystem, the Ministry of Electronic and Information Technology notified the following schemes:

i. Production Linked Incentive Scheme (PLI Scheme): For large scale manufacturing in India of products such as mobile phones

ii. Scheme for Promotion of Manufacturing of Electronic Components and Semi conductors (SPECS): To strengthen the value chain of electronic manufacturing of electronic components, specialised sub-assemblies and ATMP units

iii. Modified Electronics manufacturing Clusters Scheme (EMC 2.0): To create quality infrastructure such as Ready Built Factories and Plug and Play facilities

• To accentuate the growth of domestic manufacturing of medical devices and allied infrastructure, the government has announced the following schemes:

i. Production Linked Incentive (PLI) Scheme: To promote domestic manufacturing of medical equipment

ii. Scheme for promotion of Medical Device Parks: To create common infrastructure facilities and increase cost efficiencies

• To attract foreign investments and enhance manufacturing capacities in the defence sector, two Defence Industrial Corridors are being set up in the states of Tamil Nadu and Uttar Pradesh.

Several manufacturing zones, transport corridors, technology parks and industrial corridors are in the process of being set up across the country as the means of achieving economic self-reliance.

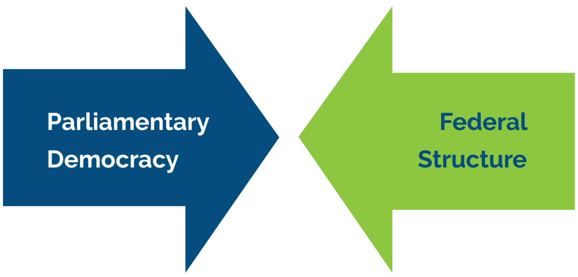

RULES

01

Legal Framework In India

Legal Framework In India

The Constitution of India is the foundational law of India which lays down the basic political structure of the country. India is the largest democracy in the world and the Constitution serves as a tool for it to function smoothly.

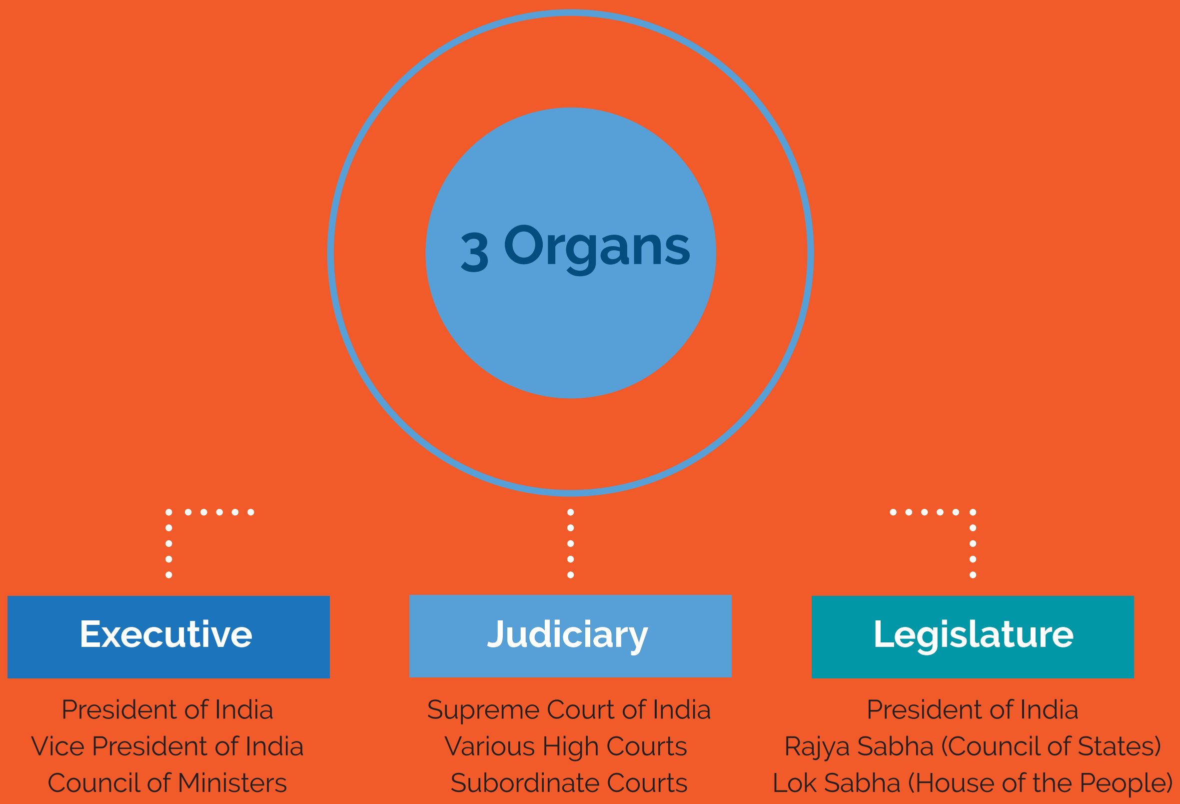


India is a federal system where there are two seats of power (at Central/Union level and State level) that are autonomous in their own spheres. The Constitution of India provides for division of powers between the Centre and States.

The Seventh Schedule under Article 246 of the Constitution deals with the division of powers between the Centre and the States.

Union List	State List	Concurrent List
Lists out subjects on which Parliament may make laws.	Lists out subjects on which State Legislatures may make laws .	Lists out subjects on which both Parliament and State Legislatures have jurisdiction. However, the Constitution provides federal supremacy to Parliament on concurrent list items in case of a conflict.

The Constitution of India also provides for three wings of governance in the form of the Executive, Legislature and Judiciary.



At the highest position in the Indian judicial hierarchy is the Supreme Court. It is the ultimate court of appeal in civil and criminal matters. It is headed by the Chief Justice of India, appointed by the President of India. High Courts come below the Supreme Court in the judicial hierarchy. Each State has a High Court and there are a few common High Courts for two or more States. E.g. - Chandigarh High Court is common for the States of Punjab and Haryana. A system of subordinate courts comes below High Courts consisting of District Courts, Fast Track Courts, Family courts etc. The Subordinate Courts play a very vital role in the Indian judicial system as these are the closest to the people.

Governance Structure At The Centre

The Union Cabinet consists of the President, Vice President and Council of Ministers. The complete executive power of the Union is vested in the President which includes the power to appoint high functionaries of the State such as judges, military powers, power to grant pardon/ reprieve. The President acts on the advice of the Cabinet i.e., the Council of Ministers headed by the Prime Minister.

Governance Structure In States

Like the Central Government, a State Government also follows the parliamentary system. The State Executive is headed by a Governor appointed by the President. Although the Governor is the constitutional head, he is to act on the advice of State Ministers.


FDI

02

Permissibility Of Foreign Direct Investment

Permissibility Of Foreign Direct Investment

Over the last years, India has been one of the most attractive emerging markets for foreign investments as the FDI policy has been significantly liberalized. A number of restrictions on foreign investment have been relaxed and the procedures have been simplified with an intent to attract and promote FDI in India in order to make India an investor friendly destination and supplement domestic capital, technology and skills for accelerated economic growth and development. The policies also aim at facilitation of the Government of India's Make in India initiative that recognizes ease of doing business as a key factor to growth and development.

FDI On The Rise

According to the Department for Promotion of Industry and Internal Trade (DPIIT), FDI equity inflow in India stood at US$ 500.123 billion during April 2000 and September 2020[1], indicating that the Government's effort to improve ease of doing business and relaxing FDI norms has yielded results.

FDI equity inflow in India stood at US$ 49.97 billion in 2019-20. Data for 2019-20 indicates that service sector attracted the highest FDI equity inflow of US$ 7.85 billion, followed by computer software and hardware at US$ 7.67 billion, telecommunications sector at US$ 4.44 billion, and trading at US$ 4.57 billion[2] .

Finland ranks 35th in terms of investment with cumulative FDI inflows[3] into India amounting to US$ 510.93 million (April 2000 – September 2020), accounting for 0.10% of total FDI inflows. The key sectors that have been of interest for investment by Finnish companies in India are pulp & paper, heavy industries, electronics manufacturing, telecom, ICT, pharmaceuticals, energy, marine, etc.

Foreign Investment In India

Foreign investment in India can broadly be categorized as follows:

Type of Investment	Particulars
Foreign Direct Investment	• Investment by a person resident outside India in an unlisted Indian company; or in 10 percent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company .
	• Investment can be made by foreign companies in India in the form of equity shares, Compulsorily Convertible Debentures ('CCD') and Compulsorily Convertible Preference Shares ('CCPS') in permitted sectors under the FDI p olicy.

1. Source: Quarterly Fact Sheet on Foreign Direct Investment (From April 2000 to September 2020)- https://dipp.gov.in/publications/fdi-statistics
2 Source: Quarterly Fact Sheet on Foreign Direct Investment (From April 2000 to September 2020)- https://dipp.gov.in/publications/fdi-statistics
3 Source: Quarterly Fact Sheet on Foreign Direct Investment (From April 2000 to September 2020)- https://dipp.gov.in/publications/fdi-statistics

Type of Investment	Particulars
	('CCPS') in permitted sectors under the FDI policy
Foreign Investment under Foreign Portfolio Investment ('FPI') route	• Investment made by a person resident outside India where such investment is less than 10 percent of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than 10 percent of the paid up value of each series of capital instruments of a listed Indian company; • Funds received under this route are not permissible to be received for investment in real estate sector, investment in capital sector and purchase of land
Foreign Investment under Foreign Venture Capital Investment ('FVCI') route	• Investment by entity registered as FVCI with SEBI. • There are no end use restrictions on funds provided under the FVCI route.
Investments on a non-repatriation basis by NRIs and PIOs	• A Non-Resident Indian (NRI) can invest in the capital of a firm or a proprietary concern in India on non-repatriation basis provided amount is invested by inward remittance or out of RE/FCNR(B)/NRO account and the firm or proprietary concern is not engaged in any agricultural/plantation or real estate business or print media sector. • Amount invested shall not be eligible for repatriation outside India.

Key Aspects Of The FDI Policy

Entry Routes for Investment: Investment can be made by foreign companies in India through the Automatic route (no Government approval required) or Government route (prior approval of Government of India required). As per the FDI regulations as they stand today, a foreign entity can invest in India except in certain prohibited sectors subject to satisfaction of conditions under the FDI Policy.

Eligible Investors: A non-resident entity can invest in India otherwise than in sectors prohibited under the FDI Policy. The Consolidated FDI Policy, 2020 incorporates restrictions notified earlier in the year on FDI coming in from overseas entities, or citizens, or where the beneficial owner of the investments belongs to a neighboring country that shares a land border with India. Such investments will trigger the requirement to obtain specific Government approval. Similarly, where the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, results in the beneficial ownership falling within the restriction/purview stated above, the same will also require Government approval.

Eligible Investees: Indian companies are eligible investee entities for foreign investment in India. Further, foreign investment is also permitted under the automatic route in Limited Liability Partnership (LLPs) operating in sectors/activities where 100% FDI is allowed through the automatic route and, there are no FDI-linked performance conditions. Conversion of an LLP (having foreign investment and operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI-linked performance conditions) into a company and vice versa is also permitted.

Instruments of investments: Investment can be made by foreign companies in India under the FDI route in the form of equity shares, CCDs and CCPS subject to pricing guidelines/ valuation norms prescribed under the Foreign Exchange Management Act.

Remittance, reporting and other conditions:

a. Pricing guidelines:
The price of shares issued to persons resident outside India under the FDI Policy, should not be less than the fair valuation of shares done by a SEBI registered Merchant Banker or a Chartered Accountant as per any internationally accepted pricing methodology on arm's length basis, where the shares of the company are not listed on any recognized stock exchange in India. In case the shares are listed in India, the pricing mechanism specified under the SEBI guidelines needs to be complied with.

General permission is also available for issue of shares/preference shares against lump sum technical know-how fee, royalty due for payment, subject to entry route, sectoral cap and pricing guidelines prescribed under the FDI policy.

Pricing guidelines are not applicable on investments under the FPI and FVCI route.

b. Sectoral caps and other conditions:
Any non-resident investment in an Indian company is direct foreign investment. Investment by resident Indian entities into an Indian company having foreign investment in it is known as indirect foreign investment. Indirect FDI is referred to as the downstream investment made by an Indian company/ LLP, which has received foreign investment and is owned or controlled by non-residents, into another Indian company/LLP.

Total foreign investment, direct and indirect, in the capital of a resident entity should not exceed the sectoral/statutory cap (please refer Annexure 1) and is subject to other conditions on investments such as norms for minimum capitalization, lock-in period, etc.

An FPI can invest in listed equities and other securities subject to the condition that the funds received are not used for investment in real estate sector, investment in capital sector and purchase of land.

An FVCI is permitted to invest in securities (not listed on a recognized stock exchange at the time of issue), of an Indian company engaged in certain specified sectors namely Biotechnology, IT related to hardware and software development, Nanotechnology, Seed research and development, Research and development of new chemical entities in pharmaceutical sector, Dairy industry, Poultry industry, Production of bio-fuels, Hotel-cum-convention centres with seating capacity of more than three thousand and Infrastructure sector.

c. Issue of capital instruments
Issuance within sixty days from the day of receipt of inward remittance; else refunded immediately to non-resident investor by outward remittance through normal banking channels, or by credit to NRE/FCNR (B) account, as the case may be, within fifteen days from the date of completion of sixty days.

d. Conversion into Equity
Indian companies have been granted general permission for conversion of External Commercial Borrowings (ECB) received in convertible foreign currency (excluding those deemed as ECB) into equity shares/fully compulsorily and mandatorily convertible preference shares, subject to conditions under the extant ECB guidelines and FDI policy.

e. Repatriation
Repatriation for dividend on capital instruments and interest on fully, mandatorily & compulsorily convertible debentures is freely repatriable without any restrictions (net of taxes).

Other Foreign Exchange Management Considerations

Time limit for settlement of normal imports:
In terms of the extant regulations, remittances against imports should be completed not later than six months from the date of shipment, except in cases where amounts are withheld towards guarantee of performance, etc.

Further, in view of the disruptions due to outbreak of COVID-19 pandemic, with effect from May 22, 2020, the time period for completion of remittances against normal imports (except in cases where amounts are withheld towards guarantee of performance etc.) has been extended from six months to twelve months from the date of shipment for such imports made on or before July 31, 2020.

Time limit for realization of export proceeds:
Every exporter is required to ensure that the amount representing the full value of export of goods, software or services exported from India shall be realized and repatriated to India, within nine months from the date of export. In view of the outbreak of pandemic COVID-19, the present period of realization and repatriation to India of the amount representing the full export value of goods or software or services exported has been increased from nine months to fifteen months from the date of export, for the exports made up to or on July 31, 2020.

Capital Account and Current Account transactions:
A Capital Account Transaction have been defined as a transaction which alters the assets or liabilities, including contingent liabilities, outside India of person resident in India or assets or liabilities in India of persons resident outside India.

Capital account transactions are not permitted unless specifically allowed by regulations, such as, Investment in India by a person resident outside India, Acquisition and transfer of immovable property in India by a person resident outside India, Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India, etc.

Further, a Current Account Transaction has been defined as a transaction other than Capital Account Transactions. Except for certain specified transactions, current account transactions are freely permissible.

03

Setting Up Business In India

Setting Up Business In India

The selection of appropriate form of business presence should be made in consideration with the business objective of the foreign entity proposing to set up presence in India.

A foreign entity can set up its business operations in India either as an incorporated (by creating a separate legal entity in the country) or unincorporated entity (foreign entity with an office in India).

Operating As An Indian Entity

Depending upon the nature of activities which the foreign entity wishes to carry on in India, such entity may set up its operations in India either by incorporating a company or a Limited Liability Partnership ("LLP") or a joint venture with Indian partners.

- **Wholly owned subsidiary:** A foreign company can set up a wholly owned subsidiary in India to engage in business activities permitted under the country's FDI Policy. Such a subsidiary is treated as a separate legal entity and requires at least two shareholders (in the case of a private limited company) and seven shareholders (in the case of a public limited company). In addition, two directors are required, with one of them being an Indian resident. Paid up capital is no more a mandatory condition for the incorporation of a private limited company.

A company limited by shares can also be set up in India as a public company. A public company requires a minimum of seven (7) members/shareholders and may have more than 200 members. A public company has to have at least three (3) directors.

A private company form is adopted/preferred where the company is proposed to be either a 100% owned subsidiary or closely held (by related/associated persons) whereas, a public limited company form is most suited in situations where the shares of such a company are to be held by larger number of shareholders. A private company is subject to lesser compliances under the provisions of the Companies Act as compared to a public company.

Foreign investors prefer to organize their investments/ventures in India as private companies as such companies also enjoy certain other privileges/exemptions which are not available to public companies, or a private company which is a subsidiary of a public company.

Under the Companies Act, 2013, a natural person who is an Indian citizen and resident in India can incorporate an OPC. It requires only one person as a subscriber to form a company unlike the traditional manner of having at least two shareholders. However, such company is required to convert into a private or public company, in case its paid up share capital is increased beyond INR 50,00,000 and its average annual turnover exceeds INR 20,000,000.

• **Limited Liability Partnership (LLP):** An LLP is an alternative form of a corporate business setup which exists separate from its partners. In India, an LLP is structured as a hybrid entity, with the advantages of a company (since it is a separate legal entity with 'perpetual succession'), and at the same time enjoys the benefits of organizational flexibility associated with a partnership structure. At least two designated partners are required, of which one needs to be an Indian resident. Profit earned by partners is exempt from tax in case of an LLP, unlike in the case of a company where the dividend earned by the shareholders is taxable in the hands of the shareholders. Foreign investment in LLPs is permitted in sectors where 100% FDI is permitted under the automatic route without any performance-linked conditions.

• **Joint Venture (JV)** with Indian partners (equity participation): Although a wholly owned subsidiary is generally the preferred option in view of the associated brands and technologies involved, foreign companies also have the option of conducting their operations in India by forming strategic alliances with their Indian partners. Typically, such foreign entities identify partners engaged in the same area of activity, or those that can add synergies to their strategic plans in India. Sometimes, formation of JVs is necessitated due to restrictions on foreign ownership in selected sectors under the FDI policy.

Operating As A Foreign Entity

A foreign entity can set up an office in India in the form of a **Liaison Office (LO), a Branch Office (BO) or a Project Office (PO)**, based on the nature of activities it proposes to engage in and its commercial objective. This can be done by submitting an application to an Authorized Dealer (AD) Bank. However, the approval of the RBI is required under certain circumstances.

• **LO**: Setting up an LO or representative office is a common practice among foreign companies or entities seeking to enter the Indian market. An LO is only allowed to undertake liaison activities in India i.e., it can act as a channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity in India and cannot earn any income in India.

• **BO**: Compared to an LO, a BO can be set up to engage in a wide range of activities, including revenue generation, in India.

• **PO**: Foreign companies planning to execute specific projects in India have the option of setting up project and site offices in India. Such POs can be operational during the tenure of a project.

The following table gives a snapshot of some of the commonly preferred business forms in India

Particulars	Liaison Office (LO)	Project Office/Branch Office (BO)
Legal status	Representator of the parent company acting as a communication channel of the foreign parent company.	Both BO and PO are extended arms of the parent company. A PO is generally set-up for specific projects, whereas a BO is set-up for carrying activities in the course of the business.
Approval for commencement	Required from an AD Bank, subject to fulfilment of prescribed conditions. In certain specific cases, RBI approval required.	**In the case of a BO:** Required from an AD Bank, subject to fulfilment of prescribed conditions. **In the case of a PO:** PO can be now opened under intimation route. In certain specific cases, RBI approval is required both in the case of BO/ PO.
Permitted activities	No commercial / business activities are permitted. Allowed to undertake liaison activities only.	Restricted scope. Activities listed by RBI are only allowed to be undertaken.
Income tax rate	An LO is not subject to tax in India, since it is allowed to undertake only liaison activities which are generally preparatory/ auxiliary in nature. However, in the recent past there has been substantial litigation by the Indian tax authorities on the taxability of activities carried by LO on the premise that such activities are not preparatory / auxiliary in nature.	Liable to tax on income earned in India @ 40%. Such rate shall be enhanced by surcharge of 2% / 5% (2% where total income exceeds INR 10 million but up to INR 100 million and 5% where total income exceeds INR 100 million) and cess of 4%
Repatriation of accumulated profits	Not applicable as LO is not permitted to undertake any business activity.	A BO/PO is permitted to remit post-tax profits outside India upon fulfilling procedural compliances.
Ease of exit	Prior approval of AD Bank and ROC authorities is required.	Prior approval of AD Bank and ROC authorities is required.

Private Limited Company	Limited Liability Partnership (LLP)
It has an independent legal status.	It has an independent legal status.
A company can be set up without any approvals subject to FDI guidelines.	An LLP can be set up without any approvals subject to FDI guidelines.
Activities specified in charter documents of the company, subject to FDI guidelines.	Activities specified in LLP agreement, subject to FDI guidelines.
Tax Slab Rate for Domestic Company for FY 2020-21: Particulars — Tax Rate Total turnover or gross receipt does not exceed INR 4 billion in FY 2018-19 — 25% Opted for section 115BA* — 25% Opted for section 115BAA* — 22% Opted for section 115BAB* — 15% Any other domestic company — 30% *Please refer detailed discussion in section on overview of tax rates. Company is liable to Minimum Alternate Tax (MAT) at the rate of 15% on its book profit, if not opted for provisions of section 115BAA and 115BAB of the Income-tax Act, 1961. ***Additional Surcharge and cess:*** • Surcharge: 10% surcharge where domestic company has opted for regime under section 115BAA or section 115BAB. In other cases, surcharge of 7% where total income exceeds INR 10 million but up to INR 100 million and surcharge of 12% where total income exceeds INR 100 million. • Cess: Health and education cess of 4% **Tax Rates for Foreign Company** A foreign company is taxable at 40%, unless otherwise provided ***Additional surcharge and cess:*** • Surcharge: Surcharge of 2% where total income exceeds INR 10 million but up to INR 100 million and surcharge of 5% where total income exceeds INR 100 million • Cess: Health and education cess of 4%	Liable to tax on global income @ 30%. Such rate shall be enhanced by surcharge of 12% (where total income exceeds INR 10 million) and cess of 4 % An LLP is liable to Alternate Minimum Tax (AMT) at the rate of 18.5% on its book profits .Such rate shall be enhanced by surcharge of 12% (where total income exceeds INR 10 million) and cess of 4%.
In the form of dividend, buy back or capital reduction .	In the form of repatriation of profits.
Through transfer of shares or liquidation .	Through sale of interest or dissolution.

04

Various Funding Options

Various Funding Options

This chapter elaborates the various financing options that are available to a corporate entity in India.

Equity Share Capital

Subscribing to equity shares is the conventional means of funding companies in India. The various features of funding through issue of equity shares are as under:

a. Voting rights are given to shareholders in proportion to the shareholding.

b. Pay-out via dividend distribution, buyback, capital reduction, etc.

c. Freely transferable, subject to sector-specific lock-in-conditions.

d. No end use restrictions.

Preference Share Capital

Another way to invest in India is through the subscription of preference share capital.

a. Preference share capital does not have any end use restrictions and can be issued in the below two forms:

• Compulsorily fully and mandatorily convertible into equity (CCPS) - Treated as equity under the FDI policy.

• Non-convertible or optionally convertible into equity (NCPS/OCPS) - Treated as external commercial borrowings under the ECB guidelines.

b. Preference shareholders are entitled to preferential right over equity shareholders with respect to dividend and repayment of capital.

Debentures And Borrowings

Companies can also raise funds by issuing debentures, bonds and other debt instruments.

a. Compulsorily Convertible Debentures (CCDs): CCDs are mandatorily convertible into equity at the end of tenure and are treated as equity under the foreign exchange regulations. Raising funds through issuance of CCDs ensures periodic interest payments. However, the returns are subject to transfer pricing provisions.

b. External Commercial Borrowings (ECBs): ECBs are commercial loans raised by eligible resident entities from recognized non-resident entities and should conform to the parameters such as minimum maturity, end use restrictions, maximum all-in-cost ceiling, etc. ECBs can be raised under the automatic route if they conform to the parameters prescribed under the ECB framework. Some of the key parameters for raising ECBs have been discussed below:

• In order to avail ECB, the lender should be resident of the Financial Action Task Force (FATF) or the International Organization of Securities Commissions (IOSCO) compliant country and the borrower should be eligible to receive FDI ("eligible borrowers").

• The framework for raising loans through ECB comprises of two options viz. foreign currency denominated ECBs and Indian Rupee denominated ECBs.

• All eligible borrowers can raise ECB up to USD 750 million or equivalent per financial year under the automatic route.

• The minimum average maturity period for ECB is generally three years and it varies between one year to ten years depending upon certain conditions such as the end use, quantum, type of borrower, type of lender.

• ECB proceeds are subject to end-use restriction and can under no circumstances be used for real estate activities, investment in capital markets, equity investment, working capital purposes (subject to certain exceptions), general corporate purposes (subject to certain exceptions), repayment of rupee loans (subject to certain exceptions) and on-lending for above entities (subject to certain exceptions).

• The ECBs should conform to all-in-cost ceiling of benchmark rate plus 450 bps spread. Benchmark rate in case of foreign currency ECB refers to 6 months LIBOR rate of different currencies, or any other 6-month interbank interest rate applicable to the currency of borrowing. Benchmark rate in case of Rupee denominated ECB is prevailing yield of the Government of India securities of corresponding maturity.

Brief comparative framework for the various funding options is as under:

Parameters	Equity	CCPS	CCDs	ECB
Meaning	Common stock of the company issued with voting rights .	Share capital having preference over equity CCPS to be compulsorily convertible into equity.	Hybrid instrument with generally fixed rate of interest. Compulsorily convertible into equity.	Borrowings in the form of loan, bonds, debentures, preference shares other than CCDs and CCPS.
Applicable framework	FDI framework - treated as equity and pricing guidelines are applicable .			ECB framework – treated as debt .
Participation in control and management	Fully	Participation only on conversion into equity.		No participation rights.
Type of return	Dividend	Pre-conversion: dividend (preference given over equity shares) Post-conversion: dividend (equity)	Pre-conversion: interest Post-conversion: dividend (equity)	Interest
End use restrictions	No end use restrictions			Applicable
Restriction on rate of return	Dividend should conform to limits provided under the Companies Act, 2013 .		Interest should conform to arm's length price if payable to associated enterprise.	Benchmark rate plus 450 bps spread and subject to arm's length price if payable to associated enterprise.
Tax saving on payout	Dividend is paid from profit after tax and hence, not a deductible expense.		Interest is generally tax deductible subject to thin capitalization norms and GAAR norms.	
Tax implications on dividend/ interest	Taxable in the hands of receiver at rates applicable to them.			

Other Modes Of Funding

a. Non-Convertible Debentures (NCDs) under the FPI route: Companies can also raise funds by issuance of NCDs to investors who have obtained FPI registration with SEBI. Investment under the general route is subject to concentration norms, minimum maturity restrictions, single/group investor-wise limit, etc. However, there is no interest rate ceiling under the foreign exchange regulations on NCDs issued under the FPI route.

Recently, RBI, in consultation with SEBI, has introduced a separate channel called the Voluntary Retention Route (VRR), to enable FPIs to invest in debt markets in India. Investments by FPIs under VRR will be free of the macro-prudential and other regulatory norms as applicable to FPI under general route provided FPIs voluntarily commit to retain a required minimum percentage of their investments in India for a certain specified period.

The allocation of the investment amount under VRR is being made on 'tap' and allocated on 'first come first serve basis'. Currently, the overall investment limit on investments under VRR route is capped at around INR 150,000 crore.

The FPI entity will be required to open one or more separate special non-resident rupee account for investment under VRR and all investments under VRR shall be made to these account(s).

The FPI entity investing funds under VRR should also comply with the following requirements:

• A minimum 75% of the amount allocated is required to be remitted into India within three months of date of allocation of investment limit. Accordingly, at least 75% of the Committed Portfolio Size (CPS) should be lent and retained in India.

• A minimum 75% of CPS should be retained in India for a minimum period of three years.

b. Optionally-Convertible Debentures (OCDs) under the FVCI route: An FVCI having a registration with SEBI is allowed to make investment in securities of an Indian company operating in certain specified sectors.

There are no end use restrictions and lock-in requirements on funds provided under the FVCI route. Furthermore, there is no cap on the interest rate under the FVCI route (subject to transfer pricing provisions).

The FVCI entity is required to comply with relevant SEBI regulations, i.e., at least 66.67% of investible funds should be invested in unlisted equity shares or equity linked instruments (which includes OCDs), and not more than 33.33% can be invested into debt instruments.

05

Repatriation Of Funds

Repatriation Of Funds

Repatriation From An Indian Company

Foreign capital invested in India is generally allowed to be repatriated along with capital appreciation, if any, after payment of taxes due. The repatriation is allowed, provided the investment was made on a repatriation basis in terms of FDI/FEMA regulations, and is subject to any lock-in conditions that may be applicable under FDI/FEMA regulations. Typical modes of repatriation in an Indian company are:

a. Dividend:

- Profits earned by an Indian company can be repatriated as dividend, subject to availability of sufficient free reserves and compliance with the requirements under the Companies Act, 2013, without RBI's permission. The repatriation is also subject to compliance with other specified conditions.
- The Indian dividend distribution tax was abolished with effect from 01 April 2020 and now dividend payments are taxable in the hands of the shareholders at the rates applicable to them.
- Dividend is taxable at 20% (plus applicable surcharge and cess), subject to beneficial tax rates provided in the applicable treaty in the hands of overseas shareholders. India-Finland Double Taxation Avoidance Agreement ('DTAA') provides a beneficial tax rate of 10% for taxability of dividend in the hands of overseas shareholder subject to satisfaction of treaty qualifying conditions such as, the overseas shareholder should be the beneficial owner of such dividend income, etc.

b. Buy back:

- Companies who are buying back shares are liable to pay tax @ 20% (plus applicable surcharge and cess) on distributed income i.e., consideration paid on buy back less issue price of such shares. Credit of such buy back tax is generally not allowed to the company.
- Buy back consideration received by the shareholder is exempt from tax in India.
- Buy back of shares is subject to restrictions under the Companies Act, 2013 in respect of amount of buy back, ratio of debt-equity pursuant to buy back, etc.
- Under the Indian exchange control regulations, buy back is permissible subject to confirmation to pricing guidelines.

c. Capital reduction:

- National Company Law Tribunal ('NCLT') driven process, subject to conditions prescribed under FDI regulations.
- Consideration to the extent of accumulated profits is taxable in the hands of overseas shareholders as deemed dividend.
- Consideration in excess of accumulated profits is subject to capital gains tax in the hands of shareholders.

Royalties And Fee For Technical Services

Indian entities are permitted to make payments to foreign entities under foreign collaboration agreements, subject to certain prescribed conditions. The payment can be for royalties and technical know-how or fees for technical services.

The entities need to substantiate genuineness of such payments. Remittances to foreign entities in the nature of royalties and fees for technical services are subject to tax withholding at 10% (plus applicable surcharge and cess) as per section 115A of the Income-tax Act, 1961, subject to beneficial tax rates provided in the applicable treaty.

India-Finland DTAA provides a beneficial tax rate of 10% for taxability of royalties and fees for technical services. India-Finland DTAA also provides that income in the nature of royalty or fees for technical services shall be deemed to arise in the country in which the right or property is used or services are performed (where such services are not related to any permanent establishment of foreign company in India). Thus, exemption may be explored under the tax treaty with Finland in relation to royalty/fees for technical service income for payments where the right or property is used outside India or where services are performed outside India. Such exemption may be prone to litigation by the Indian Revenue Authorities.

Furthermore, the said payments will be subject to arm's length test in case the transaction is between associated enterprises.

Other Remittances

a. Profits earned by Indian branches of foreign companies (other than banks) can be repatriated to their head offices subject to payment of the applicable taxes. Proceeds from the winding-up of a branch of a foreign company in India can also be repatriated.

b. Repatriation of the profit by the LLP to its partners is exempted from tax in the hands of the partners.

06

Re-organisation Of Business

Re-organisation Of Business

Divestment, Mergers & Acquisitions

India's regulatory framework facilitates acquisitions, transfers or hive-offs through different modes, each with its distinct tax-related characteristics and varying regulatory ease of conducting deals. Common modes of executing transactions include:

- Divestment
- Share purchase
- Business or asset purchase
- Amalgamations or demergers

A. Share Transfer

Transfer of the shares of an Indian company is taxable as capital gains, subject to any benefit available under the DTAA. Tax rates applicable on capital gains vary, depending on the nature of capital assets and duration for which the capital assets are held. Long-term capital gains are generally taxed at reduced rates.

Type of shares	Period of holding	Classification of gain
Listed shares	More than 12 months	Long term capital gains
	Up to 12 months	Short term capital gains
Unlisted shares	More than 24 months	Long term capital gains
	Up to 24 months	Short term capital gains

As per section 50CA, where the consideration on transfer of unquoted equity shares is less than the fair market value[1] of such shares, then the fair market value shall be considered as the sales consideration in the hands of the seller for the purposes of computation of capital gains.

Further, as per section 56(2)(x), there may be tax implications in the hands of the acquirer in case of receipt of shares at a value less than the fair market value1 (to the extent the difference exceeds INR 50,000).

1. Specific rules have been prescribed under the Income-Tax Act, 1961 for the calculation of fair market value for both listed and unlisted shares

Securities Transaction Tax (STT)

STT may be payable if the sale of shares is through a recognized stock exchange in India. STT is imposed on purchases and sales of equity shares listed on a recognized stock exchange in India at 0.1 percent, based on the purchase or sale price. STT is payable both by the buyer and the seller on the turnover (which is a product of number of shares bought/sold and price per share).

Transfers of shares (on delivery basis) are subject to stamp duty at the rate of 0.015 percent of the market value of the shares transferred.

B. Taxability Of Indirect Transfer

Non-residents are also taxed on capital gains arising on transfer of any share or interest in a company or entity registered or incorporated outside India, deriving its value substantially from assets located in India. A foreign corporation is deemed to derive its value substantially from India assets if the fair market value of the Indian assets on a specified date exceeds INR 100 million and represents at least 50% of the value of all assets owned by a foreign corporation of which the shares are getting transferred. However, no taxation on indirect transfer applies if the transferor holds minority stakes (of 5% or less) and have no right of management or control in the foreign corporation.

C. Preservation And Carry-forward Of Tax Losses On A Change In Share Holding

There is no impact on the carry forward or set off of losses on a change in the shareholding of a listed company. Subject to certain exceptions under section 79 of the Income-Tax Act, 1961, unlisted companies are not entitled to carry forward and set off their tax loss (excluding unabsorbed depreciation), if any, if there is a change of more than 49% in their shareholding.

In case of an eligible start-up as referred to in section 80-IAC[2] , brought forward loss shall be allowed to be carried forward and set off against the income of the previous year if all the shareholders of such company who held shares carrying voting power on the last day of the year, or years in which the loss was incurred, continue to hold those shares on the last day of such previous year and such loss has been incurred during the period of seven years beginning from the year in which such company is incorporated.

D. Business Or Asset Purchase Model

In India, businesses can be acquired through (a) the asset purchase model, where the buyer can purchase individual assets, leaving the liabilities and certain other assets behind with the seller entity or (b) the business purchase model, where the buyer acquires an entire business undertaking, with all its assets and liabilities, for a lump sum consideration on a going-concern basis.

a. Asset Purchase Model

• Gains are individually computed for every asset and are taxable as a short-term capital gain or long-term capital gain, depending on the period during which they were held. Sale of depreciable assets always results in short-term capital gains.

• Capital gains are determined by reducing the acquisition cost of assets from the sale consideration. In the case of long-term capital gains, the cost of acquisition is indexed, based on the cost inflection index notified by the tax authorities every year.

• If the sale consideration in case of an immovable property is less than the value determined by the stamp valuation authorities on the date of agreement, such stamp valuation shall be deemed to be the sale consideration. However, where the stamp duty valuation does not exceed 105% of the sales consideration, then the stamp duty valuation shall not be considered for the purposes of computation of capital gains.

• In an asset purchase model, individual assets are transferred at a specified price for each asset transferred. GST would apply to each asset based on the applicable tax rates (i.e., 5, 12,18 or 28 percent along with compensation cess, if applicable). Depending on the nature of the item sold, the transferee may be able to recover GST paid by the transferor through input credit.

b. Business Purchase Model

• Capital gains are determined by reducing the net worth of a business undertaking (determined in the prescribed manner) from the sales consideration.

• Capital gains are taxable as long-term capital gains if the business undertaking is held for more than three years. However, no indexation benefit is available.

• Capital gains are taxable at 20% if long term, or at the applicable corporate rates, if short term.

• In the case of a business purchase, the tax losses of the business undertaking are not transferred.

• Typically, no GST implications arise on the sale of a business as a whole on a going-concern basis wherein all the assets and liabilities (including movable and immovable property, including stock-in-trade and other goods) are transferred for a lump-sum consideration (i.e., a separate price is not assigned to each asset or liability).

E. Tax Clearance Certificate

In the case of share transfer as well as business or asset purchase model, Income-Tax Act, 1961, provides mechanism for obtaining a tax clearance certificate for transfer of assets/business. In the case of a pending proceeding against the transferor, the tax authorities have the power to claim any tax on account of completion of the proceeding from the transferee.

F. Amalgamations And Demergers

In some situations, an acquired or to be acquired entity can be integrated into the buyer's group through an amalgamation or demerger. The procedure for this is governed by specific provisions in the Companies Act, 2013, and typically requires the approval of the National Company Law Tribunal (NCLT).

Clearance may be needed from other statutory authorities such as stock exchanges and the Securities Exchange Board of India (SEBI) in the case of a listed company, the RBI and other regulatory bodies. An amalgamation or demerger may be tax-neutral when it is compliant with the prescribed conditions.

Basis	Amalgamation	Demerger
Tax neutrality	Merger of one or more companies with another company, or merger of two or more companies to form one company, subject to the following conditions: – All the assets and liabilities of the transferor should be transferred to the transferee. – Shareholders holding at least 75% of the shares (in value) in the transferor company become shareholders in the transferee company.	Transfer by a demerged company of one or more of its undertakings to any resulting company pursuant to the scheme of arrangement, subject to the following conditions: –All the assets and liabilities of the transferor's business undertaking are transferred to the resulting company at its book values. –Shareholders holding at least 75% of the shares (in value) in the demerged company become shareholders in the resulting company. –The consideration is discharged by issuance of the shares of the resulting company to the shareholders of the demerged company on a proportionate basis. –The transfer is on a 'going concern' basis.
Carry forward of losses and unabsorbed depreciation	If the amalgamating company owns an industrial undertaking or any other specified business, its losses and unabsorbed depreciation may be allowed to be considered as losses of amalgamated company, provided specified conditions, e.g. continuance of business and holding of assets are met.	Accumulated losses or unabsorbed depreciation directly related to the undertaking being demerged are transferable. Proportionate common losses are also transferable.

Fast Track Mergers

Section 233 of the Companies Act, 2013 provides a concept for simplified merger wherein no approval from the NCLT is required for a scheme of merger or amalgamation entered into between two or more small companies (i.e., private companies having a paid up capital of not more than INR 5 million or turnover of not more than INR 20 million as per last audited financial statements) or between a holding company and its wholly-owned subsidiary company. The provisions of fast track merger provide for simplification of the process to a large extent. However, the entities applying for fast track merger will still be required to comply with procedural compliances provided in section 233 such as notifying the registrar or official liquidator, requisite shareholder and creditor approval, etc.

Cross Border Mergers

The provisions for cross-border mergers have been notified under the Companies Act, 2013. The Indian regulatory authorities have notified provisions facilitating cross-border mergers/amalgamations/arrangements between Indian and foreign companies. These regulations enable an inbound merger (merger of a foreign company into an Indian company) as well as an outbound merger (merger of an Indian company into a foreign company situated in certain permitted jurisdictions) subject to prescribed conditions.

As on date, the income tax law has not been amended to incorporate the tax neutrality provisions in the case of outbound mergers.

Any transaction on account of a cross-border merger undertaken in accordance with Foreign Exchange Management (Cross Border Merger) Regulations, 2018, is deemed to have the approval of the RBI, as required under the provisions of the Companies Act, 2013.

07

Labour Laws

Labour Laws

Labour falls under the Concurrent List of the Constitution of India. Therefore, both Parliament and State legislatures can make laws regulating labour. India currently has as much as over 100 State and 40 Central laws regulating various aspects of labour such as resolution of industrial disputes, working conditions, social security and wages.

In India, the law governing the service of an employee materially depends on the nature of work being performed by the employee, his/her monthly salary, and activities carried on by the business undertaking where the employee is employed. Further, under Indian law, employees are broadly categorized into managerial and non-managerial categories.

The current labour law regime in India is all set to change as the Government seeks to implement the four new labour codes which will replace the majority of the existing labour laws. It is anticipated that the new labour codes will become effective from April 1, 2021 and accordingly, the majority of the current labour laws will be repealed from such date. Key changes brought about by these labour codes are covered in the later part of this chapter.

The Industrial Disputes Act, 1947 ("ID Act") which lays down the general obligations of the employer in case of lay-off, retrenchment, closure or transfer of undertakings, change in service conditions, etc. defines the term 'workman' to broadly include persons employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward (whether the terms of employment be express or implied) but does not include any such person –

a. who is employed mainly in a managerial or administrative capacity; or

b. who, being employed in a supervisory capacity, draws wages exceeding INR 10,000 (Indian Rupees Ten Thousand Only) per month or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

Therefore, as regards to those employees who do not fall within the category of 'workmen' under the ID Act (i.e., managerial employees), the terms and conditions of their employment would be governed by the employment contract.

However, as regards those employees who fall within the definition of 'workmen' under the ID Act, most of the labour and industrial legislations in India would be applicable to the terms and conditions of their employment.

Key labour laws in India at Center and State level are as under:

Central Laws

(i) Employee State Insurance Act, 1948;

The Employee State Insurance Act, 1948 ("ESI Act") is applicable to all factories and other establishments situated in notified areas and employing 10 (Ten) or more persons.

An employer is required to extend ESI benefits such as medical benefits, sickness benefit, maternity benefit etc. to all employees earning gross wages up to INR 21,000 (Indian Rupees Twenty-One Thousand Only).

An employer to whom the ESI Act applies, is required to get the establishment registered under the ESI Act and make employer's contribution and employee's contribution to the ESI scheme at the rate of 3.25% and 0.75% of the wages of employees.

(ii) Employees Provident Fund & Miscellaneous Provisions Act, 1952;

The Employees Provident Fund & Miscellaneous Provisions Act, 1952, a social security legislation, is applicable to employer employing 20 (Twenty) or more persons at any of its offices or when it appears to the Central Provident Fund Commissioner that employer and the majority of the employees have agreed that the provisions of the EPF Act shall be applicable to them.

An establishment to which the EPF Act applies is required either to subscribe to the statutory Employees' Provident Fund Scheme, Employees' Pension Scheme and Employees' Deposit Linked Insurance Scheme managed by the Regional Commissioner of Provident Fund or constitute its own Employees' Provident Fund Scheme, Employees' Pension Scheme and Employees' Deposit Linked Insurance Scheme by seeking an exemption.

A. Section 6 of the EPF Act requires the employer to make contributions to the provident fund accounts of each of its employees. Under the provident fund scheme, the employer is required to contribute for all employees having basic salary plus dearness allowance up to INR 15,000 (Indian Rupees Fifteen Thousand Only). The contribution paid by the employer is 12% of basic wages plus dearness allowance plus retaining allowance. An equal contribution is payable by the employee also.

(iii) Payment of Bonus Act, 1965;

The Payment of Bonus Act, 1965 is applicable to every factory and every other establishment in which 20 (Twenty) or more persons are employed on any day during an accounting year.

The minimum bonus of 8.33% of the wages is payable by every industry and establishment under section 10 of the Act to all employees earning wages up to INR 21,000 (Indian Rupees Twenty One Thousand). The maximum bonus including productivity linked bonus that can be paid in any accounting year shall not exceed 20% of the salary/ wage of an employee under the section 31 A of the Act.

(iv) Equal Remuneration Act, 1976;

The Equal Remuneration Act, 1976 provides for the payment of equal remuneration to men and women workers and for prevention of discrimination on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto.

Section 4 of the Equal Remuneration Act, 1976 provides that any worker employed in an establishment shall not be paid remuneration at rates less favourable than those of the opposite sex for performing the same work or work of a similar nature. Therefore, there should be equal pay for equal work.

(v) Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959;

The main purpose of the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959, is to provide for the compulsory notification of vacancies to employment exchanges. In terms of this Act read with the Employment Exchanges (Compulsory Notification of Vacancies) Rules, 1960, every employer who employs 25 (Twenty Five) or more persons ordinarily is required on a compulsory basis, to notify to the Employment Exchanges all vacancies, other than vacancies in unskilled categories, temporary vacancies and vacancies proposed to be filled through promotion and tender, to the Employment Exchanges, and return relating to the staff strengths at regular intervals by way of returns.

Under Rule 6 of the Employment Exchanges (Compulsory Notification of Vacancies) Rules, 1960, the Target is required to furnish quarterly returns in Form ER-1 and biennial returns in Form ER-II to the local employment exchange. While the quarterly returns are to be furnished within 30 days of the due dates namely March 31, June 30, September 30 and December 31, the biennial returns are to be furnished within 30 days of the due date September 30.

(vi) Apprentices Act, 1961;

The main purpose of this Act is to regulate the appointment of apprentices and to provide practical training to technically qualified persons in various trades. Every employer who has 40 or more employees is required to appoint between 2.5% to 10% of the average strength of the workforce in the preceding financial year as apprentices for each financial year.

Apprenticeship training refers to a course of training in any industry or establishment. Apprenticeship training consists of basic training (theoretical instructions) and practical on the job training at actual work place.

Any individual, who has completed 14 years of age, is physically fit and having minimum educational qualification prescribed for a trade can undergo apprenticeship training.

The employer on engaging an apprentice is required to execute a contract of apprenticeship with such apprentice and send contract of apprenticeship to the Apprenticeship Adviser within thirty days. The employer shall reserve training locations for apprentices who belong to scheduled castes, scheduled tribes, and other backwards categories. The employer is also required to file appropriate return on timely basis.

(vii) Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013;

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("Sexual Harassment Act") has been enacted with the objective of providing women protection against sexual harassment at the workplace and for the prevention and redressal of complaints of sexual harassment.

Every employer is required to constitute an "Internal Complaints Committee" ("POSH ICC") by an order in writing at each branch/ administrative unit with 10 (Ten) or more employees, consisting of at least 50% women members, in following manner:

(a) A presiding officer who will be woman at a senior level at workplace from amongst the employees (in case a senior level employee is not available, the presiding officer may be nominated from other offices or administrative units).
(b) At least two members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge.
(c) One member from amongst non-governmental organizations or association committed to the cause of women or a person familiar with the issues relating to sexual harassment.

An employer has to ensure that it (a) provides a safe working environment; (b) displays conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the POSH ICC; (c) organizes workshops and awareness programmes at regular intervals for sensitizing employees on the issues and implications of workplace sexual harassment and organizing orientation programmes for members of the POSH ICC; (d) treats sexual harassment as a misconduct under the service rules and initiate action for misconduct. Further, employer shall ensure that the complaint redressal mechanism formulated to deal with the complaints received must conform to the procedure mentioned under the Sexual Harassment Act.

In terms of Section 21 of the Sexual Harassment Act, every POSH ICC is required to submit an annual report to the employer and district officer, which shall have the following details: -

(a) number of complaints of sexual harassment received in the year;
(b) number of complaints disposed off during the year;
(c) number of cases pending for more than ninety days;
(d) number of workshops or awareness programmes against sexual harassment carried out;
(e) nature of action taken by the employer or District Officer.

Further, in terms of Section 22 of the Sexual Harassment Act, every employer is required to include the number of cases filed (if any) in the annual report of the organization.

If an employer fails to constitute a POSH ICC or does not comply with any provisions contained therein, the Sexual Harassment Act prescribes a monetary penalty of up to INR 50,000 (Indian Rupees Fifty Thousand Only). A repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licenses.

(viii) Trade Unions Act, 1926;

The Trade Unions Act, 1926 provides for registration of trade unions with a view to render lawful organization of labour to enable collective bargaining. It also confers on a registered trade union certain protection and privileges.

This Act extends to the whole of India and applies to all kinds of unions of workers and associations of employers, which aim at regularizing labour management relations. A Trade Union is a combination, whether temporary or permanent, formed for regulating the relations not only between workmen and employers, but also between workmen and workmen or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions, subject to conditions as prescribed in the Trade Unions Act, 1926.

(ix) Child and Adolescent Labour (Prohibition and Regulation) Act, 1986

Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 is aimed to prohibit the engagement of children in all occupations and to prohibit the engagement of adolescents in hazardous occupations and processes and the matters connected therewith or incidental thereto.

State Laws

(i) State Shops and Establishments Act;

State specific Shops and Establishments Act provides for the law relating to the registration, regulation of hours of work, payment of wages, leave, holidays, terms of service and other conditions of work of persons employed in shops, commercial establishments, establishments for public entertainment or amusement and other establishments.

Each state in India has its own enactment relating to regulation of commercial establishment which are not factories.

(ii) Industrial Employment and Standing Orders Act, 1946 read with state rules;

The Industrial Employment (Standing Orders) Act, 1946 ("Standing Orders Act") requires the certification of the standing orders by the Labour Commissioner of the State.

The applicability of Standing Orders Act to every industrial establishment is based on the number of workmen employed on any day of the preceding twelve months. This limit varies from state to state.

(iii) Contract Labour (Regulation and Abolition) Act, 1970 read with state rules;

Under the Contract Labour (Regulation and Abolition) Act, 1970 ("Contract Labour Act") every establishment that has employed such number of more workmen (as prescribed in the State) in a preceding year as contract labour is required to register itself with the authorities for the purpose of engaging contract labour. The registration under the Contract Labour Act is specific to the establishment and is to be procured by the principal employer. Further, every contractor which supplies such number of workmen (as prescribed in the State) in a preceding year as contract labour to such an establishment is also required to obtain a license.

At the time, when an establishment determines that it has triggered the requirement of the Contract Labour Act, the 'principal employer' of such establishment is required to make an application for registration under Section 7 of the Contract Labour Act to the appropriate registering officer ("Registering Officer") under the Contract Labour Act. Failure to procure registration under Section 7 of the Contract Labour Act leads to effects of non-registration (prohibiting the principal employer on employing contract labour), which are set under Section 9 of the Contract Labour Act.

Once a contractor triggers the requirement under Contract Labour Act, such contractor is required to make an application for a license under Section 12 of the Contract Labour Act, to the Registering Officer, without which such contractor must not engage or undertake provision of contract labour.

Failure to comply with the provisions of Contract Labour Act can lead to punishment for contravention of Contract Labour Act under Sections 23 and 24 of the Contract Labour Act, which may include imprisonment up to 3 months or fine up to INR 1000 (Indian Rupees One Thousand Only) or both and/ or INR 100 (Indian Rupees One Hundred Only) per day for continuing offence. Further, as per Section 25 of the Contract Labour Act, in the event a company commits a contravention of the Contract Labour Act, the company as well as any director, manager, managing agent or such other officer with whose consent such contravention has been committed, shall be liable to be proceeded against and punished under Section 23 and Section 24 of the Contract Labour Act.

(iv) Payment of Gratuity Act, 1972 read with state rules;

The Payment of Gratuity Act, 1972 (hereinafter referred to as the "Gratuity Act") is applicable to every establishment where 10 (Ten) or more persons are employed. Under the Gratuity Act, an employee, who after having completed at least 5 (Five) years of continuous service in an establishment, resigns or retires, is eligible to receive gratuity up to a maximum of INR 2,000,000 (Indian Rupees Two Million Only). The gratuity is also payable in case of death or disablement regardless of number of years of service. Normally the amount of gratuity payable is calculated on the basis of 15 (fifteen) days' salary for every year of completed service (a month is to be construed as having 26 (twenty-six) days). To meet this liability, employers of all establishments covered under the Gratuity Act, take out an insurance policy from the Life Insurance Corporation of India to ensure their payment obligations for gratuity under the Gratuity Act. Alternatively, the employers may also establish an approved gratuity fund from which obligations of payment of gratuity may be met.

In terms of Section 7(2) of the Gratuity Act, every employer on the gratuity amount becoming payable, shall determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(v) Minimum Wages Act, 1948 read with state rules;

As per the Indian Constitution, 'Minimum Wage' has been defined as the level of income for skilled and unskilled workers which ensures a sustaining standard of living while also providing for some measure of comfort.

Under the Minimum Wages Act, 1948, an employer is required to pay minimum wages as stipulated by the Government, in respect of any scheduled employment.

(vi) Payment of Wages Act, 1936 read with state rules;

The Payment of Wages Act, 1936 regulates payment of wages to certain classes of persons employed in industry, to pay wages in particular form and at regular intervals and to prevent unauthorized deductions from the wages.

This Act applies to payment of wages to persons employed inter alia in any 'industrial or other establishment' specified in Section 2(ii) of the Payment of Wages Act, 1936. Presently, the Payment of Wages Act, 1936 applies to employees drawing wages up to INR 24,000 (Indian Rupees Twenty-Four Thousand only) per month.

Every employer shall ensure that wages are paid to the employees on or before expiry of 7th day after the last day of wage-period (before 10th day – in case of establishment with 1000 or more employees) and the wage period shall not exceed 1 (one) month.

The employer is also required to maintain various registers such as the register of wages, register of advance, register of fines, etc. and submit annual returns in the prescribed form.

(vii) Maternity Benefit Act, 1961 read with state rules;

The Maternity Benefit Act, 1961 protects the employment of women during the time of her maternity and entitles her of a 'maternity benefit' – i.e. full paid absence from work – to take care for her child. The act is applicable to all establishments employing 10 or more employees.

Under Section 5 of the Maternity Benefit Act, every employer is liable to pay to a woman maternity benefit at the average daily wage rate for the period of her actual absence, i.e. the period immediately preceding the day of her delivery, the actual day of delivery and the period immediately following that day subject to a maximum of 26 (Twenty-Six) weeks of which not more than 8 (Eight) weeks may be preceding the date of delivery.

(viii) Factories Act, 1948 read with state rules;

Factories Act, 1948, is applicable to all factories which have employed 10 (Ten) or more workers on any day of the preceding 12 (Twelve) months, engaged in manufacturing process being carried out with the aid of power or 20 (Twenty) or more workers are employed in manufacturing process being carried out without the aid of power.

An occupier of a factory is required to obtain a license for carrying on manufacturing process.

The main objectives of the Factories Act, 1948, are to regulate the working conditions in factories, to regulate health, safety welfare, and annual leave and enact special provision in respect of young persons, women and children who work in the factories.

The aim and object of the Factories Act, 1948 is essentially to safeguard the interests of workers, stop their exploitation and take care of their safety, hygiene and welfare at their places of work. It casts various obligations, duties and responsibilities on the occupier of a factory and also on the factory manager. Amendments to the Act and court decisions have further extended the nature and scope of the concept of occupier, especially vis-a-vis hazardous processes in factories.

(ix) State Labour Welfare Fund Act read with state rules;

The main purpose of this Act is to ensure some basic and necessary services, amenities and facilities to the workers and to ensure the better life and standard of living of the employees. There are separate (State) Labour Welfare Fund Act and (State) Labour Welfare Fund Rule for different states & Union Territories and accordingly separate Labour Welfare Board is created for each different States and UTs and accordingly different rate of contribution for employer and employee.

The employer of an establishment is required to make contribution to Labour Welfare Fund maintained by the State Labour Welfare Board. The contribution payable in respect of an employee shall comprise of employer's contribution and employees' contribution. In addition to contribution, the employer is required to maintain register and file returns to the Welfare Commissioner.

(x) Employees Compensation Act, 1923 read with state rules;

This Act lays down the liability of the employer to compensate the employee for any personal injury caused by accident arising out of or in the course of employment. One of the exceptions is that the employer would not be liable in respect of any injury which does not result in the total or partial disablement of the employee for a period exceeding 3 days.

(xi) Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 read with state rules;

This Act applies to establishments in which 5 (five) or more inter-state migrant workmen were employed in the preceding 12 (Twelve) months. The purpose of this Act is to protect workers whose services are requisitioned outside their native states in India.

“Inter-State migrant workman” means any person who is recruited by or through a contractor in one State under an agreement or other arrangement for employment in an establishment in another State, whether with or without the knowledge of the principal employer in relation to such establishment.

Every principal employer of an establishment who employ 5 (Five) or more Inter-State Migrant Workmen has to register his establishment under this Act and provide the facilities as prescribed in the said Act/ State rules as applicable.

(xii) Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (“BOCW”) read with state rules;

BOCW is an act that regulates the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures.

Building worker is defined in Section 2(e) of the BOCW Act as "a person who is employed to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, in connection with any building or other construction work."

BOCW applies to every ‘establishment’ employing 10 (Ten) or more ‘building workers’ in any ‘building or other construction work’ anytime during the preceding twelve months. It requires that employer of establishment to apply to registering officer for registration of establishment within 60 (Sixty) days from the date of commencement of construction work and provide the facilities as mentioned thereunder.

(xiii) Compliances with National and Festival Holidays.

Every employer is obligated under the State Shops and Establishments Act or under the State National and Festival Holidays Act to provide certain National and Festival holidays to all employees.

While few states have their own enactment in relation to National and Festival Holidays Act to be observed in the State in a Calendar year, the requirement of observing close day on a National and Festival Holiday emanates from the State Shops and Establishments Act.

Labour Law Reforms In India

The Second National Commission on Labour (2002) (NCL) found existing legislation to be complex, with archaic provisions and inconsistent definitions. To improve ease of compliance and ensure uniformity in labour laws, the NCL recommended the consolidation of central labour laws into broader groups such as (i) industrial relations, (ii) wages, (iii) social security, (iv) safety, and (v) welfare and working conditions.

As per the recommendations of the 2nd National Commission on Labour, Ministry of Labour and Employment has taken steps by codification of existing Central labour laws into 4 Codes by simplifying, amalgamating and rationalizing the relevant provisions of the Central Labour laws.

The four labour codes are as under:
(a) Code on Wages, 2019;
(b) Industrial Relations Code, 2020;
(c) Social Security, 2020; and
(d) Occupational Safety, Health and Working Conditions Code, 2020

The Code on Wages, 2019 received the assent of the President on August 8, 2019 and the Industrial Relations Code, 2020, the Code on Social Security, 2020 and the Occupational Safety, Health and Working Conditions Code, 2020 received the assent of the President on September 28, 2020. The Central and the State Governments are in the process of finalizing the rules under the said codes. The implementation of four labour codes is likely to come into effect from April 1, 2021.

Upon notification of these codes, 29 present labour laws will be condensed into 4 codes to help foreign companies do business in India.

1. Code on Wages, 2019

List of current statutes that will be repealed upon notification of Code of Wages, 2019:
(a) the Payment of Wages Act, 1936,
(b) the Minimum Wages Act, 1948,
(c) the Payment of Bonus Act, 1965 and
(d) the Equal Remuneration Act, 1976

2. Occupational Safety, Health and Working Conditions Code, 2019

List of current statutes that will be repealed upon notification of Occupational Safety, Health and Working Conditions Code, 2019:
(a) the Factories Act, 1948;
(b) the Mines Act, 1952;
(c) the Dock Workers (Safety, Health and Welfare) Act, 1986;
(d) the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996;
(e) the Plantations Labour Act, 1951;
(f) the Contract Labour (Regulation and Abolition) Act, 1970;
(g) the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979;
(h) the Working Journalist and other News Paper Employees (Conditions of Service and Miscellaneous Provision) Act, 1955;
(i) the Working Journalist (Fixation of Rates of Wages) Act, 1958;
(j) the Motor Transport Workers Act, 1961;
(k) the Sales Promotion Employees (Conditions of Service) Act, 1976;
(l) the Beedi and Cigar Workers (Conditions of Employment) Act, 1966;
(m) the Cine Workers and Cinema Theatre Workers Act, 1981.

3. Industrial Relations Code, 2019

List of current statutes that will be repealed upon notification of Industrial Relations Code, 2019:
(a) the Trade Unions Act, 1926;
(b) the Industrial Employment (Standing rders) Act, 1946; and
(c) the Industrial Disputes Act, 1947

4. Code on Social Security, 2019

List of current statutes that will be repealed upon notification of Code on Social Security, 2019:
(a) the Employees' Compensation Act, 1923;
(b) the Employees' State Insurance Act, 1948;
(c) the Employees' Provident Funds and Miscellaneous Provisions Act, 1952;

(d) the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959;
(e) the Maternity Benefit Act, 1961;
(f) the Payment of Gratuity Act, 1972;
(g) the Cine-Workers Welfare Fund Act, 1981;
(h) the Building and Other Construction Workers' Welfare Cess Act, 1996;
(i) the Unorganized Workers Social Security Act, 2008.

Some key changes brought in by these labour codes are as under:

A. CODE ON WAGES

(a) Uniform definition of the term 'wages': The term 'wages' is defined to include all remuneration that can be expressed in monetary terms and lists down specific exclusions. In this regard, the Wage Code introduces a unique concept under which certain excluded components may be considered as wages if the aggregate value of such exclusions exceeds the prescribed threshold. This may have implications in the manner in which salary for employees, especially for key managerial employees, is structured.

(b) Broad definition of the term "employer" and "employee": The Wage Code broadens the definition of the term 'employer' to also include principal employers and contractors. This essentially entitles contract workers to proceed against both, the principal employer and contractor to enforce their rights.

The term 'employee' also includes persons employed at the supervisory and managerial level. Therefore, going forward, service conditions of senior level employees will be regulated by the provisions under the Wage Code. Given the Wage Code regulates deductions made to an employee's salary, this will also impact the salary structuring of such employees especially with regard to their deferred compensation and clawback provisions.

(c) Floor Wage: The Minimum Wages Act, 1948, applies only to specified employments and certain categories of employees. The Wage Code and the minimum wages related provisions would apply to all types of employment/ industries and employees. Under the Wage Code, the Central Government is empowered to fix the national minimum wages which will act as a floor for minimum wages to be fixed by the concerned state government.

B. OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2019 ("OSH CODE")

(a) It applies to establishments with at least 10 workers as well as mines and docks. It also provides provisions for certain other types of establishments and workers.

(b) It provides for the establishment of an Occupational Safety and Health Advisory Board at both national and state levels. This Board will replace various committees. It will also give guidance to the government on policy matters, occupational safety, health and working conditions of workers.

(c) It introduces the concept of "one registration, one license, and one tax return".

(d) This Code provides for the formalization of employment by making the issuance of appointment letters to every employee as a statutory provision.

(e) It focuses on the safety and welfare provisions as well. It provides that the employers must provide a hygienic work environment for its workers. Such an environment would have proper ventilation, comfortable temperature and humidity, adequate space, clean drinking water, and toilets.

(f) This Code provides a uniform threshold when it comes to welfare provisions.

(g) The employees must take care of their health, follow the health and safety standards in place, and report if there exist any unsafe conditions.

(h) A woman employee is allowed to work after 7 pm and before 6 am but only when she consents to do the same. This permission is subject to many factors including security, holidays, working hours, or any other such condition set by the State or Central Government.

(i) Workers are not required to work for more than six days a week. Further, they must get one day leave for every 20 days of the week per year.

C. THE INDUSTRIAL RELATIONS CODE, 2019 ("IR CODE")

(a) Ease in the hire and fire process: The Industrial Relations Code eases the process of hire and fire for the employers as it gives them the power to hire employees and let them go on the basis of the needs and requirements of the market.

(b) Fixed-term employment as a benefit to the employees: This Code promotes fixed-term employment across all working sectors along with statutory benefits with regards to minimum wages, provident funds and medical benefits amongst the various others.

(c) Provisions related to lay-off and retrenchment: Under this Code, the government has the authority to reduce or increase the threshold of employees through official notification; this means that an employer cannot lay off more than 100 (One Hundred) employees without approval. Keeping in mind the increase in the number of lay-offs of employees by the employers, this bill also provides for a provision for re-skilling funds to suit the best interest of the employees. With regards to the lay-off, this code states that it is due to the inability of the employer which may include reasons such as – shortage of coal, power, breakdown of machinery etc., due to which he is unable to provide employment to a worker. Along with this, it also lays down certain rules in respect of termination regulations which states that in industries which work in the field of mines or plantation, they need a prior permission from the state or central government before laying-off. It also requires these industries to pay 50% of the basic wages to the employees that they have laid off, along with a notice of one month to the employees who have been removed from services.

(d) Negotiations in trade unions: Under this Code, the trade unions are also provided with a status of sole negotiating union if there is more than 75% of workforce support. This feature is called the 'recognition of negotiating union'.

(e) Strict measures against unfair trade practices: This Code further helps in stringing the propagation of any unfair labour practices as enlisted in the Bill. This implies than no one can spread and impose restrictions against forming trade unions, establishing employer sponsored trade unions, etc.

(f) Voluntary Arbitration for settlement of dispute: Further, this Code allows for arbitration of the industrial disputes. However, for the employers and the workers to go into the process of arbitration, there has to be a written agreement which has to be signed including the clause regarding referring of the dispute to an arbitrator.

(g) Provision to empower the government officers to settle disputes: The Code also suggests the Central Government to consider

National Industrial Tribunals for settlement of industrial disputes concerning the disputes which involve questions of national importance. The government herein would appoint a conciliation officer who would investigate the dispute and assist the parties arrive at an amicable settlement. However, if the settlement is not possible, the parties are free to approach the Industrial Tribunal or National Tribunal.

(h) Standing order: This provision states that every industrial establishment with a minimum count of 100 labourers would need to prepare a standing order on the matters enlisted in First and Second Schedule of the new Code. The said matters are related to the classifications of workers, the manners of apprising workers about work hours, off days, etc. and should be indicated by the appropriate government by gazette notification.

D. THE CODE ON SOCIAL SECURITY, 2019 ("SOCIAL SECURITY CODE")

(a) Definition of wages: A important change in the definition is the inclusion of a proviso that provides that in case the excluded components of the wages (other than retirement benefits such as gratuity) exceed 50% of all remuneration paid to a worker or employee, then the amount in excess of this 50% will be deemed to be the 'wages' so that the wage portion remains at the 50% level.

(b) Explanation to definition of 'Factory': an explanation has been given for the definition of 'Factory' under the Code, that mere fact that that an electronic data processing unit or a computer unit is installed in any premises or part thereof shall not make the establishment a factory if no manufacturing process is being carried on in such premises or part thereof.

(c) Statutory benefits to fixed term contract employees – The fixed term employees are largely governed by the terms of the contracts rather than the statutory provision. The Code provides that the fixed term employees shall be considered eligible for all such benefits that are available to a regular employees on a proportionate basis even if their period of employment does not extend to the qualifying period of employment required under the statute.

(d) Option of voluntary registration under employees' state insurance scheme – The present law for employee state insurance does not provide with an option for the employer to get a voluntary registration under the scheme. However, the Code provides for such option to the employer to get voluntarily covered under the framework.

(e) Contribution to Provident Fund – Currently, both employer and employee are required to contribute 12% of wages, the Code has proposed that the government may notify a different rate for the employees' share of provident and pension fund contribution than what is prescribed under the statute. The rate of contribution to be made by an employee can be reduced from 12 % while the contribution rate of the employer will remain same.

(f) Establishment of career centres: Unlike the Employment Exchanges Act, that applied to only such establishments in the private sector which employ 25 or more persons to send vacancy details regarding their establishment to the 'employment exchanges', the Code requires notification of vacancies to career centres by every establishment.

(g) Specific period to inquire and determining the dues in matters of contribution: There has been a proposal of introducing a limitation period for the determination of amount due and initiation of inquiries of 5 years from the date from which the alleged amount is due as regards to the chapters of employees' provident fund and employees' state insurance fund. Currently there is no such limitation.

(h) Provisions for 'gig workers' and 'platform workers' – The code has introduced and defined terms like 'gig workers' and 'platform workers' and 'aggregator'. There is a provision wherein the government can formulate a scheme for the benefit of such employees. Currently, these were not covered under many employee benefit statues.

"Gig worker" means a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship.

"Platform worker" means a person engaged in or undertaking platform work and "Platform work" means a form of employment in which organizations or individuals use an online platform to access other organizations or individuals to solve specific problems or to provide specific services in exchange for payment.

"Aggregator" means a digital intermediary or a market-place for a buyer or user of a service to connect with the seller or the service provider;

Way Forward

The key challenge for labour laws is to achieve a functional and efficient labour market that would promote more formal employment and productivity. It cannot be a free market because of the asymmetry of power between capital and labour. Therefore, to achieve ease and low cost of doing business, it would be necessary to provide reasonable income and survival security for workers. The new labour reforms assure of such protection, which increases the chances of implementation.

By initiating labour reforms, the government has taken an important step, which is expected to make Indian economy more productive and competitive.

08

Intellectual Property Rights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Intellectual Property Rights

PATENTS

In India, patents are granted under the Patents Act, 1970 ("Patents Act"). To be patentable, an invention may be:

(i) a product or a process;

(ii) be new, i.e., not anticipated by publication/use anywhere in the world;

(iii) involve an inventive step, i.e., technical advance over existing knowledge or having economic significance or both and invention is not obvious to a person skilled in the art;

(iv) be capable of industrial application; and

(v) not be specifically excluded by statute.

Nature of Right

The patent granted under the Patents Act confers upon the patentee:

(i) for product: the exclusive right to prevent third parties, who do not have his/her consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;

(ii) for process: the exclusive right to prevent third parties, who do not have his/her consent, from the act of using that process and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India.

Length of Protection

A patented invention is protected under the Patents Act for a period of 20 (Twenty) years from the date of filing/ date of priority, subject to periodic renewals of the patent.

Treaty/ Convention India is Signatory to:

India is a signatory to:

- Convention Establishing the World Intellectual Property Organization
- Agreement establishing the World Trade Organization
- World Trade Organization agreement on Trade-Related Aspects of Intellectual Property Rights
- Paris Convention for the Protection of Industrial Property
- Patent Cooperation Treaty
- Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure

Assignment

While drawing up any assignment involving transfer of patents, it is mandatory that such transfer document be drawn in writing and comprise details such as:

(i) name & addresses of both the Assignor and Assignee;

(ii) details of patent/ patent application assigned and their validity period;

(iii) consideration amount and other terms of agreement such as territorial jurisdiction of rights assigned;

(iv) clauses regarding non-disclosure to third parties without explicit approval of Assignor;

(v) name and designations of the persons executing the transfer agreement on behalf of both the parties; and

(vi) registration of assignment with the Patents Office or rectification of the register of patents for the granted patent and substitution of the Assignee as the applicant for pending patent applications.

DESIGNS

Design protection is granted under the Designs Act, 2000. A design means the features of shape, configuration, pattern, ornamentation or composition of lines or colors applied to any article.

For a design to be registrable, it must:

(i) be applied to an article;

(ii) be new or original;

(iii) be not disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date/ priority date;

(iv) be significantly distinguishable from the known designs or a combination of known designs;

(v) not contain scandalous or obscene matter;

Nature of Right

Registration of a design confers upon the registered proprietor:

(i) the exclusive right to apply a design to any article in any class in which the design is registered; and

(ii) use or application or import of registered design (without authorized consent of the registered proprietor) or its obvious or fraudulent imitation applied to any article in the class in which the design is registered, constitutes infringement.

Enforcement

Proceedings for infringement of designs can be brought in any district court or High Court. Remedies, which a court may grant in any suit for infringement, include:

(i) a penalty may be imposed for each contravention;

(ii) registered proprietor can also file a suit for recovery of damages and for injunction.

Length of Protection

Protection lasts for 10 (Ten) years from date of registration and can be extended by another term of five years.

Treaty/ Convention India is Signatory to:

India is a signatory to: **Locarno Agreement (classification of Industrial designs)**

Assignment

While drawing any assignment involving transfer of designs, it is mandatory that such transfer document must be drawn in writing and comprise details like:

(i) name & addresses of both the Assignor and Assignee;

(ii) details of design registered/ design application assigned and their validity period;

(iii) consideration amount and terms of agreement including territorial jurisdiction of rights assigned;

(iv) clauses regarding non-disclosure to third parties without explicit approval of Assignor;

(v) name and designations of the persons executing the transfer agreement on behalf of both the parties; and

(vi) registration of the new proprietor of the design with the design office.

TRADEMARKS

The protection granted and rights conferred in relation to the trademarks and service marks in India are governed by the Trademarks Act, 1999 ("Trademarks Act"). As per the provisions of the said Act, trademark may be a word, signature, name, device, label, numerals or combination of colours or either of them, and should be capable of being represented graphically. The trademark may be used or intended to be used by the applicant/ proprietor in respect of goods or services being articles of commerce. Primarily the bi-fold purpose of the trademark is to viz.:

(i) distinguish the goods or services of one entity from that of other; and

(ii) indicate a connection in the course of trade between the proprietor of the trademark & goods or services being offered there under.

Nature of Right

The rights, whether acquired or conferred in relation to a trademark, are monopolistic in nature. Such proprietary rights in respect of a trademark in India can be acquired either by way of use or registration. The rights inured through use are termed as the common law rights & the other by seeking registration, the statutory rights. Under the regime of common law rights, the owner acquires both the proprietary right to the exclusive use of a trademark in exclusion to all others and also to restrain them in case of any unauthorized use.

The registration of a trademark confers statutory rights in favour of the registered proprietor, to the exclusive use of the trademark in relation to the goods or services in respect of which the trademark is registered and to restrain others from using the identical or deceptively similar mark in respect of the same or similar goods or services. However, it is significant to note that India follows the code of 'first to use'. Accordingly, in case of conflict the common law rights acquired by virtue of prior use may supplant the statutory rights conferred by way of registration.

Enforcement

The suit for the infringement of a registered trademark or relating to any right in a registered trademark or for passing off, arising out of the use by the third party of any trademark which is identical with or deceptively similar to the proprietors' trademark, whether registered or unregistered, may be instituted either in a District Court or High Court having jurisdiction to try such suit. The proceedings can be initiated either by the proprietor or registered proprietor (if the trademark is registered) or the registered user. While drawing exception to the regular Code of Civil Procedure, the Trademarks Act provides that in case of suit for infringement, the proceeding can be instituted even at the place of the Plaintiff i.e., where he actually and voluntarily resides or carries on business or personally works for gain.

Reliefs that the Court may grant in Suit for infringement or passing off includes 'Injunctions (subject to such terms, if any, as the court thinks fit) and at the option of the plaintiff, either damages or an account of profits together with or without any order for the delivery-up of the infringing labels and marks for destruction or erasure'. The court may grant an ex parte injunction and in particular orders intended to preserve evidence or documents relating to the subject matter of the suit. The said injunctions or orders are issued to restrain the defendant from appropriating with the assets in a manner that is likely to adversely affect the plaintiffs' rights to recover damages or pecuniary remedies.

Length of Protection

The registration granted is valid for the period of ten years, computed from the date of application, and is required to be renewed after every ten years.

Treaty/ Convention India is Signatory to:

India is a signatory to:	**Paris Convention for the Protection of Industrial Property** **Nairobi Treaty on the Protection of the Olympic Symbol** **Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks**
World Intellectual Property Organisation administered treaties applicable to India	**Nice Agreement on the International Classification of Goods and Services** **Vienna Classification established by the Vienna Agreement**

Assignment

While drawing any assignment involving transfer of trademark (registered or pending), it is mandatory that such transfer document must be drawn in writing and comprise details like;

(i) name & addresses of both the parties;

(ii) details of trademark being transferred;

(iii) transfer is with the goodwill or without the goodwill;

(iv) consideration amount (in case of global assignment of trademarks including India, the consideration amount or percentage thereof pertaining to Indian trademark must be indicated accompanied with the duly notarized Declaration affirming the same). The applicable Stamp Duty is determined as per the consideration amount thus, it is mandatory to provide the same; and

(v) name and designations of the persons executing the transfer agreement on behalf of both the parties.

COPYRIGHTS

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In India the Copyright Act, 1957 protects original literary, dramatic, musical and artistic works and cinematograph films and sound recordings from unauthorized uses. The copyright protects the expressions and not the ideas thus there is no copyright protection for ideas, procedures, methods of operation or mathematical concepts as such.

Nature of Right

The Act recognizes that the copyrights in relation to a work subsist therein moment the same is created. Although the first owner of the copyright is the author of the work however subject to the arrangement under which work in question was created i.e., contract for service or contract of service or absence of any contract whatsoever. Notwithstanding the nature of arrangement basically copyright is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work.

Enforcement

The suit for the infringement of all or either of the copyrights may be instituted in a District Court having jurisdiction to try such suit. The proceedings can be initiated either by the owner of copyright (including exclusive licensee) or his legal representatives. Being exception to the regular Code of Civil Procedure, the Act provides that suit for infringement of copyright shall be instituted at the place of the person instituting the suit i.e., where he actually and voluntarily resides or carries on business or personally works for gain.

The remedies that the owner of a copyright is entitled to in Suit for infringement of a copyright are 'Injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right'. In addition to the civil remedies the court may inflict imprisonment or fine or both in case of person who knowingly infringes or abets infringement. Such imprisonment or fine may be enhanced in case of subsequent infringement or abetment to the same.

Length of Protection

The term of the protection varies in respect of different works i.e.:

(i) Literary, dramatic musical and artistic works is - lifetime of the author until sixty years from the beginning of calendar year next following the year in which the author died;

(ii) Anonymous and pseudonymous work (Literary, dramatic musical and artistic works) is - for sixty years from the beginning of calendar year next following the year in which the work was published. However, if the identity of the author is disclosed before the expiry of the said period until sixty years from the beginning of calendar year next following the year in which the author died; and

(iii) Posthumous work, Photographs, Cinematograph films, Government works, Works of public undertakings, Works of international organizations is - For sixty years from the beginning of calendar year next following the year in which the work or photograph or film or sound recording or record was published.

Treaty/ Convention India is Signatory to:

India is a signatory to:

- **Berne Convention for the Protection of Literary and Artistic works**
- **Universal Copyright Convention.**

Assignment

While drawing any assignment involving transfer of copyright, it is mandatory that such transfer document must be drawn in writing and comprise details like:

(i) name, nationality & address of the author;

(ii) name and address of the Assignee;

(iii) title of the work;

(iv) year of creation of the work;

(v) nature of rights being transferred i.e., all copyrights or the specific one;

(vi) term of assignment;

(vii) territories for which rights are being assigned; and

(viii) consideration amount


PERSONAL DATA
PROTECTION

09

Data Protection Framework In India

Data Protection Framework In India

There are primarily two cornerstones in the context of law on privacy of individuals in India.

1. Constitution of India; and

2. Legislative framework

Constitution Of India

Privacy as a Fundamental Right

Article 21 of the Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law.

In this context, the Supreme Court of India in the landmark case of Justice K.S. Puttaswamy (Retd.) Vs. Union of India, (2019) 1 SCC 1, declared the Right to Privacy as an intrinsic part of Right to Life and Personal Liberty under Article 21 of the Constitution.
It held that: –

- the 'right to privacy' is a fundamental right guaranteed under the Constitution

- privacy is intrinsic to life and personal liberty guaranteed under Article 21 of the Constitution; and

- right to life and personal liberty are inalienable rights inseparable from human existence and hence, similar constitutional safeguards should be applicable to an individual's right to privacy.

Section 2(1)(o) of the IT Act.

Legislative Framework

The term 'Data' has defined to mean "a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer"[1].

Data protection refers to the set of privacy laws, policies and procedures that aim to minimize intrusion into one's privacy caused by collection, storage and dissemination of personal data. Personal data generally refers to the information or data which relate to a person who can be identified from that information or data whether collected by the Government or any private organization or agency.

India presently does not have any express legislation governing data protection or privacy. However, the relevant laws in dealing with data protection are the Information Technology Act, 2000 ("IT Act") and the Indian Contract Act, 1872.

IT Act deals with the issues relating to payment of compensation (Civil) and punishment (Criminal) in case of wrongful disclosure and misuse of personal data and violation of contractual terms in respect of personal data.

Brief History

IT Act was notified on October 17, 2000 to primarily deal with cybercrime and electronic commerce and it lacked provisions for protection and the procedure to be followed to ensure the safety and security of sensitive personal information of individual. On October 27, 2009, the Government inserted Section 43A in the IT Act vide the Information Technology (Amendment) Act, 2008 which sought to obligate corporate bodies who 'possess, deal or handle' any 'sensitive personal data' to implement and maintain 'reasonable' security practices, failing which they would be liable to compensate those affected by any negligence attributable to this failure.

In exercise of the powers conferred under Section 87(2)(ob) of the IT Act read with Section 43A of the IT Act, the Department of Information Technology on April 11, 2011 notified the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("SPDI Rules").

Applicability

SPDI Rules are applicable to a body corporate or any person located within India. It broadly regulates the: (a) collection, receipt, possession, use, storage, dealing or handling of sensitive personal data or information; (b) transfer or disclosure of sensitive personal data or information; (c) security procedures for protecting sensitive personal data or information; (d) transfer of sensitive personal data or information outside India; and (e) disclosure of sensitive personal data or information to the Government.

In terms of Section 43A of the IT Act, a body corporate[2] possessing, dealing or handling 'sensitive personal data or information' ("SPDI") in a computer resource, is required to implement and maintain reasonable security practices and procedures to prevent such SPDI from unauthorized access, use, alteration, disclosure or damage, failing which the body corporate will be required to compensate the person so affected for loss caused on account of unauthorized access or disclosure.

2. "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities

Key Definitions Under The SPDI Rules:

"Personal information" means any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.

"SPDI" - Sensitive personal data or information of a person means such Personal Information which consists of information relating to-

(i) password;
(ii) financial information such as bank account or credit card or debit card or other payment instrument details;
(iii) physical, physiological and mental health condition;
(iv) sexual orientation;
(v) medical records and history;
(vi) Biometric information;
(vii) any detail relating to the above clauses as provided to body corporate for providing service; and
(viii) any of the information received under above clauses by a body corporate for processing, stored or processed under lawful contract or otherwise.

Obligations Of A Body Corporate Under SPDI Rules

In terms of the SPDI Rules, a body corporate possessing or otherwise dealing in SPDI must adopt the following reasonable security practices and procedures:

(a) Publishing a Privacy Policy[3]

A body corporate dealing with SPDI should formulate a privacy policy for handling of or dealing in personal information including SPDI and ensure that the same are available for view by such providers of information who has provided such information under lawful contract.

Such policy must be published on website of body corporate and shall provide for-

(i) clear and easily accessible statements of its practices and policies;
(ii) type of personal or SPDI collected;
(iii) purpose of collection and usage of such information;
(iv) disclosure of information including SPDI as provided;
(v) reasonable security practices and procedures as detailed in point (i) below.

(b) Requirement to Obtain Consent before collecting SPDI[4]

Before collection of information the body corporate must obtain consent in writing through letter or fax or email from the provider of the SPDI.

(c) Stipulations Regarding Purpose, Usage and Storage Limitations[5]

Body corporate must not collect SPDI unless the data subject has been informed of the purpose for which his/ her information is being collected and information must be collected for a lawful purpose connected with a function or activity of the body corporate.

Additionally, a body corporate holding SPDI should not retain such SPDI for longer than is required for the purposes for which the information may lawfully be used or is otherwise required under any other law for the time being in force.

The information collected must be used for the purpose for which it has been collected.

(d) Providing the Data Subject an Opportunity to not provide or withdraw consent for collection or holding of SPDI[6]

3. Rule 4 of SPDI Rules
4. Rule 5(1) of SPDI Rules
5. Rule 5(2), 5(4) and 5(5) of SPDI Rules
6. Rule 5(7) of SPDI Rules

A body corporate, prior to the collection of information which includes SPDI, must provide an option to the data subject to not to provide the data or information sought to be collected. The data subject must also be given an option to withdraw his/ her consent previously given to the body corporate.

(e) Prerequisites of collection of information[7]

A body corporate collecting information must ensure that the person concerned is having the knowledge of --

(i) the fact that the information is being collected;
(ii) the purpose for which the information is being collected;
(iii) the intended recipients of the information; and
(iv) the name and address of the agency that is collecting the information; and the agency that will retain the information.

(f) Option to review the information[8]

A body corporate must permit the providers of information, as and when requested by them, to review the information they had provided and ensure that any personal information or SPDI found to be inaccurate or deficient shall be corrected or amended as feasible.

(g) Redressal to discrepancies and grievances of provider of the information[9]

A body corporate shall address any discrepancies and grievances of their provider of the information with respect to processing of information in a time bound manner. For this purpose, the body corporate shall designate a Grievance Officer and publish his/ her name and contact details on its website. The Grievance Officer shall redress the grievances of provider of information expeditiously but within one month from the date of receipt of grievance.

(h) Conditions governing transfer of Personal Information and SPDI[10]

A body corporate may transfer SPDI including any information , to any other body corporate or a person in India, or located in any other country, that ensures the same level of data protection that is adhered to by the body corporate as provided for under the SPDI Rules. The transfer may be allowed only if it is necessary for the performance of the lawful contract between the body corporate or any person on its behalf and provider of information or where such person has consented to data transfer.

(i) Other reasonable security practices and procedures to be implemented

A body corporate shall be considered to have complied with reasonable security practices and procedures, if it has implemented such security practices and standards and have a comprehensive documented information[11] security programme and information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected with the nature of business.

A body corporate or a person on its behalf can implement standard such as International Standard IS/ISO/IEC 27001 on "Information Technology -Security Techniques - Information Security Management System - Requirements" or the codes of best practices duly approved and notified by the Central Government.

7. Rule 5(3) of SPDI Rules 8. Rule 5(6) of SPDI Rules
9. Rule 5(9) of SPDI Rules 10. Rule 7 of SPDI Rules
11. "information" includes data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro-film or computer generated microfiche.

Relevant Penalties Under The IT Act

Section 43-A – Compensation for failure to protect data

A body corporate possessing, dealing with or handling any SPDI in a computer resource owned, controlled or operated by it would be liable to pay damages as compensation to affected persons if they are negligent in implementing and maintaining reasonable security practices and procedures to protect SPDI.

Section 72 - Penalty for Breach of confidentiality and privacy

Any person who, in pursuance of any of the powers conferred under the IT Act, rules or regulations made under the said IT Act, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to 2 (two) years, or with fine which may extend to INR 1,00,000 (Rupees One Lakh), or with both.

Section 72A – Punishment for disclosure of information in breach of lawful contract

In case there is disclosure of personal information in breach of a lawful contract or without consent, the body corporate would be liable to pay fine of up to INR 5,00,000 (Rupees Five Lakh) or imprisonment for a period of 3 (Three) years, or both.

Section 85 - Offences by Companies[12]

Where a person committing a contravention of any of the provisions of the IT Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. However, such a person shall not be held liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

It is further provided that where a contravention of any of the provisions of the IT Act or of any rule, direction or order made there under has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Other Key Highlights

Disclosure of SPDI

In terms of Rule 6(1) of the SPDI Rules, disclosure of SPDI by body corporate to any third party must require prior permission from the provider of such information, who has provided such information under lawful contract or otherwise, unless such disclosure has been agreed to in the contract between the body corporate and provider of information, or where the disclosure is necessary for compliance of a legal obligation.

12. In reference to this section, (i) a "Company" means any Body Corporate and includes a Firm or other Association of individuals; and (ii) "Director", in relation to a firm, means a partner in the firm.

Authority Responsible for Protection of Data

India presently does not have a national regulatory authority for protection of data. The MeitY is responsible for administering the IT Act and issuing the rules and other clarifications under the IT Act. The authorities established under the IT Act – i.e. the Adjudicating Officer and Cyber Appellate Tribunal and, thereafter, the different High Courts and the Supreme Court, are responsible for enforcing the IT Act.

Territorial Scope

The SPDI Rules issued under Section 43A of the IT Act apply only to a body corporate or any person located within India. The provisions of the IT Act (except in respect of matters governed by the SPDI Rules) are also applicable to any offence committed by a person outside India using a computer, computer system or computer network located in India.

Consent in Electronic Mode

In terms of Press Note dated August 24, 2011 issued by Ministry of Communications & Information Technology, consent includes consent given by any mode of electronic communication.

Audit of Reasonable Security Practices

A body corporate must get the audit of its reasonable security practices and procedures carried out by an auditor at least once a year or as and when the body corporate or a person on its behalf undertake significant upgradation of its process and computer resource.

Issues with the current regime

1. Section 43A only deals with SPDI and not with Personal Information. However, the SPDI Rules regulate both Personal Information as well as the SPDI;

2. The SPDI Rules only apply to data of natural person and does not protect the confidential data of body corporates;

3. The SPDI Rules do not apply to the collection of data by the Government and any of its authorized agencies;

4. IT Act has not been able to address all the concerns around privacy and protection of personal data of individuals as the scope of SPDI under the present regime is very limited;

5. Increased instances of data theft, unauthorized sharing of personal data and illegal data harvesting have made the government recognize the need to have a comprehensive law to combat these issues;

6. IT Act failed to accord special protection to personal data of children;

7. IT Act largely prescribes "consent" from the individual whose personal data is being processed as the limited ground for processing. This requirement, in fact, has been widely misused by entities who have reduced such requirement to an "I agree" button that does not allow an individual the option of providing informed and meaningful consent;

8. The SPDI Rules have not prescribed provisions for the "consent" of children prior to collection of personal data;

9. There is no dedicated regulatory authority that enforces SPDI Rules. These Rules can however be enforced by the nodal ministry viz. the MeitY.

10. Under the IT Act, the failure to maintain reasonable security practices in relation to SPDI does not attract deterrent penalties and only mandates "compensation" to an individual who has been affected.

New Data Protection Legislation

MeitY on December 11, 2019 introduced the Personal Data Protection Bill, 2019 ("Bill") in Lok Sabha. The Bill is based on the draft legislation submitted to MeitY by a ten-member committee of experts headed by Justice B.N. Srikrishna ("Committee") in July 2018. The draft legislation submitted by the Committee recommended significant changes in the way data is processed in India, and included requirements such as localization of personal data, restrictive conditions for transfer of personal data, penalties for reckless de-identification of data, and the creation of a Data Protection Awareness Fund. The Bill seeks to provide for protection of personal data of individuals and establishes a Data Protection Authority ("Authority") for the same.

Inspired by the European General Data Protection Regulation, the Bill is aimed to bring about a comprehensive overhaul to India's current data protection regime. The current draft of the Bill prescribes compliance requirements for all forms of personal data, broadens the rights given to individuals, introduces a central data protection regulator, as well as institutes data localization requirements for certain forms of sensitive data. The Bill applies extra territorially to non-Indian organizations in the event certain nexus requirements are met, and also imposes hefty financial penalties in case of non-compliance.

The draft bill proposes to put restriction on use of personal data without explicit consent of citizens and provides for a penalty of up to Rs 15 crore and up to 3 (three)-year jail term for company executives for violating privacy norms. Following are the key highlights of the Bill in its current form:

(a) The Bill applies to the processing of any personal data by entities located outside India if the personal data is processed with respect to any business or activity that involves offering goods or services to individuals located in India or the profiling of data principals within India. [13]

(b) The Bill sets out certain rights of the individual (or data principal) including the right to obtain confirmation from the fiduciary on whether their personal data has been processed, seek correction of inaccurate, incomplete, or out-of-date personal data, have personal data transferred to any other data fiduciary in certain circumstances, and restrict continuing disclosure of their personal data by a fiduciary if it is no longer necessary or consent is withdrawn.[14]

(c) The Bill allows processing of data by fiduciaries only if consent is provided by the individual. However, in certain circumstances, personal data can be processed without consent.[15]

13. Section 2(A)(c) of the Bill
14. Section 17, 18, 19 and 20 of the Bill
15. Section 12, 13 and 14 of the Bill

(d) The Bill sets up a Data Protection Authority which may take steps to protect interests of individuals, prevent misuse of personal data and ensure compliance with the Bill.[16]

(e) Sensitive personal data may be transferred outside India for processing if explicitly consented to by the individual, and subject to certain additional conditions. Certain personal data notified as critical personal data by the government can only be processed in India. However, the Bill provides that sensitive personal data should be stored in India.[17]

(f) The Bill allows a data principal to apply to the adjudicating authority to seek compensation either from a data processor or the data fiduciary, for harm suffered as a result of any infringement of any provision in the law. [18]

The Bill was referred to a 30 member team of the Joint Parliamentary Committee ("JPC") on December 12, 2019 for recommendations. The JPC's report, after timeline extensions granted, is now due to be submitted to the Parliament, in the Budget Session to be tentatively held in January 2021.[19]

16. Section 41 of the Bill
17. Section 33 and 34 of the Bill
18. Section 33 of the Bill
19. Section 64 of the Bill

10

Recent Reforms in Public Procurement Policy


TENDER

Recent Reforms in Public Procurement Policy

General Financial Rules

General Financial Rules, 2017 ("GFRs") are a compilation of rules and orders issued by the Government of India ("GoI") to be followed while dealing with matters involving public finances. These rules and orders are treated as executive instructions to be observed by all departments and organizations under the GoI and other specified bodies except otherwise provided for in these rules.

Rule 161(iv) of the GFRs earlier stated that where the Ministry or Department feels that the goods of the required quality, specifications etc., may not be available in the country and it is necessary to also look for suitable competitive offers from abroad, the Ministry or Department may send copies of the tender notice to the Indian embassies abroad as well as to the foreign embassies in India. The selection of the embassies will depend on the possibility of availability of the required goods in such countries.

The Department of Expenditure, Ministry of Finance, GoI vide Office Memorandum No.F.12/17/2019-PPD dated May 15, 2020 ("OM GFR") amended Rule 161 (iv) to also include the following additional statement:

"No Global Tender Enquiry (GTE) however shall be invited for tenders up to Rs. 200 crore or such limit as may be prescribed by the Department of Expenditure from time to time. Provided that for tenders below such limit, in exceptional cases, where the Ministry or Department feels that there are special reasons for GTE, it may record its detailed justification and seek prior approval for relaxation to the above rule from the Competent Authority specified by the Department of Expenditure".

Therefore, post the aforesaid amendment, for tenders below INR 200 crore, where the Ministry or Department feels there are special reasons for Global Tender Enquiry (GTE)[1] , it may record its detailed justification and seek prior approval for relaxation from the Secretary (Coordination), Cabinet Secretary for a GTE.

This amendment prohibits the Nodal Ministries/ Departments from issuing a GTE for procurement of goods/ services of value up to INR 200 crore. In effect the amendment requires all Nodal Ministries/ Departments to give preference to supplier of goods/ services with higher local content ratio.

In terms of Paragraph 4.3 of the Manual for Procurement of Goods, 2017:
"4.3 Global Tender Enquiry (GTE)
4.3.1 GTE is similar to Open Tender Enquiry (OTE) but, through appropriate advertising and provision for payment in Foreign Currencies through Letter of Credit, it is aimed at inviting the participation of inter-alia foreign firms. The point of balance between VfM and cost/complexity of procedure is further aggravated as compared to OTE. Development of local industry also needs to be kept in mind. Hence, it may be viable only in following situations:
i) Where Goods of required specifications/quality are not available within the country and alternatives available in the country are not suitable for the purpose;
ii) Non-existence of a local branch of the global principal of the manufacturer/vendors/contractors; iii) Requirement for compliance to specific international standards in technical specifications; and
iv) Absence of a sufficient number of competent domestic bidders likely to comply with the required technical specifications, and in case of suspected cartel formation among indigenous bidders. (Rule 161 of GFR 2017)."

The Department of Expenditure, Ministry of Finance vide another Office Memorandum dated October 29, 2020 has clarified that OM GFR is not applicable on procurement of spare parts of the equipment/ plant & machinery etc. on nomination basis from Original Equipment Manufacturer (OEM), Original Equipment Supplier (OES) or Original Part Manufacturer (OPM), as no competitive tenders are invited in such cases.

Public Procurement (Preference To Make In India) Order 2017

The Public Procurement (Preference to Make in India) Order 2017 ("PMI Order") was introduced in 2017 to increase local content in government procurement and "local suppliers" having a prescribed amount of minimum local content are to be given preference in government procurement.

DPIIT issued a new PMI Order on June 4, 2020 and then revised it further on September 16, 2020 to bring it in line with changes in the GFR.

Objective & Key Points

To encourage 'Make in India' and promote manufacturing and production of goods and services in India with a view to enhancing income and employment, DPIIT issued the PMI Order containing therein the procedure to be followed by Nodal Ministry/ Departments for procurements of goods and services.

The order aims at providing preference to suppliers having higher local content ratio. 'Local Content'[2] focuses on the amount of value added in India.

PMI Order recognizes 3 categories of suppliers:

Class-I local supplier - having minimum local content of 50% or more

Class-II local supplier - having minimum local content of 20% or more, but less than 50%

Non - Local supplier - having local content of less than 20%

Preference to suppliers with higher local content

The Nodal Ministry/ Department are now prohibited from issuing GTE for procurement having estimated value of less than INR 200 crore. In exceptional circumstances GTE for procurement having estimated value of less than INR 200 crore can be issued by the Nodal Ministry/ Department after obtaining the prior approval of the Secretary (Coordination), Cabinet Secretary.

In procurement of all goods, services and works in respect of which the Nodal Ministry/ Department has communicated that there is sufficient local capacity and local competition, only Class I Local Supplier shall be eligible to bid irrespective of purchase value.

In procurement of all goods, services or works in respect of which the Nodal Ministry/ Department has not communicated that there is sufficient local capacity and local competition, only Class I Local Supplier and Class II Local Supplier shall be eligible to bid except when a GTE has been issued and purchase preference is given to 'Class-I local supplier' in the following manner:

2. 'Local Content' means the amount of value added in India which shall, unless otherwise prescribed by the Nodal Ministry, be the total value of the item procured (excluding net domestic indirect taxes) minus the value of imported content in the item (including all custom duties) as a proportion of the total value, in percent.

A. Procurement of goods or works, which are divisible in nature:

'Class-I local supplier' shall get purchase preference over 'Class-II local supplier' as well as 'Non-local supplier' as per following procedure:

- Among all qualified bids, the lowest bid will be termed as L1.[3]

- If L1 is 'Class-I local supplier', the contract for full quantity will be awarded to L1.

- If L1 bid is not a 'Class-I local supplier', 50% of the order quantity shall be awarded to L1.

- Thereafter, the lowest bidder among the 'Class-I local supplier' will be invited to match the L1 price for the remaining 50% quantity subject to the Class-I local supplier's quoted price falling within the margin of purchase preference[4] , and contract for that quantity shall be awarded to such 'Class-I local supplier' subject to matching the L1 price.

- In case such lowest eligible 'Class-I local supplier' fails to match the L1 price or accepts less than the offered quantity, the next higher 'Class-I local supplier' within the margin of purchase preference shall be invited to match the L1 price for remaining quantity and so on, and contract shall be awarded accordingly.

- In case some quantity is still left uncovered on Class-I local suppliers, then such balance quantity may also be ordered on the L1 bidder.

B. Procurement of goods or works, which are not divisible in nature:

- Among all qualified bids, the lowest bid will be termed as L1.

- If L1 is 'Class-I local supplier', the contract will be awarded to L1.

- If L1 is not 'Class-I local supplier', the lowest bidder among the 'Class-I local supplier', will be invited to match the L1 price subject to Class-I local supplier's quoted price falling within the margin of purchase preference, and the contract shall be awarded to such 'Class-I local supplier' subject to matching the L1 price.

- In case such lowest eligible 'Class-I local supplier' fails to match the L1 price, the 'Class-I local supplier' with the next higher bid within the margin of purchase preference shall be invited to match the L1 price and so on and contract shall be awarded accordingly.

In case none of the 'Class-I local supplier' within the margin of purchase preference matches the L1 price, the contract may be awarded to the L1 bidder.

Procedure for preference in tenders where contract is to be awarded to multiple bidders.

The procedure to be followed where contract is to be awarded to multiple bidders is as under:

3. 'L1' means the lowest tender or lowest bid or the lowest quotation received in a tender, bidding process or other procurement solicitation as adjudged in the evaluation process as per the tender or other procurement solicitation.
4. 'Margin of purchase preference' means the maximum extent to which the price quoted by a "Class-I local supplier" may be above the L1 for the purpose of purchase preference. The margin of purchase preference is 20%.

1. Only 'Class I local suppliers' shall be eligible to bid for procurements in case where sufficient local capacity and competition exists for the items as notified by the Nodal Ministry;

2. In other cases, 'Class II local suppliers' and 'Non-local supplier' may also participate in the bidding process;

3. In cases where all classes of suppliers are eligible to participate and:

A. 'Class I local suppliers' qualify for contract of at least 50% of the tendered quantity – then contract may be awarded to all the qualified bidders as per award criteria.

B. 'Class I local suppliers' do not qualify for contract of at least 50% of the tendered quantity – then purchase preference shall be given to 'Class I local suppliers' over 'Class II local suppliers' and 'Non-local supplier', provided that their quoted rates are within the 20% margin of purchase preference.

The purchase preference shall be given to the lowest quoting 'Class I local supplier' whose quoted rates fall within 20% margin of purchase preference subject to its meeting the prescribed criteria for award of contract.

Process for prescribing a lower minimum local content percentage

In terms of Para 5 of the PMI Order, a Nodal Ministry/ Department may prescribe only a higher percentage of minimum local content requirement.

However, in terms of Para 14 of the PMI Order, the administrative department undertaking the procurement with the approval of their Minister-in-charge, may by written order, for reasons to be recorded in writing,

a. reduce the minimum local content below the prescribed level; or

b. reduce the margin of purchase preference below 20%; or

c. exempt any particular item or supplying entities from the operation of the PMI Order or any part of the PMI Order.

Process for verification of local content

1. Self-Certification

The 'Class-I local supplier'/ 'Class-II local supplier' at the time of tender, bidding or solicitation shall be required to indicate percentage of local content and provide self-certification that the item offered meets the local content requirement for 'Class-I local supplier'/ 'Class-II local supplier', as the case may be. They shall also give details of the location(s) at which the local value addition is made.

2. Verification of Local Content

In cases of procurement for a value in excess of INR 10 crore, the 'Class-I local supplier'/ 'Class-II local supplier' shall be required to provide a certificate from the statutory auditor or cost auditor of the company (in the case of companies) or from a practicing cost accountant or practicing chartered accountant (in respect of suppliers other than companies) giving the percentage of local content.

Applicability And Eligibility

Applicability - All Nodal Ministry/ Departments are required to adopt the procedure prescribed in the PMI Order for procurements of goods and services.

Para 15 of the PMI Order states that the Government Companies shall be directed by administrative Ministry or Department through issuance of policy directions to comply with the PMI Order.

Eligibility - In procurement of all goods, services or works in respect of which the Nodal Ministry/ Department has communicated that there is sufficient local capacity and local competition, only 'Class-I local supplier', shall be eligible to bid irrespective of purchase value.

In procurement of all goods, services or works, not covered by para above, and with estimated value of purchases less than INR 200 crore, in accordance with Rule 161 (iv) of GFR:

(i) No GTE shall be issued except with the approval of competent authority as designated by Department of Expenditure;

(ii) Only 'Class-I local supplier' and 'Class-II local supplier', shall be eligible to bid in procurements undertaken by procuring entities.

In case where GTE has been issued with the approval of competent authority as designated by Department of Expenditure, 'Non-local suppliers' shall also be eligible to bid along with 'Class-I local suppliers' and 'Class-II local suppliers'.

In terms of the PMI Order, wholly owned subsidiaries of foreign companies, as long as they fulfill the minimum local content requirement as per the PMI Order should be eligible to bid in non-GTE tenders up to INR 200 crore.

Advantage of Class II Local Suppliers over Non Local Suppliers

In terms of the Clause 3 (b) of the PMI Order, Class II Suppliers are eligible to bid in non-GTE tenders under INR 200 crore, whereas Non-Local suppliers are not.

Other Key Highlights

False Declarations

False declarations will be in breach of the Code of Integrity under Rule 175(1)(i)(h) of the GFR for which a bidder or its successors can be debarred for up to two years as per Rule 151 (iii) of the GFR along with such other actions as may be permissible under law.

A supplier who has been debarred by any procuring entity for violation of the PMI Order shall not be eligible for preference under the PMI Order for procurement by any other procuring entity for the duration of the debarment. The debarment for such other procuring entities shall take effect prospectively from the date on which it comes to the notice of other procurement entities.

Reciprocity

In terms of Para 10 (d) of the PMI Order, when a Nodal Ministry/ Department identifies that Indian suppliers of an item are not allowed to participate and/ or compete in procurement by any foreign government, due to restrictive tender conditions which have direct or indirect effect of barring Indian companies such as registration in the procuring country, execution of projects of specific value in the procuring country etc., it shall provide such details to all its procuring entities including CMDs/CEOs of PSEs/PSUs, State Governments and other procurement agencies under their administrative control and Government E-marketplace for appropriate reciprocal action

Entities of countries which have been identified by the Nodal Ministry/ Department as not allowing Indian companies to participate in their Government procurement for any item related to that nodal Ministry shall not be allowed to participate in Government procurement in India for all items related to that nodal Ministry/ Department, except for the list of items published by the Ministry/ Department permitting their participation..

Procurement in Substantial Quantity

Para 13A of the PMI Order states that, in procurements of substantial value the concerned Nodal Ministry shall notify an upper threshold value of procurement beyond which foreign companies shall enter into a joint venture with an Indian company to participate in the tender. It may be noted that the requirement to enter into a joint venture is only applicable in procurements for which the Nodal Ministry has not notified that there is sufficient local capacity and local competition.

This requirement makes it mandatory for a foreign company to enter into a joint venture with Indian company to participate in the tenders of substantial value as notified by the Nodal Ministry.

Exclusions

Following exclusions have been provided under the PMI Order:
(i) Para 13 of the PMI Order provides that while notifying the minimum local content, Nodal Ministries may make special provisions for exempting suppliers from meeting the stipulated local content if the product is being manufactured in India under a license from a foreign manufacturer who holds intellectual property rights and where there is a technology collaboration agreement/ transfer of technology agreement for indigenous manufacture of a product developed abroad with clear phasing of increase in local content.
(ii) In terms of Para 4 of the PMI Order, all procurements having estimated value of less than INR 5,00,000 are exempt from the applicability of the PMI Order.

Government E-marketplace

Para 8 of the PMI Order states that in respect of the procurement through the Government E-marketplace (GeM), while registering the item for display GeM shall mark the items which meet the minimum local content.


TAX

11

Direct Taxes

Direct Taxes

Direct Tax Overview

Corporate taxes in India are levied by the Central Government in India. The primary law governing taxation at Union level is the Income-Tax Act, 1961 enacted by the Indian Parliament. Tax year begins on 1st April of a year and ends on 31st March of the following year.

Domestic companies are taxed on their worldwide income arising from all sources.

Non-resident corporations are taxed on the income earned through a business connection in India, or any source in India, or transfer of a capital asset situated in India, or any income received in India.

A. Corporate Income Tax

For Indian income tax purposes, a corporation's income comprises of the following heads of income:

- Profits and gains of business or profession
- Income from house property
- Capital gains on disposition of capital assets
- Residual income arising from non-business activities (i.e. income from other sources)

The above heads of income are mutually exclusive i.e. income that is specifically chargeable under one head cannot be charged under another head. Different assessability and deductibility rules apply to each head of income. The net result of each category is aggregated to arrive at total income. Deduction of certain allowances from total income results in total taxable income to which applicable tax rates are applied.

B. Double Taxation Avoidance Agreement (DTAA)

Provisions of the Indian domestic tax law or the DTAA, whichever is more beneficial, are applicable to a non-resident taxpayer. As on date, the Government of India has negotiated over 90 tax treaties with various countries.

With effect from 01 April, 2020, India has entered into Multilateral Instrument ('MLI') with various countries and consequently India's treaty with such countries have been modified due to MLI. The amended provisions would necessitate the examination of 'Principal Purpose Test' (PPT) to allow benefit of DTAA to the foreign taxpayer. By invoking PPT, the Tax Authorities are empowered to deny the benefit of the DTAA, if it is reasonable to conclude that obtaining the Treaty benefit was one of the principal purposes of an arrangement or a transaction. India's treaty with Finland has also been modified pursuant to introduction of MLI w.e.f. 01 April, 2020.

C. Income Computation And Disclosure Standards ('ICDS')

In order to bring consistency in computation of taxable income and, to reduce litigation with reference to accounting matters, a framework for computation of taxable income has been put in place for all assessees following mercantile system of accounting in relation to their income under the heads 'Profits and Gains of Business or Profession', and 'Income From Other Sources', in the form of ICDS. Presently, CBDT has notified ten ICDS which need to be followed while computing the income of all assessees following mercantile system of accounting in relation to their income under the heads 'Profits and Gains of Business or Profession' and 'Income From Other Sources'.

D. Rate Of Corporate Tax

Domestic and foreign corporations are subject to a tax at a specified basic tax rate and depending upon the total income, the basic rate is increased with a surcharge, as applicable. There is an additional levy of health and education cess at the rate of 4% of the tax payable.

Generally, domestic companies are taxed at the rate of 25% or 30% and foreign companies are taxed at the rate of 40%. Lower tax rates of 15% and 22% have been introduced for domestic companies w.e.f. FY 2019-20 subject to relinquishment of certain deductions and satisfaction of certain other conditions.

Base tax rates for tax year 2020-2021:

Particulars	Base Tax Rate*	Notes
Domestic Company		
Total turnover or gross receipt does not exceed INR 4 billion in FY 2018-19	25%	Note 1
Concessional tax rate under section 115BAA	22%	Note 2
Concessional tax rate under section 115BAB	15%	Note 3
Other domestic companies	30%	Note 1
Foreign company	40%	Note 4
LLP	30%	Note 5

* Plus applicable surcharge as mentioned below and health and education cess of 4%
Surcharge for domestic companies is applicable at the rate of 7% if taxable income exceeds INR 10 million but is less than or equal to INR 100 million and 12% if taxable income exceeds INR 100 million (where option under section 115BAA and 115BAB has not been exercised). Surcharge of 10% is applicable where the companies opt for section 115BAA and 115BAB of the Income-Tax Act,1961, without any ceiling limit.
Surcharge for foreign companies is applicable at the rate of 2% if taxable income exceeds INR 10 million but is less than or equal to INR 100 million and 5% if taxable income exceeds INR 100 million.
Surcharge for LLPs is applicable at the rate of 12% if taxable income exceeds INR 100 million.

Note 1: The standard corporate tax rate is 30%. However, a lower tax rate of 25% is applicable for FY 2020-21, if turnover of the company does not exceed INR 4 billion in FY 2018-19.

Note 2: With effect from FY 2019-20, the companies have an option to opt for a special regime of taxation wherein a tax rate of 22% shall be applicable [section 115BAA]. Under the said provisions, the company shall not be eligible to claim certain specified deductions such as weighted deduction for expenditure on scientific research or on specified business/projects, additional depreciation on new plant & machinery, deduction under section 10AA in respect of units in special economic zone (SEZ), profit linked deduction under section 80-IA etc.

Note 3: Further, a reduced rate of 15% has also been introduced w.e.f. FY 2019-20 in relation to new domestic manufacturing companies [section 115BAB] provided:

- The company is set up and registered on or after 1st October, 2019 and commences manufacturing or production of an article or thing on or before 31st March, 2023
- The business is not formed by splitting up, or the reconstruction, of a business already in existence, subject to certain exceptions
- The company does not use any machinery or plant previously used for any purpose, subject to certain exceptions
- The company is not engaged in any business other than the business of manufacture or production of any article or thing and research in relation to, or distribution of, such article or thing manufactured or produced by it
- The company should not avail benefit of certain deductions such as weighted deduction for expenditure on scientific research or on specified business/projects, additional depreciation on new plant & machinery, deduction under section 10AA in respect of units in special economic zone (SEZ), profit linked deduction under section 80-IA etc.

The "business of manufacture or production of any article or thing" includes the business of generation of electricity.

Any other income which has neither been derived from, nor is incidental to manufacturing or production of an article or thing and in respect of which no specific rate of tax has been provided under Chapter XII, shall be taxed at the rate of 22% and no deduction or allowance in respect of any expenditure or allowance shall be allowed in computing such income.

Note 4: Foreign companies are taxed at the rate of 40%

Note 5: LLP is taxed at the rate of 30%

Minimum Alternate Tax:

Minimum Alternative Tax (MAT) seeks to create a tax charge on the book profits of companies which have nil or lower tax liability under normal provisions
MAT is levied on book profits of the corporates. With effect from FY 2019-20, the base rate of MAT has been reduced to 15% as against the erstwhile base rate of 18.5%. The credit for MAT paid is allowed to be carried forward for 15 years and set off against the income tax payable under the normal provisions of the Income-Tax Act, 1961, to the extent of the difference between tax according to normal provisions and tax according to MAT provisions. Companies availing the option of reduced tax rate of 22%/15% shall not be liable to pay MAT. Existing MAT credit cannot be carried forward by companies opting for the concessional tax regime under section 115BAA and 115BAB of the Income-Tax Act, 1961. A modified version of MAT – Alternate Minimum Tax (AMT) at 18.5% is applicable to LLPs.

E. Deduction For Expenses

In general, expenses are deductible if:
• the same are of revenue nature rather than of a capital nature
• laid out or expended "wholly and exclusively" for the purposes of business of the taxpayer
• laid out and expended during the relevant tax year; and
• not incurred in respect of personal and private expenses of the taxpayer;

Indian tax law expressly disallows certain expenses such as, taxes paid on the profits of a business or profession, penalty, fines, illegal expenses, expenses incurred to earn exempt income, corporate social responsibility, etc.

Deduction for certain statutory and contractual liabilities such as employee benefits (bonus, leave encashment, etc.), tax, duty, interest on specified loans, etc. is governed by section 43B which provides for allowance on payment basis.

Any expenditure incurred towards a related party which is not at arm's length is required to be disallowed as per the provisions of section 40A(2). International transactions with associated enterprises are further subject to transfer pricing provisions.

Amount of interest paid in respect of capital borrowed for the purposes of the business or profession is generally deductible subject to transfer pricing and thin capitalization provisions. Interest expense incurred in relation to capital borrowed for acquisition of an asset till the date such asset is put to use in the business of the company shall be capitalized to the cost of the asset. India has introduced thin capitalization rules to limit interest deduction exceeding INR 10 million in respect of related party debt w.e.f. FY 2017-18 by way of insertion of section 94B. Interest on related party debts incurred by an Indian company is subject to a disallowance at the lower of:

• total interest paid or payable in excess of 30% of earnings before interest, taxes, depreciation and amortization (EBIDTA); or
• the interest paid or payable to associated enterprise.

Related party debt refers to debt issued by a non-resident, being an associated enterprise of such borrower or debt issued by a lender which is not associated, but an associated enterprise either provides an implicit or explicit guarantee to such lender, or deposits a corresponding and matching amount of funds with the lender.

Interest disallowed can be carried forward for up to eight tax years to be set off against taxable income in subsequent years.

Depreciation on capital assets is allowed on the basis of written down value method using varying rates, depending on the nature of assets. The option to claim depreciation on straight line method basis is available exclusively in the case of power generating undertakings.

F. Tax Deducted At Source ('TDS') And Tax Collected At Source ('TCS') Provisions:

TDS provisions

Both resident and non-resident taxpayers making specified payments are obliged to withhold taxes according to the relevant provisions of the Income-Tax Act, 1961. In the case of payments made to non-residents, withholding tax rates are to be increased by an additional surcharge and cess, subject to benefits available under various tax treaties.

Withholding tax is a responsibility cast upon the payer and failure to withhold appropriate taxes shall result in liability to pay such taxes along with interest and penalty (benefits available in certain cases).

Withholding tax rates:

Withholding tax rates	Tax rates under Indian domestic law in %	
	Paid to a domestic company	Paid to a foreign company
Dividends	**10**	**20**
Interest	**10**	**40/20/5** (refer note 1 for details)
Royalty from patents, know-how, etc.	**10**	**10**
Royalty for sale, distribution or exhibition of cinematographic films	**2**	**10**
Fee for professional services	**10**	**10**
Fee for technical services (other than professional service)	**2**	**10**

Note 1: As per section 194LC, this rate of 5% only applies to interest on:

- monies borrowed in foreign currency from a source outside India under a loan agreement entered up to 30 June 2023 or on issue of any long-term bond including long-term infra structure bond at any time up to 30 June 2023.
- monies borrowed from a source outside India by way of issue of rupee denominated bonds up to 30 June 2023.

Such beneficial rate of 5% is available subject to satisfaction of conditions under the ECB regulations. Further, as per section 194LD, concessional rate of 5% is available in respect of interest payable up to 30 June 2023 to FPIs in respect of:

- Investment in rupee denominated bonds of an Indian company (such beneficial rate of 5% is available provided the rate of interest does not exceed SBI rate plus 500 basis points) or
- Investment in a government security

Depending upon the specific facts, any other interest on money borrowed by an Indian concern is subject to tax at a rate of 20%/ 40%.

Note 2: If PAN of the payee is not available, tax is to be withheld at a higher rate of 20% or any other applicable rate as prescribed under section 206AA, except where the withholding is required in case of payment of interest on long-term bonds as referred to in section 194LC to a non-resident. Further, where the payment is to a non-resident in the nature of interest, royalty, fees for technical services, dividend and payments on transfer of any capital asset, such higher rate of withholding shall not apply in the absence of PAN of the payee, if certain specified details such as tax identification number, tax residency certificate, etc., are made available.

Note 3: The withholding tax rates applicable for tax year 2020-21 for payment to domestic company have been reduced by 25% w.e.f. 14 May 2020 in the wake of COVID-19 pandemic.

TCS provisions

Income-Tax Act, 1961 also includes provisions for tax collection at source wherein certain persons are required to collect a specified percentage of tax from their buyers on certain specified transactions such as sale of motor vehicles up to a specified limit, scrap sale, trading of alcoholic liquor, forest produce, etc.

With a view to widen the tax net, the scope of TCS provisions has been enhanced to include TCS on foreign remittances under the Liberalized Remittance Scheme and sale of overseas tour packages. Such extended scope is applicable from 1 October 2020.

With effect from 1 October 2020, the scope of TCS provisions has also been widened to include TCS on sale of goods. Every person being a seller, who receives aggregate sale consideration exceeding INR 5 million in any previous year is required to collect from the buyer, a sum equal to 0.1% (0.075% until 31 March 2021 as per COVID relief measures) of the sale consideration exceeding INR 5 million as TCS at the time of receipt of consideration. It is applicable only to sellers whose turnover in the immediately preceding previous year exceeds INR 100 million. TCS is not required to be collected from buyer importing goods into India. Further, TCS is not applicable on goods being exported out of India.

Taxpayers are required to file TDS and TCS returns and issue TDS/TCS certificates on a quarterly basis.

G. Return Filing Obligation

Corporate income tax returns must be filed on or before 31 October after the close of the tax year. For companies on which transfer pricing provisions are applicable, income tax returns must be filed on or before 30 November after the close of the tax year .

Non-resident corporations are also required to file a return of income in India if they earn income in India or have a physical presence or economic nexus with India. However, return of income is not required to be filed in India in case the income earned from India consists of only interest or dividend or royalty or fee for technical services subject to fulfillment of certain conditions. Late filing of return of income and delay in payment or shortfall in taxes may attract penalty/interest, as applicable.

H. Books Of Accounts And Tax Audit

Every company engaged in a business is required to maintain books of accounts and get them audited by an accountant if its total sales, turnover or gross receipts exceed INR 10 million (INR 50 million provided aggregate of all amounts received including amount received for sales, turnover or gross receipts during the previous year, in cash, and aggregate of all payments made including amount incurred for expenditure, in cash, during the previous year does not exceed five per cent of the said amount) during the year.

I. Relief For Losses

Business losses, other than from speculation business loss, are permitted to be set off against income from any other source (except income from employment, i.e., salary income) in the same year. Business losses, which cannot be so set off, are permitted to be carried forward for setting off against business profits arising in the eight subsequent years. Unabsorbed depreciation is permitted to be carried forward for an unlimited period.

1. As a COVID relief measure, the Indian Government has time to time extended the due dates for return filing compliances of different assessees

J. Foreign Tax Relief

DTAAs entered into by India with several other countries govern foreign tax relief to avoid double taxation. If there is no such agreement, resident corporations can claim a foreign tax credit for the tax paid by them in other countries subject to fulfillment of certain requirements. The credit amount is the lower of Indian effective rate of tax or the tax rate of the said country on the doubly taxed income.

K. General Anti-Avoidance Rule (GAAR)

The Income-Tax Act, 1961 contains anti-avoidance provisions in the form of GAAR, which provides extensive powers to the tax authority to declare an arrangement entered by a taxpayer to be an Impermissible Avoidance Arrangement (IAA). The consequences include denial of tax benefit either under the provisions of the Income-Tax Act, 1961 or the applicable tax treaty. The provisions can be invoked for any step in or part of an arrangement entered, and the arrangement or step may be declared an IAA. However, these provisions only apply if the main purpose of the arrangement or the step is to obtain a tax benefit.

The provisions of GAAR will not apply where the tax benefit (for all parties) from an arrangement in a relevant tax year does not exceed INR 30 million.

L. Transfer Pricing Regulation In India

Transfer Pricing Regulations (TPR) in India are largely in line with the TP guidelines for multinational companies and tax administrators issued by the OECD, India being an observer country for the OECD.

Under the TPRs, any international transaction and specified domestic transaction between two or more associated enterprises (AEs) (including PEs) must be conducted at arm's length price (ALP).

RELEVANT PROVISIONS REGARDING TPR

a. International Transactions:
TPRs define an international transaction as the one that takes between two or more AEs, either or both of whom are non-residents and have a bearing on the profits, income, losses or assets of such enterprises.
Furthermore, a transaction with a non-AE may also be deemed as an international transaction if a prior agreement or arrangement pertaining to such transaction exists between the non-AE and the taxpayer's AE.

b. Specified Domestic Transactions (SDT):
In case the aggregate value of SDT exceeds INR 200 million, within the ambit of TPRs, the same shall be computed having regard to ALP.
The transactions covered under TPR(s) include all transactions with units eligible for tax holiday, or new domestic manufacturing companies chargeable to a lower tax rate.

c. Safe Harbor Rule (SHR):
SHR indicates circumstances under which tax authorities accept a transfer price declared by a taxpayer to be at arm's length. The SHR (applicable for the period FY 2016-17 to FY 2018-19) has been made applicable for FY 2019-20.

d. Advance Pricing Agreement (APA):
There is an APA program available in India, wherein the transfer price of goods and services transacted between group entities is determined in advance by the tax authorities (i.e., CBDT in India) and the taxpayers, so as to

prevent any dispute arising from controlled transactions between AEs. Application can be filed for unilateral/bilateral/multilateral APAs. There are 6 Bilateral APA applications which have been filed with Finland as on 31 March 2019.

e. Three-Tiered Documentation:
The Indian Government has adopted a three-tiered documentation structure, comprising of TP documentation, master file and country-by-country (CbC) reporting to implement the recommendations contained in the OECD's BEPS report on Action 13.

f. Secondary Adjustment:
In case, there is an increase in the total income or reduction in the loss due to the primary adjustment to the transfer price, the excess money which is available with its AE, the same shall be repatriated to India, and if not repatriated within the prescribed time, shall be deemed to be an advance made by the taxpayer to such AE (subject to fulfillment of certain conditions). The interest thereon shall be computed in the prescribed manner.

Considerations for newly set up entities

i. Robust analysis/ pre-implementation planning studies are suggested for unique/ critical transactions like royalty, fee for technical services, procurement services, intra-group services;

ii. TP Policies designed with the help of adequate benchmarking analysis undertaken at the project planning stage may help in mitigating/ reducing the risk in litigation;

iii. Robust documentation is required to substantiate the receipt and benefit from the services availed – transactions of service charges/ royalty are subject to heavy scrutiny in India;

iv. For manufacturing/ trading concerns, it is important to critically evaluate the alternate business models before setting up the operations;

v. In the case of market support service providers, potential Permanent Establishment (PE) exposure needs to be evaluated in the light of BEPS/ OECD and Domestic law changes.
The issue of marketing intangibles has been a highly litigative issue in India due to the aggressive approach of the Indian revenue authorities

M. Equalization Levy

In line with OECD's BEPS project Action Plan 1 (digital economy), India has introduced an equalization levy on certain transactions.

Equalization levy of 6% is chargeable on the payment made by a resident carrying on a business or profession or a permanent establishment of a non-resident in India to a non-resident providing services in the nature of online advertisement, or provision of digital advertising space or any other facility or service for the purpose of online advertisement. Such rate of 6% is liable to be deducted from the amount paid or payable to a non-resident by a person resident in India and carrying on business or profession, or from a non-resident having a permanent establishment in India if the aggregate consideration in a previous year exceeds INR 0.1 million.

From 1 April 2020, the scope of equalization levy has been expanded to include e-commerce supply or services by non-resident e-commerce operators. Effective from 1 April 2020, a rate of 2% shall apply on consideration received or receivable by 'non-resident e-commerce operators' from 'e-commerce supply or services'.

An 'e-commerce operator' has been defined to mean a non-resident who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both.

'E-commerce supply or services' has been defined to mean:
(i) online sale of goods owned by the e-commerce operator; or
(ii) online provision of services provided by the e-commerce operator; or
(iii) online sale of goods or provision of services or both, facilitated by the e-commerce operator; or
(iv) any combination of the above activities

The equalization levy provisions get triggered on the amount of consideration received or receivable by the e-commerce operator from e-commerce supply or services made or provided or facilitated by it to:
(i) Persons resident in India
(ii) Non-residents in the prescribed circumstances
(iii) Persons who buy goods or services or both using an IP address located in India

The equalization levy is not chargeable if the sales, turnover, or gross receipts of the e-commerce operator from the e-commerce supply or services made or provided or facilitated is less than INR 20 million in a given financial year.

Liability to pay such 2% equalization levy is on the non-resident e-commerce operator. The equalization levy is required to be paid to the Indian Government on a quarterly basis. Delay in payment of equalization levy may lead to interest and penalty exposure.

N. Tax Litigation In India

a. Tax Assessments

Taxpayers must file tax returns each year based on which the returns of income are picked up for scrutiny assessment by the tax authorities in India. A detailed procedure along with statutory timelines have been prescribed under the Income-Tax Act, 1961 for carrying out the assessment procedures involving redressal of disputes arising from assessments, levy of penalties, etc.

Recently, the Government of India has notified a faceless assessment scheme wherein all future assessment orders shall be passed in a completely faceless manner, except for cases assigned to Central Charges (i.e. search, survey etc.) and International Tax charges thereby eliminating all human interface. Under the Faceless regime there will be no physical hearings (except through video conferencing in certain exceptional situations, as may be notified) and all the submissions / communications between the taxpayer and tax department will happen online through the e-filing portal.

b. Appeal Mechanism

The tax appellate mechanism in India can be split into the following four levels:

Appellate authority	Nature of appeal
Commissioner of Income-tax (Appeals) [CIT (A)]	First level of appeal: Taxpayers can approach the CIT(A) against orders passed by lower authorities (tax officers). Recently, the Government has introduced Faceless Appeal Scheme 2020 enabling faceless filing and hearing of appeals in income tax matters. Under the scheme, an automated allocation system will facilitate random allocation of cases using artificial intelligence and other suitable technology. The proceedings in tax appeals will also be through an 'e-appeal' facility.
Dispute Resolution Panel (DRP)	Alternative to filing an appeal with the CIT(A): This option can be availed by non-resident companies and specified domestic taxpayers, who can file objections with the DRP against 'draft audit orders' passed by tax officers. The DRP, unlike the CIT(A), is required to issue directions within a prescribed time. Subsequently, the tax officer passes the final audit order on the basis of the directions of the DRP which is appealable directly before ITAT.
Income Tax Appellate Tribunal (ITAT)	Second level of appeal: Taxpayers or the Indian tax authorities can approach the ITAT against an order of the CIT(A). Taxpayers can also approach ITAT against a final order passed pursuant to the DRP's directions. The ITAT is the final fact-finding authority in India.
Jurisdictional High Court (HC)	Third level of appeal: Taxpayers or the Indian tax authorities can approach the jurisdictional HC against an order of the ITAT, provided the matter pertains to a substantial question of law.
Supreme Court (SC)	Last level of appeal: Taxpayers or the Indian tax authorities can approach the SC against an order of a jurisdictional HC. The order passed by the SC is the law of the land and no further appeal can be filed against it.

c. *Vivad se Vishwas* Scheme ('VsV Scheme')

With the intent to provide resolution to settle pending income-tax disputes, the Government of India has introduced the VsV scheme wherein the pending income tax litigations can be settled on payment of disputed tax. VsV scheme offers a golden opportunity to settle pending disputes as it offers immunity from interest and penalty exposure and saving of time, efforts and cost of litigation.

In order to apply for the VsV scheme, the applicant must file the declaration to this effect in prescribed form by 31 January 2021 and the amount of disputed tax is required to be paid up to 31 March 2021. In case where the payment is made after 31 March 2021, additional amount as applicable shall be payable by the applicant.

d. Alternative Dispute Resolution Mechanisms

• Authority of Advance Rulings (AAR)

The AAR is an alternative dispute resolution forum that provides an opportunity to non-residents and certain residents to obtain certainty with respect to tax liabilities arising from transactions undertaken or to be undertaken by them. An order of the AAR is binding on the applicant as well as the Revenue, and can only be challenged under a writ jurisdiction before the jurisdictional High Court. Presently, resolution of disputes under the AAR mechanism is taking a considerable time.

• Income-Tax Settlement Commission (ITSC)

The ITSC is another alternative dispute-resolution forum and constitutes a once-in-a-lifetime opportunity available to both residents and non-residents to seek resolution of their tax-related disputes. A taxpayer can file an application for a single year or multiple years. In order to file an application before the ITSC, taxpayers are required to provide 'full and true' disclosure of income they have not disclosed earlier. The ITSC has the power to grant immunity from penalty and prosecution.

e. Taxpayer's Charter

With the objective of building trust between the taxpayer and tax administration, a Taxpayer's Charter was announced recently. The structure of the 2020 Charter is simple and has two parts – tax department commitments and taxpayer's expectations. The Charter aims to boost trust, reduce arbitrary harassment and increase efficiency of the tax department. Making tax officers accountable for the actions may significantly reduce litigation and promote transparency. As India seeks to establish a stable and tax friendly regime, the implementation of the Charter is a welcome step.

f. Important Considerations for Non-Residents

• Determination of PE and income attributable to PE

One of the most contentious issue for tax litigations in India involves determination of PE in India. Business income of non-residents is generally taxable in India when such non-resident has a PE in India under the Income-Tax Act, 1961 read with the relevant DTAA. There are several debatable issues such as what constitutes fixed place of business in India, how to compute the number of days of presence in India, or existence of a dependent agent in India, etc. which are further driven by the nature of business a non-resident taxpayer conducts in India. Since the constitution of a PE is mainly a fact driven exercise, it is one of the most debatable issues leading to prolonged litigation.

Further, attribution of profits to PE is also an extremely challenging issue as there has been lack of certainty and clarity regarding the methodology followed by the Indian Revenue Authorities for attribution of profits of a PE of a non-resident in India. In this regard, CBDT has released draft attribution rules on how profits are to be attributed to a non-resident person having PE in India.

• Royalty from software

There is considerable litigation in India regarding characterization of amounts received for supply of software (including off-the-shelf software). Indian Courts have divergent views on the issue of whether such consideration should be construed as royalty, and consequently, be taxable in India.

• Offshore supply

Taxability of engineering, procurement and construction ('EPC') contracts has been a vexed issue in India. Depending on the nature of work, EPC contract may cover offshore supply, offshore services, onshore supply and onshore services. There has been considerable litigation on the taxability of offshore supply and services in India.

In the past, various judiciaries have held that offshore supply is not taxable in India if the title is transferred outside India and the related risk and rewards of ownership have also been transferred outside India. However, Indian tax authorities generally seek to adopt an aggressive position of bringing the profits from offshore supply to tax net in India making it a long standing matter of debate before the Indian Courts.

O. Considerations For Selection Of Investment Jurisdiction

Investments into India are often structured through holding companies in various jurisdictions for number of strategic and tax reasons. Selection of investment jurisdiction is dependent on various critical parameters such as commercial rationale, treaty network, corporate and legal framework, political and economic stability, administration support, etc. Favorable tax treaty network has been one of the critical drivers behind selection of investment jurisdiction as the same helps in reducing the tax costs of investments. However, with evolving tax laws including re-negotiation of treaties on account of signing of MLI, Indian tax authorities will be increasingly focused on scrutinizing intermediate holding companies which have been set up merely to obtain tax benefit and do not have any commercial or business rationale. Accordingly, the commercial and business rationale of choosing a particular jurisdiction needs to be thought through before routing investments through such holding jurisdiction.


28%
TAX
GST
5%
SALES
+18.63%
+20.63%
+28.63%
-20.45%
-38.23%
-20.45%

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Indirect Taxes

Indirect Taxes

Indirect Tax Overview

Domestic supply of goods and services is subject to Goods and Service Tax ('GST') at the rates prescribed under GST laws, based on classification of goods. GST rate on provision of goods ranges from 5% to 28% and 18% on provision of services. GST is also levied on reverse charge mechanism [liability casted on service recipient] on the import of services in India which includes import of software as well.

GST was introduced in India in 2017 to subsume multiple indirect taxes like excise duty, service tax, VAT, CST, luxury tax, entertainment tax, entry tax, etc. levied on different kinds of transactions. The objective behind introducing GST was to remove cascading effect of various indirect taxes and is considered as one of the biggest reforms in the indirect tax landscape in India.

Some products such as alcoholic liquor for human consumption and specified petroleum products (namely petroleum crude, high speed diesel, motor spirit, natural gas and aviation turbine fuel) are still outside the ambit of GST regime and VAT is applicable on such products.

The GST regime apart from removing the cascading effect of the various indirect taxes also promises seamless credit on goods and services used across entire supply chain with some exceptions such as supplies charged under composition scheme and supply of exempted goods and/or services.

Under the GST era, the supplier of goods and /or services is allowed to avail the credit of GST paid on account of input, input services and capital goods used in making such outward supplies (subject to restriction). Such credit can then be utilized to pay the outward GST liability. The import of goods into India is subject to the Customs duty levied by the Central Government at the rates prescribed in the Customs Tariff Act, based on classification of the goods. The classification is aligned to the internationally prevalent Harmonized System of Nomenclature ('HSN'). Customs Duty levied on imports comprises of Basic Customs Duty (BCD), Social Welfare Surcharge, and Integrated Goods and Service Tax (IGST). Certain goods are also subject to Anti-dumping Duty and Safeguard Duty in India.

Upon import of goods in India, BCD is applicable on the CIF[1] value of the goods and Social Welfare Surcharge (SWS) is computed on the BCD value. Thereafter, IGST is computed on cumulative value comprising of CIF value of goods, BCD and SWS. Below is an example for computation of customs duty:

Particulars	Applicable Rate	Amount (in INR)
CIF Value of goods	-	100
BCD	10%	10
SWS	10%	1
Subtotal	-	111
IGST	18%	19.98
Total Tax payable		30.98

1. Cost, Insurance and Freight

GST Regime

GST is a consumption-based tax applicable on every supply of goods and services.
India follows a dual structure of GST, where intra-state/intra-union territory supplies are liable to Central GST (CGST) and State GST (SGST) /Union Territory GST (UTGST). Inter-state supplies including imports are liable to IGST.

Supply

Under the GST regime, one comprehensive taxable event has been specified i.e., Supply. Supply includes sale, transfer, barter exchange, license, rental lease or disposal made or agreed to be made for a consideration, in the course or furtherance of business. As specified in the GST Laws, certain transactions if made even without consideration are considered supplies and are liable to GST. This would also include transactions between related persons.

GST Rates

The standard rate of GST is 18 percent. However, certain products/services are eligible for a lower rate of 5 percent or 12 percent. A higher rate of 28 percent applies to certain specified luxury goods including cars, tobacco and cement, etc. The applicable rate depends on the classification of the goods or services as per the GST rate schedule.
In addition to GST being liable at 28 percent, a GST compensation cess is also levied on certain luxury goods such as motor vehicles, cigarettes, carbonated beverages, cigars, aircrafts and yachts for personal use, etc.
Zero Rated or Exemptions or Reduced Rates
Export of goods or services outside India and supplies to a Special Economic Zone (SEZ) developer or a SEZ unit within India are treated as zero rated supplies. GST is zero rated on the supply of goods to SEZ unit/ SEZ developer/ Exports i.e., GST is applicable at zero rate. Refund of GST paid on inputs and input services used in such supplies is also available. Certain specified goods or services are exempt from GST or attract nil-rate of duty e.g., various agricultural produce/food, grains, items of basic necessities, electricity, etc.

Registration

Every supplier of goods shall be liable to be registered under GST if his aggregate turnover[2] in a financial year exceeds INR 4 million[3] . However, the threshold limit for service providers is INR 2 million. Thus, if at any time during the year, a supplier exceeds the threshold limit of the turnover, he would be liable to get himself registered under the GST Laws. Further, reduced threshold limit has been provided for supplier of goods located in specified states like Mizoram, Nagaland, Manipur, Tripura etc. Furthermore, certain specified categories of persons including persons making interstate supplies (i.e., from one state in India to another state or exporting goods out of India) or persons liable to pay tax under the reverse charge mechanism, are required to register regardless of their turnover being lower than INR 4 million or INR 2 million.

If the threshold limit of the aggregate turnover exceeds, the supplier would be required to get itself registered in every state from which it makes taxable supply of goods or services. However, multiple places of business in a particular state may be added in state specific GST registration. Separate GST registration can be obtained for separate business verticals in a state.

2. Computed on Pan India basis
3. With effect from 1 April 2019

Input Tax Credit ('ITC')

GST is a value added tax system. Under the GST law, seamless credit of input GST has been ensured for eligible goods and services for all kind of businesses. This facility was not available in earlier tax regime.

In some cases, ITC of taxes paid on inward supplies is not available on:
• Supplies exclusively used for making exempt or non-taxable outward supplies e.g., supply of electricity, provision of healthcare services etc.
• motor vehicles;
• food and beverages;
• outdoor catering services;
• rent-a-cab services;
• employee related expenses;
• life insurance and health insurance services, etc.

Exports and Refund of Taxes

The GST Law specifies zero-rated supplies to include export outside India or supplies made to SEZ. In such a case, the supplier has the option to either pay the applicable GST upon supply of goods and services. The supplier may use accumulated input GST for payment of output liability. Such output tax paid can then be claimed as refund from the Government.

Alternatively, such supplies may be undertaken as zero rated i.e. GST is paid at zero rate and refund of unutilized input taxes availed in relation to such supplies may be obtained from the authorities. It may be noted that refund of unutilized ITC availed on capital goods is not available.

This benefit may be availed subject to the safeguard of the specified conditions such as compliance with furnishing of Letter of Undertaking or bond etc.

Additionally, any taxable person may also claim refund in case of inverted duty structure i.e. where the GST rate of inputs used in production of output are higher than the GST rate of the output.

Under the GST Laws, online refund application is required to be filed by the taxpayer within two years from the relevant date.

Composition Scheme

Composition scheme has been made available to the suppliers having aggregate turnover of up to INR 15 million and INR 0.75 Million in case of North-Eastern states and Himachal Pradesh.

Such Scheme is available on Pan India basis. i.e., all the registration in a single PAN should opt for composition scheme. However, specific taxpayers as mentioned in the GST Laws cannot opt for such scheme and includes:
• Person making inter-state supplies
• Casual taxable person or Non-resident taxable person etc.

Further, suppliers under the said scheme are allowed to make outward supplies at defined GST rate ranging from 1 percent to 6 percent. However, there are specific restriction applicable to persons opting for composition scheme like :
• Non-availability of ITC
• Payment of tax at applicable rate for supplies under reverse charge mechanism
• Bill of supply is required to be issued instead of tax invoice which effectively means that input tax credit of the GST paid on procurement of goods and services from a composition taxpayer, would not be available to the recipient

Compliance

Typically, the returns are required to be filed on a monthly basis by all registered persons except a person opting for the composition scheme for whom the frequency of filing returns is quarterly. Details of all outward supplies of goods and services including details of debit and credit notes are required to be reported in form GSTR-1. Further, in GSTR-2A, details of all inward supplies of goods and services i.e. purchases made from registered suppliers during a tax period are auto-populated based on data filed by the suppliers in their form GSTR-1.

As per the matching concept introduced in the GST regime, every taxpayer is required to avail only those credit which is auto-populated in its Form GSTR-2A. Such credit should be reconciled every month with the credit booked by the taxpayer in its books of accounts and should be claimed only if details of invoice in possession of the taxpayer has been uploaded by its vendor on the GST portal, are matching. Any unreconciled ITC availed and utilized may have interest or penal implications.

The reasons for unreconciled ITC may be on account of GST returns not filed by the vendor, less amount of tax deposited/mentioned by the vendor in its returns, wrong GSTIN of the recipient mentioned by the vendor etc. This casts an additional burden on the taxpayer to ensure vendor compliances under GST.

Further, GSTR-2A would not include credits such as those which are availed under head import of service, import of goods, services received from unregistered person under RCM etc. These details are separately required to be reported in the GST returns.

Additionally, GSTR 3B is a simplified monthly summary return which is required to be filed for inward and outward supplies. It is a self-declaration providing the summary of GST liabilities of the taxpayer for the tax period.

Further, all registered persons are also required to file an annual return in Form-GSTR-9 on or before 31 December of the succeeding year.

Additionally, every registered person having turnover above INR 20 million in a financial year is required to get its books of accounts reconciled with Form GSTR-9 by a third party chartered accountant or a cost accountant and file the audit report in FORM-GSTR-9C on or before 31 December of the succeeding year.

Assessment

Under GST, assessment means determination of tax liability and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment. The same has been explained below:

a. Self-assessment: It involves, payment of tax on self-assessment and all GST returns are filed based on such assessment.

b. Provisional assessment: An assessee can request for provisional assessment if he is unable to determine the value of supply. Tax would be payable basis the provisional order. Final assessment order would be issued within 90 days of issuance of provisional assessment order.

c. Scrutiny of Returns: The proper officer can scrutinize the return to verify its correctness. It will inform discrepancies noticed and provide opportunity for explanation/corrections.

d. Assessment of Non-Filers of Returns: Under such assessment, tax authority may pass an assessment order on best judgment basis, based on information available when registered person fails to file returns.

e. Assessment of Unregistered Persons: The tax authority may pass an assessment order on best judgment basis, based on the information available when taxable person has not obtained registration, but was liable to pay tax.

f. Summary Assessment: Assess the tax liability and issue an assessment order, if officer believes that any delay in doing so may affect the interest of revenue.

Invoices

The law prescribes the specific details to be captured in the tax invoice and other documents. Also, the GST Council has proposed to implement a procedure to electronically obtain pre-authentication of invoices through the allocation of an electronic invoice reference number for all B2B supplies. E-invoice under GST is applicable for taxpayers from 1st October 2020 whose aggregate turnover during the financial year 2019-20 exceeds INR 5 billion and INR 1 billion from 1 January 2021. E-invoicing is applicable on supplies to registered persons (B2B), Supplies to SEZs (with/without payment), Exports (with/without payment) and Deemed Exports[4] . The invoices generated by a taxpayer will now be reported to 'Invoice Registration Portal (IRP)'. On reporting, IRP returns the e-invoice with a unique 'Invoice Reference Number (IRN)' after digitally signing the e-invoice and adding a QR Code. Then, the invoice can be issued to the receiver (along with QR Code).

Following entities/ sectors are exempt from e-invoicing requirement:
• SEZ Units
• insurer or a banking company or a financial institution, including a non-banking financial company
• goods transport agency supplying services in relation to transportation of goods by road in a goods carriage
• suppliers of passenger transportation service
• suppliers of services by way of admission to exhibition of cinematograph films in multiplex screens

Valuation in Case of Related Party Transactions – GST and Customs Law

Under GST, taxable value is the transaction value i.e., price actually paid or payable provided the supplier & the recipient are not related, and price is the sole consideration. Under GST law various categories of related persons have been specified and as relation may influence the price between two related persons therefore special valuation rule has been framed to arrive at the taxable value of transactions between related persons. In such cases, following values have to be taken sequentially to determine the taxable value:

i. Open Market Value.
ii. Value of supply of like kind and quality.
iii. Value of supply based on cost i.e. cost of supply plus 10% mark-up.
iv. Value of supply determined by using reasonable means consistent with principles & general provisions of GST law (Best Judgment method).

Similarly, under the customs law, import of goods from a related overseas supplier is subject to the Customs Valuation (Determination of Value of Imported Goods), Rules, 2007 ("CVR"). Such rules require every importer to furnish information to the Customs authorities on imports made from related overseas supplier. Information is submitted to the Special Valuation Branch (SVB) to investigate whether the assessable value on which duty would be payable on imports made from related overseas supplier is at arm's-length.

4. Deemed Exports under GST include supply under Advance Authorization, Export Promotion Capital Goods Authorization and supplies to Export Oriented Units

As per the CVR, where the buyer and seller of imported goods are related parties, then the transaction value shall be computed sequentially in accordance with the methods as laid down below:

i) Value of identical goods imported in India
ii) Value of similar goods imported
iii) deductive method
iv) Computed method

Applicability of VAT On Certain Products

The Constitutional Amendment[5] excludes alcohol for human consumption from the definition of GST. Further, five petroleum products viz. petroleum crude, motor spirit (petrol), high speed diesel, natural gas and aviation turbine fuel have temporarily been excluded from GST applicability and GST Council shall decide the date from which they would be included in GST regime. Furthermore, electricity has also been excluded from the ambit of GST.

In respect of above commodities, the existing tax regime i.e. VAT and Central Excise continues to be applicable.

5. 101stConstitutional Amendment Act, 2016

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Winding Up Of Companies In India

Winding Up Of Companies In India

Under the Companies Act 'winding up' has been defined to mean winding up under the Companies Act or liquidation under the Insolvency and Bankruptcy Code, 2016 ("IBC"), as applicable. Thus, winding up proceedings are governed by the provisions of the Companies Act as well as by the IBC. Chapter XX of the Companies Act governs the mode and process of winding up of companies.

The modes of closure of a company can be classified under the following broad categories:

Winding Up By The National Company Law Tribunal ("Tribunal")

Under the Companies Act

In terms of Section 271 of the Companies Act, a company may, on a petition under Section 272 of the Companies Act, be wound up by the Tribunal in following cases:

i. if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

ii. if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

iii. if on an application made by the RoC or any other person authorized by the Central Government, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

iv. if the company has made a default in filing with the RoC its financial statements or annual returns for immediately preceding five consecutive financial years; or

v. if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

In terms of Section 272(1) of the Companies Act a petition to the Tribunal for the winding up of a company can be presented by any of the following:

i. the company;
ii. any contributory or contributories;
iii. all or any of the persons specified in clauses (i) and (ii);
iv. the RoC;
v. any person authorized by the Central Government in that behalf; or
vi. by the Central Government or a State Government.

On receipt of a petition for winding up of the Company, by any of the persons authorized as per Section 272 of the Companies Act, the Tribunal under Section 273 of the Companies Act can pass following orders:

(a) dismiss it, with or without costs;
(b) make any interim order as it thinks fit;
(c) appoint a provisional liquidator of the company till the making of a winding up order;
(d) make an order for the winding up of the company with or without costs; or
(e) any other order as it thinks fit.

The Tribunal at the time of the passing of the order of winding up after ensuring that there has been no fraud, misconduct, misfeasance etc., appoints an official liquidator or the liquidator as the provisional liquidator or the company liquidator who is responsible for the conduct of the proceedings for the winding up of the company. Upon the company liquidator filing the final accounts after realizing all assets of the company and payment to the creditor and the shareholders, the Tribunal may pass an order for winding up of the company.

Under the IBC

In case any company commits a default or is unable to pay its debts (where the minimum amount of the default is INR 100,000, which limit is now revised to INR 10,000,000), a creditor (financial or operational) or the company itself may initiate 'corporate insolvency resolution process' by filing an application before the Tribunal.

The company may be subject to re-organization or resolution process under the IBC. In case the corporate insolvency resolution process is not successful, then the company liquidation process is initiated to pay the debt of creditors from realization of sale of assets of the company.

Summary Procedure Of Liquidation Of Eligible Companies Under Section 361 Of The Companies Act

Section 361 of the Companies Act provides for summary procedure for winding-up of certain eligible companies. In terms of the said section, powers have been granted to the Central Government (power assigned to jurisdictional Regional Director), to wind up such companies which fulfill the following criteria:

i. The Company has assets of book value not exceeding one crore rupees; and

ii. Satisfies any of the following criteria:

a) The deposit taken by a company where total outstanding of deposits does not exceeds INR 2,500,000; or

b) The company of which the total outstanding loan including secured loan does not exceed INR 5,000,000; or

c) The company of which turnover is up to INR 500,000,000; or

d) The company of which paid up capital does not exceed INR 10,000,000.

Upon winding up petition being made by the company to the Regional Director, the Regional Director appoints the official liquidator as the liquidator of the company. Further, upon the official liquidator filing the final accounts after realizing all assets of the company and payment to the creditor and the shareholders, the Regional Director can pass an order dissolving the company.

Strike Off Of A Company By The Roc Under Section 248 Of The Companies Act

In terms of Section 248(2) of the Companies Act and rules made there under, a company may, after extinguishing all its liabilities, by a special resolution or consent of seventy-five percent. members in terms of paid-up share capital, file an application in the prescribed manner to the RoC for removing the name of the company from the register of companies on all or any of the following grounds:

i. a company has failed to commence its business within one year of its incorporation; or

ii. a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company; or

iii. the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation; or

iv. the company is not carrying on any business or operations, as revealed after the physical verification carried out by the RoC.

The RoC shall, on receipt of such application, cause a public notice to be issued in the prescribed manner. After the expiry of prescribed period and the RoC upon being satisfied that the company is fit for being struck off from the RoC's companies register, strike off company's name from its register and the company shall stand dissolved.

Voluntary Liquidation Of A Company Under The IBC

In terms of Section 59 of IBC, corporate person/ company who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings and subject to the conditions mentioned under Section 59(3) of IBC, which includes the following:

i. a declaration from majority of the directors of the company verified by an affidavit stating that they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation and the company is not being liquidated to defraud any person;

ii. audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation and a report of the valuation of the assets of the company, if any prepared by a registered valuer should be attached with the abovesaid declaration;

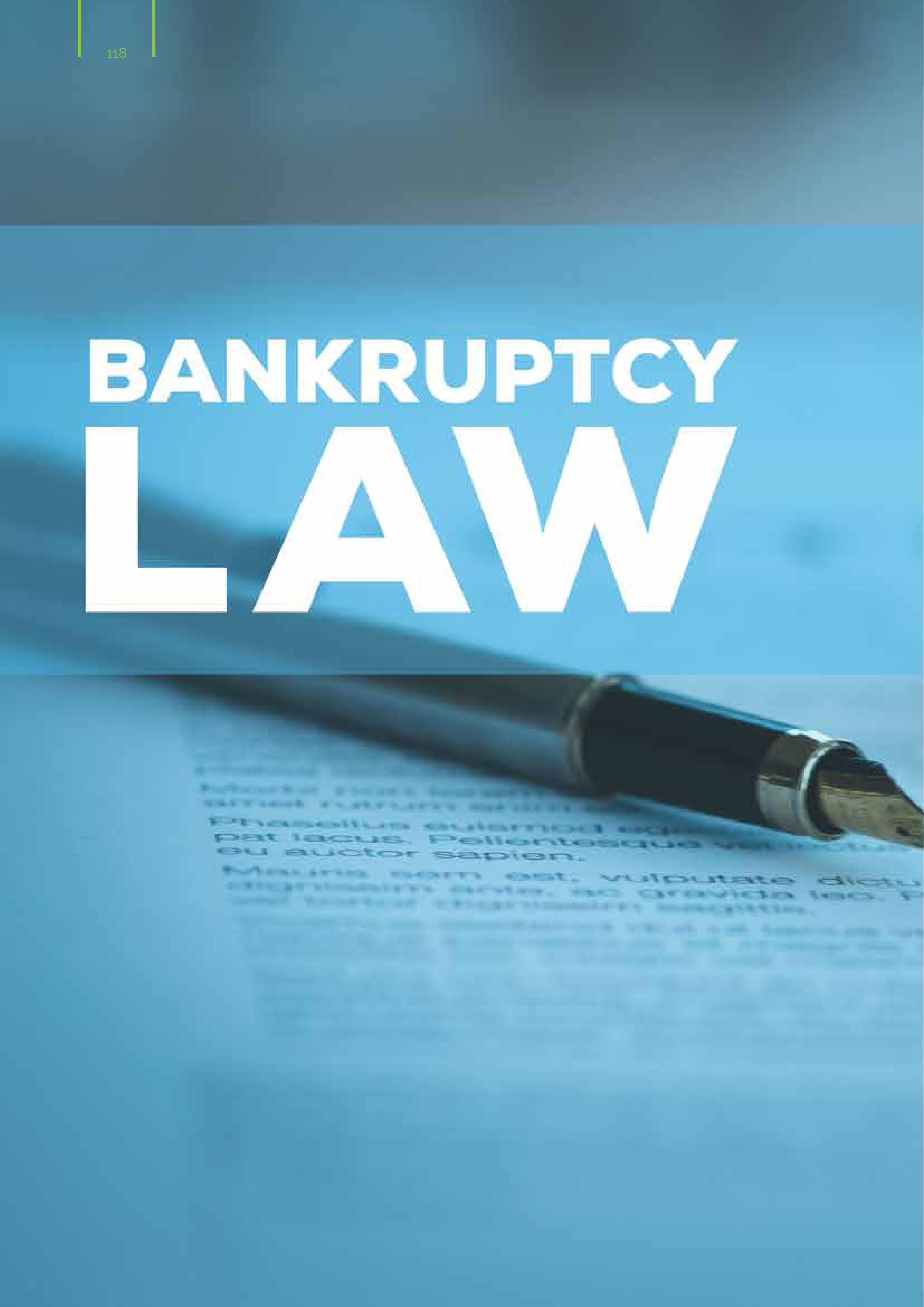
iii. within four weeks of a declaration under sub-clause (i), a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator.

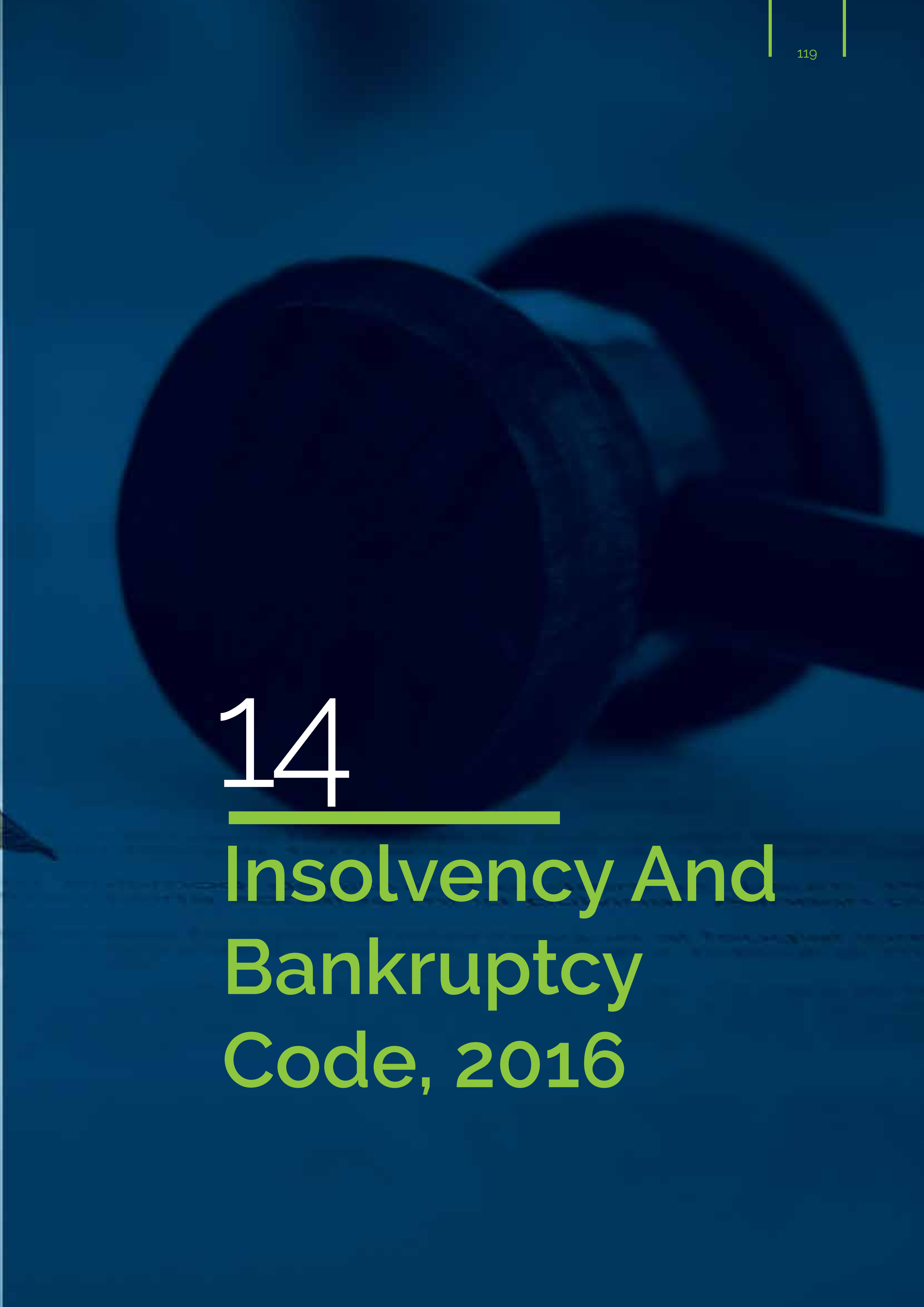
The company shall notify the RoC and the Insolvency and Bankruptcy Board of India about the resolution to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

Further, Subject to approval of the creditors, the voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the resolution.

Once the affairs of the company have been completely wound up, liquidator shall make an application to the Tribunal for the dissolution. Basis this, the Tribunal passes an order that the company is dissolved from the date of that order and the company shall be dissolved accordingly.

BANKRUPTCY LAW





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Insolvency And Bankruptcy Code, 2016

Insolvency And Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 ("Code") provides a mechanism for the insolvency resolution of debtors in a time bound manner to enable maximisation of the value of their assets, with a view to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.

The Code came into effect on December 1, 2018 and introduced a creditor-in-control regime, reduced scope for judicial intervention and established institutions such as the Insolvency and Bankruptcy Board of India, insolvency professionals and information utilities.

Applicability

The Code applies to all 'corporate persons' (i.e. a company, a limited liability partnership or is person incorporated with limited liability under any law) other than financial service providers such as banks, insurance companies, non-banking finance companies etc. Further, Code also applies to partnerships and proprietary concerns.

The Insolvency and Bankruptcy Board of India ("IBBI") has been constituted under the Code as a regulatory and supervisory body. It has the overall responsibility to educate, implement and operationalize the Code. The Code envisages the creation of new group of professional insolvency practitioners known as 'Resolution Professionals' to conduct the insolvency resolution. The Code also sets up 'Insolvency Professional Agencies', which are professional bodies to regulate the practice of insolvency professionals. 'Insolvency Professionals' are individuals who are required to take membership of an Insolvency Professional Agencies and thereafter register themselves with IBBI.

Framework Under The Code

Pursuant to the Code, various rules and regulations have been passed and notified, such as:

(i) The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("AA Rules"):- These rules set out the procedure for filing of application for corporate insolvency resolution process of a corporate debtor;

(ii) The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process Corporate Person) Regulations, 2016 ("CIRP Regulations"):- These regulations set out the Corporate Insolvency Resolution Process ("CIRP"); and

(iii) The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016:- These regulations set out the liquidation process.

The Code provides for a two-stage process to deal with insolvency of a corporate person. In stage I, the corporate debtor undergoes a CIPR where the creditors of the corporate debtor attempt to resolve the insolvency of the corporate debtor in a time bound manner. To resolve the insolvency, resolution plans for the corporate debtor are invited from various persons and thereafter approved by the committee of creditors ("COC"). If the CIRP fails, the corporate debtor enters stage II for its mandatory liquidation.

The CIRP of a corporate debtor can be initiated under the Code by its financial creditor or operational creditor, by filing an application before the National Company Law Tribunal (NCLT) in case there is a default in payment of INR 10,000,000 (Rupees Ten Million only). There is some difference between the filing procedures in case of financial creditor, operational creditor and corporate debtor itself. As per a recent amendment to the Code, no application for initiation of CIRP of a corporate debtor shall be filed, for any default arising on or after 25th March, 2020 for a period of nine months or such further period, not exceeding one year from such date, as may be notified by the Government from time to time.

Additionally, in the event of its inability to pay creditors, a company may choose to go for voluntary insolvency resolution process, a measure by which the company can itself take recourse of the Code for the purpose of revival or liquidation.

Initiation of CIRP by Financial Creditor

A Financial Creditor[1] is one to whom a financial debt is owed and includes such person to whom the debt has been legally assigned or transferred ("Financial Creditor").

A Financial Creditor may, either by itself, or jointly with other Financial Creditors, file an application for CIRP of a corporate debtor when a default has occurred. In case of financial creditors holding securities/ deposit or a class of financial creditors, an application for initiating CIRP must be filed jointly by at least one hundred such creditors, or not less than 10% of the total number of such creditors in the same class, whichever is less.

NCLT is required to, within 14 (fourteen) days from filing of such application, ascertain the existence of default. The Financial Creditor is also required to name the resolution professional to act as the interim resolution professional for CIRP in the application.

Initiation of CIRP by Operational Creditor

An Operational Creditor is defined as a person to whom an operational debt is owned and includes any person to whom such debt has been legally assigned or transferred. The Code defines an 'operational debt' as a claim in respect of provision of goods or services including employment. Apart from this, a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority is also covered under the definition of operational debt.

Unlike a Financial Creditor, prior to filing an application before NCLT, an Operational Creditor must issue a statutory demand notice to the corporate debtor. The corporate debtor then has 10 (ten) days to either pay or issue a notice of dispute, bringing to the notice of the operational creditor, existence of a dispute on payment of the debt. Such dispute should exist prior to receipt of demand notice by the corporate debtor. If the debt is not disputed, the Operational Creditor can file an application to NCLT in the prescribed form along with all prescribed documents (including documents showing debt and default) and the requisite fees.

Once an application is filed against the corporate debtor, the NCLT will issue notice to the corporate debtor and give it an opportunity to oppose the admission. As per the Code, the NCLT is required to decide the application within 14 (fourteen) days. However, this timeline has been held to be directory as opposed to mandatory and practically, it could take up to 6 (six) months for an application to be decided by the NCLT. Once the application of the Operational Creditor gets admitted by the NCLT, the CIRP of the corporate debtor commences.

1. The Code provides that an amount raised from allottees (home buyers) under a real estate project is deemed 'financial debt' as such amount has the commercial effect of a borrowing.

CIPR

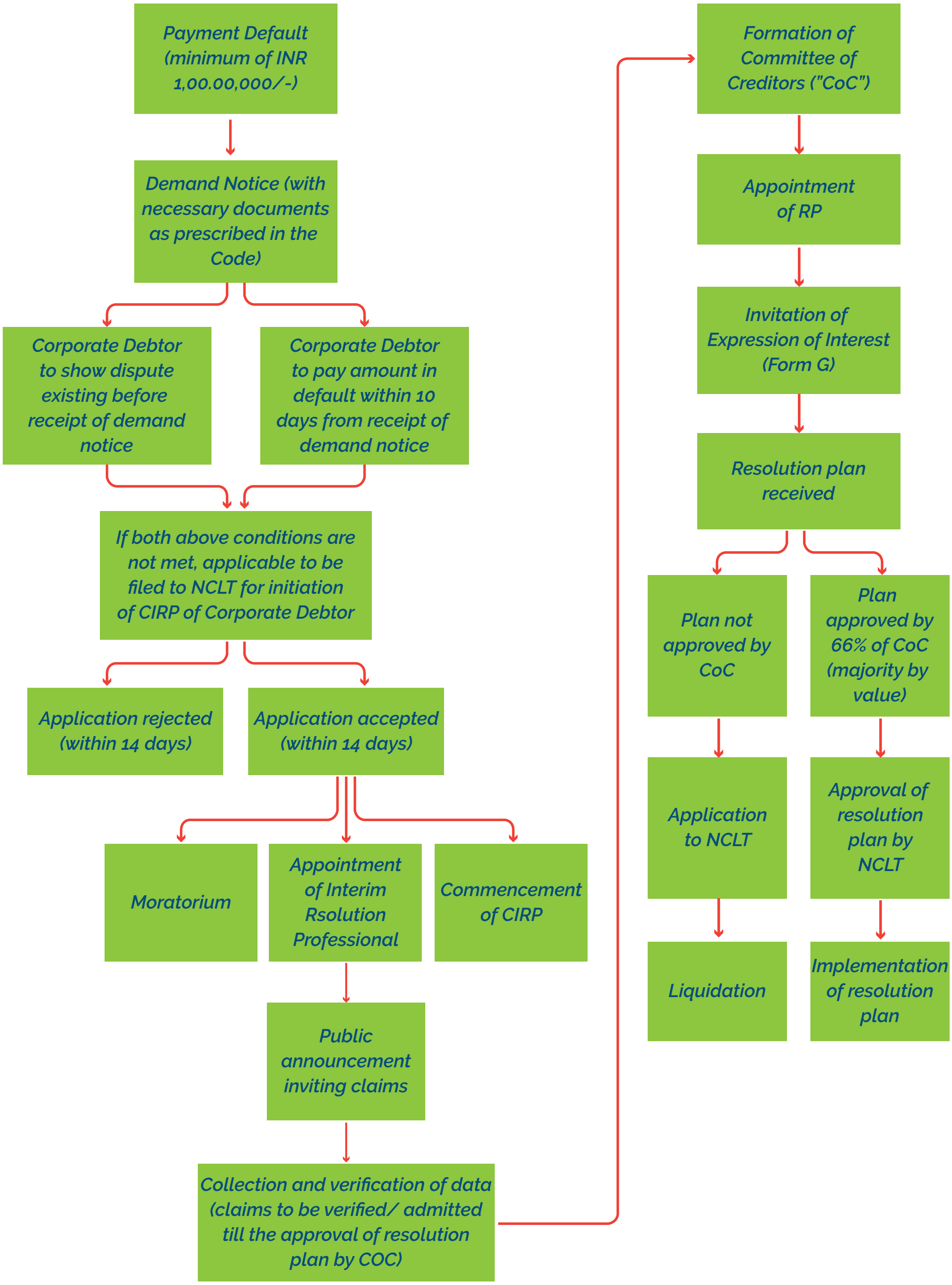
Upon passing of the admission order by NCLT, a moratorium (on actions against the corporate debtor) comes into effect and is in effect during the entire resolution process. A moratorium includes (i) prohibition of institution/ continuation of pending suits against the corporate debtor, (ii) transferring, encumbering, alienating or disposing of by the corporate debtor of any of its assets or legal/ beneficial interest therein, (iii) action of foreclosure, recovery or enforcing any security interest of the corporate debtor in respect of its property under Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002.

An Interim Resolution Professional ("IRP") is appointed for the corporate debtor to oversee the resolution process on the date of admission of CIRP by the NCLT. The powers of the board of directors of the corporate debtor are suspended and vest with the IRP. The IRP thereafter invites claims from various creditors of the corporate debtor and forms a Committee of Creditors ("CoC") that can either continue with the IRP as the resolution professional ("RP") or replace the IRP with a new RP. The RP manages the corporate debtor as a going concern and invites 'resolution plans' for the corporate debtor from persons who satisfy the eligibility criteria laid out by the RP with approval of the CoC. Such invitation is made by RP by issuance of an 'Invitation for Expression of Interest' ("IEOI"). Pursuant to such invitation, any person who satisfies the eligibility criteria and is otherwise not disqualified to present the plan under the Code ("Prospective Resolution Applicant") can submit an 'Expression of Interest' ("EOI"), showing its preliminary interest in the resolution of the corporate debtor. Upon receipt of EOI, the RP conducts preliminary diligence on the Prospective Resolution Applicant(s) and issues information memorandum and provides other relevant information to them to enable them to submit their resolution plan setting out proposals for resolving insolvency of the company.

All resolution plans that comply with requirements of the Code are placed before the CoC for their consideration. If any resolution plan is approved by the CoC (with 66% vote share of Financial Creditors), it is presented to the NCLT for final approval.

If the resolution plan is approved by the NCLT, the same is binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. On the other hand, if the CIRP is unsuccessful, the NCLT will pass a liquidation order for the corporate debtor. The approval of the resolution plan by NCLT (in case resolution is successful) or the liquidation order by NCLT (in case the resolution is unsuccessful) marks the end of CIRP.

A flow-chart of the broad sequence of events in a CIRP by an Operational Creditor is set out below. The flow chart does not cover liquidation.


Payment Default (minimum of INR 1,00,00,000/-)
Demand Notice (with necessary documents as prescribed in the Code)
Corporate Debtor to show dispute existing before receipt of demand notice
Corporate Debtor to pay amount in default within 10 days from receipt of demand notice
If both above conditions are not met, applicable to be filed to NCLT for initiation of CIRP of Corporate Debtor
Application rejected (within 14 days)
Application accepted (within 14 days)
Moratorium
Appointment of Interim Rsolution Professional
Commencement of CIRP
Public announcement inviting claims
Collection and verification of data (claims to be verified/ admitted till the approval of resolution plan by COC)
Formation of Committee of Creditors ("CoC")
Appointment of RP
Invitation of Expression of Interest (Form G)
Resolution plan received
Plan not approved by CoC
Plan approved by 66% of CoC (majority by value)
Application to NCLT
Approval of resolution plan by NCLT
Liquidation
Implementation of resolution plan

FREQUENTLY ASKED QUESTIONS

1. Is there a defined timeline within which the CIRP of the corporate debtor must be completed?

The entire CIRP process (from date of admission of application till submission of the resolution plan with NCLT for its approval) must be completed within a time period of 180 (One Hundred Eighty) days. This time period is extendable to 270 (Two Hundred Seventy) days in certain circumstances. The maximum time within which CIRP has to be mandatorily completed, including time taken in legal proceedings in relation to such resolution process is 330 (Three Hundred Thirty) days.

One of the key objectives of the Code was to achieve time-bound resolution of distress since delays severely affect deal value, particularly as scarce capital does not wait to be deployed. However, since the implementation of the Code, delays adhering to the aforesaid timelines has been a major problem. The Supreme Court has held that these timelines should be followed as closely as possible, the timelines have been held to be in the nature of 'model timelines' and may be deviated from for sufficient reasons.

2. Can an application filed before the NCLT by a Financial Creditor or Operational Creditor be withdrawn?

The Code in its original form did not contain any provision allowing withdrawal of CIRP application after an admission order was passed by NCLT. This created a helpless situation for debtors and creditors who wished to settle the outstanding payments after the commencement of CIRP of a company. Consequently, the Code and the CIRP Regulations have been amended to allow withdrawal applications to be filed by an applicant with permission of 90% of voting shares of the CoC.

3. Does the Operational Creditor recover all the outstanding dues from the Corporate Debtor?

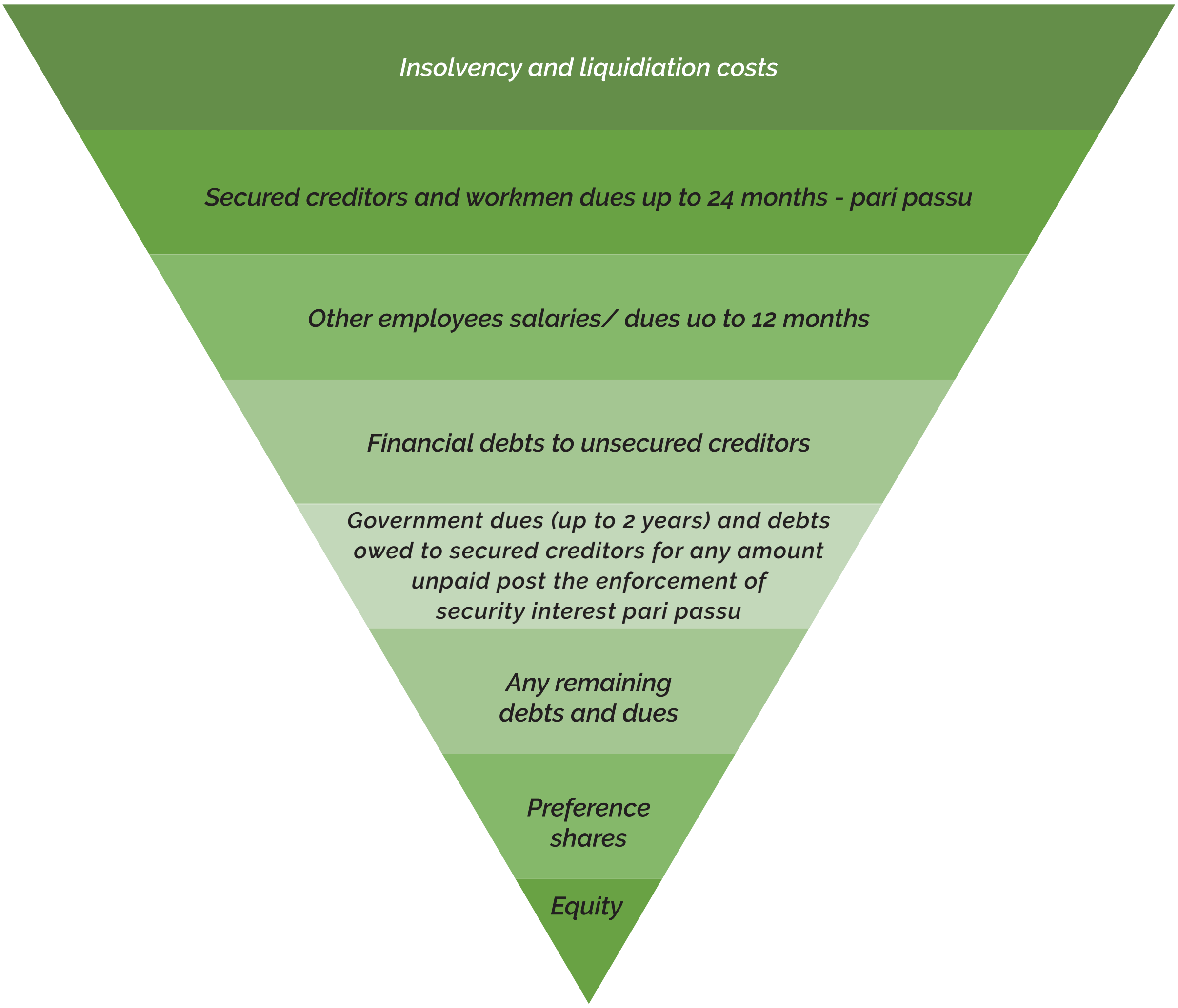
Under the Code, recovery for an operational creditor can happen in the following three ways:

(i) Settlement: Corporate debtors often try to settle their debts to fend off CIRP. In that case the amount of recovery would depend on the settlement terms agreed to between the parties.

However, judicial authorities have emphasized that the Code should not be used as a tool for recovery of dues, for which the appropriate remedy is to approach civil courts. So care must be taken to not conduct oneself in a manner which may be viewed as an abuse of the process of the Code. Fraudulent or malicious initiation of CIRP, for any purpose other than for the resolution of insolvency, is punishable with penalty of not less than INR 1,00,000 (Rupees One Lakh only) and which could go up to INR 1,00,00,000 (Rupees One Crore only).

(ii) Resolution: The other way for an operational creditor to recover its dues under the Code is under the resolution plan approved for the corporate debtor. The resolution plan provides for payments to creditors of the corporate debtor. While there is no payment waterfall prescribed for resolution and the resolution applicant is free to decide what payments it will make under the resolution plan, certain minimum requirements must be met in a resolution plan. One such requirement is that payment of debts of operational creditors should not be less than: (i) amount to be paid in the event of a liquidation of the corporate debtor; or (ii) amount that would have been paid to such operational creditor, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority set out for liquidation.

(iii) Liquidation: Failure of resolution leads to liquidation of the corporate debtor. Creditors of a corporate debtor can recover their dues in liquidation as per the 'distribution waterfall' prescribed under Section 53 of the Code, which is as follows:



It has been seen often that operational creditors have had to incur haircuts under resolution plans. In the event of liquidation, the recoveries to operational creditors depends on whether any money is left after distribution is made in accordance with the above waterfall.

4. Does an Operational Creditor form a part of the CoC?

The CoC comprises of all financial creditors of the corporate debtor. If a Financial Creditor is a related party of the corporate debtor, such Financial Creditor shall not have any right of representation, participation or voting in a meeting of CoC. This does not apply to a Financial Creditor, regulated by a financial sector regulator, if it is a related party of the corporate debtor solely on account of conversion or substitution of debt into equity shares or instruments convertible into equity shares, prior to the insolvency commencement date.

If a Financial Creditor is an operational creditor as well then (a) such creditor will be considered to be a Financial Creditor to the extent of the financial debt owed by the corporate debtor and will be included in CoC, with voting share proportionate to the extent of financial debts owed to such creditor; and (b) such creditor shall be considered to be an Operational Creditor to the extent of the operational debt owed by the corporate debtor to such creditor. All decisions of the CoC are required to be taken by a vote of not less than 51% of voting share of the Financial Creditors.

In a scenario where a corporate debtor does not have any financial debt or if all Financial Creditors are related parties of the corporate debtor, the CoC will be constituted in the following manner:

(a) 18 (eighteen) largest Operational Creditors by value[2];

(b) 1 (one) representative elected by all workmen other than those workmen; and

(c) 1 (one) representative elected by all employees other than those employees.

5. Is there an appellate mechanism from an order of the NCLT?

The court of first instance, dealing with the Code is the NCLT. NCLT benches are spread across various parts of the country. An application for initiation of CIRP is required to be filed in the NCLT within whose jurisdiction the registered office of the corporate debtor is situated.

An appeal from NCLT lies to the NCLAT which is situated in New Delhi. An appeal against an order of NCLT can be filed within a period of 30 (thirty) days before the NCLAT. NCLAT may allow an appeal to be filed after the expiry of the said 30 (thirty) days period if it is satisfied that there was sufficient cause for not filing the appeal, but such period cannot exceed 15 (fifteen) days.

Appeal from the order of NCLAT lies to the Supreme Court of India within 45 (forty five) days of such order. The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within 45 (forty five) days, allow the appeal to be filed within a further period not exceeding 15 (fifteen) days. However, an appeal to the Supreme Court can be filed only on a question of law arising out of the order of NCLAT.

2. If the number of operational creditors is less than 18 (eighteen), CoC must include all operational creditors.

6. Does the Code provide for fast track insolvency resolution process as well?

Yes, the Code provides for a fast track insolvency resolution process ("FTRP") as well. Invoking FTRP depends on the corporate debtor's assets, income and nature of creditors or quantum of debt. The thresholds for invoking FTRP have been provided in the Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 ("FTRP Regulations"). FTRP Regulations require the entire resolution process to be completed within 90 (ninety) days. However, the NCLT may, if satisfied, extend the period by another 45 (forty five) days.

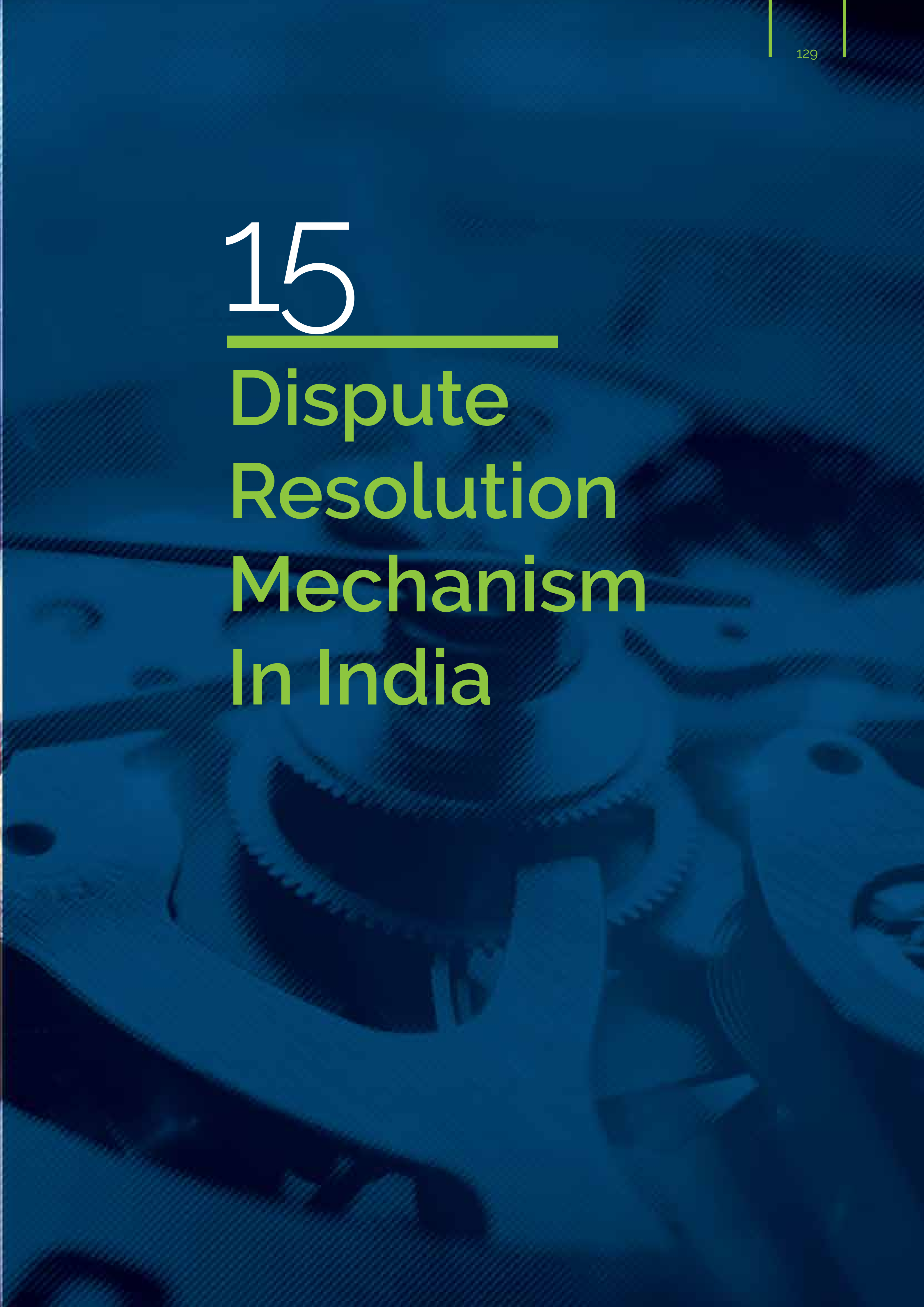
FTRP is applicable to the following categories of corporate debtors:

(i) a small company as defined under the Companies Act, 2013; or

(ii) a start-up (other than the partnership firm), as defined in the notification dated May 23, 2017 of the Ministry of Commerce and Industry; or

(iii) an unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding INR1,00,00,000 (Rupees One Crore only).


CONFLICT



15

Dispute Resolution Mechanism In India

Dispute Resolution Mechanism In India

Introduction

Dispute resolution is the process of adjudicating a dispute/ conflict that has arisen between the parties in a transaction. The dispute can be resolved in an amicable manner or by following the adversarial system, depending upon the choice of the parties and operation of law. To put it broadly, there can be the following methods of dispute resolution:

1. Traditional methods of Dispute Resolution
2. Alternate methods of Dispute Resolution

The traditional method of dispute resolution or litigation refers to a proceeding before an appropriate court of law, as per the procedure established. In addition, there are specialized tribunals such as those for recovery of debt by banks or company disputes, among others. The alternative methods of dispute resolution are more flexible and comprise of negotiation, mediation, conciliation and arbitration.

Judicial Structure In India

Indian administration comprises of three pillars, i.e. Legislature, Executive, and Judiciary. The Indian judicial setup (Judiciary) has a three-tier structure with the Supreme Court of India ("Supreme Court") holding the position of the apex court. The High Courts are below the Supreme Court, functioning in each state in most cases. There are in total 25 High Courts in India. Below the High Court, there are lower courts/ subordinate courts, which include courts at district level and other lower courts. Under the district courts, there are courts of the Sub-Judge, Additional Sub-Judge and Munsif Courts, among others.

Under the Constitution of India, 1950 ("Constitution") the law declared by the Supreme Court is binding on all other courts in India. In addition, as per the doctrine of stare decisis, law declared by High Courts binds subordinate courts and has persuasive value over High Courts of other states. The Supreme Court and the High Courts have original, appellate and writ jurisdiction.

Article 323-B of the Constitution authorizes the legislature to establish tribunals, commissions, district boards, etc. for adjudication or trial of disputes, complaints of offences with respect to various matters.

Jurisdiction And Reliefs

Jurisdiction

The Supreme Court exercises original, appellate and writ jurisdiction. In States, the High Courts have wider powers for issuing directions, writs or orders to all persons, falling under their jurisdiction. Also, the High Court is a court of record and exercises administrative, judicial and disciplinary control over the members of the judicial service of the State. Under the writ jurisdiction, Supreme Court and High Courts have the power to review administrative action including for the purposes of the enforcement of constitutional and fundamental rights under the Constitution.

Below the High courts, in each State and Union Territory, there are subordinate courts, which are the first tier of the judicial structure. The principal laws governing the court procedure in India are the Code of Civil Procedure 1908 ("CPC") and the Code of Criminal Procedure 1973 ("CrPC"). The charter High Courts such as the High Courts of Bombay, Calcutta, Delhi and Madras may also apply Letters Patent Rules, which at times override the provisions of the CPC (if applicable).

In addition to the above, there are special courts established by various statutes, like the Prevention of Corruption Act, 1988; the Narcotics Drugs and Psychotropic Substance (Amendment) Act, 1988 etc. Such special courts deal with a specific matter of litigation. The procedure followed by the special courts is similar to the regular courts with some minor differences.

The jurisdiction of a court, tribunal, or an authority depends upon certain conditions or upon the existence of a particular fact. Jurisdiction of the courts can be categorized in the following categories:

a. Territorial Jurisdiction: Every court has its own local/ territorial limits beyond which it cannot exercise its jurisdiction.

b. Pecuniary Jurisdiction: As per the CPC, a court will have jurisdiction only over those suits in which the amount or value of the subject matter does not exceed the pecuniary limits of its jurisdiction.

c. Jurisdiction as regards the Subject Matter: Different courts are empowered to decide different types of suits and some courts are precluded from entertaining certain suits. For example, matters pertaining to violations of Fundamental Rights can be heard only by the Supreme Court or the High Courts.

d. Original and Appellate Jurisdiction: By exercising original jurisdiction, courts entertain and decide suits, and under appellate jurisdiction courts entertain and decide appeals.

Reliefs

The reliefs which can be granted by a court of law can be divided into three broad categories, i.e., Interim Reliefs, Specific Reliefs and Damages.

A. Interim Reliefs

Orders/ Reliefs which can be passed by a court during the pendency of a suit or proceeding are called interim reliefs. Injunctions, attachment of property, deposit of security deposit are some of the interim reliefs, which are sought from the courts.

(a) Injunction

An injunction is a process by which one who has invaded or is threatening to invade the legal rights of another, is restrained from continuing or commencing such wrongful act. The law governing the grant of injunction is contained in the CPC and the Specific Relief Act, 1963 ("SRA"). An injunction can be categorized as a temporary injunction, perpetual injunction and mandatory injunction.

(b) Attachment of property

Order 38 Rule 5 of the CPC prescribes certain kinds of reliefs in the nature of grant of security, attachment of property etc. It may be granted by the courts, if it is satisfied that the Respondent with an intention to obstruct or delay the execution of a decree is about to dispose of the whole or part of its property or is removing the whole or any part of its property from the local limits of the court having jurisdiction.

(B) Specific Reliefs

The Specific Relief Act, 1963 provides for specific relief for the purpose of enforcing individual civil rights and includes all the cases where the court can order specific performance of an enforceable contract.

The following specific reliefs can be granted under the SRA:

- Remedies of the nature of injunctions;
- Recovery of property;
- Specific performance of contracts;
- Rescission of contracts;
- Rectification of instruments; and
- Declaratory reliefs.

(C) Damages

Under the Common Law, the main remedy for breach of contract or for injury under tort law, is that of damages.

Sections 73 to 75 of the Indian Contract Act, 1872 ("Contract Act"), provide for the remedy of damages.

Section 73 of the Contract Act provides that where there has been a breach of contract, the party suffering from the breach thereof is entitled to receive compensation from the party who is responsible for the breach. However, no compensation is payable for any remote or indirect loss or damage so caused. Section 74 deals with liquidated damages and provides for the measure of damages in two categories: (i) where the contract names a sum to be paid in case of breach; and (ii) where the contract contains any other stipulation by way of penalty. In both the cases the measure of damages is reasonable compensation not exceeding the amount or penalty stipulated for.

Alternative Dispute Resolution

A dispute can be resolved by approaching Courts or by adopting Alternative Dispute Resolution Mechanism ("ADR"). Some popular methods of Alternative Dispute Resolution are Negotiation, Conciliation, Mediation and Arbitration.

Under the provisions of Section 89 of the CPC, a reference for the resolution of disputes can be done by adopting any one of the following:

a. Arbitration
b. Conciliation
c. Judicial settlement including settlement through Lok Adalat
d. Mediation

Negotiation

Negotiation is a non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement of the dispute [See The Major Law Lexicon, 2010 Edn., Pg. 4531]

Conciliation

A conciliation is a without prejudice non-binding dispute resolution process in which an independent third party ("neutral") assists the parties to settle their differences but may, if necessary, deliver his opinion as to the merits of the dispute [see The Major Law Lexicon, 2010 Edn., Pg. 1360]

Conciliation has been inserted in Part III of the Arbitration and Conciliation Act, 1996 ("A&C Act") and it has been adopted as one of the means of settlement of disputes.

Mediation

A Mediation is a form of alternative dispute resolution in which a third party, usually professionally trained, helps the parties to resolve their differences. The Mediator plays a passive but effective role in helping the parties to arrive at the settlement. As mentioned above, Section 89 of the CPC empowers the courts to direct settlement of disputes by mediation amongst other means. Other legislation that covers mediation includes the Commercial Courts Act 2015, whereby it is mandatory for parties to exhaust the remedy of pre-institution mediation under the said Act before instituting a suit.

Arbitration

India adopted the Model Law (UNCITRAL Model Law on International Commercial Arbitration) in its entirety except for a few variations and enacted the A&C Act, with the objective "to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation…". It is a comprehensive piece of legislation and lays down the law on arbitration in India. The A&C Act is divided into the following four parts:

Part I - Arbitration seated in India;
Part II - Enforcement of Foreign Awards;
Part III - Conciliation; and
Part IV - Supplementary Provisions.

The following are the different kinds of Arbitrations in India:

a. Ad-hoc Arbitration – One in which there is no institution to administer the arbitration

b. Institutional Arbitration – Administered by an arbitral institution

c. Statutory Arbitration – Imposed on the parties by operation of law

d. Foreign Arbitration – Proceedings are conducted in a place outside India.

The following are the key features of the A&C Act:

Arbitration Agreement

An arbitration agreement is a pre-condition for commencement of arbitral proceedings. An arbitration agreement may be a clause in a contract or a separate agreement to arbitrate all or certain disputes which have arisen or may arise in respect of a defined legal relationship, whether contractual or not (Section 7 of the A&C Act).

Arbitrability of dispute

Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is arbitrable. However, as a matter of public policy, certain categories of proceedings have been reserved by the legislature exclusively for public fora. Certain other categories of cases, though not expressly reserved for adjudication by public fora, are nevertheless excluded from the purview of private fora.

Some well-known illustrations of non-arbitrable disputes are as follows:

a. Patent, trademarks and copyright.
b. Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
c. Disputes involving allegations of fraud and/or corruption;
d. Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
e. Guardianship matters;
f. Insolvency and winding up matters;
g. Testamentary matters (grant of probate, letters of administration and succession certificate); and
h. Tenancy disputes which are governed by rent control legislations.

Appointment of Arbitrators in India

The parties to an arbitration are free to agree on a procedure for appointing the arbitrator(s). If the parties fail to appoint an arbitrator or the selection mechanism has failed:

a. in case of domestic arbitration, an application for appointment can be made to the High Court; and

b. in case of international commercial arbitration, the parties may directly approach the Supreme Court for the appointment of arbitrator(s) [Section 11(6) of the A&C Act]

Section 12 of the A&C Act provides that an arbitrator can only be challenged if: (a) circumstances exist which give rise to justifiable doubts as to his independence or impartiality; or (b) he does not possess the qualifications as agreed between the parties.

Interim Measures of Protection

Under the A&C Act, parties have a right to approach the courts under Section 9 of the A&C Act (or arbitral tribunal, under Section 17 of the A&C Act) for interim measures. Some of the interim measures available to the parties include:

a. the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
b. securing the amount in dispute in the arbitration;
c. order for detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in the arbitration;
d. interim injunction or the appointment of receiver; and
e. such other interim measure of protection as may appear to be just and convenient to the court or arbitral tribunal.

Further, the arbitral tribunal has the same power for making orders as the court has for the purpose of, and in relation to, any proceedings before it.

Setting Aside of Arbitral Awards/ Resisting Enforcement of Foreign Award

Under the A&C Act, there is no provision for appeal against an award. The only recourse for a party is to file an application to set aside the award on limited grounds under Section 34 of the A&C Act [Section 34(1)]

Section 34 of the A&C Act provides that an arbitral award may be set aside by the court only if the party making the application furnishes proof that:

(i) the party was under some incapacity;
(ii) the arbitration agreement was not valid;
(iii) proper notice of the appointment of an arbitrator was not given or the party was unable to present its case;
(iv) the award fell outside the scope of the arbitration agreement;
(v) composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
(vi) the subject matter of the dispute is not capable of settlement by arbitration; or
(vii) the award is in conflict with the public policy of India.

Enforcement of Arbitral Award

Section 36 of the A&C Act provides that an arbitral award (domestic) shall be enforced in the same manner as if it were a decree passed by the court, once the time prescribed for making an application to set aside the award under Section 34 of the A&C had expired or an application made for this purpose had been refused.

Amendments to the A&C Act

The A&C, 1996 was amended in 2015, and again in 2019 to make the arbitral process more effective and to make India an arbitration friendly jurisdiction. Some of these key amendments are:

a. Arbitral award to be made within 12 months after pleadings are completed, with an option for a 6 months extension by consent of the parties. Further extension, if required, is to be sought from the court.

b. Courts are empowered to grant interim measures of protection in aid of foreign seated arbitration.

c. When an arbitrator is approached for a possible appointment he has to disclose in writing the existence of any direct or indirect relationship or interest in any of the parties or in relation to the subject matter of the dispute that are likely to give rise to justifiable doubts as to his independence or impartiality.

d. Where an award made in India is challenged before the court, there is no automatic stay on enforcement of an arbitral award. An application for stay has to be filed before the court seeking stay of the operation of the award and the court may order security to be furnished by the award debtor prior to grant of stay.

India is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") as well as the Geneva Convention on the Execution of Foreign Arbitral Awards ("Geneva Convention").

Commercial Courts

The Commercial Courts Act 2015 provides for the constitution of commercial courts at a district level, except areas where the High Court exercises ordinary civil jurisdiction and provides for commercial divisions (in all High Courts having ordinary civil jurisdiction) and commercial appellate divisions in each High Court for the adjudication and speedy disposal of commercial disputes of a specified value of not less than INR 3,00,000 or such other notified value within the limits of the relevant territorial jurisdiction.

Commercial disputes include disputes arising from the following [Section 2(c) of Commercial Court Act]:

a. ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;

b. export or import of merchandise or services;

c. issues relating to admiralty and maritime law;

d. transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;

e. carriage of goods;

f. construction and infrastructure contracts, including tenders;

g. agreements relating to immovable property used exclusively in trade or commerce;

h. franchising agreements;

i. distribution and licensing agreements;

j. management and consultancy agreements;

k. joint venture agreements;

l. shareholders agreements;

m. subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;

n. mercantile agency and mercantile usage;

o. partnership agreements;

p. technology development agreements;

q. intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;

r. agreements for sale of goods or provision of services;

s. exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum;

t. insurance and re-insurance; and

u. contracts of agency relating to any of the above.

Enforcement Of Judgments

Execution of Decree

The party in whose favor the decree is passed is called the decree holder, and the other party is called the judgment debtor. The judgment debtor has to honor the decree. However, if the judgment debtor fails to honor the decree passed against him, the decree holder can file an Execution Petition in the court for execution of the decree, under the provisions of the CPC.

Enforcement of foreign judgments

The Enforcement of a foreign judgment in India is governed by the CPC. Such foreign judgment can be from a reciprocating territory or a non-reciprocating territory.

Section 44A of the CPC deals with the execution of decrees passed by any of the superior Courts in reciprocating territory, provided it is a decree for the payment of money.

As per the Explanation 1 of Section 44A, a 'reciprocating territory' means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purpose of Section 44A. Accordingly, if the decree is passed by a superior Court in a reciprocating territory, the decree may be executed in India as if it had been passed by the District Court in India. A foreign judgment from a recognised court in a reciprocating territory can be executed immediately under Section 44A of the CPC.

In addition, the Court shall refuse the execution of this judgment, if it is shown to the satisfaction of the Court that the judgment falls within any of the following exceptions specified in section 13 of the CPC:

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India.

Where a foreign judgment is from a foreign court in a non-reciprocating territory, the judgment-holder can either file a fresh civil action (suit) based on that foreign decree, or on the original cause of action (or both) in an Indian court of competent jurisdiction. In the fresh civil action, the foreign decree is considered evidentiary.

Enforcement Of Arbitration Award

India is a signatory to both the New York Convention and Geneva Convention. Part II of the A&C Act provides for enforcement of foreign awards under both conventions. Only those foreign awards that arise out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, are enforceable. Further, India follows the reciprocity principle and limits the enforcement of arbitral awards to those made in other New York Convention and Geneva Convention countries.

Requirements under the A&C Act

The party applying for the enforcement of a foreign award shall, at the time of the filing an application for enforcement, produce before the court the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made.

The party also needs to produce the original agreement for arbitration or a duly certified copy thereof and such evidence as may be necessary to prove that the award is a foreign award [Section 47 (1) of the A&C Act].

In case the award or agreement to be produced is in a foreign language, the party seeking to enforce the award shall produce a translation in English certified as correct by diplomatic or consular agent of the country to which the party belongs, or certified as correct in such other manner as may be sufficient according to the law in force in India [Section 47 (2) of the A&C Act].

Conditions for enforcement of a foreign award

Enforcement of a foreign award may be refused under section 48 of the A&C Act on broadly similar grounds as prescribed in section 34 of the A&C Act, except that an application to resist enforcement of a foreign award under Section 48 cannot be made on the ground that the award was patently illegal and therefore against the public policy of India.

16

Schemes And Incentives


INCENTIVE
PROGRAM

Schemes And Incentives

Tax Incentives In India

Direct tax incentives

a. Start-up businesses engaged in innovation, development, deployment or commercialization of new technology- or intellectual property-driven products, processes or services

Special tax incentive is provided to an eligible start-up being engaged in innovation, development or improvement of products or processes or services or a scalable business model with a high potential of employment generation or wealth creation which holds a certificate of eligible business from the Inter-Ministerial Board of Certification.

As per section 80-IAC, 100% tax holiday for three consecutive years out of 7 years, is available to eligible start-ups set-up before 1 April 2021 having a turnover up to INR 25 crore in the year for which deduction is claimed.

b. Special Economic Zones (SEZs) in India:

Undertakings/ units located in SEZs and engaged in the manufacture or production/ provision of services are allowed tax deduction under section 10AA of the Income-Tax Act, 1961.

Deduction is available to units setup in a SEZ in a phased manner as under:

• 100% deduction in respect of export profits for first five years

• 50% deduction in respect of export profits for the next five years

• 50% of export profits, provided that the profits are transferred to a Special Economic Zone Reinvestment Reserve Account for the purpose of acquiring plant or machinery within three years

The aforesaid tax holiday is only available for SEZ units approved by 31 March 2020 and which commence operation by 31 March 2021 or any other notified date. Due to this sunset clause, the said deduction cannot be claimed by new SEZ units.

c. Some of the other tax deductions and tax incentives have been highlighted below:

Activity	Benefits (subject to specified conditions)
Deduction in respect of employment of new employees allowed to taxpayers whose total income includes profits and gains derived from business and to whom section 44AB applies [section 80JJAA]	Deduction of 30% of additional employee cost for 3 assessment years
Expenditure on scientific research (not being cost of land or building) on approved in-house research and development facility by a company engaged in the business of bio-technology or in any business of manufacture or production of any article or thing [section 35(2AB)]	100% deduction from FY 2020-21 onwards
Deduction in respect of specified business categories such as cold chain facilities, warehousing facilities for storage of agricultural produce, cross-country distribution of natural gas/ oil, infrastructure facilities, etc. (section 35AD)	100% deduction on capital expenditure
Expenditure on skill development projects (section 35CCD)	100% deduction (from FY 2020-21 onwards) on expenditure incurred on a notified skill development project by a company
Units located in International Financial Service Centers (IFSCs) (section 80LA)	• 100% tax holiday for 10 consecutive years out of 15 years • Reduced Minimum Alternate Tax rate of 9% • Specified relaxation from Securities Transaction Tax, Long-term Capital Gains Tax and Commodities Tax

The above deductions other than under section 80JJAA not available where the assessee is opting for provisions of section 115BAA or 115BAB of the Income-Tax Act, 1961.

Indirect Tax Incentives

a. Foreign Trade Agreements (FTAs)

India has entered into 15 trade agreements and one unilateral DFTP (Duty Free Tariff Preference) Scheme. ASEAN-India FTA[1] , Agreement on SAFTA[2] , India-Japan CEPA[3] and India-South Korea CEPA are among the most widely used trade agreements of India. Under such agreements, preferential rate of Basic Custom Duty (BCD) is applicable on import of goods from specified countries. To avail such benefit, certificate of origin is required to be obtained and submitted at the time of import or within prescribed time after imports.

Due to multiple instances of misuse of the FTAs, recently, the Government of India has introduced Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020 (CAROTAR, 2020)[4] . Under such rules, extensive information regarding the origin of the product may be sought. Importers are required to maintain such information for a period of five years from the imports.

Additionally, a declaration about correctness of origin of goods is now required to be submitted along with import declarations.

A verification proceeding from the exporting country may also be initiated by the Customs authorities if they are not satisfied with the information provided by the importer.

b. Project Import Scheme

Under the Project Import Regulations, 1986, capital goods required for the initial setting up of a unit, or the substantial expansion of an existing unit, of a specified industrial plant, power project, mining project, oil exploration project or any such project as may be notified by the Government of India, may be imported at a concessional BCD. Single rate of duty is applicable to all the goods imported for the specified project. The scheme offers smooth and faster clearance of goods at concessional rate of duty i.e. applicable BCD may vary from Nil to 5 percent.

c. Foreign Trade Policy

The Foreign Trade Policy ('FTP') is introduced by the Government of India to govern the imports and export process of the country. The present FTP will remain effective until 31 March 2021. Objective of FTP is to regulate exports and imports from India and promote export. FTP is formulated and regulated by Directorate General of Foreign Trade (DGFT) which aims to improve the ease of doing business in India.

Various incentives on export of goods and services provided under the policy have been explained below:

1. ASEAN means the Association of Southeast Asian Nations which comprises of the Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao PDR, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam and whose members are referred to in the Agreement collectively as the ASEAN Member States and individually as an ASEAN Member State
2. South Asian Free Trade Area - SAFTA signatory countries are Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka
3. Comprehensive Economic Partnership Agreement
4. Implemented w.e.f. 21 September 2020

(i) Incentives on exports:
(a) Merchandise Exports from India
Scheme ['MEIS']

Under the MEIS scheme, incentives in the form of duty credit scrips are available on export of the notified goods at the rate ranging from 2 percent to 5 percent. Such incentives are computed basis the FOB value of exports realized or as given in the shipping bill in foreign exchange, whichever is lower. Where export of goods is made through courier or international post, the said scheme would be available only on consignments of FOB value of up to INR 500,000.

Duty credit scrips issued under the said scheme are valid for a period of twenty-four months from the date of its issuance. Further, these are freely transferable and may be used for payment of BCD
.

However, MEIS is not available in case supplies are made from DTA unit to SEZ unit, deemed export, exports by FTWZ etc.

Further, incentive under the MEIS scheme is being withdrawn with effect from 31 December 2020 and is being replaced by new scheme known as "Remission of Duties or Taxes on Export Products".

Remission of Duties or Taxes on Export Products' (RoDTEP):

Indian Government has recently approved the RoDTEP Scheme and the same would be notified in a phased manner. RoDTEP Scheme is set to replace the existing MEIS scheme and aims to reimburse all the taxes/duties/levies being charged at the Central/State/Local level which are not currently refunded under any of the existing schemes but are incurred in the manufacturing and distribution process. The rebate may be claimed as a percentage of the FOB value of export of goods and would be in the form of transferable duty credit/ electronic scrip which will be maintained in electronic ledger and may be used for payment of BCD.

(b) Service Export from India Scheme
[SEIS Scheme]

SEIS intends to offset the infrastructural inefficiencies and associated costs on export of notified services. The service exporters are incentivized in the form of duty credit scrips at a rate ranging from 5 percent to 7 percent as computed on Net Foreign Exchange ('NFE')[5] earned by the service exporter . The duty credit scrips as issued under SEIS scheme are freely transferable and may be used for payment of BCD. These credit scrips are valid for a period of twenty-four months from the date of its issuance.

However, benefit under SEIS is not available in the case of providing software related services or turnover related to services of units operating in EOU/EHTP/STPI/BTP Schemes etc.

(ii) Export Promotion Capital Goods Scheme ('EPCG Scheme')

The objective of the EPCG Scheme is to facilitate import of capital goods for producing quality goods and services and enhance India's manufacturing competitiveness. Such Scheme allows import of capital goods (except those specified in negative list) at the pre-production, production, and post-production stages at zero customs duty subject to the condition that such benefit is valid for a period of 18 months on import of capital goods from the date of issuance of authorization. Revalidation of the EPCG authorization is not permitted under the law i.e. a new authorization needs to be obtained post expiration of 18 months.

5. Rate increased from3% and 5% respectively w.e.f. 01.11.2017

Such imports are also exempted from payment of IGST and compensation cess up to 31 March 2021. The importer also has an option to import the goods upon payment of IGST and avail input tax credit of the same. The scheme mandates fulfilment of specific export obligation equivalent to six times of duties, taxes and cess saved on capital goods, to be fulfilled in six years reckoned from date of issue of Authorization.

Capital goods for the purpose of the EPCG scheme shall include:

• Capital Goods as defined in Chapter 9 of Foreign Trade Policy i.e. any plant, machinery, equipment or accessories required for manufacture or production, either directly or indirectly, of goods or for rendering services, including those required for replacement, modernization, technological upgradation or expansion. It includes packaging machinery and equipment, refrigeration equipment, power generating sets, machine tools, equipment and instruments for testing, research and development, quality and pollution control including in CKD/SKD condition thereof;

• Computer systems and software which are a part of the Capital Goods being imported;

• Spares, moulds, dies, jigs, fixtures, tools & refractories; and

• Catalysts for initial charge plus one subsequent charge.

In case of local procurement of goods by an EPCG authorization holder, refund of GST paid is available to supplier or to the EPCG authorization holder.

(iii) Scheme for units operating under Export Oriented Unit (EOU) Scheme, Electronics Hardware Technology Park (EHTP) Scheme, Software Technology Park (STP) Scheme or Bio-Technology Park (BTP) Scheme.

Incentive under the said scheme includes, duty free imports or procurement from bonded warehouse of inputs, capital goods etc. Scheme provides duty exemption on entire custom duty viz, BCD, additional duty, IGST and compensation cess. However, the said exemption would be available till 31 March 2021 and thereafter, only BCD would be exempt.

In case of local procurement of goods by an EOU Unit, refund of GST paid is available to supplier or EOU unit.

This scheme is eligible for manufacture of goods, including repair, re-making, reconditioning, re-engineering, rendering of services, development of software, agriculture including agro-processing, aquaculture, animal husbandry, biotechnology, floriculture, horticulture, pisciculture, viticulture, poultry and sericulture. However, trading units are not covered under these schemes.

Further, EOU / EHTP / STP / BTP units are required to earn positive net foreign exchange (NFE). NFE Earnings shall be calculated cumulatively in blocks of five years, starting from commencement of production.

(iv) Advance Authorization (AA Scheme)

AA Scheme provides upfront duty exemption on import of inputs to the authorization holder, i.e. exemption is provided on payment of BCD, SWS, IGST, safeguard duty and ADD. Such imports are also exempted from payment of

IGST and compensation cess up to 31 March 2021. The importer also has an option to import the goods upon payment of IGST and avail input tax credit of the same. Under the said scheme, the duty-free inputs are required to be physically incorporated in exported goods. In addition to the above, inputs such as packaging material, fuel, oil, catalyst which is consumed/ utilized for manufacturing of resultant goods, are also allowed to be imported duty free.

Import of inputs are allowed as per defined Standard Input-Output Norms ('SION') or product specific norms fixed by Directorate General of Foreign Trade authorities (DGFT) authorities.

Further, the authorization holder is mandatorily required to fulfil the export obligation for goods manufactured from imported duty-free raw material, consumables etc. The authorization holder is eligible to avail the benefit on import of goods within 12 months from the date of authorization whereas, the export obligation is required to be completed within 18 months from the date of authorization.

In case of local procurement of goods by an AA holder, refund of GST paid is available to supplier or to the AA Holder.

Special Economic Zone Scheme

Units set up in an SEZ area have been provided with area-based incentives to provide an internationally competitive and conducive environment for export of goods and services from India. SEZ are deemed to be a territory outside India and are incentivized in the form of exemption on payment of duties and taxes on imports or domestic procurements. Import in SEZ units are exempted from the customs duty. Further, the goods imported by unit are allowed to be cleared without any examination at the port of import except for specific intelligence. SEZ units are required to execute one-time bond cum letter of undertaking prior to duty exempted imports or domestic procurements.

Goods and services may be procured locally without payment of GST. Supplies from non-SEZ to SEZ unit are also eligible for duty drawback benefit as well.

Further, only authorized operations approved by the authorities can be undertaken in SEZ unit. Such units are required to maintain positive NFE which would be calculated for a block of five years starting from commencement of production. Export of goods by SEZ unit are exempt from GST subject to compliances. Further, refund of input tax credit used in exports is also available to an SEZ unit. There is no restriction on domestic supply of goods by SEZ unit.

State industrial policies

Under the pre-GST regime, many states were granting refund of a specified percentage of VAT/CST paid by them for a specified period. With GST replacing the earlier taxes, the state governments now reimburse the specified percentage of SGST deposited in cash. The reimbursement is generally restricted to the value of capital investment made by the applicant.

For instance, the government of Andhra Pradesh reimburses 100 percent of net SGST deposited in cash for five years to MSME units, 75 percent for seven years to medium industries and 50 percent for seven years to large industries. Similarly, in Maharashtra, Package scheme of Incentives is being provided by the State Government. Subsidy in the form of refund at specified percentage of SGST are being provided to eligible industries undertaking eligible activities as specified in the Scheme. Similar benefits are provided under various state industrial policies along with other non-tax benefits.

Incentive Under Make In India

The Government of India in May 2020 called for a 'Self-Reliant India Movement' to be built on five pillars, namely, economy, infrastructure, system, vibrant demography and demand. To this end, the Government has introduced special economic and comprehensive package of INR 20 Trillion which is equivalent to 10% of India's GDP. The package is aimed at providing much needed financial and policy support to various industries and sectors in India. The Government has also announced a host of other bold reforms to attract investment, enhance ease of doing business in India.

Fast Tracking of Investments

The Government is introducing fast track investment clearance through empowered group of secretaries. States will be ranked on investment attractiveness to compete for new investments. Certain champion sectors have also been identified which include pharma, textile, solar and renewable energy. Incentive schemes will be launched for promotions of such sectors such as for Solar PV manufacturing, advanced cell battery storage etc.

Public Sector Enterprises

A new public sector enterprise policy will soon be introduced by the Government, pursuant to which all sectors will now be open to the private sector. However, public sector enterprises will play an important role in defined areas; the new public sector enterprise policy will introduce a list of strategic sectors requiring presence of public sector enterprises (in public interest). In certain strategic sectors, at least one enterprise will remain in the public sector, but private sector will also be allowed; in other sectors, public sector enterprises will be privatized.

Key Sector Specific Reforms And Enablers

Manufacturing

Manufacture and Other Operations in Warehouse Regulations, 2019 [MOOWR Scheme]

With a view to promote India as a global manufacturing hub and the commitment towards ease of doing business, CBIC has notified revamped regulation under Customs Law for manufacture and other operations in bonded warehouse - Manufacture and Other Operations in Warehouse (no. 2) Regulations, 2019. Under this scheme, the government has streamlined the existing provisions for manufacturing goods in a custom bonded warehouse.

An importer is allowed to import raw materials and capital goods without payment of Customs duty for the purpose of manufacturing and other operations in private bonded manufacturing facility. The Customs duty on such imports is deferred until the manufactured finished goods and/ or capital goods are cleared in the domestic market from the private bonded manufacturing facility. One of the most distinctive features of the scheme is waiver of interest liability on deferment of Customs duty (which is paid at the time of clearance in domestic market).

The regulation has come into force from 1 October 2019. This scheme does not contemplate any export obligation requirement and geographical restrictions. Such private bonded manufacturing facility can be set-up anywhere in India.

Aviation

• There will be efficient airspace management for civil aviation. Restrictions on utilization of the Indian air space will be eased so that civilian flying becomes more efficient. This will also reduce fuel use and time. Up until now, only 60% of the Indian airspace was freely available.

• More world-class airports will be built through public-private partnership. Bidding process for 6 new airports will commence very soon.

• There will be significant push by the Government for India to become a global hub for aircraft maintenance, repair and overhaul (MRO).

• Tax regime for Maintenance, Repair, Overhaul (MRO) ecosystem has been rationalized. Convergence between defense sector and the civil MROs will be established to create economies of scale.

• Regional connectivity scheme of UDAN (Ude Desh ka Aam Nagrik) 1.0 and 2.0, launched by the Government aims to connect 66 airports and 31 heliports across the Country.

• Under UDAN 3.0, proposals for 235 routes were awarded for 16 unserved airports, 17 under-served airports, 50 served airports, and 6 water aerodromes. New 50 Unserved and Under-served airports (including 5 heliports) with 285 routes have been added under UDAN. Being a part of the implementing agency, by 2021 Airport Authority of India has an ambitious plan to develop at least 100 airports/ water-dromes/ heliports.

• Initiatives for MRO services:

(i) The tools and tool-kits used by the M R O have been exempted from Customs duty. The exemption shall be based on the list of tools and tool kits certified by the Directorate General of Civil Aviation (DGCA) approved Quality Managers of aircraft maintenance organizations.

(ii) MROs were required to provide proof of their requirements of parts or orders from their client airlines. The process for the clearance of the parts has been brought in line with that of the tool kits for one-time certification by DGCA approved Quality Managers in MROs.

(iii) Restriction of one year for utilization of duty-free parts has been extended to three years to enable economies of scale.

(iv) To allow the import of unserviceable parts by MROs for providing exchange/ advance exchange, the concerned notification has been revised to enable advance export of serviceable parts.

(v) Foreign aircrafts brought to India for MRO work will be allowed to stay for the entire period of maintenance or up to 6 months. For stay beyond 6 months, DGCA's permission will be required.

(vi) India to become hub for MRO Airframe. There is an investment of 2 hanger base/ heavy maintenance facility for narrow bodies aircraft tied up at Kochi Airport by private MRO.

Electronics Manufacturing Clusters Scheme

• For further strengthening infrastructure base for the electronics industry in the country and deepening the electronics value chain, the Government has approved financial assistance to Modified Electronics Manufacturing Clusters (EMC2.0) Scheme for development of world-class infrastructure along with common facilities and amenities through Electronics Manufacturing Clusters.

• To boost production of mobile phones in India, the Government has approved Production Linked Incentive Scheme for large scale electronics manufacturing. The scheme proposes production linked incentive to boost domestic manufacturing and attract large investments in mobile phone manufacturing and specified electronic components including assembly, testing, marking and packaging units. The Scheme will extend an incentive of 4% to 6% on incremental sales (over base year) of goods manufactured in India and covered under target segments, to eligible companies, for a period of 5 years subsequent to the base year. The total cost of the proposed scheme is approximately INR 40,995 Crore (INR 409.95 Billion).

• To position India as a global hub for Electronics System Design and Manufacturing (ESDM) sector, the Government has offered financial incentive of 25% of capital expenditure for manufacturing of goods that constitute the supply chain of an electronic product under the Scheme for promotion of manufacturing of Electronic Components and Semiconductors. The total cost of the scheme is approximately INR 3,285 Crore (INR 32.85 Billion).

• EMC 2.0 scheme has been notified to support the creation of quality infrastructure with common facilities and amenities, including Ready Built Factory (RBF) sheds/ Plug and Play facilities. Under the scheme, financial assistance of 50% of the project cost will be provided to EMC projects subject to a ceiling of INR 700 Million for every 100 acres of land while 75% of the project cost will be provided for Common Facility Centres (CFCs) subject to a ceiling of INR 700 Million. The scheme will be open for applications for a period of 3 years from the date of notification and disbursement of funds to the approved projects will be done in a period of 5 years. EMC 2.0 scheme has an outlay of about USD 500 Million.

• The Prime Minister has given his approval to introduce the Production-Linked Incentive (PLI) Scheme in Electronics System Sector through the Ministry of Electronics and Information Technology with a financial outlay of INR 50 Billion over 5 years period for Enhancing India's Manufacturing Capabilities and Enhancing Exports.

Thermal Power

• A tariff policy laying out reforms, has been released which inter alia includes the following measures to promote industry:

(i) Ensure the availability of electricity to consumers at reasonable and competitive rates;

(ii) Ensure financial viability of the sector and attract investments.

(iii) Promote transparency, consistency and predictability in regulatory approaches across jurisdictions and minimize perceptions of regulatory risks;

(iv) Promote competition, efficiency in operations and improvement in the quality of supply;

(v) Promote the generation of electricity from renewable sources;

(vi) Promote hydroelectric power generation including Pumped Storage Projects to provide adequate peaking reserves, reliable grid operation and integration of variable renewable energy sources;

(vii) Evolve a dynamic and robust electricity infrastructure for better consumer services;

(viii) Facilitate the supply of adequate and uninterrupted power to all categories of consumers; and

(ix) Ensure creation of adequate capacity including reserves in the generation, transmission and distribution in advance, for the reliability of supply of electricity to consumers.

• Government of India undertook the initiative for setting up of Ultra Mega Power Projects (UMPPS) of 4 GW capacity each, to reap the benefits of economies of scale, and provide fast capacity addition. The Ministry of Power identified Power Finance Corporation (PFC) as the nodal agency for the UMPPs. To enhance investors' confidence, reduce risk perception and get a good response to competitive bidding, PFC incorporated Special Purpose Vehicles (SPVs) for each UMPP. The SPVs take up the bidding process on behalf of the power procuring (beneficiary) States. The purpose of the SPVs is to carry out the bid process management and obtain various clearances/ consents for the projects. The same is transferred to the successful bidder along with the SPV, who are selected through the tariff based International Competitive Bidding. Based on the above initiative of the Government and its implementation process, four UMPPs i.e. Sasan in Madhya Pradesh, Mundra in Gujarat, Krishnapatnam in Andhra Pradesh and Tilaiya in Jharkhand were successful bidders. Mundra UMPP and Sasan UMPP are fully commissioned and are generating electricity.

• The Fuel Supply Agreement with Coal India Ltd. will ensure the availability of coal for power companies over the long term.

• To reduce dependency on imported coal, a Public–Private Partnership policy framework is planned to be devised with Coal India Ltd. to increase coal production.

• The Government is planning to revise the National Electricity Policy to bring out far-reaching changes in the power industry. This includes ensuring a cleaner atmosphere by increasing renewable generation including rooftop solar PV generation, increasing electric vehicles in cities and towns, improved power supply reliability to consumers through the smart grid. This policy would also encourage efficient utilization of resources including land and water.

• The Government is privatizing electricity distribution in the Union Territories of India (being Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli and Daman and Diu, Jammu and Kashmir, Lakshadweep, Ladakh and Puducherry).

Space

• Indian private sector will be a co-traveler in India's space sector journey boosting space activities. The Government will level the playing field for private companies in satellites, launches and space-based services.

• Future projects for planetary exploration, outer space travel etc. will be opened for private sector.

• The Government will introduce a liberal geo-spatial data policy for providing remote sensing data to tech entrepreneurs.

• Department of Space published "Draft-Spacecom Policy-2020". The policy aims to meet the growing demand of space based communication requirements of the nation. This will boost Government's initiatives towards Self Reliant India (Aatmanirbhar Bharat) that will drive focus on "ease of doing business" and encourage healthy competitiveness in the growth of the national economy.

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Partnering In India

Partnering In India

For all those companies outside India making a decision to enter India could seem like a daunting prospect. However, this can be offset by finding a right partner in India thereby gaining local knowledge, market access, leveraging resources etc. In this context, joint ventures are a very popular mode of entry into the Indian market.

However, with more transparency in the system and digitalization helping Ease of Doing Business, many companies are now setting up businesses on their own as 100% subsidiaries.

Due Diligence

Various legal and regulatory requirements for Indian companies along with a complex tax regime can be difficult to navigate. Therefore, foreign companies looking to do business in India should conduct a proper due diligence. In case of joint venture, a detailed due diligence on a prospective Indian partner to identify, or prepare against any possible risk exposure is also important. Major types of due diligence in India are legal, financial, HR, and commercial.

Industrial Associations/ Sectoral Associations

There are several sectoral/ region specific and industrial associations in India such as FINCHAM, Associated Chambers of Commerce and Industry of India, Confederation of Industries in India, Federation of Indian Chambers of Commerce & Industry, US India Partnership Forum etc. which are good starting points in the search for an Indian partner. Such associations are repositories for industry surveys, business opportunities, list of suppliers/ vendors. They typically have details of reputed consultants, agencies, law firms etc. which can be engaged for conducting due diligences, drafting term-sheets/ other documentations etc.

Government of India's Invest India Portal

Invest India is a National Investment Promotion and Facilitation Agency of India which acts as the first point of reference for investors in India. Invest India partners with substantial investment promotion agencies and multilateral organizations. The Invest India portal is a great starting point for collating information on various sector specific opportunities, foreign direct investment restrictions, processes and approvals, State/ sector specific incentives etc. Invest India works closely with various stakeholders including states and regulatory authorities, thereby being a very credible source for investment opportunities across sectors, projects and in industrial corridors.

Ministry Of Corporate Affairs (MCA)

MCA regulates corporate affairs in India through the Companies Act, 1956, 2013 and other allied Acts and Rules. MCA also protects investors and offers many important services to stakeholders such as giving access to public documents of Indian companies. Such public documents include annual audited accounts, shareholding pattern, details on charges on the assets of companies etc. A search through such documents of a prospective Indian partner will give a very deep understanding of its finances, encumbrances and major decisions taken by the Board/ shareholders of such prospective partner.

Team Finland

Team Finland • Embassy of Finland, New Delhi • Honorary Consulates of Finland Contact Information • Finland Chamber of Commerce in India

The Team Finland network brings together Finnish authorities, publicly funded organizations and other key parties with ties to Finland. The network promotes Finland's external economic relations, boosts Finland's country image abroad, assists in internationalization of Finnish companies, and attracts investment to Finland.

In India, Team Finland operates under the aegis of the Embassy of Finland and Business Finland, both located in New Delhi. Team Finland India Director is the Ambassador of Finland, and the Team Finland Coordinator is the Country Director of Business Finland India. In recent years, the Team has been strengthened considerably, including by the arrival of a Team Finland Knowledge specialist and Talent Boost project manager.

Close local Team Finland partners include the Honorary Consulates of Finland and the Finland Chamber of Commerce in India (FINCHAM India).

Embassy of Finland
New Delhi

EMBASSY OF FINLAND, NEW DELHI

The Embassy of Finland in New Delhi promotes the interests of Finland and Finns in India. It facilitates, strengthens and deepens bilateral ties between Finland and India across sectors, with a strong focus on commercial and economic relations.

As part of its Team Finland work, the Embassy follows the developments in India closely, seeking to identify the most interesting business, economic and cooperation opportunities. It promotes contacts to the Indian administration, business and society, and provides support to Finnish companies locally. The Team Finland Knowledge network, an integral part of the Embassy's operation, supports Finnish universities in their internationalization efforts, and shares Finnish knowledge, expertise and educational innovation in India. It also strives to attract talented people to Finland as part of the Talent Boost programme, in cooperation with Business Finland.

An essential task of the Embassy is to issue visas and resident permits for Indians and third country nationals in the wider region, and provide support for Finnish citizens in consular matters.

The remit of the Embassy of Finland in New Delhi also includes Finland's relations with Bangladesh. The Ambassador of Finland to India and Bangladesh is H. E. Ms Ritva Koukku-Ronde.

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BUSINESS FINLAND

Business Finland is the Finnish government organization for innovation funding and trade, travel and investment promotion. Business Finland's 600 experts work in 40 offices globally and in 16 regional offices around Finland. Business Finland is part of the Team Finland network.

Business Finland is an accelerator of global growth, creating new growth by helping businesses go global and by supporting and funding innovations. The top experts at Business Finland and the latest research data enable companies to seize market opportunities and turn them into success stories.

Business Finland was created on 1st January 2018 by the merger of two organizations: Finpro, which offered services for internationalization, investments and tourism promotion, and Tekes, which offered funding for innovation activities. The organization aims to develop Finland to be the most attractive and competitive innovation environment in which companies are able to grow, change, and succeed.

Business Finland's new strategy aims to serve the needs of the Finnish Economy even better than before and in a more needs-oriented manner. The organization will adopt an even more customer-oriented approach, while enhancing their employee experience, be more proactive in seizing the opportunities arising from significant societal changes, and will place sustainable development at the heart of our strategy and operations.

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FINLAND CHAMBER OF COMMERCE IN INDIA

Finland Chamber of Commerce in India (FINCHAM India) has b
between Finland and India, and to support investment and other business operations of its members in various terms. The membership of the Chamber presently comprises of Finnish companies all across India, and representing diverse industries/ sectors ranging from manufacturing, energy, logistics, ICT, electronics, mines & minerals, chemicals, construction, to name a few.

In a short span of time, FINCHAM India has evolved into a systematic and well recognized portal for Finnish companies in India, for the discussion and identification of common economic and trade interests and concerns. Through its activities which include road-shows, interface with both Indian and Finnish government officials, members and committee meetings, expert talks & knowledge sessions, inter-company / industrial visits for sharing of best practices and networking events, FINCHAM India has been building and fostering growth of a collaborative business climate for the Finnish business community in India by inter alia acting as an advocacy forum for promoting interests of members on the policy front. Furthermore, the Chamber also supports member companies in their corporate affair and social responsibility activities, government relations work, dispute resolution and problem solving. All this in collaboration with Finnish government officials.

The Chamber has significant collaborations with industry associations, including India's leading industry association, Confederation of Indian Industry (CII), to explore the possibility of associating as Technology/Infrastructure Solution partners as a cohesive group, in relation to infrastructure projects and business initiatives coming up in India, including the Smart Cities initiative. FINCHAM India is also an active participant of the European Economic Group (EEG), a working group recently constituted by the EU Delegation with the objective of diversifying and reinforcing the EU business presence in India, and also strengthening EU wide business advocacy across sectors and Member States.

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Annexure 1

Foreign Direct Investment

Automatic Route		Approval Route	
Cap	Sector/ Activity	Cap	Sector/ Activity
100%	• Manufacturing • Mining (other than of titanium bearing minerals and ores) • Greenfield projects and other existing projects in Civil Aviation Sector (Airports) • Other services in civil aviation sector such as maintenance and repair organizations; flying training institutes; and technical training institutions. • Greenfield projects in pharmaceuticals • Wholesale/ cash & carry trading • E-commerce activities • NBFC (Conditional) • Setting up of industrial parks • Construction Development Projects (Conditional) • Petroleum & Natural Gas exploration • Broadcasting carriage services -Cable Network, Direct to Home broadcasting, Mobile TV • Single Brand product retailing • Duty free shops • Railway infrastructure • Credit Information Companies	100%	• Mining and separation of titanium bearing minerals and ores • Telecommunication services (investment beyond 49%) • Satellites- establishment and operation, subject to the sectoral guidelines of Department of Space/ ISRO • Defence (investment beyond 74% wherever it is likely to result in access to modern technology or for other reasons to be recorded) • Scheduled air transport services (investment beyond 49%) • Foreign Investment in investing companies not registered as NBFCs with the Reserve Bank of India and in core investment companies, both engaged in the activity of investing in the capital of other Indian entities
74%	Defence	74%	• Private Sector Bank (investment beyond 49%) • Security agencies in private sector (investment beyond 49%)

Foreign Direct Investment

Automatic Route		Approval Route	
Cap	Sector/ Activity	Cap	Sector/ Activity
49%	• Telecommunication services • Private Sector Banks • Insurance company • Power exchanges • Scheduled Air transport services • Security agencies in private sector	51%	• Multi Brand Retail Trading
		49%	• FM radio • Up linking of news and current affairs TV channel
		26%	• Uploading/ Streaming of News & Current Affairs through Digital Media • Publishing of newspaper and periodicals dealing with news and current affairs

Foreign Direct Investment

- Lottery Business including Government/ private lottery, online lotteries, etc.
- Gambling and Betting including casinos etc.
  Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for Lottery Business, Gambling and Betting activities.
- Chit funds
- Nidhi company
- Trading in Transferable Development Rights
- Real Estate Business or Construction of Farm Houses
- Real estate business shall not include development of townships, construction of residential/ commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (Real Estate Investment Trusts) Regulations 2014.
- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- Activities/ sectors not open to private sector investment e.g. (I) Atomic Energy and (II) Railway operations (other than permitted activities mentioned above)

Annexure 2

Process For Incorporation Of A Company

In terms of the relevant provisions of the Companies Act the incorporation of a company in India involves two steps:

a. firstly seeking of name availability for the proposed company; and
b. thereafter, obtaining certificate of incorporation from the office of the concerned Registrar of Companies, ("RoC") by filing requisite documents.

After incorporation of the company, declaration with regard to commencement of business is also required to be filed (it has been dealt separately below).

a. Name Availability

For seeking the availability of the proposed name for a company, an application is required to be made with the RoC in the prescribed web-based Form SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus) Part A. The application for seeking name availability is also required to briefly state the main object(s) addressing the principal activities to be undertaken by the company, type/class/category of the company to be incorporated and two proposed names.

Name availability application is ordinarily processed by the RoC within 5-7 working days from the date of filing of the complete application.

b. Obtaining Certificate Of Incorporation

Once the name has been made available by the RoC, the next step is filing inter-alia following documents with the RoC in web-based Form SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus) Part B:
i. Memorandum of Association ("MoA") signed by the initial subscribers;
ii. Articles of Association ("AoA") signed by the initial subscribers;
iii. Declaration by each of the subscribers and the first directors;
iv. Consent to act as a director for all proposed first directors;
v. Constitutional documents alongwith Certificate of Incorporation and address proof of the foreign company(ies) who are acting as subscribers of the company to be incorporated;
vi. Intimation regarding the situation of the registered office of the company.

The MoA in terms of the Companies Act contains inter alia the information in relation to the name of the company, State in which the registered office of the company is to be situated, the objects of the company, share capital of the company with which the company is to be registered, etc.

The AoA provides for the regulations for the internal management of the company and is essentially an agreement between members/ shareholders of the company and the company and also between the members/ shareholders inter se. The AoA ordinarily contains provisions relating to the share capital, names of the first directors, lien on shares, calls on shares, transfer of shares, transmission of shares, forfeiture of shares, alteration of capital, procedure for general meetings and board meetings, voting rights of members, directors, manager, secretary, dividends and reserves, accounts and capitalization of profits. Such provisions should be consistent with the provisions of the Companies Act. In order to keep the AoA simple and straight forward, ordinarily as a practice many closely held companies adopt the provisions of Table F[1] of Schedule I of the Companies Act subject to such exclusions, modifications and variations thereto as may be desired.

Upon filing of the aforesaid documents, requisite registration fees and stamp duty is payable to the RoC.

Name of the company, incorporation and other integrated services application can also be filed together by filling necessary information in SPICe+ Part A and Part B.

Upon the RoC being satisfied that the statutory requirements regarding registration have been duly complied with, the RoC registers the MoA, AoA and other documents filed and issues the Certificate of Incorporation. The Certificate of Incorporation is conclusive evidence that all requirements under the Companies Act have been complied with in respect of registration of the company.

Obtaining of Certificate of Incorporation may take at least 7-10 working days from the date of filing of the incorporation documents with the RoC.

Commencement Of Business

In terms of the Section 10A of the Companies Act, a declaration has to be filed by a director within a period of 180 (one hundred and eighty) days of the date of incorporation of the company in form INC-20A (Declaration for Commencement of Business) with the RoC that every subscriber to the MOA of the company has paid the value of the shares as agreed to be taken by him on the date of making of such declaration.

1. Table F is a standard model format of the regulations for the internal management of a company limited by shares appended to the Companies Act.

Other Requirements

a. Director Identification Number (DIN)

As per the relevant provisions of the Companies Act, a person cannot be appointed as a director of a company unless he has obtained a valid and confirmed DIN from the Ministry of Corporate Affairs ("MCA"). For obtaining the DIN, e-Form DIR-3 is required to be electronically filed with the MCA alongwith requisite enclosures (proof of identity, proof of residence, income tax PAN in case of India resident, passport in case of foreign national and photograph).

Or

DIN can also be obtained while incorporating a company and filing the details of the proposed directors to be appointed in Form SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus) Part B.

b. Digital Signatures

All the e-Forms filed with the RoC (including the SPICe+ Part A and B, INC-20A and INC-22) under the relevant provisions of the Companies Act are filed online (via electronic mode) and for this purpose digital signatures of the person(s) filing the e-Forms is required to be obtained from the concerned agencies. Digital signatures can be obtained within 2-3 working days from the date of submission of documents/ paper works with the concerned agencies.

c. Local Representation And Residency Requirements

Under the Companies Act, there is requirement for residency/ local representation where every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year. However, in case of a newly incorporated company the above-said requirement applies proportionately at the end of the financial year in which it is incorporated.

Incorporation Of Limited Liability Partnership

LLP is a form of business structure in India which can be formed under the Limited Liability Partnership Act, 2008 ("LLP Act") and is being viewed as an alternative corporate business vehicle that not only provides the benefits of limited liability but also allows its members the flexibility of organizing their internal structure as a partnership based on mutual agreement. The contribution of a partner could consist of tangible, movable or immovable or intangible property, or other benefits brought, or contribution by way of an agreement or contract for services. Further, no partner is liable on account of the independent or un-authorized acts of other partners, thus allowing individual partners to be shielded from joint liability created by another partner's wrongful acts or misconduct.

LLP is comparatively easier to manage with less compliance levels as compared to a company form of organization. Every LLP is required to have at least two partners and have at least two individuals as Designated Partners, one of whom is required to be a resident in India. Nominee of a body corporate can be appointed as designated partner of an LLP.

Setting up of LLPs involves obtaining Designated Partners Identification Number (DPIN, which is similar to DIN), reservation of name, filing of prescribed forms (providing information with regard to LLP agreement, appointment of partner/ designate partner etc.), payment of requisite fees and obtaining certificate of incorporation. Also, the designated partners of the LLP are required to have their respective digital signatures.

LLP incorporation also broadly involves two steps, namely, seeking name availability for the proposed LLP and obtaining the certificate of incorporation from the concerned RoC after filing the requisite documents and payment of requisite fees and stamp duty.

a. Name Availability

For seeking the availability of the proposed name for an LLP, an application is required to be made with the RoC in the prescribed web-based Form RUN-LLP. The application for seeking name availability is also required to briefly state the main object(s) addressing the principal activities to be undertaken by the company and two proposed names.

Name availability application is ordinarily processed by the RoC within 5-7 working days from the date of filing of the complete application.

b. Obtaining Certificate Of Incorporation

Once the name has been made available by the RoC, the next step is the filing of following documents with the RoC in e-Form FiLLiP:

i. Subscribers' sheet including consent from individual and/ or nominees of body corporate to be appointed as designated partner, copy of resolution on the letterhead of such body corporate;

ii. Constitutional documents alongwith Certificate of Incorporation and address proof of the foreign company(ies) who are acting as partner of the LLP to be incorporated;

iii.Proof of address of registered office of LLP; and

iv. Information with regard to LLP agreement in e-Form 3.

The LLP agreement contains inter alia the information in relation to the name of the LLP, State in which the registered office of the LLP is to be situated, the objects of the company, contribution of the partners with which the LLP is to be registered, etc.

Upon filing of the aforesaid documents, requisite registration fees and stamp duty is payable to the RoC.

Upon the RoC being satisfied that the statutory requirements regarding registration have been duly complied with, the RoC registers the LLP and other documents filed and issues the Certificate of Incorporation.

Obtaining of Certificate of Incorporation may take at least 7-10 working days from the date of filing of the incorporation documents with the RoC.

Annexure 3

Union Ministry	Union Minister	Minister of State (MoS)	Website
Ministry of Agriculture and Farmers Welfare	Mr. Narendra Singh Tomar	Mr. Parshottam Rupala Mr. Kailash Choudhary	https://www.agriculture.gov.in
Ministry of Civil Aviation	Mr. Hardeep Singh Puri		https://www.civilaviation.gov.in/
Ministry of Coal	Mr. Pralhad Joshi		https://coal.nic.in/
Ministry of Commerce and Industry	Mr. Piyush Goyal	Mr. C. R. Chaudhary Mr. Hardeep Singh Puri	https://commerce.gov.in/
Ministry of Communications (Department of Telecommunications)	Mr. Ravi Shankar Prasad	Mr. Dhotre Sanjay Shamrao	https://dot.gov.in/
Ministry of Corporate Affairs	Ms. Nirmala Sitharaman	Mr. Anurag Singh Thakur	http://www.mca.gov.in/
Ministry of Defence	Mr. Rajnath Singh	Mr. Shripad Yesso Naik	https://www.mod.gov.in/
Ministry of Earth Sciences	Dr. Harsh Vardhan		https://www.moes.gov.in/
Ministry of Education	Mr. Ramesh Pokhriyal		https://www.education.gov.in/
Ministry of Electronics and Information Technology	Mr. Ravi Shankar Prasad	Mr. Sunderjeet Singh Ahluwalia	https://www.meity.gov.in/
Ministry of Environment, Forest and Climate Change	Mr. Prakash Javadekar	Mr. Babul Supriyo	http://moef.gov.in/
Ministry of External Affairs	Dr. Subrahmanyam Jaishankar	Mr. V. Muraleedharan	https://mea.gov.in/
Ministry of Finance	Ms. Nirmala Sitharaman	Mr. Anurag Singh Thakur	https://finmin.nic.in/
Ministry of Food Processing Industries	Mr. Narendra Singh Tomar	Mr. Rameshwar Teli	https://mofpi.nic.in/
Ministry of Health and Family Welfare	Dr. Harsh Vardhan		https://www.mohfw.gov.in/
Ministry of Heavy Industries and Public Enterprises	Mr. Prakash Javadekar	Mr. Arjun Ram Meghwal	https://dhi.nic.in/

Union Ministry	Union Minister	Minister of State (MoS)	Website
Ministry of Home Affairs	Mr. Amit Shah	Mr. G. Kishan Reddy Mr. Nityanand Rai	https://www.mha.gov.in/
Ministry of Housing and Urban Affairs		Mr. Hardeep Singh Puri	
Ministry of Law and Justice	Mr. Ravi Shankar Prasad	Mr. P. P. Chaudhary	https://lawmin.gov.in
Ministry of Mines	Mr. Pralhad Joshi		
Ministry of New and Renewable Energy		Mr. Raj Kumar Singh	https://mnre.gov.in/
Ministry of Petroleum and Natural Gas	Mr. Dharmendra Pradhan		http://petroleum.nic.in/
Ministry of Power		Mr. Raj Kumar Singh	https://powermin.nic.in/
Ministry of Railways	Mr. Piyush Goyal		https://www.indianrailways.gov.in/
Ministry of Road Transport and Highways	Mr. Nitin Gadkari	General (Dr.) V.K. Singh	https://morth.nic.in/
Ministry of Science and Technology	Dr. Harsh Vardhan		https://dst.gov.in/
Ministry of Ports, Shipping and Waterways	Mr. Mansukh Mandaviya		http://shipmin.gov.in/
Ministry of Skill Development and Entrepreneurship	Dr. Mahendra Nath Pandey	Mr. Raj Kumar Singh	https://msde.gov.in/
Ministry of Steel	Mr. Dharmendra Pradhan		https://steel.gov.in/
Ministry of Textiles	Ms. Smriti Zubin Irani		http://texmin.nic.in/
Ministry of Tourism		Mr. Prahlad Singh Patel	https://tourism.gov.in/

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