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INVESTING IN INDIA

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Index

Investing in India

CONTRIBUTORS: GAURAV DAYAL, PARITOSH CHAUHAN

India is a booming G20 economy. As per the IMF, India is 'easily' the fastest growing economy in the world. The Indian economy's rapid growth has been attributed to the government of India (**"GOI"**) increasing focus towards higher capital expenditure over the last few years.[1] It has seen consistent economic growth over the last decade and has a high future potential, thanks to its burgeoning middle class with increasing disposable incomes, several high net worth individuals and a stable democracy. It is also one of the relatively newer industrialised countries of the world and has a large and growing base of educated and skilled manpower.

Some sectors which have historically attracted the highest foreign direct investment (**"FDI"**) inflows are sectors such as the services sector, computer software and hardware, trading, telecommunications, automobiles etc.[2] In the first half of 2024, inbound M&A in India was valued at USD$ 17.2 billion, which is up 32.4% on a year on year basis. Similarly, equity fundraising also reached significant milestones, with proceeds worth USD$ 29.5 billion being raised, more than twice the amount raised in the same period last year.[3] PE investments for the second quarter in 2024, was at USD$ 3.64 billion, which is a seven quarter high, up by 75% sequentially since the last recorded quarter.[4]

Business Environment

The Constitution of India prescribes and segregates matters to be legislated over, at the central level (by the Parliament), state level (by state legislative assemblies and councils), or at both central and state level.

1. India 'easily' fastest growing economy, IMF director says, as GDP growth soars (cnbc.com)
2. Quarterly Fact Sheet on Foreign Direct Investment (FDI) Inflow from April 2000 to March 2024, Department for Promotion of Industry and Internal Trade, <https://dpiit.gov.in/publications/fdi-statistics>
3. Tech drives India's M&A market in first half of 2024: Top 10 deals decoded | Personal Finance - Business Standard (business-standard.com)
4. PE Investments: India sees 75% spike & $3.64 bn in Q1 - The Hindu BusinessLine

Generally, business laws in India are formulated at the Central level. Some of the key laws governing business in India are set out below:

The Companies Act, 2013, for formation, financing, functioning of companies.

The Indian Contracts Act, 1872 lays down general principles relating to formation, performance and enforeceability of contracts.

Foreign Exchange Management Act, 1999, for exchange control, undertaking external trade and payments.

Labour and Employments Laws, which set out the employment conditions, social security and occupational health conditions for employees.

Sector-specific Laws such as the Drugs and Cosmetics Act, Insurance Act, Explosives Act, Spices Board Act, Insurance laws etc.

Other Laws such as the Competition Act, 2002 (promotes fair competition in market), Arbitration and Conciliation Act (provides for alternate dispute resolution mechanism) etc.

Rights and protections for foreign investments

A major factor enabling investments is the fact that as the largest functioning democracy in the world, India enforces the rule of law, guarantees fundamental rights, including the right to practice a trade or profession and has an independent judiciary. To address grievances by way of litigation, corporations and individuals may approach courts established in India.

Supreme Court: Apex court of the country. Its decisions are binding on all subordinate courts.

High Court: Court of appeal. It has the power to issue writs, including in relation to fundamental rights, and supervises the lower courts.

District Court: Deals with cases in the district, both civil and criminal, and also handles appeals from subordinate courts.

Subordinate Courts: Deal with matters of civil and criminal nature.

Parties may also resort to alternate dispute resolution mechanisms for resolving their grievances. Various alternative dispute resolution mechanisms such as arbitration, mediation, conciliation and negotiation are also available and often preferred by private parties over a traditional court process, which can be time consuming.

India is also a party to various bilateral and multilateral treaties. The bilateral investment treaties (“**BITs**”) to which India is a party, guarantee treaty-based rights and protection to foreign investors operating in India, special tariffs for imports and benefits on account of Indian investments abroad. BITs create a level-playing field for foreign investors who contribute to the economy by way of capital, technology and know-how.

Budget Overview

The Union Budget as announced by the Finance Minister for the year 2024 – 2025 (“**Budget**”) sets out the plan for the deployment of funds by the GOI, to support certain sectors, provide incentives / subsidies, facilitate ease of doing business and generally providing support to the micro, small and medium enterprises sector in India.

The Budget also entailed the Finance Minister announcing setting up of additional tribunals to minimize pendency of cases under the Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016. The Budget also proposed the abolishment of angel tax for all classes of investors which can accelerate growth of startups and provide investors with an impetus to invest heavily in a growing economy.

Improving ease of doing business

In recent years, the GOI has introduced and implemented various measures dedicated towards facilitating ease of doing business in India. Some of the key improvements introduced by the GOI for ease in starting of business are listed below.

- Streamlined the business incorporation process by introducing the SPICe+ form (INC-32). Prior to the introduction of the SPICe+ electronic form, the timelines involved in incorporation of a company used to extend to 5–15 working days, which have now been reduced to about 1 day on an average.[5]

- The reforms in incorporation process have not only enabled faster incorporation but also other benefits such as grant of PAN, TAN and director identification numbers for upto 3 directors. In addition, through the SPICe+ form, the companies may also obtain other mandatory registrations for ESIC, EPFO, professional tax number etc.

- Registration under Employee State Insurance Corporation (ESIC), Employee Provident Fund Organisation (EPFO), Contract Labour (Regulation and Abolition) Act, 1970 (CLRA), Building and Other Construction Workers (BOCW) (Regulation of Employment and Conditions of Service) Act, 1996, Inter-State Migrant Workmen Act (ISMW) Act, 1979 are available at Shram Suvidha portal as a common online service.
- Doing away with the incorporation fee for companies with an authorised capital of up to INR 1,500,000.
- Single window system for the approval of building plans for dealing with construction permits.
- Setting up of an investment promotion agency "Invest India" to act as an advisor or facilitator to investors seeking to invest in India.
- Regulations for protection of minority investors.
- Ease of trading across borders, reduced border compliance through improvement in infrastructure.
- Amendment of various penal provisions across 42 sectoral laws to decriminalise minor violations to promote ease of doing business.

Governmental benefits

The GOI has launched several initiatives with a view to promote investments in India. These include providing allowances to manufacturers (subject to certain conditions) for setting up units in special economic zones, national investment and manufacturing zone and export-oriented units. Such benefits include export incentives like duty drawback, duty exemption, and other sector specific and area-based incentives.

Further, in recent years, the GOI has launched various initiatives such as:

- The "Digital India" programme, for creation of digital infrastructure, delivering services digitally and to increase digital literacy.
- The "Make in India" programme, to promote domestic manufacturing.

5. Paragraph 2.2.4, Chapter 2, Annual Report 2023-24, Ministry of Corporate Affairs

- The “Start-Up” programme, which entails providing special tax incentives to certain start-ups. India has retained its position as the third largest start-up base in the world with over 70,000 recognised start-ups.

The GOI has also undertaken several regulatory reforms to open new sectors to foreign direct investment (“**FDI**”) in India, increase the limits on foreign investment in sectors in which lower levels of foreign investment is allowed and simplify other conditions associated with foreign investment. Progressive FDI Policy reforms have eased the path to doing business in India and accelerated the pace of foreign investment in the country, thereby making India an attractive destination for foreign investment.

Setting-up shop:
Foreign investments in India

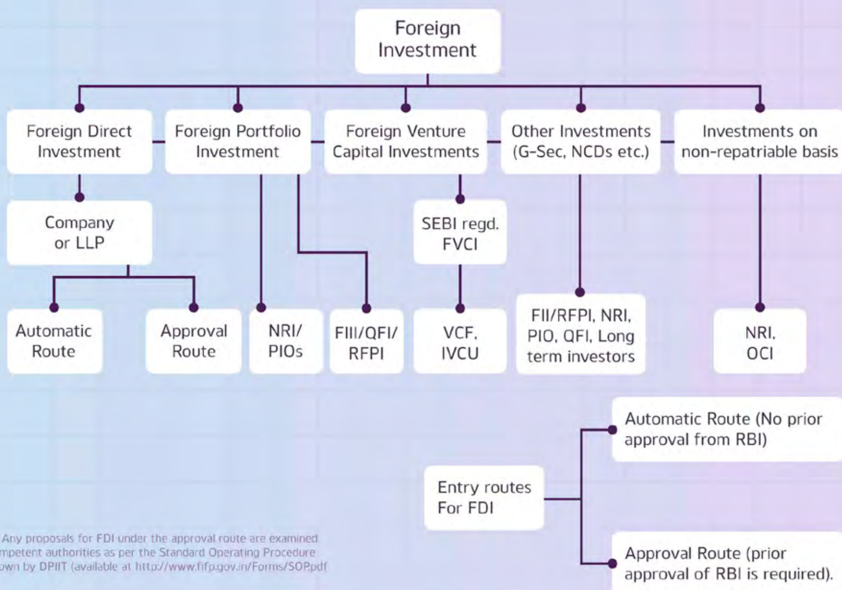
CONTRIBUTORS: GAURAV DAYAL, PARITOSH CHAUHAN

The Department for Promotion of Industry and Internal Trade **(“DPIIT”)** is the nodal department for the formulation of policy on FDI. It is also responsible for the maintenance and management of data on FDI into India, based upon the inward remittances reported by the Reserve Bank of India (“**RBI**“). DPIIT plays an active role in the liberalisation and rationalisation of the FDI policy and has been constructively engaged in the extensive stakeholder consultations on various aspects of the FDI Policy.

DPIIT is the competent authority for grant of approvals or rejection of foreign investment proposals requiring approval from the GOI in case of multi brand retail trading.

Investment mechanisms

Broadly, a foreign investor may invest in India through the following mechanisms, subject to applicable compliances.



Note: Any proposals for FDI under the approval route are examined by competent authorities as per the Standard Operating Procedure laid down by DPIIT (available at http://www.fifp.gov.in/Forms/SOP.pdf

Structuring considerations

Any foreign entity which is desirous of entering the Indian markets needs to consider the following at the time of structuring its entry strategy:

- Eligible investee entities: Foreign entities may make investments in companies, limited liability partnerships, investment vehicles, venture capital funds, trusts etc.

- Pricing guidelines: Any transfer of equity instruments of an Indian company shall be subject to certain pricing guidelines, which prescribe floor prices for inward remittance and ceiling for outward remittance.

- Deferred consideration: In case of purchase of equity instruments of an Indian company, deferred consideration is permitted up to 25% of the consideration amount, which is required to be paid within 18 months.

- Escrow holdbacks: Similarly, escrow holdbacks are permitted but must be settled within 18 months from the date of transfer of the equity instruments.

- Non-cash consideration: Non cash consideration would include capital goods or machinery, pre-incorporation expenses, swap of equity shares, convertible debentures and preference shares of an Indian company and equity capital of a foreign entity.

- Share swaps: Swap permitted towards the equity shares, convertible debentures and preference shares of an Indian company and equity capital of a foreign entity.

FDI Policy

The erstwhile foreign investment framework governing investments into India underwent a significant revision with effect from 15 October 2019 when the Foreign exchange management (Transfer or issue of security by a person resident outside India) Regulations, 2017 and the Foreign exchange management (Acquisition and transfer of immovable property in India) Regulations, 2018, were repealed, and the Foreign exchange management (Non-debt Instruments) Rules, 2019 (**"NDI Rules"**), were notified. Subsequent to this change, the DPIIT issued a consolidated FDI policy, which is effective from October 15, 2020 (**"FDI Policy"**) and is a compilation of various decisions and policy pronouncements of the Government with regard to FDI in various sectors. The DPIIT issues press notes to amend the FDI policy from time to time.

With a view to attract more FDI, the GOI has put in place a liberal policy on FDI, under which FDI up to 100%, is permitted under the automatic route in most sectors/activities. Significant changes have been made in the FDI regime in recent times to ensure that India remains an increasingly attractive investment destination, some of which are as follows:

- Increase in FDI limits: The GOI has increased FDI limits in various sectors, for instance: In sectors like satellite manufacturing and operations, up to 74% investment is allowed under the automatic route and beyond 74% under the approval route. Separately, manufacturing of components and systems for satellites is permitted up to 100% under the automatic route.

- To facilitate raising of capital, start-ups are allowed to issue convertible notes to persons resident outside India upto an amount of INR 2.5 million in a single tranche.

- Contract-manufacturing has been recognized as being at par with direct manufacturing in India such that an entity with foreign investment, which undertakes manufacturing activity in India through contract-manufacturing arrangements, can now retail (including through e-commerce), the contract-manufactured products without GOI's approval.

- Easing the process of FDI: In order to introduce a single point interface of the GOI, the GOI has introduced a new portal (http://www. fifp.gov.in), which is administered by DPIIT. The portal facilitates the single window clearance of applications which are through approval route.

In addition, the DPIIT released Press Note 3 (2020 series) dated 17 April 2020 (**"Press Note 3"**), which brought in the requirement of a prior government approval for FDI in India being made by a citizen of or an entity incorporated in a country which shares a land border with India (such as, inter alia, China, Bhutan, Bangladesh, Pakistan, and Nepal) (**"Neighboring Countries"**) or where the beneficial owner of the investment into India is situated in or is a citizen of one of the Neighboring Countries.

Contours of foreign investment in India

The FDI Policy prescribes sector wise limits on foreign investment in Indian entities, along with the conditions of entry and manner of investment. If there are no prohibitions or upper limits on foreign investment prescribed for a specific sector, then 100% investment shall be permitted under the automatic route.

Sectoral limits for certain sectors, prescribed under the NDI Rules, are as follows:

Sector	FDI Limit	Entry
Agriculture[6]	100%	Automatic Route
Banking- Private Sector	74%	Up to 49% Automatic Route; Government Route beyond 49% and up to 74%
Civil Aviation (Airports) (For greenfield and existing projects)	100%	Automatic Route
Construction Development: Townships, Housing, Built-up Infrastructure	100%	Automatic Route
Defence Industry subject to Industrial license under the Industries (Development and Regulation) Act, 1951 and Manufacturing of small arms and ammunition under the Arms Act, 1959	100%	Up to 74% Automatic Route; above 74% Government Route[7]
E-Commerce (B2B E-commerce activities) (Market place model of E-commerce)	100%	Automatic Route
Insurance Company	74%	Automatic Route
Life Insurance Corporation of India	20%	Automatic Route
Insurance Intermediaries	100%	Automatic Route
Industrial Parks	100%	Automatic Route
Manufacturing	100%	Automatic Route
Mining and Exploration of Metal and Non-Metal Ores	100%	Automatic Route

6. FDI is only allowed in the following agriculture sector or activity: (a) Floriculture, Horticulture and Cultivation of vegetables and mushrooms under controlled conditions; (b) Development and production of seeds and planting material; (c) Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture and Apiculture; and (d) Services related to agro and allied sectors.
7. However, foreign investment in this sector shall be subject to clearance by the Ministry of Home Affairs and as per guidelines of the Ministry of Defence.

Multi Brand Retail Trading	51%	Government Route
NBFCs (registered with RBI)	100%	Automatic Route
Petroleum and Natural Gas	100%	Automatic Route
Railway Infrastructure	100%	Automatic Route
Single Brand Product Retail Trading	100%	Automatic Route
Telecom	100%	Automatic Route
Private Security Agencies	74%	Up to 49% Automatic Route Government Route beyond 49% and up to 74%
Pharmaceuticals	100%	Greenfield - Automatic Route Brownfield - Up to 74% Automatic Route, and above 74% Government Route
White label ATM operations	100%	Automatic route

Prohibited Sectors

Foreign investment is prohibited under the FDI Policy in the following activities:

In addition to the above, foreign technology collaborations in any form including licensing for franchise, trademark, brand name, and management contract are also prohibited for lottery businesses, gambling and betting activities.

Eligible Investee Entities

- Company
- LLP
- Partnership Firm
- Proprietary Firm
- Trust
- Startups
- Investment Vehicle

Reporting Requirements

All filings which are required to be made under the NDI Rules are made through a foreign investment reporting and management system portal through a single master form i.e., a one-stop destination for all filings which are required under the NDI Rules. Some of the filings required to be made under the NDI Rules are:

FC-GPR: For issuance of equity instruments, Form FC-GPR along with other documents, as prescribed, to be filed with the authorised dealer bank within 30 days from the date of issuance of equity instruments.

FC-TRS: For transfer of shares, Form FC-TRS along with other documents, as prescribed, to be filed with the authorised dealer bank within 60 days from the of transfer of equity instruments or receipt/remittance of funds whichever is earlier.

FLA: Annual return on foreign assets and liabilities to be filed with RBI by July 15 every year.

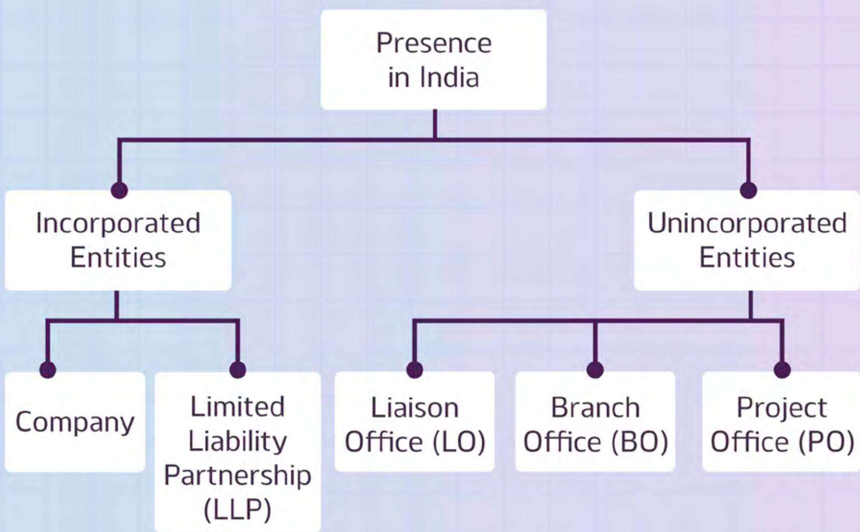
Violations under FEMA

As per the provisions under FEMA, any violation of regulations prescribed thereunder can result in a penalty up to thrice the sum involved in such contravention (where such amount is quantifiable), or up to INR 200,000 (where the amount is not quantifiable), and where such contravention is a continuing one, further penalty which may extend to INR 5,000 for every day after the first day during which the contravention continues.

Setting-up shop:
Establishment of presence in India

CONTRIBUTORS: GAURAV DAYAL, PARITOSH CHAUHAN

There are several types of entities which a foreign investor may set up in India to establish its presence here. Such entities may be incorporated or unincorporated. The different structures are discussed below.



A brief overview of the entities shown above is set out below.

Unincorporated entities

Presence in India can be established through 'offices' of certain types. They are merely extensions of the foreign companies in India and do not have the status of independent legal entities.

A. Liaison Office

A liaison office (**"LO"**) acts as a representative of the parent foreign company in India. It can act as a channel of communication between a principal place of business and any other entities in India. However, an LO cannot undertake any commercial, trading, or industrial activities, directly or indirectly, and its expenses must pay for itself from the remittances received from its parent foreign company. The approval for setting up an LO is generally valid for 3 years and can be extended by making an application to the authorised dealer bank before the expiry of the validity of the approval.

B. Branch Office

A branch office (**"BO"**) mirrors the functions of the parent foreign company and is established to perform similar operations as of the foreign parent company. A BO can undertake commercial activity and can carry on the business operations of the parent foreign company in India, subject to the activity being permitted. It can represent the foreign parent company in India and act as its buying or selling agent in India.

C. Project Office

A project office ("**PO**") is a place of business in India for a foreign entity intending to execute a project in India. A foreign company, subject to obtaining approval from the authorised dealer bank and other sectoral caps, may set up a PO in India under the automatic route subject to certain preconditions being fulfilled.

Incorporated entities

Incorporated entities are corporate bodies such as a wholly owned subsidiary, equity joint venture etc. They can carry out a much wider spectrum of activities as compared to an LO, BO or PO, and with lesser restrictions on usage or remittance of funds. Investment in incorporated entities is the most common mode of foreign investment in India.

Incorporated entities in India are governed by the provisions of the Companies Act 2013 (**"CA 13"**) / Limited Liability Partnership Act, 2008 (**"LLP Act"**).

A. Limited Liability Partnership

A limited liability partnership ("**LLP**") is a partnership with some features of a company. The liability of partners in an LLP is limited to the contribution made by them to its capital. The incorporation of an LLP is governed by the provisions of the LLP Act. Every LLP is required to have a minimum of two partners who can be individuals or corporate bodies. Further, every LLP is required to have a minimum of two designated partners who are individuals and one of whom shall be a person resident in India.

There has been a gradual relaxation in the FDI investment framework in relation to LLPs: (a) FDI is now permitted under automatic route in LLPs operating in sectors in which 100% FDI is allowed under automatic route; and, (b) LLPs with FDI may make downstream investments into other companies or LLPs in sectors where 100% FDI is allowed under the automatic route. The above mechanisms are permitted provided there are no FDI-linked performance conditions.

B. Company

The CA 2013 sets out provisions related to incorporation of a company, issuance of shares, roles and responsibilities of directors, dissolution of a company (winding-up), etc. A company is comprised of directors and shareholders. The shareholders are the ultimate owners as they hold shares in the company. The directors of a company are the persons responsible for directing, controlling, and managing the day-to-day affairs, subject to the Articles of Association (**"AoA"**) of the company. The authority that oversees companies and their compliances is the Registrar of Companies (**"RoC"**).

Companies may either be 'private limited companies' or 'public limited companies'.

Private Limited Company: Private limited company is a company which through its AoA restricts the right to transfer its shares and prohibits any invitation to the public to subscribe to any of its securities.

Public Limited Company: A public limited company is any company which is not a private company and includes a private company that is the subsidiary of a public company. A public limited company has a minimum of 7 members, and no cap on the maximum number of members. Its shares are freely transferable, and it may invite members of the public to subscribe to its securities.

Please see below the table broadly setting out the differences between a private limited company and a public limit company:

S. No	Particulars	Private Company	Public Company
1	Minimum members	2 (two)	7 (seven)
2	Maximum members	200	No limit
3	Minimum number of directors	2	2
4	Transfer of securities	Not freely transferable	Freely transferable
5	Restriction of borrowing	No restriction on borrowing	Approval of shareholders for borrowing beyond the prescribed threshold
6	Payment of remuneration to senior management	No restriction	Limit of maximum remuneration payable
7	Special privileges with respect to annual compliances such as forms to be filed with ROC etc.	Enjoys several benefits from compliances under the CA 2013.	No benefits

Incorporation process

As a part of the GOI's ease of doing business initiative, the Ministry of Corporate Affairs (**"MCA"**) has simplified the process of incorporating a company by introducing a single, integrated e-form INC 32 (**"SPICe+"**) to be filed as against five e-forms previously required.

The SPICe+, introduced to ease the process of procuring statutory registrations, is an integrated web form which helps the applicant avail multiple services offered by GOI, ministries and departments such as the Ministry of Corporate Affairs, Ministry of Labour, Department of Revenue in the Ministry of Finance and a state government. While the SPICe + has undergone many changes since its introduction, its current functionality helps the applicant apply for statutory registrations like for Goods and Services Tax (GST), Employees State Insurance (ESIC), Employees Provident Fund (EPFO), Shops and Establishment Act (available for a few states), and Professional Tax registrations (available for a few states), at the time of the formation of the company.

One of the mandatory requirements for incorporation of a company in India is to appoint a director who is a resident of India for at least 182 days during the financial year.

In line with Press Note 3 by DPIIT, the Ministry of Corporate Affairs, Government of India, has amended the Companies (Incorporation) Rules 2014 and the Companies (Qualification and Appointment of Director) Rules 2014, mandating the requirement of government approval for the incorporation of company in India, by entities or citizens belonging to any of the Neighboring Countries.

In addition, in case a national from one of the Neighboring Countries is seeking an appointment as a director in an Indian company, they are required to obtain security clearance from the Ministry of Home Affairs, GOI and attach such clearance along with their consent while applying, in form DIR-2. This change has also been introduced in the process of obtaining a director identification number under form DIR-3, which is essentially the first step for seeking directorship in an Indian company.

Financing a company

Types of Securities

Indian companies may issue various types of securities. The primary types of securities used in foreign investments into India are:

Equity Shares: Equity shares are shares which allow voting rights and dividend rights. Equity shares with differential rights as to voting and dividend can also be issued in accordance with the applicable provisions.

Preference Shares: Preference shares are shares which carry a preferential right to receive dividends at a fixed rate as well as preferential rights during liquidation over the equity shares.

Debentures: Debentures are debt securities issued by a company, and typically represent a loan taken by the issuer company with an agreed rate of interest. Debentures may either be secured or unsecured.

For the purposes of FDI, fully and compulsorily convertible preference shares and debentures are treated at par with equity and need not comply with the external commercial borrowings (**"ECB"**) guidelines (**"ECB Guidelines"**). The ECB Guidelines place certain restrictions and requirements on the use of ECB. Indian companies are permitted to avail ECB, up to USD$ 750 million per company per year under the automatic route (depending on the sector in which they are doing business).

In order to raise ECB, the Indian company and the foreign financier must fulfill the criteria of an eligible borrower and a recognised lender respectively, under the ECB Guidelines. Further, there are restrictions on the average maturity period and the permitted end-uses of such ECB.

Getting started with business: Labour laws in India

CONTRIBUTORS: GAURAV DAYAL, PARITOSH CHAUHAN

India has one of the largest pools of young population and skilled human resource. Consequently, foreign investors can identify and engage skilled, cost-effective human resource for their operations in India, at every level, with relative ease.

India has an established labour law regime which balances the interests of employers with rights of employees.

An overview of Indian labour laws

It is critical for investors and employers to identify key labour legislations which could impact businesses in India. We have provided a brief overview below.

- The Industrial Disputes Act, 1947 ("**ID Act**") defines and sets out provisions governing employers' obligations, workmen's rights, industrial disputes, lay-offs, lockouts, strikes and retrenchment.

- The Trade Unions Act, 1926 defines and sets out provisions defining and governing the workers' right to form associations and their bargaining power with the management.

- The Payment of Gratuity Act ("**Gratuity Act**") defines and governs the payment of 'gratuity'. Gratuity is a type of benefit payable on cessation of employment to an employee who has remained in continuous service for 5 years or more. The amount payable depends on the number of years of service.

- The Employees Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**") provides for collection of provident fund, pension and deposit linked insurance for the employees at factories and other establishments. A detailed mechanism of contribution by the employer and employee towards the same has been provided.

- The Employees State Insurance Act, 1948 ("**ESI Act**") provides certain benefits to employees in case of sickness, maternity, disablement and injury (during employment), and for providing other benefits. Under the ESI Act, employers are required to contribute 3.25% (three-point two five percent) of an employee's wages; and employees are required to contribute 0.75% (zero point seven five percent) of their wages to the employee state insurance fund. The wage limit for coverage under the ESI Act is INR 21,000 per month.

- State level shops and commercial establishment acts and the Factories Act, 1948 ("**Factories Act**") regulate the hours of work, leave, holidays, payment of wages, terms of service and other conditions of employment of employees and factory workers in commercial establishments or shops and factories, respectively.

- The Payment of Bonus Act, 1965 ("**Bonus Act**") provides for the maximum and minimum bonus that is payable to a workman in India. As per the provisions of the Bonus Act, a confirmed employee, who has completed thirty working days of service in the relevant year and drawing salary or wage not exceeding INR 21,000 is entitled to a minimum bonus of 8.33% of total salary or wage earned by the employee during the accounting year or INR 100, whichever is higher.

- The Employees' Compensation Act, 1923 provides for compensation to be paid to employees in case of any injury or accident in the working premises of the company. It also provides for various kinds of benefits payable to the employee in case of disablement or death.

- The Industrial Employment (Standing Orders) Act, 1946 is another beneficial piece of legislation that lays down that any industrial establishment that employs 100 or more workmen must have certified standing orders in place. In certain states in India, the government has issued notifications pursuant to which industrial establishments employing less than 100 workmen are also required to have their standing orders certified by the certifying authority. The standing orders of a company lay down the formal conditions of employment in a workplace between the employer and the employee.

Employing Foreign Nationals

Indian companies are permitted to engage the services of a foreign national (including a non-resident Indian or an overseas citizen of India) on both short and long term assignments. Indian companies may engage services of such persons on short term assignments. In such cases, the government requires a foreign national to hold either a business visa designated as 'B' visa or employment visa designated as 'E' visa. No registration is required in case the stay of a foreign employee is for a short period (i.e., less than 180 days), but in case a foreign employee intends to stay in India for more than 180 days (i.e., in case of B visa if the aggregate stay of such foreign national in a calendar year is more than 180 days and for E-visa if visa of such foreign national is for more than 180 days), they will be required to get registered within 14 days from the date of their arrival with the Foreigners Registration Office. The registration takes into account either the length of the proposed stay or the duration of the visa.

Labour Reforms

With the aim of modernising and simplifying labour and employment laws in India and encouraging 'ease of doing business', the Indian Government has published 4 labour law codes namely: (a) the Code on Wages; (b) Industrial Relations Code; (c) Code on Social Security; and (d) Occupational Safety, Health and Working Conditions Code, (collectively referred as **"Labour Codes"**), which will repeal 29 (twenty-nine) labour related legislations. Once enforced, the Labour Codes would streamline and abridge the regulatory framework governing labour and employment laws in India and enable smoother governance which is beneficial for both employers and employees across industries.

An overview of some of the key changes under the upcoming reforms is set out below.

- **The Code on Wages, 2019:** It will regulate wage and bonus payments across different types of employment. Some of the significant changes include, inter alia, redefining 'wages' in terms of express inclusions and exclusions, with house rent allowance, conveyance allowance, overtime allowance, social security contributions, gratuity, retrenchment compensation, etc. being kept out of the purview. The Code on Wages has done away with a wage threshold for its applicability to employees, thereby, expanding its scope to all employees across sectors, such as, service sector (IT, hospitality, transportation etc.), domestic workers, unorganized workers, teachers, workers in railways, mines, oil fields, etc. It has also introduced the concept of floor wage to be notified by the Central Government. The state governments are obligated to not fix minimum wages in their sphere below the floor wage so notified.

- **The Industrial Relations Code, 2020:** It will consolidate and amend the laws relating to trade unions, conditions of employment in industrial establishments, and investigation and settlement of industrial disputes. Some of the significant changes include, inter alia, provision of statutory benefits for fixed term employees on completing 1 year of service, introduction of worker re-skilling fund for workers affected by retrenchment or closure of units and setting up of a streamlined approach to dispute resolution in the industrial establishment.

- **The Code on Social Security, 2020:** It seeks to amend and consolidate the laws relating to social security, with the goal to extend social security to all employees and workers in both the organised and unorganised sector.

- **The Occupational Safety, Health and Working Conditions Code, 2020:** It seeks to consolidate and amend the laws regulating occupational safety, health and working conditions of the persons employed in an establishment. Some examples of significant changes are the inclusion of migrant workers (who were not covered under the earlier legislations), fixation of daily working hours of a worker in an establishment to a maximum of 8 hours (as opposed to the 10.5 hours stipulated under the Factories Act). The Occupational Safety, Health and Working Conditions Code requires a singular registration to be made by every employer of any establishment covered under the code.

Getting started with business: Environmental law

CONTRIBUTORS: GAURAV DAYAL, PARITOSH CHAUHAN

The environmental regulations in India primarily focus on the following two key aspects: (i) protection and conservation of wildlife and natural habitats including forests and coastline; and (ii) sustainable functioning of industries. Some of the key principles in environmental law are the polluter-pays principle, precautionary principle, sustainable development, extended producer responsibility and absolute liability. These are crucial for companies who are setting up their manufacturing base in India and for investors to be aware of the implications relating to expansion into certain areas and industries in India.

Laws relating to Environmental Protection

The Ministry of Environment, Forest and Climate Change (**"MoEFCC"**), GOI and the respective state authorities are responsible for framing the acts, rules, policies, etc. related to environment protection. The Central Pollution Control Board (**"CPCB"**), various state pollution control boards (**"SPCBs"**), and the pollution control committees in union territories (**"PCCs"**) are responsible for the effective implementation of the environment acts and regulations in India.

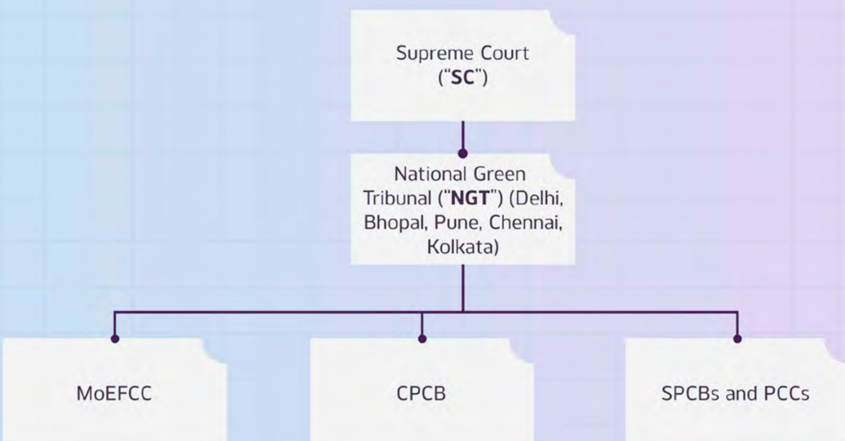
To operate a factory in India, the factory operator is required to obtain and periodically renew various consents under the Environment (Protection) Act, 1986 (**"EPA"**) from the relevant SPCB in respect of such factory.

In addition, each factory that generates, treats, or handles any hazardous waste is required to obtain an authorisation from the relevant SPCB under the Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016.

The legislative framework of environmental protection in India is as follows:

- **Constitutional Provisions:** Fundamental rights (Articles 21, 32, and 226 of the Constitution of India); Directive Principles of State Policy (Articles 47, 48A, and 49 of the Constitution of India); Fundamental duties (Article 51A(g) of the Constitution of India).
- **Special Laws:** Environment and pollution control laws.
- **General Laws:** Civil Procedure Code, Indian Penal Code, Criminal Procedure Code.
- **Administrative Framework:** MoEFCC, CPCB, SPCBs, PCCs etc.
- **Policies:** National Environment Policy 2006, National Forest Policy, National Agriculture Policy etc.

The institutional framework for the implementation of environmental legislation is given in the diagram below:



The EPA is the umbrella act for environment protection and conservation which empowers the GOI to set national standards for environmental quality and for controlling emissions or discharges of environment pollutants, to prescribe procedures for management and handling of hazardous substance, to carry out and sponsor investigations and research relating to problems of environmental pollution, etc.

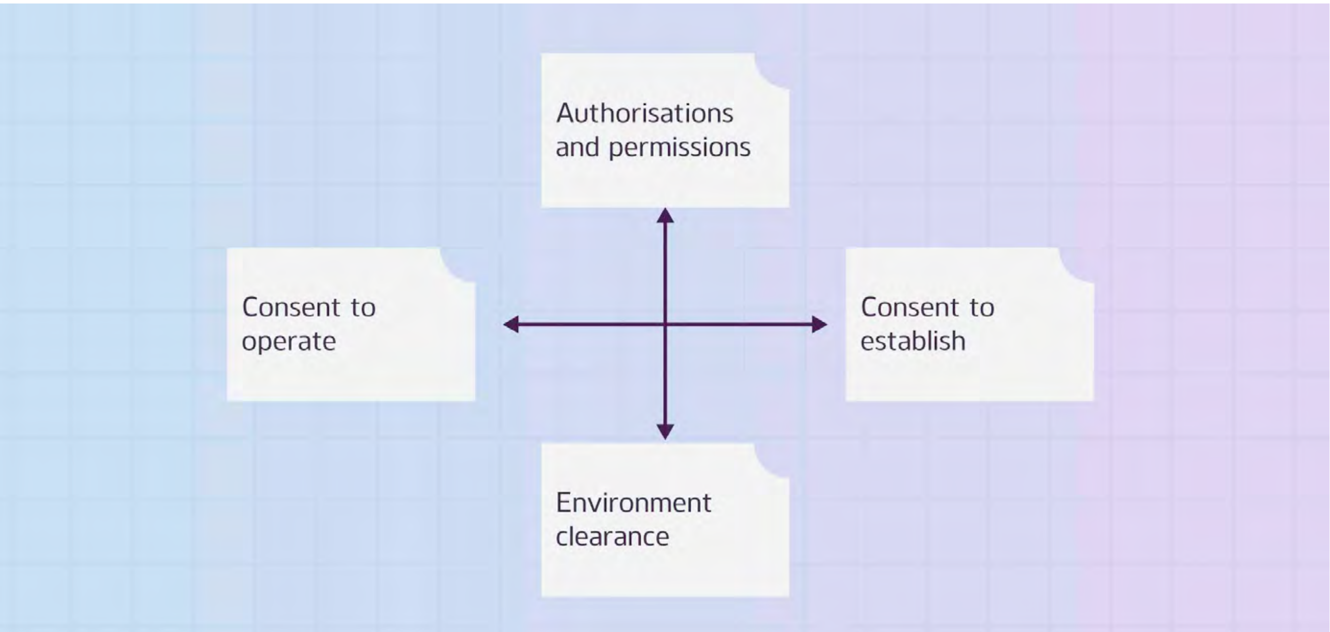
National green tribunal have been established under section 3 of the National Green Tribunal Act, 2010, with an objective to reduce the burden on the existing judicial system as well as to ensure effective and speedy implementation of environmental legislation. These tribunals are a specialised body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues.[8]

In terms of the Public Liability Insurance Act, 1991 ("**PLI Act**"), owners of any entity having control over handling of hazardous substances at the time of an accident shall be responsible for taking an insurance policy for a minimum prescribed quantity against liability to give relief in case of any accidents or mishaps that may occur at the workplace while handling hazardous substances.

8. http://www.greentribunal.gov.in/

The central government may by notification exempt government authorities as well as corporations owned or controlled by the government from the application of the PLI Act.

Key environmental approvals for setting-up an industry or project



Effect of non-compliance

There are multiple environment laws in India which regulate different types of industries. Any industry or business can only commence and continue its operations subject to securing applicable consents, registrations, or licenses, under applicable environment laws. They may also be subject to routine inspections or audits to assess compliance with the conditions subject to which the consents are provided. The NGTs, CPCB and SPCBs have the power to enforce obligations under the applicable environmental laws. Any non-compliance may have adverse consequences such as delay in setting up establishments, increased costs, depreciation of ESG credentials or ratings, impeded business continuity and in certain cases, even criminal liability.

The NGTs, CPCB, and SPCBs have the power to take serious actions like revocation of consent to operate, inspection of the facilities, disconnecting water/electricity, fines and/or imprisonment, and even closure of industry for non-compliance with environmental regulations.

The major challenges in achieving environmental compliance include identification of applicable environmental regulations, identification and assessment of the associated environmental risks, lack of a culture of environmental compliance, lack of resources, lack of awareness and financial constraints.

The use of a wide range of chemicals and rapid depletion of potable water reserves has led to growing awareness in India about the imperative of following a path of sustainable industrial development. In light of various judicial pronouncements, the CPCB and SPCBs have embarked on various initiatives like installation of online continuous environmental monitoring systems, zero liquid discharge, etc. Identification of the applicable regulations and continuous compliance with the prescribed conditions are critical for achieving overall compliance with the environmental laws and for achieving business continuity.

In 2023, the Jan Vishwas (Amendment of Provisions) Act, 2023 ("**Jan Vishwas Act**") was enacted under which certain offenses under the EPA and the other environmental laws in India have been de-criminalised, which further promotes ease of doing business in India.

Increasing Significance of Environmental, Social, and Corporate Governance ("ESG") Factors

ESG includes Environment (usage of natural resources, net carbon emissions, waste management, usage of renewable energy), Social (labour and employee management, supply chain standards), and Governance (corporate governance, corporate behaviour, employee expectations) aspects.

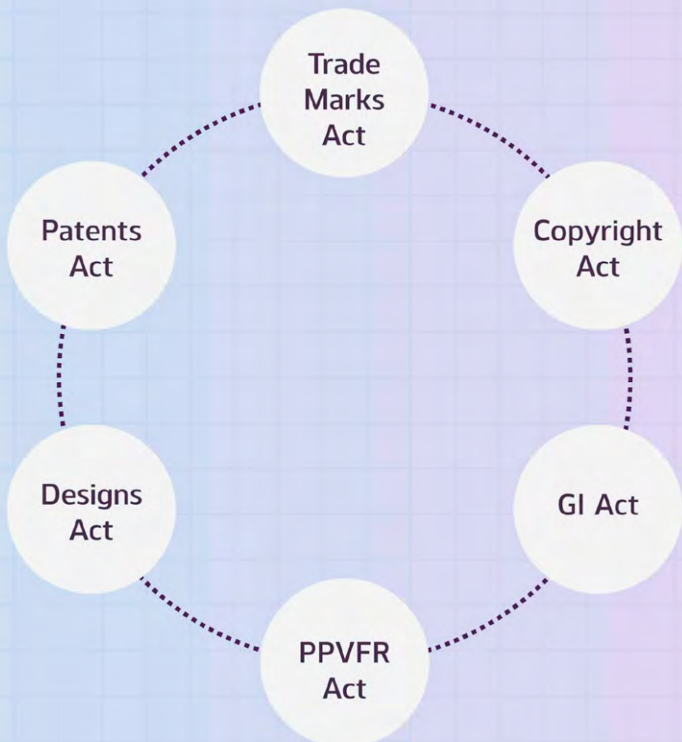
ESG principles are centered around 'sustainability', which is now recognised as a key driver of long-term value creation. The ESG regulatory framework is rapidly evolving in India and there has been an improvement in the incidence and quality of disclosures by companies. The objective is to gradually build a more comprehensive and extensive ESG reporting regime, moving towards the goal of sustainable, transparent and long-term investing trends.

In this context, the RBI and the Securities and Exchange Board of India have already introduced initiatives such as Business Responsibility and Sustainability Reporting, assurance and reporting of core ESG parameters, priority sector lending scheme, introduction of sovereign green bonds etc. Investors and other stakeholders are also promoting technology-enabled service companies and traditional companies are also pivoting towards more sustainable means of doing business.

Safeguarding your business interest: Intellectual property law in India

CONTRIBUTORS: VINDHYA S. MANI

Broadly, the intellectual property rights (**"IPRs"**) protection framework in India comprises the following legislations:



Trademarks

As per Section 2(zb) of the Trade Marks Act, 1999, (**"Trade Marks Act"**) the term "trade mark" means a mark capable of being represented graphically, capable of distinguishing goods and services of one person from another and includes the shape of goods, their packaging and combination of colours.

India is a signatory to three international treaties, which deal with trade marks, namely, the Agreement on Trade Related Aspects of Intellectual Property Rights (**"TRIPS"**), the Paris Convention and the Madrid Protocol. Trademarks in India are protected under the Trade Marks Act, 1999, as amended.

In India, registration of a trade mark is not mandatory. However, registration immediately gives the applicant a legal right to protect the trade mark against infringement or misuse. A registered trade mark is valid for an initial period of 10 years and thereafter can be renewed after every 10 years, indefinitely. There is, however, recourse available to an unregistered trade mark owner, to protect their trade mark too. For instance, the common-law remedy of "passing off" or proving that the mark is a "well-known" mark.

Section 18 of the Trade Marks Act provides for registration of trade marks in India in three categories:

- Ordinary trade mark – for a single class of goods or services;
- Multiclass trade mark – for more than one class of goods or services; and
- Convention application- for marks claiming priority from convention countries.

India enacted the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 which creates special courts for disposing of 'commercial disputes', which includes IPR disputes above a certain pecuniary limit. All district level and state level courts now have special commercial courts/divisions dealing with original and appellate cases which must be decided in a time-bound manner.

The Tribunals Reforms Act, 2021 (**"Tribunals Reforms Act"**) abolished the Intellectual Property Appellate Board (**"IPAB"**) which had original and appellate jurisdiction under various intellectual property laws. The powers of IPAB under the Trade Marks Act have now been transferred to the high courts. These powers include jurisdiction over appeals against the orders of the Registrar of Trade Marks, removal and rectification of trade marks. Since a trademark application can be filed at any one of the Trade Marks Registries located at Mumbai, Delhi, Kolkata, Chennai or Ahmedabad, the respective high courts of these jurisdictions have the power to hear appeals against the orders of these Registries.

Further, pursuant to enactment of the Tribunals Reforms Act, 2021, the Delhi High Court notified the creation of the Intellectual Property Division (**"IPD"**) in the High Court of Delhi, to specifically deal with matters related to Intellectual Property. The High Court of Delhi further notified the Delhi High Court Intellectual Property Rights Division Rules 2022 (**"IPD Rules"**) on 24 February 2022 to provide specific procedures for matters related to intellectual property including trade marks.

Building upon the precedent set by the Delhi High Court, the Madras High Court officially published its own Intellectual Property Division ("**IPD**") Rules, on 5 April 2023. This landmark move positions the Madras High Court as the second high court in India to establish a dedicated intellectual property division with a dedicated single judge dealing with matters pertaining to IPRs along with a division bench assigned to hear such matters. The Madras High Court's IPD Rules outline the procedural framework governing the exercise of both original and appellate jurisdiction within the Intellectual Property Division.

After the Delhi and Madras High Court, the Hon'ble Calcutta High Court could also soon have an IP Division.

On 19 December 2023, the Calcutta High Court notified its proposal of draft rules for the 'Intellectual Property Rights Division Rules of the High Court at Calcutta'. These rules are meant to govern pending cases before Calcutta's Intellectual Property Rights Division ("**IPRD**") and the Intellectual Property Rights Appellate Division ("**IPRAD**"). The proposed rules aim at covering matters related to intellectual property, including intellectual property laws like the Copyright Act, Designs Act, Trade Marks Act, and even the Information Technology Act, 2000.

Additionally, on 1 August 2024, significant amendments to India's intellectual property laws came into effect under the Jan Vishwas Act. These changes aim to decriminalise and rationalise penalties for certain offenses, fostering a more business-friendly environment and enhancing trust-based governance. Key amendments have been made to the Patents Act, Trade Marks Act, Geographical Indications Act, and Copyright Act, focusing on decriminalising major violations and enhancing governance effectiveness.

Pursuant to provisions of the Jan Vishwas Act the DPIIT released draft Trade Marks (First Amendment) Rules on 10 January 2024 for adjudication of holding inquiry, imposing penalties, and preferring appeals under provisions of the Trade Marks Act. This regulatory endeavor is conducted under the delegated powers provided for in Section 157 of the Trade Marks Act. These rules would create a unified adjudication process by strengthening the "adjudicating officer's" capabilities who shall hold inquiry and impose penalties for contravention. It introduces imperative changes to the Trade Marks Act, specifically altering the criminal penalty outlined in section 107 to a civil penalty. One important aspect further includes the electronic transmission of all communications and the mandate to upload every order to Intellectual Property India's official website. Further, the Draft Trade Marks (First Amendment) Rules also provide a new Form-D which can be used to file the complaint online.

Hence, these amendments aspire to alleviate legal intricacies that may arise during the practical implementation of the Act, contributing to an effective trademark governance.

Copyright

A copyright is a bundle of exclusive rights given in respect of original expression of works such as literary, artistic, musical, sound recording, cinematograph work, etc. The relevant statute which governs copyright in India is the Copyright Act, 1957 (**"Copyright Act"**).

The Copyright Act is at par with the international standards as set out in TRIPS and is in line with the Berne Convention for Protection of Literary and Artistic Works, 1886 and the Universal Copyrights Convention. In July 2018, India also acceded to the WIPO Internet Treaties, namely the WIPO Copyright Treaty (**"WCT"**) and WIPO Performances and Phonograms Treaty (**"WPPT"**). The WCT sets out a framework for the protection of authors' rights in the digital environment and makes mandatory the protection of computer programs and databases. The WPPT protects the rights of performers and producers of phonograms such as the rights of actors, musicians, singers and producers of soundtracks in a digital environment.

The validity of a registered copyright varies depending on the type of work. Literary/dramatic/artistic/musical work are valid up to the life span of the author and an additional 60 years from the year of death. On the other hand, works like cinematograph films and sound recordings are valid for a period of 60 years from the date of their publication.

A copyright owner can sue against infringement under Section 51 of the Copyright Act on the grounds that infringing copies are for sale or hire, there is public exhibition of infringing copies by way of trade; and importation of infringing copies into India etc. The previously referred to expedited enforcement under the new Commercial Courts law, applies to copyright disputes as well.

Moreover, the Jan Vishwas Act, by establishing revision of adjudicating officers and appellate authorities, permits practical modification of fines and penalties proportionate to the offense committed, and periodically increases the amount of fines and penalties. According to the Jan Vishwas Act, section 68 of the Copyright Act, 1957 which states penalty for making false statements for the purpose of deceiving or influencing any authority or officer; is omitted.

RELIEF FOR COPYRIGHT INFRINGEMENT

Civil Injunction, profits and damages under section 55, Copyright Act	Criminal Imprisonment or fine under section 63, Copyright Act

Post the enactment of the Tribunals Reforms Act, powers of the IPAB under the Copyright Act have been transferred to other courts. With respect to disputes on date of publication of work, term of copyright, assignments, license, resale share rights, anonymous and pseudonymous works, the power vests with the Commercial Court or Commercial Court division of a High Court. With respect to rectification of copyright and appeals against the order of Registrar of Copyright, the power has been transferred to the High Court. Furthermore, IPD Rules of Delhi High Court are applicable for institution of suits before the Delhi High Court.

Under the Madras IPD Rules, cases pertaining to the IT Act, 2000 dealing with the rights and liabilities of intermediaries and e-commerce platforms shall be deemed within the purview of IPR.

Patents

Inventions are protected by grant of patents under the Patents Act, 1970 (**"Patents Act"**). India has been a signatory to the Paris Convention since inception. India also became TRIPS compliant and accordingly, the law was amended to align it with TRIPS in 2005.

Patent Act defines the term *"invention"* to mean a new product or process involving an inventive step and capable of industrial application. Further, the term *"inventive step",* under the Patents Act, means a feature of an invention that involves technical advancement as compared to the existing knowledge or economic significance or both and that makes the invention not obvious to a person skilled in the art. Therefore, for a patent registration, the invention should meet the novelty, inventive step and industrial application tests, under the Patents Act.

In India, unlike trade marks and copyright, it is compulsory to register a patent to protect an invention. A patent is valid for a period of 20 years from the date of application, after which the exclusive right over the patent terminates. One particularly important provision is section 8 of the Patents Act which mandates that the applicant discloses all relevant details of the corresponding patent applications filed in major patent offices outside India in two ways i.e. voluntarily and on direction from the Controller. Failure to supply information regarding foreign prosecutions, especially in cases where claims in foreign jurisdictions were narrowed down or rejected or underwent opposition, could lead to revocation of a patent.

It is noteworthy that under the recent amendments to the Patent Rules, India brought in various changes to the Patent Rules for faster disposal of applications. Such changes include mandatory e-submission of documents and hearing through video-conferencing besides changes in procedure and providing for expedited examination. The time for putting an application in order for grant after examination report has been reduced to six months from twelve months. Request for expedited examination has been made available for certain National Phase applications for which International Search Authority was chosen as Indian Patent Office and also for applications filed by start-ups.

The Patents Act also provides for *'compulsory licensing'*. This is of high importance especially in industries like pharmaceuticals. Through judicial pronouncements, it has been held that for grant of compulsory license, it is necessary that the applicant for a compulsory license first applies for a voluntary license. In case the holder of the patent does not provide voluntary license, then the Controller provides a compulsory license, on grounds such as reasonable requirements of the public for the patented product not being met, the patented product not being available for a reasonable price or the patented invention not being worked in India.

It is of notable significance that recent amendments to the Patent Rules in India have brought about several pivotal changes aimed at expediting the examination of patent applications. Under the Tribunals Reforms Act, the authority of the Intellectual Property Appellate Board (IPAB) under the Patents Act has been effectively transferred to the High Courts. Consequently, the powers concerning patent revocation, patent rectification and appeals against decisions made by the Controller of Patents now exclusively rest with the high courts. Given that patent applications are filed in the Patent Offices located in Delhi, Mumbai, Chennai and Kolkata, appeals against orders originating from these offices may be instituted before the respective high courts where the original application was filed. In addition to the Intellectual Property Division ("**IPD**") Rules, the Delhi High Court has also formulated the Rules Governing Patent Suits 2022, which govern the initiation and proceedings of patent suits brought before the Delhi High Court. Furthermore, the Madras High Court has come up with IPD Rules of 2023 and patent matters are governed by such rules which has consequently facilitated in timely disposal of matter pending before the erstwhile IPAB which were transferred to Madras High Court.

To streamline the patent examination process in India, the Patent (Amendment) Rules, 2024 (the "**Amended Patent Rules**") were notified by the Ministry of Commerce and Industry on 15 March 2024. The Amended Patent Rules have brought crucial changes in the pre-grant opposition procedure. Once a pre-grant opposition is filed, the controller shall first decide the maintainability of such representation. However, if the controller is not satisfied that a *prima facie* case is made by the opponent, the opponent may be heard (if requested) after which the controller will pass a speaking order admitting or rejecting the opposition. If a *prima facie* case has been made by the opponent, the controller shall pass a reasoned order and notify the applicant. The timeline for replying to the notice has been reduced from three months to two months in the Amended Patent Rules. With respect to post-grant opposition, the timeline for the opposition board to give recommendations has been reduced from three months to two months. These changes have been made with a view to curb proxy oppositions that stall patent grants and also to expedite the opposition proceedings in general.

Penalties under section 120 have ascended from INR 1 lakh to INR 10 lakhs. The Act also provides imprisonment and fine for wrongful use of the words "patent office." The latest changes also provide for insertions of new provisions for adjudication of penalties, appeal against adjudication, etc. Moreover, major change has been introduced with respect to the manner in which the statement of working of patent has to be furnished in Form 27 as per Rule 131 (2). The Amended Patent Rules require the patentee/licensee to file Form 27 once in every three financial years, starting from the financial year commencing immediately after the financial year in which the patent was granted.

These noteworthy developments demonstrate and signify the nation's commitment to provide a robust mechanism for the protection of IPR and an effective adjudication of disputes arising from the breach of IPR.

Geographical Indications

Geographical Indications (GIs) in India, governed by the Geographical Indications of Goods (Registration and Protection) Act, 1999, play a pivotal role in preserving the unique identity and heritage of various products. GI, a distinctive sign used on products that have a specific geographical origin and possess qualities, reputation, or characteristics inherent to that location. This legal framework not only safeguards the authenticity of traditional goods but also empowers local communities by enhancing the marketability of their products. GIs ensure that the cultural and economic value of the Indian products are recognised globally. In December 1999, the Indian Parliament had passed the Geographical Indications of Goods (Registration and Protection) Act, 1999. This act provides for the registration and better protection of geographical indications relating to goods in India. The act is administered by the Controller General of Patents, Designs and Trade Marks- who is also the Registrar of Geographical Indications. The Geographical Indications Registry is located at Chennai. The Geographical Indications of Goods (Registration and Protection) Rules, 2002 were further enacted and established in 2003 along with the GI Act.

Section 2(1)(e) of the GI act states the geographical indication in relation to agricultural, natural or manufactured goods which originate or are manufactured in the region wherein a given quality, reputation or other characteristics of such goods is attributable to the geographic location, the same will be given an indication. Furthermore, according to the provisions of section 11 of the Act any producer who is willing to register a geographical indication in relation to such products shall apply in writing to the Registrar for the registration of the GI. The Act also provides registration of a GI shall be for a period of 10 years which can be extended and renewed.

The Ministry of Commerce and Industry, through the DPIIT, has also proposed the Geographical Indication of Goods (Registration and Protection) (Second Amendment) Rules, 2023, published on 2 January 2024. There has been a significant rise in Geographical Indication (GI) registrations, showing a threefold increase from the previous year. Currently, India has 573 registered GIs. In the 2023-24 period, 98 new GIs have been registered, with an additional 62 expected by 31 March 2024. Furthermore, 11,621 authorised users are registered, and another 2,575 users are anticipated to be registered by 31 March 2024. These draft rules aim to bring significant changes to the existing framework established by the Geographical Indication of Goods (Registration and Protection) Rules, 2002.

Designs

The protection for the aesthetic appeal or novel *'design'* of any finished article is conferred under the Designs Act, 2000 (**"Design Act"**). The benefits of design registration are that the registered owner gets an exclusive right to apply the design to the article, the right to sue for piracy and the right to license the design as legal property for consideration or royalty. A registered design is valid up to 10 years from the date of registration and is extendable by 5 years. Section 4 of the Designs Act provides for a list of designs that cannot be registered. These include reasons such as a design not being new or original; or a design having been disclosed to the public anywhere in India or in any other country; or a design which is not significantly distinguishable from known designs or a combination of known designs, etc. According to the section 2(d) of the Designs Act, a design must specifically exclud*e, "any mode or principle of construction or anything which is in substance a mere mechanical device".* This exclusion has been affirmed in various case laws, seminal being Carlsberg v. Som Distilleries, 2017 SCC OnLine Del 8125 which have held that *"designs which are purely functional cannot be protected or form the basis for an action for infringement."*

Piracy of a registered design during the existence of the copyright would attract a liability of a sum not exceeding INR 25,000 recoverable as a contract debt, under section 22 of the Design Act. Piracy includes acts such as unauthorised application of a registered design or any fraudulent imitation of any article for sale, import, publication or exposure for sale of such article. This section also provides for the right of a proprietor to bring a suit for the recovery of damages and for an injunction against the repetition of such an act. The expedited enforcement under the new commercial courts law referred to above applies to these matters as well.

The Designs Act and Rules offer the option to file a Design Application within any of the four designated Patent Offices in India, namely, the Patent Offices in Delhi, Mumbai, Chennai, or Kolkata. Presently, the process of prosecuting design applications in India is exclusively conducted at the Kolkata Patent Office. Consequently, in the event of an appeal arising from an order issued by the Design Controller concerning a design application, the jurisdiction for such appeals lies with the Calcutta High Court.

Running operations:
Direct taxation in India

CONTRIBUTORS: S. VASUDEVAN, KARANJOT SINGH

Direct tax is an important parameter that investors must factor in while making investment decisions and structuring investments. This section details domestic tax provisions and their interplay with Double Taxation Avoidance Agreements (**"DTAA"**) signed by India so as to provide a holistic view on India's taxing rights on various streams of income earned by non-residents from India.

In India, the central government levies a tax on the income earned by the taxpayer during a financial year (**"FY"**) which commences on 1 April and ends on 31 March. The income is assessed to tax in the immediately succeeding financial year which is known as assessment year (**"AY"**). The central government presents a finance bill in the Parliament in the month of February for the FY commencing in April thereafter. This bill contains the rate of taxes in relation to various categories of taxpayers and streams of income as well as amendments proposed by the central government in the Income-tax Act, 1961 (**"IT Act"**). Income tax is levied on the income earned by individuals, companies, partnership firms, association of persons and artificial juridical persons. The IT Act allows deduction of all expenses (other than capital expenses) incurred wholly and exclusively for the purpose of business or profession. For example, expenses related to renting, repairs, depreciation, interest on borrowed capital, to name a few.

The IT Act allows deduction of expenses (other than capital expenses) incurred wholly and exclusively for the purpose of business or profession. For example, expenses related to renting, repairs, depreciation, interest on borrowed capital, to name a few.

Applicable Tax Rates:

For Individuals

The individuals are liable to tax on the slab rates. The slab rates vary as per the age of the individuals as tabulated below:

Taxable income	Particulars
Up to INR 250,000	NIL
INR 250,001 to INR 500,000	5
INR 500,001 to INR 1000,000	20
Above INR 1,000,000	30

The tax rates are to be further increased by applicable surcharge and cess of 4%. The surcharge rates applicable to individuals are given below:-

- 10% of tax where taxable income exceeds INR 5 million but does not exceed Rs. 10 million.
- 15% of tax where taxable income exceeds INR 10 million but does not exceed Rs. 2 million.
- 25% of tax where taxable income exceeds INR 20 million but does not exceed Rs. 50 million.
- 37% of tax where total income exceeds INR 50 million.

However, an option is also available with the individual taxpayer to opt for the lower tax regime by giving up around 70 tax exemptions and deductions that are otherwise available. The slab rates under the lower tax applicable for AY 2025-26 are tabulated below:

Tax Slab	Rates (in %)
Up to INR 300,000	NIL
INR 300,001 to INR 600,000	5
INR 6,00,001 to INR 9,00,000	10
INR 900,001 to INR 1,200,000	15
INR 1,200,001 to INR 1,500,000	20
Above INR 1,500,000	30

Note: The surcharge rates under the lower tax regime has also been restricted to 25% as against 37% applicable for taxable income exceeding INR 50 million.

For Corporate (Effective Tax Rates) as applicable for AY 2025-26

Particulars	Indian company** (in %)	Foreign Company (in %)
Companies having a turnover of up to INR 4 Million in FY 2022-23		
Taxable income exceeds INR 10 million but does not exceed INR 100 million	27.82	37.128
Taxable income exceeds INR 100 million	29.12	38.22
Other Companies		
Taxable income exceeds INR 10 million but does not exceed INR 100 million	33.38	37.128
Taxable income exceeds INR 100 million	34.94	38.22

Note: Recently, tax rates applicable for foreign companies has been reduced by Finance (No.2) Act were reduced from AY 2025-26 onwards. For AY 2024-25 and prior years, tax rates as mentioned below shall be applicable on the foreign companies:

- Taxable income exceeds INR 10 million but does not exceed INR 100 million = 42.432%
- Taxable income exceeds INR 100 million = 43.68%

Certain tax benefits under IT Act

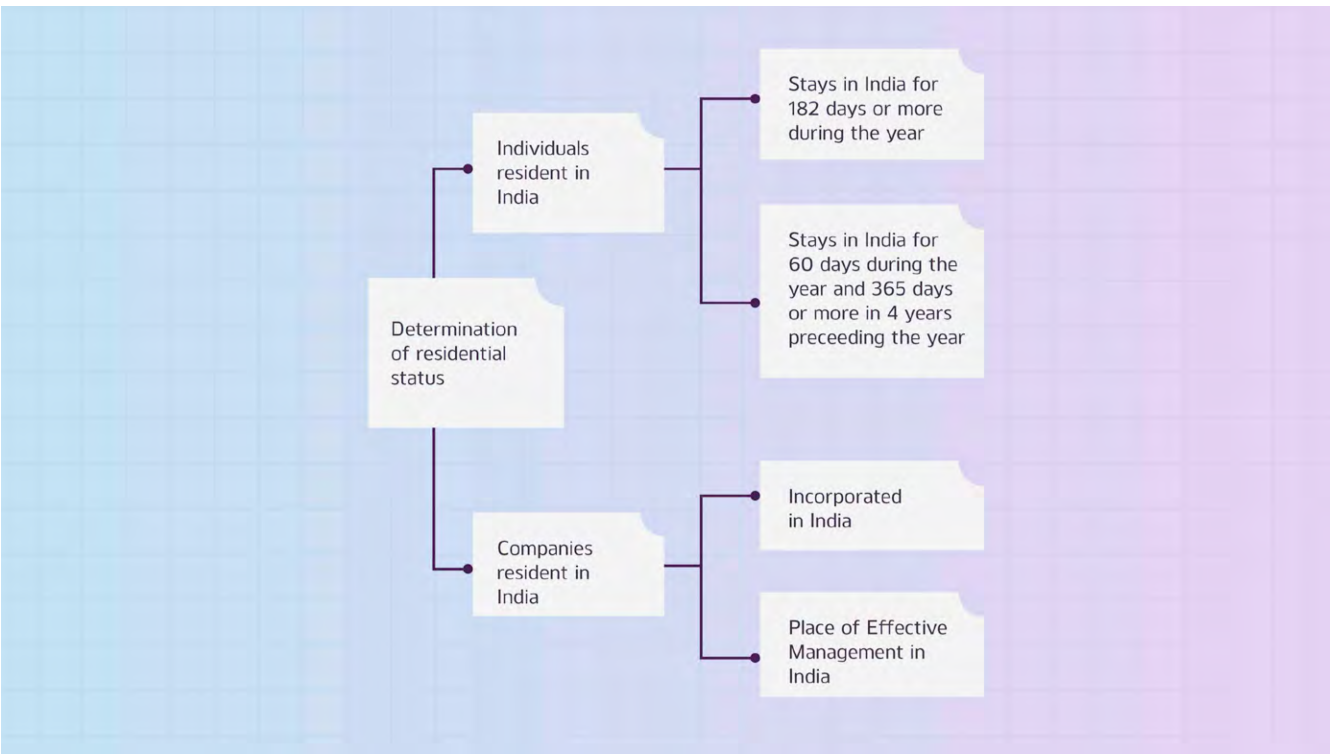
- Tax exemption for units in International Financial Services Centre (IFSC): IFSC is a special economic zone set-up within India with the intent of providing impetus to financial services entities. The GOI with the object of making IFSCs a global hub of financial services, provides several tax concessions to units located in IFSCs. Entities set up in IFSC are entitled to 100% income-tax holiday for a period of 10 consecutive years out of first 15-years of setting-up the unit in IFSC. Incentives have also been extended to offshore funds (having underlying assets in India) for relocation to IFSC.
- Expenditure on scientific research: 100% deduction of the expenditure (including capital expenditure but excluding expenditure for acquiring land or interest in land) on scientific research.

• Royalty income earned by a resident from patents developed and registered in India: Royalty income from patents developed and registered in India would be taxable at 10% of gross consideration.

• Additional deduction for employment generation: Taxpayers are allowed an additional deduction of 90% of the employee cost incurred on additional employment generation in a year. The additional deduction of 90% is allowed in three equal yearly instalments beginning from the year in which the employment is provided and is subject to satisfaction of certain conditions.

• Profit linked tax holiday for eligible start-up set up in India: An eligible start-up is allowed deduction of an amount equal to 100% of its business profits for three consecutive years out of a block of ten years. The said benefit is available to start-ups incorporated before 1 April 2025.

Scope of Taxable Income in India



Subject to the DTAA, a non-resident is, therefore, liable to pay tax in respect of the categories of income in India mentioned below:

- Income from business connection in India.
- Income from transfer of capital asset situated in India.
- Salary earned from exercise of employment in India.
- Dividend income earned from an Indian Company.
- Interest income earned from monies borrowed from India.
- Royalty income arising from properties used in India.
- Fees for technical services availed for business in India.
- Sums of money received without consideration from a person resident in India.

Double Tax Avoidance Agreements ("DTAA")

India has signed DTAAs with more than 85 countries. Wherever there is a conflict between domestic income-tax law and DTAA, non-residents are eligible to claim benefit of DTAA to the extent it is beneficial to them. The DTAA will be applicable not only to determine taxability in India but also to determine the applicable tax rates. The availability of DTAA benefit is subject to furnishing of certain documents like Tax Residency Certificate, Form 10F etc.

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI").

India is a signatory to the MLI and has notified most of the DTAAs signed by it. Pursuant to MLI, the Principal Purpose Test ("**PPT**") now applies to DTAA signed by India. MLI has also widened the scope of PE. To bring the scope of IT Act in line with the provisions of MLI, certain amendments have also been made in the IT Act.

General Anti Avoidance Rule (“GAAR”)

Similar to PPT in MLI, GAAR is an anti-abuse provision in the IT Act. GAAR is applicable to ‘impermissible avoidance arrangements’ that are primarily structured to achieve tax benefit. The provisions relating to GAAR provide, inter-alia, denial of benefit of DTAA if such benefit is sought to be obtained as a consequence of impermissible avoidance arrangement. The aim of GAAR provisions is to tax the substance of the transactions irrespective of the legal structure of the arrangement. Presently, the monetary threshold for applicability of GAAR is INR 3 crores (approximately USD$ 357,440).

IMPERMISSIBLE AVOIDANCE ARRANGEMENT

Main purpose is Tax benefit

AND

Creates rights or obligations which are not ordinarily created between persons dealing at arm's length

OR

Directly or indirectly results in misuse or abuse of domestic law provisions

OR

Lacks or deemed to lack commercial substance

OR

Not entered into or carried out for bona fide purposes

Acquisition and Restructuring

There could be different modes of acquisition and restructuring like amalgamation, demerger, acquisition of shares, acquisition of individual assets or liabilities of a business, slump sale or buyback. These options are briefly discussed in subsequent paragraphs.

Amalgamation and Demerger

Acquisition/transfer of business by way of amalgamation and demerger is tax neutral in India for both the transferor and transferee. This is however subject to satisfaction of certain prescribed conditions.

Acquisition of shares

(i) Angel Tax

IT Act contains anti-abuse provisions which are applicable to an Indian company raising capital from its shareholders. The said provisions are applicable if the company issues shares (equity or preference) to the shareholders at a premium. Capital raised by Indian companies from its shareholders at a value which is in excess of the fair market value of shares issued by it, is deemed to be income and is taxed at the applicable corporate tax rate. Since, the provisions can potentially have adverse implications in relation to angel investments raised by companies in early stages, the provision was colloquially referred to as 'Angel Tax'. In order to improve the ease of doing business for the Indian companies and to instill investor's confidence, Angel Tax has been made inapplicable from FY 2024-25. Thus, any investment made by a person in share capital of an Indian company post 1 April 2024 will not be subject to Angel Tax.

(ii) Capital Gains Tax

While amalgamation and de-merger are tax neutral, other options of re-structuring may result in capital gains. For example, when an investor sells its shares in an Indian company, capital gains tax may arise in the hands of such investor. Capital gains in India is generally classified into two categories viz short-term capital gains and long-term capital gains. The said classification is based on the period for which an asset is held by the transferor before its sale. The rates of taxation and the cost allowable as deduction against sale consideration varies based on the classification of capital gains. For short term capital gains, the cost actually incurred is allowed as deduction. However, for long term capital asset, indexed cost (inflation adjusted cost) is allowed as deduction until 23 July 2024. Thus, for transfers made post 23 July 2024, indexation benefit is not available. Hence, the long-term capital gains computation will be made by deducting cost actually incurred therefrom for transfers made on or after 23 July 2024.

Applicable Capital Gain tax rates for the period April 23 to July 23

Capital Asset	Period of Holding		Tax Rates as per IT act			
	Short term capital asset	Long term capital asset	Short term capital gains		Long term capital gains	
			Resident	Non-Resident	Resident	Non-Resident
Listed equity shares	Held for not more than 12 months	Held for more than 12 months	15%*	15%*	10%* without indexation	10%* without indexation
Unlisted equity shares	Not more than 24 months	More than 24 months	Slab rates (Highest rate being 30%*)	Slab rates (Highest rate being 30%*)	20%* with indexation	10%* without indexation

*Rates for individual taxpayers as IT Act *Surcharge and Cess as applicable *Applicable on capital gains exceeding USD 1489

Applicable Capital Gain tax rates on or after July 23, 2024

Capital Asset	Period of Holding		Tax Rates as per IT act			
	Short term capital asset	Long term capital asset	Short term capital gains		Long term capital gains	
			Resident	Non-Resident	Resident	Non-Resident
Listed equity shares	Held for not more than 12 months	Held for more than 12 months	20%*	20%*	12.5%* without indexation	12.5%* without indexation
Unlisted equity shares	Not more than 24 months	More than 24 months	Slab rates (Highest rate being 30%*)	Slab rates (Highest rate being 30%*)	12.5%* without indexation	12.5%* without indexation

*Rates for individual taxpayers as IT Act *Surcharge and Cess as applicable *Applicable on capital gains exceeding USD 1489

The non-resident taxpayers can opt for beneficial provisions of DTAA for the determination of their capital gains tax liability.

Generally, as per the DTAA, if shares in an Indian Company are held by a foreign resident and they derive some gains from the alienation of such shares, the gains may be taxed in India. However, in case of certain DTAAs (such as India- Netherlands DTAA), the capital gains from sale of shares of Indian company are taxed only in country of residence of shareholders. However, the benefit in such DTAAs will be subject to PPT in DTAA and GAAR in IT Act.

Slump sale

Another way of business acquisition could be through a slump sale which involves the transfer of one or more 'undertakings' for a lump sum consideration without values being assigned to the individual assets and liabilities in such transfer. The transferor's profits (sales consideration minus net worth of undertaking transferred) are chargeable to tax as capital gains.

Acquisition of individual assets

Further, an investor can acquire individual assets of a business in India instead of acquiring the going concern as a whole. Taxation of gains on transfer differs based on whether a capital asset is a depreciable asset or a non-depreciable asset. The non-resident taxpayers can opt for beneficial provisions of DTAA for determination of their capital gains tax liability.

Buy-Back of shares

In order to take an exit, one of the options is buy-back of shares by the issuing company from its shareholders. Until 30 September 2024, buy-back of shares was taxable in the hands of issuing company and exempt in the hands of the shareholder. However, with effect from 1 October 2024, buy-back proceeds shall be taxable in hands of shareholders as deemed dividend. Further, cost of acquisition shall be allowed as a capital loss to the shareholders which can be carried forward for a period of 8 years and can be set off against the capital gains arising in those years. The non-resident taxpayers can opt for beneficial provisions of DTAA for determination of their tax liability on account of the buy back of the shares.

Tax Compliance

Due dates of filling Income Tax Return

- For an Indian company engaged in international transaction – 30 November of AY

- For an Indian company not engaged in international transaction – 31 October of AY

Consolidated returns

- No provision is made for group taxation or group treatment; therefore, each entity is taxed separately.

Easy of business

- India has an advance pricing agreement (APA) scheme which allows investor friendly tax regime in India. It is basically an arrangement between a tax administration and a taxpayer which determines in advance the arm's length price for cross border transactions between group entities.

Royalty and Fee for Technical Services ("FTS")

Income of non-residents from royalty/FTS earned in India is taxable at the rate of 20% (plus applicable surcharge and cess) on gross basis. Most of the DTAA provide a taxation rate of 10% ~ 15% for income in the nature of royalty/FTS. Therefore, certain non-residents (from countries such as the USA, UK wherein DTAA provides for 15% tax on royalty/FTS) are likely to pay higher tax on their royalty/FTS income as compared to earlier years.

Secondment of Employees

Cross-border movement of employees between multinational group companies has been a need as well as a regular practice. It has become an essential part of modern-day global business and there is hardly any sector where overseas employees are not seconded/ deputed to India from time to time. This deputation of employees brings along with it many advantages of global talent pool, skill development, saving cost of training, knowledge transfer, etc. But there are certain tax aspects to it also. The seconded employees may be subject to taxation in India on the global salary/ remuneration earned by them during the period of deputation on which Indian entity may be liable to tax withholding obligations. In addition, depending on the contractual arrangement between the parties, the Indian entity may also be required to withhold tax from any payments made to the overseas entity towards such deputation.

Digital Taxation Policy of India: Equalisation Levy and Significant Economic Presence

Equalisation levy

In order to widen the Indian tax base, Indian tax authorities *vide* Finance Act 2016 introduced Equalisation Levy (**'EL'**) provisions. The provisions require an Indian payer to deduct 6% EL from consideration payable in relation to digital advertisement to a non-resident. The scope of EL was further expanded in 2020. The expanded provision provides for 2% tax liability on all consideration received by non-resident e-commerce operators from e-commerce supply or services made or facilitated by it to the Indian residents. The said levy is to be paid directly by non-residents to the Central Government. Recently, the 2% EL has been withdrawn with effect from 1 August 2024.

*Significant economic presence (“**SEP**”)*

Previously, under the Indian tax laws, any income accruing or arising from a business connection in India was taxable in India. Such business connection normally required carrying on of operations by the non-residents in India through physical presence. However, after the change in the law with effect from AY 2022-23, even a SEP of a non-resident is deemed to constitute a business connection in India, and hence, income generated by a non-resident from such SEP will be taxable in India.

Non-residents are deemed to have a business connection in India by way of SEP where:

- The non-resident carries out transactions in any goods or services or property with any Indian resident and the aggregate payments exceed INR 20 million (approximately USD$ 270,000) in a year; or
- The non-resident engages in systematic and continuous soliciting of business or in interaction with a minimum of 300,000 users in India.

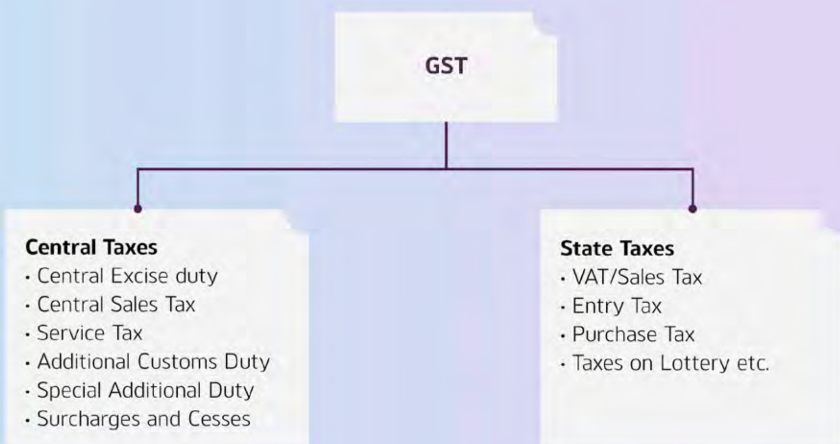
Non-resident taxpayers may be required to pay tax and make various compliance (including obtaining tax registration) in India on account of having SEP in India.

Running operations: Indirect taxation

CONTRIBUTORS: SHIVAM MEHTA, ROHINI MUKHERJEE

India's erstwhile indirect tax regime was complex and contained distinct frameworks for various indirect taxes such as excise, customs and service tax. The erstwhile indirect tax system had many shortcomings. The absence of provisions allowing set-off meant that there was no way to claim credit for payment of a certain type of indirect tax against another payable under a different statute. This led to a cascading of taxes. The taxation regime was spread across several central and state legislations and compliance with it posed enormous challenges.

To mitigate these and other issues, the Parliament of India enacted the Central Goods and Service Tax Act, 2017 ("**CGST Act**"), (and the respective state enactments and rules in furtherance of the same) (collectively, "**GST Law**"), which subsumed most of the indirect tax legislations. The GST Law was implemented keeping with the ideal, 'one nation, one tax'.



Indirect tax under the GST Law is levied by the Central and State governments in equal measure, by way of the CGST and State Goods and Services Tax ("**SGST**") on the same taxable base. In case of inter-state transactions, the Central Government levies the Integrated Goods and Service Tax ("**IGST**").

Central Goods and Services Tax

Tax on intra-state transactions of goods or services, or both.

Taxes such as Central Excise Duty, Central Sales Tax, Service Tax, and Special Additional Duty of Customs has been subsumed in CGST.

State Goods and Services Tax

Tax on intra-state transactions of goods or services or both.

The SGST replaces state VAT, entertainment and amusement tax which used to be levied by state authorities under the erstwhile regime.

Integrated Goods and Services Tax

Tax on inter-state movement of goods or services, or both.

IGST is also leviable on imports.

IGST is apportioned and distributed between center and states in the agreed ratio.

Compensation Cess

Compensation Cess is levied on certain motor vehicles, goods such as tobacco and pan masala, aerated drinks etc. for compensating states for loss of revenue due to introduction of GST, or a period up to 31 March 2026.

At present, the following goods are outside the scope of GST:

- Alcohol for human consumption, and un-denatured extra neutral alcohol or rectified spirit used for manufacture of alcoholic liquor, for human consumption.

- Five petroleum products, namely, crude oil, diesel, petrol, natural gas and aviation turbine fuel.

Tax exemptions

The GST law provides for tax exemptions to certain categories of goods and services. Some of the goods and services which enjoy GST exemption are as follows:

- Fresh milk and pasteurised milk, including separated milk, milk, and cream, not concentrated nor containing added sugar or other sweetening matter, excluding ultra-high temperature milk.
- Postal items, like envelope, post card etc., sold by the Government.
- Curd, lassi, butter milk, natural honey (excluding honey which is pre-packaged and labelled).
- Services supplied by electricity distribution utilities by way of construction, erection, commissioning, or installation of infrastructure for extending electricity distribution networks for agricultural use.
- Storage or warehousing of cereals, pulses, fruits, and vegetables.
- Services by the Department of Posts in relation to post cards, inland letters, book posts and ordinary posts (only extended to envelopes weighing less than 10 grams).
- Training or coaching in recreational activities relating to arts or culture by an individual.
- Services by veterinary clinics in relation to health care of animals or birds
- Health care services by a clinical establishment, an authorised medical practitioner or paramedics (excluding the service of providing rooms wherein room charges exceed INR 5,000 per day), ambulance services.

Economic benefits of GST

The salient features of Indian GST are as follows:

1) Free flow of Tax Credit

GST is a tax levied on goods and services, with a comprehensive and continuous chain of set-off benefits that extends from the producer to the retailer. It is levied only on the value addition at each stage, and a supplier at each stage is permitted to set-off the GST paid on the purchase of goods and services through a tax credit mechanism.

2) Mitigation of cascading effect of taxes

One of the primary objectives behind the introduction of the GST system was to mitigate the levy of taxes at multiple stages in the supply chain, manufacturing process and sale of goods and services, which often resulted in double taxation under the previous regime. This has been achieved by subsuming most of the Central and State taxes into a single tax regime, thereby allowing a set-off of prior-stage taxes.

3) Ease of doing Business & standardization

GST has standardised taxes throughout the country, thereby making it easier for businesses to operate in India.

4) Increase of investment in India

A stable and transparent tax regime leads to a strong and secure business sector, which further encourages local and foreign investment.

Threshold Registeration

- Under the GST Law, a business with a turnover of more than INR 2 million per annum is required to register as a normal taxable person.
- The turnover threshold for registering in special category States, such as the States of Manipur, Mizoram, Nagaland and Tripura, is more than INR 1 million per annum.

- For persons dealing in exclusive supply of certain goods, the threshold is more than INR 4 million per annum for registration, except for certain states.

- Under the GST Law, a registered person having an annual turnover of up to INR 15 million per annum in the preceding financial year can register as composition dealers under the Composition Scheme, pursuant to which, small taxpayers can get rid of tedious GST formalities and pay GST at a flat rate of 1% of the turnover in State or turnover in Union territory in case of a manufacturer.

- A dealer opting for the Composition Scheme

  » Cannot avail Input Tax Credit.

  » Cannot supply goods which are not taxable under GST (such as alcohol).

  » Form GST CMP-08 to be filed every quarter on 18th of the month following the quarter.

Tax Compliance:

1. Form GSTR 1
   - To be filed on the 11th of every month.
2. Form GSTR3B
   - To be filed on the 20th of every month.
3. Form GSTR9/GSTR9C - Annual return
   - To be filed on 31st December of the year following the relevant Year.
4. E-invoicing
   - From 1st August 2023 onwards, e-invoicing is mandatory for businesses with a turnover exceeding INR 50 million.

Business restructuring

Internal restructuring

A. Investment/Diversification/Expansion

There are various incentives to promote the expansion of businesses, based on the location of a business and/or product or service provided by it, such as reimbursement of the SGST or CGST.

Location-based Incentives

In order to encourage business enterprises to expand and grow, various location-based incentives have been provided such as:

1) Uttar Pradesh Industrial Investment & Employment Promotion Policy, 2017

Under this policy, the State government incentivises business by reimbursing net SGST on fulfilling the specified criteria of capital investment under the scheme on the following basis:

- » 90% of net SGST to be reimbursed to small industries for a period of 5 years
- » 60% of net SGST to be reimbursed to medium industries for a period of 5 years
- » 60% of net SGST to be reimbursed to large Industries (other than Mega Industries) for a period of 5 years
- » 70% of net SGST to be reimbursed to mega industries for a period of 10 years.

The above stated reimbursement shall be allowed from the year of fulfilling the criteria of capital investment under the scheme.

2) Haryana State Electric Vehicle Policy, 2022

- This policy offers incentives to buyers that would reduce the effective upfront cost and motivate individuals to take up electric vehicles (EV) as their primary mode of transportation.
- EV manufacturers can avail reimbursement of 50% of applicable net SGST for 10 years or up to realization of fixed capital investment (FCI), whichever is earlier.
- In case, where Net SGST deposit under cash ledger is less than 5% of FCI in a year or project having inverted duty, the investment subsidy up to 5% of FCI may be given for a period of 8 years in equal installments subject to annual ceiling of INR 5 crore for mega units.

Product based incentives

There are various schemes which provide incentives on the basis of the product manufactured and are aimed at promoting domestic manufacturing of the product. These schemes also include incentives in relation to GST. An example of such scheme is as follows:

1. Handloom, Power-loom, Silk, Textile and Garmenting Policy 2017

This policy offers incentives to textile units in terms of net SGST reimbursement subject to an annual upper limit of 25% of fixed capital investment for a period of 10 years.

» 90% of net SGST can be reimbursed to MSME textile units.

» 80% of net SGST can be reimbursed to mega and super-mega units.

» 90% of net SGST can be reimbursed to units in Poorvanchal and Bundelkhand.

» 75 % of net SGST can be reimbursed to units in Madhyanchal and Pashchimanchal.

B. Relocation of Factory

Under GST, various types of benefits are given in relation to the place of operation of business, to promote the relocation of factories to specific zones earmarked for such industries. Some of these zone-based incentives are:

a) Special Economic Zones

Any supply of goods or services or both to a Special Economic Zone (“**SEZ**”) developer or unit will attract no GST. In other words, supplies into SEZ are considered as exports and thereby supplier is eligible the benefits as available on export of goods or services.

b) Operations in Custom Warehouse

This program allows a unit to import capital goods and/or inputs under customs duty, with no liability to pay interest. The units do not have to abide by a certain investment threshold or have to fulfil export obligation. Further, if the goods manufactured out of such imported capital goods or inputs are exported, the entirety of the duties are remitted. If such goods are supplied in the domestic market subsequent to ex-bonding, then only the import duty stands payable.

External restructuring

Companies use restructuring as a business strategy to ensure their long-term viability. The common modes of external restructuring and their GST implications are as follows:

A. Slump Sale

If the business is transferred as a going concern along with assets and liabilities, the same is outside the purview of GST. Further, the company can transfer the accumulated unutilized input tax credit to the resultant company.

B. Itemized Sale

In the case of individual sale of assets, the accumulated input tax credit in the electronic credit ledger in respect of the individual asset cannot be transferred to the purchaser of such asset as per the GST Law. However, the purchaser is eligible to avail the credit of the tax paid on the purchase of goods.

Resolve, revive, empower: The Insolvency and bankruptcy code

CONTRIBUTORS: YOGENDRA ALDAK

The GOI introduced the Insolvency and Bankruptcy Code, 2016 (**"IBC"**) to, among others, curb the menace of rising non-performing asset(s) (**"NPA"**) in the financial market. IBC consolidated several disparate insolvency-related laws into one comprehensive framework. IBC touches upon the insolvency resolution of not just corporate persons but also of limited liability partnerships, guarantors and individuals (although the part of IBC that deals with the latter categories is yet to be notified).

When IBC was first brought into force, India was languishing at 137/190 in the 'Ease of Doing Business' Index. However, IBC streamlined the entire insolvency process and significantly reduced the time required for completing the process. The process of insolvency resolution in India would unfold over years on average in India as against 1 and 1.5 years respectively in the United States and the United Kingdom. In 2019, the World Bank hailed India's efforts in undertaking business reforms, including resolving insolvency and by 2020, India had raced up to the 63rd position in the 'Ease of Doing Business' rankings.

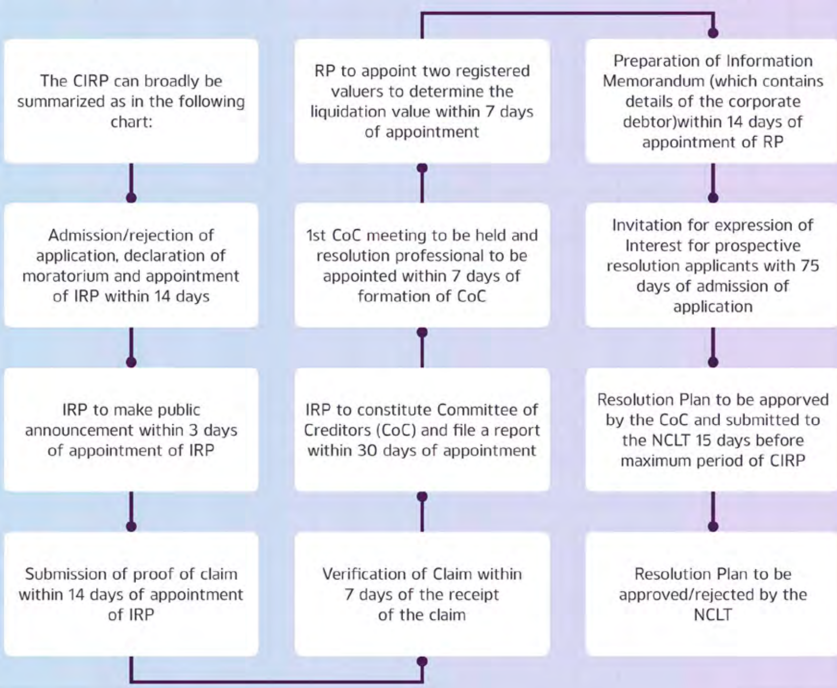
According to data released by the Insolvency and Bankruptcy Board of India (**"IBBI"**), since the enactment of IBC till June 2024, IBC has come to the rescue of 3293 corporate debtors (1005 through resolution plans, 1192 through appeal or review or settlement and 1096 through withdrawal). Also, 2547 corporate debtors have been referred for liquidation. The resolved corporate debtors have resulted in a recovery of more than 32% as against the admitted claims and more than 161% as against the liquidation value. Further, in the financial year 2023-24, India has witnessed around 43% year-on-year jump in the successful resolution of cases to 270 under IBC in the last financial year from 189 cases during the previous financial year.

The robustness of the IBC has also allowed various complex and high-value businesses such as Essar Steel, Electrosteel Steels, and Bhushan Steel to be rescued, resulting in substantial recovery in excess of USD$ 4-5 billion for creditors in such cases, or a rare 100% recovery of the debt of about USD$ 1 billion for several creditor banks in the resolution of Binani Cements.

Corporate Insolvency Resolution Process

IBC specifies a strict timeline of 330 days for completion of the entire corporate insolvency resolution process. The process for resolution of insolvency and liquidation under IBC rests on four pillars. The first is a class of regulated persons, the insolvency professionals (“**IPs**”), who play a key role in the efficient working of the insolvency, liquidation/bankruptcy process. The second is the new industry of Information Utilities (“**IUs**”) that stores financial information about debtors, eliminating delays and disputes during resolution. The National Company Law Tribunal (“**NCLT**”) and Debt Recovery Tribunals (“**DRT**”) adjudicate matters pertaining to IBC and constitute the third pillar. Finally, there is the regulator - IBBI, which regulates the insolvency professionals as well as processes. Besides IBC, the Corporate Insolvency Resolution Process (“**CIRP**”) is also regulated through Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, among others. The IBBI has also notified specific rules and regulations for the liquidation process, Insolvency Professional agencies, voluntary liquidation process, information utilities and fast track insolvency resolution process for effective implementation of provisions of IBC.

THE CIRP CAN BROADLY BE SUMMARIZED AS IN THE FOLLOWING CHART



Based on the decision of the Adjudicating Authority, either the resolution plan is implemented, or the company goes into liquidation. For liquidation of the company, the IBBI (Liquidation Process) Regulations, 2016 come into play.

Implications for Foreign Investors and Creditors under IBC

The advent of IBC sets up a new avenue for foreign investment and mergers and acquisitions in the Indian market. It allows bidders / investors to bid for and purchase at a lower valuation, quality companies under temporary financial distress but with a sound business model.

IBC has opened a compelling route for foreign investors to foray into the Indian market through brownfield investments in existing companies as in the case of Arcelor Mittal acquiring Essar Steel. An acquirer who would otherwise have had to incur the fixed cost of setting up an entire company, hire the management team & other staff, and obtain fresh business and establishment licenses, may instead acquire a fully functional company through IBC window and revive it by investing the necessary capital and tweaking its business model. Investors with the right appetite may also consider reviving a company whose business has temporarily stalled and sell it off as a going concern after complying with restrictions under IBC.

Foreign creditors, on the other hand, stand to benefit from IBC by being able to achieve time-bound recovery of debt. By prioritising resolution over liquidation, IBC has been an empowering tool and has instilled confidence in creditors and acquirers in corporate insolvency resolution and recovery of debts. It adds an extra layer of recovery-certainty in an otherwise volatile debt market.

IBC maximises the possibility of a company to remain a going concern despite a financial default. It obligates an Insolvency Professional to run the debtor-company as a going concern, prohibit suspension or termination of supply of essential and critical services to the debtor-company, secure continuation of licenses, permits and grants, stay execution of individual claims, enable raising interim financing for running the debtor-company, etc. By allowing viable companies to continue operating as going concerns, the insolvency law supports entrepreneurial risk-taking and at the same time protects the interests of the investors and creditors in such ventures. Even after an order for liquidation is made, IBC enables the liquidator to sell the corporate debtor as a going concern to enable revival and continuation of the corporate debtor.

IBC redefines the balance of power among the stakeholders of a company. While the shareholders enjoy complete control of the company when the debt is serviced, the control shifts to the creditors in the event of default who can take effective steps to ensure the recovery of debt. It is because of this paradigm shift in the debtor-creditor relationship under IBC regime that many debtors today prefer to resolve financial distress at an early stage and avoid letting the company go into CIRP.

The guidelines with regard to cross-border insolvency are expected soon and these guidelines, when notified, will bring greater clarity to insolvency that involves corporate structures spread across multiple jurisdictions. Meanwhile, the Supreme Court of India, in the case of *Macquarie Bank Limited v. Shilpi Cable Technologies*[9], has set a valuable precedent that foreign creditors will have the same rights as those available to domestic creditors in the corporate insolvency resolution process under IBC. The cross-border insolvency guidelines, when operational, will be instrumental in addressing the gaps in IBC and the orders of the NCLT / NCLAT (the appellate court for IBC related matters) as regards multi-jurisdictional insolvency and will ensure that the NCLT and NCLAT can offer reciprocity to foreign courts. These guidelines will also open doors for Indian creditors to proceed against foreign assets.

9. (2018) 2 SCC 674

Quick and effective:
Arbitration law in India

CONTRIBUTORS: YOGENDRA ALDAK

Alternate dispute resolution methods such as arbitration, mediation, conciliation and Lok Adalats have become key instruments for time efficient dispute resolution in India, given how overburdened the Indian judiciary is with pending cases.

The legislature has formally recognised arbitration in extension of India's commitments as a signatory to the New York Convention. To better facilitate the resolution of commercial disputes, India adopted the UNCITRAL Model Law on International Commercial Arbitration in its entirety, except for a few variations, and enacted the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**). This single piece of legislation addresses both international and domestic arbitration.

To overcome the shortcomings of the Arbitration Act and make India a hub of international commercial arbitration, the Arbitration Act has been amended three times in the last decade, on 23 October 2015, 9 August 2019, and 10 March 2021. The major amendments have been made to include provisions mandating all judicial authorities to refer parties to arbitration in cases subject to the arbitration agreement, restrictions on automatic stay on arbitral award upon the filing of a challenge in courts, freedom to choose arbitrators, declaration of impartiality and independence of arbitrators, time-bound and cost saving proceedings etc. Additionally, the amendments embodied in the Arbitration and Conciliation (Amendment) Act, 2019 provide for the creation of an independent body called the 'Arbitration Council of India', which would grade arbitral institutions and accredit arbitrators. The constitution of the Arbitration Council of India has not been notified yet.

Further, pursuant to the Commercial Courts Act, 2015, special commercial divisions have been set up in high courts having original jurisdiction and commercial courts have been set up in the district courts to hear and dispose of arbitration matters involving commercial disputes of a specified value not less than INR 300,000.

Institutional Arbitrations

Institutional arbitration is still at a nascent stage in India and at present, a majority of the arbitration in India is conducted on an ad hoc basis. However, the

GOI has been taking initiatives to make India as hub of international arbitration and setting up of independent arbitration institutions for institutionalised domestic and international arbitrations are a step in this direction. As experience around the world suggests that institutional arbitration are more efficient and effective when compared to *ad hoc* arbitration. Some of the institutional arbitration centers in India are listed below:

- Nani Palkhivala Arbitration Centre (NPAC) Established 2005
- Mumbai Centre for International Arbitration (MCIA) Established in 2016
- Court annexed Arbitral Institutions Eg: Delhi International Arbitration Centre, the Madras High Court Arbitration Centre
- Indian Council of Arbitration (ICA) Established 1965

In addition to the above, the following arbitration institutions have been / are yet to be established in India:

- India International Arbitration Centre.
- The Arbitration Council of India is yet to be established.
- The Government of India also announced to set up international Arbitration Centre in special economic zone, i.e. the Gujarat International Finance Tec-City ("**GIFT**").
- Establishment of the New Delhi International Arbitration Centre ("**NDIAC**") under the New Delhi International Arbitration Centre Act of 2019. This NDIAC has been set up to better facilitate domestic and international arbitration in the country. The NDIAC is set to be declared as an institution of national importance. The NDIAC has also been mandated to establish a Chamber of Arbitration which will empanel arbitrators. Further, the NDIAC may also establish an Arbitration Academy to train arbitrators.
- International Arbitration and Mediation Centre, Hyderabad.

Seat outside India

In a recent judgment in the matter of *PASL Wind Solutions Private Ltd. v. GE Power Conversion India Private Ltd.,*[10] the Supreme Court of India upheld party autonomy, and decided that two Indian parties are entitled to elect a foreign seat of arbitration. It was further clarified that the arbitral award passed in such cases would be considered as a foreign award and shall be enforceable in accordance with the provisions of Part II of the Arbitration Act. The impact of this decision is significant- Indian subsidiaries and joint ventures of foreign parties may now opt for a seat of arbitration outside India even if their contracts and disputes are with other Indian parties. It is however still unclear whether the substantive law governing the contract may also be foreign law.

Reference to Arbitration

Since the 2015 amendment, courts in India have been encouraging arbitration by applying the rule of *Kompetenz-Kompetenz* which provides that the jurisdiction of an arbitral tribunal can be decided by such tribunal itself. Whenever a party approaches a court for the appointment of an arbitral tribunal under section 8 or section 11 of the Arbitration Act, the court is required to refer the matter to arbitration unless a valid arbitration agreement is *prima facie* non-existent. Similarly, even if the question of arbitrability of the dispute is raised by a party such dispute is required to be referred to arbitration as long as it does not *prima facie* fall within the exceptions to arbitrability (such as disputes relating to criminal offenses; matrimonial and family disputes; insolvency and winding- up matters; testamentary matters, etc.). *"When in doubt, refer to arbitration"* is the rule of thumb that applies.

In international commercial arbitration also, a judicial authority refers parties to arbitration except in cases where it finds that the agreement in question is null and void, inoperative, or incapable of being performed. Accordingly, courts in India are dutybound to only determine at the outset whether an arbitration agreement exists. .

Enforceability of Arbitration Agreement

In India, earlier the arbitration agreement not properly stamped could not be invoked for arbitration and taken into evidence unless impounded. However, the seven-judge bench of Supreme Court of India in a landmark judgment of *In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act, 1996, and the Indian Stamp Act, 1899*[11] held that agreements which are not

10. 2021 SCC Online SC 331
11. (2024) 6 SCC 1.

stamped or are inadequately stamped are not rendered void or void ab initio or unenforceable as non-stamping or inadequate stamping is a curable defect. Hence, the arbitration may continue while the defect is being cured. Further, the courts at reference stage under section 8 or 11 of the Arbitration Act is not required to examine or impound an unstamped instrument but rather leave it for the determination by the arbitral tribunal.

Anti-Arbitration Injunction

The anti-arbitration injunctions have always been a matter of concern around the world which are essentially inunction orders against a party or an arbitral tribunal precluding the initiation or continuation of arbitration. While the Indian judiciary typically favours arbitration, there have been instances where the courts have granted anti-arbitration injunctions.

Recent judgments (for example, by the Delhi High Court in *MC Donald's India Pvt. Ltd. v. Vikram Bakshi*[12] or by the Supreme Court of India in *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd.*[13] have held that the power to grant anti-arbitration injunctions should be used sparingly and not in cases where there is a valid arbitration agreement. This is in line with the amended Arbitration Act and reinforces the pro-arbitration approach taken by the Indian judiciary in recent times.

Interim Measures of Protection

Under the Indian law, parties have the right to approach the courts under section 9 of the Arbitration Act (or the arbitral tribunal, under section 17 of the Arbitration Act) for interim measures. Some of the interim measures available to the parties include:

- The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement.
- Securing the amount in dispute in the arbitration.
- Order for detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in the arbitration.
- Interim injunction or the appointment of receiver.
- Such other interim measure of protection as may appear to be just and convenient to the court or arbitral tribunal.

12. (2016) 232 DLT 394.
13. (2014) 11 SCC 639.

Further, the arbitral tribunal has the same power to issue orders as a court of law has in relation to proceedings before it. The Delhi High Court in *Ashwani Minda and Jay Ushin v. U-shiv Limited and Minebea Mitsumi In*[14]. expanded the applicability of section 9(3) to foreign-seated tribunals giving interim relief.

Recently, there have been significant amendments to sections 9 and 17 of the Arbitration Act to make interim measures more effective, such as imposing time limits for starting arbitral proceedings when such measures have been obtained. In 2015, it was clarified that provisions for interim measures provided under section 9, which falls under part I of the Arbitration Act, shall apply to international commercial arbitrations even if the seat of arbitration is outside India as long as the parties have not expressly excluded its application.

Emergency Awards

Recently, the Supreme Court of India, in the case of *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors.*[15] held that an award by an emergency arbitrator in a foreign seated international commercial arbitration constitutes an order under the section 17 of the Arbitration Act and will be enforceable in India. By recognising the award of an emergency arbitrator appointed for the grant of urgent interim relief prior to the constitution of the arbitral tribunal (which was previously possible only by way of a petition under section 9 of the Arbitration Act), this decision has strengthened the arbitration process in India further.

Enforcement of Awards

The Arbitration Act gives teeth to the procedure of enforcement of awards by providing that they will be enforced under the Indian Civil Procedure Code in the same manner as a decree of the court. Hence, once the time to set aside the award has passed, the award becomes enforceable immediately without any requirement for further action by the court. In order to facilitate enforcement of awards, the Arbitration Act introduced a new section 36(2), which has done away with the old principle of automatic stay of award on filing of an application to set aside the award. There is no provision in the Arbitration Act for appeal against an award. Once an arbitral award is issued, there are very limited grounds available for a party to have such an award set aside. Courts in India rarely set aside domestic awards. Even applications opposing the enforcement of foreign awards are allowed only on grounds of violation of public policy.

14. (2020) SCC OnLine Del 721
15. (2022) SCC OnLine Del 2112.

Level playing field: Competition law

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Regulatory Overview

The principal legislation governing competition law in India is the Competition Act, 2002 (**"Competition Act"**). It contains specific provisions regulating (i) anti-competitive agreements, (ii) abuse of dominant position, and (iii) mergers and acquisitions (merger control). The Competition Commission of India (**"CCI"**) is the regulatory authority enforcing the Competition Act. The Competition (Amendment) Act, 2023 (**"Amendment Act"**) was the most significant amendment to the scheme of the Competition Act since its enactment, resulting in several major substantive and procedural amendments, while some of these changes have come into force, some other are yet to see the light of day .

Earlier this year, the Ministry of Corporate Affairs published the draft Digital Competition Bill, 2024 (the "**DCB**") which aims to *ex ante* regulate the conduct of significant enterprises operating in the digital market in India. The DCB is currently undergoing public consultation.

Merger Control

India has a mandatory and suspensory merger control regime. The Competition Act along with the CCI Regulations, 2024 (**"Combination Regulations"**) form the legislative framework for merger control. The Competition Act also empowers the Central Government of India to issue notifications pertaining to merger control.

Notifiability

- A merger, acquisition or amalgamation is notifiable when it crosses the prescribed thresholds ("**Combination**"). Such Combinations may involve the following structures:

» acquisition of control, shares, voting rights or assets of an enterprise by a person;

» acquisition of control of an enterprise where the acquirer already has direct or indirect control of another enterprise engaged in identical business; or

» a merger or amalgamation between or among enterprises.

- While joint ventures are not specifically mentioned in the Competition Act, they may also be subject to notification requirements if a joint venture is in the form of a Combination and breaches the prescribed financial thresholds.

- Combinations between offshore entities (also called "foreign-to-foreign" transactions) having a nexus with Indian markets are also required to be notified to the CCI.

Thresholds for Notification

A transaction requires a prior merger notification to the CCI when the combined assets or turnover of the transacting parties satisfy the thresholds prescribed under either the 'parties test' or the 'group test'. The Competition Act prescribes the following parties and group tests in terms of the financial thresholds for combinations involving (i) parties based in India; and (ii) parties based outside of India.

- India

Test	Parties	Assets		Turnover
Parties test	Acquirer and Target	INR 25 billion (~ USD$ 240 million)	or	INR 75 billion (~USD$ 900 million)
Group test	Acquirer group and Target	INR 100 billion (~USD$ 1.2 billion)	or	INR 300 billion (~USD$ 3.6 billion)

- Worldwide

Test	Parties	Assets		Turnover
Parties test	Acquirer and Target	USD$ 1.25 billion in worldwide assets, with INR 12.5 billion in India (~USD$ 150 million)	or	USD$ 3.75 billion in worldwide turnover, with INR 37.5 billion (~USD$ 450 million) in India
Group test	Acquirer group and Target	USD$ 5 billion in worldwide assets, with INR 12.5 billion (~USD$ 150 million) in India	or	USD$ 15 billion in worldwide turnover, with INR 37.5 billion (~USD$ 450 million) in India

Deal Value Threshold
The Amendment Act introduces a new threshold based on the value of the transaction. A transaction of the value INR 20 billion (~USD$ 240 million) or above, where the target enterprise has "substantial business operations" ("**SBO**") in India will amount to a combination under the Amendment Act ("**deal value threshold**"). The Combination Regulations prescribe distinct conditions for testing SBO for companies operating in digital markets. The deal value threshold is effective from 10 September 2024.

Exemptions under the Competition Act

- The recently notified Competition (Minimum Value of Assets or Turnover) Rules, 2024 has codified effective the *de minimis* exemption in relation to transactions (i.e., acquisition, merger, amalgamation) involving target enterprises which have low assets and turnover values. The de minimis exemption can be availed when the value of assets and turnover of the target enterprise in India is less than INR4.5 billion (~USD$ 54.63 million) and INR 12.5 billion (~USD$ 149 million). The *de minimis* exemption is inapplicable if the transaction breaches the deal value threshold.

- The Competition Act empowers the Central Government to exempt the application of the Act to specific enterprises or sectors. Presently, such exemptions are available to:

(a) Public Sector Enterprises in the oil and gas industry.[16]

16. Ministry of Corporate Affairs ("MCA"), Notification No. 3714(E).

(b) Reconstitution, transfer (whole or part), amalgamation of nationalised banks.[17]

(c) Amalgamation of regional rural banks.[18]

(d) Banking company in respect of which a notification under Section 45 of the Banking Regulation Act, 1949 has been issued.[19]

- The **Competition (Criteria for Exemption of Combination) Rules, 2024** also prescribe a list of Combinations which do not require notification even if the notification thresholds are met, on the basis that typically such Combinations do not cause an appreciable adverse effect on competition ("**AAEC**") in India.

Notification Process

- **Form I** is the short form which is typically filed by the parties if the transaction is notifiable under the Competition Act, including for transactions notifiable under the green channel route. The fee for filing Form I is INR 3 million (~USD$ 35,700).

- **Form II** is the long form of notification, which is filed when the parties to the transaction have significant overlaps, i.e., where the combined market share of the parties: (i) exceeds 15% in horizontally overlapping markets; or (ii) exceeds 25% in vertically overlapping markets. The fee for filing Form II is INR 9 million (~USD$ 107,100).

- **Green Channel Route** is available in case of Combinations where there are no horizontal, vertical or complementary (in any of the plausible connected relevant markets) overlaps between the businesses of the acquirer and target enterprises. Combinations notified to the CCI under the *'green channel route'* are afforded automatic approval.

Inter-connected Transactions

In case of a Combination involving multiple inter-connected steps, the determination of notification obligations is based on the substance of the transaction and the *"ultimate intended effect"* of the steps comprising the transaction. In such a scenario, when one or more of the inter-connected

17. MCA, Notification No. 2828(E)
18. MCA, Notification No. 2561(E)
19. MCA, Notification No. 1034(E)

steps amount to a Combination, a single notice is required to be filed providing details of all the steps comprising the Combination. For the assessment of notifiability of transactions based on the deal value threshold, any consideration attributable to interconnected transactions will also be aggregated to calculate the value of the transaction.

Factors for Review

The substantive test to assess a Combination is contained under Section 20(4) of the Competition Act. The CCI considers various factors under this provision to determine the effect of a Combination in the relevant market in India, a few of which are as follows:

- Actual and potential level of competition in the market – size and influence of existing competitors.
- Extent of barriers to entry into the market.
- Level of concentration in the market – incentive and ability to foreclose competition in the market, or to influence profit margins/ increase prices.
- Degree of countervailing power in the market.

Review Timelines

The CCI is required to form a prima facie opinion on whether a Combination is likely to cause an AAEC in the relevant market in India within a period of 30 days from the receipt of the notification. The 30 day timeline, which constitutes Phase I of the review, excludes the time taken by parties to provide any additional information sought by the CCI. At the end of phase I, the CCI may either approve the transaction, or order a detailed review of the Combination in phase II if it is of the *prima facie* view that the Combination may cause an AAEC in the relevant market in India. The transaction cannot be completed until either: (i) a final decision has been made and communicated by the CCI; (ii) CCI has failed to form a *prima facie* opinion within 30 days of receipt of notice or (ii) lapse of 150 days from the date of notification to the CCI.

Extraterritorial Jurisdiction

The Competition Act provides the CCI with extra-territorial jurisdiction over foreign-to-foreign Combinations if the transacting enterprises meet the jurisdictional thresholds in India. In such Combinations, which satisfy the jurisdictional thresholds by virtue of indirect presence of the parties in India (either by way of subsidiaries, associate companies or joint ventures, etc.), notification to the CCI is required even if the businesses of the parties in India are entirely unrelated to and do not form part of the proposed Combination.

Gun-jumping

Under the suspensory regime, no Combination can be consummated in part or entirely, before receiving an approval from the CCI or lapse of 150 days as per the Amendment Act, since filing the notice. The CCI has the power to penalize parties for part or complete consummation of a notifiable transaction with fines of up to 1% of the total turnover or assets or the value of transaction of the enterprises/ persons involved. CCI may refer to Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024 (**"Penalty Guidelines"**) to determine the quantum of penalty.

Final Verdict

The end of the regulatory process is marked by the passing of an 'order' by the CCI either approving (unconditionally or with modifications/commitments) or blocking the Combination. Parties can also end the regulatory process by informing the CCI that the proposed transaction has been abandoned by the parties.

In cases requiring modifications/remedies to alleviate the AAEC concerns, the process ends when either the parties accept the modifications proposed by the CCI, or when the CCI accepts the modifications proposed by the parties.

The CCI has previously imposed structural as well as behavioural remedies. In cases of structural remedies involving divestment, the CCI may also appoint independent monitoring agencies to ensure that the remedies or modifications are being complied with by the parties[20].

Appeals

Parties have the right to appeal the final decision of the CCI before the National Company Law Appellate Tribunal (**"NCLAT"**) within 60 calendar days. Appeals may lie with respect to the CCI's orders pertaining to (i) blocking/rejection of a Combination, (ii) any penalties imposed, or (iii) any modifications ordered. Orders of the NCLAT may be appealed before the Hon'ble Supreme Court of India (**"SC"**), the final appellate authority. Under the Amendment Act, when a CCI order is appealed, the parties are required to deposit 25% of the penalty amount for the appeal to be allowed in the NCLAT.

Anti-Competitive Agreements and Practices

The Competition Act empowers the CCI to investigate and penalise the following conduct:

- Anti-competitive horizontal agreements and cartels (in terms of section 3(3)) – An agreement between or amongst enterprises that are engaged in identical

20. Holcim Limited and Lafarge S.A, Combination Registration No. C-2014/07/190

or similar trade of goods or provision of services (i.e., competitors) which directly or indirectly result in determination of price, supply, distribution, etc., division of markets or bid-rigging are covered under this provision. Such agreements are presumed to have an AAEC and are *per se* anti-competitive under the Competition Act. The Amendment Act introduces a provision for hub and spoke arrangements, maintaining that enterprises not engaged in identical or similar trade shall also be presumed to be part of the agreement under section 3(3), given that the enterprise intends to participate in the furtherance of such agreement.

- Anti-competitive vertical agreements (in terms of section 3(4)) – Agreements between enterprises operating at different levels of the production or supply chain in different markets are covered under this provision. Such agreements could be in the nature of (i) resale price maintenance; (ii) exclusive dealing agreement; (iii) exclusive distribution agreement; (iv) refusal to deal; and (v) tie-in arrangements. Vertical agreements are not presumed to be anti- competitive and are examined based on their effect on the market.

- Unilateral abuse by dominant firms (in terms of section 4) – The Competition Act prohibits abuse by dominant enterprises or groups. Abuse can be exploitative or exclusionary. Dominance in the market is not presumed to be anti-competitive.

Investigation and Adjudication by the CCI

An investigation can be initiated in one of three ways: (i) *suo moto* by the CCI; (ii) upon *'reference'* from the government; and (iii) by way of an information memorandum (an *'information'*) filed by a person (this includes third parties and public-spirited individuals, and the result of leniency applications).

Upon receipt of information, the CCI forms a *prima facie* view to either direct an investigation by the Director General (**"DG"**) or dismiss the information and close the matter. At the end of an investigation, the DG submits a report to the CCI. Thereafter, the CCI can issue one of three orders: (i) an order under section 26(6) finding no violation; (ii) an order under section 26(8) directing further investigation by the DG; or (iii) an order under section 27 finding a violation of the Competition Act. Under section 27, the CCI can impose penalties, direct parties to cease and desist from their anti-competitive actions and seek rectification of the anti-competitive conduct by the parties.

Penalty for anti-competitive conduct

The penalties for anti-competitive agreements and abuse of dominance can be up to 10% of the average turnover of the concerned enterprises for the preceding three financial years. In case of cartels, the penalty can be up to three times the profit of the concerned enterprises for continuance of such agreement, or 10% of the turnover of such enterprises for each year during the continuance of such agreement, whichever is higher. Two amendments have been made to this provision by way of the Amendment Act. Firstly, penalty can be based on the turnover or the income of the person or enterprise party to the agreement/that has abused its dominant position. Secondly, the term 'turnover' now constitutes global turnover derived from all the products and services provided by a person or an enterprise. The CCI may refer to the Penalty Guidelines for determining the quantum of penalty for behavioural violations.

Leniency Regime

To encourage cartel detection through whistle-blowers, the Competition Act has a leniency provision, whereby the CCI has the power to reduce penalties (including a complete waiver) in lieu of 'full, true and vital disclosures' made regarding the existence of a cartel. The Amendment Act includes a provision for the 'leniency plus regime', meaning which, if during the course of the investigation the whistle blower who has disclosed a cartel makes a 'full, true and vital disclosure' for another cartel, the CCI can further reduce penalties.

Appeals

The appeals procedure highlighted under the merger control section is also available in case of such behavioural cases where an aggrieved party may file an appeal before the NCLAT and the SC.

Settlements and Commitments

The Amendment Act has introduced provisions for enterprises to provide settlements and commitments in cases of anti-competitive vertical agreements and abuse of dominance. Parties under investigation can file a settlement application after the DG has submitted the investigation report but before the CCI gives a final finding on the case. A commitment application on the other hand can be filed any time after the CCI passes its *prima facie* order and before the receipt of the DG report by the parties subject to certain conditions. If the settlement and commitment applications are accepted by the CCI, the parties can pay the settlement amount or make behavioural changes to their present conduct allegedly leading to anti-competitive outcomes. The settlements and commitments provisions have been notified.

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Lakshmikumaran & Sridharan is a full-service law firm specialising in areas such as corporate & commercial laws, dispute resolution, taxation and intellectual property. The firm is able to keep a finger on the pulse of litigation and commercial law matters throughout the country through offices in 14 locations in India. The firm's driving principles are integrity, knowledge, innovation, and collaboration.

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