# DOING BUSINESS IN INDIA

CLASIS LAW

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*This publication intends to give the reader an overview of the various aspects of doing business in India including but not limited to the applicable legislations, compliances and processes. It is not intended and cannot be construed as a comprehensive and detailed analysis of Indian Law or, under any circumstances, as legal advice from Clasis Law.*

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# GLOSSARY

| S.No. | Term | Definition |
|---|---|---|
| 1. | Act | Companies Act, 2013 |
| 2. | AD Bank | Authorized Dealer of a Category I Bank |
| 3. | AOA | Articles of Association of a Company |
| 4. | Company | An Indian company incorporated in terms of the Companies Act, 2013 or the erstwhile Companies Act, 1956 |
| 5. | Constitution | Constitution of India |
| 6. | Director | A director on the board of a Company |
| 7. | DPIIT | Department for Promotion of Industry and Internal Trade under the Ministry of Commerce and Industry |
| 8. | FDI | Foreign Direct Investment |
| 9. | FDI Policy | Foreign Direct Investment Policy issued by DPIIT from time to time |
| 10. | FEMA | Foreign Exchange Management Act, 1999 |
| 11. | GDP | Gross Domestic Product |
| 12. | GDPR | The General Data Protection Regulation implemented on May 25, 2018 which is applicable to all companies processing and holding the personal data of data subjects residing in the European Union and the United Kingdom, regardless of the company's location |
| 13. | Government | Government of India |
| 14. | INR | Indian Rupees |
| 15. | IT Act | Income Tax Act, 1961 |
| 16. | JV | Joint Venture Company |
| 17. | LLP | Limited Liability Partnership |
| 18. | MCA | Ministry of Corporate Affairs |
| 19. | MOA | Memorandum of Association of a Company |
| 20. | NCLAT | National Company Law Appellate Tribunal |
| 21. | NCLT | National Company Law Tribunal |
| 22. | NR | Non-Resident |
| 23. | NRI | A non-resident Indian who is an individual resident outside India but who is a citizen of India. |
| 24. | OCI | An overseas citizen of India who is an individual resident outside India and who is registered as an overseas citizen of India cardholder under section 7(A) of the Citizenship Act, 1955 |
| 25. | RBI | Reserve Bank of India |
| 26. | SEBI | Securities and Exchange Board of India |
| 27. | Supreme Court/ Apex Court | The Supreme Court of India |
| 28. | USD | United States Dollar |
| 29. | WoS | Wholly owned subsidiary |

# CHAPTER 1

## India at a Glance

# 1. INDIA AT A GLANCE

## 1.1. Indian Economy

India is known for its rich and diverse cultural heritage having plethora of languages, traditions and beliefs. Indian economy is one of the fastest growing economies in the world and it is expected that it will be ranked amongst the top 3 economic powers of the world in the coming years. It is the seventh largest country by area, second-most populous country having a population of over 1.37 billion and the sixth largest economy in the world.

Over the years, India has adapted itself to the global competitive environment and hence has become an emerging marketplace for strategic investments by international investors. Availability of skilled manpower, lower cost of production due to cheap labour, increase in domestic consumption by growing middle class population, vast range of industries, investment-friendly policies and close proximity to South-East Asia, Middle East and Europe are strong drivers of foreign investments in India. Hence, many global majors are pitching for joint ventures and other collaborations with Indian Companies.

FDI inflow of USD 44,366 million for the financial year 2018-2019 with inflow of USD 10,874 million in the first quarter (January – March, 2019) indicates a positive impact of ease of doing business and changes in FDI norms in the economy. During the financial year 2018-19, the services sector (including financial, banking, insurance, non-financial outsourcing, research and development, courier, technological testing and analysis) attracted the highest FDI equity inflow of USD 9,158 million.

The computer software and hardware sector followed by the telecommunications sector took the next two spots amongst the top three sectors attracting the highest FDI equity inflows. On the aspect of FDI, India received the highest FDI equity inflow (of USD 16,288 million) from Singapore in the financial year 2018-2019.[1]

GDP is the broadest quantitative measure of a nation's total economic activity and represents the monetary value of all goods and services produced within a nation's geographic borders over a specified period of time. A rising GDP signifies the progress of the economy of a particular country. Thus, higher the GDP, greater the growth prospects of a country. In India, agriculture plays a vital role in the economy and contributes about 17% to the total GDP and provides employment to over 60% of the population. While the GDP for the financial year 2018-19 was 6.8%, the projected real GDP for the financial year 2019-20 is projected at 7.3% (and is expected to reach 7.7% in the subsequent years). India is expected to have GDP of USD 4.6 trillion by the year 2023.[2]

*Near future endeavours to bolster economic growth*

The Government endeavours to attain a USD 5 trillion economy by 2025 by development in 9 key areas which inter-alia include information technology, healthcare, education, energy and financial services. The Government has already taken initiatives for the growth and progress of the country towards achieving a USD 5 trillion economy. These initiatives include the Make in India initiative; the Digital India initiative; approval of National Policy on Software Products 2019; National Mineral Policy 2019; National Electronics Policy 2019; Faster Adoption and Manufacturing of (Hybrid and) Electric Vehicles (FAME II), etc.

1. https://dipp.gov.in/sites/default/files/FDI_Factsheet_27May2019.pdf
   https://dipp.gov.in/sites/default/files/Final_Report-Working_Group_16012019.pdf
2. https://www.imf.org/en/Countries/IND#countrydata

As part of its near future endeavours, India is also focusing on renewable sources to generate energy. It is planning to achieve 40% of its energy requirements from non-fossil sources by 2030 which is currently 30% and also has plans to increase its renewable energy capacity to 175 GW by 2022.[3]

The Government has taken many steps to enable business opportunities for foreign investors. This has resulted in India's rank in the 'World Bank's Ease of Doing Business 2020' survey climb to the 63rd place among 190 countries surveyed. It is expected that India will break into the top 25 countries in the World Bank's Ease of Doing Business ratings by 2025. Further, the World Bank has also released the rankings for the most "notable improvement" in the ease of doing business and India has been ranked 9th, with a score of 3.5 in the change in 'Doing Business' score.

## 1.2. Indian Legal System

Indian legal system, being one of the oldest legal systems in the world, is primarily a mix of common law and customary laws. With the invasion of British East India Company, the Indian judiciary was introduced with a new system of law which was based on recorded judicial precedents. Thereafter, common law emerged as one of the sources of law in India. Common law system is primarily based on the decisions of the courts and tribunals. The courts are bound to follow the reasoning used in prior decisions in order to resolve a similar dispute. A majority of judicial framework in India is derived from the British common law system.

3. https://www.ibef.org/economy/indian-economy-overview

Post independence, the Parliament of India drafted a constitution for the newly independent nation. The Constitution is the main source of law which provides recognition to other statutes, acts and ordinances. Central as well as state governments and local authorities frame rules, regulations and bye-laws subordinate to these laws.

The Constitution guides the 3 pillars of democracy - the legislature, executive, and judiciary. While the legislature is vested with the powers to make laws, the executive is empowered to implement these laws. Parliament is the absolute legislative body of India. The Indian Parliament comprises of the President and the two houses - Rajya Sabha (which represents council of states) and Lok Sabha (which is the house of the people).

The third pillar of a democratic government is the judiciary. The role of judiciary is to adjudicate disputes. The Constitution empowers the courts to make decisions, enforce the law and solve the disputes in accordance with these laws. The primary purpose of the Indian judiciary is to protect fundamental rights of the citizens of India. The judiciary comprises of the Supreme Court, the High Courts, the District Courts and the Lok Adalats.

The Supreme Court is the highest judicial body as well as the highest court of appeal in India. It can exercise original, appellate as well as advisory jurisdiction. Every state has its own High Court and the matters at the district level of a state are heard by the District Courts. District Courts are subordinate to High Courts and are established according to the population distribution of the district and the state. Indian judicial system also includes Lok Adalats and mediation centres established for the purpose of amicable settlement of dispute between the parties.

Further, the Constitution provides for the establishment of administrative tribunals to lower the burden on Indian courts by adjudicating quasi-judicial matters. Such tribunals adjudicate disputes related to specific matters such as debt recovery, company law related matters, labour disputes, recovery matters, consumer complaints and insolvency cases. Thus, over the years, the Indian legal system has evolved as one of the essential organs of the world's largest democracy with the objective to secure constitutional rights of every citizen.

# CHAPTER 2

## Doing Business in India

# 2. BUSINESS STRUCTURES IN INDIA

## 2.1 Business Structures and Forms of Entities in India

It is crucial to determine an appropriate legal entity to match the exact needs of a business. The entity should, amongst other aspects, be relevant from a fund raising perspective, taxation perspective and the FDI norms in light of the nature of business and the activities it proposes to conduct. For instance certain relaxations are offered to limited liability partnerships which are not provided to a company and vice versa.Such factors should be deliberated and considered before setting up a business entity in India. The following are the forms of entities for doing business in India:

### (a) Company (private or public)

A company can be a private limited company or a public limited company. However the most common form of entity used for doing business in India is a private limited company, set up as a subsidiary or a JV.

### (b) Limited Liability Partnership (LLP)

LLP is a body corporate and a legal person separate from its partners. FDI is permitted in LLPs operating in sectors/activities where 100% FDI is allowed through the automatic route and there are no FDI – linked performance conditions.

### (c) Offices (branch office, project office, liaison office)

A foreign company can open a branch office or liaison office or project office in India. The scope of operations of such offices is typically limited to activities and functions such as representative office, sourcing, technical and / or marketing support, import and export, executing a specific project, etc.

The establishment of a branch office or liaison office is a two-pronged process and involves seeking RBI approval (through an AD Bank) and registration of the branch/liaison office with the relevant Registrar of Companies.

Further, a foreign company may open project office/s in India provided it has secured from a Company, a contract to execute a project in India (subject to the fulfilment of certain conditions) without any prior approval from RBI.

The obligations of a foreign company are briefly discussed in Chapter 4.

### (d) Franchise Agreement / Distribution Agreement / Agency

A foreign company, subject to the nature of its business, can proceed with doing business in India through an unincorporated presence. A foreign company may choose to appoint a distributor for the whole of India, or for a certain defined territory, by way of entering into a detailed distribution agreement. Further, a foreign company may choose to appoint an agent, wherein the foreign company is the principal and would retain control over the product sale and price. The agent only represents the foreign company in India.

Another form of doing business in India is the franchise model. A foreign company may adopt a franchise arrangement to distribute its products in India. The said arrangement is generally adopted where sharing of technical know-how and business methods is required. In India, many foreign companies have adopted the franchise model to sell their products.

## 2.2 Incorporation of Companies

There are various means to establish a legal presence in order to carry out business in India, however, the most commonly used structure for setting up presence in India is a company incorporated in accordance with the provisions of the Act. Following are the types of companies which can be incorporated in India:-

(i) **Public company** with a minimum of 3 Directors (who are individuals) and 7 shareholders; and

(ii) **Private company** with a minimum of 2 Directors (who are individuals) and 2 shareholders.

The pre-requisites to set up a Company are identifying the proposed name, principal/registered office premises in India, the Directors and shareholders of the Company.

The charter documents of the Company comprising of the MoA and the AoA are also required to be prepared. The MoA, inter alia, includes the name, registered office, object, liability and authorized capital clauses of a Company and the AoA are its bye laws. The Act provides flexibility to the Indian Companies to alter their MoA and AoA, when required, after following process as prescribed under the Act.

The process of incorporation involves submitting the requisite application(s) along with the supporting documents with the MCA. If the application is complete in all respects, the Company is registered and a Company Identification Number (**"CIN"**) is allotted by the MCA. As soon as a Company is registered, its information such as name, authorized share capital, paid-up share capital, registered office and directors is available on the website of MCA against its CIN.

Depending on the requirements of the investors the WoS or JV companies can be set up as private or public limited companies. The private limited Companies are subject to lesser compliances under the Act as compared to a public limited Company.

# CHAPTER 3

# Foreign Direct Investments in India and Overseas Direct Investment

# 3. FOREIGN DIRECT INVESTMENTS IN INDIA AND OVERSEAS DIRECT INVESTMENT

## 3.1 Foreign Investment in India

Persons resident outside India[4] can invest in permitted non-debt instruments[5] and permitted debt instruments[6].

While foreign investment in non-debt instruments is regulated by the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 ("**Non-debt Instrument Rules**"), any foreign investment in debt instruments is regulated by the Foreign Exchange Management (Debt Instruments) Regulations, 2019 ("**Debt Instrument Regulations**").

1. Body corporate(s) incorporated or registered outside India are covered within the meaning of person resident outside India. Residential status of a foreign individual as person resident outside India or person resident in India would depend on the purpose and period of stay in India. If a foreign individual stays in India for a period of 182 days or more during the preceding financial year for employment, carrying out business or other purpose, then, such foreign individual would become a person resident in India.

2. Non-debt instruments means (a) all investments in equity instruments in incorporated entities: public, private, listed and unlisted; (b) capital participation in LLP; (c) all instruments of investment recognised in the FDI Policy notified from time to time; (d) investment in units of Alternative Investment Funds (AIFs), Real Estate Investment Trust and Infrastructure Investment Trusts; (e) investment in units of mutual funds or Exchange-Traded Fund which invest more than 50% in equity; (f) junior-most layer (i.e. equity tranche) of securitisation structure; (g) acquisition, sale or dealing directly in immovable property; (h) contribution to trusts; and (i) depository receipts issued against equity instruments.

3. Debt instruments include (a) dated Government securities / treasury bills; (b) non-convertible debentures / bonds issued by an Indian company; (c) commercial papers issued by an Indian company; (d) units of domestic mutual funds or exchange-traded funds which invest less than or equal to 50% in equity; (e) security receipts issued by asset reconstruction companies; (f) debt instruments issued by banks, eligible for inclusion in regulatory capital; (g) credit enhanced bonds; (h) listed non-convertible / redeemable preference shares or debentures; (i) securitised debt instruments, including any certificate or instrument issued by a special purpose vehicle set up for securitisation of asset/s with banks, financial institutions or NBFCs as originators; and (j) rupee denominated bonds / units issued by infrastructure debt funds.

In terms of the Non-debt Instrument Rules, persons resident outside India can invest in permitted equity instruments either through the FDI route, the portfolio investment scheme (**"PIS"**)[7] route, or the foreign venture capital investment route.

Any investment in debt instruments needs to comply with the provisions of the Debt Instrument Regulations. Only foreign portfolio investors (**"FPI"**), NRI, OCI, foreign central banks, multilateral development banks or any other entity permitted by the Reserve Bank of India (**"RBI"**) can invest in debt instruments.

## FDI route

India has one of the most transparent and liberal FDI regimes amongst the emerging and developing economies.

The acquisition of securities of an Indian company, either by way of subscription or purchase, by a person resident outside India is regulated primarily through FEMA read with the Non-debt Instrument Rules and the consolidated FDI Policy issued by the DPIIT (collectively referred to as the **"FDI Norms"**).

7. While FDI deals with acquisition of listed and / or unlisted shares (either by way of subscription and/or purchase) by way of a private arrangement, PIS covers acquisitions of listed shares through stock market purchase. While any person, other than those who are residents in prohibited / restricted countries, can invest under the FDI route, the PIS route is limited to investments by foreign portfolio investors and non-resident Indians.

FDI is permitted in all sectors except the prohibited sectors / activities. Apart from the sector / activity specific restrictions, any investment either by a citizen of, or an entity incorporated in, Bangladesh or Pakistan requires prior Government approval.

FDI in most sectors is permitted either under the 'automatic route' or the 'government / approval route'. In certain sectors, FDI upto a certain threshold is permitted under the automatic route and any FDI above the specified level requires Government approval.

*Automatic route*

Most sectors now provide for foreign investment under the automatic route.[9] Any investment under this route does not require any prior Government approval specifically for the foreign investment. However, sector specific approvals for investment may still be required.

8. Prohibited sectors / activities include lottery business, gambling and betting, manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes, real estate business (other than development of townships, construction of residential / commercial premises, roads or bridges and real estate investment trusts), chit funds and Nidhi companies.

9. Sectors under the automatic route include – manufacturing, agriculture & animal husbandry, mining, broadcasting carriage services, cable networks, airports, non-scheduled air transport services, construction-development projects, cash & carry wholesale trading, E-commerce, single brand product retail trading, duty free shops and railway infrastructure.

Government / Approval route

Prior Government approval[10] is required in the following:

(i) For investment in sectors which fall within the approval route (such as, terrestrial broadcasting FM (FM Radio), print media, satellites establishment and operation and private security agencies);

(ii) where the investment sought to be made is in excess of the sectoral cap specified under the automatic route or where as a result of the investment the aggregate of foreign investment limit permitted under the automatic route will be exceeded[11];

(iii) where the investment does not comply with the requirements/ conditions for investment under the automatic route; and / or

(iv) where shares / permitted equity instruments are being acquired or purchased by a non-resident for non-cash consideration, except in the following cases:

10. Prior to its abolition in May 2017, the relevant authority was the Foreign Investment Promotion Board (FIPB). Post the abolition of the FIPB, the relevant authority to grant approval for foreign investment is the relevant department / ministry which is concerned with the sector in which the relevant Indian company, in which foreign investment is proposed to be made, is engaged.

11. Certain sectors (such as defence and telecom services) provide for a specific level of foreign investment under the automatic route, and any investment (either on an individual basis or on an aggregate basis) above this threshold requires Government approval.

(a) an Indian subsidiary which is wholly owned by a non-resident entity and which operates in a sector in which 100% FDI is permitted without any conditions can issue shares (up to a maximum of 5% of its authorised capital or USD 500,000, whichever is less) to the overseas parent company against the pre-incorporation expenses,

(b) an Indian company engaged in a sector in which FDI is permitted under the automatic route can issue shares against swap of equity instruments or import of capital goods / machinery / equipment (excluding second hand machinery), and

(c) an Indian company may issue shares to a person resident outside India against any funds payable by the Indian company to the person resident outside India and the remittance of which is permitted under FEMA and any rules or regulations framed under FEMA[12].

12. This would include issuance of shares in lieu of outstanding dues payable by a person resident in India to a person resident outside India.

*Permitted equity instruments*

Indian companies are allowed to issue the following types of equity instruments to a person resident outside India:

(i) equity shares (including partly paid shares);

(ii) fully, compulsorily and mandatorily convertible debentures;

(iii) fully, compulsorily and mandatorily convertible preference shares; and/or

(iv) share warrants.

In addition to the above, Indian startup companies[13] are permitted to issue convertible notes[14], subject to compliance with certain conditions.

13. As per the definition set out in the Gazette of India Notification G.S.R. 127(E) dated February 19, 2019, an entity shall be considered as a "start-up":

(a) up to 10 years from the date of its incorporation/registration,
(b) if its turnover for any of the financial years has not exceeded INR 1,000,000,000, and
(c) it is working towards innovation, development, or improvement of new products, processes or services or if it is a scalable business model with a high potential of employment generation or wealth creation.

14. Convertible notes are defined as instruments which evidence receipt of money initially as debt and which at the option of the holder is either repayable or can be converted into equity shares, within a period of 5 years from the date of issue.

Any instrument which is non-convertible, optionally convertible or partially convertible is considered as foreign debt and not treated as FDI. Accordingly, all restrictions applicable to raising of foreign debt, under India's external commercial borrowing regulations, apply to such instruments[15].

*Pricing guidelines*

The FDI Norms regulate the price at which a person resident outside India can:

(i) acquire permitted equity instruments of an Indian company, either by way of subscription or by way of purchase from resident sellers; and / or

(ii) sell the permitted equity instruments of an Indian company to resident purchasers.

15. The Non-debt Instrument Rules have introduced the concept of "Hybrid Securities", which term means, hybrid instruments such as optionally or partially convertible preference shares or debentures and other such instruments as specified by the Central Government from time to time, which can be issued by an Indian company or trust to a person resident outside India. However, Non-debt Instrument Rules currently do not provide for permissbility of, and / or mechanism for, issuance of hybrid securities by Indian companies.

The pricing guidelines provide for:

(i) a floor price in case of acquisition of permitted equity instruments (either by way of subscription or by way of purchase from resident shareholders) by a non-resident investor, and

(ii) a ceiling in case of sale of permitted equity instuments by a non-resident seller to a resident purchaser.

*Transfer of equity instruments*

The FDI Norms generally permit transfer of equity instruments of an Indian company by a person resident outside India to a person resident in India and vice-versa without any approval.

(i) Sale of equity instruments of an Indian company by a person resident in India to a person resident outside India has to be in compliance with entry routes, sectoral caps / investment limits, pricing guidelines and other applicable conditions and reporting requirements prescribed by the RBI.

(ii) Transfer of equity instruments of an Indian company by a person resident in India to a person resident outside India by way of gift is permitted with the prior approval of the RBI and subject to certain prescribed conditions such as the gift does not exceed 5% of the paid up capital of the Indian company.

(iii) No approval of the RBI is required for transfer of equity instruments of an Indian company by person resident outside India to person resident in India by way of gift.

(iv) Sale of equity instruments of an Indian company by a person resident outside India to a person resident in India has to be in compliance with the pricing guidelines and other applicable conditions and reporting requirements prescribed by the RBI.

*Reporting and filing requirements*

Reporting and filing requirements with respect to foreign investment in non-debt instruments have been set out under the Foreign Exchange Management (Mode of Payment and Reporting of Non Debt Instruments) Regulations, 2019 (**"Reporting Regulations"**).

As per the Reporting Regulations, every Indian company issuing equity instruments to a person resident outside India under the FDI route is required to file Form FC-GPR (in the Single Master Form[16]) within a period not exceeding 30 days from the date of issue of the equity instruments. Further, every transfer of equity instrument(s) between a person resident outside India and a person resident in India is required to be reported in Form FC-TRS.

Every Indian company which has received FDI in the previous year(s) including the current year is required to furnish an annual return on foreign assets and liabilities to the RBI on or before the 15th day of July of each year.

16. Every Indian company, which has received or expects to receive foreign investment or indirect foreign investment is required to file the Entity Master on the FIRMS (Foreign Investment Reporting and Management System) platform at https://firms.rbi.org.in.

*Certain key issues*

Deferred Payment Consideration

The FDI Norms currently permit deferred payment of consideration with respect to share transfer/purchase transaction between resident buyer and a non-resident seller or vice-versa. However, the amount of deferred consideration can not exceed 25% of the total consideration and needs to be paid within a period not exceeding 18 months from the date of the share transfer agreement.

In the event that the total amount of consideration has been paid by the buyer to the seller, then the seller may furnish, for a period not exceeding 18 months, an indemnity to the buyer for an amount not exceeding 25% of the total consideration.

The buyer and seller can also settle an amount not exceeding 25% of the total consideration through an escrow arrangement for a period not exceeding 18 months from the date of the transfer agreement.

In all the 3 scenarios above, the total consideration finally paid for the shares is required to be in compliance with the applicable pricing guidelines.

Repatriation of contractual claim amounts

Repatriation of any contractual claim amount requires prior approval of RBI. In practice, while RBI does usually permit repatriation of any amounts awarded to a person resident outside India pursuant to a court order or arbitral award, it usually does not permit the repatriation of amounts pursuant to a mutual settlement agreed between the parties.

## Portfolio Investment Scheme (PIS) route

*Eligible investors*

The PIS route permits the following categories of non-resident investors to acquire listed shares directly through the Indian stock markets:

(i) NRI;

(ii) OCI; and

(iii) FPIs.

*Conditions for investments*

(i) Investments by NRIs and/or by OCIs:

(a) The purchase and sale must be done through a designated AD Bank branch.

(b) The total holding of an individual NRI / OCI should not exceed 5% of the total paid up equity shares (on fully diluted basis) of the relevant Indian company or of the total value of the series of debentures / preference shares / warrants issued by the Indian company, as the case may be.

(c) The aggregate consolidated holdings of all NRIs / OCIs should not exceed 10% of total paid up equity shares (on fully diluted basis) of the relevant Indian company or of the paid up value of each series of debentures / preference shares / warrants. This 10% limit can be raised to 24% by way of a special resolution passed by the shareholders of the relevant Indian company.

(d) The consideration should be received as inward remittance through banking channels or out of funds held in a Non Resident External (NRE) Account.

(ii) Investments by FPIs:

(a) Total holding of each FPI or an investor group should be less than 10% of the total paid up equity capital (on a fully diluted basis) of the relevant Indian company or the paid up value of each series of debentures / preference shares / warrants issued by the relevant Indian company, as the case may be. In case the total holding of an FPI in any Indian company increases upto 10% of the total paid up equity capital (on a fully diluted basis) or paid up value of each series of debentures / preference shares / warrants, as the case may be, then, the total investment made by the FPI shall be re-classified as FDI.

(b) Unless the limit has been increased by an Indian company which requires board approval and shareholders' approval, the aggregate consolidated holding of all FPIs in the Indian company cannot exceed 24% of paid-up equity capital (on a fully diluted basis) or paid up value of each series of debentures / preference shares / warrants, as the case may be.

(c) With effect from April 1, 2020, FPIs can invest in an Indian company upto the sectoral caps applicable to the relevant Indian company unless the relevant Indian company has decreased the limit for FPI investment to a lower threshold of 24% or 49% or 74% with the approval of its board of directors and shareholders before March 31, 2020. Such an Indian company may, however, increase this limit for FPI investment subsequently which would require board approval and shareholders' approval.

Once the aggregate limit has been increased to a higher threshold, the Indian company cannot reduce the same to a lower threshold.

In case of an Indian company engaged in a prohibited sector, the aggregate limit for FPI investment shall be 24%.

**FVCI route**

This option is limited to such person(s) resident outside India who are registered as foreign venture capital investors (**"FVCIs"**) with SEBI in accordance with the SEBI (Foreign Venture Capital Investors) Regulations, 2000. FVCIs are permitted to invest in the securities issued by an unlisted Indian company engaged in certain specified sectors[17] or an Indian start-up or in the units issued by the venture capital funds or alternate investment funds[18].

17. Foreign Venture Capital Investor is allowed to invest in (a) Biotechnology; (b) IT related to hardware and software development; (c) Nanotechnology; (d) Seed research and development; (e) Research and development of new chemical entities in pharmaceutical sector; (f) Dairy industry; (g) Poultry industry; (h) Production of bio-fuels; (i) Hotel-cum-convention centres with seating capacity of more than 3000; and (j) Infrastructure sector.

18. SEBI registered funds.

The benefit of investing under this option is that the person resident outside India can buy and/or sell shares of an Indian company at any price which is mutually agreeable between the buyer and seller.

## 3.2 Overseas Direct Investment from India

Any direct investment outside India (**"Overseas Direct Investment"**)[19] by a person resident in India has to comply with the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 and the Master Direction on Direct Investment in JV/WoS abroad issued by the RBI.

*Modes of Overseas Direct Investment by an Indian party*[20]

The Overseas Direct Investment can be made by an Indian party in a JV[21] and / or a WoS incorporated outside India by way of:

(i) capital contribution;
(ii) subscribing to the charter documents of the foreign entity;
(iii) purchase of existing shares of a foreign entity by way of market purchase;
(iv) private placement; or
(v) acquisition through stock exchange.

19. "Direct investment outside India" means investment by way of contribution to the capital or subscription to the memorandum of association of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, but does not include portfolio investment.

20. "Indian Party" means a company incorporated in India or a body created under an Act of Parliament or a partnership firm registered under the Indian Partnership Act, 1932 or a Limited Liability Partnership (LLP) registered under the Limited Liability Partnership Act, 2008, making investment in a joint venture or wholly owned subsidiary abroad, and includes any other entity in India as may be notified by the RBI.

21. "Joint Venture (JV)" means a foreign entity formed, registered or incorporated in accordance with the laws and regulations of the host country in which the Indian party makes a direct investment.

*Modes of Overseas Direct Investment by resident Individual*

A resident individual may also make Overseas Direct Investment in the equity shares and compulsorily convertible preference shares of a JV or WoS outside India within the overall limit of USD 250,000 per financial year prescribed by the RBI under the provisions of liberalised remittance scheme. The limit of USD 250,000 is the aggregate limit and is applicable for all permitted capital account and/or current account transactions which may be undertaken by a resident individual in a financial year.

Additionally, general permission has been granted to an Indian individual to:

(i) acquire foreign securities as a gift from any person resident outside India;

(ii) acquire shares under cashless Employees Stock Option Programme (**"ESOP"**) issued by a company outside India, provided it does not involve any remittance from India;

(iii) acquire shares by way of inheritance from a person, whether resident in or outside India;

(iv) purchase equity shares offered by a foreign company under its ESOP Schemes, if he is an employee, or, a director of an Indian office or branch of a foreign company, or, of a subsidiary in India of a foreign company, or, an Indian company in which foreign equity holding, either direct or through a holding company / special purpose vehicle irrespective of the percentage of the direct or indirect equity stake in the Indian company.

Investment Routes

Overseas Direct Investment can be made by an Indian party through the automatic route or the approval route.

(i) Automatic route - Under the automatic route the Indian investor does not require any approval from the RBI for the Overseas Direct Investment provided that the amount of investment made by such Indian investor is within the prescribed ceiling which is as follows:

(a) the total financial commitment[22] of the investing Indian party should not exceed 400% of the net worth of the Indian party as per the last audited balance sheet; and

(b) annual financial commitment of the Indian party should not exceed USD 1 Billion.

(ii) Approval route – Any Overseas Direct Investment not falling under the automatic route would require prior approval of the RBI. Examples are:

(a) Overseas investments in the energy and natural resources sector exceeding the prescribed limit of the net worth of the Indian companies as on the date of the last audited balance sheet;

22. "Financial Commitment" means the amount of direct investment by way of contribution to equity (equity shares, compulsorily convertible preference shares and other preference shares), loan and 100% of the amount of guarantees and 50% of the performance guarantees issued by an Indian Party to or on behalf of its overseas JV or WoS.

(b) Overseas investments by proprietorship concerns and unregistered partnership firms satisfying certain eligibility criteria;

(c) Issuance of corporate guarantee by the Indian party on behalf of the second and subsequent level of stepdown subsidiary outside India.

*Source of investment*

The Overseas Direct Investment (or financial commitment) in an overseas JV / WoS may be funded out of one or more of the following sources:

(i) drawal of foreign exchange;
(ii) capitalisation of exports[23];
(iii) swap of shares[24];
(iv) proceeds of external commercial borrowings (ECBs) / foreign currency convertible bonds (FCCBs);
(v) in exchange of American depository receipts (ADR) / global depository receipts (GDR);
(vi) balances held in EEFC account of the Indian party; and / or
(vii) proceeds of foreign currency funds raised through ADR / GDR issues.

23. Indian companies are permitted to capitalise the payments due from the foreign companies towards exports, fees, royalties or any other dues for supply of technical know-how, consultancy, managerial and other services. In case the export proceeds remain unrealised beyond the prescribed period of realisation, prior approval of the RBI shall be required for capitalisation of such export proceeds.

24. In cases of investment by way of swap of shares, irrespective of the amount, valuation of the shares would have to be made by a merchant banker registered with SEBI or an investment banker outside India registered with the appropriate regulatory authority in the investee company's country of incorporation. Approval of the Government of India would also be a pre-requisite in terms of the foreign direct investment policy of India.

*Pledge of shares*

Indian companies can pledge the shares held by them in an overseas company to Indian banks or public financial institutions as security towards a loan being availed by the Indian company. Indian companies can also create a pledge over the shares held by them in an overseas company in favour of an overseas lender.

*Prohibited investment*

Indian party is prohibited from making investment (or financial commitment) in a foreign entity engaged in real estate[25] or banking business, without the prior approval of the RBI.

*Disinvestment by way of sale*

Disinvestment of shares or security held in a JV or a WoS outside India by an Indian party by way of sale to (i) another Indian party; or (ii) to a non-resident is also permitted subject to certain conditions including pricing etc. In case of listed shares, the sale must be effected through stock exchange only. Where the shares of such JV or WoS outside India are unlisted, the price should not be less than the value certified by a chartered accountant or certified public accountant as the fair value basis the latest audited financial statements of the JV/WoS. The Indian party is required to submit details of such disinvestment within 30 days from the date of disinvestment.

25. "Real estate business" means buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential / commercial premises, roads or bridges.

# CHAPTER 4

# Laws Governing Companies in India

# 4. LAWS GOVERNING COMPANIES IN INDIA

## 4.1 Overview of the Act

The Act is the primary legislation which governs the companies established in India during their lifecycle. It encompasses a wide set of provisions related to governance of companies including those related to incorporation of companies, capital infusion in companies, management and administration of companies, borrowings and investment by companies, audit and accountability, restructuring of companies and investor protection. The Act provides for various regular and event based compliances which have to be adhered to by the companies.

## 4.2 Modes of Funding

In order to successfully run a business, funding in an efficient manner with a right combination of capital and debt is the most essential requirement. The funding options available are:

(i) **Share Capital:** The share capital of a Company comprises of equity and preference share capital. Equity shareholders have the right to participate and vote in the shareholder's meeting along with the prospects of sharing the profits of the Company through dividends or share value appreciation. However, a preference shareholder is entitled to preferential rights with respect to dividends and repayment of capital at the time of closure of the Company. In certain circumstances, preference shareholders are also entitled to voting rights.

(ii) **Debt:** Subject to the requisite compliances under the Act, a Company can borrow funds in the form of term or working capital loan from banks / financial institutions or unsecured / secured loans from other companies, investors (who are risk averse) and directors. In lieu of the debt, depending on the requirements of the lending party, a Company may issue instruments such as bonds, debentures, convertible notes etc.

## 4.3 Directors

Every Company is required to have a board of directors comprising of such number of individuals as prescribed under the Act. Every individual to be appointed as a director on the board of a Company is required to have a director identification number and a digital signature certificate. The categories of director includes: - Executive Director, Non Executive Director, Independent Director, Nominee Director and Small Shareholders' Director. There are certain requirements in relation to the composition of the board of Directors of a Company, such as, every Indian Company is required to have atleast 1 resident Director (that is an individual who has stayed in India for a period of 182 days in a year).

The directors of the Company have a fiduciary position since they act as agents appointed by the shareholders who are charged with the management of the Company. The Act has specific provisions prescribing the duties to be adhered by the directors of the Company. Any breach of such duties shall attract penal provisions under the Act.

Besides the above, the Act prescribes the maximum number of directorships that an individual can hold, disclosure of interest by a Director in case he / she is interested in a contract to be entered by the Company, remuneration to be drawn by Directors, loan to Directors, resignation / removal of an individual from the office of directorship, grounds of disqualification of a Director and consequent vacation from the office of directorship, constitution of committees of Directors (for specified class of companies).

The Act mandates the directors of a Company to meet at regular intervals to transact the business related to the Company and clearly lays down the procedure to be followed for convening the meetings of the board including the quorum requirements, manner of circulation of notice, minutes etc.

## 4.4 Shareholder and Member

A person acquiring shares in the Company becomes a shareholder and a shareholder whose name is entered in the register of members acquires the status of a member. Any person whether an individual or a body corporate can be a member/shareholder of a Company. The member of a Company is entitled to receive dividends, notice of the general meetings and vote at such meetings.

There could be instances where the person whose name appears in the register of members may be holding shares on behalf of or for the benefit of other person(s) (**"Beneficial Interest"**). The Act mandates disclosure requirements in case the Beneficial Interest is held by a person other than the member of the Company.

The Company is required to convene a meeting of its members within 6 months from the close of a financial year, such meetings are called annual general meeting (**"AGM"**). Any meeting of the members other than AGM is called an extra ordinary general meeting (**"EGM"**). The Act prescribes the process to be followed for convening the AGM and EGM including the quorum requirements, manner of voting, postal ballot, convening meetings at shorter notice, etc.

## 4.5 Auditors

Every Company is required to appoint a chartered accountant or a firm of chartered accountants registered in India to audit its books of accounts.

The first auditor is required to be appointed within a maximum period of 90 days from the date of incorporation to hold office till the conclusion of the first AGM. Thereafter, the auditor is appointed for a 5 year term, in accordance with the provisions of the Act. The Act also prescribes the process for removal or resignation of the auditors during their prescribed tenure of 5 years.

The auditors are required to conduct the statutory audit of a Company and submit a report along with the audited financials for each of the financial year to the members of the Company.

## 4.6 Statutory Records and Books

Every Company is required to maintain statutory registers, books, documents etc. as per the provisions of the Act. Some of the key statutory records to be maintained include register of members / security holders of the Company, register of significant beneficial owners, annual returns, books of accounts, minutes of the proceeding of the board and general meetings and register of directors.

The Act primarily mandates that the statutory records should be maintained at the registered office of the Company. However, subject to the provisions of the Act, certain statutory records can be maintained at a place other than the registered office.

## 4.7 Intercorporate Loans and Investments

Subject to obtaining requisite board and/ or shareholders' (in case the limits prescribed under the Act are breached) approval, the Companies are allowed to:

(i) give loan(s) to any person or other body corporate,
(ii) make investment(s) in the securities of any other body corporate,
(iii) provide security or give guarantee in connection with a loan to any person or body corporate.

However, Companies are not allowed to make investment through more than 2 layers of investment companies except in certain cases as prescribed under the Act.

## 4.8 Corporate Social Responsibility ("CSR")

Every Company which meets the prescribed criteria in a particular financial year is required to spend at least 2% of its average profits (as calculated in accordance with the provisions of the Act) made during the 3 immediately preceding financial years towards CSR activities. For this purpose, the Act mandates constitution of a CSR committee (comprising of the directors of the Company), formulation of the CSR policy and spending the amounts on such activities as prescribed under the Act.

## 4.9 Related Party Transactions

The Act prescribes that the following types of contracts and arrangements (not in the ordinary course of business and at arm's length price) with related party[26] can be entered into by the Company only upon approval from the board of directors at a board meeting:

(i) sale, purchase or supply of any goods or services;
(ii) selling, leasing or otherwise disposing of property of any kind;
(iii) appointment of any agent for purchase or sale of goods, materials, services or property;
(iv) related party's appointment to any office or place of profit in the Company, its subsidiary company or associate company; and
(v) underwriting the subscription of any securities or derivatives thereof, of the Company.

26. The term 'related party', inter alia, includes directors of a company, its key managerial persons, their relatives, holding, subsidiary or associate company(s).

In the event the value of contracts or arrangements to be entered with related party exceeds the prescribed limits, a prior approval from the members of the Company is required.

## 4.10 Restructuring

The Act provides various modes through which the existing structure of companies can be altered. Some of the common methods of restructuring adopted by companies, basis the underlying requirement, are as under:

(i) Conversion of one form of a Company to another, such as conversion of a Company from private limited to public limited and vice versa.

(ii) Alteration of existing share capital of a Company through increase in authorised share capital, reduction of existing share capital, buy back of shares from existing shareholders, consolidation and sub division of all or any of the share capital of a Company into shares of larger amount than the existing shares, sub-division of existing shares into shares of smaller amount, conversion of fully paid shares into stock and vice versa.

(iii) Merger or amalgamation of companies with other companies.

(iv) Demerger/ hiving off of businesses of existing companies.

The Act provides for specific provisions / compliances which need to be followed for undertaking any of the aforesaid restructuring processes. In many cases, such as in case of merger / amalgamation / demerger, specific approval of the Government through designated regulatory bodies is required to be obtained prior to proceeding with the restructuring process. The Act provides ample flexibility to investors to structure / restructure companies in India depending upon their requirements.

## 4.11 Foreign Companies Doing Business in India

A foreign company (i.e. a company or body corporate incorporated outside India) having a place of business in India either by itself or through electronic mode and conducting any business activity in India is required to register itself with the MCA after furnishing the documents as prescribed under the Act.

Further, the Act casts various obligations on foreign companies, such as having the books of accounts prepared and submitted with the MCA, delivering documents with respect to alteration in the prescribed information and having the charges created on their property in India registered with the MCA.

## 4.12 Closure of Business in India

A Company can be closed by following 2 methods after complying with the requirements as prescribed under the applicable law:

(i) Winding up by the NCLT, or

(ii) voluntarily by the members, or

(iii) creditors of the Company, or

(iv) Striking off the name of the Company from the register of the relevant Registrar of Companies.

The mode of closure to be adopted largely depends on the status of operations of the Company and its assets and liabilities position.

## 4.13 Laws Governing Listed Companies in India

A Company whose securities (whether equity or debt) are publicly traded on recognised stock exchanges in India, apart from the provisions of the Act, is also governed by the provisions of the Securities and Exchange Board of India Act, 1992 (**"SEBI Act"**) and the Securities Contracts (Regulations) Act, 1956 (**"SCRA"**). SEBI is the statutory body which is entrusted with the powers of regulating and governing the functioning of listed companies in India. SEBI, under the SEBI Act and the SCRA, has issued various rules and regulations which are required to be followed by listed companies in India. Some of the important regulations issued by SEBI are those related to listing of equity shares by companies, listing of debt instruments / securities by companies, takeover of listed companies, issue of capital and disclosure requirements and listing obligation and disclosure requirements. These regulations have been briefly discussed in chapter 5.

# CHAPTER 5

## Banking and Securities Laws

# 5. BANKING AND SECURITIES LAWS

## 5.1 Overview of the Banking and Financial Sector

The Indian banking and finance sector predominantly comprises of banks which can be classified into scheduled and non-scheduled banks (based on certain factors), and further into public sector banks, private sector banks and foreign banks (depending upon their ownership).

Each public sector bank is constituted under a specific enactment of the Parliament and is regulated by the Banking Regulation Act, 1949 (**"Banking Regulation Act"**) in addition to the provisions of the specific enactment. Private sector banks and foreign banks are also regulated by the Banking Regulation Act.

Every bank has to obtain a licence from the RBI to carry on the banking business in India.

The operation, governance and management of banks as well as other aspects such as capital adequacy requirements are regulated by the RBI. The RBI strictly regulates all aspects, including change in shareholding (acquisition of 5% or more of paid up share capital of, or voting rights in, a bank requires prior approval of the RBI), opening of new branches and termination, appointment as well as remuneration of chairman and key managerial personnel.

Apart from banks, several non-banking entities offer an alternate to the traditional banking system. Such non-banking entities are called non-banking financial companies (**"NBFCs"**)[27] which are regulated by the RBI in terms of the powers entrusted upon the RBI under the Reserve Bank of India Act, 1934.

NBFCs are broadly categorised into deposit accepting NBFCs and non-deposit accepting NBFCs. Within the broad categorisation, NBFCs can further be categorised into systemically important and non-systematically important. Additionally, basis their activities, NBFCs can further be sub-classified as an asset finance company, investment company, systemically important core investment company, loan company, infrastructure finance company, NBFC-factor, NBFC-Micro Finance Institution, mortgage guarantee companies and NBFC-non-operative financial holding company.

In order to provide additional avenues of fund raising, the Government has permitted Indian entities to access overseas markets and raise external commercial borrowings (**"ECB"**) at a relatively lesser cost, subject to fulfilment of certain conditions.

27. The term "non-banking financial company" is defined to mean:
   (a) a financial institution which is a company;
   (b) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;
   (c) such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by notification in the Official Gazette, specify.

ECB refers to commercial loans raised by eligible resident entities from non-resident entities in the form of bank loans, floating / fixed rate notes, bonds / debentures / preference shares (other than fully and compulsorily convertible instruments), trade credits beyond 3 years, foreign currency convertible bonds, foreign currency exchangeable bonds and financial lease.

The ECB framework comprises of the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 as notified by the RBI under FEMA and the 'Master Direction-External Commercial Borrowings, Trade Credits and Structured Obligations' issued and updated by the RBI from time to time.

The ECB framework sets out certain parameters (such as minimum average maturity, permitted end-uses and all-in-cost ceiling) all of which are required to be complied with in order to raise an ECB.

Indian entities, which are eligible to receive FDI, can receive ECB either in any freely convertible foreign currency or Indian currency, subject to certain conditions. As in case of FDI, ECB can be raised either under the automatic route or the approval route.

The following conditions need to be met in order to raise ECB under the automatic route:

(i) Eligible Lenders: A non-resident person is an eligible lender under the ECB framework if such non-resident person is: (a) a resident of FATF or IOSCO compliant country, or (b) a Multilateral and Regional Financial Institution where India is a member country, or (c) an individual or entity provided that such individual or entity is a foreign equity holder of Indian borrowing entity, or subscribes to bonds / debentures which are issued by Indian borrowing entity listed abroad.

(ii) Minimum maturity: The minimum average maturity period for ECB is generally 3 years. However, different minimum average maturity period has been specified for specific categories of ECB as set out below:

| | |
|---|---|
| ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year | 1 year |
| ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of rupee loans | 5 years |
| ECB raised for (a) working capital purposes or general corporate purposes, or (b) on-lending by NBFCs for working capital purposes or general corporate purposes | 10 years |
| ECB raised for (a) repayment of rupee loans availed domestically for capital expenditure, or (b) on-lending by NBFCs for the same purpose | 7 years |
| ECB raised for (a) repayment of rupee loans availed domestically for purposes other than capital expenditure, or (b) on-lending by NBFCs for the same purpose | 10 years |

(iii) Ceiling on cost of ECB: All in cost of ECB cannot exceed the benchmark rate[28] plus 450 bps spread. Prepayment charge / penal interest, if any, for default or breach of covenants, cannot exceed 2% over and above the agreed rate of interest on the outstanding principal amount.

(iv) Permissible Limits: An eligible borrower can raise ECB up to USD 750 million or equivalent per financial year under the automatic route.

(v) End use of ECB: Except for real estate activities, equity investment, capital market investment and other activities prescribed by the RBI, ECB proceeds can generally be utilised for all purposes.

The ECB framework permits creation of security in favour of non-resident lender by way of: (a) creation of charge on immovable assets and / or movable assets, (b) creation of pledge on financial securities, and (c) issuance of corporate and / or personal guarantees in favour of overseas lender / security trustee.

28. Benchmark rate in case of FCY ECB / TC refers to 6-months LIBOR rate of different currencies or any other 6-month interbank interest rate applicable to the currency of borrowing, for eg., EURIBOR. Benchmark rate in case of Rupee denominated ECB / TC will be prevailing yield of the Government of India securities of corresponding maturity.

## 5.2 Overview of Securities Law Framework

The securities and capital market in India is regulated by SEBI which was established under the provisions of the SEBI Act, 1992. SEBI regulates all activities in securities and capital markets as well as the various market participants (such as, depository participants, merchant bankers, foreign portfolio investors, and registrar and share transfer agents). In order to safeguard the interest of investors, SEBI issues various regulations, notifications, guidelines and circulars from time to time.

Some of the key areas of supervision of SEBI are: (i) raising of capital by way of public offering, and (ii) investment and dealing in listed securities. Every listed company and every company proposing to undertake a public offering is required to comply with the ICDR Regulations[29] as well as the Listing Regulations[30]. Additionally, in order to regulate investment, and dealing in public securities, SEBI has issued the Takeover Code[31] and Insider Trading Regulations[32], amongst other regulations.

29. The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018
30. The Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015
31. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
32. The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015

*ICDR Regulations*

The ICDR Regulations lay down the framework governing the raising of funds by companies by way of issuance of securities on stock exchange such as initial public offer, rights offer, qualified institutional placement and preferential issue / private placement. The ICDR Regulations further prescribe certain mandatory disclosure requirements at the time of raising of funds by way of capital issue. These regulations seek to bring transparency in working of listed companies and at the same time, protect the interest of public shareholders of listed companies by ensuring fair disclosures of the necessary information about the listed companies which might affect the decision of the public shareholders to invest in such listed company.

*Insider Trading Regulations*

The Insider Trading Regulations lay down the governing law for insider trading offences. Under these regulations, it is an offence for a person to deal in a company's shares in certain circumstances if he is in possession of unpublished price-sensitive information in relation to those shares. Where the acquirer receives unpublished information about the target company, advice needs to be taken as to whether that information is price-sensitive.

The acquirer, the directors of the target company and any persons connected with either of them, need to be especially mindful of the fact that they do not trigger the Insider Trading Regulations while acquiring price sensitive information during due diligence on the target company. Since there is ambiguity surrounding interpretation of several aspects of the regulations, whether any information is price sensitive in relation to a particular transaction or not, is a question of fact to be answered having regard to the circumstances of each case. Further, since breach of the law can lead to criminal action, caution must be exercised.

*Takeover Code*

The Takeover Code regulates the substantial acquisition of shares of or voting rights in, or control of, public listed companies. The primary trigger point is acquisition of, directly or indirectly, (i) control[33] of listed public company, (ii) 25% or more of the equity shares of, or voting rights in, the listed target company, or (iii) additional equity shares of, or voting rights in, the target company entitling it to exercise more than 5% of the voting rights in any financial year by an acquirer who, together with Persons Acting in Concert (PAC)[34], already holds 25% or more of shares of, or the voting rights in, the target company but less than 75% (which is the maximum permissible non-public shareholding). In each

33. "control" includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

34. "Persons acting in concert" or "PAC" means the persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company. In addition to the wide definition of PACs, certain persons, like promoter and promoter group, group companies, companies with common directors and others, are deemed to be PACs subject to evidence to the contrary.

of these cases, the acquirer has to give open offer to public shareholders for acquiring at least 26% shares of the listed target company. The open offer has to be made by the acquirer at a price not less than the price determined as per the pricing guidelines given in the Takeover Code.

Further, the Takeover Code has set out certain disclosure requirements. In case of acquisition by an acquirer of 5% or more of the equity shares of, or voting rights in, a target company, such acquirer shall disclose his aggregate shareholding and voting rights in such target company. Also the sale or purchase of 2% or more of equity shares of, or voting rights in, the target company by an acquirer who, together with PAC with him, already holds 5% or more of the equity shares of, or voting rights in, a target company has to be disclosed. Additionally, annual disclosure of the shareholding has to be made by (i) the shareholders holding 25% or more of equity shares of, or voting rights in, the target company; and (ii) promoters of the target company.

# CHAPTER 6

# Labour and Employment

# 6. LABOUR AND EMPLOYMENT

## 6.1. Overview of the Legal Framework of Employment Laws

The Constitution empowers both, the Central and the State Government, to legislate on labour related matters. Both the Central Government and the State Government have legislated extensively on labour and employment issues. Further, the State Governments have the power to enact State specific rules under central laws. The State Governments have also enacted labour laws which apply to the employers and employees based in that particular State. Hence, employers need to ensure compliance with Central and State specific labour laws as applicable to them.

The applicability of labour and employment laws depends on a variety of factors, which primarily include number of employees, location of office, nature of business activity and if there are any exemptions available to an employer.

The sheer volume of labour legislations in India poses complexities in compliance and is a cause of widespread litigation. Therefore, with an objective to simplify the existing labour laws framework, the Government has initiated major reforms. The Government is currently in the process of consolidating the existing Central labour legislations into 4 labour codes - the Code on Wages, Code on Industrial Relations, Code on Social Security and Code on Occupational Safety, Health and Working Conditions, which would result in the repealing of 44 old labour legislations. The Code on Wages Bill, 2019 has already been passed by the Indian Parliament and has received the assent of the President on August 8, 2019. Once the provisions of the Code come into force, it shall repeal the existing Central legislations relating to wages and payments. Additionally, the Code on Occupational Safety, Health and Working Conditions Bill, 2019, has also been introduced in the Indian Parliament. However, until the proposed law reforms are in effect, an entity doing business in India is required to comply with the existing labour laws, both at the Central and State level.

## 6.2. General Categorisation of Employer Organisation

An employer organisation engaged in any trade or providing services could be an 'establishment' or 'commercial establishment' as defined and regulated by the State specific Shops and Commercial Establishments Acts (**"S&E Acts"**).

An employer organisation engaged in manufacturing activities is categorised as a 'factory' and is governed by the provisions of the Factories Act, 1948 (**"Factories Act"**) which is a Central law with State specific amendments and rules.

Depending on the nature of business activities, some industries may have their own sector specific labour laws, such as for workers employed in mines, building construction, motor transport, cinemas, newspapers etc.

An employer is required to obtain applicable registrations or licenses under a variety of labour laws, maintain statutory registers and records and ensure periodic filings with labour authorities.

## 6.3. General Categorisation of Employees

The employees in India are generally categorised into workman and non-workman. The workman category employees have certain special protections under the labour laws.

The Industrial Disputes Act, 1947 (**"ID Act"**), a legislation dealing with the investigation and settlement of industrial disputes, defines the concept of "workman", which has been largely borrowed in other labour laws also. Under the ID Act, briefly a "workman" is defined to include persons employed in any industry to do any manual, unskilled, skilled, technical, operational or clerical work. However, employees working mainly in a managerial capacity who exercise (either by the nature of the duties attached to the office or by reason of the powers vested in them) functions mainly of a managerial nature, do not fall under the definition of workman.

In considering whether or not an employee would qualify as workman or not, the designation and remuneration of an employee is not conclusive. It would depend on the nature of his or her employment and whether or not his / her job duties are managerial or supervisory in nature. The concept of workman has been a subject matter of litigation and the legal position has evolved over the years through judicial precedents.

All other employees not falling under the ambit of workman essentially form the non-workman category. The employees in the non-workman category are primarily governed by the terms of their employment contract and the S&E Acts, as applicable.

## 6.4. Employment Contracts and HR Handbook

The employment agreements should set out the terms and conditions of employment in accordance with the local S&E Acts and Factories Act, as may be applicable. Employees are generally required to serve a probation period of 3 to 6 months although the concept of probation is not expressly provided for under Indian labour laws.

Employers generally have a HR handbook or employee related policies and procedures in place, which lay down the common workplace rules and regulations and ensures uniform practices and procedures within the organisation. The employers should ensure that the adoption of any global policies and procedures and the HR handbook is in compliance with applicable labour and employment laws of India.

## 6.5. Working Hours

The legally permissible working hours range from 8 to 9 hours in a day and 48 hours in a week, with a minimum of 1 day given as a weekly off. Overtime is permissible up to limits specified under the local S&E Act and Factories Act, as applicable. The employers are required to pay extra for overtime hours worked by an employee, which is usually paid at the rate of twice the normal rate of wages.

## 6.6. Wages, Salaries

An employer is required to pay at least the minimum wage as per applicable local law. The aspects relating to wage period, timely payment of wages, permissible deductions from wages and components constituting wages are governed by different labour laws, as may be applicable. The minimum wages are prescribed by the State Government and are revised periodically.

The break-up of wages / salaries into different heads of payment such as basic pay, dearness allowance and other allowances should be structured keeping in mind tax considerations and implications under labour laws.

## 6.7. Leaves and Holidays

The leaves and holidays are generally governed by the local S&E Act and the Factories Act. The leave entitlements and prescribed public holidays vary from State to State. The leaves are generally categorised as privilege or earned annual leave, sickness and casual leave. The law allows accumulation and encashment of privilege or earned annual leave. Employers adopting global policies or uniform policies across offices should ensure that the leave policies are compliant with applicable local law requirements.

## 6.8. Hiring Contract Labour

The contract labour system refers to workers engaged through an intermediary (typically a contractor / manpower supply agency) and is based on a triangular relationship between the principal employer of an establishment, the contractor and the workers employed as contract labour. Therefore, a workman is deemed to be a contract labour when he / she is hired in connection with the work, or “contract for service” of an establishment by or through a contractor. They are indirect employees; persons who are hired, supervised and remunerated by a contractor who, in turn is compensated by the principal employer.

The contract labour system in India is governed by the Contract Labour (Regulation & Abolition) Act, 1970 (**“CLRA”**), which is a central legislation having State specific amendments and State specific rules. In respect of an establishment employing contract labour and covered within CLRA, the principal employer is required to seek a registration, while the contractor is required to obtain a license from the competent authority set up under CLRA.

## 6.9. Restrictive Covenants in Employment Agreements

A distinction has been drawn in Indian law between a restrictive condition in a contract of employment which is operative during the period of employment and one which is to operate after the termination of the employment. A negative covenant enforced by the employer during the subsistence of employment is generally considered valid and not regarded as a restraint of trade.

The legal position in India is settled that non-compete restrictions are not enforceable post the termination of employment contracts. The courts have consistently taken a view that a covenant which restricts the employee from taking up work of his / her own choice after termination of service is void.

## 6.10. Health and Safety

Some labour laws stipulate provisions relating to health, safety and welfare of the employees in factories and commercial establishments. The employer has a duty to comply with minimum requirements as laid down under applicable laws.

A new law namely, Code on Occupational Safety, Health and Working Conditions Bill, 2019, has recently been introduced in the Indian Parliament.

## 6.11. Social Security Benefits

The main social security legislations in India are:

(i) The Employees' Provident Funds & Miscellaneous Provisions Act, 1952 (**"Provident Fund Act"**);

(ii) The Employees' State Insurance Act, 1948 (**"ESI Act"**); and

(iii) The Payment of Gratuity Act, 1972 (**"Gratuity Act"**).

The Provident Fund Act is a social security and welfare legislation, which provides for provident fund, family pension and insurance to employees working in factories and other establishments. It covers 3 schemes i.e. employee provident fund scheme, pension scheme and employees deposit linked insurance scheme. In terms of the Provident Fund Act, both employer and employee are required to contribute a prescribed percentage of the monthly salary of each covered employee towards the employees' provident fund and other schemes. It is a central law and administered by the Government, through the Employees Provident Fund Organization.

The ESI Act, inter alia, provides for certain benefits to the employees in contingencies such as maternity, temporary or permanent physical disablement due to employment injury resulting in loss of wages or earning capacity, death due to employment injury, as well as medical care to employee and their immediate dependants. An Employees State Insurance Fund (**"ESI Fund"**) has been created under the ESI Act. The contribution to the ESI Fund is required to be paid at a prescribed percentage of the employee's "wages" by the employer as well as the employee. The employer is liable to pay, in respect of each eligible employee, the employers contribution as well as the employees' contribution (as deducted from the employee's monthly wages), into the ESI Fund on a monthly basis.

The Gratuity Act is a central legislation, which was enacted to introduce a scheme of payment of a certain sum, by the employer, as gratitude in lieu of a person's continuous employment. It is the statutory liability of the employer to pay gratuity which is capped at a prescribed amount. Gratuity is payable to an employee after he / she has rendered continuous service for not less than 5 years and the gratuity becomes payable on the termination of employment, or on the occurrence of either of the following: (i) superannuation; (ii) retirement or resignation; or (iii) death or disablement due to accident or disease.

## 6.12. Maternity Benefit

The maternity benefit in India is regulated under the Maternity Benefit Act, 1961 and the ESI Act, according to which eligible female employees are entitled to maternity leave for a period of 26 weeks. In addition to the said benefit, the female employees are also entitled to receive other benefits such as medical bonus, paid leave in case of miscarriage or medical termination of pregnancy, additional paid leave in case of illness arising out of pregnancy, etc.

Further, commissioning mothers and adopting mothers are also entitled to receive 12 weeks of maternity leave.

Establishments having 50 or more employees are required to have a crèche facility within the prescribed distance, either separately or along with other common facilities.

Indian law presently does not provide for paternity leave. However, establishments are free to provide such benefits to male employees as per their internal policies.

## 6.13. Workplace Harassment

Although the Indian labour laws deal with unfair labour practices, there is no specific law to provide for issues pertaining to victimisation, discrimination or harassment at workplace, except for the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (**"POSH"**), which specifically deals with the issue of sexual harassment of women at workplace.

POSH is a Central law applicable to all establishments / employers and covers all employees. It lays down several duties for the employer and amongst other things requires the employer to constitute an internal committee to inquire into complaints of sexual harassment and provide redressal to aggrieved woman; conduct awareness and sensitisation training for employees.

## 6.14. Industrial Relations and Trade Unions

Indian laws recognise trade unions, the spirit of collective bargaining and seek to ensure stability of industrial relations. The Trade Unions Act, 1926 empowers the employees to form and register a trade union subject to certain conditions.

The ID Act is the main legislation which provides the framework for resolution of industrial disputes and aims to promote amity between employer and workers.

## 6.15. Lay Off, Retrenchment, Transfer, Termination of Employment

The concept of “hire and fire at will” is not entirely recognised under Indian law. The S&E Acts typically provide for at least 1 months’ notice or payment in lieu for termination of employment by either party. Some S&E Acts specifically provide that termination has to be for a reasonable cause. Termination on grounds of misconduct is recognised, however misconduct must be established on record and the employer should have conducted the inquiry in accordance with the principles of natural justice.

Termination of workman category employee is regulated under the ID Act and requires the employer to give reasons for dismissal. The ID Act permits “retrenchment” which means termination of services of a workman by the employer for any reason, except the retirement, termination on grounds specified in a fixed term-contract (or the non-renewal of a fixed term contract), and / or termination on grounds of continued ill health, subject to the employer following prescribed procedure.

The ID Act also deals with matters pertaining to lay-offs, transfer or closure of undertaking, transfer of employees, labour disputes, unfair labour practices, changes to conditions of service, etc. and prescribes certain conditions and procedural aspects which an employer needs to comply with while dealing with the aforesaid matters.

In case of wrongful termination, an aggrieved employee can bring an action against the employer and there could be instances where the Indian courts may order reinstatement of an employee with / without back wages etc., or otherwise allow damages or compensation to the employee.

It is important for employers to bear in mind the legal requirements governing dismissal and payment of full and final settlement dues and have proper documentation in place with respect to termination of employees with or without cause.

## 6.16. Concept of International Worker and Immigration Issues

International mobility of workforce for short term or long term assignments needs to be ensured in compliance with laws of the home and host country of employment. Secondment of expatriate employees to India needs to be structured keeping in mind the Indian legal requirements. First and foremost, depending on the duration and nature of assignment, an expat would need to obtain an employment visa or in some cases a business visa for India.

One of the key conditions is that the foreign national being sponsored for an employment visa in India should draw a salary in excess of USD 25,000 per annum. Employment visa shall not be granted for jobs for which qualified Indians are available or for routine, ordinary or secretarial / clerical jobs. If an expat intends to stay in India for a duration of more than 180 days, registration with the Foreigners Regional Registration Office (**FRRO**) is required.

With respect to the social security coverage of an expat employee, the Provident Fund Act facilitates the continuation of the social security contribution by the expat in his home country subject to there being a social security agreement between India and the expatriate’s home country. In the absence of a social security agreement, the Indian employer is required to contribute to provident fund for the international workers.

## 6.17. Compliance and Enforcement under Labour Laws

From a compliance and enforcement perspective, Indian labour authorities conduct routine inspections, inspections based on computerised systems in place and in response to any complaints made to the labour authorities. The Indian labour authorities at the State level have often been considered lax in implementing and enforcing labour laws, however with the ongoing labour reforms and digitisation of systems, the labour authorities have become significantly active, especially in metropolitan cities.

The Central labour laws, especially the social security laws, are enforced rigorously and authorities such as the provident fund and ESI authorities are known to be proactive and strict.

## 6.18. Labour Reforms

The Government has been taking various measures to promote ease of doing business in India and at the forefront of these reforms is the use of technology, digitisation of procedures and promotion of electronic records and filings and reduction in paper work. Over the last few years, the labour and employment regime has been undergoing steady reforms with a new approach aimed at promoting transparency, facilitating compliance and reducing the burden of paperwork for employers.

The current labour law regime is expected to go through a complete overhaul once the 4 new labour codes come into force repealing several old labour laws.

# CHAPTER 7

## White Collar Crimes

# 7. WHITE COLLAR CRIME

## 7.1. Meaning of “White Collar Crime”

“White Collar Crime” is essentially an economic offence or an offence committed in order to illegally gain monetarily or materially therefrom. It covers offences/crimes which are non-violent in nature, generally committed by persons from the upper strata of society in the course of their business, occupation or profession through deceptive illegal acts in an attempt to amass vast amounts of money. In India, the term “White Collar Crime’ has not been defined specifically, but there are various legislations which deal with offences / crimes covered under the concept of “White Collar Crime”. Some of such legislations are discussed in this chapter.

## 7.2 Legislations Involving White Collar Crimes

The legislations in India which cover white collar offences are as under:-

(i) **Indian Penal Code, 1860 -** It imposes penalty in the form of imprisonment and / or fine on a person / company / association / body of persons, involved in generating revenue illegally, through their illegal activities that may, inter alia, involve extortion, cheating, forgery, breach of trust, counterfeiting, etc.

(ii) **Prevention of Corruption Act, 1988 -** It imposes criminal liability on a public servant, who obtains or accepts or attempts to obtain from any person, an undue advantage or reward or who in anticipation of such illegal gratification in the future commits or abstains from an act in his duty. Even a third person, who accepts or obtains or attempts to obtain from another person any undue advantage for himself or for any other public servant is covered under the legislation. It also imposes fine on a commercial organization / partnership / association of persons that (a) is incorporated in India but carries on business outside India, and (b) any other body incorporated outside India but carrying on its business in India.

The bribe giver is also liable for prosecution unless (a) he was compelled to give the bribe and subsequently informs the law enforcement agencies of the same within 7 days of the incident, and (b) he informs the law enforcement / investigating agency of his proposed act to give a bribe to a public servant in order to assist such law enforcement / investigating agency in its investigation of the offence alleged against such public servant.

(iii) **The Whistle Blowers Protection Act, 2014 -** It was enacted to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or wilful misuse of power or wilful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against victimisation of the person making such complaint.

**(iv) Prevention of Money Laundering Act, 2002 ("ML Act") -** Money laundering is a process of converting money illegally obtained through various socio-economic crimes/criminal activity into legal money thereby projecting the same to have been generated from a legitimate source. The ML Act was introduced to prevent money laundering and confiscation of property derived from money laundering. The ML Act imposes an obligation on the banking companies, financial institutions and other intermediaries to verify the identity of their clients, to maintain records and to furnish information in prescribed form. It is invoked in cases such as bank frauds where loans taken for a specific purpose are laundered for other purposes or where a builder launders the money collected from prospective home buyers for the purpose of construction of a housing project or where money is collected for purported investment schemes but is illegally laundered to the disadvantage / loss of the investor.

**(v) IT Act -** The IT Act prescribes punishment for those who evade paying income-tax, which they otherwise are liable to pay under the IT Act. There is a clear judicial distinction that has been drawn between avoiding and evading the payment of income tax. One may avoid paying tax on a particular portion of income by investing it in legally permissible channels such as insurance. It applies to individuals / corporations / partnerships / association of persons. It also applies to non-residents who have any income taxable in India.

**(vi) Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 -** These regulations restrict providing / procuring / allowing access or communication of any unpublished price sensitive information (including insider information about a company or investment trades) relating to a company, to any person including other insiders, except when it is in furtherance of legitimate purposes, performance of duties or discharge of legal obligations.

**(vii) Prohibition of Benami Property Transactions Act, 1988 -** It has been enacted to prohibit benami (anonymous) transactions and the right to recover property held anonymously. A benami transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person. Property means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.

**(viii) Information Technology Act, 2000 -** It prescribes punishment for those offenders / cybercriminals who indulge in illegal computer activities including hacking, electronic money laundering, internet frauds, unauthorized copy of an extract from any data, stealing of industrial secrets and copyright infringements.

(ix) **Negotiable Instrument Act, 1881 -** It prescribes punishment against the drawer of a cheque in case the cheque gets dishonoured, inter alia, on account of insufficient funds. If the drawer of the dishonoured cheque is a company, then every person, who was in-charge and responsible for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence.

# CHAPTER 8

## Anti-Trust Laws

# 8. ANTI-TRUST LAWS

## 8.1 Overview of Anti-Trust Laws in India

The primary legislation governing antitrust laws in India is the Competition Act, 2002 (**"Competition Act"**) and the rules and regulations made thereunder. The intent of the Competition Act is to promote competition, protect the interest of consumers, ensure freedom of trade and prevent practices / arrangements having an appreciable adverse effect on competition (**"AAEC"**).

The Competition Act contains specific provisions for anti-competitive agreements (whether vertical or horizontal agreements), abuse of dominant position as well as combinations (which include acquisition, merger, amalgamation and joint venture).

The Competition Commission of India (**"CCI"**) is the primary authority responsible for the enforcement of the provisions of the Competition Act. The CCI has the power to take suo moto action or act on receipt of information against any person (which term is defined to include individual, company, body corporate incorporated outside India, association of persons or body of individuals and any government authority).

## 8.2 Anti-Competitive Agreements

An agreement (whether horizontal or vertical) is considered to be anti-competitive if such agreement causes or is likely to cause an AAEC in India.

### Horizontal Agreements

Horizontal agreements refer to agreements / arrangements entered between persons operating at the same stage of the production chain.

Horizontal agreements entered between the parties, engaged in identical or similar trade of goods or services, for the purposes of determining prices, limiting production or supply of goods or services, sharing the market by allocating geographical area of market or types of goods / services or number of customers, bid rigging or collusive bidding are deemed or presumed to have an AAEC in India.

The only exception is a joint venture arrangement if such arrangement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or services.

### Vertical Agreements

Vertical agreements are agreements / arrangements entered between 2 or more persons at different levels of production or distribution chain.

The Competition Act contains an inclusive list of vertical agreements which would be prohibited if the CCI finds that such agreements cause or are likely to cause an AAEC in India. The list of agreements provided in the Competition Act includes tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance.

While determining whether an agreement (whether horizontal or vertical) has an AAEC, the CCI is required to take into account certain factors such as whether the arrangement / agreement will result in creation of barriers to new entrants in the market, drive out existing competition, and / or foreclose competition. These factors are then required to be weighed against potential benefit to the consumers, improvements in production or distribution of the relevant goods or services, and / or technical, scientific and economic development.

## 8.3 Abuse of Dominant Position

The Competition Act prohibits abuse of dominant position by an enterprise or a group holding a dominant position in the relevant market in India. The Competition Act defines 'dominant position' as a position of strength enjoyed by an enterprise in the relevant market in India which enables it to operate independently of competitive forces or affect its competitors or consumers or the relevant market in its favour.

It is not holding / having a dominant position which is prohibited under the Competition Act, but the abuse of such position of dominance within the relevant market.

There would be an abuse of dominant position if an enterprise or group, directly or indirectly, imposes unfair or discriminatory trading conditions or prices, or engages in predatory pricing, or limits or restricts the production of goods or services in the market, or limits or restricts technical or scientific development relating to goods or services to the prejudice of consumers, or denies market access, or concludes contracts subject to acceptance by other parties of supplementary obligations having no connection with the subject of such contracts, or uses the position of dominance in one market to enter into or protect a nother relevant market.

Dominant position of an enterprise is assessed by taking into account various factors, such as market share of the enterprise, economic power, size and resources of the enterprise, importance of the competitors, consumer dependence on the enterprise, vertical integration and entry barriers.

## 8.4 Combinations

As per the Competition Act any combination, unless it is specifically exempted, which exceeds the prescribed asset or turnover thresholds (considered on a stand-alone and / or on a consolidated / group basis, in India and abroad) requires prior approval of the CCI.

The Competition Act covers the following 3 broad categories of combinations:

(i) any acquisition of control, shares, voting rights or assets of an enterprise, where the parties to the acquisition (being the acquirer and enterprise) or the group to which the target enterprise will belong post-acquisition meet specified assets or turnover thresholds (in India or outside India).

(ii) any acquisition of control of an enterprise by a person who already, directly or indirectly, controls another enterprise (the "existing enterprise") which is engaged in the business of (a) the production, distribution or trading of goods which are similar or identical to or substitutable with goods of the existing enterprise, or (b) provision of services which are similar or identical to or substitutable with services provided by the existing enterprise, if the target enterprise along with the existing enterprise jointly have turnover or assets (in India or abroad) above the specified threshold or the group to which the target company would belong to after the acquisition has assets or turnover (in India or abroad) above the specified threshold.

(iii) any merger or amalgamation where (a) either the enterprise remaining after the merger or the enterprise being created as a result of the amalgamation, or (b) the group to which the enterprise will belong after the merger or amalgamation, meets the specified assets or turnover thresholds (within India or abroad).

However there are certain specific and general exemptions (the general exemption is based on the turnover or assets of the target enterprise).

Additionally, in order to increase the ease of doing business in India, the CCI has recently proposed amendments, which came into effect from August 15, 2019, to the combination regulations. The CCI, through these amendments, has introduced a green channel mechanism for deemed approval of certain combinations. As per the green channel route, which is available to the parties only if they do not have any horizontal, vertical or complementary overlaps, a relevant combination will be deemed to be approved upon receipt of an acknowledgement of filing.

# CHAPTER 9

## Insolvency and Bankruptcy Laws

# 9. INSOLVENCY AND BANKRUPTCY LAWS

## 9.1 Insolvency and Bankruptcy Code

The Insolvency and Bankruptcy Code, 2016 (**"Insolvency Code"**) is a one stop solution for resolving insolvencies which previously was a long process that did not offer an economically viable arrangement. The Insolvency code aims to protect the interests of Indian and overseas investors and make the process of doing business less cumbersome. The threshold amount to kick start insolvency proceedings is INR 100,000.

**Key Features**

**Insolvency Resolution:** The Insolvency Code outlines the insolvency resolution processes to be pursued for individuals, companies and partnership firms. The process may be initiated against a company (**"Corporate Debtor"**) who owes money to the creditors. A maximum time limit, for completion of the insolvency resolution process, has been set for corporates and individuals. For companies, the process will have to be completed in an overall time period of 330 days.

**Insolvency regulator:** The Insolvency Code establishes the Insolvency and Bankruptcy Board of India (**"IBBI"**), to oversee the insolvency proceedings in the country and regulate the entities registered under it. The IBBI has 10 members, including representatives from the Ministries of Finance and Law and the RBI.

**Insolvency Professionals:** The insolvency process is managed by licensed professionals. These professionals also control the assets of the Corporate Debtor during the insolvency process.

NCLT (**"Adjudicating Authority"**) is the adjudicating authority for insolvency resolution process of companies and LLPs under the Insolvency Code.

The jurisdiction of the civil courts has been ousted in relation to the proceedings in respect of any matter which the NCLT or the NCLAT is empowered to determine by or under the Insolvency Code or any other law for the time being in force. As such, no injunction can be granted by any court or other authority in respect of any action taken or to be taken by NCLT or NCLAT in pursuance of any power conferred by or under the Insolvency Code or any other law for the time being in force.

The NCLT has 16 benches with the principal bench being in New Delhi. The order / judgments of NCLT may be appealed before the NCLAT and the orders / judgments of the NCLAT may further be appealed to the Supreme Court. The Supreme Court has upheld the Insolvency Code in its entirety.

## Creditors and Nature of Debts

The Insolvency Code has introduced new and distinct concepts of 'Financial Creditor' and 'Operational Creditor' as opposed to the Act which merely introduced the term 'creditor', without any classification thereof. As per the Insolvency Code, a Financial Creditor means "a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred". In order to ascertain whether a person is a Financial Creditor, the debt owed to such a person must fall within the ambit of 'Financial Debt' which has been defined under the Insolvency Code to mean:

"*a debt along with interest, if any, which is disbursed against the consideration for time value of money and includes-*

*(a) Money borrowed against payment of interest;*
*(b) Any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent;*
*(c) Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
*(d) The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*

(f) *Any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing;*

(g) *Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*

(h) *The amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause*".

Further, an Operational Creditor is defined under the Insolvency Code to mean:

"*any person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred*".

In order to ascertain whether a person would fall within the definition of an Operational Creditor, the debt owed to such a person must fall within the definition of an operational debt. An operational debt is defined under the Insolvency Code to mean:

"*a claim in respect of the provisions of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority*".

The Bankruptcy Law Reforms Committee in its final report differentiated between the Financial Creditor and Operational Creditor as under:

*"Here, the Code differentiates between financial creditors and operational creditors. Financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or debt security. Operational creditors are those whose liabilities from the entity comes from a transaction on operations...The Code also provides for cases where a creditor has both a solely financial transaction as well as an operational transaction with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.*"

**Procedure**

In relation to the Operational Creditors, the insolvency proceedings are kick started by either serving a statutory demand notice at the registered address of the Corporate Debtor or emailing the said notice through email (on the email ID of the Corporate Debtor). The Corporate Debtor then is obligated to respond within 10 days from the date of the receipt of the statutory demand notice to either bring to the notice of the Operational Creditor that there is a "pre-existing" dispute or the fact that the claim amount has already been paid.

A “pre-existing” dispute includes pendency of any suit or arbitration between the parties or any correspondence that captures the dispute that the Corporate Debtor may have raised prior to receiving of the statutory demand notice. The Supreme Court has clarified that a defence of pendency of “pre-existing” dispute cannot be a moonshine and bald assertion and needs to be supported with evidence.

As far as Financial Creditors are concerned, there is no requirement of issuing a statutory demand notice and they can directly approach the NCLT upon default. Further, in such cases, the defence of existence of “pre-existing” dispute is not available to the Corporate Debtors.

The procedure applicable before the NCLT in relation to the Financial Creditor or the Operational Creditor is substantially similar. The insolvency pleas shall lie before the NCLT Bench within whose territorial jurisdiction the registered address of the Corporate Debtor is situated. A plea for insolvency is submitted to the Adjudicating Authority (which is the NCLT) by Financial or Operational Creditors or the Corporate Debtor itself. The maximum time allowed to either accept or reject the plea is 14 days, however, at times this may be extended. If the plea is accepted, the NCLT has to appoint an Interim Resolution Professional (**“IRP”**) for initiating the Corporate Insolvency Resolution Process (**“CIRP”**) and the process has to be completed within a time period of 330 days. For the said period, the board of directors of the Corporate Debtor stand suspended, and the promoters do not have a say in the management of the company. The IRP, if required, can seek the support of the company’s management for day-to-day operations. If the CIRP fails in reviving the company the liquidation process is initiated.

## CIRP

CIRP once initiated has to be completed within a time period of 330 days. Pursuant to the order of the Adjudicating Authority for initiating CIRP, an order of moratorium and public announcement shall also be passed with respect to prohibition of instituting a fresh suit or continuation of pending suits or proceedings against the Corporate Debtor which also includes execution of any (domestic or foreign) judgment, decree or order in any court of law or tribunal. Such restraining order of the Adjudicating Authority also restrains the representatives of the Corporate Debtor to transfer, alienate or dispose off any asset or any legal right / beneficial interest of the Corporate Debtor. However, it is important to note that such order of moratorium shall not terminate or suspend the regular supply of essential goods and services that are required by the Corporate Debtor to perform its usual functions. Additionally, such moratorium order shall not be applicable to any surety in a contract of guarantee to a Corporate Debtor and the order of moratorium shall remain effective till the completion of the CIRP. In the meantime, the IRP appointed pursuant to the order of the Adjudicating Authority is duty bound to make a public announcement and invite claims from other creditors of different categories (secured / unsecured creditors) that are due and payable by the Corporate Debtor.

## IRP and Committee of Creditors

After the order of moratorium and public announcement, the IRP is entitled to constitute a Committee of Creditors (**"CoC"**) upon receiving the claims from all the creditors either within the limited time period as fixed by IRP or the maximum time period of 90 days from the date of commencement of CIRP. It is important to note that such CoC plays a vital role in taking decisions in terms of revival or winding up of the Corporate Debtor since all the decision making powers as that of the Board of Directors are deviated to the CoC and all the actions pertaining to management of the Corporate Debtor has to be first approved by CoC with the majority of up to 66% of the total number of members of CoC. The decision making powers with respect to the CoC is duly divided amongst creditors depending upon the percentage of debt they owe towards the Corporate Debtor and every decision with respect to, either the approval of the resolution plan or the winding up of the Corporate Debtor has to be taken after considering the voting percentage of the CoC.

## Resolution Professional and Resolution Applicant

Pursuant to the formation of CoC for initiating CIRP, a joint decision is taken by all the members of CoC with respect to either appointment of a fresh resolution professional (**"Resolution Professional"**) or appointing the IRP as the Resolution Professional for execution of the resolution plan for revival of the Corporate Debtor. Once the decision with respect to finalization of Resolution Professional is taken by the CoC, thereafter the Resolution Professional is entitled to collect the information with respect to the Corporate Debtor that may include collecting information regarding the business operations for the previous 2 years of the Corporate Debtor, its tangible and intangible assets and all other information pertaining to the interest of Corporate Debtor in order to prepare its complete account for analyzing the financial health of Corporate Debtor. Once the Resolution Professional is appointed, it invites bidders interested to participate in a bid for appointment of resolution applicant who shall prepare a resolution plan for reviving the Corporate Debtor (**"Resolution Applicant"**). Such Resolution Applicant is required to prepare a suitable resolution plan for the revival of the Corporate Debtor within the maximum time period permitted under provisions of the Insolvency Code and present it before CoC and Adjudicating Authority for its approval. In case either the CoC or the Adjudicating Authority rejects such resolution plan or the Resolution Applicant fails to provide a plan within the given time period, then the Adjudicating Authority may pass an order directing the liquidation of the Corporate Debtor. Once the order of liquidation is passed by the Adjudicating Authority, the Resolution Professional is substituted / converted into a liquidator and all the powers and managerial functions of the Resolution Professional are deviated to such liquidator in order to expedite the process of liquidation of Corporate Debtor. The liquidator in order to initiate the process of liquidation of the Corporate Debtor is required to make a fresh public announcement for receiving all the claims of creditors against the Corporate Debtor and upon receipt of such claims, the liquidator is authorized to verify the claims and accordingly either admit or reject them. Post verification of claims by the liquidator, the process of liquidation is initiated by distributing the assets of Corporate Debtor in a preferential manner as envisaged under the provisions of the Insolvency Code.

## Voluntary Liquidation

Independent of the procedure laid down under the Insolvency Code for liquidation of any corporate entity in case of a default, the corporate entity can also voluntarily liquidate itself as envisaged under the Insolvency Code. The corporate entity is required to meet the conditions and procedural requirements that include declaration from majority of the Board of Directors of the corporate entity verifying on affidavit that the assets of the corporate entity are sufficient to meet the total debt amount owed to its creditors and the corporate entity is not liquidated to defraud any person. Such declaration is to be accompanied by the audited financial statements of the previous 2 years and a valuation report of the assets of the corporate entity. In furtherance to the said declaration, a special resolution is also required to be passed by the corporate entity in a general meeting wherein a liquidator shall be appointed for the purposes of performing the actions for the liquidation of the corporate entity.

# CHAPTER 10

## Dispute Resolution

# 10. DISPUTE RESOLUTION

## 10.1 Litigation

### Civil Procedure

India is a common law jurisdiction. The civil procedure in India is guided by the Code of Civil Procedure, 1908 (**"CPC"**). The objective of the CPC is to consolidate and amend the laws relating to procedure of the Courts of Civil Judicature. In 2016, with the passing and introduction of the Commercial Courts Act, 2015 (**"CCA 2015"**), the CPC was amended to set up specialised commercial courts to hear commercial disputes (as defined under the CCA 2015) of a specified value. The objective behind introduction of CCA 2015 was to simplify the manner and approach to be followed in adjudication of commercial disputes, with the emphasis being on speedy and time bound adjudication.

### Hierarchy of Courts

A single unified judicial system is a unique feature of the Indian judicial system. The Supreme Court is at the apex of the entire judicial system, followed by High Courts in each State or group of States and / or Union Territories having appellate, supervisory and administrative jurisdiction over their respective States, group of States and Union Territories. Below each State's High Court lies a hierarchy of subordinate courts.

Further, specialized tribunals such as the NCLAT, NCLT, National Consumer Disputes Redressal Forum, the Debt Recovery Tribunal, the Intellectual Property Appellate Tribunal and others have been established under various enactments. Appeals from the orders of these tribunals / appellate tribunals lie to the Supreme Court and / or the High Court, as the case may be.

**Jurisdiction**

The jurisdiction of a court or tribunal is dependent upon meeting of certain parameters or upon the existence of a particular fact. The courts would have the jurisdiction to try and entertain the matter only once such parameters are met. Jurisdiction of the courts may be classified under the following categories:

**(i)** **Territorial Jurisdiction:** Every court has its own territorial limits beyond which it cannot exercise its jurisdiction. In terms of the CPC, every suit must be instituted within the local limits of whose jurisdiction:

(a) the defendant(s), at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain; or

(b) any of the defendant(s), at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain. However, in such a case, either the leave of the court must be taken, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

**(ii)** **Pecuniary Jurisdiction:** The CPC envisages that a court will have jurisdiction only over those suits in which the amount or value of the subject matter does not exceed the pecuniary limits of its jurisdiction.

**(iii)** **Jurisdiction as to subject matter:** Different courts have been empowered to try and entertain the matters of a specific nature. For instance, in relation to commercial disputes, the same shall be tried and entertained by the Commercial Courts and Commercial Divisions provided the value of the dispute is above the specified limit. Further, matters in relation to violation of fundamental rights can be tried and entertained only by the High Courts and the Supreme Court. The Court having any or all of the aforementioned jurisdictions are generally known as the courts of first instance.

**Suit Proceedings:** There are various kinds of suits (such as suit for declaration, suit for mandatory injunction, suit for specific performance etc.) that may be filed by a party.

**(i)** **Institution of a suit:** The CPC envisages that every suit shall be instituted by the presentation of a plaint at a court of first instance. A plaint is the plaintiff's statement of claim wherein he sets out his entire case and is also accompanied with all relevant documents which the plaintiff would be relying upon. All parties who are considered necessary and proper parties have to be arrayed as parties to the suit.

**(ii)** **Court Fees:** The Court Fees Act, 1870 is the central legislation for the purposes of determining the court fees, which is usually dependent upon the subject matter of the litigation. However, certain States have also enacted separate statutes for determining the court fees.

**(iii)** **Written Statement:** This is the reply (statement of defence) which is filed by the defendant once the court has issued summons / notice to the defendant. As per the CPC, the defendant is required to file the written statement within 30 days from the date of receipt of the summons, which can be further extended to 90 days subject to the court being satisfied of the reasons provided by the defendant of not being able to file it within 30 days.

(iv) **Limitation:** The Limitation Act, 1963 is applicable to suit proceedings. Usually, the limitation period to file a suit is three (3) years from the date of cause of action, failing which, the court may dismiss the suit as being barred by limitation.

**Enforcement: Indian and Foreign Judgments / Decrees**

The decree passed by the court has to be enforced in the manner provided under the CPC. While enforcing a decree, the execution court usually does not go into the merits of the dispute and / or re-appreciate the evidence presented before the court which passed the decree. For the purposes of execution of the decree, the court has the power to seize the property (movable and immovable) of the judgment debtor until the decree is satisfied. In case, the judgment debtor is unable to satisfy the decree, the court can also dispose off / sell the assets of the judgment debtor.

The Indian courts are also empowered to enforce a foreign decree. A decree passed by a court of a foreign country which has been recognized as a reciprocating territory by the Government can be enforced by filing of an enforcement cum execution petition before the Indian courts having appropriate jurisdiction. Such decrees shall then be enforced in the same manner as a decree passed by an Indian court. In relation to a judgment / decree passed by a court of a non-reciprocating territory, a fresh suit would have to be instituted wherein the foreign judgment / decree shall hold evidentiary value.

### Appeal

Whoever is dissatisfied with the decree of the court can file an appeal before the Appellate Court (as recognized by CPC). The Appellate Court may either reject the appeal, or allow the appeal and set aside the decree passed by the court of first instance or may remand the case back to the court of first instance for its re-consideration.

## 10.2 Arbitration

India is taking active steps to make itself an international arbitration hub. The principle statute governing the law on arbitration and conciliation in India is the Indian Arbitration and Conciliation Act, 1996 (**"Indian Arbitration Act"**). India has seen a 200% growth in the disputes being referred to arbitration in the recent years.

The Indian Arbitration Act is based upon the UNCITRAL Model Law on International Commercial Arbitration, 1985. The objective of the Indian Arbitration Act is to facilitate domestic and international commercial arbitrations and to make provisions for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration. The Indian Arbitration Act defines an "international commercial arbitration" to mean an arbitration arising from a legal relationship which must be considered commercial where either of the parties is a foreign national or resident or is a foreign body corporate, is a company, association, or body of individuals whose central management or control is in foreign hands

There are following kinds of arbitrations that the parties may adopt:

(a) **Ad hoc Arbitration:** In such a proceeding the parties make their own arrangements for selection of arbitrators. The parties are under discretion to choose designation of rules, applicable law, procedures and administrative support.

(b) **Institutional Arbitration:** It is a method of arbitration where the entire arbitration is conducted by an established arbitral institution or organization. The arbitration agreement itself provides for appointment of an arbitral institution for conducting the arbitration.

### Interim Relief

The parties can approach the Indian courts to seek interim reliefs under section 9 of the Indian Arbitration Act in domestic as well as foreign arbitrations. While in domestic arbitrations, section 9 is mandatorily applicable, in a foreign arbitration, the parties have discretion to exclude the applicability of section 9. The courts have held that in order to grant relief under section 9, the court shall consider factors such as, balance of convenience, prima facie cases, irreparable injury, and the concept of just and convenient.

Once the arbitral tribunal has been constituted, in a domestic arbitration, a party can seek interim relief from the arbitral tribunal under section 17 of the Indian Arbitration Act. Further, section 9 was amended in 2015 and the amended section envisages that if the Court passes an interim relief before commencement of arbitral proceedings, then the arbitral proceedings shall have to commence within a period of 90 days from the date of such order or within such time as the Court may determine. The Court shall also not entertain any application under section 9 of the Indian Arbitration Act unless it finds that circumstances exist which may not render the remedy under section 17 (of the Indian Arbitration Act) efficacious.

**Time Period**

As per the amendment carried out in 2015, section 29A of the Indian Arbitration Act envisaged that an award would have to be made within a period of 12 months from the date the arbitral tribunal enters upon the reference and such period may be extended by a maximum period of 6 months by the parties. However, as per the recent amendment of 2019, the tribunal must make the award within a period of 12 months from the date of completion of pleadings. The statement of claim and defence under this section shall be completed within a period of 6 months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment. It also provides that this time limit shall not apply to international commercial arbitrations; however, endeavour may be made to dispose of the matter within a period of 12 months from the date of completion of pleadings.

## Fast Track Arbitration

As per the amendment carried out, a party can, before constitution of the arbitral tribunal, agree in writing to conduct arbitration under a fast track procedure. Under the fast track procedure, unless the parties otherwise make a request for oral hearing or if the arbitral tribunal considers it necessary to have an oral hearing, the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents, and submissions filed by the parties without any oral hearing. Here, the award under this procedure must be made within six (6) months from the date the arbitral tribunal enters reference.

## Challenge to Award

In relation to a domestic award, the aggrieved party has a statutory right to challenge the award before the Indian courts and thereafter, may also appeal to the Appellate Court. However, in relation to a foreign award, no such right is available to the aggrieved party and in such a case, the party who succeeded before the arbitral tribunal can directly file a consolidated petition for enforcement cum execution of the foreign award. The grounds of challenge are narrower in a foreign arbitration as against the domestic arbitration.

### Enforcement: Foreign Award

A foreign arbitral award in relation to an arbitration which has its seat in a country which is a contracting State under the New York Convention and which has also been recognized as a convention country by the Government can be enforced by filing of a consolidated petition of enforcement cum execution under the provisions of the Indian Arbitration Act. The award becomes enforceable as a decree passed by the Civil Court if the party succeeds in satisfying the court about the enforce ability of the award.

## 10.3 Mediation

At present, the most popular form of mediation adopted under the Indian legal system is the court referred mediation. However, in the recent years, several mediation centers have opened across India which deal in private mediations. The courts in India have also realized the importance of mediation as an effective dispute resolution mechanism. Taking a step forward, the Indian legislature has also been bringing in amendments to existing statutes adopting mediation as a preferred form of dispute resolution. A new Chapter has been inserted in the CCA 2015, for mandatory pre-institution mediation and settlement in certain category of cases. Recently, on August 7, 2019, India became a signatory to the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation). Once the convention is enforced, the inter-state disputes which are settled through mediation can be directly enforced in the same manner as that of an international arbitration award.

# CHAPTER 11

## Real Estate

# 11. REAL ESTATE

## 11.1 FDI in Real Estate

As per the prevailing FDI Policy, FDI is prohibited in an entity which is engaged or proposes to engage in real estate business, construction of farm houses or trading in transferable development rights. In this regard, "real estate business" means dealing in land and immovable property with a view to earning profit therefrom and does not include development of townships, construction of residential / commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure and townships. Further, earning of rent / income on lease of the property, not amounting to transfer, also does not amount to real estate business.

However, FDI up to 100% is permitted under the automatic route in construction-development projects which would include development of townships, construction of residential / commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure and townships. Such FDI is permitted subject to compliance with certain conditions including exit related conditions.

Further, real estate broking services has also been excluded from the definition of "real estate business" and 100% foreign investment is allowed in real estate broking services under the automatic route.

## 11.2 Acquisition of Immovable Property by Non-Residents

Acquisition or transfer of immovable property by a person resident outside India is governed by the rules and regulations issued under FEMA and except as may be permitted, no person resident outside India can acquire or transfer immovable property in India.

An NRI or an OCI is permitted to acquire immovable property in India, other than agricultural land or farmhouse or plantation property if the consideration is paid out of funds received in India through banking channels by way of inward remittance from any place outside India or funds held in any non-resident account maintained in India in accordance with the provisions of FEMA. Further, an NRI or an OCI may also transfer any immovable property held in India to a person resident in India and if such property is not agricultural land or farmhouse or plantation property, to another NRI or OCI.

A person resident outside India (not being an NRI or an OCI) is not permitted to acquire immoveable property in India. However, a foreign national who is residing in India for more than 182 days during the course of the preceding financial year for taking up employment or carrying on business / vocation or for any other purpose indicating his intention to stay for an uncertain period can acquire immovable property in India as, in such as case, he would be treated as a person resident in India.

Further, a branch or office or any other place of business in India, other than a liaison office, established by a person resident outside India in accordance with the applicable FEMA regulations, may acquire immovable property in India which is necessary for or incidental to the activity carried out in India by such branch or office. In addition, branch offices, project office and liaison offices have general permission to carry out permitted / incidental activities from leased property subject to the lease period not exceeding 5 years.

Notwithstanding the above, citizens of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal, Bhutan, Hong Kong, Macau or Democratic People's Republic of Korea (including a branch or office or any other place of business in India established by persons of such countries) cannot acquire or transfer immovable property in India (except for lease not exceeding 5 years) without the prior approval of the RBI.

## 11.3 Key Aspects

In India, all transactions that involve sale and purchase of immovable property for a value exceeding INR 100 should be made by way of a registered instrument. Additionally, all transactions involving gift of immovable property as well as lease for a period exceeding 1 year are also mandatorily required to be registered. Registration of instruments / documents pertaining to the transfer of immovable properties is to be undertaken by the parties at the office of the Sub-Registrar of Assurances within whose jurisdiction the property is situated.

Instruments / documents that are required to be mandatorily registered should ordinarily be presented for registration within 4 months from the date of their execution, along with the requisite registration fee and stamp duty. Stamp duty charges are governed by the Indian Stamp Act, 1899 and the corresponding stamp acts adopted by different States in India. Accordingly, stamp duty on a particular transaction varies from State to State.

Even though it is not a legal obligation, it is always recommended for the proposed buyer or lessee to undertake a due diligence of the property prior to purchasing or leasing a particular property (whether for residential, commercial or industrial use). This process has the potential of not only impacting the commercials but also determining the feasibility of the transaction itself. Typically, a due diligence exercise includes ascertainment of title, permitted use, completeness of registrations and approvals for construction and occupancy, encumbrances, litigations and easements etc.

## 11.4 Key Sectoral Developments

In 2016, the Government enacted the Real Estate (Regulation and Development) Act, 2016 (**"RERA"**). RERA has been enacted to establish the Real Estate Regulatory Authority (**"Authority"**) for the regulation and promotion of the real estate sector and to ensure sale of plot, apartment, building or a real estate project in an efficient and transparent manner, to protect the interests of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal. The RERA is considered to be one of the landmark legislations enacted by the Government with the objective of bringing transparency and accountability in the real estate sector.

In the recent past, the concept of co-working office spaces has become extremely popular in India, particularly in the metros and tier-II cities. Co-working office spaces provide an alternative option to companies in view of the high costs involved in setting up personal offices and the challenges faced in negotiating long term leases at preferred locations.

# CHAPTER 12

# Intellectual Property Rights

# 12. INTELLECTUAL PROPERTY RIGHTS

## 12.1 Overview of Intellectual Property Law in India

Intellectual Property Rights (**"IPR"**) provide a secure environment for investors, inventors, scientists, artists, designers, traders etc. to foster innovation and a scientific temperament. Such innovations often have the potential to yield astronomical returns and rewards to creators and users. The Indian IPR regime aims to strike a balance between public and private rights and provide a stable environment for domestic and foreign investments.

The twenty-first century witnessed the emergence of "Intellectual Capital" as a key wealth driver of international trade between countries across the world, and India is no exception. IPR has become an indispensable element of India's business fraternity. India has a modern IPR legal system and has adhered to all major international IP treaties including the Paris Convention, the Berne Convention, the Trips Agreement and the Madrid Agreement and Protocol.

Since 2015, India has also established dedicated commercial courts for adjudicating 'commercial disputes' which specifically include disputes related to intellectual properties. These courts are equipped to provide efficient and quick adjudication of disputes which is vital for IPR owners.

## 12.2 Intellectual Property Rights Recognised Under Indian Law

### Trademarks

In India, trademark rights are regulated under the provisions of The Trade Marks Act, 1999. An application for trademark registration is filed before the Registrar of Trademarks by any person claiming to be the proprietor of a trademark.

Trademarks are registered for a period of 10 years and can be renewed for subsequent terms of 10 years at a time. Registration of trademark gives a trademark proprietor the exclusive right to use the trademark in the course of trade. If a third party uses an identical or deceptively similar trademark, the registered proprietor of a trademark can institute proceedings for recovery of damages for infringement of its trademark and may seek injunctive relief as well. In addition to the above, despite the fact that the law does not define "Passing Off", the law denies the registration of any trademark if the use of the mark is prevented by virtue of the law of passing off and enables an individual to claim his rights under the law, even if the mark is unregistered. Therefore, an action for passing off can also be filed by a person who does not have a registered trademark.

India is also a member of the Madrid System which is administered by the International Bureau of the World Intellectual Property Organization. The Madrid System facilitates international registration of trademarks by filing a single application through which an applicant may designate any member state for the purpose of registering its trademark. Accordingly, a foreign entity may register its trademarks in India under the provisions of the Madrid System.

Indian trademark law also recognizes Geographical Indications (GI).

A GI mark is a standardised and unique mark (“ ”) that can only be used after receiving GI registration vis-à-vis products that have a specific geographical origin and possess qualities or reputation that are quintessentially linked to that geographic origin alone. In order to use the aforesaid GI mark, an applicant must satisfy the trademarks registry that its product possesses unique qualities and characteristics which are fundamentally attributable to the place of origin of the product. A GI mark registration enables those who have the right to use the GI indication to prevent its use by a third party whose products do not conform to the applicable standards. Geographical indications are typically used for agricultural products, foodstuffs, wine and spirit drinks, handicrafts and industrial products. A registered GI is valid for 10 years from the date of application and can be renewed for a subsequent periods of 10 years on payment of renewal fees.

## Designs

In compliance of the provisions of the TRIPS Agreement, India has already amended its national legislation, i.e. The Design Act, 2000 to provide for the minimal standards under the TRIPS Agreement. India has also achieved a mature status in the field of industrial designs and in view of globalization of the economy, the present legislation is aligned with the changed technical and commercial scenarios and made to conform to international trends in design administration.

The requirements for registering a design are that the design should be new and original, should not have been disclosed to the public and should be distinguishable from other known designs. The period of protection is 10 years from the date of registration. The right holder can renew the period of protection for a second term of 5 years from the expiration of the original period of 10 years. Further, Indian law only protects registered designs. In case of infringement of a registered design, the owner can claim damages from the infringer and may also apply for an injunction on further use of the design.

## Copyrights

Copyrights are regulated by The Copyright Act, 1957. Copyright means the exclusive right to do or authorize the doing of any acts in respect of literary, dramatic, musical and artistic works, cinematograph films and sound recordings (**“Work”**).

Acquisition of copyright is automatic and does not require any formality of registration. Copyright comes into existence as soon as a Work is created. However, a certificate of registration of copyright and the entries made therein serve as prima facie evidence in a court of law with reference to disputes relating to the ownership of a copyright. In the case of original literary, dramatic, musical and artistic works, the duration of copyright is the lifetime of the author / artist, plus 60 years counted from the year following the death of the author / artist. In the event of copyright infringements, the true copyright holder is entitled to remedies under civil and criminal law.

Further, the Indian copyright regime also acknowledges and recognizes moral rights that may subsist in literary, dramatic, musical or artistic works.

Copyright in works originating in any foreign country which is listed as a member of the International Copyright Order are protected in India, as if such works are Indian works. The term of copyright in a work shall not exceed that which is enjoyed by it in its country of origin.

### Patents

The object of patent law is to encourage scientific research, new technology and industrial progress. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period (20 years) of the monopoly, passes into the public domain. The fundamental principle of Indian patent law is that a patent is granted only for inventions which are novel and possess utility. It is essential for the validity of a patent that it must be the inventor's own discovery as opposed to mere verification of what was already known before the date of the patent. A patentable invention, apart from being a new invention, must also be useful.

Patents are governed by The Patents Act, 1970. Under the said legislation, an invention is patentable when it (i) is novel; and (ii) involves an inventive step. A patent granted shall confer upon the patentee; (a) where the subject matter of the patent is a product, the exclusive right to prevent third parties, who do not have the patentee's consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India; (b) where the subject matter of the patent is a process, the exclusive right to prevent third parties, who do not have the patentee's consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India.

The term of a patent granted in India is 20 years from the date of filing of the application for patent registration. These rights can be assigned and licensed to third parties as per the discretion of the patent holder. If a third party makes use of a patented product or process (without consent) the patent holder can institute a suit for infringement of patent.

**As patents are territorial rights, foreign patent holders** are not entitled to file a suit for infringement against a person / entity holding a similar / identical patent in India. Pertinently, as India is signatory to the Paris Convention, the rights of a foreign patent holder as the inventor are recognized in India and the patent holder may institute appropriate opposition or revocation proceedings against a similar / identical Indian patent application or registered patent respectively. Further, foreign entities may file convention applications in India for claiming a priority date based on the same or substantially similar application filed in any of the convention countries by the said entity. Furthermore, as India is a member of the Patent Corporation Treaty (PCT), foreign entities desirous of registering their patent in India may do so by filing a PCT application whilst designating India as a contracting party.

## Semiconductors and Integrated Circuits Layout

The registration of circuits and designs related thereto are governed by The Semiconductor Integrated Circuits Layout Design Act, 2000, which was enacted to provide protection of IPR in the area of semiconductors and integrated circuits and for matters connected therewith or incidental thereto. A layout design can be registered if it is original, has not been commercially exploited anywhere in India or in a convention country and is inherently distinctive. Other information like any idea, procedure, process, system, programme stored in the integrated circuit or a method of operation cannot be registered in India. The said legislation empowers the registered proprietor of the layout-design with an inherent right to use the layout-design, commercially exploit it and obtain relief in case of any infringement.

## Trade Secrets and Know-How

Although trade secrets and know-how are not protected by any specific statutory law in India, they are protected under common law. The courts, under the doctrine of breach of confidentiality, have granted protection to trade secrets.

## 12.3 Characteristics of IPR under Indian Law

The following table identifies the main characteristics of IPR under Indian law. This information is not comprehensive and is for reference purposes only:

| | Trademark | Copyright | Design | Patent |
|---|---|---|---|---|
| Subject Matter | - Wordmarks<br>- Service marks<br>- Logos & symbols<br>- Series marks<br>- Collective marks<br>- Certification marks<br>- Colour marks<br>- Sounds marks | - Literary work<br>- Dramatic work<br>- Musical work<br>- Artistic work<br>- Cinematograph Film<br>- Sound Recording<br>- Moral rights | New and original features of new shape, configuration, surface pattern, ornamentations and composition of lines or colours applied to articles which in the finished state appeal to and are judged solely by the eye. | A new product or process involving an inventive step and which is capable of industrial application. |
| Registration pre-requisites | Distinctiveness and non-descriptive | Original and independent creation | Novelty and distinctiveness | Novelty, inventive & non-obvious and capable of |
| Duration of protection | 10 years | Generally throughout the life of the au-thor +60 years after author's death | Initial term of 10 years | 20 years |
| Renewable | Renewable for subsequent terms of 10 years on payment of renewal fees | No | Renewable for an additional term of 5 years on payment of renewal fees | No |

# CHAPTER 13

## Taxation Laws

# 13. TAXATION LAWS

## 13.1 Overview of the Taxation Regime in India

A person doing business in India should take into account various applicable direct and indirect taxes. The direct taxes are payable on the income earned by individuals and / or corporates whereas indirect taxes are levied on the production and sale of goods and provision of services. Taxes in India are levied by the Central Government as well as the State Governments. Further, local authorities such as municipalities are also empowered to levy minor taxes.

Several major reforms in the tax regime have been made in India recently and in the past few years for ease of doing business such as reduction of corporate tax rates and introduction of the Goods and Services Tax (**"GST"**). Introduction of GST in 2017 was one of the biggest reforms to simplify the complex multiple indirect tax system of India. GST has subsumed most of the indirect taxes which were applicable in India and is now considered as the unified indirect tax system. Additionally, in order to give an impetus to investment and growth, the Ministry of Finance reduced the corporate tax rates twice in 2019 (in July and September).

## 13.2 Direct Taxes

*Income Tax*

The primary legislation in India applicable in relation to tax payable on income whether of individuals or corporates is the IT Act. The IT Act prescribes the thresholds for payment of tax and percentages of tax payable by an individual and corporates on their income. The prescribed thresholds and percentages of applicable taxes are usually amended every year. The income tax is payable for a financial year (which runs from April 1 to March 31) in the year following such financial year (known as the 'assessment year').

The liability of tax depends on the residential status of the individuals and corporates. The residential status of an individual is determined based upon the number of days (prescribed under the IT Act) such individual is physically present in India in a financial year and previous financial years. Based upon the residential status, an individual is categorised as 'resident', 'not ordinarily resident' or 'non-resident'. While a resident is taxed on his / her worldwide income in India, not ordinarily resident or non-resident is generally taxed on income sourced in India (subject to the benefits of Double Taxation Avoidance Agreement (**"DTAA"**) with the country of residence of such individual).

A corporate is considered to be a resident of India if (i) it is incorporated in India, or (ii) it is not incorporated in India but has a place of effective management (**"POEM"**) during the relevant financial year in India (**"Resident Company"**) whereas a corporate incorporated outside India and having POEM outside India in the relevant financial year is considered as a non-resident company (**"Non-Resident Company"**). Similar to individuals, a Resident Company is taxed on its worldwide income in India whereas a Non-Resident Company is generally taxed on income sourced in India (subject to the benefits of DTAA with the country of incorporation of such company).

After the changes made in tax rates on September 20, 2019, the income tax rate for the financial year 2019-20 applicable on a Resident Company has been reduced from 30% to 22%, subject to such Resident Company not availing any tax exemption or incentive. The effective tax rate now is 25.17% (including applicable surcharge and cess) on a Resident Company. Further, such Resident Company will not be required to pay minimum alternate tax. Additionally, to give a boost to the manufacturing sector, a reduced tax rate of 15% (excluding surcharge and cess) is now applicable on new manufacturing companies set up on or after October 1, 2019 if such a Resident Company commences manufacturing on or before March 31, 2023, provided that such Resident Companies are not availing any tax exemption or incentive.

The Resident Companies which are availing tax exemption or incentive shall continue to pay tax at the rates applicable earlier. However, such Resident Companies would be eligible to opt for the concessional tax rates as mentioned above once their tax exemption / holiday period expires.

In case of payments to a Non-Resident Company, tax would have to be withheld at the applicable withholding tax rates. The obligation to withhold taxes is generally in relation to business income (to the extent the income is attributable to the permanent establishment of such company in India) and on payments of interest, royalty and fee for technical services.

In addition to the income tax, a Resident Company is also liable to pay dividend distribution tax on the dividends paid to its shareholders. A Non-Resident Company is not subject to dividend distribution tax.

*Double Taxation Avoidance Agreements*

India has executed DTAAs with more than 80 countries for avoidance of double taxation. Typically, most of the investment into India is routed through an intermediate holding company set up in a jurisdiction having tax friendly regime with India under the respective DTAA.

A non-resident tax payer may be taxed either in accordance with the IT Act or the DTAA whichever is more beneficial. DTAAs generally provide that non-residents are subject to Indian tax on business profits earned from a business in India only if such non-residents have a permanent establishment in India. The term 'permanent establishment' is defined in the DTAAs entered by India.

*Transfer Pricing*

Transfer pricing refers to the rules and methods of pricing international transactions and / or specified domestic transactions between associated enterprises. According to the IT Act, any such transaction must be at an arm's length price. The terms 'international transaction', 'specified domestic transactions', 'associated enterprises' and 'arm's length price' are defined in the IT Act.

There are several methods prescribed under the IT Act for determination of the arm's length price such as comparable uncontrolled price method, resale price method, cost plus method, profit split method, transactional net margin method, etc.

Further, the IT Act also permits Advance Pricing Arrangements (**"APAs"**) which is an agreement between the tax payer and the tax authority to determine the arm's length price or the manner of determining the arm's length price in relation to international transactions for a specified period not exceeding 5 consecutive years. APAs are not applicable on specified domestic transactions.

In addition to APAs, the IT Act also provides for safe harbour rules pursuant to which the tax authorities accept a transfer price declared by the tax payer to be at arm's length price for transacting with its associated enterprises.

## 13.3 Indirect Taxes

*Goods and Services Tax*

As mentioned above, in 2017, GST was implemented in India which has subsumed most of the indirect taxes which were applicable in India (whether imposed by the Central Government or any State Government) such as value added tax, excise duty, service tax, octroi, entry tax and luxury tax. However, certain goods such as petrol and petroleum products, alcoholic liquor for human consumption, and tobacco and tobacco products are not yet within the ambit of GST. Value added tax and excise duty is still levied on such products.

GST is a destination-based tax and the Central Government and State Governments have the power to levy taxes. The Central Government has the power to levy taxes pursuant to the Central Goods and Services Tax Act, 2017, and to tax inter-state commerce pursuant to the Integrated Goods and Services Tax Act, 2017. Further, each State and Union Territory of India has the power to levy taxes pursuant to State Goods and Services Tax Act, 2017 and Union Territory Goods and Services Tax Act, 2017 respectively.

GST is levied at the rate of 5%, 12%, 18% and 28% depending on the rate schedule applicable to goods / services in question. Further, certain goods and services also attract cess in addition to GST. However, there are several goods and services which are exempt from GST.

*Customs Duty*

Customs duty is the duty levied by the Central Government on the goods imported into India and exported from India. However, in order to encourage exports, export duty is levied on very few items. Customs duty is levied in accordance with the Customs Act, 1962 and the Customs Tariff Act, 1975 on the value of transaction and it is typically payable by the importer of goods (in case of imports). The rates of custom duty payable and classification of goods are provided in the Customs Tariff Act, 1975. The classification of goods is aligned with the Harmonised System of Nomenclature (HSN) developed by the World Customs Organisation.

In addition to GST and customs duty, there are few other indirect taxes applicable in India such as stamp duty, profession tax and property tax.

# CHAPTER 14

## Data Protection Laws

# 14. DATA PROTECTION LAW

## 14.1 Data Protection Law in India

With the increase in usage of technology in our personal lives and businesses, the ease of planning our day and doing business has gone up albeit with consternations about the protection of personal information and data. The concept of data protection and privacy has not been addressed in any exclusive comprehensive legislation in India. However, the Supreme Court through a recent landmark judgment has heralded right to privacy as a fundamental right guaranteed to an Indian citizen under Article 21 of the Constitution. Such right to privacy impliedly includes the protection of personal and sensitive data of a person such as age, sex, date of birth, sexual orientation (which are all important aspects of dignity).

***Right to privacy and data protection in India vis-à-vis the landmark Supreme Court judgment***

The sphere of privacy stretches at one end to those intimate matters to which a reasonable expectation of privacy may attach. It expresses a right to be left alone. A broader connotation which has emerged in academic literature of a comparatively recent origin is related to the protection of one's identity. Data protection relates closely with the latter sphere.

On August 24, 2017, in a landmark 9 judge bench ruling, the Apex Court in ***Justice K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India & Ors.***[35], unanimously declared right to privacy as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution and ordered the Government to ensure a "robust regime for data protection" that would deliver "a careful and sensitive balance between individual interests and legitimate concerns of the state."

### *Data protection under the Information Technology Act*

The Information Technology Act, 2000 (**"Information Technology Act"**) contains specific provisions intended to protect electronic data (including non-electronic records or information that has been, is currently or is intended to be processed electronically). The Information Technology Act was amended to provide for protection of 'sensitive personal data or information' (**"SPDI"**) and deal with compensation for negligence in implementing and maintaining reasonable security practices and procedures in relation to SPDI. As a system of checks and balances, the Information Technology Act imposes punishment for disclosure of information in breach of a lawful contract or without the information provider's consent and provides for protection of personal information.

35. Writ Petition (Civil) 494 of 2012

To elaborate further on the point of compensation for failure to protect data, the Ministry of Communications and Information Technology adopted the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules (**"Rules"**) which took effect in 2011. The Rules require corporate entities collecting, processing and storing personal data, including SPDI to comply with certain procedures. Further, in August, 2011, the Ministry of Communications and Information Technology released a press note which clarified a number of provisions of the Rules. Amongst others, the press note clarified that the Rules relate to SPDI and are applicable to any person located in India or a body corporate.

***The Rules, its applicability and other obligations under its purview***

***<u>What is SPDI?</u>***

Before analyzing the Rules, we must take a look at what constitutes SPDI. SPDI includes passwords, financial information, such as bank account or credit card details, physical, physiological and mental health condition, sexual orientation, medical records and history, and biometric information.

***Applicability and analysis of the Rules***

The Rules relate to SPDI and are applicable to a body corporate or to any person located within India. Outsourcing companies / intermediaries located within or outside India are exempt from the provisions of collection and disclosure as set out under the Rules, however, a body corporate providing services to an information provider directly under a contractual obligation is not exempt from these provisions of collection and disclosure as set out under the Rules.

To sum up, the Rules broadly regulate the: (a) collection, receipt, possession, use, storage, dealing or handling of SPDI; (b) transfer or disclosure of SPDI; (c) security procedures for protecting SPDI; (d) transfer of SPDI outside India; and (e) disclosure of SPDI to the Government. Further, in terms of the Rules, each body corporate is required to comply with certain obligations to ensure data is processed properly.

## 14.2 Impact of GDPR on Indian Companies

The chapter on data privacy cannot be completed without mentioning the European Union General Data Protection Regulation (**"GDPR"**) law. The GDPR was adopted on May 24, 2016 and came into effect on May 25, 2018, after a 2 year transition period. This regulation stipulates that any and all businesses within the European Union (EU), or dealing with the EU will have to comply with GDPR. This makes all the businesses liable to protect any data that is categorised as "personal".

GDPR makes it clear that these regulations will be applicable regardless of whether the processing takes place in EU or not. Therefore, an Indian company processing personal data in context of activities of an establishment of a controller or processer in EU, will fall within the ambit of GDPR. This shall have a far reaching impact on Indian companies dealing with the EU or EU citizens.

***Obligations of Indian companies that process data***

Prior to undertaking any processing activity, Indian companies will be required to enter into a contract with their customer (generally, a data controller). Such contract will, inter alia, stipulate the subject-matter and duration of processing activity, its nature and purpose and the type of personal data and categories of data subjects.

By way of such contract, a customer (the data controller) will seek from an Indian company a flow down of the following obligations:

(i) Implementation of appropriate organisational measures to ensure (a) pseudonymisation and encryption of personal data; (b) confidentiality and integrity of processing systems; (c) restoration of availability and access to personal data after a physical or technical incident; and (d) regular testing and evaluation of such measures (Article 32);

(ii) In the event of a personal data breach, the same must be notified to the customer without undue delay (Article 34); and

(iii) Carry out a data protection impact assessment prior to commencement of the processing activity (Article 35).

***Guarantee of an adequate level of protection of data***

The bedrock of GDPR, in terms of Article 45, is the stipulation of 'adequacy requirements' which curbs the transfer of personal data to any third country or international organisation that does not "guarantee an adequate level of protection." In doing so, the European Commission considers whether the legal framework prevalent in the country to which the personal data is sought to be transferred, affords adequate protection to data subjects in respect of privacy and protection of their data.

In India, the current legal framework pertaining to data privacy and protection is governed by the Rules, which is far from being adequate. As stated above, the landmark judgment of the Hon'ble Supreme Court in the case of *Justice K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India & Ors,* declaring the right to privacy as a fundamental right has provided the much-needed impetus to introducing a long awaited, all encompassing data protection legislation in India.

## 14.3 Emerging Law on Data Protection - Personal Data Protection Bill, 2018

The ever changing legal and regulatory landscape within India, as well as the emergence of GDPR, has given rise to the need for having a law for protection of personal data in India. This paves the way for the birth of the Personal Data Protection Bill, 2018 (**"Bill"**) which emphasises on the need for increased safeguards vis-à-vis personal data along with stringent penalties. It is expected that the forthcoming legislation will be on the lines of the GDPR.

In terms of the Bill, there is increased accountability on the part of the person processing, collecting or using the data, which in turn, increases its risk and exposure to liability unless complied with the provisions of this upcoming law. Corporates need to be aware of their obligations and potential liabilities, as a data fiduciary or a data processor. Lack of awareness, often leads to inadvertent non-compliances, which could sooner or later result in unforeseen and severe consequences. The draft Bill also lays emphasis on the aspect of consent without which a data principal's data cannot be processed. The Bill also stresses on the fact that for the consent of the data principal to be valid, it must be free, informed, specific, clear and capable of being withdrawn.

The Bill is in the draft stage and shall come into force only after it is passed by the Parliament and after obtaining the President's assent, both of which are expected to happen in the near future.

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