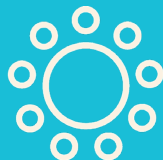
Country Guide
India

Prepared by



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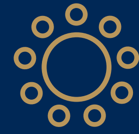

Shardul Amarchand Mangaldas

Guide to Doing Business in India 2024

Guide to Doing Business in India - 2024

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Table of Content

Introduction	6
Overview	10
Companies	13
Foreign Investment	28
Overseas Investments	42
Acquisition of Shares	49
Private Equity	56
Takeovers	60
Delisting	70
Business and Asset Transfers	79
Court based restructuring	82
Litigation	87
Arbitration	93
Competition Law	105
Insolvency and Bankruptcy	114
Intellectual Property	121
Employment Law	126
Direct Tax	138
Indirect Tax	151
Privacy and Data Protection	160
Glossary	165

Introduction

Thirty years ago, a balance of payments crisis prompted India to undertake fundamental structural reforms to liberalise its economy. The budget of June 1991 reoriented India's engagement with the world. The economy gradually opened up to foreign direct investment (FDI), which played a key role in industrial modernisation through access to technology, links to global markets and ideas for new management styles. Over the last three decades, slow but steady reforms towards an open market economy have seen India emerge as the fifth largest economy globally. India is enroute to becoming the second largest economy by 2075.

This economic momentum has continued despite shocks including the COVID-19 pandemic and the Russia-Ukraine war. Indian markets have shown tremendous resilience, given the economy's robust fundamentals coupled with strategic policy interventions by the Reserve Bank of India (RBI). FDI inflows into India in FY2022 stood at USD 70.97 billion. India Inc.'s total deal volume in FY2022 surpassed pre-pandemic levels, although deal activity in 2022 was down by more than 10% in volume over 2021. This includes private equity (PE) deals and strategic acquisitions (M&A).

While Indian markets may have weathered the storm unleashed by the COVID-19 pandemic and the Russia-Ukraine war, global markets are in the midst of a deeper, fundamental churning. Geopolitical factors are fast reshaping and even challenging the traditional forces of globalisation. Additionally, other factors have assumed unprecedented importance, notably risks posed by climate change. Global investors as well as multinational businesses are fast adapting to these new dynamics and changed realities, and rethinking their long-term strategies and supply chains.

India is particularly well placed to take advantage of this global churning. India's G20 Presidency in 2023 has signalled its arrival on the global stage, marking a milestone in its global leadership role. With well-entrenched democratic institutions, robust rule of law, vibrant market ecosystem, and young demography, India is a natural partner for global investors and multinational businesses alike. India is also deeply committed to enhancing the ease of doing business. The country has undertaken myriad policy reforms to address all four factors of production - capital, entrepreneurship, land, and labour.

The capital markets regulator, Securities and Exchange Board of India (SEBI) was particularly active in FY2022, with a slew of policy measures enhancing the robustness of primary and secondary markets. Pre-filing of offer documents has been introduced, enabling issuers to interact with Qualified Institutional Buyers (QIBs) without making offer documents public. The Issue of Capital and Disclosure (ICDR) Regulations stand amended to provide appropriate disclosures on Key Performance Indicators (KPIs), to include nontraditional pricing parameters inter alia, enabling better valuation of new-age technology companies. Social Stock Exchanges (SSEs) have been operationalized, with an attendant regulatory framework laid down. Timelines for issue and listing of securities issued via private placement stand reduced to T+3 days. The Offer for Sale (OFS) framework through stock exchanges has been reviewed comprehensively; notable changes include relaxing eligibility criteria regarding minimum shareholding for non-promoter shareholders offering shares through OFS; and availability of OFS to unitholders or sellers of listed Real Estate Investment Trusts (REITs)/ Infrastructure Investment Trusts (InvITs). Measures have also been taken to streamline onboarding for Foreign Portfolio Investors (FPIs), including by reducing timelines for registration and opening of accounts. Foreign investors have been allowed to participate in Indian exchange traded commodity derivatives (ETCDs) through the FPI route. Policy changes relating to REITs and InvITs have also been initiated by SEBI. Timelines for allotment and listing after closure of the issue stand reduced to 6 working days, and the mandatory listing period for institutional placement of units by listed REITs/InvITs stands reduced to 6 months. For REITS, the minimum holding requirement of units by sponsors and sponsor groups stands reduced to 15% of total outstanding units. Separately, SEBI has issued consultation papers on a gamut of issues. These include reducing timelines in listing of shares in public issues, and streamlining regulatory frameworks for registering Foreign Venture Capital Investors (FVCIs). Reportedly, SEBI is also actively considering the issue of promoter classification of founders and investors of companies headed for Initial Public Offers (IPOs). This is important from the standpoint of minimum promoter holdings in companies, especially in new-age companies where founder stakes are often diluted, owing to equity dilution. SEBI has also signalled its intention to leverage technological tools to streamline securities regulation, by using new-age technologies such

as AI/ML, blockchain and DLT in India's securities markets. Going ahead, there is reportedly renewed interest in allowing Indian companies to directly list overseas. This may unleash the full potential of Indian start-ups. An allied development concerns the establishment of an Expert Committee to increase the inflow of venture capital (VC) and PE investments, by the Ministry of Finance (MoF). The committee's mandate includes studying end-to-end frictions and potential accelerants to facilitate ease of investing, suggesting changes to accelerate the growth of alternative capital in the VC/PE industry. These are steps in the right direction, which foreign investors may want to watch closely. Relatedly, the International Financial Services Centre Authority (IFSCA) had also set up Expert Committees to consider topical issues. These include measures to make IFSC in GIFT City the preferred choice of Indian startups; and facilitating the capital structure of IFSC companies from INR to freely convertible foreign currency.

Importantly, deal making activity in CY2022 amounted to an impressive USD 158.8 billion spanning 2,103 deals. CY2022 saw PE activity shooting for the stars at USD 51.7 billion. VC investments compressed from USD 38.5 billion in 2021 to USD 25.7 billion in 2022. These investments were crucial in propelling as many as 23 Indian companies to unicorn status in CY2022. India added its 100th unicorn (Open Technologies) in May 2022. Broadly speaking, businesses driven by digital models have fared well. Sectors that are prominent in receiving investor funds are content and social media, ed-tech, food delivery, Web 3.0, SAAS, shipping and logistics, fintech and e-commerce. The gaming sector which had experienced enormous growth over the last few years is, however, caught up in severe headwinds with India implementing 28% Goods and Services Tax (GST) on the sector from October 1, 2023.

With market indices breaking new grounds, the IPO market has been particularly active. There was significant rise in number of companies newly listed as the number of IPOs increased to 164 in FY2022-2023 from 120 in FY2021-2022. However, funds raised through public issues decreased by almost 50% during 2022-23 compared to 2021-22. This moderation was possibly influenced by prevailing economic uncertainties, inflation, geo-political tension, and monetary tightening – all of which affected companies' prospective IPO plans. However, there was a rise in listings in the SME Platform. And finally, 2022-23 saw India's largest IPO, the Life Insurance Company of India (LIC).

Continuing with the long-term trend of liberalizing FDI inflows into the country, Parliament had previously raised the upper limit of foreign investment in insurance companies from 49% to 74%. Further, the MoF also raised the upper limit for foreign investments in the defense sector to 74% via the automatic route. Additionally, it paved the way for up to 20% foreign investment into LIC via the automatic route. Reportedly, enhanced foreign investment in the space sector is anticipated, flowing from the revised Indian Space Policy, 2023. These developments highlight India's willingness to liberalize the foreign investment regime across strategic sectors, thus opening exciting new opportunities for foreign investors. Further, all States, Union Territories and Central Government Departments will be part of the National Single Window System (NSWS) in FY 2023-24. The NSWS system allows identifying, applying, and tracking for all government approvals in a streamlined manner, and is valuable in enhancing the ease of doing business.

Speaking of investment opportunities, the Finance Minister had laid out the proposed National Monetization Pipeline with a goal to raise USD 75 billion, between 2022 to 2025. Roads, railways, and power feature as the top three sectors. Pursuant thereto, the Central Government completed the divestment of 3.5 per cent stake in LIC in Q12023, making it the largest listing of an Indian public entity till date. FY 2021-22 had already witnessed the successful disinvestment of the national carrier, Air India. Notably, the Central Government is looking at a disinvestment target of USD 6.12 billion for FY 2023-24, including potential disinvestments of the Shipping Corporation of India and the Container Corporation of India. The Central Government has also successfully divested a 3% stake in Coal India, through the OFS route. These indicate India's increasing acceptance of private participation in strategic sectors.

India has also been particularly keen to signal its deep commitment to the rule of law. The government has previously done away with the controversial retrospective taxation law. The formal burial of retrospective taxation signaled a major reform in India's investment climate, providing predictability around taxation of foreign investments. Concrete steps have been taken to establish India as an investor-friendly pro-arbitration destination, with India's Supreme Court (SC) playing a proactive role. The SC set an important precedent when it upheld the domestic enforcement of an emergency award passed

by a Singaporean arbitrator. In another judgement, the SC has held that a foreign arbitral award cannot be challenged on the ground that an entity is not party to the arbitration agreement. The SC has also recently referred for reconsideration to a seven-judge bench its prior decision holding that arbitration clauses contained in unstamped or insufficiently stamped agreements were unenforceable. These are steps in the right direction. They also provide much needed clarity about the pro-arbitration and pro-enforcement orientation of the Indian judiciary.

Measures have also been instituted to strengthen the overall regulatory framework for alternative dispute resolution and promote India as a hub for international arbitrations. The recently enacted Mediation Act, 2023 has encouraged pre-litigation institutional mediation for commercial disputes, and contemplates international mediation inter alia. Alongside, implementation of the forthcoming recommendations of the Expert Committee reviewing the Arbitration and Conciliation Act, 1996 set up to strengthen the arbitration eco-system, will be important. Parallelly, the recent Jan Vishwas (Amendment of Provisions) Act, 2023 by decriminalizing and rationalizing offences across 42 central legislations has provided confidence and aided the ease of doing business in India.

Facilitating innovation, domestic entrepreneurship and the growth of the digital economy has been a priority for India. This is evident from the changes introduced by the Competition (Amendment) Act, 2023. This has introduced significant changes including a new deal-value threshold (DVT) of USD 0.24 billion for merger notification, and a settlement and commitment mechanism wherein parties may propose settlements or commitments to address certain antitrust concerns, during inquiry. The amendment also expands the definition of control and reduces overall merger-review timelines from 210 days to 150 days. In sync, the forthcoming recommendations of the Digital Competition Law Committee and the proposed digital competition law will provide a blueprint for navigating the unique regulatory complexities posed by digital markets. The recent appointment of three new members to the Competition Commission of India, India's antitrust regulator, also points to proactive capacity-building underway to adapt to these changes.

Efforts have also been undertaken to give a fillip to the technology sector, particularly FinTech and HealthTech. The Indian government successfully marshalled its resources for recognition of Digital Public Infrastructure (DPI). The G20 ministers dealing with the digital economy have finally recognised the importance of DPI in the outcome document of August 19, 2023, by providing a working definition for DPI, and detailed principles and approaches for its development and deployment. India has already become a leader in creating DPI. For instance, 2022 saw 7400 crore digital payments of Rs. 126 lakh crores (or USD 1512 billion) through the Unified Payment Interface (UPI). The Union Budget 2023 has pledged fiscal support for DPI to continue in FY 2023-24.

There is also considerable optimism surrounding the rollout of a Central Bank Digital Currency (CBDC) for India, which is likely to minimize interbank settlement risks. The RBI has already initiated pilots for the CBDC in FY 22-23 in both the wholesale and retail segments and is now reportedly considering the introduction of pilots for wholesale CBDCs in the call money market. Beyond CBDCs, reforms have been afoot in the digital lending space. In June 2023, RBI's new guidelines on Default Loss Guarantee recognized the First Loss Default Guarantee (FLDG) structure in the digital lending sector. This is a crucial reform given the substantial rise in fintech companies that have implemented synthetic business structures and are acting as digital lending platforms. On the HealthTech front, the government launched a regulatory sandbox under the Ayushman Bharat Digital Mission for testing innovations which improve the delivery of healthcare in India. This would help spur responsible innovation in the health sector, by providing a unique environment for innovators and healthcare service providers to try new technologies. Following this, the National Health Authority has invited contributors to participate in the Health Exchange Ecosystem – Sandbox, which envisages interoperability of health claims and a protocol to exchange claims-related information among interested actors.

More good news is also expected for data-driven innovations, with the recent enactment of the Digital Personal Data Protection Act, 2023 (DPDP Act). The DPDP Act has enabled a framework for processing digital personal data of individuals, balancing individual rights with the lawful need for processing such data, through recognizing rights and duties of both data principals and data fiduciaries. The DPDP Act centers around seven

key principles, including consent, purpose limitation, reasonable security safeguards and accountability. These will work towards enabling India's digital economy, and also positively impact the ease of doing business. The constitution of the Data Protection Board of India under the DPDP Act, is also a step towards this. Alongside, the reported introduction of a new legislation updating the Information Technology Act, 2000 soon, will be significant for India's broader technology regulation framework.

India is slowly becoming more conscious of accepting genuine business failures to facilitate entrepreneurship. The Insolvency and Bankruptcy Code, 2016 (IBC) now provides a clear legal framework for exit from a failed business, enabling more efficient reallocation of capital. Till March 2023, the RBI noted that financial creditors realised 32% of their claims under the IBC. In value terms, 72% of distressed assets were rescued under the law since its inception. The IBC however continues to be a work in progress, with policymakers being extremely proactive in ironing out creases as and when they appear. For instance, Registered Valuers follow a range of standards, approaches, and methods for valuation of assets. Various assumption such as discount rate, growth rate, terminal values etc bring a lot of subjectivity to the process. That is why the Insolvency and Bankruptcy Board of India is currently trying to set uniform valuation standards to make the valuation process under the IBC more credible.

On land and infrastructure, the government has led with an array of enabling reforms over recent years. The National Banking for Financing Infrastructure and Development Act, 2021 established a unique Development Finance Institution to support the development of long-term non-recourse infrastructure financing in India. Beyond these legislative reforms, efforts have also been undertaken to funnel investment into infrastructure. The National Highways Authority of India's (NHAI) plan to set up its first InvIT will reportedly be realized in FY 23-24. This is a major development, as it will allow the flow of investment into attractive infrastructure projects. This development is also prescient, coming in the wake of India's Finance Minister's Budget Speech commitment to expand the nation's highway network by 25,000 km in FY2022-2023.

India has also prioritized labour reforms keeping in view the need to create millions of jobs for its young population which is entering the workforce. Over the past few years, four Labour Codes have been introduced and enacted, to augment the capabilities of Indian workers and strengthen industrial relations. The first of these, the Code on Wages, 2019, consolidates four previous Central laws relating to payment of wages and bonuses. Subsequently, Parliament passed three further codes – the Industrial Relations Code, the Occupational Safety, Health and Working Conditions Code and the Code on Social Security, in 2020. These four codes together consolidate 29 existing Central labour laws. Moreover, they contain provisions for speedy resolution of industrial disputes, simplify the regime for obtaining licenses to set up new industrial establishments, provide social security to gig and platform workers, and protect vulnerable and marginalized communities, such as women and migrant workmen. Alongside, emergent legislation such as the Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023, which offers a model of providing social security benefits to gig workers, should be noted. This acknowledges the rapidly growing phenomenon of gig work, in light of the growth of digital platforms the world over.

Summing up, improving the ease of doing business in India remains an active aspirational ideal. The cited reforms signal India's credible commitment to the same, while streamlining pathways to incubate and grow sustainable, scalable, and world-class businesses. These reforms further transparency, accountability, and clarity, and aid the Government's aspirations to make India the destination of choice for investors and businesses.

1. Overview

Q1. What is the legal system in India?

India is a federal, parliamentary democracy with a written constitution. The Constitution contains a well-defined mechanism for separation of powers between: (a) the executive; (b) the legislature; and (c) the judiciary, both at the central (federal) level, and the state level. Despite the federal set-up, the Indian judiciary is unified, with one Supreme Court of India at New Delhi, High Courts for states, and district courts for districts within the states. Indian courts follow precedent, adhere to rule of law, are independent, and have ardently protected the Constitution. At several instances, the Supreme Court and the High Courts have quashed government decisions and legislation that violate the Constitution. The Indian legal system is based on the common law model, with several British era statutes still in effect, notable amongst those is the Indian Contract Act, 1872.

Q2. How are powers shared between the Centre and States?

The Constitution contains three lists: (a) the 'union list' contains matters for which only the central legislature can make laws; (b) the 'state list' contains matters for which only the state legislatures can make laws; and (c) the 'concurrent list' contains matters for which both the central legislature and the state legislatures can make laws, but generally the central laws take primacy. Laws made by a state operate within the territory of the state.

Business related laws pertaining to companies, foreign investment, contracts, income tax, anti- trust (competition), and arbitration fall in the union list, and do not vary from state to state. Matters such as local permits, land and building codes fall in the state list and may vary from state to state.

In addition to the central and the state legislatures, other governmental bodies such as Reserve Bank of India ('RBI') and Securities and Exchange Board of India ('SEBI') are empowered by specific central laws to issue delegated legislations, including rules, regulations, and notifications.

Q3. What are the business related laws in India?

Business related laws in India may be divided into following categories: (a) foreign investment laws; (b) laws that apply to all businesses irrespective of foreign investment; and (c) laws that are specific to certain businesses. Statutes are supplemented by policy pronouncements, press notes, notifications, regulations, and rules by governmental ministries, departments and regulators.

The key business related legislations in India are the :

- Companies Act, which governs the incorporation, management, restructuring and dissolution of companies;
- LLP Act, which governs the incorporation and and dissolution of LLPs;
- Contract Act, which lays down general principles relating to the formation and enforceability of contracts;
- FEMA, the principal legislations governing foreign investment into India;
- SEBI Act, which governs the functions and powers of India's securities market regulator;
- Securities Contracts (Regulation) Act, 1956, which governs the listing and trading of securities on stock exchanges in India;
- IBC, which governs the reorganisation and insolvency resolution of corporate persons, partnership firms and individuals;
- GST laws, which subsume several existing indirect taxes into one single tax removing multiplicity of taxes and Compliances
- IT Act, which prescribes the income tax treatment on the income of individuals and corporations;
- Special Economic Zones Act, 2005, which provides for the establishment, development and management of SEZs for the promotion of exports;
- Foreign Trade (Development and Regulation) Act, 1992, which provides for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India; and
- Competition Act, which regulates combinations (merger control) and anticompetitive behaviour

In addition, there are several sector specific legislations (e.g. the Banking Regulation Act; the Insurance Act; the Indian Telegraph Act, 1885; the Drugs and Cosmetics Act, 1940; the Food Safety and Standards Act, 2006 and various labour legislations) that apply depending on the nature and type of activity being undertaken.

Q4. What are the types of business entities that can be set up in India?

Business ventures can be carried on in India through a sole proprietorship, a partnership (with unlimited or limited liability) or through an incorporated company. In addition, non-residents can carry on certain limited business activities through branch office, liaison office or a project office.

Sole Proprietorship

This is the simplest form of business establishment, and is typically used by individuals to carry out their businesses. The owner of a sole proprietorship is personally entitled to all profits and responsible for all losses arising from the business. Sole proprietorship is typically a small scale operation, and is not well suited for large scale operation or for foreign investment.

Partnership

Partnerships in India are of two kinds: (a) those which are regulated under the Partnership Act, and where partners have unlimited liability; and (b) LLP which are regulated under the LLP Act, and where the liability of the partners is limited.

Unlimited partnerships are generally not the preferred business entity, and are typically used by professional services firms on account of regulatory reasons. LLP is increasingly becoming common because of limitation of liability, and characteristics that are similar to that of a company, such as incorporation, and perpetual succession. The partners in a LLP need not be individuals, and can be corporate entities. Both unlimited and partnership and LLP require registration.

Company

A company may be incorporated in India either as a private company (including a one-person company (OPC)) or a public company. A public company could be listed or unlisted. A company may be incorporated without any minimum capitalisation requirements. However, foreign investment regulations require minimum capitalisation for investment in certain businesses. Please see Chapter 2 (Companies) for further details on the incorporation and management of companies.

Branch offices (BO) or Liaison offices (LO) or Project offices (PO)

BO, LO or PO could be established by a non-resident as an extension of the non-resident entity, and do not have separate legal identity. A LO can conduct only liaison activities, and not undertake commercial activities. A BO could engage in commercial activities, but its activities are limited. A PO could undertake only a specific project, for example construction of a road project.

Establishing, BP, LO and PO requires a prior approval which is generally granted by a bank designated as an 'authorised dealer' by the RBI. However, the authorised dealer banks require the prior approval of RBI in certain cases. Illustratively, such cases include: (a) where the principal business of the applicant is in the defence, telecom, private security or information and broadcasting sectors, and the applicant has not already obtained requisite approval from the relevant Ministry of the Government of India or the sectoral regulator; (b) where the applicant is a citizen of, or is registered or incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau, and the application is for Jammu and Kashmir, the north east region, or the Andaman and Nicobar Islands; or (c) where the applicant is a non-government organisation, or is a not for profit, which is not registered under the Foreign Contribution (Regulation) Act, 2010. In case of BO or LO by foreign banks or insurance companies, application is required to be made directly to the RBI and the IRDAI, respectively.

An approval of RBI is not required for foreign companies to establish branch offices in SEZs in order to undertake manufacturing and service activities, subject to satisfaction of certain conditions, including that the BO must be functioning in sectors where 100% FDI is allowed and is able to function on a standalone basis.

Q5. Are there any restrictions on the kind of business activities that can be carried on by business organizations in India?

Yes, the kind of business activity that can be carried on by a business organisation depends on how it is set up in India, and whether the business organization has received foreign investment.

A BO may enter into contracts on behalf of the non-resident parent and may generate income. However, the activities of BOs are restricted to those in which the parent company is engaged in and can extend to only the following activities:

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

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

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

An Indian company generally has no restrictions on its business activities, except as may be set out in its Moan (i.e. its charter document). However, if the Indian company has received foreign investment then it must engage only in those activities which are open for foreign investment.

2. Companies

Q1. How are companies regulated in India?

The Companies Act, 2013 is the primary legislation governing companies in India. The provisions of the Companies Act have been notified and implemented by the Government of India in a phased manner and have replaced the provisions of the Companies Act, 1956. As of date, the Companies Act, 2013 has been fully implemented.

The Companies Act has, among other things, introduced enhanced corporate governance standards particularly concerning independent directors, audit, Corporate Social Responsibility ("**CSR**"), mandatory valuation for a private placement of securities, cross-border mergers(including the merger of Indian companies into foreign companies) and class action suits. The central government is empowered to prescribe additional requirements via subordinate rules, which are ancillary to and have to be read together with the provisions of the Companies Act.

The Companies Act has been amended by the Companies (Amendment) Act, 2020 ("**Amendment Act**"), which received the assent of the President of India on September 28, 2020 and the sections of the Amendment Act have been notified on various dates including December 21, 2020, January 22, 2021, February 11, 2021. The notified sections of the Amendment Act, amongst others, (a) remove the penalty for certain offences, (b) remove imprisonment for certain offences, (c) reduce the amount of fine payable for certain offences, (d) establish additional benches of the NCLAT, (e) permit certain classes of public companies to list certain classes of securities in foreign jurisdictions, (f) make provisions for payment of adequate remuneration to non-executive directors, and (g) revise provisions related to CSR.

In addition to the Companies Act, listed companies or to-be-listed companies are also governed and required to ensure compliance with the provisions of the SEBI Act and rules, regulations, notifications, guidelines and circulars issued thereunder, including the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("**SEBI ICDR Regulations**") and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**SEBI Listing Regulations**"), as amended from time to time.

Further, depending upon the business activity undertaken or proposed to be undertaken by the company, various other legislations may apply which regulate such companies (in addition to the Companies Act). For instance, insurance companies are also governed by the Insurance Act, 1938 and the Insurance Regulatory and Development Authority Act, 1999, banking companies are regulated by the Banking Regulation Act, 1949 and companies engaged in the business of generation or supply of electricity are also regulated by the Electricity Act, 2003.

Q2. What are the different types of companies that can be incorporated in India?

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

- private companies having two or more members, or with one member to be formed as an OPC; or
- public companies having seven or more members (which are not the same as companies which are publicly held or which are publicly traded).

The primary difference between a private company and a public company is that private companies have greater operational flexibility (see response to question 15 below). However, private companies cannot have more than 200 members. Additionally, the Articles of Association ("**AoA**") of a private company must contain restrictions on the transfer of its shares. The shares of a public company, on the other hand, are freely transferable and such companies can have any number of members above the requisite minimum.

S No.	Point of Distinction / Comparison	Private Limited Company	Public Limited Company	Source
1.	Suffix to be used	A private limited company is mandatorily required to add the words "Private Limited" as a suffix to its name.	A public limited company is mandatorily required to add the words "Limited" as a suffix to its name.	Section 4 of the Companies Act, 2013

S No.	Point of Distinction / Comparison	Private Limited Company	Public Limited Company	Source
2.	Minimum and maximum number of members	A private limited company is required to have a minimum of 2 members	A public limited company is required to have a minimum of 7 members.	Section 3 of the Companies Act, 2013
3.	Maximum number of members	A private limited company is permitted have a maximum of 200 members.	There are no restrictions on the number of members a public limited company can have.	Section 2(68) of the Companies Act, 2013
4.	Minimum number of directors	A private limited company is required to have a minimum of 2 directors.	A public limited company is required to have a minimum of 3 directors.	Section 149 of the Companies Act, 2013
5.	Transferability of shares	The shares of a private limited company are not freely transferrable and the Articles of Association must contain restrictions on transfer of shares.	The shares of a public limited company are freely transferrable.	Section 2(68) of the Companies Act, 2013
6.	Public issue of securities	A private limited company is not permitted to make a public issue of securities.	A public limited company can invite the public to subscribe to its securities.	Section 23 of the Companies Act, 2013
7.	Payment of managerial remuneration	Payment of managerial remuneration by a private limited company to its key managerial personnel is not subject to any limits or restrictions.	Payment of managerial remuneration by a public limited company to its key managerial personnel is subject to certain prescribed limits or restrictions.	Section 197 of the Companies Act, 2013

The concept of an OPC has been introduced under the Companies Act, and allows a natural person who is an Indian citizen whether resident in India or otherwise to set up a company. Such a person cannot be a member of more than one OPC at any point in time. The concept has been introduced with the aim of benefitting small entrepreneurs, since these companies are, exempt from certain filing requirements and requirements in relation to meetings, *etc*.

While a private company is required to have a minimum of two directors, a public company is required to have a minimum of three directors. An OPC can be incorporated only with one person acting as the member and director of the company. Every company can have a maximum of 15 directors, unless its shareholders approve a higher number (through the passing of a special resolution at a general meeting of shareholders).

Companies may be:

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

Further, a company may be a listed company (where its securities are listed on a recognized stock exchange in India), or an unlisted company. A company listed in the equity segment would also be a public company as that is one of the criteria to be eligible to seek listing. Such companies are often referred to as being “publicly held” or “listed public companies” and are distinct from unlisted public companies.

Based on control and holding structure, a company (in connection with another company) may be categorized as a holding company, a subsidiary company or an associate company. Other types of companies that receive mention in the Companies Act are foreign companies, not-for profit companies, small companies, government companies, banking companies, producer companies, nidhi companies and dormant companies.

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

Q3. What is the incorporation process?

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

Under the new web service SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus: INC-32), applicants can make a single application for availing the following services simultaneously:

- reservation of name of a new company;
- incorporation of a new company;
- allotment of DIN for up to three directors of the new company;
- obtaining PAN for the company;
- obtaining TAN for the company;
- allotment of Goods and Service Tax Identification Number (GSTIN);
- registration with the Employee State Insurance Corporation;
- registration with the Employee Provident Fund Organization;
- opening of bank account of the company; and
- obtaining profession tax registration for the new company (currently available for the states of Maharashtra, Karnataka and West Bengal in India).

Relevant information and documents are required to be submitted along with such application, such as, details of directors and subscribers, MoA and AoA.

Once the application is approved, the company would be registered, and a corporate identification number would be allocated to it.

The MoA and AoA are the constitutional or charter documents of a company. The MoA sets out the name, place of registered office, objects, scope of activity and liability of the company, along with its authorized share capital. The AoA set out the rules and regulations of the company in respect of its management and the rights of the members inter se and vis-à-vis the company.

A company is required to, within 30 days of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices addressed to it, failing which the RoC may initiate action for the removal of the name of the company from the register of companies pursuant to a physical verification of the registered office and after notifying the company and its directors.

A company incorporated after November 2, 2018 having share capital, is not permitted to commence any business or exercise any borrowing powers unless:

- a declaration is filed by a director, within a period of 180 days of the date of incorporation of the company (in such form as may be prescribed), with the RoC, that every subscriber to the MoA has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and
- the company has filed the verification of its registered office with the RoC.

Q4. What is significant beneficial ownership and who is a significant beneficial owner?

Sections 89 and 90 of the Companies Act read with the Companies (Significant Beneficial Owners) Rules, 2018 ("**SBOR**") prescribe disclosure requirements for individuals who hold 'ultimate' control over a company. The SBOR has been introduced with the objective of promoting corporate transparency and preventing the misuse of corporate entities for illicit purposes such as money laundering, tax evasion, corruption and other illegal activities.

A "significant beneficial owner" under Section 90 of the Companies Act read with Rule 2(1)(h) of the SBOR, refers to an individual who, either by himself or with others, directly or indirectly through persons (resident or non-resident) including trusts, possesses one or more of the following rights or entitlements in such reporting company, namely:

- holds indirectly, or together with any direct holdings, not less than ten per cent. of the shares;
- holds indirectly, or together with any direct holdings, not less than ten per cent. of the voting rights in the shares;
- has right to receive or participate in not less than ten per cent. of the total distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;
- has right to exercise, or actually exercises, significant

influence or control, in any manner other than through direct-holdings alone.

Section 89(10) of the Companies Act defines 'Beneficial Interest' in a share as including, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to: (a) exercise or cause to be exercised any or all of the rights attached to such share; or (b) receive or participate in any dividend or other distribution in respect of such share. The SBOR prescribes various requirements for identifying individuals as SBOs and filing requirements such as:

- an individual shall be considered to hold a right or entitlement indirectly in the reporting company if he satisfies any of the following criteria in respect of a member of the reporting company, namely:
  - where the member of the reporting company is a body corporate (whether incorporated or registered in India or abroad), other than a limited liability partnership, and the individual (a) holds majority stake in that member; or (b) holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member;
  - where the member of the reporting company is a HUF (through karta), and the individual is the karta of the HUF;
  - where the member of the reporting company is a partnership entity, either under the Partnership Act or LLP Act, (through itself or a partner) and the individual (a) is a partner; or (b) holds majority stake in the body corporate which is a partner of the partnership entity; or (c) holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership entity;
  - where the member of the reporting company is a trust (through trustee) and the individual (a) is a trustee in case of a discretionary trust or a charitable trust; (b) is a beneficiary in case of a specific trust; (c) is the author or settlor in case of a revocable trust;
  - where the member of the reporting company is (a) a pooled investment vehicle; or (b) an entity controlled by the pooled investment vehicle, based in member state of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member state is a member of the International Organization of Securities Commissions, and the individual in relation to the pooled investment vehicle, is a general partner; or is an investment manager; or is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.
- The related filing requirements are as follows:
  - Every SBO is required to file a declaration with the company in which he holds the SBO;
  - Every reporting company shall find out any SBO and cause him to file a declaration;
  - Every company which receives any declaration as mentioned above, is required to file a return with the RoC in respect of such declaration;
  - Each company is required to maintain a register of SBOs which shall be available for inspection to the shareholders.
- Following are exempt from the application of SBOR:
  - the authority constituted under sub-section (5) of Section 125 of the Companies Act (for administration of the Investor Education and Protection Fund);
  - its holding reporting company (subject to the requirement that the details of such holding reporting company are reported in prescribed form);
  - the central government, state government or any local authority;
  - a reporting company or a body corporate or an entity controlled by the central government or by any state
  - government(s), or partly by the central government and partly by one or more state government(s);
  - SEBI registered investment vehicles such as mutual funds, alterative investment funds, real estate investment trusts and infrastructure, investment trusts;
  - Investment Vehicles regulated by RBI, or IRDA, or Pension Fund Regulatory and Development Authority.

Further, SBOs who do not make relevant disclosures and companies that do not comply as per the SBOR and other requirements under the Companies Act, are subject to penalties as per the provisions under the Companies Act, ranging from INR 50 thousand (approx. USD 610) to a maximum of INR 5 lakhs (approx. USD 6098).

Q5. Are shares of a public company required to be in dematerialized form?

Yes, with a few exceptions namely, unlisted public companies which are: (a) nidhi companies; (b) government companies; and (c) wholly owned subsidiaries. An unlisted public company is required to issue the securities only in dematerialized form and facilitate dematerialization of all its existing securities. Further, any unlisted public company seeking to issue shares (including bonus and rights issues), or to undertake buy-back of its securities, is required to ensure that the shares held by its directors, promoters and key managerial personnel are in demat form before undertaking any such action. In addition, post October 2, 2018, transfers of shares of unlisted public companies held by any person can no longer be made in physical form. In other words, existing holders of shares (who are not promoters, directors or key managerial personnel) may continue to hold such shares in physical form provided they do not seek to transfer such shares while promoters, directors or key managerial personnel who hold shares in physical form would in addition need to convert their shares into dematerialized form if and when the company seeks to issue shares irrespective of their intention to transfer. Additionally, every holder of securities of an unlisted public company who intends to subscribe to securities of an unlisted public company, after October 2, 2018, must ensure that all his existing securities are held in dematerialized form before such subscription.

In case of such class(es) of unlisted companies as may be prescribed, securities shall be held or transferred only in dematerialized form as per the provisions of the Depositories Act, 1996 and regulations framed under it.

For listed companies, the shares of the promoters and members of the promoter group are required to be in dematerialized form. In addition, SEBI Listing Regulations provide that any person holding physical shares of a listed company will only be able to transfer such shares after they are converted into dematerialized form (with an exception for transmission or transposition of shares).

Q6. Can a non-resident be the first shareholder of a company?

Yes, a non-resident may be the first shareholder of a company, in the relevant permitted sectors, subject to compliance with the norms on foreign investment. The entire share capital of an Indian company may be held by non-resident shareholders, subject to compliance with the norms on foreign investment. In case of a private company, a non-resident may be the first shareholder of the company together with another person (whether resident or non-resident) to satisfy the requirement of a private company to have at least two shareholders. In case of a public company, a non-resident may be the first shareholder of such company together with six other shareholders. Please see Chapter 3 *(Foreign Investment)* *for further details.*

Q7. How are minority shareholders protected under Indian law?

The term 'minority shareholders' is not defined under the Companies Act. However, the Companies Act contains various provisions relating to the protection of minority shareholders. The Companies Act refers to shareholders as members. There are various rights available to shareholders under the Companies Act (discussed in further detail below).

The Companies Act protects minority shareholders from oppression and mismanagement by the majority shareholders.

Chapter XVI of the Companies Act contains the relevant provisions relating to the prevention of oppression and mismanagement. Under Section 241 of the Companies Act, read with Section 244 of the Companies Act, (i) 100 members of the company or 10% of the number of members of the company, whichever is less, or any member(s) holding not less than 10% of the issued share capital or (ii) 20% of the number of members, in case of a company not having a share capital, may apply to the NCLT in relation to situations wherein (a) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or (b) a material change (not brought about by or in the interests of any creditors, including debenture holders or any class of shareholders of the company) has taken place in the management or control of the company, whether by an alteration in the Board, or manager, or in the ownership of the

company's shares (or if it has no shares, in its membership) or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members. The NCLT may, upon application, dispense with the requirements set out in (i) and (ii) above.

In addition, the central government has also been empowered to apply to the NCLT in case it is of the opinion that the affairs of a company are being conducted in a manner prejudicial to public interest. The central government has also been empowered to initiate case(s) against specified person(s) in certain circumstances and refer the same to NCLT.

Further, various other provisions of the Companies Act have the aim of protecting the rights of the minority shareholders, including the following:

- Shareholders holding more than 25% of the voting capital of a company are also be protected from actions of majority shareholders to the extent that they can block resolutions on matters which require special resolutions. Please refer to question 8 below for further details in this regard.
- If an acquirer becomes a registered holder of 90% or more of the issued equity share capital of a company (upon amalgamation, share exchange, conversion of securities or for any other reason), the minority shareholder is permitted to offer its shares to the acquirer at a price determined on the basis of a valuation of a registered valuer.
- The Companies Act permits class action suits that may be instituted against the company if the minority shareholders are of the opinion that the management and/or the conduct of affairs of the company is prejudicial to the company, members and/or depositors. Such class action suits also allow direct claims to be made against third parties (such as experts, advisors or consultants) for incorrect statements made to the company or for damages or compensation for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on its part.
- Provisions relating to appointment of a small shareholder director, in a listed company, by the prescribed threshold of shareholders.

Certain provisions under the SEBI Listing Regulations and the SEBI Takeover Regulations, such as, the requirement to obtain the approval of the majority of the minority shareholders for matters involving the payment of royalty or for brand usage of more than 5% of the annual consolidated turnover of the listed entity (as per the last audited financial statements) to its related party(ies) and the obligation of persons, together with PACs (defined below), acquiring shares or voting rights of a listed entity beyond the minimum thresholds prescribed (please refer to our response to [Question 1 under Chapter 7 (Takeovers)]) to make mandatory open offers to the shareholders of such entity, are also aimed at protecting the interest of minority shareholders.

In case of joint holdings such as JVs, interests of the minority partners may be protected through provisions in the shareholders or joint venture agreements, which increase the threshold, required for the passage of certain resolutions (therefore providing for 'veto' rights) and provide for special quorum requirements.

Q8. What are the rights of a shareholder holding more than 75% and 50% shares?

The approval of the shareholders by way of a special resolution (i.e. resolutions requiring the approval of 3/4th majority of the shareholders of the company entitled to and voting at any general meeting) is required for various matters including but not limited to:

- alteration of the AoA;
- further issue of share capital by an offer of shares to persons other than the existing shareholders or employees by the company;
- reduction of share capital;
- disposal of undertaking or borrowing above a certain threshold (except in case of private companies).

Where the share capital of the company is divided into different classes of shares, the rights attached to the shares of any particular class may be varied only with the consent in writing of 3/4th majority of the holders of that class of shares or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class.

The shareholders of a company may approve several matters of business by way of an ordinary resolution (i.e. requiring

approval of over 50% of the shareholders entitled and voting), including:

- alteration of the capital clause of the MoA;
- declaration of dividend;
- approval of audited financial statements;
- appointment and fixing of remuneration of auditors.

Accordingly, shareholders holding 75% or more of a company's voting rights are able to control the approval of proposals which are required to be approved by a special resolution, and the shareholders holding more than 50% of the company's voting rights have the ability to control decisions regarding proposals which are required to be approved by an ordinary resolution. However, as stated earlier, shareholders may contractually provide for affirmative voting rights / veto rights to ensure that resolutions are not passed by the majority shareholders without the affirmative vote of the minority shareholders.

Q9. How does one fund a subsidiary in India?

A foreign / non-resident may fund an Indian company, in the following manner (subject to the exchange control regulations discussed in Chapter 3 (*Foreign Investment*)):

- By subscribing to instruments such as:
  - equity shares;
  - fully, compulsorily and mandatorily convertible debentures;
  - fully, compulsorily and mandatorily convertible preference shares;
  - share warrants;
  - convertible notes, in the context of startup companies (i.e., a private company incorporated under the Companies Act shall be eligible for recognition as a startup company if it: (i) has not completed 10 years from the date of its incorporation; (ii) has a turnover not exceeding INR 100 crores (approx. USD 12 million) for any of the financial years since incorporation; and (iii) is working towards innovation, development or improvement of products or processes or services, or is a scalable business model with a high potential of employment generation or wealth creation);
  - depository receipts; and/or
- By subscribing to other types of preference shares and/ or debentures i.e. redeemable, non-convertible, optionally convertible or partially convertible and/ or borrowings from foreign shareholders subject to compliance with norms relating to external commercial borrowings norms.

Q10. What types of shares can a company issue?

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

- Equity shares: with voting rights, or with differential rights as to dividend, voting or otherwise subject to fulfilment of conditions under the Share Capital Rules; and
- Preference shares: which carry a preferential right in respect of (a) payment of dividend; and (b) repayment, in case of winding up. Preference shares do not carry voting rights, except in certain circumstances. However, a private company may provide that the preference shares shall carry voting rights.

SEBI also has an approved framework in place for issuance of differential voting rights shares / superior voting rights shares (SR Shares) by public listed companies. This framework, can be found in the relevant SEBI regulations (such as the SEBI Listing Regulations, the SEBI ICDR Regulations, and the SEBI Takeover Regulations).

Some of the key requirements in relation to SR Shares under the SEBI Listing Regulations are as follows:

- If a listed entity has outstanding SR Shares, at least half of its Board should comprise of independent directors;
- If a listed entity has outstanding SR shares, its audit committee should comprise only of independent directors and the stakeholders relationship committee and the risk management committee should have at least two thirds independent directors. Additionally, the nomination and remuneration committee of all listed entities, including a listed entity that has outstanding SR shares, should have at least two-thirds independent directors.

- A listed entity cannot issue shares in any manner that may confer on any person; superior or inferior rights as to dividend vis-à-vis the rights on equity shares that are already listed or inferior voting rights vis-à-vis the rights on equity shares that are already listed. However, a listed entity having SR Shares issued to its promoters or founders can issue SR shares to its SR shareholders only through a bonus, split or rights issue in accordance with the SEBI ICDR Regulations and the Companies Act;
- SR equity shares should be treated at par with ordinary equity shares in all respects (including dividends), except in case of voting on resolutions;
- The total voting rights of SR shareholders (including ordinary shares) in the issuer upon listing, pursuant to an initial public offer, should not exceed 74% at any point of time;
- SR equity shares should be treated like ordinary equity shares in terms of voting rights in certain prescribed circumstances, for e.g., appointment and removal of independent directors or auditors; related party transactions involving a shareholder holding SR Shares, etc.;
- SR Shares should be converted to equity shares having voting rights at par with ordinary shares on the fifth anniversary of the listing of ordinary shares of the listed entity. Conversion prior to this period is also permitted at the option of the SR shareholder. SR Shares may be valid for an additional period five years if a resolution to that effect is passed, where SR shareholders have not been permitted to vote;
- SR Shares will be compulsory converted to equity shares having voting rights at par with ordinary shares on the occurrence of any of the following events: (a) demise of the promoter(s) or founders holding such shares; (b) resignation of an SR shareholder from the executive position in the listed entity; (c) merger or acquisition of the listed entity having SR shareholder(s), where the control would no longer remain with the SR shareholders; and (d) the SR equity shares are sold by an SR shareholder who continues to hold such shares after the lock-in period but prior to the lapse of validity of such SR Shares.

One of the key provisions in the SEBI Takeover Regulations is that an increase in the voting rights of any shareholder beyond the threshold limits stipulated in sub-regulations (1) and (2) of Regulation 3 of the SEBI Takeover Regulations, without the acquisition of control, pursuant to the conversion of equity shares with superior voting rights into ordinary equity shares, shall be exempted from the obligation to make an open offer under Regulation 3.

Q11. Who can be appointed as a director of a company in India? Can a non-resident be appointed as a director of an Indian company?

Under the Companies Act, only an individual can be appointed as a director of a company in India. A person proposed to be appointed as a director of a company is required to give his consent to hold the office as a director. Such a person is also required to obtain and maintain a DIN. In case such person is a national of a country which shares land border with India, necessary security clearance from the Ministry of Home Affairs, Government of India would be necessary for obtaining the DIN and such security clearance shall also be attached along with the consent. A person cannot hold office as a director, including alternate directorship, in more than 20 companies at the same time. The maximum number of public companies in which a person can be appointed as a director is 10.

However, it is pertinent to note that in case of listed companies, the Listing Regulations provide that a person is not permitted to be a director or serve as an independent director in more than seven listed entities, and a whole-time director / managing director in any listed entity is not permitted to serve as an independent director in more than three listed entities. Yes, a non-resident can be appointed as a director of an Indian company. However, under the Companies Act, at least one director of the Board is required to stay in India for a total period of at least 182 days during the financial year. In case of a newly incorporated company, such a requirement would apply proportionately at the end of the financial year in which such company is incorporated.

Q12. What are the liabilities and obligations of a director under Indian law?

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

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

Independent directors have additional duties which have been codified under Schedule IV of the Companies Act.

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

The director of a listed company *inter alia* is also required to:

- comply with the code of conduct established for all members of the Board and senior management of the company;
- disclose his or her directorship, committee membership on the Board of other companies and substantial shareholding in other companies to the Board of the listed company on an ongoing basis and ensure that their number of directorships and membership of committees across companies is within prescribed limits;
- ensure disclosure of information to stock exchanges and shareholders as required under the SEBI Listing Regulations; and
- monitor corporate governance practices.

Q13. Are there any corporate social responsibility norms in India?

Yes, the Companies Act requires every company, having during the immediately preceding financial year:

- a net worth of at least INR 500 crores (approx. USD 61 million) or
- a turnover of at least INR 1,000 crores (approx. USD 122 million); or
- a net profit of at least INR 5 crores (approx. USD 609,756),

to constitute a CSR committee of the Board consisting of three or more directors, out of which at least one director is an independent director. Companies that are not required to appoint an independent director under the Companies Act (such as private companies) are required to have at least two or more directors in its CSR committee.

Companies meeting the thresholds mentioned above are required to spend at least 2% of their average net profits made during the three immediately preceding financial years, in pursuance of its 'CSR Policy'. In case companies which meet such thresholds have not completed three years since their incorporation, they can calculate the 2% amount based on the average net profits of such immediately preceding financial years. Reporting on CSR spending is mandatory and the Companies Act follows the 'comply or explain' approach in relation to CSR.

In case the CSR amount remaining unspent relates to an ongoing project fulfilling such conditions as may be prescribed, the company is required to transfer any unspent CSR amount in a financial year to a specified account within 30 days from the end of the financial year and spend the same within three financial years from the date of transfer, failing which, such amount should be transferred to a specified fund under Schedule VII of the Companies Act. Furthermore, in case a company fails to contribute toward CSR and the amount does not relate to a project as specified above, the amount is required to be transferred to a fund specified under Schedule VII of the Companies Act within a period of 6 months from the end of the financial year. The Amendment Act also provides penal consequences for non-compliance with the CSR obligations by a company.

In light of the Covid-19 pandemic, contributions made toward Covid-19 related activities will also be considered toward CSR contribution of companies. Additionally, as per the Amendment Act, when a company spends an amount in

excess of the requirement of at least 2% average profits then such an excess amount may be set off against the requirement to spend in up to 3 immediately succeeding financial years subject to conditions as prescribed.

Q14. Are there any corporate governance norms?

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

- mandatory appointment of independent directors and a woman director on the Board of certain classes of companies,
- as well as an obligation to ensure that at least one independent director of the company is also on the Boards of the material unlisted subsidiaries;
- appointment of small shareholders' directors on Boards of listed companies;
- constitution of nomination and remuneration committee, stakeholders relationship committee, and audit committee for certain classes of companies;
- mandatory vigil mechanism systems have been prescribed for certain companies which allow directors and employees to report genuine concerns and adequate safeguards against victimization;
- mandatory appointment of key managerial personnel such as managing director, chief executive officer and chief financial officer for certain classes of companies;
- stringent policy for related party transactions and inter-corporate transactions;
- certain prescribed accounting standards;
- mandatory rotation of independent directors and auditors;
- secretarial audits (for the company and its material unlisted subsidiaries); and
- various minority protection measures (such as those described in our response to question 7 above).

Further, companies which are listed on the main board of the stock exchanges, as well as subsidiaries of such companies, are also required to comply with the requirements prescribed by the SEBI Listing Regulations. Accordingly, listed public companies are required to maintain a specified number of independent, non-executive directors on their Board and constitute separate committees for functions such as for audit, stakeholders, risk assessment and strategy formulation on risk aversion/ minimization. Additional corporate governance requirements for listed public companies include (but are not limited to) the following:

- *Reporting requirements*, such as reporting outcomes of Board meetings where they pertain to specified items, reporting the occurrence of a prescribed category of events to the stock exchanges as and when they occur and submission of quarterly corporate governance compliance reports;
- *Monitoring requirements*, such as requiring periodic review of the policy on related party transactions, requiring prior approval of the audit committee (whether in omnibus form or otherwise) for related party transactions and requiring material related party transactions (i.e. those crossing specified thresholds) to be approved by a shareholders resolution;
- *Internal control requirements*, including requiring the audit commit to review financial statements of subsidiaries and requiring reporting of deficiencies in internal controls to the audit committee by the chief executive officer and compliance officer.
- *Board composition*, requiring the board of directors of a listed entity to have an optimum combination of executive and non-executive directors with at least one woman director and not less than fifty per cent. of the board of directors comprising of non-executive directors. Furthermore, the Board of directors of the top 1,000 listed entities are also required to have at least one independent woman director.

Q15. Are there any exemptions available for private companies under the Companies Act?

Certain key exemptions available to private companies are as follows:

- The holding company, subsidiary company or associate company of a private company, or the subsidiary of a holding company to which a private company is a subsidiary, are not considered as related parties of such private company – thereby ensuring that they are exempt from restrictions on related party transactions.
- A private company can issue shares with differential voting rights without compliance with the Share

Capital Rules if it is allowed to do so under its charter documents.
- A private company can issue further shares to employees under an employee stock option plan by passing an ordinary resolution at a meeting of its shareholders and is not required to obtain a special resolution for the same.
- Provisions under the Companies Act on giving of notice of general meetings, statements to be annexed to such notice, quorum for general meetings, chairman, proxies, restrictions on voting rights, voting by show of hands and demand for poll are not applicable to a private company (if so specified in its AoA).
- Certain provisions under the Companies Act which require the Board of a company to take actions only with the approval of the company by a special resolution do not apply to private companies.
- Certain compliance requirements under the Companies Act in relation to acceptance of deposits from members, such as issuance of circulars to members, filings with the ROC, maintaining a deposit repayment reserve account, are not applicable to private companies: (i) accepting from their members monies not exceeding 100% of aggregate of their paid up share capital, free reserves and securities premium account; or (ii) which are startups, for five years from the date of of incorporation; or (iii) which fulfil the following conditions – (a) not being an associate or a subsidiary company of any other company, (b) borrowings of such a company from banks or financial institutions or any body corporate being less than twice its paid up share capital or INR 50 crores (approx. USD 6.1 million), whichever is lower, and (c) not having defaulted in the repayment of such borrowings subsisting at the time of accepting deposits.

Q16. Can voting rights be exercised by proxy?

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

Q17. Can statutory meetings be held through electronic means?

Under the Companies Act, a company is permitted to conduct a Board meeting through video conferencing or other audio-visual means, provided the procedure prescribed in the Companies Act is complied with. Vide an amendment dated June 15, 2021, the MCA has completely omitted the rules made by it restricting certain matters from being dealt with by the Board in a meeting conducted through video conferencing and therefore, all matters can be dealt with, by means of video conferencing.

Further, the Companies Act requires that certain kinds of business, such as buy-back of shares, giving loans or extending guarantee or providing security in excess of specified limits, may only be transacted by means of voting through a postal ballot. This requirement does not apply to OPCs or companies having up to 200 members.

Additionally, in order to ensure wider shareholder participation in the decision making process of companies, every listed company or a company having not less than 1,000 shareholders, must provide to its members, a facility to exercise their right to vote at general meetings by electronic means.

A 'virtual meeting' of the shareholders, that is, a meeting without any physical venue, is not permissible under the Companies Act, as minimum quorum requirements, which are applicable to shareholders' meetings of public and private companies, require the requisite number of members to be personally present at the venue of the meeting. However, in light of the Covid-19 pandemic, companies have been permitted to convene their extra-ordinary general meetings through video-conferencing or other audio-visual means till September 30, 2024, subject to compliance with certain specified conditions. Similarly, companies have been permitted to convene their annual general meetings through video- conferencing or other audio-visual means till September 30, 2024, subject to compliance with certain specified conditions.

Q18. What are the restrictions on distribution of profit in India?

The Companies Act regulates the declaration and distribution of dividend and prescribes that dividend for any financial year may be paid out of undistributed profits of the company for that year or previous financial years arrived at after providing for depreciation in the prescribed manner. A company may also declare dividends out of accumulated profits earned by it in previous years and transferred to the free reserves, subject to certain conditions including that the amount so drawn should first be utilized to set off losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.

A company is not permitted to declare or pay dividends:

- from reserves other than free reserves; and
- unless carried over previous losses and depreciation not provided in previous years are set off against profits of the company for the current year.

Further, in case of a company having preference share capital, such preference share capital is required to carry a preferential right with respect to payment of dividend over the equity share capital of such company.

The Companies Act also prohibits the payment of dividend on equity shares by a company in case it has failed to comply with provisions relating to acceptance or repayment of deposits.

The Board is also permitted to declare an interim dividend during any financial year, or any time between the closure of a financial year and holding of the annual general meeting for such financial year, out of surplus and profits of the financial year in which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend. Where the company has incurred losses during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, then the rate of interim dividend declared cannot be higher than the average dividends declared by the company during the immediately preceding three financial years.

Under FEMA, dividends are freely repatriable (outside India) without any restrictions (net after tax deduction at source or dividend distribution tax, if any, as the case may be).

SEBI Listing Regulations provide that a listed company must declare and disclose the dividend on a per share basis only. The top 1,000 listed entities based on market capitalization (calculated as on March 31 of every financial year) are required to formulate a dividend distribution policy which is required to be disclosed in their annual reports and on their websites. In case a listed entity proposes to declare dividend on the basis of parameters in addition to what has been prescribed in its dividend distribution policy or proposes to change such additional parameters, it is required to disclose such changes, along with the rationale for the same, in its annual report and on its website.

Q19. How can a company be listed in India?

Equity shares or securities convertibles into equity shares (together, referred to as specified securities) can be listed through an IPO, by way of a public issue or an offer for sale to the public in accordance with the requirements specified under the SEBI ICDR Regulations. The issuer can further choose to undertake the IPO of its specified securities at a fixed price or through the book building process, i.e., the process of generating demand for the issuer's specified securities to determine the quantum or value such specified securities in accordance with the SEBI ICDR Regulations.

Companies proposing to be listed in India are required to, in addition to compliance with the Companies Act and the SEBI ICDR Regulations, comply with the SEBI Act, Securities Contracts (Regulation) Act, 1956, Securities Contracts (Regulation) Rules, 1957 and various regulations including the SEBI Listing Regulations, and guidelines issued by SEBI thereunder.

A company is eligible to undertake an IPO only if:

- the company, its directors or promoters, members of the promoter group and any selling shareholders in the IPO are not debarred from accessing the capital markets by SEBI;
- its promoters and directors are not promoters or directors of a company which is debarred from accessing the capital markets by SEBI, are not willful defaulters, fraudulent borrowers and are not fugitive economic offenders;
- there are no outstanding convertible securities or any rights entitling any person any option to receive equity shares of the company after the IPO (other than stock options and fully paid-up convertibles which will convert

prior to the filing of the red herring prospectus);
- it meets the following criteria:
  - It has net tangible assets of at least INR 3 crores (approx. USD 365,854), calculated on a restated and consolidated basis, in each of the preceding three full years, of which not more than 50% is held in monetary assets (unless the IPO is entirely through an offer for sale). Where more than 50% of the net tangible assets are held in monetary assets, the company needs to have either utilized or made firm commitments to utilize the excess monetary assets in its business or project;
  - It has an average operating profit of at least INR 15 crores (approx. USD 1.83 million), calculated on a restated and consolidated basis, during the preceding three years with operating profit in each year;
  - It has a net worth of at least INR 1 crore (approx. USD 121,951) in each of the preceding three years, calculated on a restated and consolidated basis;
  - If it has changed its name within the last one year, at least 50% of the revenue, calculated on a restated and consolidated basis, for the preceding one full year has been earned by it from the activity indicated by its new name.
- Where a company does not satisfy the conditions set out above, it is eligible to undertake an IPO only if the issue is made through the book building process and the company undertakes to allot at least 75% of the net offer to qualified institutional buyers and to refund the full subscription money if it fails to do so. It is clarified that 75% of the net offer to qualified institutional buyers, cannot be underwritten.

If a company has issued SR equity shares (i.e., equity shares of a company having superior voting rights compared to all other equity shares issued by that company) to its promoters/ founders, then such company will be allowed to do an IPO of only ordinary shares for listing on the main board, subject to compliance with the relevant provisions of the SEBI ICDR Regulations. Further, if a company has issued SR equity shares and is seeking listing of its ordinary shares, it is mandatorily required to list its SR equity shares on the same stock exchange along with the ordinary shares being offered to the public.

A company undertaking an IPO is required to ensure that:

- It has made an application to one or more stock exchanges seeking an in-principle approval for listing its specified securities on such stock exchanges and has chosen one of them as the designated stock exchange;
- It has entered into an agreement with a depository for dematerialization of the specified securities already issued and proposed to be issued;
- All its specified securities held by the promoters are in dematerialized form prior to filing of the offer document;
- All its existing partly paid-up equity shares have either been fully paid up or have been forfeited;
- It has made firm arrangements of finance through verifiable means towards 75% of the stated means of finance for a specified project proposed to be funded from the issue proceeds, excluding the amount to be raised through the IPO or through existing identifiable internal accruals; and
- The amount for general corporate purposes, as mentioned in the objects of the issue in the draft offer document and the offer document shall not exceed 25% of the amount being raised by the company.

Additional conditions apply in case of an offer for sale as the selling shareholders need to have held the shares they are offering for at least a year prior to the filing of the draft offer document.

Further, under the SEBI ICDR Regulations, promoters of the company are required to continue to hold at least 20% of the post issue capital for a period of 18 months from the date of allotment in the IPO. In case the majority of the issue proceeds excluding the portion of offer for sale is proposed to be utilized for capital expenditure, the lock-in period will be 3 years from the date of allotment in the IPO. However, since the 20% lock-in requirement is required to be met out of a pool of eligible shares (which aren't pledged, or recently acquired or otherwise ineligible), promoters typically continue to hold more than just the 20% which is compulsorily locked-in. In addition, all other pre-IPO shareholders are also locked in for 6 months after the IPO barring a few exceptions such as venture capital funds, FVCIs and category I and II alternative investment funds (for whom the lock-in period of 6 months begins from their date of purchase) and employees who received equity shares under an ESOP.

IPO-bound companies typically undergo a fairly rigorous process to meet all requirements for seeking listing. This usually entails changes to the composition of their Board in accordance with the SEBI Listing Regulations and any other regulations or guidelines specified by any regulator which

governs the industry in which the issuer operates, amendments to their AoA, the constitution of committees, implementation of various policies, dematerialization of physical shares among other things including adhering to some restrictions on the kind of publicity they can undertake while in IPO-mode. SEBI registered merchant bankers are mandatorily required to be appointed by companies seeking to list and they, along with their counsel, guide companies through this process.

Any company coming out with an IPO is required to file a draft offer document (or draft red herring prospectus) along with prescribed fees with SEBI and the stock exchanges. SEBI may specify changes or issue observations to the draft offer document within 30 days of a prescribed number of events. Additionally, the stock exchanges may also issue observations on the draft offer document (or draft red herring prospectus), prior to issuing the in-principle approval. In case SEBI and/or stock exchanges specify any changes or issues observations on the draft offer document, the changes need to be carried out and an updated draft is required to be submitted to SEBI prior to filing the prospectus, red herring prospectus or shelf prospectus with the relevant RoC. Subsequent to filing the draft offer document, the issuer is required to obtain an in-principle approval from recognized stock exchanges (including at least one such stock exchange having nationwide terminals, in case of an IPO).

The draft red herring prospectus filed with SEBI is required to be made public, for comments, if any, for a period of at least 21 days from the date of such filing, by hosting it on the websites of SEBI, relevant stock exchanges and merchant bankers associated with the issue.

The final observations issued by SEBI are valid for a year i.e. the bidding period (as described later) should commence within a period of 12 months from the date of issuance of final observations by SEBI and if not, if a company still wants to proceed with an IPO, it will need to file a fresh draft offer document with SEBI. Thereafter, the issuer shall, before filing the red herring prospectus or prospectus with the relevant RoC, file a blackline draft red herring prospectus with SEBI through the lead merchant bankers, highlighting all changes made in the draft red herring prospectus pursuant to any comments received from the public and observations received from SEBI.

After receiving an approval from SEBI and the in-principle approval from the stock exchanges, the red herring prospectus is required to be filed with the relevant RoC, specifying the period during which bids or applications for subscription to specified securities can be submitted by prospective investors or bidders and the details of the price band. In the event the price band is not included in the red herring prospectus, it should be advertised at least two working days prior to opening of the bidding period, in accordance with the SEBI ICDR Regulations.

The bidding period can extend for a minimum of three working days and a maximum of 10 working days, including in case of a revision in the price band. During the bidding period prospective investors will place their bids for the issuer's securities at different price points within the price band. Certain category of investors (retail bidders, eligible employees, etc.) can make their bids at the cut-off prices.

Once the bidding period is closed, the issuer, in consultation with the merchant bankers (and at times with the selling shareholders as well) and the relevant stock exchange, will determine the price at which the specified securities will be allotted to the successful bidders, using the book building process in accordance with the SEBI ICDR Regulations. Thereafter, the issuer is required to file a prospectus with the relevant RoC, including information pertaining to the number of securities issued or offered through the IPO and the price at which such specified securities are allotted. In case of a fresh issue (i.e., not being an offer for sale to the public), the issuer is required to obtain a minimum subscription of 90% of the issue size through the IPO (which if not met will trigger a refund of the entire bid amount to the bidders). Thereafter, the issuer will allot the specified securities to the successful bidders and apply to the relevant stock exchanges for obtaining the final listing and trading approvals.

Q20. What is the minimum level of public shareholding in a listed company? What are the consequences of the shareholding of the acquirer being in excess of the minimum level of public shareholding?

The SEBI Listing Regulations and the Securities Contract (Regulation) Rules, 1957 specify that a listed company is required to have a minimum public shareholding in its share capital (except for entities listed on institutional trading

platform without making a public issue). Accordingly:

- Every listed company is required to maintain public shareholding of at least 25%; and
- Where the public shareholding in a listed company falls below 25% at any time, such company is required to bring the public shareholding to 25% within a maximum period of 12 months from the date of such fall in the manner specified by SEBI (discussed below).

Where the non-public shareholding of a listed company is in excess of the minimum public shareholding level, the company is required to undertake suitable actions to raise the public shareholding within the prescribed time, in order to keep the company's shares listed. The following methods have been prescribed by SEBI to comply with minimum public shareholding requirements:

- Issuance of shares to public through prospectus;
- Offer for sale of shares held by promoters to public through prospectus;
- Sale of shares held by promoters through the secondary market;
- Rights issue to public shareholders, with promoter or promoter group shareholders forgoing their entitlement to equity shares that may arise from such issue;
- Bonus issues to public shareholders, with promoter or promoter group shareholders forgoing their entitlement to equity shares that may arise from such issue;
- Allotment of equity shares under qualified institutions placement in terms of Chapter VI of the SEBI ICDR Regulations;
- Sale of shares held by promoter(s) / promoter group in the open market in any one of the following ways, subject to compliance with the conditions specified:
  - up to 2% of the total paid-up equity share capital of the listed entity, subject to five times' average monthly trading volume of the shares of the listed entity, every financial year till the due date for minimum public shareholding compliance as per the Securities Contracts (Regulation) Rules, 1957 (or)
  - up to 5% of the paid-up capital of the listed entity during a financial year, in a single tranche or in multiple tranches not exceeding a period of 12 months, subject to the condition that the public holding in the listed entity shall become 25% after completion of such sale and the amount of shares sold shall not exceed the trading volume of the shares of the listed entity during the preceding 12 months from the date of announcement.
- Exercise of options and allotment of shares under an employee stock option (ESOP) scheme up to 2% of the paid-up equity share capital of the listed entity, in compliance with the Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations, 2021 with the promoter or promoter group shareholders not being allotted any shares.
- Transfer of up to 5% of the paid-up equity share capital of the listed entity held by the promoter or promoter group shareholders to an Exchange Traded Fund (ETF) managed by a SEBI-registered mutual fund, subject to conditions specified. The promoter and promoter group shareholders shall not subscribe to the units of such ETF to which shares have been transferred for the purpose of compliance with minimum public shareholding requirements.
- Any other method as may be approved by SEBI on a case to case basis. In this regard, listed entities may approach SEBI with appropriate details.

Companies failing to comply with the minimum level of public shareholding within the time period set forth in the Securities Contract (Regulation) Rules, 1957 and the SEBI Listing Regulations can face penalties such as compulsory delisting, suspension of trading, monetary penalties, etc.

3. Foreign Investment

Q1. What is foreign investment?

Foreign investment means any investment made by a person resident outside India on a repatriable basis in "Equity Instruments" of an Indian company or in the capital of an LLP. Please see our response to [question 6] of this Chapter for a detailed description of Equity Instruments.

A beneficial interest of a non-resident in an Indian security legally held by a resident entity is also considered as foreign investment, if appropriate declarations of such interest under the Companies Act have been made.

A person resident outside India may hold foreign investment inter alia either as FDI or as FPI in an Indian company in accordance with the provisions of the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ("NDI Rules").

The NDI Rules define FDI to mean the investment through Equity Instruments by a person resident outside India (i) in an unlisted Indian company, or (ii) in 10% or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.

If the existing investment of a person resident outside India in Equity Instruments of a listed Indian company subsequently falls below the aforesaid 10% threshold, such investment is continued to be treated as FDI.

FPI refers to any investment made by a person resident outside India in Equity Instruments where such investment is (i) less than 10% of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company, or (ii) less than 10% of the paid up value of each series of Equity Instruments of a listed Indian company. An Indian company which has any of its equity instruments or debt instruments listed on a recognized stock exchange in India is considered a listed company, in this context.

Any further downstream investments by Indian entities which are majority owned or controlled by persons resident outside India are also governed in the same manner as a foreign investment, however, such entities may not be able to get certain benefits available in case of direct foreign investment in Indian entities, which are not specifically provided for in the NDI Rules .

Q2. How is foreign investment regulated in India?

Foreign investment in India is primarily regulated by:

- The Foreign Exchange Management Act, 1999 ("**FEMA**"), and the rules, regulations and directions issued by way of notifications and circulars, thereunder, including, the NDI Rules;
- FDI Policy issued by the DPIIT (formerly known as DIPP) from time to time.

Q3. Who are the key regulators that monitor foreign investment in India?

The key regulators that monitor foreign investment in India include:

- Central Government
  - which specifies permissible capital account transactions not involving debt instruments and frames rules in relation to the same in accordance with the provisions of FEMA.
- Reserve Bank of India ("**RBI**"):
  - which classifies permissible capital account transactions involving debt instruments and frames regulations in relation to the same in accordance with the provisions of FEMA; and
  - which is empowered to administer the NDI Rules, and interpret and issue directions, circulars, instructions, and clarifications to implement the NDI Rules.
- DPIIT, which is:
  - responsible for making policy pronouncements on foreign investment; and
  - instrumental in administering the applications falling under the approval route, including referring these to the competent Administrative Ministry or Department of the GOI (Competent Authority), and holding joint reviews on pending proposals. To

this end, DPIIT has established the National Single Window System (NSWS). Previously, the proposals for foreign investment requiring GOI approval were administered through the Foreign Investment Facilitation Portal.
  - DPIIT's concurrence is mandatory for a Competent Authority to reject applications made under the Approval Route, and for imposing additional conditions not provided in the FDI Policy or sectoral laws or regulations.
  - Please see our response to [question 4] of this Chapter for a detailed discussion on automatic and approval route.
- Competent Authority:
  - which considers applications for approval of foreign investment in the sectors over which it exercises oversight and monitors foreign investment in such sectors, in accordance with the FDI Policy, such as Ministry of Defense for defense sector related approvals, Ministry of Information and Broadcasting for broadcasting sector, Ministry of Civil Aviation for the civil aviation sector and Department of Economic Affairs for the financial sector.
- Ministry of Home Affairs (MHA)
  - which considers all applications for approval of foreign investment requiring security clearance. All proposal for foreign investment in broadcasting, telecommunication, satellites - establishment and operation, private security agencies, defence, civil aviation and mining and mineral separation of titanium bearing minerals and ores, and its value addition and integrated as well as investment proposals from neighbouring countries require a security clearance from MHA. Please see our response to [question 5] of this Chapter for details on restrictions on investments from neighbouring countries.
- Ministry of External Affairs (MEA)
  - to whom all applications for approval of foreign investment are forwarded for its comments and wherever necessary, MEA provides its comments to the Competent Authority.

Q4. What are the different routes through which a foreign investor may invest in India?

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

- FDI, either under the automatic route or the approval route:
  - under the automatic route, the foreign investor or the Indian company does not require any approval from the GOI or RBI to make or receive the FDI, and
  - under the approval route, with prior approval of the GOI (that is, the Competent Authority) and/or RBI, to be obtained by the foreign investor or the Indian company, as applicable.
  - it is pertinent to note that foreign investors do not require any prior registration with a regulatory authority in India for undertaking FDI.
- Investment as a foreign portfolio investor, subject to prior registration with SEBI;
- Investment as a FVCI, subject to prior registration with SEBI;
- Investment as: (i) an NRI or an OCI on a recognised stock exchange on repatriation basis, or (ii) an NRI or OCI, including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, on a non-repatriation basis. Such investment is deemed to be domestic investment at par with the investment made by residents;
- Investment in the units of an entity registered and regulated under relevant regulations framed by SEBI (Investment Vehicle);

Q5. What are the restrictions on the neighbouring countries to invest in India?

The NDI Rules were amended on April 22, 2020 to curb the opportunistic takeovers / acquisitions of Indian companies. Prior to the Amendment, the restrictions only applied to investments from Bangladesh and Pakistan. Post the amendment, any foreign investment by or from an entity of any country sharing land borders with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, requires prior approval from GOI. Further any subsequent changes in beneficial ownership (by way of direct or indirect

transfers) of any existing or future FDI that would result in such beneficial ownership falling within the purview of aforesaid restriction would require prior approval from GOI. It is however clarified that a Multilateral Bank or Fund, of which India is a member, shall not be treated as an entity of a particular country nor shall any country be treated as the beneficial owner of the investments of such Bank or Fund in India.

Q6. What are the different instruments available for investment in India under the foreign direct investment regime?

- In accordance with the NDI Rules, a foreign investor can invest in the following instruments (Equity Instruments):
  - equity shares (including partly paid equity shares);
  - fully, compulsorily and mandatorily convertible preference shares;
  - fully, compulsorily and mandatorily convertible debentures;
  - share warrants
- Partly paid shares issued to non-residents should be fully called-up within 12 months of such issue (except in certain limited cases). Furthermore, 25% of the total consideration amount (including share premium, if any) in respect of such shares should be received upfront. In the case of share warrants at least 25% of the consideration should be received upfront and the remainder should be received within 18 months of issuance of share warrants.
- For convertible instruments the price or conversion formula should be determined upfront at the time of issue of the said instruments.
- Issuance of preference shares or debentures that are non-convertible, optionally convertible or partially convertible are considered as ECB and would be subject to compliance with extant regulations pertaining to ECB, discussed at [question 20] of this Chapter.
- Equity Instruments can contain an optionality clause subject to a minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price.
- An eligible foreign investor may invest in the units of Investment Vehicles such as Real Estate Investment Trusts, Infrastructure Investment Trusts, Alternative Investment Funds.
- A foreign investor, not being a foreign portfolio investor or an FVCI, may make a capital contribution or acquire the profit share of an LLP in which FDI up to 100% is permitted under the automatic route and there are no FDI linked performance conditions attached, in accordance with FDI Policy and NDI Rules.

Q7. Is foreign investment prohibited in any sector or business?

Foreign direct investment is prohibited in the following sectors:

- Lottery business including government or private lottery, online lotteries;
- Gambling and betting including casinos. In relation to lottery, gambling and betting activities, foreign technology collaboration in any form (including licensing for franchise, trademark, brand name, management contract) is also prohibited;
- Chit funds;
- Nidhi companies;
- Trading in transferable development rights;
- Real estate business or construction of farm houses; however, 'real estate business' does not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014 and earning of rent or income on lease of the property, not amounting to transfer;
- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes;
- Activities or sectors not open to private sector investment for example atomic energy and railway operations (that is, other than the permitted railway infrastructure);
- Agriculture sector or activity except as specifically permitted (such as floriculture, horticulture and cultivation of vegetables and mushrooms under controlled conditions, development and production of seed and planting material, animal husbandry (including breeding of dogs), pisciculture, aquaculture,

apiculture, and services related to agro and allied sectors).

- Plantation sector or activity except as specifically permitted (such as tea sector including tea plantations, coffee plantations, rubber plantations, cardamom plantations, palm oil tree plantations and olive oil tree plantation).

Q8. Are there any limits or caps on foreign investment depending upon the business of the Indian Company?

Yes, the maximum permissible limit for foreign investment in an Indian company or sectoral cap (the extent of a specified percentage of the total capital of an entity) is determined by the sector in which the company is operating. The NDI Rules also prescribe certain conditions for specific sectors such as retail trading, e-commerce, construction and development and the like.

Q9. Are there any restrictions on foreign investment in an Indian company engaged only in the activity of further investing into Indian companies?

Foreign investment in investing companies not registered as NBFCs with RBI and in Core Investment Companies (CICs) which are registered with RBI, engaged in the activity of investing in the capital of other Indian entities, requires prior government approval. CICs additionally need to comply with the regulatory framework prescribed for such companies as NBFCs under the Reserve Bank of India Act, 1934 and regulations framed thereunder.

Foreign investment in investing companies registered as NBFC with RBI, is permitted up to 100% under the automatic route (*i.e.*, without the prior government approval), since they are being regulated, overall, by RBI.

Q10. What are the ways for a foreign investor to invest in an Indian company?

Foreign investment in India can be undertaken through the following ways:

Issuance of permissible instruments by a company:

Subject to compliance with the FDI Policy and NDI Rules, an Indian company may issue Equity Instruments under the FDI Policy to a non-resident investor. For sectors under the automatic route, subject to compliance with the conditions prescribed by the GOI and/or RBI from time to time, issue of equity shares against swap of existing equity instruments, import of capital goods, machinery or equipment (excluding second-hand machinery) and pre-operative or pre-incorporation expenses (including payment of rent) is permitted, subject to certain reporting requirements. Issue of equity shares against such swap, import or expenses by companies in sectors requiring government approval, is allowed under the approval route.

An Indian company may issue equity shares against any funds payable by it to a person resident outside India, the remittance of which is permitted under FEMA and the rules/regulations thereunder or does not require prior permission of the GOI or RBI.

Acquisition by way of transfer of existing shares:

Subject to compliance with the FDI Policy and NDI Rules, non-resident investors can also invest in Indian companies by purchasing or acquiring existing permissible instruments from Indian shareholders or from other non-resident shareholders in the following manner:

- Non-resident to Non-resident: A person resident outside India (other than an NRI or an OCI or an erstwhile overseas corporate body) can transfer, by way of sale or gift, the Equity Instruments of an Indian company or units of an Investment Vehicle to any person resident outside India, provided that prior government approval shall be obtained for such transfer in case the company is engaged in a sector requiring government approval.
- Transfer of Equity Instruments (held on a non-repatriation basis) from a non-resident to a non-resident, by way of sale where the Equity Instruments are intended to be held on a repatriable basis, should

be in compliance with the NDI Rules and the FDI policy (including sectoral caps, pricing guidelines, documentation and reporting requirements).

- Non-resident to Resident: A person resident outside India can transfer, by way of sale or gift, Equity Instruments or units of an Investment Vehicle to a person resident in India, subject to compliance with the conditions stipulated under NDI Rules and the FDI Policy (including sectoral caps, pricing guidelines, documentation and reporting requirements).
- Resident to Non-resident: A person resident in India can transfer, by way of sale, Equity Instruments or units of an Investment Vehicle to a person resident outside India, subject to compliance with the conditions stipulated under NDI Rules and the FDI Policy (including sectoral caps, pricing guidelines, documentation and reporting requirements). Gift of such instruments by a resident to a person resident outside India will require the prior approval of RBI.
- Non-resident on the Stock Exchange: A person resident outside India can sell the Equity Instruments of an Indian company or units of Investment Vehicles (in case the same are listed) held by it on a repatriable basis, on a recognised stock exchange in India in the manner prescribed by SEBI.
- Further, a non-resident investor who has already acquired and continues to hold the control of an Indian company, in accordance with SEBI Takeover Regulations, can acquire shares of the listed Indian company on the stock exchange, subject to FDI Policy and NDI Rules.
- Purchase and sale of Equity Instruments of an Indian Company, capital of an LLP, convertible notes issued by start-ups or units of Investment Vehicles, by an NRI or an OCI, on non-repatriation basis, under NDI Rules, is deemed to be domestic investment at par with the investment made by residents. Further, a company, trust, and partnership firm incorporated outside India and owned and controlled by NRIs can invest in India under the special dispensation available to NRIs or OCIs under the FDI Policy and NDI Rules. However, a NRI or an OCI including a company, a trust and a partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, cannot make any investment in equity instruments or units of a Nidhi company or a company engaged in agricultural or plantation activities or real estate business or construction of farm houses or dealing in transfer of development rights.

Q11. Are there any pricing guidelines that a foreign investor has to comply with while investing into any of the instruments of an Indian entity?

NDI Rules prescribe the pricing guidelines for both the subscription to, and the acquisition of, Equity Instruments by non-residents.

- Issue of Equity Instruments – the price of Equity Instruments issued to a person resident outside India should not be less than:
  - In case of an Indian company listed on a recognised stock exchange in India – the price worked out in accordance with the SEBI guidelines.
  - In case of an Indian company going through a delisting process – the offer price per share determined through a book building process under the SEBI Delisting Regulations.
  - In case of an Indian company not listed on a recognised stock exchange in India – the price of Equity Instruments issued to a non-resident cannot be less than the value of Equity Instruments determined as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a merchant banker (registered with SEBI) or a chartered accountant or a practicing cost accountant.
  - Where the issue of instruments is pursuant to a rights issue:
    - of a listed company, the issue price, subject to SEBI ICDR Regulations, is the price determined by the company;
    - where the investee company is not listed, the issue price cannot be less than the price offered to resident shareholders; and
    - after renunciation of rights from a person resident outside India, in accordance with the pricing guidelines for issuance of equity instruments (other than share warrants).
  - In the case of convertible equity instruments, the price or conversion formula of the instrument is required to be determined upfront at the time of issue of the instrument. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance

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

Transfer of Equity Instruments by a Resident to a Non-resident

The price of Equity Instruments of an Indian company transferred by a person resident in India to a person resident outside India should not be less than:

- In case of an Indian company listed on a recognised stock exchange in India, the price worked out in accordance with the relevant SEBI guidelines or in case of a sale under a private arrangement, the price at which a preferential allotment of shares can be made under the SEBI guidelines, as applicable.
- In case of an Indian company that is going through delisting, the price worked out in accordance the SEBI Delisting Regulations.
- In case of an Indian company not listed on a recognised stock exchange in India, the value of the shares determined pursuant to any internationally accepted pricing methodology for valuation on arm's length basis duly certified by a merchant banker (registered with SEBI) or a chartered accountant or a practicing cost accountant.

Transfer of Equity Instruments by a Non-Resident to a Resident

The price of Equity Instruments of an Indian company transferred by a person resident outside India to a person resident in India should not exceed:

- In case of an Indian company listed on a recognised stock exchange in India, the price worked out in accordance with the relevant SEBI guidelines or in case of a sale under a private arrangement, the price at which a preferential allotment of shares can be made under the SEBI guidelines, as applicable, provided that the price is determined for such duration as specified in SEBI guidelines, preceding the relevant date, which shall be the date of purchase or sale of shares.
- In case of an Indian company that is going through delisting, the price worked out in accordance with the SEBI Delisting Regulations.
- In case of an Indian company not listed on a recognised stock exchange in India, the value of the shares determined pursuant to any internationally accepted pricing methodology for valuation on arm's length basis duly certified by a merchant banker (registered with SEBI) or a chartered accountant or a practicing cost accountant.

The guiding principle is that the person resident outside India is not guaranteed any assured exit price at the time of making such investment or agreement and will exit at the price prevailing at the time of exit.

Pricing for Swap of equity instruments

- In case of swap of equity instruments, valuation will have to be determined by a Merchant Banker registered with SEBI or an investment banker outside India registered with the appropriate regulatory authority in the host country.

Pricing of optionality clauses

- Agreements with foreign investors having optionality clauses in respect of Equity Instruments, are considered permissible under the extant FDI Policy and NDI Rules.
- However certain prescribed conditions would have to be satisfied, including the following:
  - The exercise of the optionality or exit is subject to completion of, the higher of, the minimum lock-in period of one year or minimum lock-in period as prescribed under the FDI Policy for the concerned sector;
  - Pricing guidelines have been prescribed for exit by the foreign investor, and where the non-resident investor is not guaranteed any assured exit price at the time of making such investment, the non-resident investor will exit at the fair price determined at the time of exit in accordance with such pricing guidelines.

Pricing for LLPs

- Investments by foreign investors in LLPs are also subject to the applicable pricing guidelines as provided in Schedule 6 of NDI Rules.
- Investment in an LLP either by way of capital contribution or by way of acquisition or transfer of profit shares, should not be less than the fair price worked out in accordance with any valuation norm which is internationally accepted or adopted in accordance

with market practice and a valuation certificate to that effect should be issued by a chartered accountant or by a practicing cost accountant or by an approved valuer from the panel maintained by the central government.

- In case of transfer of capital contribution or profit share of an LLP:
  - from a person resident in India to a person resident outside India, the transfer should be for a consideration not less than the fair price of capital contribution/ profit share of an LLP.
  - from a person resident outside India to a person resident in India, the transfer should be for a consideration which is not more than the fair price of the capital contribution/profit share of an LLP.

Pricing of partly paid shares and share warrants

The pricing of partly paid equity shares must be determined upfront. Similarly, in case of share warrants, the pricing and the price / conversion formula must be determined upfront. The price at the time of conversion should not, in any case, be lower than the fair value worked out, at the time of issuance of such warrants.

Q12. Are there any instances of transfer by way of sale which require prior approval from the RBI or the Government of India?

Indicative instances where prior permission of RBI is required for transfers, by way of sale of Equity Instruments from residents to non-residents are as follows:

- In cases where the transfer is to take place at a price that is not determined in accordance with the pricing guidelines prescribed under the NDI Rules and does not fall under the exceptions that have been provided in this regard.
- In cases where the non-resident investor proposes to defer payment of the amount of consideration or seeks indemnity from the seller, otherwise than as permitted under NDI Rules and deposit regulations.

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

- Transfer of Equity Instruments of companies engaged in sectors falling under the approval route including where such transfer *inter alia* results in change or transfer of control or ownership of the existing Indian company from resident Indian citizens and Indian companies (that are owned and/or controlled by resident Indian citizens), to non- residents;
- A transfer of Equity Instruments resulting in foreign investments (in such Indian company) breaching applicable sectoral cap under the exchange control regulations or any other conditions specified under NDI Rules and FDI Policy; and
- Transfer of Equity Instruments from an NRI/OCI or eligible investors under NDI Rules, to a non-resident who is not an NRI/OCI/eligible investor under NDI Rules, where such Equity Instruments are held on non-repatriation basis in approval route sector.

Q13. Is there any reporting to the RBI in case of issuance of shares or transfer of shares?

- The RBI issued the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 which sets out the mode of payment and attendant conditions for investment in India by a person resident outside India.
- An Indian company, having received FDI for issue of Equity Instruments either under the automatic route or the approval route, within 30 days of issue of the Equity Instruments to investor person resident outside India, must report such issuance in Form FC-GPR. With effect from September 1, 2018, RBI has introduced a single master form (SMF) and as a result, the reporting of FDI, which was previously a two-step procedure viz., ARF and FC-GPR is merged into a single revised FC-GPR.
- The reporting of transfer of shares from a person resident in India to a person resident outside India and vice versa has to be made in Form FC-TRS, which should be submitted by the transferor/ transferee who is resident in India, within 60 days of transfer of Equity Instruments or receipt or remittance funds whichever is earlier. The onus of reporting is on the resident transferor/transferee or the person resident outside

India holding Equity Instruments on a non-repatriable basis, as the case may be.

- SMF had been made effective from September 1, 2018 for filing five forms, including Form FC-GPR, Form FC-TRS, Form LLP-I, Form LLP-II and Form CN, for facilitating the ease of doing business in India. Other four forms viz., ESOP, DI, DRR and InVi have now been made available for filing subsequently.
- The Indian company receiving FDI is required to file an annual return - the Foreign Liabilities and Assets ("FLA") return. Indian companies have to report the current financial year's FLA as well as the previous year(s) assets and liabilities.
- In the event there is any delay in such reporting, the person/entity responsible for such reporting will be liable for payment of late submission fee, as may be determined by RBI.

Q14. Who can be registered as a Foreign Portfolio Investor?

A person who is a non-resident and is not an NRI or an OCI, and is a resident of a country whose security market regulator is a signatory to the International Organisation of Securities Commission's Multilateral Memorandum of Understanding or a signatory to a bilateral memorandum of understanding with SEBI, and who satisfies the eligibility criteria prescribed under the SEBI FPI Regulations, 2019 (which have replaced the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014) is eligible to be registered as a foreign portfolio investor.

The foreign portfolio investor needs to have a valid registration as long as it continues to hold securities or derivatives in India. NRIs, OCIs, and resident Indians may be the constituents of the applicant to the foreign portfolio investor license, provided they meet the conditions specified by SEBI.

Eligible persons may seek registration, subject to fulfilment of additional requirements of the SEBI FPI Regulations, under the following categories:

- As Category I foreign portfolio investors, if such persons are:
  - Government and government related investors such as central banks, sovereign wealth funds, international or multilateral organizations or agencies including entities controlled or at least 75% directly or indirectly owned by such government and government related investor(s);
  - Pension funds and university funds;
  - Appropriately regulated entities such as insurance or reinsurance entities, banks, asset management companies, investment managers, investment advisors, portfolio managers, broker dealers and swap dealers;
  - Entities from the financial action task force member countries or from any country specified by the central government by way of any order or an agreement or treat with other sovereign governments, which are – appropriately regulated funds; unregulated funds whose investment manager is appropriately regulated and registered as a Category I foreign portfolio investor (Provided that the investment manager undertakes the responsibility of all the acts of commission or omission of such unregulated fund); and university related endowments of such universities that have been in existence for more than five years;
  - An entity (A) whose investment manager is from the financial action task force member country and such an investment manager is registered as a Category I foreign portfolio investor; or (B) which is at least seventy-five per cent owned, directly or indirectly by another entity, eligible under the aforementioned sub-clauses of Category I foreign portfolio investors, and such an eligible entity is from a financial action task force member country: (Provided that such an investment manager or eligible entity undertakes the responsibility of all the acts of commission or omission of the applicants seeking registration under this criteria.)
  - As Category II foreign portfolio investors, if such persons are not eligible under Category I foreign portfolio investors such as appropriately regulated funds not eligible as Category-I foreign portfolio investor, endowments and foundations, charitable organisations, corporate bodies, family offices, Individuals, appropriately regulated entities investing on behalf of their client, as per conditions specified by the board from time to time, and

unregulated funds in the form of limited partnership and trusts.

- An applicant incorporated or established in an international financial services center is deemed to be appropriately regulated for the purposes of the SEBI FPI regulations.

Q15. What are the advantages of investing as a foreign portfolio investor?

Investing as an FPI is typically the preferred route for portfolio investments for *inter alia* the following reasons:

- The ability to buy and sell securities on the stock exchanges without prior regulatory approval, and pricing restrictions that are applicable to FDI investors; and
- Being a more efficient mode of acquisition for secondary investments in listed securities compared to FDI.

Q16. Are there any restrictions or investment norms for foreign portfolio investors?

A registered FPI may, subject to the pricing and ownership restrictions discussed below, freely buy and sell securities issued by any Indian company, realise capital gains on investments made through the initial amount invested in India, appoint a domestic custodian for custody of investments made and repatriate any capital, capital gains and dividends that they may make or receive.

Some of the limitations which apply to investments by FPIs include, *inter alia*, the following:

- All transactions of the FPI are subject to process restrictions and specifications prescribed by SEBI and must necessarily be through stock brokers registered with SEBI, except in certain cases.
- The total holding by each FPI or an investor group (as referred to in the SEBI FPI Regulations), should be less than 10% of the total paid up equity capital on a fully diluted basis in an Indian company listed or to be listed on a recognized stock exchange in India, or less than 10% of the paid up value of each series of debentures and preference shares or warrants issued by an Indian company.
- From April 1, 2020, the aggregate limit of holdings by all FPIs put together is the sectoral caps contained in the FDI Policy and NDI Rules, with respect to the paid-up equity capital on a fully diluted basis or such same sectoral cap percentage of paid-up value of each series of debentures or preference shares or share warrants.
- An Indian company could decrease (prior to March 31, 2020) such aggregate limit to a lower threshold of 24%, 49% or 74% as deemed fit, by a resolution by its Board followed by a special resolution to that effect by its general body up to March 31, 2020
- Further, an Indian company that has decreased the aggregate limit to 24%, 49% or 74%, may increase it to 49% or 74% or the sectoral cap or statutory ceiling respectively, as deemed fit, by a resolution by its Board followed by a special resolution to that effect by its general body.
- An Indian company cannot reduce the limit to a lower threshold, once such aggregate limit has been increased to a higher threshold.
- Aggregate limit with respect to an Indian company in a sector where FDI is prohibited would be 24%.
- Further, where the total investment under the SEBI FPI Regulations by a FPI including its investor group exceeds the threshold of ten per cent of the total paid up equity capital in a listed or to be listed company, the foreign portfolio investor is required to divest the excess holding within five trading days from the date of settlement of the trades resulting in such a breach.
- In case the FPI chooses not to divest, the entire investment so made by the FPI will be re-classified as FDI subject to the terms and conditions as specified by SEBI and the FPI and its investor group cannot make further portfolio investment in the company concerned. Further in such a scenario, the investee company and the investor would be required to comply with the applicable reporting requirements.
- For investments in the debt securities and instruments other than the Equity Instruments, FPIs must also comply with terms, conditions or directions, specified or issued by SEBI or RBI.
- An FPI is required to deal with securities only in the dematerialized form however, if any shares held in the physical form, before the September 23, 2019,

may continue to be held in the physical form, if such shares cannot be dematerialized. Furthermore, all the rights entitlements may be held or transferred in non-dematerialized form.

Q17. Who is an FVCI?

FVCI means an investor incorporated and established outside India, who is registered under the SEBI FVCI Regulations, and undertakes investment in accordance with such regulations. SEBI acts as the nodal agency for providing registration to an FVCI. In examining an application for registration, SEBI would generally examine whether the applicant is a 'fit and proper' person to be registered as an FVCI. Various factors are considered including the applicant's track record and competence, whether its constitutional documents permit it to carry on venture capital investment activities, and whether the applicant is regulated by: (a) an appropriate foreign regulatory authority; or (b) is a registered income tax payer; or (c) has submitted a certificate from either its banker of its or its promoters track record where it is neither a regulated entity nor an income tax payer.

Q18. What are the advantages of investing using the FVCI route?

The FVCI route is generally preferred for investments in unlisted Indian companies, although in certain cases investments are also made in listed Indian companies. Investment through the FVCI route offers the following primary benefits:

- An FVCI can make and dispose of investments at negotiated prices that are not subject to RBI's pricing regulations and is therefore not subject to any limit on returns unlike other foreign investors.
- Pre-IPO share capital held by an FVCI would not be subject to a lock-in period of six months post the date of allotment in an IPO subject to the FVCI having held the shares for a minimum period of six months (from the date of purchase by the FVCI), unlike most of the other pre-IPO share capital of such Indian companies. Further, in case such equity shares have resulted pursuant to conversion of fully paid-up compulsorily convertible securities, the holding period of such convertible securities as well as that of resultant equity shares together shall be considered for the purpose of calculation of six months period and convertible securities shall be deemed to be fully paid-up, if the entire consideration payable thereon has been paid and no further consideration is payable at the time of their conversion.
- Certain open offer obligations contained in the SEBI Takeover Regulations are not applicable to a transfer of shares from an FVCI to the promoters of the target company pursuant to an agreement between the FVCI and such promoters.
- FVCIs registered with SEBI have been accorded Qualified Institutional Buyer status and would accordingly be eligible for subscribing to securities at the IPO of a VCU through the book- building route.
- FVCIs can invest in equity or equity linked instrument or debt instrument issued by an Indian 'start-up' irrespective of the sector in which the start-up is engaged. A start-up is an entity (that is a private limited company, a registered partnership firm or an LLP) which complies with the definition and conditions laid down in Gazette notifications issued by the DPIIT.

Q19. Are there any restrictions or investment norms for FVCIs?

FVCI investments are subject to the SEBI FVCI Regulations and the other regulations on foreign investment. The limitations which apply to FVCI investments at present include the following:

- An FVCI is required to designate its investible funds for investment into India at the time of seeking registration. Accordingly, the investment conditions and restrictions would be applicable with respect to such investible funds. The conditions concerning investible funds are required to be satisfied by the end of its life cycle;
- A registered FVCI must maintain a prescribed asset composition of its investible funds:
  - where at least 66.67% of its investible funds must be invested in unlisted equity shares or equity

linked instruments (i.e. instruments convertible into equity shares or share warrants, preference shares, debentures compulsorily or optionally convertible into equity) of VCUs (i.e. Indian companies whose shares are not listed on any recognised stock exchange in India and which are not engaged in certain specified business) or investee companies;

- whilst not more than 33.33% of its investible funds may be invested, inter alia, by way of subscription to an IPO of a VCU or investee company, (a) whose shares are proposed to be listed or (b) debt or debt instruments of VCU or investee company in which FVCI already has investment by way of equity or (c) through preferential allotment of equity shares of a listed company (subject to a lock-in period of one year) or through special purpose vehicles which are created for the purpose of facilitating or promoting investment in accordance with the SEBI FVCI Regulations.

- An FVCI can invest its total funds committed in one VCF or Category I AIF or units of a scheme or of a fund set up by a VCF or by a Cat-I AIF.
- An FVCI may, however, not invest in securities of a VCU engaged in most categories of NBFCs, gold financing, activities or any other activity not permitted under the industrial policy of the GOI. Presently, FVCIs are permitted to invest in securities of companies which are not listed on stock exchanges at the time of issuance and which are engaged in any sector out of a list of 10 prescribed sectors. These are biotechnology, IT related to hardware and software development, nanotechnology, seed research and development, research and development of new chemical entities in pharmaceutical sector, dairy industry, poultry industry, production of bio-fuels, hotel-cum-convention centres with seating capacity of more than 3,000, and infrastructure sector as given in the Harmonised Master List of Infrastructure sub-sectors approved by GOI.

Q20. Has any relaxation been provided to start-ups to attract foreign investment?

Pursuant to the GOI's stated objective of promoting the ease of doing business and contributing to an eco-system conducive for growth of entrepreneurship, RBI has brought about necessary amendments to enable start-up initiatives, irrespective of the sector in which they are engaged, to receive foreign venture capital investment. FVCIs registered under the SEBI FVCI Regulations, have now been permitted to invest in equity, equity linked instruments or debt instruments issued by eligible start-ups, irrespective of the sector in which such start-up is engaged provided that if the investment is in equity instruments, then the sectoral caps, entry routes and attendant conditions apply. Further, FVCIs have been permitted to acquire from, or transfer any security or instrument held by them to, any resident or non- resident at a price mutually acceptable to the parties.

Further, NDI Rules enables foreign investors (not being entities or persons who are registered in or are citizens, as applicable, of Pakistan and Bangladesh) to purchase convertible notes issued by eligible start-up companies (that is, duly formed private companies recognised as start-ups by the DPIIT) for an amount of INR 25 lakhs (approx. USD 30,488) or more in a single tranche. The issue of shares against such convertible notes would have to be in accordance with Schedule I of NDI Rules. Acquisition or transfer by way of sale of convertible notes by a person resident outside India to or from another person resident in or outside India, would take place in accordance with pricing guidelines prescribed by RBI. If such eligible start-up companies are engaged in sectors which are in the approval route, prior approval from government would have to be obtained for such issuance or transfer of convertible notes. A NRI or an OCI may acquire convertible notes on non-repatriation basis.

Q21. What are the ECB norms in India?

In terms of the '*Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations*' issued by the RBI on 26 March 2019 (as amended from time to time) ("**ECB Master Directions**"), external commercial borrowings ("**ECBs**") are commercial loans in the form of bank loans, floating/fixed rate notes, bonds, debentures

(other than fully and compulsorily convertible instruments) raised by '*eligible resident entities*' from '*recognized non-resident entities'.* All borrowings in the form of ECB should conform to parameters such as *inter alia* minimum average maturity period ("**MAMP**"), permitted and non-permitted end-uses, and maximum all-in-cost ceiling. As per the FDI policy circular dated 15 October 2020, non-convertible debentures, optionally convertible debentures or partially convertible debentures for issue of which funds have been received on or after May 1, 2007 are considered as *'debt'*. The only exclusion to the ECB regime is the issuance of fully and compulsorily convertible debentures.

ECBs are governed by ECB Master Directions and various other regulations issued under FEMA, including the '*Foreign Exchange Management (Borrowing and Lending) Regulations, 2018*' dated December 12, 2018 and the '*Foreign Exchange Management (Guarantees) Regulations, 2000*' dated May 03, 2000. The parameters apply in totality and not on a standalone basis. The RBI has also issued the '*Foreign Exchange Management (Debt Instruments) Regulations, 2019*' on October 17, 2019, which governs investments by FPIs, NRIs and OCIs in debt instruments such as government securities, treasury bills, non-convertible debentures/bonds issued by an Indian company, security receipts issued by asset reconstruction companies, debt instruments issued by banks that are eligible for inclusion in regulatory capital, bonds issued by PSUs, amongst others.

The ECB Master Directions enable '*eligible resident entities*' to borrow from '*recognized non-resident entities*' in the following forms:

- Loans including bank loans;
- Floating / fixed rate notes / bonds / debentures (other than fully and compulsorily convertible instruments);
- Trade credits beyond three years;
- Foreign Currency Convertible Bonds ("**FCCBs**");
- Financial Lease; and
- Foreign Currency Exchangeable Bonds ("**FCEBs**").

ECBs may be availed under two routes:

- Automatic route, in respect of which the cases are examined by authorised dealer category- I banks; and
- Approval route, in respect of which applications made through authorised dealer banks are examined by RBI.

The framework for raising loans through ECB comprises of following two options:

- Foreign currency denominated ECB; and
- Rupee Denominated ECB.

Under the ECB Master Directions, all entities eligible to receive FDI are considered as '*eligible borrowers*'. Further, the following entities are also eligible to raise ECB:

- Port Trusts;
- Units in SEZ;
- SIDBI;
- EXIM Bank; and
- Registered entities engaged in micro-finance activities, viz., registered Not for Profit companies, registered societies/trusts/cooperatives and non-government organisations (permitted only to raise INR ECB).

Recognized non-resident entities / lenders and investors under the ECB Master Directions should be resident of FATF or IOSCO compliant country, including on transfer of ECBs. However,

- Multilateral and Regional Financial Institutions where India is a member country will also be considered as recognised lenders;
- Individuals as lenders can only be permitted if they are foreign equity holders or for subscription to bonds/ debentures listed abroad; and
- Foreign branches / subsidiaries of Indian banks are permitted as recognised lenders only for foreign currency denominated ECB (except FCCBs and FCEBs). Foreign branches / subsidiaries of Indian banks, subject to applicable prudential norms, can participate as arrangers/underwriters/market-makers/traders for Rupee denominated Bonds issued overseas. However, underwriting by foreign branches/subsidiaries of Indian banks for issuances by Indian banks is not allowed.

The ECB Master Directions provides a ceiling in terms of the interest rate/ 'all-in cost ceiling' that can be charged in relation to an ECB and it is: Benchmark Rate (which, in case of foreign currency, is any widely accepted interbank rate or Alternate Reference Rate of 6-month tenor, applicable to the currency of borrowing) (a) plus 550 bps spread (for the existing foreign currency ECBs as of 8 December , 2021 whose Benchmark Rate is linked to LIBOR and (b) plus 500 bps spread for all other foreign currency ECBs and Benchmark Rate (which, in case of Rupee denominated

ECBs, is prevailing yield of the Government of India securities of corresponding maturity) plus 450 bps spread. For ECBs raised between 1 August, 2022 till 31 December, 2022, by 'eligible borrowers' of 'investment grade' rating from Indian Credit Rating Agencies (CRAs), the all-in-cost ceiling was temporarily increased by 100 bps.

Some of the newly established ARRs are: (a) Secured Overnight Financing Rate for USD-denominated loans; (b) Sterling Overnight Index Average for GBP-denominated loans; and (c) Tokyo Overnight Average Rate for JPY-denominated loans.

As per the ECB Master Directions, all-in cost includes rate of interest, other fees, expenses, charges, guarantee fees, ECA charges, whether paid in foreign currency or Indian rupees but will not include commitment fees and withholding tax payable in Indian rupees.

RBI has stipulated the MAMP as three years. However: (a) manufacturing sector companies may raise ECBs with MAMP of one year for ECB up to USD 50 million or its equivalent per financial year; (b) if the ECB is raised from foreign equity holder and utilised for working capital purposes, general corporate purposes or repayment of Rupee loans, MAMP would be five years; (c) ECBs with a MAMP of 10 years can be raised for working capital purposes and general corporate purposes. Borrowings by NBFCs for the above maturity for on-lending in relation to the above purposes are also permitted; (d) ECBs with a MAMP of seven years can be availed for repayment of Rupee loans obtained domestically for capital expenditure; as also by NBFCs for on-lending for the same purpose; (e) For repayment of Rupee loans availed domestically for purposes other than capital expenditure and for on-lending by NBFCs for the same, the MAMP is required to be 10 years. For the categories mentioned at (b) to (e) above, ECB cannot be raised from foreign branches / subsidiaries of Indian banks.

The call and put option, if any, shall not be exercisable prior to completion of MAMP.

ECB proceeds cannot be utilized for (i) real estate activities, (ii) investment in capital market, (iii) equity investment, (iv) working capital and general corporate purposes, except in case of ECB raised for the purpose as mentioned at (b) and (c) above, (v) repayment of Rupee loans, except in case of ECB raised for the purpose as mentioned at (d) and (e) above, and (vi) On-lending to entities for the above activities, except in case of ECB raised by NBFCs as given at (c), (d) and (e) above.

ECB proceeds are permitted to be parked abroad as well as domestically. ECB proceeds meant only for foreign currency expenditure can be parked abroad till utlisation and can be invested in certain liquid assets. ECB proceeds meant for rupee expenditure should be repatriated immediately for credit to their rupee accounts with AD Category-I banks in India and may be parked in term deposits for a maximum period of 12 months which term deposits should be kept unencumbered.

ECB for Start-Ups

Eligible start-ups (entities recognised as a start-up by the GoI), have been permitted to raise ECB under automatic route as per a separate framework. The salient features under this framework include the following:

- **Recognised Lender**
  Eligible start-ups may raise ECB under this framework from recognised money lenders who are residents of a FATF compliant country. However, foreign branches/ subsidiaries of Indian banks and overseas entity in which Indian entity has made overseas direct investment as per the extant Overseas Direct Investment Policy will not be considered as recognized lenders under this framework.

- **Amount, All-in-Costs, End-Use Restrictions**
  ECB raised under this framework should not exceed USD 3 million per financial year and may be raised in any freely convertible currency or INR or combination of both. In case of borrowing in INR, the non-resident lender, should mobilise INR through swaps/outright sale undertaken through an AD Category-I bank in India. No all-in-cost ceiling has been prescribed and can be mutually agreed upon between the lender and the borrower and ECB under this framework may be raised for any expenditure in connection with the business of the borrower.
- **Forms of ECB**

The borrowing can be in form of loans or non-convertible, optionally convertible or partially convertible preference shares. Conversion of such ECBs into equity is freely permitted subject relevant applicable regulations for foreign investment in Startups.

Q22. Are there any limitations on repatriation of dividend or royalty or consultancy fees?

There are no restrictions specific to non-residents on the remittance of dividends. However, as noted above, restrictions do exist on the ability of a company to declare a dividend under the Companies Act, 2013 and the Companies (Declaration and Payment of Dividend) Rules, 2014. The dividends (net of applicable taxes) declared on foreign investments can be remitted freely through normal banking channels.

Non-convertible or optionally convertible preference shares and bonds are treated as an ECB and the rate of interest has to be within the limits provided in the ECB policy.
All remittances for royalty fall under the automatic route.

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

4. Overseas Investments

Q1. How are overseas investments regulated?

The regime for overseas investment in India has undergone significant changes in August 2022 with the implementation of a new regulatory framework that is set out in:

- the Foreign Exchange Management (Overseas Investment) Rules, 2022 ("**OI Rules**") notified by the Central Government on August 22, 2022;
- the Foreign Exchange Management (Overseas Investment) Regulations, 2022 ("**OI Regulations**") issued by the Reserve Bank of India ("**RBI**") on August 22, 2022; and
- the Foreign Exchange Management (Overseas Investment) Directions, 2022, ("**OI Directions**") issued by the RBI on August 22, 2022.

The OI Rules, OI Regulations and OI Directions are collectively referred to as the OI Framework.

Q2. What are the investment routes available for overseas investment by a person resident in India?

The OI Framework prescribes for two categories of overseas investments, namely:

- overseas portfolio investment ("**OPI**"); and
- financial commitment, which includes overseas direct investment ("**ODI**").

Overseas investments may be made through the following two routes:

- the automatic route (i.e., without requiring the prior approval of the Reserve Bank of India ("**RBI**")); or
- the approval route (i.e., with the prior approval of the RBI or the Central Government, as the case may be).

Q3. What is direct investment outside India?

Overseas investment may be in the form of ODI or OPI.

ODI has been defined to mean investment: (i) by way of acquisition of any unlisted equity capital of a foreign entity or subscription as a part of the memorandum of association of a foreign entity; (ii) an investment in 10% or more of the paid up equity capital of a listed foreign entity; or (iii) investment with control where investment is less than 10% of the paid up equity capital of a listed foreign entity. For this purpose, 'control', has been defined in the OI Rules as 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 that entitle them to 10% or more of voting rights or in any other manner in the entity.

OPI on the other hand means investments, other than ODI, in foreign securities, except in unlisted debt securities or securities issued by a person resident in India who is not in an International Financial Services Centre ("**IFSC**").

Q4. Who is eligible to make overseas investment from India under the automatic route?

Overseas investment can be made by any of the following persons:

- a company incorporated in India;
- a body corporate incorporated under any law for the time being in force;
- a partnership firm registered under the Indian Partnership Act, 1932;
- a limited liability partnership ("**LLP**") registered under the Limited Liability Partnership Act, 2008.

Resident individuals ("**RI(s)**") have also been permitted to undertake overseas investment, and such investments are subject to other prescribed conditions, as detailed under our response to question 21 of this Chapter.

Q5. In which sectors is overseas investment permitted?

Overseas investment is generally permitted in a foreign entity that is engaged in a *bona fide* business activity, i.e., any business activity permissible under any law in force in India and the host country or host jurisdiction, as the case may be.

However, a person resident in India is not permitted to make ODI in a foreign entity engaged in (i) 'real estate activity'; (ii) gambling in any form; and (iii) dealing with financial products linked to the Indian rupee. 'Real estate activity' means buying and selling of real estate or trading in transferable development rights, but does not include development of townships, construction of residential or commercial premises, roads or bridges for selling or leasing. 'Financial products linked to Indian Rupee' includes non-deliverable trades involving foreign currency-INR exchange rates, stock indices linked to Indian market, etc.

In addition, special conditions are applicable to investment by Indian entities in a foreign entity engaged in financial services activity:

- Where the Indian entity making such investment is engaged in the financial services sector:
  - the Indian entity should have posted net profits during the preceding 3 financial years;
  - the Indian entity should be registered with or regulated by a financial services regulator in India; and
  - the Indian entity should have obtained approval, as may be required, from the regulators of such financial services activity, both in India and the host country or host jurisdiction, for engaging in such financial sector activities.

Q6. What are the terms and conditions applicable to ODI by an Indian Party under the automatic route?

In terms of the OI Framework, ODI made by an Indian entity is subject to, *inter alia*, the following conditions:

- The 'total financial commitment' of the Indian entity in all the foreign entities taken together at the time of making the financial commitment must not exceed the eligible limit, i.e., 400% of the net worth of the Indian entity as on the date of the last audited balance sheet. However, any financial commitment in excess of USD 1 billion, or its equivalent, in a financial year, would require prior approval of RBI even when the total financial commitment is within the eligible limit. The ceiling of 400% of the net worth also applies to:
  (i) amount raised by issue of American Depository Receipts ("**ADR**") or Global Depository Receipts ("**GDR**") and stock-swap of such receipts;
  (ii) proceeds from External Commercial Borrowings ("**ECB**") that have been utilized towards making the financial commitment which exceeds the amount of the corresponding pledge or creation of charge on assets which has already been counted towards the financial commitment limit. However, utilization of balances held in the Exchange Earners' Foreign Currency account or the amounts raised by issue of ADR or GDR issues and stock-swap of such receipts prior to the date of notification of the OI Framework shall not be reckoned towards the 400 % ceiling.
- ODI should be made in an overseas foreign entity having limited liability and engaged in a bona fide business activity.
- ODI should not be in companies engaged in real estate or gambling or dealing with financial products linked to the Indian rupee in any form, as explained above.
- The overseas investment or transfer of such investment (including swap of securities) by Indian entities in foreign entities registered or incorporated in Pakistan, or any other countries notified by the Central Government, from time to time, are permissible with prior approval from the Central Government.
- An Indian entity may lend or invest in any debt instrument issued by a foreign entity or extend non-fund based commitment to or on behalf of a foreign entity, including overseas step down subsidiary ("**SDS**") of such Indian entity only if such Indian entity is eligible to make ODI, has made ODI in the foreign entity and the Indian entity has acquired control in such foreign entity at the time of making such financial commitment.
- Additionally, the OI Framework also prohibits financial commitment by an Indian entity in a foreign entity that has invested or invests into India, at the time of making such commitment, or thereafter which, either directly or indirectly, results in a structure with more than two layers of subsidiaries.

Q7. How is 'total financial commitment' reckoned for the purposes of ODI? How is net worth calculated for the purposes of ODI?

The 'total financial commitment' of the Indian entity in all the foreign entities taken together at the time of making the

financial commitment must not exceed the eligible limit, i.e., 400% of the 'net worth' of the Indian entity as on the date of the last audited balance sheet or as directed by the RBI in consultation with the Central Government from time to time.

For companies, the OI Framework has adopted the concept of 'net worth' under the Companies Act, 2013. For LLPs and a registered partnership, net worth shall be the sum of the capital contribution of partners and undistributed profits of the partners after deducting therefrom the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the last audited balance sheet.

Q8. Does the entire investment abroad have to be made in a single tranche?

The investment abroad may be made in multiple tranches. However, the Indian entity should ensure that the sum of all tranches and all ODIs, that is, the total financial commitment, does not exceed 400% of its net worth at the time of making the relevant tranche of investment.

Q9. What are the sources of funds from which ODI may be made?

A person resident in India may use the following sources of funds for making ODI:

- by remittance made through banking channels;
- from funds held in an account maintained in accordance with the provisions of the Foreign Exchange Management Act, 1999 ("**FEMA**");
- by swap of securities;
- by using the proceeds of ADR or GDR or stock-swap of such receipts or ECBs raised in accordance with the provisions of FEMA and the rules and regulations made thereunder for making ODI or financial commitment by way of debt by an Indian entity.

Q10. Are there any valuation requirements in relation to the shares through which ODI is made?

The issue or transfer of equity capital of a foreign entity from a person resident outside India or a person resident in India to a person resident in India who is eligible to make such investment or from a person resident in India to a person resident outside India is subject to a price arrived on an arm's length basis. The authorised dealer bank ("**AD Bank**"), before facilitating a transaction is required to ensure compliance with arm's length pricing taking into consideration the valuation as per any internationally accepted pricing methodology for valuation.

Q11. Are Indian Parties permitted to remit funds for the purpose of participation in the bidding process for the acquisition of a foreign company?

A person resident in India who is eligible to make ODI may make remittance towards earnest money deposit or obtain a bid bond guarantee from an AD Bank for participation in bidding or tender procedure for the acquisition of a foreign entity. In case of an open-ended bid bond guarantee, it is required to be converted into a close-ended guarantee within 3 months from the date of award of the contract.

Q12. Are there any general considerations which the RBI may take into account while granting approval to Indian entities not generally permitted to make ODI?

RBI may, *inter alia*, take into account the following factors while considering an application for approval of ODI under the approval route:

- Background and brief details of the transaction;
- Reason(s) for seeking approval mentioning the extant FEMA provisions;
- Observations of the designated AD Bank with respect to the following:
  - prima facie viability of the foreign entity;
  - benefits which may accrue to India through such

investment;
  - financial position and business track record of the Indian entity and the foreign entity;
  - any other material observation.
- Recommendations of the designated AD Bank with confirmation that the applicant's board resolution or resolution from an equivalent body, as applicable, for the proposed transaction(s) is in place.
- Diagrammatic representation of the organisational structure indicating all the subsidiaries of the Indian entity horizontally and vertically with their stake (direct and indirect) and status.
- Valuation certificate for the foreign entity (if applicable).

Q13. Can an Indian Party issue guarantees in favour of its offshore subsidiary? Is the RBI's approval required at the time of the enforcement of a guarantee?

Indian entities are permitted to issue guarantees on behalf of its offshore subsidiary or SDS in which the Indian entity has obtained control through the foreign entity.

Guarantees may also be provided by a group entity of such Indian entity in India, being a holding company (which holds at least 51% stake in the Indian entity) or a subsidiary company (in which the Indian entity holds at least 51% stake) or a promoter group company, which is a body corporate. RI promoters of an Indian entity may also provide guarantees on behalf of an Indian entity, which will be reckoned towards the total financial commitment limit of such Indian entity.
However, no guarantee can be 'open ended'. In case of a performance guarantee, 50% of the amount of guarantee is to be reckoned towards the financial commitment limit, and the time specified for the completion of the contract shall be the validity period. Where the invocation of performance guarantee breaches the prescribed limit of financial commitment in force, prior permission of RBI is required to be obtained before remitting beyond the prescribed limit. Roll-over of guarantee is not to be treated as fresh financial commitment where the amount on account of such roll-over does not exceed the amount of the original guarantee. Such roll-over is required to be reported in terms of the OI Regulations.

Q14. Can an acquirer borrow funds for the purposes of overseas investment?

Indian banks are permitted to extend financial assistance to Indian companies for acquisition of foreign securities of foreign entities. Indian acquirers also have the option of funding overseas acquisitions through ECBs subject to compliance with the regulations governing ECB and satisfaction of the conditions applicable to Overseas Investment under the automatic route.

Q15. Is an Indian entity permitted to pledge its shares in the offshore subsidiary or SDS, or create a charge over its assets in India or those of the offshore subsidiary or SDS?

An Indian entity which has made ODI by way of investment in equity capital in a foreign entity is permitted to:

- pledge the equity capital of the foreign entity in which it has made ODI or of its or SDS in favour of an AD Bank or a public financial institution in India or an overseas lender, for availing fund based or non-fund based facilities for itself or for any foreign entity in which it has made ODI or its SDS outside India or in favour of a debenture trustee registered with SEBI for availing fund based facilities for itself; or
- create a charge by way of mortgage, pledge, hypothecation or any other identical mode over (i) its Indian assets in favour of an AD bank or a public financial institution in India or an overseas lender as security for availing of the fund based or non-fund based facility or both, for any foreign entity in which it has made ODI or for its SDS outside India; or (ii) the assets outside India of the foreign entity in which it has made ODI or SDS in favour of an AD bank in India or a public financial institution in India as security for availing of the fund based or non-fund based facility or both, for itself or any foreign entity in which it has made ODI or for its SDS outside India or in favour of a debenture trustee registered with SEBI in India for availing fund based facilities for itself.

Further the value of the pledge or charge or the amount of the facility, whichever is less, will be reckoned as financial commitment, unless the facility has been availed by the Indian entity for itself. Additionally, loans from an overseas lender shall not be from any country or jurisdiction in which financial commitment is not permissible under the OI Rules.

Q16. Can an Indian entity make overseas investment by way of exchange or swap of shares of an Indian company?

Yes, depending on the transaction structure, an Indian entity may make overseas investment by way of exchange or swap of shares of an Indian company and subject to the inward leg of the transaction also being compliance with rules governing foreign direct investment. However, where swap of equity capital results in acquisition of any equity capital which is not in conformity with the OI Rules/ OI Regulations, e.g., ODI in foreign entity engaged in financial services activity, foreign entity having a subsidiary/SDS, etc., such equity capital must be disinvested within a period of 6 months from the date of such acquisition.

Q17. What are the reporting requirements incumbent on the investor under the OI Framework?

The investor is required to make an application for remittance of foreign exchange to the AD Bank under the automatic route in the prescribed form. The investor who has made ODI or OPI, or making financial commitment or undertaking disinvestment in a foreign entity is required to report the same within the prescribed timelines under the OI Regulations.

A person acquiring equity capital in a foreign entity through ODI is required to submit an Annual Performance Return ("**APR**") to RBI through the AD Bank, every year on or before December 31, based on the audited financial statements of the foreign entity.

Where the person resident in India does not have control in the foreign entity and the law of the host country does not mandatorily require auditing of the books of account of the foreign entity, the APR may be submitted based on the un-audited financial statements of the foreign entity provided the same is certified by the statutory auditors of the Indian entity or by a chartered accountant where the statutory audit is not applicable. In addition, the person resident in India is required to report the details regarding acquisition or setting up or winding up or transfer of a SDS or alteration in the shareholding pattern in the foreign entity during the reporting year in the APR. No APR shall be required to be filed if (i) a person resident in India is holding less than 10% of the equity capital without control in the foreign entity and there is no other financial commitment other than by way of equity capital; or (ii) the foreign entity is under liquidation.

Q18. Apart from the reporting and approval requirements, are there any other obligations which an Indian Party needs to fulfil in relation to ODI?

An Indian entity which has made ODI is required to:

- Receive and submit to the AD Bank, share certificates or any other document as per the applicable laws of the host country or the host jurisdiction, as an evidence of investment in the foreign entity within 6 months from the date of effecting remittance or the date on which the amount to be capitalised became due to the Indian entity or on the date on which the amount due was allowed to be capitalised;
- Realize and repatriate to India all dues receivable from the foreign entity the amount of consideration received on account of transfer or disinvestment of such ODI and the net realisable value of the assets on account of the liquidation of the foreign entity as per the laws of the host country or the host jurisdiction, as the case may be, within 90 days from the date when such receivables fall due or the date of such transfer or disinvestment or the date of the actual distribution of assets made by the official liquidator;
- Submit the APR to the AD Bank, based on the financial

statements of each foreign entity for the preceding year;
- Submit an annual return on foreign liabilities and assets to RBI; and
- In addition, an Indian entity which has made ODI is permitted to transfer/ disinvest such investment only after a period of 1 year from the date of such investment.

Q19. Is Portfolio investment overseas by a listed Indian entity permitted?

A listed Indian entity may make OPI not exceeding 50% of its net worth as on the date of its last audited balance sheet, in accordance with the provisions of the OI Framework.

OPI by a person resident in India in the listed equity capital of a listed entity, even after its delisting, is to continue to be treated as OPI until any further investment is made in the entity, i.e., any further investment made in the equity capital of the foreign entity after its delisting shall be made as ODI.

Q20. Is investment in equity/ equity linked instruments of offshore venture capital undertakings permitted?

Yes, investments in equity/ equity linked instruments of offshore venture capital undertakings is permitted, subject to such venture capital undertaking being duly regulated by the regulator for the financial sector in the host jurisdiction. Such overseas investment shall be considered as OPI.

Q21. What are the stipulations regarding overseas investment by individuals resident in India?

RBI has given general permission to RIs to acquire foreign securities subject to the limits prescribed under the Liberalized Remittance Scheme ("**LRS**"), unless specified otherwise as detailed below. Under the LRS, RIs are permitted to remit up to USD 250,000 per financial year (April to March) outside India to undertake any permitted current or capital account transaction or a combination of both which includes acquisition of debt and non-debt instruments of overseas listed companies or otherwise.

An RI may acquire or hold overseas investment by way of the following, in accordance with the provisions of the OI Framework:

- ODI in an operating foreign entity not engaged in financial services activity and which does not have subsidiary or SDS where the RI has control in the foreign entity;
- OPI, including by way of reinvestment;
- ODI or OPI, as the case may be, by way of:
  - capitalisation, within the time period, if any, specified for realisation of any amount due from the foreign entity the remittance of which is permitted under FEMA or does not require prior permission of the Central Government or the RBI;
  - swap of securities on account of a merger, demerger, amalgamation or liquidation;
  - acquisition of equity capital through rights issue or allotment of bonus shares;
  - gift from a person resident outside India in accordance with the provisions of the Foreign Contribution (Regulation) Act, 2010 and the rules and regulations made thereunder;
  - gift from a RI, without any limit;
  - inheritance from a person who may or may not be a resident in India, without any limit; and
  - qualification shares for holding a management post in the foreign entity;
  - issuance by a foreign entity of shares or interest under Employee Stock Ownership Plan or Employee Benefits Scheme or sweat equity shares offered by such overseas entity, without any limits, provided that the issue of Employee Stock Ownership Plan or Employee Benefits Scheme are offered by the issuing overseas entity globally on a uniform basis.

However, RIs are not permitted to make any financial commitment to a foreign entity by way of debt.

Q22. Can a person resident in India make overseas investment in an IFSC in India?

A person resident in India may make overseas investment in an IFSC inter alia subject to the following conditions:

- in the case of an ODI made in an IFSC, the approval by the financial services regulator concerned, wherever applicable, shall be decided within 45 days from the date of application;
- an Indian entity not engaged in financial services activity in India, making ODI in a foreign entity, which is directly or indirectly engaged in financial services activity, except banking or insurance, who does not meet the net profit condition (as discussed above), may make ODI in an IFSC;
- a person resident in India may make contribution to an investment fund or vehicle set up in an IFSC as OPI;
- a RI may make ODI in a foreign entity, including an entity engaged in financial services activity, (except in banking and insurance), in IFSC if such entity does not have subsidiary or SDS outside IFSC where the RI has control in the foreign entity.

5. Acquisition of Shares

Q1. What are the various modes of acquisition of shares of an existing company?

Typically, shares or instruments convertible into shares, of an existing company may be acquired by way of:

- subscription and allotment of newly issued shares by the company; or
- a secondary purchase of shares from existing shareholder(s) of the company.

Such issuance, allotment or sale of shares has to be undertaken in compliance with the provisions of the Companies Act and the rules framed thereunder, FEMA and the rules and regulations framed thereunder (in case one of the parties is a non-resident or is owned or controlled by non-residents) and other applicable laws. In respect of issuance by and acquisition of shares of Indian companies listed on a stock exchange, additional requirements under the SEBI ICDR Regulations, the SEBI Listing Regulations and the SEBI Takeover Regulations have to be duly followed and complied with.

Q2. What are the stages at which Indian companies typically seek to access capital?

A company may seek to access capital at various stages of its growth cycle, including at the time of:

- Incorporation and initial set up (mandatory);
- Placements during establishment phase where the company may seek:
  - venture capital placements;
  - strategic placements;
  - private equity placements;
  - IPO and pre-IPO placements;
- Follow-on Offerings (post listing) such as:
  - Domestic: Follow-on public offer, rights issues, bonus issues, qualified institutions placements, preferential allotments; or
  - International: GDR, ADR, foreign currency convertible bond.

Q3. What are the rules and regulations that are relevant to a fresh issue of shares by way of preferential allotment?

The Companies Act mandates that a preferential allotment of shares is subject to the prior approval of the shareholders by way of a special resolution. Further, the price of such shares should be determined by the valuation report of a registered valuer (except in case of preferential allotment of shares by a listed company).

The issuance of such shares should also be authorised by the AoA of such company. The preferential allotment will also have to comply with the provisions of the Companies Act governing the private placement of securities which includes the requirement of issuance of a private placement offer cum application letter, restrictions on the number of people to whom the offer may be made, limitations on the release of public advertisements or marketing of the offer, etc. The Companies Act also restricts the utilization of monies raised through private placement (retained in a designated bank account) until allotment is made and the return of allotment is filed with the RoC within 15 days from the date of allotment, and prescribes the penalty for non-filing of return of allotment within prescribed time period. The Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2018 have dispensed with the erstwhile requirement of the value of the offer or invitation per person being at least INR 20 thousand (approx. USD 244) of the face value of securities. Every public company is required to issue securities only in dematerialised form. Further, as per the Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023, every private company (other than a small company) is now mandated to issue securities in dematerialised form.

A preferential allotment by a public listed company is subject to the SEBI ICDR Regulations and the SEBI Listing Regulations (as amended from time to time), which prescribe:

- the eligibility requirement for the acquirer to participate in a preferential allotment;
- the process and the approvals of the shareholders and the stock exchanges required for such preferential allotment;
- the time period within which the allotment process is required to be completed;
- the process for determination of the price at which the

acquirer can subscribe to the shares; and

- the lock-in on the pre-preferential shareholding of the acquirer and the lock-in on the shares and instruments convertible into shares, that are preferentially allotted to non-promoters or promoters of the company as the case may be.

The necessity for obtaining regulatory approvals in the case of foreign investors seeking to subscribe to shares under the FDI route or the FPI route would be dependent on the activities of the target company and whether investment in companies carrying out such activities is permitted to be made under the automatic route under the applicable FEMA rules and regulations.

A *post facto* filing and an annual return in the applicable prescribed forms would have to be made to the RBI, reporting the subscription of shares as discussed in Chapter 3 (*Foreign Investment*).

Q4. What are the options available to a seller to sell existing shares of an Indian company?

A seller may exit its investment in an Indian company in a number of ways. Following are the exit options that are commonly availed by sellers:

Negotiated sale off the stock exchange

A seller may sell its shares to resident Indians or non-residents through a negotiated deal. In this regard, please note the following:

- Non-resident to Non-resident: A person resident outside India (other than an NRI or an OCI or an erstwhile OCB) can transfer, by way of sale or gift, Equity Instruments (as defined under Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("**NDI Rules**")) of an Indian company or units held by it to any person resident outside India.
- An NRI or an OCI, holding Equity Instruments of an Indian company or units on repatriation basis, can transfer the same by way of sale or gift to any person resident outside India.
- An NRI or an OCI or an eligible investor under Schedule IV of NDI Rules, holding Equity Instruments of an Indian company or units on a non-repatriation basis, can transfer the same by way of gift to an NRI or an OCI or an eligible investor under Schedule IV of NDI Rules, who shall hold it on a non-repatriable basis.
- Non-resident to Resident: A person resident outside India holding Equity Instruments of an Indian company or units can transfer the same to a person resident in India, by way of sale or gift or can sell the same on a recognized stock exchange in India, subject to compliance with the pricing guidelines, reporting requirements etc.
- Resident to Non-resident: A person resident in India holding Equity Instruments of an Indian company or units, or an NRI or an OCI or an eligible investor under Schedule IV of NDI Rules, holding Equity Instruments of an Indian company or units on a non-repatriable basis, can transfer the same to a person resident outside India:
  - by way of sale, subject to compliance with the entry routes, sectoral caps, pricing guidelines, reporting requirements, etc. as may be specified by RBI;
  - by way of gift, with prior approval of RBI, in the prescribed manner and subject to specified conditions, such as, the donee should be eligible to hold such security under NDI Rules, gift should not exceed 5% of the paid-up capital of the Indian company or each mutual fund scheme, the applicable sectoral cap of foreign investment application to such Indian company should not be breached and the value of security to be transferred together with any security transferred to any person resident outside India as gift during the financial year should not exceed rupee equivalent of USD 50,000.

Qualified IPO or sponsored ADR / GDR:

- In case the target company is an unlisted company, the seller may require that the company undertake an IPO and list the shares on a stock exchange. In such cases, the seller would have the option to offer for sale its shareholding in the target company as part of the listing process or exit thereafter. However, such an exit would be subject to compliance with the SEBI ICDR Regulations and the SEBI Listing Regulations which typically require special rights to fall away at listing as well. There would also be considerations in terms of the SEBI Insider Trading Regulations particularly in view of

the offer document which will be released to the public at which time no other UPSI can be made available to specific persons.

- In case the target company is a listed company, the seller may require the company to support a sponsored ADR /GDR program, where the underlying shares are offered by the shareholder as opposed to a fresh issue of shares by the target company to form the shares underlying the depository receipts issued. Such exit route also requires other conditions and criteria such as a minimum prior holding period, etc. to be satisfied by the seller. Depository receipts may also be issued by eligible listed companies, including companies in the International Financial Service Centre in India, under the Depository Receipts Scheme, 2014 (as amended in 2019) and the Framework for Issue of Depository Receipts released by SEBI through a circular dated October 10, 2019.

Buy-back by the company:

The target company may buy-back the shares held by the seller. Under the Companies Act, a company can buy-back only up to 25% of the aggregate of paid-up capital and free reserves of the company in a single financial year, and not more than 25% of the aggregate of the paid up capital and free reserves. The buy-back may only be funded out of the proceeds of a fresh issue of securities (other than securities of the variety being bought back), the securities premium account or the company's free reserves. The debt owed by the company should not exceed twice its paid-up capital and free reserves after such buy-back. Further, unless the buy-back is of 10% of the total paid-up equity capital and free reserves or less, it would require the approval of the shareholders at a general meeting by way of a special resolution. The buy-back offer is required to be made on a pro-rata basis to the existing shareholders. Listed companies would have to additionally comply with the provisions of SEBI (Buy-back of Securities) Regulations, 2018. Companies with non-resident shareholders would have to ensure compliance with the NDI Rules and applicable foreign exchange regulations.

On an Indian stock exchange:

In the case of target companies which are listed, a seller (including a non-resident seller) is permitted to sell its investment on the stock exchange subject to the conditions specified under the NDI Rules. Subject to the sale being at the prevailing market price, the investor may freely repatriate the sale proceeds outside India upon payment of applicable taxes.

SEBI (Delisting of Equity Shares) Regulations, 2021 ("Delisting Regulations")

Delisting of equity shares of a company which are listed on a recognised stock exchange is governed by the Delisting Regulations. Delisting of equity shares is not permitted unless a period of at least 3 years has elapsed since the listing of such class of equity shares, The Delisting Regulations also govern delisting of equity shares having superior voting rights, from all or any of the recognised stock exchanges where such shares are listed, after providing an exit opportunity to the shareholders, unless the delisting is initiated by the stock exchange by a reasoned order to the company. The delisting should not be pursuant to buy-back of the equity shares or preferential allotment, which has taken place in the 6 months prior to the delisting. An acquirer which has sold the equity shares of the company during the period of 6 months prior to the date of the initial public announcement to delist by the company, cannot propose to delist the company. An acquirer cannot directly or indirectly, employ funds of the company to finance an exit opportunity or for acquisition of shares in case of compulsory delisting.

A sale of shares on the floor of a stock exchange cannot typically be made to an identified buyer. A special provision has however been made for the consummation of large transactions on the exchange which are pursuant to private arrangements concluded off the exchange for the sale and purchase of shares of listed companies. Such transactions are required to be completed on the 'block trade' window of the stock exchange, which is operational for a specified period of the day, and is required to be done between an identified buyer and an identified seller. A revised mechanism has been put in place by SEBI with effect from January 1, 2018 in respect of block deals. Under the revised mechanism, the transaction has to be concluded at a price which is within 1% of the applicable block reference price. The reference price for execution of block deals in the morning block deal window will be the previous day closing price or adjusted previous close price (on account of corporate action) of the security.

If security is not traded on the previous day then the latest available close price will be considered. The reference price for block deals in the afternoon block deal window will be the volume weighted average market price of the trades executed in the stock in the equity segment between 1:45 PM to 2:00 PM. If trades are not executed between 1:45 PM to 2:00 PM, the reference price considered will be previous close price of that security. The minimum order value for block deal should be INR 10 crores (approx. USD 1.22 million). There is no specific requirement of minimum order quantity applicable for a block deals. Further, by way of an amendment to the SEBI Takeover Regulations, with effect from July 1, 2020, SEBI has now permitted acquirers to acquire such shares of listed companies through preferential issue or through the stock exchange settlement process through the block trade mechanism as well, subject to compliance with certain conditions.

Please see Chapter 3 (*Foreign Investment*) for further details on transfer of equity instruments by non-residents.

Remittance of profits

As a general rule, remittance of profits (from investments in India) is generally permitted in case of investment under the FDI route as such investment is made on a repatriable basis, subject to compliance with applicable pricing guidelines, though in certain circumstances approval of RBI may be required. However, in certain sectors where securities held by an FDI investor are subject to lock-in restrictions, such as in the case of 'construction development', the NDI Rules permit such investor to transfer its stake to another person resident outside India, within the lock-in period without repatriation of foreign investment. Further, NRIs and OCIs are permitted to purchase equity instruments of an Indian company or LLP or a firm or proprietary concern, subject to certain conditions, on a non-repatriation basis. Furthermore, in case of exercise of an employee stock option by a person resident outside India, where such person was issued such option when he was resident in India, is required to hold the shares acquired after exercising the option on a non-repatriation basis.

Q5. Are there pricing restrictions applicable to subscription / acquisition of shares? Are there special restrictions applicable to foreign investors?

Please refer to our response to Question 11 under Chapter 3 (*Foreign Investment*), for a discussion on pricing restrictions applicable to foreign investors in case of subscription as well as acquisition of shares and other equity instruments.

In addition, the Companies Act provides for the concept of a "registered valuer" in an attempt to provide a proper mechanism for valuation of various assets and liabilities related to a company and to standardise the procedure thereof. The registered valuer is to be appointed by the audit committee or in its absence by the Board of the company.

Matters such as (i) further issue of shares of a company, other than rights issue; (ii) non-cash transaction involving directors; (iii) application before the NCLT for a scheme of compromise or arrangement; (iv) purchase of minority shareholding in accordance with Section 236 of the Companies Act and (v) valuation of assets in case of appointment of a liquidator for winding up of the company, require valuation to be completed by a registered valuer.

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

Registered valuers are required to undertake valuations in accordance with the valuation standards notified by the GOI based on the recommendations of a committee constituted in accordance with the provisions of the Companies (Registered Valuers and Valuation) Rules, 2017, to advise on valuation matters.

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

Q6. Can parties enter into put and call options for the sale and purchase of shares?

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

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

A person resident outside India holding Equity Instruments of an Indian company containing an optionality clause and exercising the option/ right, can exit without any assured return, subject to the pricing guidelines and a minimum lock-in period of one year or any sector specific minimum lock-in period as prescribed under NDI Rules, whichever is higher.

Please see Chapter 3 (*Foreign Investment*) for further discussion on Equity Instruments with optionality clauses.

Q7. Can the acquirer enter into an agreement with the other shareholders of the company on governance and transfer related aspects?

In practice, an acquirer enters into a shareholders' agreement with the other shareholders of the company for setting out terms and conditions of operation and management of a company. As is standard practice globally, a shareholders' agreement, typically, records and sets out, amongst others, the mutual rights and obligations inter se the shareholders; the manner in which the company would be managed and governed including matters concerning the right to appoint directors, affirmative voting rights, restrictive covenants and transfer restrictions on the shares held by the parties to the agreement.

As an additional step to make such agreements binding and enforceable on the company, provisions of such agreements are also incorporated into the AoA of the company. The issue of enforceability of transfer restrictions in case of the shares of a public company has been the subject matter of judicial scrutiny and conflicting judgments. However, the Companies Act clarifies that any contract or arrangement between two or more persons in respect of transfer of securities of a public company would be enforceable as a contract inter se the parties. As indicated above, in the event such company proposes to undertake an IPO, special rights granted to any shareholder including in relation to governance and transfer of equity shares, will have to cease to exist with effect from the date of listing of the equity shares on the relevant stock exchanges. Such rights may be revived post listing subject to approval of the shareholders of the company by way of a special resolution once in every five years starting from the date of grant of such special right. SEBI had introduced amendments to SEBI Regulations to clarify the treatment of shares with superior voting rights (**"SR Equity Shares"**). SEBI has permitted certain categories of listed entities with SR Equity Shares issued to their promoters or founders, to issue further SR Equity Shares to its shareholders who already hold SR Equity Shares only through a bonus, split or rights issue in accordance with the provisions of the SEBI ICDR Regulations and the Companies Act. Such companies are also subject to a higher standard of corporate governance under the Listing Regulations (for instance, at least half the board of such listed company shall comprise of independent directors, and the audit committee of such listed company is required to comprise of independent directors only). In addition, agreements entered into by shareholders, promoters, promoter group entities, related parties, directors, key managerial personnel, employees of the listed entity or of its holding, subsidiary or associate company and to which the listed entity is not a party should be notified by the aforementioned parties, to the listed entity within two working days of entering into such agreement.

Q8. Are there restrictions of insider trading applicable to the acquisition of shares of listed companies?

Yes, as per the SEBI Insider Trading Regulations, an "insider" (either on his own or on behalf of any other person) is prohibited from trading in securities on the basis of UPSI or communicating, counselling, or procuring to convey such information to another. An 'insider' is any person who is or was connected with the company or is deemed to have been connected with the company, such that it allows the person access to UPSI or is reasonably expected to allow such access or who is in possession of or has access to UPSI pertaining to a scheme.

UPSI means any information, relating to a company or its securities, directly or indirectly, that is not generally available, which upon becoming generally available, is likely to materially affect the price of the securities and includes (i) financial results; (ii) dividends; (iii) change in capital structure; (iv) mergers, de-mergers, acquisitions, de-listings, disposal, etc.; and (v) changes in the key managerial personnel. Information published on the website of a stock exchange, would ordinarily be considered generally available.

An act of subscribing, redeeming, switching, buying, selling, dealing, or agreeing to subscribe, redeem, switch, buy, sell, deal in any listed securities by any person would be 'trading' in securities for the purpose of SEBI Insider Trading Regulations. The communication of UPSI in furtherance of a legitimate purpose, performance of duties or discharge of legal obligations is not prohibited. All such information shall be handled within the organisation on a need to know basis. SEBI has clarified that whether the transfer is on-market and off-market, such transfer of securities will require pre-clearance, according to the code of conduct of the company.[1]

UPSI can also be provided in connection with a transaction that entails an obligation to make an open offer under the SEBI Takeover Regulations, provided the Board of the target listed company is of the informed opinion that sharing of such information is in the best interests of such company. If the transaction does not entail an open offer, but the Board is of the informed opinion that sharing of such information is in the best interests of the target listed company, UPSI can be shared, provided the UPSI is made generally available at least two trading days prior to the proposed transaction being effected in such form as the Board may determine to be adequate and fair to cover all relevant and material facts (in such case, the parties are further required to execute the necessary agreements for confidentiality and non-disclosure obligations).

The SEBI Insider Trading Regulations have been amended with effect from April 1, 2019 to the effect that the scope of disclosures has been expanded by substituting 'employees' with 'designated persons' (who must be determined by the Board or other analogous body of every listed company on the basis of such person's role and function in the organisation and the access that such role and function would provide to UPSI in addition to seniority and professional designation, and must include specified employees of such listed company, its material subsidiaries, intermediary or fiduciary). The designated persons are required to disclose certain information, such as name of their educational institutions, past employers, names and phone numbers of persons with whom they share a material financial relationship (if a person receives a payment equivalent to at least 25% of the payer's annual income during the immediately preceding 12 months).

In addition, the following compliance requirements were prescribed for listed companies with effect from April 1, 2019:

Every listed, or proposed to be listed company is mandatorily required to maintain a digital database containing the names and Permanent Account Number or any other identifier authorised by law where Permanent Account Number is not available of all persons or entities who receive the company's UPSI; and Board of every listed company is required to formulate a code of conduct in accordance with the SEBI Insider Trading Regulations.

The SEBI Insider Trading Regulations have been further amended by the Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2020 which has sought to strengthen the digital database to be maintained by the listed companies by requiring it to contain the nature of UPSI and the names of the persons

1 FAQ no. 28, Comprehensive FAQs dated 29 April 2021 on PIT Regulations.

who have shared the information and the names of the persons with whom such UPSI has been shared together with their PAN or other identifiers. Such database is also not permitted to be outsourced and is required to be maintained internally with adequate internal controls and checks such as time stamping and audit trails to ensure non-tampering of the database. Further, such database is also required to be preserved for period of at least 8 years after completion of the relevant transactions. In the event of any investigation or enforcement proceedings such database is required to be preserved till the completion of such proceedings.

Q9. Can the acquirer undertake a due diligence exercise prior to the investment? Are there any restrictions on conducting such exercises with respect to a listed company?

It is common practice to conduct a legal, financial and/or tax due diligence prior to investing in private companies or public unlisted companies. Due diligence exercises may also be undertaken on a listed company, subject to the provisions of the SEBI Insider Trading Regulations.

Certain matters in relation to any company would form part of public record and may be accessed by applying to the appropriate authority (such as the RoC or the stock exchanges) on the payment of necessary fees. Specific documents and records of information are also required to be maintained by companies at their registered offices and can be reviewed by shareholders. Needless to say, the quantum and quality of publicly available information is more extensive in relation to publicly listed companies than private companies.

Q10. Can an acquirer undertake a leveraged acquisition in India?

Subject to the rules against financial assistance and the limitations on the ability to pledge shares of an Indian company, a non-resident acquirer may leverage overseas to fund the acquisition of shares in India. However, the ability of an acquirer to acquire shares by leveraging locally within India is restricted because of, inter alia, the following factors:

- Investing companies with foreign investment / foreign owned operating cum investing companies are not permitted to leverage funds from the domestic market for making downstream investments in India;
- Prohibition on the use of foreign debt for investment in capital markets under the end-use restrictions imposed by the guidelines governing ECB;
- Restrictions under the Banking Regulation Act, 1949 on banks holding shares in a company beyond a prescribed threshold, including as a pledgee, mortgagee or absolute owner.

Q11. What are the disclosures mandated in relation to the acquisition or disposal of shares of a target company? Are there special disclosures applicable to foreign investors?

The SEBI Takeover Regulations, the SEBI Listing Regulations and the SEBI Insider Trading Regulations prescribe continual and periodic disclosures in relation to acquisitions or changes to shareholding by shareholders holding above prescribed thresholds, to be made in the prescribed format to the target company and the stock exchange(s). Separate disclosure as well as reporting requirements under the foreign exchange rules would apply depending upon the route for the investment. Please refer to our response to Question 16 under Chapter 7 (*Takeovers*).

6. Private Equity

Q1. Are foreign PE investors recognized as a separate class of foreign investors?

No, foreign PE investors are not recognized as a separate class of foreign investors. Investment routes and other conditions that apply to foreign investment in India, apply to investment by foreign PE investors as well.

Q2. What entry routes are available for foreign PE investors to invest in India?

Foreign PE investors can invest through FDI, FPI or FVCI routes in various types of non-debt instruments. Please see Chapter 3 (Foreign Investments) for further details.

Q3. Does a foreign PE investor need to be registered with any regulatory authority in India?

This depends on the entry route (please see Chapter 3 (Foreign Investment) for further details). Foreign PE investors are not required to be registered in India for investment through the FDI route. However, foreign PE investors need to be registered with SEBI for investment through the FPI and FVCI routes.

Q4. Is it possible to raise funds, and form a PE fund in India?

Yes, it is possible to raise funds and form a PE fund in India, by registering the fund as an 'alternative investment fund' ("AIF") with SEBI, under the SEBI (Alternate Investment Fund) Regulations, 2012, subject to minimum corpus and other investment requirements.

AIFs are categorized as follows:

- Category I AIFs: Funds which invest in start-ups, early stage ventures, social ventures, small or medium enterprises, infrastructure or other sectors / areas which the government or regulators consider as socially or economically desirable. This includes venture capital funds, SME funds, social venture funds, angel funds and infrastructure funds.
- Category II AIFs: Funds which do not fall within Category I or Category III, and which do not undertake leverage or borrowing other than to meet day-today operational requirements and as permitted. PE funds and debt funds for which no specific incentives or concessions are given by the government or any regulator typically fall within this category.
- Category III AIFs: Funds which employ diverse or complex trading strategies and may employ leverage including through investment in listed or unlisted derivatives. This includes hedge funds, funds which trade with a view to make short term returns or funds that are open-ended and for which no specific incentives or concessions are given by the government or any regulator.

Q5. What are the conditions for investment by an Indian alternative investment fund?

The following key conditions govern investments by all categories of AIFs:

- Category I and II AIFs cannot invest more than 25% of the investable funds in one investee company, directly or through investment in the units of other AIFs. Large value funds for accredited investors of Category I and II AIFs can, however invest upto 50% of the investable funds in an investee company, directly or through investment in units of other AIFs.
- Category III AIFs cannot invest more than 10% of the investable funds in one investee company, directly or through investment in the units of other AIFs. Large value funds for accredited investors of Category III AIFs can, however invest upto 25% of the investable funds in an investee company, directly or through investment in units of other AIFs.
- AIFs cannot invest in associates or units of AIFs managed or sponsored by its manager, sponsor or associates of its manager or sponsor, except with the approval of 75% of investors by value of their investment in the AIF.

In addition to above, several other conditions also apply with respect to the investments and borrowings by each category of AIFs.

Q6. Can a non-resident invest in an Indian AIF?

- Yes, non-residents are permitted to invest in Indian AIFs, and such investment is regulated.
- An AIF may also issue its units to a non-resident against swap of equity instruments of a special purpose vehicle proposed to be acquired by such AIF.
- Other general conditions applicable to foreign investment, such as pricing norms and sectoral caps, also apply to investment by non-residents in Indian AIFs.

Q7. Can an Indian AIF, that has foreign investment, invest freely in India?

- An Indian AIF can invest freely in India depending on whether its sponsor and investment manager are residents. Investments made by an AIF are treated as indirect foreign investment if the sponsor, manager or the investment manager: (i) is not owned and not controlled by resident Indian citizens; or (ii) is owned and controlled by non-residents. In case the sponsors, managers or investment managers of the AIF are individuals, for the treatment of downstream investment by such AIF as domestic, sponsors, managers or investment managers should be resident Indian citizens. Please see Chapter 3 (Foreign Investment) for conditionalities applicable to indirect foreign investment.
- A Category III AIF which has received any foreign investment can make portfolio investment in only those securities or instruments in which a FPI is allowed to invest.

Q8. Is it true that India prohibits foreign investors from having an 'assured return' on their investment?

This depends on the route of investment chosen by the foreign investor. Indian foreign exchange laws prohibit foreign investors from having an 'assured return' under the FDI route for equity instruments (such as equity shares and optionally / mandatorily convertible preference shares and debentures). However, this is not the case under the FPI or FVCI route, which are market driven.

Q9. What factors are typically taken into consideration when determining PE deal structures in India?

The primary factors that are typically considered for PE deals are tax efficiency (and, for this reason several investments are routed through jurisdictions that have beneficial tax treaties with India), exchange control restrictions (in case of investment by a foreign PE investor), securities laws restrictions (in case of investment in a listed company) and regulatory approvals (including exchange control related approvals, anti-trust approvals, and other sector specific approvals). Regulatory approvals can impact deal timelines.

In recent times, significant minority, majority and controlling stake acquisitions by PE investors, have become more common, particularly in case of stressed assets.

Q10. Is there an issue with a PE investor acquiring 'control' over an Indian company?

There is no legal issue with a PE investor acquiring 'control' over an Indian company. However, in certain situations, legal implications often drive investors to curtail their rights over the company's management and operations so as to ensure that they do not exercise 'control' over the company. Some of these common situations are:

- investment in a listed company, where the PE Investor does not want to trigger an "open offer." Please see Chapter 7 (Takeovers) for further details;
- investment in a company, where the sectoral regulations require such company to be Indian owned and controlled (relevant for a 'foreign' PE investor); and
- where the PE Investor does not want to become a 'promoter' of an Indian company as this has certain obligations and liabilities under law.

While 'control' has a statutory definition, it is widely worded, and there are no identified set of rights that do or do not confer control. This is presently a matter of interpretation, with limited guidance through judicial decisions.

Q11. What rights can a PE investor typically expect in a minority acquisition?

While the spectrum of rights available to a PE investor may vary, based on deal specific considerations, the typical gamut of rights in a minority acquisition includes:

- right to appoint nominee directors on the board of directors and their committees (whose presence is essential to constitute quorum);
- limited affirmative voting rights on certain reserved matters (see Q13 below);
- anti-dilution rights, to prevent dilution of the investor's shareholding;
- liquidation preference, where the investor is given payout in preference to other shareholders;
- pre-emptive rights, right of first offer or the right of first refusal (investors usually prefer a right of first offer), tag-along rights;
- a pre-decided exit mechanism which can include IPO, strategic sale, buyback; and
- information and inspection rights.

Q12. What rights can a PE investor typically expect in a majority acquisition?

While the spectrum of rights available to a PE investor may vary, based on deal specific considerations, the typical gamut of rights in a majority acquisition includes:

- right to appoint majority of board of directors and their committees (whose presence is essential to constitute quorum);
- right to appoint a chairman to the board of directors (with or without casting vote);
- right to appoint the key employees of a company;
- extensive affirmative voting rights (see Q13 below);
- anti-dilution rights, to prevent the dilution of controlling interest of the investor;
- liquidation preference, where the investor is given payout in preference to other shareholders;
- pre-emptive rights, right of first offer or the right of first refusal (investors usually prefer a right of first offer) tag-along and drag-along rights;
- a pre-decided exit mechanism which can include IPO, strategic sale, buyback; and
- extensive information and inspection rights.

Q13. What affirmative veto rights does a PE investor typically have?

Typically, a PE investor acquiring majority stake has extensive affirmative vote rights, whereas a minority investor's affirmative vote rights may be relatively limited.

These rights may include the following:

- *Share Capital:* Issuance of securities; variation of share capital and classes of securities; declaration of dividend;
- *Indebtedness:* Incurrence of material indebtedness; creation of security over the target's assets; redemption of preference shares;
- *Disposal of assets:* Sale, lease, license or disposal of material assets, undertakings, businesses or subsidiaries;
- *Acquisitions:* Undertaking acquisitions, joint ventures or material assets;
- *Commencement of new businesses:* Commencement or acquisition of any new line of business, substantially changing the business, or shutting down of any existing line of business;
- *Restructuring:* Listing, merger, demerger, scheme of arrangement, voluntary liquidation, winding-up, composition with creditors or other similar forms of restructuring;
- *Key employees:* Appointment or termination of the employment of any key employees;
- *Audit, tax related:* Appointment, change in terms of appointment or termination of auditors or change in the accounting, tax or revenue recognition practices;
- *Alteration of charter documents:* Amendment or restatement of the articles of association or memorandum of association;

- *Litigation:* Commencement or settlement of any material litigation, claim or proceeding;
- *Material contracts:* Entering into, amendments to, and termination of, any of material contracts; and
- *Related party transactions:* Entering into new transactions, or amending terms of existing transactions, between the target and its related parties.

Generally, these rights extend to activities of the target company and its subsidiaries.

Q14. Are there any limitations on enforceability of negative covenants in a shareholder's agreement?

Negative covenants in a shareholder's agreement typically include non-compete, non-solicitation, anti-disparagement and confidentiality obligations.

Under Indian contract law, agreements that are 'in restraint of trade' are void and unenforceable. Non-compete contracts are questionably in restraint of trade. On exception, non-compete contracts involving sale of goodwill are expressly enforceable, but are subject to limitations in terms of geography, time and scope.

Even though a non-compete clause has limited enforceability in India, having a non-compete restriction is standard in shareholders' agreements in PE investments to restrict the promoter group from indulging in competing business.

Q15. What are the exit options available to a PE investor?

There are several considerations that determine the exit route selected by investors such as the performance of the target, valuation, pricing considerations, tax considerations and guaranteed returns. Exit options which are typically available to a PE investor include an IPO, a third-party sale, a strategic sale, financial sale or exercise of a put option. (see, 'Acquisition of Shares' and 'Foreign Investment').

Q16. How has the Covid-19 pandemic affected the PE industry in India?

After the initial slowdown due to uncertainty around the pandemic, PE industry showed remarkable revival in India. In addition to traditional favourites like banking and financial services, sectors like life sciences, pharmaceuticals, healthcare, clean energy and technology enabled services have been in focus. Investor interest is also seen leaning towards technologically capable companies with robust levels of ESG (environmental, social and governance factors) compliance. However, this calendar year has witnessed a decrease in deal volumes owing primarily to global macroeconomic uncertainty, geopolitical challenges as well as higher interest rates / tighter credit markets. That said, the general, overall investor outlook on India continues to remain positive.

7. Takeovers

Tender offer obligations only arise with respect to public companies that are listed on a recognised stock exchange in India (**"Target"**). Such tender offer(s) are governed by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, as amended from time to time (the **"SEBI Takeover Regulations"**).

Q1. When does a takeover or a substantial acquisition of shares trigger a tender offer in India?

In terms of the SEBI Takeover Regulations, the acquisition of shares or voting rights or control of a Target triggers the obligation to make a public announcement of an open offer to the shareholders of such Target in the following circumstances:

- Any acquisition of shares or voting rights which entitles an acquirer (defined below), together with persons acting in concert (**"PACs"**) (defined below), to exercise 25% or more of the voting rights of the Target;
- Where an acquirer (together with PAC) has already acquired 25% or more of the voting rights of a Target but less than 75% of the shares or voting rights of the Target, acquires further shares or voting rights entitling them to exercise more than 5% of the voting rights of the Target in any financial year; or
- The acquisition of 'control' over the Target (directly or indirectly), irrespective of whether there has been an acquisition of shares or voting rights. 'Control' includes the right to appoint the majority of the directors on the board of the Target, or to control the management or policy decisions exercisable by a person individually or acting in concert, directly or indirectly, or by virtue of shareholding, management rights, shareholders/voting agreements or in any other manner. A director or officer of a Target is not considered to be in 'control' over such Target, merely by virtue of holding such position.

However, in case of a listed company which has its specified securities listed on the "Innovators Growth Platform", a reference to the 25 % as mentioned above is to be read as 49% instead.

Q2. Who is an "acquirer" and who are "persons acting in concert"?

An "acquirer" means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert, shares or voting rights in, or control over the Target.

PACs mean persons, who with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over the Target, pursuant to an agreement or understanding (whether formal or informal), directly or indirectly co-operate for the acquisition of shares or voting rights in, or exercise of control over, the Target. The SEBI Takeover Regulations set out certain categories of persons who are deemed to be PACs, unless the contrary is established. The shares or voting rights of PACs are included in the shareholding already held and/or proposed to be acquired by the acquirer in determining whether a tender offer requirement under the SEBI Takeover Regulations is triggered.

An acquirer and its PACs are jointly and severally responsible for fulfilling of applicable obligations under the SEBI Takeover Regulations.

Q3. Will acquisitions of overseas companies or unlisted Indian companies or listed Indian companies which consequently result in a substantial acquisition of shares or voting rights, or of control, of a Target trigger tender offer obligations under the SEBI Takeover Regulations?

Yes, the SEBI Takeover Regulations apply to both direct and indirect acquisitions of shares and/or voting rights and/or control over a Target. The thresholds set out in question 1 above would apply with respect to both direct and indirect acquisitions. If an indirect acquisition provides the ability to the acquirer (together with PACs) to exercise or direct the exercise of such percentage of voting rights in, or control over the Target, the acquisition of which would otherwise attract the obligation to make a public announcement of an open offer under the SEBI Takeover Regulations, then such an indirect acquisition will trigger the requirement to make an open offer to the shareholders of the relevant Target in accordance with the SEBI Takeover Regulations.

An 'indirect acquisition' is deemed to be a 'direct acquisition' for the purposes of the SEBI Takeover Regulations (including without limitation, the obligations relating to timing, pricing and other compliance requirements for a tender offer) if the proportionate net asset value or sales turnover or market capitalisation of the indirectly acquired Target, represented as a percentage of the consolidated net asset value or the consolidated sales turnover or the enterprise value of the entity or the business being acquired, is in excess of 80%, on the basis of the most recent audited annual financial statements.

For 'indirect acquisitions' which do not satisfy the above criteria and are not a deemed 'direct acquisition', some flexibility has been provided with respect to timing, pricing and other compliances. A key difference between direct acquisitions (and deemed direct acquisitions) on the one hand and indirect acquisitions on the other hand, is that in case of an indirect acquisition, the open offer process is 'paused' after the issuance of the public announcement of an open offer until the underlying/primary acquisition is completed. Once the primary acquisition is completed, the acquirer together with PACs are required to issue a detailed public statement (**"DPS"**) no later than 5 working days of completion of the primary acquisition of shares or voting rights in or control (directly or indirectly), after which the open offer process (and timelines) resume. For such 'paused' period, the acquirer needs to add an interest component to the offer price (as described in the question relating to offer price).

Q4. What is the difference between a mandatory tender offer and a voluntary tender offer?

Mandatory offers are tender offers triggered by the transactions described in question 1 above. As per the SEBI Takeover Regulations, a voluntary offer is an offer made by an acquirer who together with PACs (holds shares or voting rights in the Target entitling it/them to exercise 25% or more but less than 75% voting rights in the Target) to acquire at least an additional 10% of the voting rights in the Target (subject to the maximum permissible non-public shareholding), despite there being no trigger event. To clarify, any person holding less than 25% shares of the Target can also make a tender offer voluntarily by announcing an intent to hold more than 25% shares of the Target, though the minimum offer size in such cases needs to be 26% of the share capital of the Target. The minimum offer size in case of a mandatory offer is 26% of the total shares of the Target as of 10th working day from the closure of the tendering period (i.e. the period within which shareholders may tender their shares in acceptance of an open offer to acquire shares of a Target under the SEBI Takeover Regulations) taking into account all potential increases in the number of outstanding shares of the Target during the offer period (for e.g., through a preferential allotment of shares to the acquirer).

Q5. Can an unsolicited or hostile offer be made under the SEBI Takeover Regulations?

Yes, unsolicited or hostile offers are allowed under the SEBI Takeover Regulations. Any person can make an open offer provided the open offer is for a minimum size prescribed as set out in question 4 above.

Q6. Can a competitive offer be made under the SEBI Takeover Regulations?

Yes, a competitive offer (by way of making a public announcement) can be made by any person (other than the acquirer who has made a public announcement of an open offer) within 15 working days of the date of issuance of the DPS by the acquirer who has made the first public announcement. The minimum offer size of a competing offer has to be at least equal to the shares held by the original bidder, including the number of shares proposed to be acquired by the original bidder under the transaction triggering the requirement to make a mandatory open offer and the mandatory offer.

Once a competitive offer is made, the original bidder is entitled to revise the terms of its open offer (provided they are more favourable to the shareholders of the Target). The acquirers making competing offers can make upward revisions of the offer price at any time, up to one working day prior to the commencement of the tendering period. The competing open offer(s) are not permitted to be conditional on a minimum level of acceptances, unless the open offer first made is an open offer conditional as to the minimum level of acceptances.

Competing offers are treated at par and the board of directors of the Target needs to extend similar information and co-operation to all acquirers. A Target is not permitted to favour any acquirer or appoint any acquirer's nominees on the board of the Target, pending completion of the competing offers.

The schedule of activities and the tendering period for all competing offers is required to be carried out with identical timelines, and the last date for tendering shares in acceptance of every competing offer would stand revised to the last date for tendering shares in acceptance of the competing offer last made.

Q7. What is "creeping acquisition"?

Shareholders holding between 25% and 75% (i.e. the maximum permissible non-public shareholding) of a Target may (together with its PAC) consolidate their shareholding or voting rights by way of acquisitions of up to 5% of the voting rights of the Target in each financial year without triggering a mandatory open offer. This acquisition may be made through negotiated transfers, preferential allotments or on-market transactions. The 5% limit is calculated by way of an aggregation of the gross acquisitions of the acquirer and PACs without netting off any sales or dilution owing to fresh issue of shares by the Target. In case the aggregate acquisition of shares during a financial year exceeds 5% of the total voting rights of the Target, the acquirer is required to make a mandatory open offer in accordance with the SEBI Takeover Regulations. In any event an acquirer (together with PACs) is not entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Q8. Can the Target be delisted as part of the tender offer process under the SEBI Takeover Regulations?

Yes, the SEBI Takeover Regulations permit the acquirer to declare an intent to delist the Target in the DPS and, upon such declaration, the tender offer process pauses and the delisting process under the relevant SEBI regulations commences. If the delisting process succeeds in accordance with the relevant SEBI regulations, then the acquirer can proceed to delist the shares of the Target. If the delisting process fails in accordance with the relevant SEBI regulations, then the acquirer will need to file a draft letter of offer with the Securities and Exchange Board of India (**"SEBI"**) within 5 working days from the date of announcement of such failure and comply with all other applicable provisions of the SEBI Takeover Regulations. The acquirer will need to add an interest component of 10% per annum to the offer price for the period between the scheduled date of payment of consideration to the shareholders and the actual date of payment of consideration to the shareholders.

Q9. Are there any exemptions from the obligations under the SEBI Takeover Regulations?

While there are no exemptions from the disclosure requirements under the SEBI Takeover Regulations, certain transactions are exempted from tender offer obligations. The exemptions typically cover cases involving:

- *inter-se* transfer of shares amongst qualifying persons (such as transfer amongst immediate relatives, persons named as promoters in the shareholding pattern filed by the Target under the Indian listing regulations for not less than three years prior to the proposed acquisition, PACs for not less than three years prior to the proposed acquisition (and such PACs having been disclosed under the listing regulations) etc.);
- acquisition by way of transmission, succession and inheritance;
- increase in voting rights in a Target pursuant to corporate actions (such as rights issues and buy-backs) subject to certain conditions;
- acquisitions made in the ordinary course of business by inter alia an underwriter pursuant to an underwriting agreement and a registered market maker of a stock exchange in receipt of shares for which he is the market maker during the course of market making, a stock broker registered with SEBI on behalf of his clients in exercise of lien over the shares purchased on behalf of the client under the bye-laws of the stock exchange where such stock broker is a member;
- acquisition pursuant to an approved resolution plan under the IBC;

- acquisition of shares by lenders pursuant to conversion of their debt as part of a debt restructuring implemented in accordance with the guidelines specified by the Reserve Bank of India;
- acquisition of shares of voting rights or control of a Target that has stressed assets by way of preferential issue in compliance with certain prescribed conditions;
- increase in the voting rights in the Target without any acquisition of control pursuant to conversion of equity shares with superior voting rights of the Target into ordinary equity shares; and
- acquisition pursuant to schemes of arrangements (such as those involving the Target as a transferor or transferee company, or reconstruction of the Target, including amalgamation, merger or demerger, pursuant to an order of a court or a tribunal under any law or regulation, Indian or foreign).

Further, SEBI may, for reasons recorded in writing, grant exemption from the obligation to make an open offer for acquiring shares under the SEBI Takeover Regulations subject to such conditions as the SEBI deems fit to impose in the interests of investors in securities and the securities market.

Q10. How is the 'offer price' calculated under the SEBI Takeover Regulations?

The SEBI Takeover Regulations set out detailed methods of computation of the minimum price that is required to be offered to the public shareholders in a takeover offer. These methods vary depending on whether it is a direct acquisition (including deemed direct acquisition) or an indirect acquisition of shares.

For direct acquisitions of shares or voting rights in or control over the Target and indirect acquisitions (which are deemed to be direct acquisitions), the minimum offer price is the highest of the following:

- The highest negotiated price per share for any acquisition under the agreement attracting the obligation to make the open offer;
- The volume weighted average price paid or payable for acquisitions by the acquirer or PACs during the 52 weeks immediately prior to the date of the public announcement;
- The highest price paid or payable for any acquisition by the acquirer or PACs during the 26 weeks immediately prior to the date of the public announcement;
- The volume weighted average market price of the shares for a period of 60 trading days immediately prior to the date of the public announcement as traded on the stock exchange where the maximum volume of trading in the shares of the Target are recorded during such period (for frequently traded shares);
- For infrequently traded shares, the price determined by the acquirer and the manager to the open offer taking into account valuation parameters, including book value, comparable trading multiples and such other parameters as are customary for valuation of shares of such companies; and
- The per share value of the Target taken into account for an indirect acquisition of the Target (in cases of indirect acquisitions which are deemed direct acquisitions), if applicable.

In case of indirect acquisitions (where the parameters for a deemed direct acquisition are not satisfied), the offer price stands enhanced by an amount equal to a sum determined at the rate of 10% per annum for the period between the earlier of the date on which the primary acquisition is contracted or the date on which the intention or decision to make the primary acquisition is announced in the public domain, and the date of the DPS, provided such period is more than 5 working days.

Indirect acquisitions also mandate a "price attribution" where the proportionate net asset value or sales turnover or market capitalization of the underlying listed company represents is in excess of 15% of the directly acquired entity on the basis of the most recent audited annual financial statements. In such cases, the acquirer is required to compute and disclose, in the letter of offer, the per share value of the Target taken into account for the acquisition, along with a detailed description of the methodology adopted for such computation.

Furthermore, for direct as well as indirect acquisitions, the price paid for shares of the Target includes any price paid or agreed to be paid for the shares or voting rights in, or control over the Target, in any form whatsoever, whether stated in the agreement for acquisition of shares or in any incidental, contemporaneous or collateral agreement, whether termed as control premium or as non-compete fees or otherwise. Where

any acquisition by the acquirer or his PAC(s) is undertaken at a higher price than the price offered to the public shareholders during the offer period or within 26 weeks after the tendering period, the price offered to the public shareholders is required to be enhanced to such higher price. In such a scenario, the acquirer and his PACs are required to pay the difference between the highest acquisition price and the offer price, to all the shareholders whose shares were accepted in the open offer, within 60 days from the date of such acquisition.

Separately, in case the acquirer is unable to make payment to the shareholders who have accepted the open offer within the prescribed time period, the acquirer needs to pay interest at the rate of 10% per annum for the period of delay. However, if such delay was not attributable to any act or omission or commission of the acquirer, or due to the reasons or circumstances beyond the control of the acquirer, the SEBI may grant waiver from the payment of such interest.

Q11. What is the mandatory offer size under the SEBI Takeover Regulations?

An open offer, other than a voluntary open offer, is required to be made for a minimum of 26% of total shares of the Target as of the 10th working day from the closure of the tendering period, taking into account any potential increase in the number of outstanding shares during the offer period contemplated as of the date of the public announcement.

A voluntary offer is required to be made for a minimum of an additional 10% of the voting rights in the Target in case the person making the offer holds at least 25% stake in the Target. The mandatory offer size is required to be 26% of the share capital of the Target if the voluntary open offer is made by a person holding less than 25% shares of the Target.

If the validly tendered shares in an open offer are more than the offer size, then the validly tendered shares are required to be accepted on a proportionate basis.

Q12. What are the modes of payment under the open offer?

The SEBI Takeover Regulations permit consideration for the open offer to be paid in the following forms:

- Cash;
- Issue, exchange or transfer of listed shares in the equity share capital of the acquirer or of any PAC;
- Issue, exchange or transfer of listed secured debt instruments issued by the acquirer or of any PAC with certain minimum ratings;
- Issue, exchange or transfer of convertible debt securities entitling the holder to acquire listed shares of the acquirer or of any PAC; or
- A combination of the above.

If the acquirer or PACs acquire or agree to acquire shares during the 52 week period prior to the public announcement of the open offer constituting more than 10% of the voting rights in the Target and the consideration is paid in cash, the open offer must provide an option to the tendering shareholders to receive payment in cash and a shareholder who has not exercised an option in his acceptance is deemed to have opted for receiving the offer price in cash. In case of revision in the offer price, the mode of payment may be altered, subject to the condition that the component of the offer price to be paid in cash before such revision has not been reduced.

Q13. What are the main obligations imposed on the Target and its board of directors under the SEBI Takeover Regulations?

The SEBI Takeover Regulations mandate a neutral role for the Target during the offer period. The SEBI Takeover Regulations require the board of directors of the Target to ensure that during the offer period, the business of the Target is conducted in the ordinary course consistent with past practice.

Upon receipt of the DPS, the board of directors of the Target is required to constitute a committee of independent directors to provide reasoned recommendations on the open offer. Such recommendations along with the voting pattern of the meeting in which the open offer proposal was discussed needs to be published by the Target at

least two working days prior to the commencement of the tendering period in the manner as prescribed under the SEBI Takeover Regulations. The board of directors of the Target are required to facilitate the acquirer in verification of the shares tendered upon acceptance of the open offer. Furthermore, the board of directors of the Target are required to make available to all acquirers making competing offers any information and co-operation provided to any acquirer who has made a competing offer.

During the offer period, the Target or its subsidiaries are not permitted to undertake certain actions without the approval of the shareholders by way of a special resolution through postal ballot. These actions, subject to certain exceptions, include (i) alienation of any material assets (whether by way of sale, lease, encumbrance or otherwise) or entering into any agreement outside the ordinary course of business; (ii) effecting any material borrowings outside the ordinary course of business; (iii) issuance or allotment of any authorised but unissued securities entitling the holder to voting rights; (iv) implementing any buyback of shares or effecting any other change to the capital structure of the Target; or (v) entering into, amending or terminating any material contracts to which the Target or any of its subsidiaries is a party, outside the ordinary course of business (whether such contract is with a related party); or (vi) accelerating any contingent vesting of a right of any person to whom the Target or any of its subsidiaries may have an obligation, whether such obligation is to acquire shares of the Target by way of employee stock options or otherwise. In addition, during the offer period, no person representing the acquirer or any PAC can be appointed as a director of the Target. If the acquirer or any PAC is already represented by a director on the board of the Target, such director cannot participate in any deliberations of the board of directors of the Target or vote on any matter in relation to the open offer.

The Target is prohibited from fixing any record date for a corporate action on or after the 3rd working day prior to the commencement of the tendering period and until the expiry of the tendering period.

Q14. What is the typical process and timeline and process for a tender offer?

A brief timetable for an open offer (both direct and indirect offers) is given below. All days listed below are working days (WDs):

S. No.	Particulars	Direct (and deemed direct)	Indirect	Responsibility
1.	Signing of the Stock Purchase Agreement OR public announcement of an intent to acquire more than 25% shares, or control, of the Target	X	X	
2.	Public announcement to be made to all the stock exchanges on which the shares of the Target are listed.	X (in case of deemed direct acquisitions, the public announcement is to be made on the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain)	X + 4 WD	Acquirer or Manager
3.	Copy of the public announcement to be sent to SEBI and the Target.	X + 1 WD	Within X+ 5 WD Y = Closing of underlying transaction	Acquirer

S. No.	Particulars	Direct (and deemed direct)	Indirect	Responsibility
4.	The acquirer needs to open an escrow account. The amount to be deposited in escrow is to be 25% of the open offer consideration on the first INR 500 crores (approx. USD 61 million) + 10% of the balance open offer consideration, provided that where an open offer is conditional upon minimum level of acceptance, the higher of 100% of the consideration payable in respect of the minimum level of acceptance or 50% of the consideration payable under the open offer is to be deposited in cash in the escrow account. The escrow can be in the form of: • Cash; • 1% of the open offer consideration in cash + bank guarantee; • or frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin of a value equivalent to the escrow amount. In case of indirect acquisitions (which are not deemed direct acquisitions), (a) an amount equivalent to 100% of the consideration payable in the open offer needs to be deposited in the escrow account; and (b) deposit of securities as mentioned in point (c) above is not permitted.	X + 3 WD	Y + 3 WD	Acquirer
5.	Publication of the DPS through the manager in newspapers (English, Hindi and regional language daily with wide circulation).	X + 5 WD	Y + 5 WD	Acquirer or Manager
6.	Submission of one copy of the DPS to: SEBI, through the manager; All stock exchanges where the Target is listed; and The Target (at the registered office), and the Target is required to forthwith circulate it to the members of its board.	X + 5 WD	Y + 5 WD	Acquirer or Manager
7.	Draft letter of offer to be filed with (and prescribed non-refundable fee to be paid to) SEBI along with the manager's due diligence certificate through the manager and copy sent to (i) the Target at its registered office; and (ii) the stock exchanges where the shares of the Target are listed.	X + 10 WD	Y + 10 WD	Acquirer or Manager
8.	Upon receipt of DPS, the Board of the Target is required to constitute a committee of independent directors to provide reasoned recommendations on the open offer.	Any time after receipt of the DPS by the Target		Target

S. No.	Particulars	Direct (and deemed direct)	Indirect	Responsibility
9.	SEBI to provide its comments on the draft letter of offer (if any) within 15 working days from the filing of the draft letter of offer with SEBI (as specified above) and in the event SEBI specifies any changes, the manager and the acquirer will incorporate the same before dispatching the draft to the shareholders as specified below and the timeline will be extended to the 5th working day from the receipt of satisfactory reply to the clarification or information sought by SEBI.	X + 25 WD	Y + 25 WD	SEBI or Manager or Acquirer
10.	The Target, will furnish to the acquirer, a list of shareholders as per its register of members, within two working days from the Identified Date.**	X + 29WD	Y + 29 WD	Target
11.	Dispatch of letter of offer to the shareholders (whose name appear on the register of members of the Target on the Identified Date).	X + 32 WD (or within 7 WD from receipt of comments from SEBI)	Y + 32 WD (or within 7 WD from receipt of comments from SEBI)	Acquirer or Manager
12.	Publication of the written reasoned recommendations on the open offer to the shareholders of the Target (in a specified format) by the independent directors of the Target to be sent to the (i) SEBI; (ii) all the stock exchanges where the shares of the Target are listed; (iii) the manager of the open offer (and where there are competing offers, to the manager of the open offer for every competing offer).	X + 35 WD	Y + 35 WD	Target
13.	Issue of advertisement in a specified format announcing the schedule of activities for open offer, status of statutory and other approvals, if any, unfulfilled conditions, if any, and their status, the procedure for tendering acceptances and such other material detail as may be specified.	X + 36 WD	Y + 36WD	Acquirer or Manager
14.	Offer opens for tender of shares	X + 37 WD	Y + 37 WD	Acquirer or Manager
15.	Offer closes for tender of shares	X + 47 WD	Y + 47 WD	Acquirer or Manager

S. No.	Particulars	Direct (and deemed direct)	Indirect	Responsibility
16.	Completion of payment of consideration to all shareholders who have tendered shares in acceptance of the open offer. For the amount of consideration payable in cash, the acquirer will need to open a special escrow account with a banker to the issue and deposit such amount as would, together with cash transferred from the escrow account (i.e., an amount not exceeding 90% of the escrow account), make up the entire sum due and payable to the shareholders as the consideration payable under the open offer. An extension is granted to make the payments if any statutory approvals are yet to be received, subject to such non-receipt not being attributable to any willful default, failure or neglect on the part of the acquirer to duly pursue such approvals and the acquirer agreeing to pay interest (at specified rates) to the shareholders for the delay. The offer can also be withdrawn if the statutory approvals are not received, subject to the disclosure of such approvals in the DPS.	X+57 WD	Y+57 WD	Acquirer
17.	Acquirer to issue a post offer advertisement within five working days from the offer period, giving details including aggregate number of shares tendered, accepted, date of payment of consideration.	X + 62 WD	Y + 62 WD	Acquirer
18.	Release of the amounts deposited in the escrow to the acquirer within 30 days from the completion of payment of consideration to the shareholders who have tendered their shares in acceptance of the open offer.	X + 57WD + 30 days	Y + 57 WD + 30 days	Escrow Agent upon certification of the Manager
19.	Completion of the acquisition contracted under any agreement attracting the obligation to make an open offer to be not later than 26 weeks from the expiry of the offer period.	X + 57WD + 26 weeks	Y + 57 WD + 26 weeks	

** "Identified Date" means the date falling on the 10th working day prior to the commencement of the tendering period, for the purposes of determining the shareholders to whom the letter of offer is to be sent.

Q15. In what circumstances can an acquirer withdraw a mandatory or voluntary tender offer?

A mandatory or voluntary open offer may be withdrawn only in the event of:

- final refusal of a statutory approval (provided such requirement was specifically disclosed in the DPS and the letter of offer);
- the acquirer, being a natural person, has died;
- failure to meet the conditions stipulated in the underlying agreement triggering the open offer for reasons outside the reasonable control of the acquirer and such agreement is rescinded (subject to specific disclosure of such conditions in the DPS and the letter of offer).

In addition, SEBI can permit the withdrawal of an open offer in such circumstances which, in its opinion, merit withdrawal.

In the event of a withdrawal of the open offer, the acquirer is required to through the manager to the open offer, within 2 working days, - (i) make an announcement in the same public newspaper in which the public announcement of the open offer was published, providing the grounds and reasons for withdrawal of the open offer; and (ii) simultaneously with the announcement, inform in writing to the board of directors of the Target, all the stock exchanges on which the shares of the Target are listed and the Target at its registered office.

Q16. What are the key disclosure requirements under the SEBI Takeover Regulations?

Under the SEBI Takeover Regulations, the acquirer is required to disclose to every stock exchange where the shares of the Target are listed and to the Target its registered office (within two working days of receipt of intimation of allotment (in case of subscriptions) or acquisition or the disposal of shares or voting rights in the Target) in a specified format:

- its aggregate shareholding and voting rights in case of an acquisition which results in such shareholding or voting rights of the acquirer and its PACs aggregating to 5% or more of the shares of such Target;
- any subsequent change in shareholding or voting rights of 2% or more, as compared to the level of shareholding or voting rights at the time when the last disclosure was made.

Separately, in case of a listed company which has its specified securities listed on the "Innovators Growth Platform", with respect to disclosure of acquisition of shareholding/voting rights of a Target or a change thereof, the threshold needs to be read as 10% instead of 5% and where the change exceeds 5% instead of 2%.

For the purpose of disclosures under the SEBI Takeover Regulations, the acquisition and holding of any convertible securities are considered an acquisition of shares and the appropriate disclosures of such acquisitions and holdings will therefore be necessary. Further, subject to certain exceptions, shares taken by way of an 'encumbrance' in favor of a person is considered as an acquisition of shares by that person, and shares given upon release of encumbrance is considered as a disposal of shares, and the appropriate disclosures will need to be made by such person.

Promoters (along with the PACs) are required to disclosure to the stock exchange(s) where the shares of the Target are listed and the Target at its registered office, in a specified format, the details of shares in the Target (i.e. pledge or lien) encumbered by him or his PACs and the invocation and release of such encumbrance, within seven working days from the creation, invocation or release of the encumbrance, as the case may be, provided that such disclosure requirement would not be applicable where the relevant encumbrance is undertaken in a depository).

In addition, the promoters of a Target are required to make an annual declaration within seven working days from the end of each financial year (i.e., March 31st of each year) to the stock exchange(s) where the shares of the Target are listed and the audit committee of the relevant Target that they, along with PACs, have not created any encumbrance (directly or indirectly) on the shares held by them in the Target, other than the encumbrances already disclosed during the financial year.

The SEBI Takeover Regulations also prescribe certain disclosures (in addition to those described above) in cases of acquisitions which are exempt from the tender offer obligation.

8. Delisting

Delisting of securities means removal of securities of a listed company from a stock exchange. As a consequence of delisting, the securities of that company would no longer be traded on that stock exchange. The process of delisting is governed by:

- The Securities and Exchange Board of India ("**SEBI**") (Delisting of Equity Shares) Regulations, 2021 ("**Delisting Regulations**") for delisting of equity shares; and
- The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR Regulations**") for delisting of Non-Convertible Debt Securities ("**NCDS**") and Non-Convertible Redeemable Preference Shares ("**NCRPS**") [to be effective from 01 January 2024].

Q1. What are the kinds of delisting that may be effected?

There are four kinds of delisting permitted under the Delisting Regulations:

- voluntary delisting;
- compulsory delisting;
- delisting by operation of law (involving delisting in case of winding up proceedings of a listed company, proceedings under the Insolvency and Bankruptcy Code, 2016 (**"IBC"**), de-recognition or refusal of renewal of registration of stock exchanges where shares of companies are listed, etc.); and
- delisting of Small Companies (*as defined below*).

Q2. What are the circumstances under which voluntary delisting is not permitted?

Voluntary delisting of equity shares is not permissible in certain circumstances. The Delisting Regulations do not allow any company to apply for, and a recognised stock exchange to permit, delisting of equity shares where it is:

- prior to expiry of three years from the listing of that class of equity shares on any recognised stock exchange; or if any instruments issued by the company, which are convertible into the same class of equity shares that are sought to be delisted, are outstanding; or
- pursuant to buyback of equity shares by the company, including a buyback pursuant to consolidation or division of all or part of the equity share capital of the company, unless a period of six months has elapsed from the completion of the buyback; or
- pursuant to preferential allotment made by the company, unless a period of six months has elapsed from such allotment; or
- if the Acquirer (where **'Acquirer'** includes a person who decides to make an offer for delisting of equity shares or any entity belonging to the promoter(s) or promoter group along with the persons acting in concert) has sold equity shares of the company during a period of six months prior to the date of the initial public announcement.

Q3. When and how can a voluntary delisting be effected?

A company may delist its equity shares from all the recognised stock exchanges where they are listed by providing all the public shareholders, holding equity shares of the class which are sought to be delisted, an exit opportunity in accordance with the Chapter IV of the Delisting Regulations.

In addition, a company may delist its equity shares from the only recognised stock exchange where they are listed. In case if the shares are proposed to be delisted from some exchanges but continue to remain listed on any recognised stock exchange with a nationwide trading terminal (i.e., BSE Limited, National Stock Exchange of India Limited or any other recognised stock exchange which may be specified by SEBI in this regard), an exit opportunity need not be given to the public shareholders.

In the event, where the equity shares are delisted from some exchanges, but continue to remain listed on any recognised stock exchange and no exit opportunity is necessary, in order to delist the shares, the company's board of directors need to:

- pass an ordinary resolution to such effect;
- the company needs to publish a public notice of the proposed delisting in at least one English national daily with wide circulation, one Hindi national daily with wide

circulation and one regional language newspaper of the region where the concerned stock exchanges are located. This public notice should include the names of recognised stock exchanges from which the equity shares are intended to be delisted, the reasons for such delisting and the fact of continuation of listing of equity shares on recognised stock exchange having nationwide trading terminals.

- apply to the concerned recognised stock exchanges from which the delisting is sought (the application must be disposed of by the stock exchange within thirty days from the date of receipt of such application, complete in all respects); and
- disclose the fact of delisting in the first annual report of the company prepared after the delisting.

In the event where the equity shares are delisted from all the recognised stock exchanges where they are listed by providing all the public shareholders with an exit opportunity, the following process needs to be followed by the Acquirer and the company:

Process to be followed by the Acquirer:

- Appoint a merchant banker as manager to the exit offer;
- make an initial public announcement which should include, *inter alia*, reasons for delisting, to all the stock exchanges on which the shares of the company are listed which the stock exchanges will disseminate to the public;
- obtain approval from the board of directors of the company in respect of the Acquirer's proposal to delist the equity shares of the company within twenty-one days from the initial public announcement;
- on receipt of the in-principle approval from the recognised stock exchange, the Acquirer needs to make a detailed public announcement in at least one English national newspaper with wide circulation, one Hindi national newspaper with wide circulation in their all India editions and one vernacular newspaper of the region where the relevant recognised stock exchange is located followed by dispatch of letters of offer to the public shareholders not later than two working days from the date of public announcement;
- the bidding period will open within seven working days of the public announcement, and the offer will remain open for five working days for public shareholders to submit their tender;
- the Acquirer shall facilitate tendering of shares by the shareholders and settlement of the same, through the stock exchange mechanism as specified by the SEBI following which the manager to the offer needs to announce the outcome of the reverse book building process ("**RBB**") within two hours of the closure of the bidding period;
- within two working days from the closure of the bidding period, through the manager to the offer, make a public announcement in the same newspapers in which the detailed public announcement disclosing the success or failure of the RBB process, along with the discovered price accepted by the Acquirer in the event of success of this process. The public shareholders holding the equity shares of the company, which are sought to be delisted, are entitled to participate in the RBB process;
- after fixation of the floor price, the discovered price is determined through the RBB and the manager discloses it in the detailed public announcement and the letter of offer;
- the Acquirer has the option to: (a) provide an indicative price in respect of the delisting offer higher than the floor price; (b) revise the indicative price upwards before the start of the bidding period disclosing it to the shareholders; and (c) pay a price higher than the discovered price;
- the offer shall be deemed to be successful if the post offer shareholding of the Acquirer along with the shares accepted through the eligible bids at the final price determined reached 90% of the total issued shares of that class excluding: (a) the shares which were held custodian and against which depository receipts have been issued overseas; (b) shares held by a trust for employee benefit scheme; and (c) shares held by inactive shareholders such as vanishing companies and struck off companies, shares transferred to the Investor Education and Protection Fund's account and shares held in terms of the LODR Regulations;
- the Acquirer is bound to accept the equity shares: (a) tendered or offered in the delisting offer, if the discovered price determined through the RBB process is equal to the floor price or the indicative price, if any, offered by the Acquirer; (b) at the indicative price, if any offered by the Acquirer, even if the price determined through the RBB process is higher than the floor price but less than the indicative price, (a) and (b) set out in this paragraph does not apply if the discovered price is

higher than the indicative price.

- if the discovered price is not accepted by the Acquirer and no counter offer (at a price not less than the book value of the company as certified by the manager) is made by the Acquirer within two working days of the price discovery, the delisting offer fails;
- if minimum number of shares are not tendered or the Acquirer rejects the price discovered through RBB process, the delisting fails. The equity shares tendered/ offered shall be returned or released.

Process to be followed by the Company:

The board of directors, before considering the proposal of delisting, shall appoint a peer review company secretary to carry out due diligence. The company secretary shall carry out the due diligence and submit a report to the board of directors of the company certifying that the buying, selling, and dealing in the equity shares of the company carried out by the Acquirer and the top twenty-five shareholders is in compliance with the applicable provisions of securities laws;

- the board of directors, while considering the proposal for delisting, need to certify that: (a) the company and the Acquirer are in compliance with applicable laws; and (b) delisting, in their opinion, is in the interest of the shareholders of the company;
- the company shall communicate the decision of the board of directors to the stock exchanges along with: (a) the due diligence report; and (b) the audit report in respect of the equity shares sought to be delisted, covering a period of six months prior to the date of the application after which the stock exchanges need to disseminate this information to the public;
- the company needs to obtain prior approval of shareholders of the company by a special resolution passed through postal ballot/e-voting, after disclosure of all material facts in the explanatory statement sent to the shareholders in relation to such resolution (with votes in favor of the resolution being at least two times the votes cast against it);
- the company needs to apply to the concerned recognised stock exchanges for in-principle approval in the form specified by such recognised stock exchanges; and
- the application seeking in-principle approval for delisting shall be disposed of by the concerned recognised stock exchange within a period not exceeding fifteen working days from the date of receipt of such application complete in all respects.

If the offer is successful [i.e., the requisite number of shares have been tendered in the delisting offer and the Acquirer has either accepted the discovered price or is obligated to accept the discovered price (on account of it being either equal to the floor price, or less than/equal to the indicated price)], an application needs to be made to the stock exchanges for delisting the shares of the company. The remaining shareholders i.e., who did not participate in the offer, of the company will be entitled to tender their shares to the Acquirer for a period of one year from the date of delisting at the price at which the delisting was undertaken.

Q4. How is the voluntary delisting of Small Companies regulated?

Chapter 4 of the Delisting Regulations (above noted procedure) does not apply to voluntary delisting by a Small Company.

A Small Company is –

a) a company with paid up capital not exceeding INR 10 crores (approx. USD 1.22 million) and net worth not exceeding INR 25 crores (approx. USD 3.05 million);
b) a company whose number of equity shares traded, on all the recognised stock exchanges on which the equity shares of the company are listed, during the twelve calendar months immediately preceding the date of the board meeting in which the proposal for delisting is considered is less than 10% of the total number of shares; and
c) which company has not been suspended for any non-compliance from any of the recognised stock exchanges having nationwide trading terminals in the preceding one year **("Small Company")**.

In such cases, the communication made to the public shareholders needs to contain justification for the offer price with particular reference to the applicable parameters and specifically mention that consent for the proposal would include consent for dispensing with the exit price discovery through RBB method. The Acquirer of

Small Company can decide the exit price in consultation with the manager. The exit price cannot be less than the floor price determined as per the relevant provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, **(“Takeover Regulations”)**.

The Acquirer(s) is required to individually write to all public shareholders informing them of the proposal for delisting, stating the exit price and its justification and seeking consent of such public shareholders for the delisting. The public shareholders, irrespective of their numbers, holding 90% or more of the public shareholding give their consent in writing to the proposal and have consented to either sell their equity shares at the offered price or to remain holders of the equity shares even if they are delisted. The positive consents in this regard should be received within 75 working days from the date of first communication. Once the requisite consents of shareholders are received in writing, the Acquirer needs to make the payment of consideration in cash within 15 working days from the date of expiry of the 75 working days. Upon receiving the approval of the concerned recognised stock exchange, the shareholders can exit, and the delisting process is completed.

Q5. How is the RBB process effected?

RBB is a process used for efficient price discovery wherein offers are collected from the shareholders at a price equal to or above the floor price determined in accordance with the Takeover Regulations. The final offer price is one that takes the shareholding of Acquirer to 90% of total issued shares of that class[1] (excluding: (a) the shares which were held by a custodian and against which depository receipts have been issued overseas; (b) shares held by a trust for employee benefit scheme; and (c) shares held by inactive shareholders such as vanishing companies and struck off companies, shares transferred to the Investor Education and Protection Fund’s account and shares held in terms of the LODR Regulations). The shareholders may withdraw or revise their bids upwards not later than one day before the closure of the bidding period. However, downward revision of bids is not permitted.

The Acquirer has the option to accept the discovered price or reject the same. The Acquirer is required to accept the equity shares tendered or offered in the delisting offer, if the discovered price determined through the RBB process is: (a) equal to the floor price or the indicative price; and (b) higher than the floor price but less than the indicative price. The Acquirer has the option to accept the discovered price or reject the same. If the discovery price is not acceptable to the Acquirer, a counter offer may also be made, provided that the counter offer price is not be less than the book value of the company, as certified by the manager of the offer. Those investors who do not participate in the RBB process have an option to offer their shares for sale to the Acquirer at the same exit price for a period of one year from the date of delisting.

Q6. When is a delisting offer successful?

Except in cases where no counter-offer has been made by the Acquirer under the Delisting Regulations, a voluntary delisting offer is deemed to be successful only if:

- the post-offer Acquirer shareholding taken together with the shares accepted through eligible bids at the discovered price or the counter-offer price, as the case may be, reaches 90% of the total issued shares of that class (excluding: (a) the shares which were held by a custodian and against which depository receipts have been issued overseas; (b) shares held by a trust for employee benefit scheme; and (c) shares held by inactive shareholders such as vanishing companies and struck off companies, shares transferred to the Investor Education and Protection Fund’s account and shares held in terms of the LODR Regulations); and
- it is to be noted that in case of a delisting offer under the provisions of Takeover Regulations, the threshold limit of 90% for a successful delisting offer is calculated by taking into consideration the post offer shareholding of the Acquirer taken together with the existing

1 Illustration: Assuming floor price of INR 550 (approx. USD 7) per share, shareholding of the Acquirer at 75% and number of shares required for successful delisting as 1,500,000, the discovered price would be the price at which the Acquirer reaches the threshold of 90%, i.e., it would be INR 600 (approx. USD 7) per share.

shareholding (excluding: (a) the shares which were held by a custodian and against which depository receipts have been issued overseas; (b) shares held by a trust for employee benefit scheme; and (c) shares held by inactive shareholders such as vanishing companies and struck off companies, shares transferred to the Investor Education and Protection Fund's account and shares held in terms of the LODR Regulations), shares to be acquired which attracted the obligation to make an open offer and shares accepted though eligible bidding at the final price determined under the provisions of the Delisting Regulations; or

- if a counter-offer is made by Acquirer, the offer is deemed to be successful only if post offer Acquirer shareholding taken together with the shares accepted at the counter-offer price reaches 90%, of the total issued shares of that (excluding: (a) the shares which were held by a custodian and against which depository receipts have been issued overseas; (b) shares held by a trust for employee benefit scheme; and (c) shares held by inactive shareholders such as vanishing companies and struck off companies, shares transferred to the Investor Education and Protection Fund's account and shares held in terms of the LODR Regulations).

Q7. How is a company compulsorily delisted?

A recognised stock exchange may order the delisting of shares of a company for reasons including losses incurred by the company during the preceding three years and a negative net worth; suspension of trading of the company's securities for more than six months; infrequent trading of the company's shares during the preceding three years; public shareholding falls below 25%; and the company has failed to raise public holding to the required level within the timelines prescribed by the stock exchange after providing a reasonable opportunity to the company to explain.

The decision of delisting is required to be taken by a panel constituted by the stock exchange. Prior to making an order for delisting, the stock exchange is required to issue a notice of delisting in one English national daily, one Hindi national newspaper with wide circulation in their all-India editions and one regional language newspaper where the concerned stock exchange is located, to provide an opportunity to persons aggrieved by the proposed delisting to make representations before the stock exchange. The stock exchange will consider the representations (received within a period of fifteen days), if any, made by the company and other aggrieved persons pursuant to the aforesaid notices while passing the order for delisting of the equity shares of the company.

In addition, the stock exchange needs to undertake the following:

- Take steps to trace the promoter(s) of the company whose equity shares are proposed to be delisted to ensure purchase of equity shares by them from the public shareholders;
- consider the nature and extent of the non-compliance of the company (including verification of the status of compliance with the Registrar of Companies) and the number and percentage of shareholders who may be affected due to delisting;
- displaying the names of the company and its promoter(s) on the website of the stock exchange;
- filing of prosecution proceedings, if appropriate, against identifiable promoter(s) and directors of the company for non-compliance; and/or
- if appropriate, filing of a winding up petition against the company or making a request to the RoC to strike off the name of the company from the Registrar of Companies.

Subsequent to passing of the order of delisting the shares of a company, the stock exchange is required to:

- Appoint an independent valuer to determine the fair value of the delisted equity shares and such valuation shall be done in the same manner as in case of voluntary delisting;
- publish a notice in one English national daily, one Hindi national newspaper with wide circulation in their all India editions and one regional language newspaper where the concerned stock exchange is located, of such delisting along with disclosure of the name and address of the company, the fair value of the delisted equity shares determined by the valuer, and the names and addresses of the promoter(s) of the company who would be liable to purchase shares from the public shareholders;
- inform all other stock exchanges where the equity shares sough to be delisted are listed, about such delisting; and
- upload a copy of this order on their website.

The promoter(s) of the company are required to acquire the delisted equity shares from the public shareholders upon payment of the value determined within three months of the date of delisting from the recognised stock exchange, subject to the option of promoter retaining the shares.

As a consequence of compulsory delisting of a company, whose fair value is positive:

- No transfer by way of sale, pledge etc. may be effected of the shares held by the promoter/promoter group;
- all the corporate benefits for all delisted shares held by promoter/promoter group will be frozen; and
- the promoter(s) and whole-time directors of such delisted company will be ineligible to become directors of any listed company

Q8. What is the process involved in the delisting of a company by operation of law?

In case of winding up proceedings of a company whose equity shares are listed on a recognised stock exchange, a necessary corollary is delisting such company.

Generally, such proceedings are governed by the Companies Act, the Sick Industrial Companies Act or the IBC. In case of delisting of securities pursuant to a scheme sanctioned by Board of Industrial and Financial Reconstruction or the National Company Law Tribunal or a resolution plan approved under the IBC, such schemes and/or resolution plan typically lay down the specific procedure for delisting and the exit option to the existing public shareholders at a specified rate. In absence of such procedure and exit option being provided, the delisting of such company will be done in accordance with the provisions of the Delisting Regulations.

In the event SEBI withdraws the recognition granted to a stock exchange, or refuses renewal of recognition to it, SEBI may pass appropriate orders in respect of the status of equity shares of the companies listed on such a stock exchange. In cases where stock exchanges have been derecognised, SEBI has issued circulars: (a) prescribing the mechanism for listing of shares of such companies on other stock exchanges; and (b) providing for voluntary delisting by such company and exit to their shareholders.

Q9. Can SEBI relax strict enforcement of the Delisting Regulations?

According to Regulation 42 of the Delisting Regulations, SEBI may relax the strict enforcement of the Delisting Regulations and exempt any person or class of persons from the operation of all or any of the provisions of the Delisting Regulations for periods not exceeding 12 months, for furthering innovation in technological aspects through testing new products, processes, services, business models, etc. in live environment of regulatory sandbox in the securities markets. Further, any exemption granted by SEBI shall be subject to the applicant satisfying conditions specified by SEBI including conditions to be complied with on a continuous basis[2].

Q10. Can a delisted company re-list its shares?

Upon voluntary delisting of its equity shares, a company cannot seek listing of any of its delisted equity shares for a period of three years from the date of such delisting.
In case a company has been compulsorily delisted, the company cannot seek to list their delisted equity shares or access the securities market, directly or indirectly, for a period of ten years from the date of such delisting. Similar restriction is imposed on all the whole-time directors and promoter(s) (including any companies promoted by any of them) of the company whose shares have been compulsorily delisted.

An application for listing of delisted equity shares may be made without any tenure restriction if:

- A Small Company is seeking to re-list its delisted shares;
- the equity shares are listed and traded on the innovators

2 Regulatory sandbox means a live testing environment where new products, processes, services, business models, etc. may be deployed on a limited set of eligible customers for a specified period of time, for furthering innovation in the securities market, subject to such conditions as may be specified by SEBI.

growth platform pursuant to an initial public offer and which is delisted from the platform; or
- the equity shares have been delisted pursuant to a resolution plan under the IBC.

Reforms in delisting process

The SEBI board, on 28 September 2021, approved the proposal to amend the existing regulatory framework for delisting of equity shares pursuant to an open offer, as provided under the then existing Regulation 5A of the Takeover Regulations. Under the same, if an open offer was triggered, compliance with Takeover Regulations would take the incoming Acquirer's holding to above 75% or perhaps even 90%. However, to ensure compliance with Securities Contract (Regulation) Rules, 1957 (**"SCRR"**) the Acquirer would be forced to first bring his stake down to 75%. This would create an anomalous situation where if the Acquirer ended up holding shares above 75% but less than 90%, the delisting would fail and the Acquirer would have violated the minimum public shareholding norms under the SCRR.

This increased the complexity in the takeover of listed companies, especially where the Acquirer desired to get the company delisted pursuant to over the takeover. The proposed framework aimed to overcome this challenge.

The key features of the proposed framework as suggested by SEBI were as follows:

- The framework would be made available in the case of open offers under the Takeover Regulations for an incoming Acquirer who sought to acquire control under Regulation 3(1) (substantial acquisition of shares or voting rights) or Regulation 4 (acquisition of control) or Regulation 5 (indirect acquisition of shares or *control*)[3];
- if the Acquirer was desirous of delisting the target company, the Acquirer had to propose a higher price for delisting with suitable premium[4] over open offer price;
- if the response to the open offer lead to the delisting threshold of 90% being met, all shareholders who tendered their shares would be paid the same delisting price and if the response to the offer leads to the delisting threshold of 90% not being met, all shareholders who tendered their shares would be paid the same takeover price;
- if a company did not get delisted pursuant to the open offer under this framework, and the Acquirer crossed 75% due to the open offer, a period of 12 months from the date of completion of the open offer would be provided to the Acquirer to make further attempts to delist the company under the Delisting Regulations using the RBB mechanism. If delisting during this extended 12-month period was unsuccessful, the Acquirer then would have to comply with the minimum public shareholding norm within 12 months from the end of such period;
- if the Acquirer at the time of open offer, stated upfront that it would opt for remaining listed and the total stake at the end of the tendering period reaches above 75%, then the Acquirer could opt for either proportionately scaling down purchases made under both, i.e., the underlying share purchase agreement and the shares tendered under open offer, such that the 75% threshold was never crossed or, alternatively, the Acquirer would have to become compliant with minimum public shareholding within the time stipulated under SCRR; and
- while undertaking delisting under this proposed framework, all the provisions of the Delisting Regulations would be applicable *mutatis-mutandis*.

In accordance with this proposal, and to facilitate delisting of equity shares following an open offer, SEBI amended its Takeover Regulations in December 2021. While confirming largely the suggestions listed above, additional nuances have been added to iron out creases. These nuances include specifying that an Acquirer cannot be a promoter, promoter group, a person(s) in control; directly/indirectly associated with the promoter/person(s) in control; or hold more than 25% share or voting rights. An Acquirer also cannot acquire joint control with existing promoters/persons in control. Further, the amended Takeover Regulations specify that the indicative price for delisting must be in accordance with the Delisting Regulations and specify the floor price for further delisting attempts by Acquirers.

Recent developments:

Besides the regulatory changes discussed above, the following recent developments may be noted:

- To facilitate easier access and usage of data, SEBI by

3 Please note that Acquirer making an open offer under Regulation 3(2) of the Takeover Regulations is not covered here. Under Regulation 3(2) of the Takeover Regulations, an Acquirer holding 25% or more may acquire more than 5% in a financial year and trigger an open offer for acquiring 26%.

4 Please note that SEBI is yet to set out the parameters of what would constitute a "suitable premium".

way of a circular dated February 15, 2023, introduced the concept of Issue Summary Document (ISD) in XBRL format for voluntary delisting of equity shares.

- In August 2023, SEBI issued the Consultation Paper on Review of Voluntary Delisting Norms under the Delisting Regulations ('Consultation Paper'), to review certain aspects of voluntary delisting for equity shares, including the RBB process and provide alternate mechanisms. The Consultation Paper offered suggestions on critical aspects of the existing Delisting Regulations including: (i) the counter-offer mechanism under RBB; (ii) definition of floor price; (iii) propose alternatives to RBB; and (iv) reviewing the reference date for calculation of floor price.
  - **Review of the Counter-Offer Mechanism:** Where cumulative shareholding of the shares held by Acquirer and shares tendered by public shareholders does not reach 90%, it is proposed to reduce the threshold for counter-offer to below 90% but equal to or more than 75% (75%-90%) of the paid-up capital of the company. The floor price of the counter-offer shall be the Volume Weighted Average Price of the shares tendered by the willing shareholders in the delisting offer wherein the Acquirer failed to reach 90%.
  - **Floor Price under the Delisting Regulations:** An additional parameter, i.e., Adjusted Book Value, has been suggested, for computing floor price. This will apply to the delisting of frequently traded and infrequently traded shares.
  - **Alternatives to RBB:** Delisting at fixed price has been proposed, as an alternative to RBB for companies whose shares are frequently traded. This responds to the need to provide certainty to acquirers and shareholders with respect to pricing, arranging funds and deciding on participation in the delisting process. The fixed price mechanism also minimizes speculation post-announcement of a delisting offer.
  - **Reference Date for determining the Floor Price:** It has been proposed to change the reference date to the date of the initial public announcement, from the date of approval of the board meeting. For delisting equity shares of a subsidiary company under a scheme of arrangement, the reference date is the date on which prior intimation is given to stock exchanges.

The Consultation Paper also proposes to allow delisting of Investment Holding Companies ("**IHC**") through Schemes of Arrangement for selective capital reduction under the Companies Act, through: (a) transfer of underlying shares held by IHC to public shareholders in proportion to their shareholding; and (b) cash payments to public shareholders for investments made in unlisted companies and other assets. This alternate mechanism to RBB will only apply to listed IHCs having at least 75% of its total value comprising investments in other listed companies.

- Most recently, on 4 October 2023, SEBI has announced the creation of Working Groups to provide recommendations on simplification, enhance ease and reduce costs associated with various regulations. This flows from announcements in the Union Budget for FY 2023-24 to simplify, ease and reduce cost of compliance by financial sector regulators. Suggestions have been sought on simplification of the Delisting Regulations and the LODR Regulations. Accordingly, additional changes and paradigm shifts may be forthcoming in the existing process for delisting equity shares and NCDS respectively.
- Going ahead, SEBI will also be reviewing the compulsory delisting framework adopted by stock exchanges.

Delisting of Non-Convertible Debt Securities ('NCDS')

Background

In May 2023, SEBI issued a **Consultation Paper on Delisting of Non-Convertible Debt Securities** to examine the feasibility of creating a mechanism for delisting NCDS. This was necessitated by the absence of dedicated provisions dealing with non-convertible debt securities, unlike in the case of equity shares. It was recognized that listed entities could look to voluntarily delisting non-convertible debt securities for a variety of commercial reasons, including having less number of debt holders and restructuring needs due to financial distress. Best practices in other jurisdictions and stock exchanges were considered as well. The consultation paper proposed a mechanism for the voluntary delisting of listed non-convertible debt securities from all/any recognized stock exchanges where such securities are listed. This mechanism would be unavailable in certain situations such as where debt securities were delisted by Stock Exchanges consequent to any penalty/ action, redemption, or a resolution plan approved under

IBC. A listed entity with more than 200 non-QIB holders in any ISIN relating to listed NCDS would not be permitted to voluntarily delist its listed NCDS. The proposed framework was aimed at augmenting the ease of doing business for listed entities wishing to delist their non-convertible debt securities, and to clarify the rights of holders of such securities.

The consultation paper laid down further details of this proposed voluntary delisting process including: (a) in-principle approval from stock exchanges for delisting; (b) obligations of the listed entity re obtaining approvals of all holders; disclosures by the listed entity on its website; (c) when the delisting proposal is considered a failure; (d) final application to recognized stock exchanges; and (e) monitoring of compliances by stock exchanges.

On 28 June 2023, in the SEBI Board Meeting, the introduction of provisions in respect of listing of NCDS and voluntary delisting of NCDS was approved. Unlike delisting of equity shares in which approval by a threshold majority is sufficient for approval of delisting, approval of 100% of the debt security holders is mandated for delisting of debt securities. This is because unlike equity, which is a perpetual instrument, listed debt securities have a finite term to maturity.

Considering this decision taken at the Board Meeting, the LODR Regulations were amended on 20 September 2023 and a new chapter [Chapter VIA – Regulations 64A to 64I] was introduced, laying down the framework for voluntary delisting of NCDS and NCRPS and obligations of the listed entities on such delisting.

Salient features of the framework for voluntary delisting of NCDS and NCRPS under LODR Regulations (as amended on 20 September 2023):

- **In-principle approval:** Under this framework, the listed entity is mandated to make an application to the relevant stock exchange for seeking in-principle approval for the proposed delisting of NCDS and NCRPS within 15 working days from the date of passing of the board resolution to that effect.
- **Notice of delisting:** Within 3 working days from the date of receipt of the in-principle approval, the listed entity shall send the notice of delisting to the holders of NCDS and NCRPS.
- **No-objection letter:** Within 15 working days from the date of the notice of delisting, the listed entity shall obtain approval from all the holders NCDS and NCRPS and also obtain the No-Objection Letter from the debenture trustee in case of delisting of NCDS.
- This framework also sets out obligations of the listed entities.
- **Failure of delisting:** The delisting shall be deemed to have failed on account of: (a) non-receipt of in-principle approval from any of the stock exchanges; or (b) non-receipt of requisite approval from the holders of NCDS and NCRPS; or (c) non-receipt of No-Objection Letter from the debenture trustee in case of proposal for delisting NCDS. In case of failure of the delisting proposal, the listed entity shall intimate the same to the stock exchanges within 1 working day of the date of event of failure.
- **Final application to the stock exchange**: Within 5 working days from the date of obtaining the requisite approval from the holders of NCDS and NCRPS, the listed entity shall make the final application for delisting to the stock exchange. Such final application for delisting shall be disposed of by the stock exchange within 15 working days from the date of receipt of such application that is complete in all respects.
- **Delisting from stock exchanges**: Upon disposal of the final application for delisting by the stock exchange NCDS and NCRPS of the listed entity shall be delisted from the stock exchange.
- **Delisting when NCDS are listed on more than one stock exchange**: Where the NCDS and NCRPS are listed on more than one stock exchanges, the listed entity may choose to delist such securities or shares from all stock exchanges except one such stock exchange having nationwide trading terminals. In such a situation, the requirements of in-principle approval, notice of delisting, approval and no-objection letter, failure of delisting, final application to stock exchanges, etc., under Chapter VIA will not be applicable. For the same, a separate procedure has been specified under Regulation 64H which is to be followed by the listed entities. Such application for delisting shall be disposed of by the stock exchange within 30 days from receipt of such application.

9. Business and Asset Transfers

Q1. What is the difference between a business transfer and an asset sale?

In India, acquisitions by way of purchase of certain key assets and/or liabilities of a business undertaking (popularly known as 'asset sale' or 'itemised sale'), and entire business undertaking as a going concern (also known as 'business transfer' or 'slump sale') are quite common.

The primary difference between a business transfer and an asset sale is that in the former, the purchaser acquires the entire business undertaking of the seller consisting of assets, liabilities, employees and goodwill, taken as a whole, on a going concern basis. The transaction is structured in such a way that the whole undertaking is transferred to the purchaser on as-in-where-is basis. In other words, the undertaking being transferred includes all the elements essential to constitute a business activity on a standalone basis. Whilst in the latter, the purchaser can acquire specific identified assets and/or liabilities as agreed with the seller.

An asset sale is thus generally a piece meal sale of assets by a seller, i.e. involving cherry-picking of individual assets. One of the major advantages of an asset sale is that the buyer can pick and choose the assets and/or liabilities which are to be acquired. The buyer may also take over or choose not to take over any liabilities but purchase only the assets of the seller.

A business transfer is a sale of an undertaking, which typically involves a lump-sum consideration for the sale, without values being assigned to individual assets and liabilities (save and except, the determination of value of assets and liabilities, as applicable for the purpose of payment of stamp duty, registration fee and similar purposes). On the other hand, in case of an asset sale, the price of each asset proposed to be transferred is specifically identified and apportioned to such asset depending on its nature, classification and valuation. A single price can also be identified for the entire basket of assets, being sold in an asset sale, and the sale concluded on such single price. In case of an asset sale involving goods which have capitalized and input credit taken on the same, care should be taken that fair market value assigned to such goods is not less than the amount of input credit that can be attributed for the remaining useful life of such goods.

Q2. What are the transaction costs that would typically accrue to a business transfer and an asset sale?

The cost-effectiveness of both kinds of transactions depends upon various factors, including the nature of assets which are proposed to be transferred between the parties. Generally speaking, a business transfer {which qualifies as a 'slump sale' for the purpose of the Income-Tax Act, 1961 ("IT Act")} is more cost efficient than an asset sale on account of the following:

Direct Taxes

- The gains arising from a business transfer which falls within the definition of a 'slump sale' under the IT Act are taxed as long term or short term capital gains depending on the period for which the seller held the undertaking, as a whole, prior to disposition, irrespective of the period for which each constituent asset was held. On the other hand, in case of an asset sale, tax on capital gains or business income is to be paid by the seller on the income arising from the transfer of each asset independently, depending on the nature of the assets and period for which such assets were held.
- Also, generally in case of a business transfer, subject to the provisions of the relevant tax holiday scheme, it may be possible to argue that a tax holiday period attached to the eligible business undertaking should be allowed to be carried forward. However, such an interpretation would not be plausible where the assets of the eligible business undertaking are transferred individually/separately.

Indirect Taxes

- The transfer of a business on a going concern basis (i.e. a 'slump sale') is outside the purview of GST levy. However, the itemized sale of assets in India is exposed to GST levy in India. The rate of tax is dependent on the nature of assets/ goods proposed to be transferred and the classification is determined by their Harmonized Nomenclature (HSN). In case a single price is allocated for the entire transfer of assets, the highest rate of GST applicable on any asset will be applicable on the single price determined as sale consideration.

- In case of a slump sale, unutilized input tax credits of the seller (pertaining to the business which is being transferred) can be transferred to the buyer subject to fulfilment of procedural formalities. In case of asset sale, the GST charged on the assets by the seller can be contractually recovered from the buyer. The buyer can take input tax credit of such GST paid to the seller, subject to restrictions and fulfilment of routine compliances enshrined under the GST laws.

Stamp duty

- Generally, whenever (a) an instrument is executed in India, or, (b) an instrument that is executed outside India is brought into India and such instrument relates to a property situate, or, to a matter or thing done or to be done in India, an obligation to make certain revenue payments known as "stamp duty" is attracted, under the relevant legislations. Stamp duty is chargeable on the instrument that is executed and not the underlying transaction. The rate of stamp duty, generally, depends on the State in which the document is executed, the instrument being executed, and the place where the property or asset that is proposed to be transferred is situated, as applicable. Accordingly, instruments (documents) that are executed in relation to the business transfer and asset sale, become chargeable to relevant stamp duties.
- Typically, the master document governing a business transfer or asset sale would record the transfer of components thereof and would be chargeable to stamp duty, in accordance with the Stamp Act applicable in the State of its execution. The component assets, i.e.: (a) immovable properties under a registered deed of conveyance; (b) movables by delivery of possession; and (c) intellectual property comprising trademark, copyright etc. by deeds of assignment or novation would be transferred in a similar manner for both business transfer as well as asset sale.
- A deed of conveyance for the transfer of immoveable properties in respect of both slump sale and asset transfer will attract payment of stamp duty, in the State in which the property is situated. Where moveable property (except intellectual property) is transferred by delivery of possession (without a specific deed of conveyance), no stamp duty would ordinarily be payable. Subject to the local stamp duty law requirements, such transfers are usually effected through physical delivery, which is evidenced by exchange of a delivery and possession receipt.

Registration Fees

- Instruments (documents) effecting the transfer of immoveable property are required to be registered with the relevant authority upon payment of fees, which may vary from State to State.

Q3. What approvals are required for affecting a slump sale or an asset sale?

In the event, a private company is undertaking a 'slump sale' or an 'asset sale', it may undertake the same with the approval of its board of directors ("Board") (unless its constitutional documents provide otherwise).

If an unlisted public company is undertaking a 'slump sale' or an 'asset sale', in addition to obtaining the approval of its Board, an approval of the shareholders by way of a special resolution (unless a higher threshold is prescribed in the constitutional documents) would be required, provided the said transfer satisfies certain materiality parameters prescribed under the Companies Act.

In case of listed public companies, a 'slump sale' or an 'asset sale' above the materiality thresholds can be effected only if, in addition to the approval of the Board and special resolution of the shareholders, the votes cast by the public shareholders in favour of the resolution exceed the votes cast by such public shareholders against the resolution.

Specific approvals from the lenders, employees, third parties and regulatory authorities may be required, for undertaking the transfers by way of 'slump sale' and 'asset sale', as applicable. Care should also be taken to ensure that the assets are not being disposed of to escape any tax demand or liability imposed by the revenue authorities.

Additionally, Indian labour laws also provide protection for 'workmen' working in certain "undertakings" in the event of transfer of such "undertakings". Such transfer normally attracts a retrenchment compensation and prior notice obligations, as prescribed, unless: (a) the workmen are

absorbed in the transferred undertaking and the services of the workmen are not interrupted for such transfer; (b) the terms of employment in the transferred undertaking are not less favourable than those applicable to the transferred workmen at the time of their employment with the transferor and (c) under the terms of transfer, in the event of retrenchment of a workman, the new employer is liable to pay to the workman, compensation on the basis that his service has been continuous and has not been interrupted by the transfer.

For such employees who do not qualify as 'workmen', when they are transferred as part of a "slump sale", such transfer is generally on the basis of their consent, continuity of service and the terms of engagement at the transferee which are no less favorable than those applicable to them in the original employment. The cessation of employment of such other employees is generally governed by their respective employment agreements and the Shops & Establishments Act applicable to the State in which such persons are employed.

Further, it would not be out of context to note that the present regulatory regime for foreign exchange including Foreign Exchange Management Act, 1999 permits foreign owned and controlled companies in India (usually termed as FOCCs) to acquire business undertakings/ assets in India, for the purpose of its operations.

Q4. How long does it take to complete a business or asset transfer by private arrangement?

The process of business transfer or asset transfer could take between four to six weeks or more (depending on the due diligence, approvals and consents that may be required, and duration of the negotiation between the parties involved). There are additional formalities, particularly for transfer of immoveable properties which could take a little longer.

Q5. Are there any disadvantages of a private arrangement over a court process?

A business transfer may be carried out through a private arrangement by executing a business transfer agreement; or through a court approved scheme (provided *inter alia*, other eligibility conditions as prescribed in relation to schemes under the IT Act and other applicable laws are satisfied).

Despite the fact that a business transfer through a court approved scheme is a time-consuming process (it could take between ten to twelve months to complete) and has certain limitations, however one of the logistical advantages of the court approved scheme over a private arrangement is that it binds the minority creditors as well as the shareholders. Furthermore, although approvals of the regulatory and other authorities and third party consents (where contractually agreed) are required both in case of a court approved scheme as well as a private arrangement, however in case of a scheme, the transfer of all the approvals is facilitated through the scheme's sanction, which brings certainty to parties.

On the other hand, in case of a private arrangement, separate and independent approvals of the shareholders, creditors, regulatory authorities and third parties are required for the transfer of the undertaking, licenses and other business related agreements.

10. Court based restructuring

Q1. What are the various forms of restructuring that are recognized under Indian law?

Chapter XV of the Companies Act, 2013 ("**Companies Act**") contains provisions for a company to enter into a compromise or arrangement with its creditors and/ or members. The terms compromise and arrangement have been interpreted judicially to be very broad so as to encompass any sort of contractual arrangement with creditors and/ or members involving give and take. Accordingly, several types of restructuring, whether of the business (including mergers, demergers spin- offs or slump sales), capital reorganisations (including reduction of capital, buy back of securities, consolidation of shares of different class or division of shares into different classes) and corporate debt restructuring can be achieved through a process involving sanction by the National Company Law Tribunal ("**NCLT**") under the provisions as contained in Chapter XV of the Companies Act. The restructuring of business and capital reorganisation can be achieved in a composite manner. The basic process involves the filing of a scheme of arrangement setting out the terms of the reorganisation with the NCLT and seeking NCLT's sanction. The legal process before the NCLT also involves obtaining the approval of the shareholders and the creditors (secured and unsecured), as required in each type of restructuring. The NCLT will examine (after seeking the representation of the Central Government, relevant sectoral regulators including the Competition Commission of India (if applicable) and the Income Tax Department, whether the proposed restructuring is procedurally as well as substantively fair.

As regards Government Companies, the powers of the NCLT stand delegated to the Ministry of Corporate Affairs, Government of India.

In addition, the Companies Act permits merger between two or more small companies or between a holding company and its wholly owned subsidiary ("**WOS**"), without requiring the approval of the NCLT under Section 233 of the Companies Act. On direction by the Central Government, the NCLT may look into such a scheme if the matter is referred to them under Sections 233(5) and (6) of the Companies Act as either bearing further scrutiny or not being in the public interest or the interest of creditors.

The basic process involves approval of the scheme of arrangement by shareholders holding at least 90% of the total number of shares and by majority of creditors representing 9/10th in value of the creditors or class of creditors of the respective companies. The approved scheme is filed with the central government, Registrar of Companies ("**RoC**") and the official liquidator (applicable in cases of merger). If there are no objections to the scheme, it is registered by the Central Government, through its regional directors.

Recently, by way of amendment made in May, 2023, the process under Section 233 has been further streamlined by amending sub-rules (5) and (6) of rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**Rules**"). In accordance with section 233 (2) and (3) of Companies Act read with the substituted sub-rule 5 of the Rules, once the registrar of companies and the official liquidator receive the scheme of merger, they are required to object or provide suggestions to the Central Government, within a set time frame of 30 (thirty) days from the receipt of the scheme. Where the objection/suggestion is not received from the registrar and the official liquidator within the said period of 30 (thirty) days and the Central Government is of the view that the scheme is in the interest of the public or creditors, the Central Government has been empowered to issue a confirmation order on such scheme within 15 (fifteen) days of the expiry of the said period of 30 (thirty) days. Pertinently, before the said amendment, there were no time limits specified under sub-rule (5) for the registrar and the official liquidator to provide their objections or suggestions to the scheme.

In addition to the above, a deemed approval provision has been introduced under the substituted sub-rule (5), wherein if the Central Government fails to issue the confirmation order within 60 (sixty) days of the receipt of the scheme, then it will be deemed that the Central Government has 'no objection' to the proposed scheme and accordingly, the Central Government will be obliged to issue the confirmation order. Further, under Sub-rule (6) of the Rules, if the Central Government is of the view that the objection/suggestion received from the registrar and official liquidator is not sustainable and that the scheme is in the interest of public or creditors, then it will issue the confirmation order within 60 (sixty) days of the receipt of the scheme. However, if the Central Government is of the view that the scheme is not in the interest of the public

or creditors (whether on the basis of such objections or otherwise), then it may file an application before the Tribunal, within 60 (sixty) days of the receipt of the scheme, requesting the Tribunal to move the scheme under section 232 of Companies Act and not under section 233. Also, a deemed approval mechanism has been introduced under the substituted sub-rule (6), wherein if the Central Government does not provide any confirmation order or file an application to the Tribunal within 60 (sixty) days of the receipt of the scheme, then it will be deemed that the Central Government has 'no objection' to the scheme and accordingly, the Central Government will be obliged to issue the confirmation order.

Q2. Are any special rules applicable to schemes of arrangement involving listed companies?

Under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**SEBI Listing Regulations**") and the master circular issued by SEBI dated 20 June 2023 (which subsumes the earlier circulars on the topic) ("**SEBI Circular**"), any scheme of arrangement proposed to be filed by a listed company before the NCLT under Sections 230 to 232 or other relevant provisions of the Companies Act including section 66, has to be filed before the designated stock exchange, for approval, at least one month before it is presented to the NCLT. However, schemes which provide for merger of a WOS with the parent company or for demerger/ hive-off of a division of a WOS with its parent company do not require approval of the relevant stock exchanges. Such schemes are however, required to be filed with relevant stock exchanges for the limited purpose of disclosures.

In addition, pursuant to the Securities Exchange Board of India ("**SEBI"**) circular dated 29 July 2022, entities having debt securities listed on stock exchanges proposing to undertake a scheme of arrangement or amalgamation also need to obtain approval of the designated stock exchanges in accordance with the requirements prescribed under the circular prior to filing the scheme with the NCLT.

The SEBI Listing Regulations read with the SEBI Circular also require that listed companies to obtain fairness opinions and valuation reports (where issuance of fresh shares is involved as consideration under the arrangement) in relation to the scheme. This requirement is not applicable for schemes between a wholly-owned subsidiary with its parent entity. In certain circumstances (for example, schemes between the listed company and its promoter/ promoter group, schemes resulting in augmenting of shareholding of promoter/ promoter group, schemes resulting in a decrease in the public shareholding by 5% or more or hive off of a substantial business undertaking of the listed company to an unlisted entity), the scheme would need to be approved by the majority of the non-interested/public shareholders of the listed company, which requirement is above the thresholds for approval set out under the Companies Act.

A scheme involving corporate debt restructuring also requires the obtaining of a valuation report in respect of the shares, assets and properties of the company from a registered valuer.

Where the transferor entity is listed and the transferee entity is unlisted, then the latter's shares may be listed without making an IPO subject to the satisfaction of various conditions, approaching SEBI and stock exchanges for approval and complying with all listing requirements. Such conditions would typically, inter alia, include, (i) that the listing will be in accordance with the terms of the scheme sanctioned by the NCLT; (ii) the percentage of shareholding of pre-scheme public shareholders of the transferor entity and the qualified institutional buyers of the transferee entity (i.e. the company seeking listing), in the post scheme shareholding pattern of the transferee entity on a fully diluted basis should not be less than 25%; (iii) the transferor entity should provide information with regard to the transferee entity in the format specified for abridged prospectus in the explanatory statement or notice sent to the shareholders while seeking their approval for the scheme and such disclosures should be certified by a SEBI registered merchant banker after carrying out the necessary due diligence; and (iv) if the shareholders of the transferor company (i.e. the company which is listed) decide to opt out of the transferee company (i.e. the company seeking listing), an exit opportunity is required to be provided to such shareholders and a provision is required to be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula, which cannot be less than the price specified by the regulations of SEBI.

It is pertinent to highlight, the shares of the transferee entity issued in lieu of the locked- in shares of the transferor entity are subjected to lock-in for the remaining period. In case of a scheme involving a hiving-off of a division of a listed entity into an unlisted entity or merger of a listed entity with an unlisted entity and its subsequent listing, the promoters' shares will be locked-in to the extent of 20% of the post-merger paid-up capital of the transferee company, for a period of three years from the date of listing of the shares of the transferee company. The balance of the entire pre-merger capital of the transferee company shall also be locked-in for a period of one year from the date of listing of the shares of the transferee company. However, no additional lock- in will be required if the post-scheme shareholding of the transferee entity is the same as that of the transferor entity. In case the transferee entity is a listed company, the stock exchange often imposes certain lock-in requirements in relation to the shares being issued by the transferee company as a condition of listing the freshly issued shares.

Q3. What are the advantages and disadvantages of following a restructuring scheme under the orders of the National Company Law Tribunal?

The following are the main advantages of adopting the route of a NCLT sanctioned scheme of arrangement:

- **Beneficial Tax Treatment**: 'Amalgamations' and 'demergers' are specifically defined under the Income Tax Act, 1961 ("IT Act") and if implemented in accordance with the conditions specified would, inter alia, provide the following benefits:
  - they would not give rise to any capital gains tax incidence on the transferor / de-merged company or its shareholders (who are issued shares in consideration for the merger or demerger), provided the resulting company is an Indian company. However, in context of outbound cross border mergers permitted under the Companies Act, the IT Act does not contain an exemption from capital gains tax to the transferor company or its shareholders, when the transferee company is a foreign company. The period of holding required to determine whether the shares sold are a long term capital asset or a short term capital asset will be computed by including the period for which that shareholder held shares of the amalgamating / demerged company, prior to the scheme;
  - subject to fulfilment of certain conditions, the amalgamated company may carry forward the accumulated business loss and unabsorbed depreciation of the amalgamating company(ies) for eight years and an indefinite period from the date of amalgamation, respectively;
  - the companies can amortise the expenses of the amalgamation over five years from the date of amalgamation/demerger;
  - generally, tax holidays or other tax benefits available to the amalgamating / demerged company(ies) as of the date of amalgamation / demerger will be available to the amalgamated / resulting company.
- **Single window clearance**: Reduces multiplicity of approvals for matters separately provided for in the Companies Act.
- **Exemption from mandatory tender offer requirements**: Acquisition of shares under a scheme of arrangement is exempt from the mandatory tender offer requirements under the SEBI Takeover Regulations.
- **Transaction Costs**: In certain states within India, there is a cap on the stamp duty charges that are payable for a transfer implemented under an NCLT sanctioned scheme of arrangement. However, in certain other states, transfer of properties would be stamped separately as a conveyance, unless a specific entry is made in the relevant state Stamp Act, e.g. Bombay Stamp Act, 1958.

The main disadvantages in this process are:

- **Timelines:** The current time period for completion by the NCLT is typically seven to twelve months and can be further delayed because of objections raised by statutory authorities, shareholders or creditors before the NCLT. However, objection by shareholders or creditors to a scheme can be made only by persons holding not less than 10% of the shareholding or having outstanding debt amounting to not less than 5% of the total outstanding debt in accordance with the latest audited financial statements of the company. Further, in case of a listed company, obtaining clearances from the designated stock exchange (pre-filing) may delay the proposed scheme;
- **Disclosures:** Particularly in the case of unlisted and listed

companies undertaking court based restructurings, the nature of disclosures is akin to an abridged prospectus and may seem onerous; and

- The NCLT also has the power to modify the scheme prior to sanctioning the same, which changes may not be commercially desirable. The parties however have the ability to withdraw the scheme and are not obliged to implement the scheme in the event that the modifications are not acceptable.

Q4. What is the role of the National Company Law Tribunal when approving a scheme of restructuring?

The NCLT will not sanction a scheme merely because shareholders and creditors have accorded their consent. Some of the key principles in relation to the role of the NCLT include the following:

- that the scheme is fair, reasonable and not a tool to defeat the provisions of the law including payment of stamp duty or other taxes;
- that the statutory provisions have been complied with;
- that the concerned meetings had the relevant material for the shareholders or creditors to make an informed decision;
- that the scheme is not patently unfair or grossly prejudicial to the shareholders; and
- that the scheme is not violative of any provision of law or contrary to public policy.

Typically, the NCLT will not examine the commercial rationale behind the scheme, including valuation, and rely upon the expertise of the accountants who have issued the valuation and the merchant banker who has provided the fairness opinion.

Q5. How are classes of shareholders and creditors determined?

Under the Companies Act, companies are required to convene separate class meetings of shareholders and creditors to approve the scheme. It is now settled that persons who have a commonality of interests, and to whom the company has offered the same compromise and/or arrangement would be considered as persons within the same class. If persons are offered different rights and are subject to different terms, such persons would not be considered as being within the same class.

Q6. Are there any special provisions for schemes of arrangement in relation to banks?

- Voluntary amalgamations between two banking companies are governed by the Banking Regulation Act, 1949 and are administered by the Reserve Bank of India (“**RBI**”). In brief, the process would be as follows:
- the draft scheme of amalgamation needs to be approved individually by the boards of directors of the two banking companies by a two thirds majority of the total strength of the board of directors (and not just those present at the meeting);
- the scheme of amalgamation would then have to be approved by the shareholders of each banking company by a resolution passed by a majority in number representing two-thirds in value of the shareholders, present in person or by proxy, at a meeting called for that purpose;
- after the scheme of amalgamation is approved by the requisite majority of shareholders, it must be submitted to the RBI for its sanction, together with certain other information, including a valuation report (with a detailed computation), details of the price of the shares, where the amalgamated company is listed and such other information as the RBI may request;
- in the event of the scheme being sanctioned by the RBI, a dissenting shareholder is entitled to make a claim on the concerned banking company with respect to the shares held by him, on the basis of their value as determined by the RBI when sanctioning the scheme.

Q7. What are the broad procedural requirements that need to be complied with in a NCLT based restructuring?

- The board of directors have to approve the scheme of the arrangement including consideration payable, whether in the form of cash or shares (i.e., consideration other than cash).
- Stock exchanges (in case of a listed company) need to accord their 'no-objection' to the scheme. A draft of the scheme of arrangement has to be submitted to the stock exchanges at least 30 days prior to the scheme being filed with the NCLT. However, schemes which provide for merger of a WOS with the parent company or for demerger/ hive-off of a division of a WOS with its parent company will not require approval of the relevant stock exchanges. Such schemes however, need to be filed with relevant stock exchanges for the limited purpose of disclosures. In addition, entities having debt securities listed on stock exchanges proposing to undertake a scheme of arrangement or amalgamation also need to obtain approval of the designated stock exchanges prior to filing the scheme with the NCLT.
- The NCLT will direct that meetings of the various classes of shareholders and creditors be convened to approve the scheme. However, the NCLT may dispense with meeting of creditors, if creditors holding 90% value agree to the scheme by way of a consent affidavit. The NCLT in terms of its inherent powers may also dispense with the shareholder meeting if all shareholders consent in writing.
- After the majority in number and three-fourth in value of the voting shareholders and / or creditors (or classes) have approved the scheme (if dispensation of class meetings is not granted), the petition for sanction of the scheme is filed with the NCLT.
- Mandatory notification of the scheme is made to multiple regulatory authorities, including Central Government, income tax authorities, and relevant sectoral regulators. Such authorities are provided 30 days to make their representations on the proposed scheme, failing which, it is presumed that they have no representation to make.
- The sanction order of the NCLT must be filed with the RoC within 30 days of receipt of order from the NCLT. However, the notification of August 2019 of the Central Government, permits companies upon filing of the sanction order with the RoC, to postpone the effectiveness of the Scheme in case further statutory approvals to the arrangement are forthcoming.

Q8. Are cross border mergers allowed in India?

The merger of a foreign company into an Indian company and vice versa is permitted under section 234 of the Companies Act, subject to prior approval of the RBI and provided that the foreign company is incorporated in territories notified by the Central Government for this purpose. Further, any cross- border merger under section 234 will have to comply with the requirements as laid down in sections 230 to 232 of the Companies Act (requirements applicable to domestic mergers). This includes procedural requirements such as filing an application before the NCLT, conducting meetings of shareholders/ creditors, notification to statutory and income tax authorities, approvals from SEBI (for listed companies), other sectoral regulators etc. The RBI has issued the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 on March 20, 2018 which provide the framework for mergers, amalgamations and arrangements between Indian and foreign companies, covering both, inbound and outbound investments.

11. Litigation

Q1. What is the role of the Judiciary under the scheme of the Constitution of India?

Under the Indian Constitution, there is separation of powers. While the power to legislate and implement the law is vested in the legislature (at the federal and state levels) and the executive respectively, the higher judiciary (the Supreme Court and the High Courts) is constitutionally vested with the power to interpret the law. The Indian judiciary functions independently of the legislature and the executive. The independence of the judiciary has been held to be part of the basic structure of the Indian Constitution which cannot be abrogated or taken away even by way of a constitutional amendment.

Q2. What is the system and hierarchy of courts in India?

The Indian Constitution provides for an integrated system of administration of justice, as opposed to separate hierarchies of federal and state judiciary prevalent in certain countries. The Supreme Court is the highest court of the land and has its seat in New Delhi, India's capital. Immediately subordinate to the Supreme Court in the judicial hierarchy are the High Courts of various states, which in turn exercise administrative and judicial control over the district or sessions courts constituted at the state level. Further, subordinate to the district or sessions courts are the courts of the civil or sub-judges and magistrates of first or second class. The Indian Constitution also provides for the establishment of specialized tribunals for adjudicating certain categories of disputes or grievances, such as in the areas of public employment, employment in armed forces, telecom sector, consumer rights, airport operations and company matters.

Q3. What is the scheme of functioning of the Supreme Court of India?

Articles 124 to 147 of the Constitution provide for the constitution, composition and jurisdiction of the Supreme Court. The Supreme Court has a sanctioned strength of 34 judges, who may be elevated from the High Courts or directly called from the Bar. The Supreme Court is possessed of the power to exercise original jurisdiction, appellate jurisdiction (civil and criminal), writ jurisdiction and jurisdiction to grant special leave to appeal. Additionally, the Supreme Court exercises original jurisdiction in respect of any dispute (a) between the Government of India (**"GOI"**) and one or more states; or (b) between the GOI and any state or states on one side and one or more other states on the other; or (c) between two or more states. The Supreme Court is also vested with the extraordinary jurisdiction to entertain writ petitions in cases involving violation of fundamental rights arising out of legislative or executive actions. Further, under Article 143 of the Constitution, the President of India may refer to the Supreme Court, a question of law or fact which, the President of India thinks to be of public importance.

Q4. What is the scheme of functioning of the High Courts in various states?

Article 214 of the Indian Constitution provides for the establishment of a High Court for each state of the country (barring few exceptions, where a High Court exercises jurisdiction over more than one state). The High Courts are the highest courts in the judicial hierarchy of a state and exercise appellate, revisional and writ jurisdictions (civil and criminal). Certain High Courts, including the High Courts of Delhi, Bombay, Calcutta and Madras, have also been vested with original jurisdiction over civil and commercial matters above a specified pecuniary value. The High Courts are also vested with the constitutional power of superintendence over all courts and tribunals throughout the territories in relation to which they exercise jurisdiction.

Q5. What is the scheme of functioning of the District or Sessions and other subordinate courts in India?

The district, sessions and subordinate courts are the courts of first instance and their constitution or structure is determined by the respective states or union territories on the basis of population density and other myriad range

of factors. Within the hierarchy of district, sessions and subordinate courts, there are further sub-divisions for civil, criminal and revenue cases. The district / sessions courts additionally exercise appellate jurisdiction over the subordinate courts under certain statutes.

Q6. Do the courts in India follow the rule of precedents?

Article 141 of the Indian Constitution provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The Indian legal system also recognizes the well-known doctrine of stare decisis and precedents, which renders a judgment or decision of a higher court binding on a sub-ordinate court. Only the legal principle on which a case is decided (*the ratio decidendi*) is treated as binding, and not the other observations in the judgment (*the obiter dicta*) which may be fact specific. Where there is a conflict between the decisions of two benches of the Supreme Court of different strengths, the decision of the larger bench would prevail. Further, in case of conflict between judgments of coordinate benches of the Supreme Court, the bench noticing the conflict ordinarily refers the matter to the Chief Justice of India for constitution of a larger bench.

Q7. What is the sanctity of commercial bargains in India?

The Indian legal system recognises and upholds the sanctity of contractual provisions, unless they are contrary to Indian law. Further, the courts rarely rewrite or ignore the express terms of a contract. Even the Indian law of evidence provides that when the terms of a contract have been reduced into writing, oral and other contemporaneous evidence cannot be admitted to contradict or vary the terms of such a contract, except in certain narrow circumstances. Further, while specific performance of contracts is now the general rule in case of breach of contract (and not a mere discretionary relief), damages for breach can be claimed in addition or in the alternative.

Q8. What is the law of limitation for filing a case in India?

The (Indian) Limitation Act, 1963 ("**Limitation Act**") generally governs and provides for the limitation period for the filing of civil cases in India. Certain special enactments and statutes prescribe their own limitation period, which would override the Limitation Act. Under the Limitation Act, delay in filing a civil action cannot be condoned by the courts if such action is otherwise time barred. However, many other statutes provide for their own period of limitation and in many instances, the courts are vested with the power to condone delay under certain specified circumstances, upon sufficient cause being shown.

In criminal cases, limitation is generally provided for in cases where an offence is punishable with imprisonment for up to three years. However, no limitation is provided for taking action on an offence punishable with imprisonment exceeding three years. Having said that, the delay in instituting a criminal case may be a relevant fact in certain circumstances.

Q9. Do courts have the power to grant interim relief(s) to parties?

In order to secure the ends of justice, courts in India have the power to grant interim relief(s), pending final adjudication of the main dispute. The grant of interim relief depends upon the discretion of the court. For grant of interim relief in civil cases, a court will have to be satisfied that: (1) there is a strong prima facie case in favour of the applicant, (2) the balance of convenience is in favour of the applicant, and (3) irreparable loss would be caused to the applicant if interim relief is not granted. In case of disobedience of any injunction order(s), courts have the power to order attachment of property of the person guilty of disobedience, or to commit such person to civil prison.

Q10. Is there any different mechanism for resolution of commercial disputes?

The Indian Commercial Courts Act, 2015 ("**Commercial Courts Act**") is a path-breaking legislation enacted for adjudication of commercial disputes. Commercial courts, commercial divisions and commercial appellate divisions of High Courts have been designated in almost all parts of the country and judges with special expertise in commercial disputes preside over these courts. This act provides for strict timelines for various steps of litigation to ensure that the process of adjudication is expedited. Recent amendments in the Commercial Courts Act have also made it mandatory for the parties to undergo pre-institution mediation process in cases where no urgent interim relief is contemplated or sought.

As a step towards modernizing the legal framework and expediting the resolution of civil and commercial disputes, the Government of India has recently passed the Mediation Act, 2023. The main objective of this act is to promote and facilitate mediation as a means of dispute resolution (commercial or otherwise), to ensure enforcement of mediated settlement agreements, and to provide for a body for registration of qualified mediators. This legislation marks a seminal shift by elevating mediation as a voluntary option for dispute resolution, prior to resorting to traditional court processes.

Q11. Are Court fees payable in India?

In certain categories of cases, court fees are payable by a party filing a case before the court. The quantum of court fees payable may vary from state to state. Court fees are generally determined on the basis of valuation of the claim raised by the party filing a case. Court fees are also payable on counter claims and set-offs.

Q12. Are actual litigation costs awarded to a winning litigant?

Usually, courts in India do not award actual litigation costs. Under certain statutes like the Indian Commercial Courts Act, 2015, the courts are vested with the power to award costs where claims or defences are found to be vexatious or frivolous. The Indian Arbitration and Conciliation Act, 1996 also allows arbitral tribunals to award reasonable costs to the successful party.

Q13. How are judgments or decrees enforced in India?

In respect of civil cases, the Code of Civil Procedure, 1908 (**"CPC"**) provides the mode and manner of execution of decrees. In case of disobedience of a decree, the executing courts have the power to order attachment and sale of property and arrest of a judgment debtor, amongst others.

Further, in certain cases, the courts have also invoked contempt jurisdiction as against errant parties where solemn undertakings given before a court have been breached.

Q14. How are foreign judgments enforced in India?

Section 44A CPC permits certain classes of foreign decrees passed by a superior court of any reciprocating territory (as notified by the Central Government) to be executed in India as if the said decree has been passed by a court in India, subject to certain specified conditions.

Where a foreign decree or judgment, under which a sum of money is payable, has been rendered by a superior court in any country or territory outside India which the GOI has, by notification, declared to be a reciprocating territory, it may be enforced in India by proceedings in execution as if the judgment had been rendered by a court in India. Various countries including the United Kingdom, UAE and the Republic of Singapore have been declared by the GOI to be reciprocating territories. In case of a judgment of a court in a jurisdiction which is not a reciprocating territory (for example, Courts in United States of America), a fresh suit has to be filed upon the foreign judgment instead of the original cause of action and in such a case, the foreign judgment will merely have evidentiary value. Such a suit must be filed in India within three years

from the date of the judgment in the same manner as any other suit filed to enforce a civil liability in India.

A judgement rendered by a court outside India is conclusive as to any matter thereby directly adjudicated upon, except where:

- the judgment has not been pronounced by a court of competent jurisdiction;
- the judgment has not been given on the merits of the case;
- the judgment appears on the face of it to be founded on an incorrect view of international law or that there has been a refusal to recognize the law of India in cases in which such law is applicable;
- the proceedings in which the judgment was obtained are opposed to natural justice;
- the judgment has been obtained by fraud; and
- the judgement sustains a claim founded on a breach of any law in force in India.

Q15. Do the courts in India have the power to punish for contempt of court?

A contempt of court action can be initiated if a party fails to comply with an order or direction of a court or otherwise tries to lower the sanctity of the court or for breach of an undertaking given to the court. Article 129 of the Indian Constitution vests the power with the Supreme Court to punish for its contempt. Similarly, Article 215 of the Indian Constitution recognizes the power of the High Court to punish for its contempt. Further, Section 10 of the Contempt of Courts Act, 1971 confers the power on the High Courts to exercise the same jurisdiction, powers and authority in respect of contempt of the courts subordinate to it. The Supreme Court and the High Court can initiate contempt of court action either on a motion filed by a party or *suo motu*, i.e. of its own.

Q16. What are the innovations employed by Indian Courts during the lockdown owing to the Covid-19 pandemic?

During the Covid-19 era, Indian courts have displayed promptness and innovation in embracing technology and providing open and universal access to justice. Virtual hearings are being held in most courts after framing of rules to institutionalise and simplify the procedures for e-filing and virtual hearing of matters. Recently, while some courts in India have now returned to physical hearings, many courts still follow a hybrid system, where the parties have the option to opt for virtual hearing., Further, the Chief Justice of India has urged all High Courts to continue with virtual hearings and sought responses from High Courts and Tribunals on whether they are continuing with hybrid mode of hearing. It is thus expected that system of e-filing and virtual hearings is set to continue even in future.

Recent significant judgments aimed at promotion of ease of doing business in India

The Supreme Court and the High Courts have recently passed some noteworthy judgments which accord primacy to the contractual bargain between commercial parties and promote the ease of doing business in India. Some illustrative judgments are as under:

- ***M/S Patil Automation Pvt. Ltd. v. Rakheja Engineers Pvt ltd***[1]: In the said judgment, the Supreme Court, while dealing with the issue of whether Section 12A of Indian the Commercial Courts Act, 2015 is mandatory in nature, held that the requirement of pre-litigation mediation is mandatory because of the usage of the word "*shall*" appearing in Section 12A and that non-compliance with the said requirement shall result in rejection of plaints. The Supreme Court also noted that the Commercial Courts Act, 2015 was enacted to promote speedy settlement of commercial disputes and to facilitate ease of doing business and that, the mandatory nature of Section 12A was in line with this objective.
- ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited***[2]: The Supreme Court observed that a court granting interim reliefs under Section 9 of the Indian Arbitration and Conciliation Act, 1996 is not strictly bound by procedural rigors of CPC and therefore, it should not withhold such equitable relief on technicalities. It was held that procedural safeguards

1 (2022) 10 SCC 1

2 2022 SCC Online SC 1219

intended to promote the cause of justice cannot be read in such a way that justice is defeated and all that the court is required to examine are general principles for equitable relief i.e. whether the applicant for interim measure has a good *prima facie* case, whether the balance of convenience is in favour of interim relief as prayed and whether the applicant has approached the court with reasonable expedition.

- ***Atlanta Ltd. v. Union of India***[3]**:** The Supreme Court reiterated that the arbitrator is the final arbiter of all disputes. It was held that it is not open for a party to challenge the award under Section 34 of the Indian Arbitration and Conciliation Act, 1996 on the ground that the arbitrator has drawn his own conclusions or has failed to appreciate certain facts and that, it is beyond the jurisdiction of the appellate court to assign to itself, the task of construing the terms and conditions of the contract and its provisions and to take a view on certain amounts awarded in favour of a party. The Supreme Court observed that by going into minute details of evidence with a magnifying glass, the courts entertaining Section 34 petitions transgress the limitations placed on it.
- ***Rahul S. Shah v. Jinendra Kumar Gandh***[4]: The Supreme Court observed that the actual difficulties of a litigant in India begin when he obtains a decree in his favour as execution proceedings which are supposed to be a handmaid of justice and sub-serve the cause of justice are, in effect, becoming tools that are easily misused to obstruct justice. The Supreme Court reiterated that in execution proceedings, there can only be adjudication on a limited gamut of issues and not a re-trial of the entire dispute. Therefore, the Supreme Court deemed it appropriate to issue a list of mandatory directions to be followed by all courts dealing with execution proceedings including that an executing court must dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.
- ***Inox Renewables Ltd. v. Jayesh Electricals Ltd***[5]**:** The Supreme Court while upholding the supremacy of party autonomy held that it is open for parties to an arbitration agreement to change the seat/venue of arbitration by mutual agreement. Further, such an agreement, even if not in writing, would be considered valid if it is recorded in the award and not challenged by either party.
- ***Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Others***[6]**:** The Supreme Court held that full party autonomy is given by the Indian Arbitration and Conciliation Act, 1996 to have a dispute decided in accordance with institutional rules, which can include Emergency Arbitrators delivering interim orders, described as 'awards'. The Supreme Court further held that since such interim orders are an important step in aid of decongesting the civil courts and afford expeditious interim relief to the parties, they would be enforceable in the same manner as if it were an order of the Court.
- ***PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited***_[7]: The Supreme Court held that nothing stands in the way of party autonomy in designating a seat of arbitration outside India, even when both parties happen to be Indian nationals. In this decision, the Supreme Court recognised the primacy of party autonomy in arbitration proceedings by calling it a brooding and guiding spirit of arbitration.
- ***Government of India v. Vedanta Limited and Ors.***[8]: The Supreme Court held that in considering the enforceability of foreign awards, the Court does not exercise appellate jurisdiction over the foreign award and will not enquire into whether some error has been committed by the arbitral tribunal while rendering the foreign award.
- ***Bank of Baroda v. Kotak Mahindra Bank Ltd***[9]: The Supreme Court held that where a decree holder does not take any steps for execution of a decree in the foreign country in which the decree was issued, the limitation period for executing such a decree in India would be the limitation prescribed in the country where the foreign decree was issued. The Supreme Court further held that where the decree holder takes steps

3 (2022) 3 SCC 739

4 (2021) 6 SCC 418

5 (2023) 3 SCC 73

6 2021 SCC Online SC 557

7 2021 SCC OnLine SC 331

8 Civil Appeal No. 3185 of 2020, decided on 16.09.2020

9 2020 SCC Online SC 324

for execution of a decree in the foreign country in which the decree was issued and for some reason the decree is not fully satisfied, the limitation period of executing such a decree in India would be three (3) years from the finalisation of the execution proceedings in the foreign country.

- ***State of Maharashtra v. Bores Brothers***[10]*:* The Supreme Court held that given the object of speedy disposal sought to be achieved both under the Indian Arbitration and Conciliation Act, 1996 and the Indian Commercial Courts Act, 2015, delay beyond the prescribed periods of limitation as provided under the said acts (where condonable) is to be condoned only by way of exception and not as a rule.
- ***Desh Raj v. Balkishan***[11]**:** The Supreme Court held that under the Indian Commercial Courts Act, 2015, the timeline prescribed for filing of written statement is mandatory and no discretion is vested with courts to condone any further delay in filing a written statement.
- ***Global Music Junction Pvt. Ltd. v. Shatrughan Kumar Aka Khesari Lal Yadav and Others***[12]**:** The Delhi High Court observed that the 2018 amendments in the Indian Specific Relief Act, 1963 deleted the provision which prescribed that those contracts for the non-performance of which compensation in money was an adequate relief may not be specifically enforced. Consequently, the amendment act does away with the primacy given to damages as a relief over specific performance and has changed the nature of specific performance from an equitable, discretionary remedy to a statutory remedy. The Delhi High Court observed that the intention behind this amendment was to promote 'ease of doing business' and to provide an effective remedy to parties who have suffered loss due to breach or non-fulfilment of a contract as also to ensure that the non-defaulting party can obtain due performance of the contract.
- ***Department of Transport, GNCTD v. Star Bus Services Pvt. Ltd***[13]***:*** The Delhi High Court observed that the underlying principle and policy of law that arbitration proceedings should not be unduly prolonged and delayed, remains intact and embodied. The Delhi High Court held that awards passed after an inordinate, substantial and unexplained delay would be "*contrary to justice and would defeat justice*" and would be in conflict with the public policy of India and would be amenable to challenge. The court further observed that a large time gap between hearing of the oral submissions/submission of pleadings and rendering the decision would, in effect, debilitate the purpose of resorting to arbitration for expeditious adjudication of the disputes.

10 2021 SCC Online SC 233

11 (2020) 2 SCC 708

12 2023 SCC OnLine Del 5479

13 2023 SCC OnLine Del 2980

12. Arbitration

Q1. How is commercial arbitration used in India and what are the recent trends?

The increase in international trade and vulnerable economic norms have played the role of a catalyst in growth of cross border commercial disputes. Given the need for an efficient dispute resolution mechanism, international commercial arbitration has emerged as the preferred option for resolving cross-border commercial disputes and preserving business relationships through a speedy resolution mechanism. India is actively taking steps to make the country a hub for international arbitration and move up the ladder in the ease of doing business index. Recently, the Government of India has constituted an Expert Committee to examine the working of arbitration law in India and to recommend reforms to the Arbitration and Conciliation Act, 1996 ('Arbitration Act').

Q2. What is the law applicable to arbitration in India?

The Arbitration Act, based on the UNCITRAL Model Law, is the key law governing arbitration in India. The Arbitration Act has been divided into four parts:

- Part I sets out general provisions on arbitrations seated in India. Certain provisions of Part I are applicable to arbitrations seated outside India as well: Section 9 (interim measures by court etc.), Section 27 (court assistance in taking evidence), Section 37 (1)(a) and Section 37 (3) (appealable orders);
- Part II deals with the enforcement of foreign awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ('New York Convention') or the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention);
- Part III deals with conciliation [amended by the Mediation Act, 2023 ('Mediation Act') as discussed below]; and
- Part IV sets out certain supplementary provisions.

Q3. What is conciliation and how does it differ from arbitration?

Conciliation is a method of resolving a dispute, wherein an independent person, (i.e., a conciliator, helps the parties to arrive at a negotiated amicable settlement).

The concept of conciliation is included in the definition of mediation as per the Mediation Act. Section 3(h) of the Mediation Act defines mediation to include a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute.

As per the Mediation Act, any provision, in any other enactment for the time being in force, providing for resolution of disputes through conciliation in accordance with the provisions of Arbitration Act, shall be construed as reference to mediation as provided under the Mediation Act; and any conciliation proceeding initiated in pursuance of Part II of the Arbitration Act as in force before the commencement of the Mediation Act, shall be continued as such, as if the Mediation Act, had not been enacted.

Conciliation is different from arbitration as in an arbitration, the appointed arbitrator arrives at a decision which is binding on both parties. Arbitration is a more formal and elaborate procedure than conciliation.

Q4. What is an international commercial arbitration?

For the purpose of Part I of the Arbitration Act, an 'international commercial arbitration' is defined in a party-centric manner in Section 2(1)(f) of the Arbitration Act, as an arbitration where at least one of the parties is:

- an individual who is a national of, or habitually resident in, any country other than India;
- a body corporate which is incorporated in any country other than India;
- an association or a body of individuals whose central management and control is exercised in any country other than India; or
- the government of a foreign country.

However, for the purpose of Part II, an 'international commercial arbitration' is party-neutral and place-centric, and means an arbitration which takes place between two parties outside India, in a New York Convention country [PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India (2021)].

Q5. Can a company incorporated in India but controlled by a foreign company or entity be considered a foreign party for the purpose of determining whether an arbitration is an international commercial arbitration?

The place of incorporation is the only deciding factor in determining the nationality of a company. A company incorporated in India but whose central management and control is exercised outside India, will not be considered to be a foreign party for the purpose of determining whether an arbitration is an international commercial arbitration.

Q6. What kind of foreign arbitral awards can be enforced in India?

Part II of the Arbitration Act deals with enforcement of foreign arbitral awards, i.e., arbitral awards rendered outside India which are considered as commercial under the law in force in India. In order to be enforceable under the Arbitration Act, the award has to be made in a country which is: (a) a party to the New York Convention or the Geneva Convention, and (b) has been notified in the official gazette of India as a reciprocating territory. Once the court is satisfied that the award is enforceable and it rejects any objections that can be made to the enforcement of the award, the award shall be deemed to be a decree of an Indian court and enforced accordingly.

Awards rendered in arbitrations between two Indian parties at a foreign seat are also foreign awards, and are enforceable in India under Part II of the Arbitration Act [PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India (2021)].

Q7. What are the kinds of objections that can be made to the enforcement of foreign arbitral awards? What is the extent of court interference in enforcement of foreign awards?

Indian courts have time and again upheld a high threshold for refusal to enforce a foreign award. Sections 48 and 57 of the Arbitration Act enumerates the grounds of objections which a party may take against the enforcement of a foreign award passed under the New York Convention or the Geneva Convention, respectively. Under Section 48(1), enforcement of the foreign award may be refused, at the request of the party against whom it is invoked if a party was under some incapacity; the arbitration agreement was not valid under the applicable law; proper notice was not given to the party for appointment of an arbitrator or of the arbitral proceedings; the party was unable to present its case; the award passed was out of the scope of the submissions to arbitration; the composition of the arbitral tribunal or the arbitral procedure was not according to the agreement or failing such agreement, was not in accordance with the law of the court where the arbitration took place; or if the award has not yet become binding on the parties; or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Further, the sections provide two additional grounds when enforcement of an award may be refused if the Court finds that, (a) the subject-matter is not capable of settlement by arbitration; or (b) if the award is in conflict with the public policy of India. An award is said to be in conflict with public policy of India only in limited circumstances. These circumstances are: the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81 of the Arbitration Act (which deal with confidentiality of and admissibility of evidence relating to conciliation proceedings respectively); the award is in contravention with the fundamental policy of Indian law; or the award is in conflict with the most basic notions of morality or justice. It has been clarified that, a contravention of the fundamental policy of Indian law shall not entail a review on the merits of the dispute. An enforcement court cannot correct an award, review the award on merits, or set aside

the award even if any of the conditions in Section 48 are made out because setting aside of the award falls solely in the domain of the seat court [Government of India v. Vedanta (2020)].

Q8. What is the difference between an 'ad hoc arbitration' and an institutional arbitration?

Section 19 of the Arbitration Act provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conduct of the arbitral proceedings. The two main ways in which parties determine the procedure is by either appointing an institution to administer the arbitration proceedings or making their own arrangements in an 'ad hoc' manner.

An 'ad hoc' arbitration is a proceeding that is not administered by any institution and requires the parties to make their own arrangements for selection of arbitrators and for designation of rules, applicable law, procedures and administrative support.

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It promotes procedural efficiency and good case management. The 2019 Amendment seeks to establish the Arbitration Council of India ('ACI') and one of objectives of the ACI is to promote institutional arbitration in India. The ACI will also be responsible to grade and strengthen the arbitral institutions in India.

Examples of arbitral institutions include the International Chamber of Commerce ('ICC'), the London Court of International Arbitration ('LCIA'), the Singapore International Arbitration Centre ('SIAC'), the Delhi International Arbitration Centre ('DIAC'), the Mumbai Centre For International Arbitration ('MCIA'), the International Arbitration and Mediation Centre, Hyderabad ('IAMC'), the Indian Council of Arbitration ('ICA'), the India International Arbitration Centre ('IIAC') and the Nani Palkhivala Arbitration Centre ('NPAC').

Q9. At what point are arbitral proceedings deemed to commence?

A party to an arbitration agreement which intends to initiate arbitration has to send a notice to the other party against which the proceedings are to be commenced. Section 21 of the Arbitration Act provides that unless otherwise agreed by the parties, the arbitral proceedings commence on the day on which a request for that dispute to be referred to arbitration is received by the respondent.

Q10. What is the process of appointment and composition of the arbitral tribunal?

Section 10 of the Arbitration Act provides that the parties to an arbitration agreement are free to determine the number of arbitrators provided that such number is not an even number, and upon their failure to do so, the arbitral tribunal should consist of a sole arbitrator. Further, Section 11 of the Arbitration Act provides that the parties are free to agree on the procedure for appointing arbitrators.

If the parties fail to agree on a procedure, the appointment process prescribed under Section 11(3) applies and each party is required to appoint an arbitrator, following which the two party-appointed arbitrators will appoint the presiding arbitrator. In international commercial arbitrations where the parties fail to appoint an arbitrator within 30 days from the receipt of the request to do so, or the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, either party may request an arbitral institution designated by the Supreme Court to make the appointment. In the case of domestic arbitrations, any arbitral institution designated by the High Court will have the power to make the appointment upon a request made by either party.

Similarly, in an arbitration with a sole arbitrator, if the parties fail to mutually agree on a sole arbitrator within 30 days from the receipt of request from the other party, the arbitral institution designated by the Supreme Court or the High Court, as applicable, will appoint the sole arbitrator upon a request (made by way of filing an application) made by either party.

Moreover, in an institutional arbitration, a procedure for appointment is usually prescribed by the rules of the relevant institution. Section 11(13) of the Arbitration Act, as amended by the 2019 Amendment Act, also prescribes that an application for appointment of an arbitrator must be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

Q11. Does the law of limitation apply to arbitration proceedings?

In accordance with Section 43 of the Arbitration Act, the Limitation Act, 1963 ('Limitation Act') applies to arbitrations as it applies to proceedings in court.

In recent judgments, the Supreme Court has clarified that under Article 137 of the Limitation Act, the period of limitation for filing a petition for the enforcement of a foreign award would be 3 years from when the right to apply accrues [Government of India v. Vedanta (2020)], and for a Section 11 application would be three years from either: (a) the date of refusal of appointment of an arbitrator; or (b) the expiry of 30 days from the date of issuance of the notice of arbitration, whichever is earlier [BSNL v. Nortel Networks (2021)].

Q12. When is the arbitral tribunal deemed to have entered upon the reference?

Under the explanation to Section 29-A of the Arbitration Act, the arbitral tribunal is deemed to have entered upon the reference on the day on which the sole arbitrator, or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

Q13. What are the requirements for an arbitration agreement to be enforceable under the Arbitration Act?

Section 7 of the Arbitration Act enumerates the requisites for a valid arbitration agreement. It provides that the parties are required to agree (in writing) to submit to arbitration all or certain disputes which have arisen or which may arise between them. The agreement will only be considered to be in the form of writing if it is contained in:

- A document signed by the parties;
- Any form of communication which provides a record of the agreement; or
- An exchange of statement of claims and defence in which the existence of the agreement is alleged by one and not denied by the other.

The Supreme Court recently held in Garware Wall Ropes v. Coastal Marine Engineering (2019) that there is no valid arbitration agreement if the underlying agreement, containing the arbitration clause, is not duly stamped, since the arbitration agreement did not come into existence.

In N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. (2023), the constitution bench of the Supreme Court, held that an arbitration agreement or clause would not be enforceable under Indian contract law, if the instrument containing the arbitration agreement is not stamped in terms of the Indian Stamp Act, 1899 ('Stamp Act'). Accordingly, such an arbitration agreement was held to not 'exist in law' or be capable of being acted upon, thereby requiring that at the stage of appointment of arbitrators by courts under Section 11 of the Arbitration Act, the appointing court must ascertain whether appropriate stamp duty has been paid on the underlying instrument as well as the arbitration agreement. This decision is being reconsidered by a seven-judge bench of the Supreme Court in a curative petition, and the decision is likely to be delivered soon on the issue whether an unstamped/insufficiently stamped arbitration agreement was unenforceable.

Q14. What procedural rules are arbitrators bound by? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Parties can determine the procedural rules to govern the arbitration. If no such procedure is agreed upon, the tribunal may conduct the proceedings in such manner as it considers appropriate. However, parties cannot agree to a

procedure in contravention of the mandatory provisions of Indian law. If it is an institutional arbitration, the arbitrator will also be bound by the procedural rules of the arbitral institution. In any event, the procedures applicable to court proceedings and admissibility of evidence in court proceedings do not apply to an arbitration.

As per the second proviso to Section 24(1), the arbitral tribunal is required to, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on a day-to-day basis, and not grant adjournments unless sufficient cause is provided. The tribunal may also impose exemplary costs on the party seeking frivolous adjournments.

Q15. What powers does a court have to intervene and assist arbitration proceedings?

The Arbitration Act provides in Section 5 that in matters governed by Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in Part I. Part I of the Arbitration Act gives the courts power to intervene and assist arbitration proceedings only in limited situations:

- Under Section 8 of the Arbitration Act to refer the parties to arbitration;
- Under Section 9 of the Arbitration Act, a party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced, apply to a Court for interim measures. However, according to Section 9(3), once the arbitral tribunal has been constituted, the Court shall not entertain an application for interim measures, unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 (interim measures ordered by arbitral tribunal) efficacious. Section 9(2) also makes it mandatory for parties to commence arbitration proceedings within 90 days if the court passes an order for any interim measure of protection;
- Under Section 11 of the Arbitration Act for appointment if the parties are unable to appoint an arbitrator on their own;
- The courts can also decide on termination of the mandate of the arbitrator if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay under Section 14 of the Arbitration Act;
- During the arbitration proceedings, the parties can take the court's assistance in taking evidence under Section 27 of the Arbitration Act;
- Once the proceedings are over, the parties can file applications to set aside the award in court under Section 34 of the Arbitration Act. Any order of the court whether setting aside or refusing to set aside the award can be appealed under Section 37 of the Arbitration Act. Once the objections to the award are dismissed, the court enforces the award in the same manner as a decree of the court; and
- As noted above, the provisions of Section 9 (interim measures by court etc.), Section 27 (court assistance in taking evidence), Section 37 (1)(a) and Section 37 (3) (appealable orders) are also available in international commercial arbitrations seated outside India.

Under Part II of the Arbitration Act, courts have power to intervene and assist arbitration proceedings only in the following situations:

- Under Sections 45 and 54 of the Arbitration Act, the court can refer parties to arbitration;
- Under Sections 49 and 58 of the Arbitration Act, the court may enforce a foreign arbitral award as if it were a decree of the court. Also, the court may refuse to enforce an award as per Sections 48 and 57 of the Arbitration Act respectively; and
- Under Sections 50 and 59 of the Arbitration Act, the court can hear appeals from the orders of a court refusing to refer parties to arbitration or refusing to enforce a foreign award under Sections 48 and 57 of the Arbitration Act respectively. Pertinently, no appeal would lie from a decision enforcing a foreign award or referring parties to arbitration under Section 45.

Q16. What is the risk of a court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

The parties may approach the court at different stages of the proceedings, as explained above. However, the situations in which the court can be approached during the arbitration proceedings are limited. As the scope of court intervention is limited, the risk of delaying the arbitration proceedings by frequent court applications is low.

Q17. What interim remedies are available from an arbitral tribunal?

Section 17 of the Arbitration Act empowers the arbitral tribunal to grant interim measures necessary to preserve the subject matter of the dispute. Interim measures granted by the arbitral tribunal may relate to securing the amount in dispute in the arbitration, the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in the arbitration, etc. Orders of the arbitral tribunal granting interim measures are enforceable as if they are orders of the court. Breach of an arbitral tribunal's order could result in contempt proceedings.

The judgment of the Supreme Court in Amazon.com NV Investment Holdings LLC v. Future Retail Limited (2021) also upheld the right of parties to India-seated arbitrations to approach the tribunal for emergency relief under Section 17(1). Such emergency awards are enforceable under Section 17(2) by the courts.

The High Court of Calcutta in Uphealth Holdings INC. v. Glocal Healthcare Systems (P) Ltd. (2023) has held that the Arbitration Act does not provide for enforcement of orders passed by an emergency arbitrator ('EA') in cases of a foreign seated arbitration, and that there is no *pari materia* provision under Part II of the Arbitration Act similar to Section 17(2) of the Arbitration Act. However, the High Court also held that a foreign-seated EA's order is an additional factor which can be taken into account while considering an application for grant of interim relief by the Court under Section 9 of the Arbitration Act.

Q18. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

If one of the parties to an arbitration agreement initiates court proceedings in contravention of the arbitration clause, the other party can object to the same on the ground that there is an arbitration agreement between the parties. The court may then refer the parties to arbitration under Section 8 or Section 45 of the Arbitration Act. However, such objection should be made before filing the first statement in the arbitration.

If arbitration is invoked where there is either no arbitration clause or where the dispute is not arbitrable, the other side can make a preliminary objection to the validity of the arbitration. There can be no arbitration in breach of a valid jurisdiction clause.

The limited judicial review under Section 8 and Section 45 of the Act is to protect the parties from being forced to arbitrate when the subject matter of the dispute is clearly non-arbitrable [Sorin Group Italia S.r.l. v. Neeraj Garg (2022)].

Q19. Will Indian courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

There have been cases where Indian courts have granted injunctions restraining proceedings started overseas in breach of an arbitration agreement. The approach of the Indian courts has been to draw a balance between protecting interest of parties. Recently, the High Court of Madras in ADM International Sarl v. Sunraja Oil Industries (2021) reiterated the findings of the High Court of Delhi in McDonald's India v. Vikram Bakshi (2016) on the principles for granting an anti-arbitration injunction. The threshold to be met for such an injunction is very high because the party would have to show that the arbitration agreement is null and void, inoperative or incapable of being performed, on principles analogous to those found in Section 8 and Section 45.

Q20. If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

The arbitral tribunal can order for disclosure of documents or attendance of witnesses (factual or expert) upon an application filed by one of the parties. It is also open for the arbitral tribunal or any party involved in arbitration with the

approval of the arbitral tribunal, to apply to the court for assistance in taking evidence. The application should include the details of the parties and the arbitrator along with the evidence or the details of the witness whom the parties want to produce. The requirement of involving the arbitral tribunal in taking assistance of the court is not a mere formality. It puts an obligation on the tribunal to apply its mind before itself making, or allowing any application to be made, before the court.

Q21. What final remedies are available from the tribunal?

The arbitral tribunal has broad powers to pass a final award, depending on the prayer of the parties which may range from seeking an injunction, a declaratory relief, specific performance, recovery of dues, damages, costs etc., depending on the merits of the case. The tribunal also has the discretion to award costs and interest, at rates it deems reasonable, in accordance with the provisions of the Arbitration Act.

The tribunal can also within 30 days from the date of the award can correct and interpret certain portions of the award.

Q22. Is there any time limit specified for the arbitral tribunal to pass an award?

The arbitral tribunal in an India-seated arbitration is required under Section 29A of the Arbitration Act to complete all arbitrations within 12 months from the date of completion of the parties' pleadings. The 2019 Amendment requires the parties to submit their pleadings within a period of six months from the date of appointment of all the arbitrators. Prior to the 2019 Amendment, the 12-month limit for issuing the arbitral award ran from the date of appointment of all the arbitrators.

The 12-month period can be extended for a further 6 months by agreement of the parties. However, in the event an award has not been rendered within the extended period, the parties may approach the appropriate court seeking an extension. The Court may grant an extension if it is satisfied that the delay is on account of a sufficient cause, failing which the mandate of the arbitrators is terminated. The 2019 Amendment has clarified that the mandate of the arbitrator continues during the pendency of the application for extension.

The 12-month time limit is not mandatory for international commercial arbitrations, but the arbitrators are encouraged to act expeditiously and endeavor to dispose of the matter within the prescribed time-period of 12 months.

Q23. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does India recognise the concept of kompetenz-kompetenz?

The principle of Kompetenz – Kompetenz is recognised in India and enshrined in Section 16 of the Arbitration Act. It vests the power with the arbitral tribunal to rule on its own jurisdiction, including ruling on any objections, with respect to the existence or validity of the arbitration agreement. Therefore, the arbitral tribunal has the power to define the contours of its jurisdiction. If the arbitral tribunal decides that it does not have jurisdiction, the parties can file an appeal against such an order before the court under Section 37(2)(a) of the Arbitration Act. However, if the arbitral tribunal holds that it has jurisdiction, the parties will have to wait till the award is given and then challenge the award under Section 34 of the Arbitration Act.

Q24. What is the process to appeal or challenge arbitration proceedings?

Section 34 of the Arbitration Act provides for circumstances in which an application to set aside the arbitral award can be made to a court. An award may be set aside if a party was under some incapacity, the arbitration agreement was not valid under the subjected law, notice was not given to the party for appointment of an arbitrator, the party was not given the opportunity to present its case, the award passed was out of the scope of the submissions to arbitration, or the composition of the arbitral tribunal or the procedure was not according to the agreement.

Further, Section 34 provides two additional grounds when the court can set aside the award, i.e., the subject-matter is not capable of settlement by arbitration under the law for the time being in force, or if the award is in conflict with the public policy of India. An award is said to be in conflict with public policy of India, only in limited circumstances. These circumstances are: (a) the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81 of the Arbitration Act (which deal with confidentiality of, and admissibility of evidence relating to conciliation proceedings, respectively); (b) the award is in contravention with the fundamental policy of Indian law; or (c) the award is in conflict with the most basic notions of morality or justice. It has been clarified that, a contravention of the fundamental policy of Indian law shall not entail a review on the merits of the dispute. Arbitral awards arising out of arbitrations other than international commercial arbitrations may also be set aside on the ground of conflict with public policy of India if the court finds that the award is vitiated by patent illegality appearing on the face of the award.

The procedure under Section 34 of the Arbitration Act requires a party to file an application to set aside an award under one of the grounds mentioned above. Such an application has to be filed within three months from the date of receipt of the signed copy of the arbitral award by the parties [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (2021)]. An extended period of 30 days can be granted by the court, if the court is satisfied that there was sufficient reason for the delay.

An order of the court refusing to condone delay in filing the Section 34 application is appealable under Section 37(1)(c) [Chintels India Ltd. v. Bhayana Builders (2021)]. An advance notice of the Section 34 application has to be mandatorily given to the opposing party.

If the party filing the application also seeks a stay of the enforcement of the arbitral award, a separate application will have to be filed. The court may order a stay, subject to conditions as it may deem fit. Very often, Indian courts may order deposit of the award amount or a part thereof.

A court exercising its powers under Section 34 can only either: (a) set aside the award; or (b) remand the award to the tribunal to eliminate the grounds for setting aside the award. As clarified by Supreme Court in NHAI v. M. Hakeem (2021) the court does not have the power to modify arbitral awards.

Q25. Can the appointment of an arbitrator be challenged? What are the grounds to challenge the appointment of an arbitrator?

The appointment of the arbitrator can be challenged under Section 13 of the Arbitration Act if circumstances exist that give rise to justifiable doubts as to his/her independence or impartiality, or he/she does not possess the qualifications agreed to by the parties. If the challenge is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award and thereafter the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34 of the Arbitration Act.

The grounds which give rise to justifiable doubts as to the independence or impartiality of an arbitrator are enumerated in the Fifth Schedule of the Arbitration Act, whereas relationships that make a person ineligible for appointment as an arbitrator are enumerated in the Seventh Schedule.

Section 14 of the Arbitration Act further provides that the mandate of the arbitrator shall be terminated if he/she becomes *de jure* or *de facto* unable to perform his/her functions or fails to act without undue delay. The arbitrator may also withdraw from the office or the parties may agree to end his/her mandate.

A challenge arising due to allegations of perceived bias against the tribunal does not fall within the ambit of Section 14 of the Arbitration Act. With respect to issues of perceived bias, the same would axiomatically be required to be established by facts and is specifically dealt with under Sections 12 and 13 of the Arbitration Act. Hence, in such scenarios, the requisite approach would be to proceed before the arbitral tribunal in terms of Section 13 of the Arbitration Act, and an identical enquiry cannot be undertaken by the court under Section 14 of the Arbitration Act [Union of India v. Reliance Industries Ltd. & Ors. (2022)].

Q26. How is an arbitral award enforced?

An arbitral award is final and binding on the parties. An arbitral award issued in an India seated arbitration can be enforced, as if it were a decree of the court, under Section 36 of the Arbitration Act as follows:

- After the expiry of three months from the date of receipt of the arbitral award, if no application has been filed under Section 34 of the Arbitration Act for setting aside the arbitral award; or
- If an application for setting aside the arbitral award under Section 34 of the Arbitration Act has been filed along with an application seeking stay of the operation of the arbitral award under Section 36 of the Arbitration Act, and no stay is granted by the court.

The 2021 Amendments to the Arbitration Act provide that a court shall unconditionally stay an award pending disposal of the challenge under Section 34, if the Court is satisfied that a *prima facie* case is made out that the arbitration agreement, or the contract forming the basis of the award, or the making of the award, was induced or effected by fraud or corruption [Second proviso to Section 36(3)].

The arbitral award is enforced like a decree of a civil court under the Code of Civil Procedure, 1908.

Q27. What legal fee structures can be used to remunerate an arbitral tribunal? Are fees fixed by law?

The 2019 Amendment requires arbitral institutions to determine the fees and manner of payment of the arbitral tribunals based on the Fourth Schedule to the Arbitration Act [Section 11(14)]. However, this provision does not apply to international commercial arbitration or in situations where the parties choose to follow an arbitral institution's framework on fees.

Fourth Schedule is not mandatory and it is open to parties to agree and specify the fees payable to the arbitrator(s) or the modalities for determination of arbitrators' fees. Further, when an arbitral tribunal fixes the fee in terms of the Fourth Schedule (which is a model fee schedule), the parties should not be permitted to object the fee fixation. Fourth Schedule is not applicable to international commercial arbitrations and arbitrations where the parties have agreed that the fees are to be determined in accordance with rules of arbitral institutions [ONGC v. Afcons Gunanusa JV (2022)].

Q28. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Section 31A(2) of the Arbitration Act provides that the general rule is that the unsuccessful party shall pay the costs of the successful party. However, the court or arbitral tribunal may decide otherwise for reasons to be recorded in writing.

The 'costs' include the fees and expenses of the arbitrator, court and witnesses; legal fees and expenses; administration fees of the institution or any other expenses in connection with the arbitral award. While awarding these costs, the arbitral tribunal considers the conduct of the parties, whether the parties have made any frivolous claims, whether the party made any reasonable offer to settle the dispute which was refused by the other party and whether a party has partly succeeded in the case.

Q29. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?

The Arbitration Act grants no powers to a tribunal to enjoin a third party to pending arbitration proceedings. Non-signatories to the arbitration agreement can be bound to the arbitration agreement under the 'groups of companies' doctrine, where a clear intent to bind such non-signatories can be established. This doctrine was established by the Supreme Court in Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors. (2013) which held that 'under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties'. Further, in GMR Energy Limited v. Doosan Power

Systems India Private Limited (2017) the High Court of Delhi ruled that a non-party to the arbitration agreement could be made part of the arbitral proceedings on the grounds that it acted as an alter ego to the contracting party.

However, in Reckitt Benckiser India Private Limited v. Reynders Label Printing India (2019), the Supreme Court refused to apply the 'group of companies' doctrine because it found that there was no mutual intention to bind the non-signatory and refused to extend the arbitration agreement.

Further, the High Court of Delhi in Shapoorji Pallonji v. Rattan India Power (2021) applied the 'group of companies' doctrine along with principles of alter ego and lifting of the corporate veil, to hold that non-signatory affiliates of a parent company could be bound by an arbitration agreement.

The Supreme Court in Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises (2022) analysed the 'group of companies' doctrine and laid down the following factors to determine whether a company within a group of companies, which is not a signatory to an arbitration agreement, would nonetheless be bound by it:

- Mutual intent of the parties;
- Relationship of the non-signatory to a party, which is a signatory to the agreement;
- Commonality of the subject matter;
- Composite nature of the transaction; and
- Performance of the contract.

The Supreme Court noted that although party autonomy is recorded under Section 7 of the Arbitration Act, a non-signatory may be held to be bound under a consensual theory, founded on the principles of agency and assignment, or on a non-consensual basis such as estoppel or alter ego.

Pursuant to this judgment, the Supreme Court in Cox & Kings Ltd. v. SAP India (P) Ltd. (2022) referred the aspect of interpretation of "claiming through or under" as occurring in amended Section 8 of the Arbitration Act (power to refer parties to arbitration where there is an arbitration agreement) qua the doctrine of group of companies to a larger bench to provide clarity on this aspect, which decision is awaited.

Q30. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?

Section 8 of the Arbitration Act empowers parties to the arbitration agreement, to apply to a judicial authority to refer the matter to arbitration. The Arbitration Act now also allows any person claiming through or under a party that is a party to the arbitration to apply to a judicial authority to refer the matter to arbitration. Therefore, non-signatories who are claiming through or under a party to the arbitration agreement can apply to the court to refer parties to arbitration.

Q31. Are there any requirements relating to arbitrators' independence and/or impartiality?

The arbitrator appointed is duty bound to disclose the existence of circumstances that give rise to justifiable doubt as to his/her independence and impartiality under Section 12 of the Arbitration Act. These circumstances are listed in the Fifth Schedule of the Arbitration Act and are broadly based on the IBA Guidelines on Conflict of Interest in Arbitration. If the disclosures are of those circumstances, which are listed in the Seventh Schedule of the Arbitration Act, the person will not be eligible for appointment as an arbitrator, unless the parties expressly decide to waive the conflict after the dispute has arisen.

Q32. Does the law prohibit any types of disputes from being resolved through arbitration?

The Arbitration Act does not explicitly exclude any category of disputes as non-arbitrable. However, the courts have held that the following disputes are generally treated as non-arbitrable:

- Disputes falling within the exclusive jurisdiction of a special court under a special statute excluding the

jurisdiction of an ordinary civil court; and
- Disputes which are generally considered by the courts as appropriate for decision by public fora, for instance, disputes pertaining to rights *in rem*.

Examples of such disputes are as follows:
- patent, trademarks and copyright;
- antitrust or competition laws;
- insolvency or winding up;
- intra-company disputes;
- claims covered by the DRT Act;
- trust deeds;
- bribery or corruption;
- eviction and tenancy matters covered by special enactments such as rent control legislations;
- guardianship and matrimonial matters; and
- criminal matters.

Supreme Court in Vidya Drolia v. Durga Trading Corporation (2020) laid down a four-fold test for determining when the subject matter of a dispute is not arbitrable:
- When cause of action and subject matter of the dispute relates to actions *in rem*, that do not pertain to subordinate rights *in personam* that arise from rights *in rem*;
- When cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable;
- When cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and
- When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

With regards to the arbitrability of fraud, the Supreme Court in Vidya Drolia (supra) and Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) (2020) held that only "serious allegations of fraud", as opposed to "simple allegations of fraud" are non-arbitrable. Serious allegations of fraud occur when: (a) the plea of fraud permeates the entire contract, and particularly the arbitration agreement; or (b) where the allegations of fraud have an implication on the public domain.

Certain matters such as consumer disputes are arbitrable at the option of the aggrieved party. In Emaar MGF Land v. Aftab Singh (2019), the Supreme Court held that the aggrieved party may elect to approach the courts or choose to arbitrate in the first instance, if a valid arbitration agreement exists.

Q33. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

Prior to the 2019 Amendment, confidentiality of the arbitral proceedings was not expressly recognized under the Arbitration Act and it was common practice to include a confidentiality clause in the arbitration agreement. The 2019 Amendment imposes a statutory obligation upon the parties, the arbitrators and the arbitral institution to maintain the confidentiality of the arbitral proceedings. However, the confidentiality requirement is waived during the implementation and enforcement of the arbitral award.

Q34. What is the effect on the arbitration of pending insolvency of one or more of the parties to the arbitration?

IBC is the governing legislation for all the insolvency proceedings initiated in India. As per Section 14 of the Indian Insolvency and Bankruptcy Code, 2016, ('IBC') upon commencement of the insolvency proceedings, the adjudicating authority has the power to suspend proceedings against the insolvent company. This suspension will persist till such time the corporate insolvency resolution process is completed.

As per this provision, all arbitrations that are commenced after the moratorium is imposed are rendered *non est* in law, as was held by the Supreme Court in Alchemist Asset Reconstruction Company Ltd. v. Hotel Gaudavan Pvt. Ltd. & Ors. (2018). In P. Mohanraj v. Shah Brothers Ispat (2021),

the Supreme Court clarified that the Section 14 moratorium would apply to Section 34 proceedings under the Arbitration Act as well, as the Section 34 proceedings may result in the arbitral award being upheld resulting in monies being payable to the corporate debtor.

The Supreme Court in Indus Biotech Pvt. Ltd. v. Kotak India Venture (2021) held that where the NCLT determines the existence of a default and that a debt is payable in an IBC Section 7 application, the proceedings would become an *in rem* proceedings. Therefore, there could be no reference to arbitration in such a circumstance. If the NCLT is satisfied that there is no default, the parties would be free to seek appoint of arbitrators.

Q35. Which arbitral institutions are commonly used to resolve commercial disputes in India?

The following foreign arbitral institutions are commonly used to resolve commercial disputes in India:

- SIAC
- ICC
- LCIA

Further, the following Indian arbitral institutions are commonly used to resolve commercial disputes:

- Delhi International Arbitration Centre (DIAC)
- Mumbai Centre For International Arbitration (MCIA)
- International Arbitration and Mediation Centre, Hyderabad (IAMC)
- India International Arbitration Centre (IIAC)
- Indian Council of Arbitration (ICA)
- Construction Industry Arbitration Council (CIAC)
- The International Centre for Alternative Dispute Resolution (ICADR)
- Nani Palkhivala Arbitration Centre (NPAC)

Q36. What are the recent changes that have been brought to the Indian Arbitration and Conciliation Act, 1996?

The Arbitration and Conciliation (Amendment) Act, 2021 received Presidential assent on 11 March 2021, and is deemed to have come into force from 4 November 2020. The key changes brought about by the Amendment are:

- As detailed above, the unconditional staying of an award pending Section 34 proceedings, on grounds of fraud or corruption.
- The deletion of Section 43J and Eighth Schedule introduced by the 2019 Amendments, which provided minimum qualifications, experience, and norms for arbitrators.

13. Competition Law

Q1. What are the laws governing competition/ anti-trust in India?

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

Q2. What is the scope of the Competition Act?

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

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

Q3. What is the institutional framework for governing the Competition Act?

The Competition Act provides for the establishment of the Competition Commission of India (***CCI***), the nodal authority for the monitoring, enforcement and implementation of competition law in India. The CCI and its investigative wing, the Office of the Director General (***DG***), are entrusted with extensive powers of investigation with respect to anti-competitive practices, including the power to summon and enforce the attendance of any person, examine them on oath and receive evidence on affidavit. Orders passed by the CCI may be appealed to the National Company Law Appellate Tribunal (***NCLAT***)[1] and the final orders passed by the NCLAT may be appealed to the Supreme Court of India.

Q4. What is meant by "relevant market" under the Competition Act?

The Competition Act defines the relevant market as the market, which the CCI may determine with reference to the "relevant product market" and/ or the "relevant geographic market". "Relevant product market" is defined as a market comprising all those products or services: (i) which are regarded as interchangeable or substitutable by the consumer, by reason of the characteristics of the products or services, their prices and intended use; (ii) the production or supply of, which are regarded as interchangeable or substitutable by the supplier, by reason of ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.[2] "Relevant geographic market" is defined as a market comprising the area in which the conditions of competition for: (i) supply of goods; (ii) provision of services; or (iii) demand of goods or services, are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

Q5. What are "anti-competitive agreements"?

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

1 Orders of the CCI were initially appealable to the erstwhile Competition Appellate Tribunal (COMPAT). On 26 May 2017, COMPAT merged with the NCLAT, and the appellate functions of the COMPAT were conferred upon the NCLAT.

2 Based on the Competition (Amendment) Act of 2023, of which certain provisions were brought into force on 18 May 2023 as per the Ministry of Corporate Affairs' Notification, available at: https://nclat.nic.in/sites/default/files/2023-05/Appointed%20day%20of%20Competition%20%28Amendment%29%20Act%2C%202023_1.pdf (CAA 2023).

Q6. What is an abuse of a dominant position?

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

An enterprise or group will have abused its dominant position if it:

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

Q7. What are the factors that the CCI may take into consideration while determining the AAEC in cases involving anti-competitive agreements and abuse of dominant position?

Section 19(3) of the Competition Act sets out certain factors that the CCI is required to consider while determining whether an agreement has an AAEC under Section 3 of the Competition Act. These factors are: (i) creation of entry barriers; (ii) driving competitors out of the market; (iii) foreclosure of competition; (iv) benefits or harm to consumers; (v) improvements in the production or distribution of goods or the provision of services; and (vi) the promotion of technical, scientific, and economic development. The CCI may consider any or all of these factors in its analysis.

Section 19(4) of the Competition Act sets out certain factors that the CCI is required to consider while determining whether an enterprise enjoys a dominant position under Section 4 of the Competition Act. These factors are: (i) market share of the enterprise; (ii) size and resources of the enterprise; (iii) size and importance of its competitors; (iv) economic power including commercial advantages over competitors; (v) extent of vertical integration; (vi) dependence of consumers; (vii) entry barriers (regulatory and otherwise); (viii) countervailing buyer power; (ix) market structure and size; (x) social obligations and social costs; (xi) relative advantage by way of contribution to economic development by the dominant enterprise; and (xii) any other relevant factors. The CCI may consider any or all of these factors in its analysis.

Q8. What are the penalties for contravention of the antitrust provisions of the Competition Act?

Liability of an Enterprise

Section 3 of the Competition Act

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

Section 4 of the Competition Act

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

Determination of Penalty

It should be noted that, further to a judgment of the Supreme Court of India (May 2016), the "relevant turnover" as opposed to the "total turnover" of the breaching enterprise is considered while determining the penalties to be imposed. However, the CAA 2023 is set to reset the turnover back to the global turnover from the relevant domestic turnover, once the provisions come into effect.

Individual Liability

Individuals may also be fined where a company has breached the provisions of the Competition Act.

A person who, at the time of the contravention, was in charge of, and was responsible to, the company for the conduct of its business, shall be deemed guilty and punished accordingly. However, there will be no liability where it is proven that the contravention was committed without his/ her knowledge or that he/ she had exercised all due diligence to prevent the breach. In addition, where any director, manager, secretary or other officer of the company has connived at or consented to the breach, or the breach is attributable to his/ her neglect, such person shall also be deemed guilty of the contravention and be punished accordingly.

Leniency

Section 46 of the Competition Act provides for the imposition of lesser penalty on a member of a cartel that makes full, true and vital disclosure in respect of the cartel. Under the Competition Commission of India (Lesser Penalty) Regulations, 2009 the first party to make such disclosure to the CCI can benefit from a reduction in penalty of up to 100%, if the disclosure enables the CCI either to: (i) form a *prima facie* opinion regarding the existence of cartel; or (ii) establish the existence of a cartel in the matter under investigation, where the DG or the CCI did not have sufficient evidence to do so at the time of the application.

The second applicant can gain up to a 50% reduction in fines. There is no upper limit on the number of subsequent applicants and each of them can gain up to a 30% reduction in fines, if they disclose evidence that provides significant incremental value to the evidence already in possession of the CCI or DG.[3]

Individuals, including employees or ex-employees, can also benefit from the lesser penalty provisions, by either: (i) themselves applying for lesser penalty; or (ii) being included in the leniency application filed by their employer. A leniency applicant must co-operate until the completion of the proceedings before the CCI or DG in order to secure a reduction in penalty.

Q9. What are the key highlights in relation to the introduction of a settlement and commitments procedure?

CAA 2023 envisages a mechanism for an enterprise under investigation to apply for settlements and offer commitments to the CCI to address the identified competition concerns. CAA 2023 provides that the detailed procedure for such commitments and settlements shall be set out under regulations to be formulated by the CCI.

The settlement provisions, as provided in CAA 2023, envisage parties involved in certain competition law violations of vertical agreement or an abuse of dominance to voluntarily propose payment of such amount or on such other terms and manner of implementation of settlement and monitoring as may be specified by regulations. Similarly, through the commitment provisions, an enterprise against whom an inquiry is initiated for alleged violations of vertical agreement or an abuse of dominance, may offer commitments before the CCI. The CCI recently, on 23 August 2023, released the drafts of Competition Commission of India (Settlement) Regulations, 2023 and Competition Commission of India (Commitment) Regulations, 2023 for public comments. Once effective, the settlement and commitment procedures will expedite resolution of competition violations while enhancing cooperation and limit time consuming litigations.

Q10. What is the merger control regime in India?

From 1 June 2011, any acquisition, merger or amalgamation, where the parties or their groups cross certain thresholds (based on assets or turnover) specified in the Competition Act, must be notified to the CCI, unless it can avail of the stipulated exemptions provided. These transactions – referred to as "combinations" - are subject to Sections 5 and 6 of the Competition Act, which prohibits a combination, which causes or is likely to cause an AAEC in the relevant market

3 The CAA 2023 introduces two key changes to the leniency regime: (i) an applicant is allowed to withdraw a marker; and (ii) the introduction of a leniency plus mechanism. The leniency plus mechanism would allow an applicant filing for leniency for one cartel to help expose another cartel to the CCI and receive a reduction in penalty for both cartels. However, the appurtenant regulations and the provisions in the CAA 2023. relating to such provisions are yet to come into force.

in India and consider it as void. The merger control regime in India is mandatory and suspensory, and transactions subject to review by the CCI cannot be concluded until: (i) merger clearance in India has been obtained; or (ii) a review period of 210[4] calendar days, from the date of notification of the combination (taking account of various "stops to the clock"), has passed, whichever is earlier. The CCI in its orders has made it clear that even global transactions with an Indian element qualifying as a combination cannot be concluded without obtaining clearance from the CCI.

Q11. What are the transactions that require notification to the CCI?

Some examples of such transactions are:

- the acquisition by one or more persons of control, shares (including convertible instruments), voting rights or assets of one or more enterprises, where the parties or the group to which the target will belong post-acquisition meet specified assets or turnover thresholds. It should be stressed that even acquisitions not involving a change of control may need to be notified to the CCI;
- the acquisition by a person of control over an enterprise where the person concerned already has direct or indirect control over another enterprise engaged in the production, distribution or trading of similar or identical or substitutable goods, or in the provision of a similar or identical or substitutable service, where the parties, or the group to which the target will belong post-acquisition, meet specified assets or turnover (see below).
- mergers or amalgamations, where the enterprise remaining, or enterprise created, or the group to which the enterprise will belong after the merger or amalgamation, meets specified assets or turnover (see below).

Substance over form

The CCI seeks to capture innovative structuring of transactions designed to avoid notifications to the CCI. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (***Combination Regulations***) provide that a notification requirement must be assessed with respect to the substance of the transaction and that any transaction structure, which has the effect of avoiding a notification requirement, will be disregarded by the CCI.

Q12. What are the jurisdictional thresholds under the Competition Act?

The jurisdictional thresholds are prescribed under Section 5 of the Competition Act for the relevant parties and the group and are set out in detail below:

Thresholds

Parties test:

- the parties have combined assets in India of INR 2,000 crores (approx. USD 242 million)[5] or a combined turnover in India of INR 6,000 crores (approx. USD 728 million); or
- the parties have combined worldwide assets of USD 1,000 million, including combined assets in India of INR 1,000 crores (approx. USD 121 million); or a combined worldwide turnover of USD 3,000 million, including a combined turnover in India of INR 3,000 crores (approx. USD 364 million);

OR

Group test:

- the group has assets in India of INR 8,000 crores (approx. USD 970 million); or a turnover in India of INR 24,000 crores (approx. USD 2,911 million); or
- the group has worldwide assets of USD 4,000 million including assets in India of INR 1,000 crores (approx. USD 121 million); or a worldwide turnover of USD 12,000 million, including a turnover in India of INR 3,000 crores (approx. USD 364 million).

The Government of India (***GoI***) issued a *de minimis* target based filing exemption (***Target Exemption***) notification on 27 March 2017. Under this notification, such transaction will not need to be notified to the CCI where the target has either: (i) assets in India of less than INR 350 crores (approx. USD 42.4

4 The CAA 2023 proposes to reduce this timeline to 150 calendar days.

5 Conversion rates are based on the average spot rate of the last six months as on 30 September 2023, quoted by the RBI and will therefore change over time.

million); or (ii) turnover in India of less than INR 1,000 crores (approx. USD 121 million).

For the purposes of assessing jurisdiction thresholds under Section 5 of the Competition Act and applicability of the Target Exemption, only: (i) the value of assets of; and (ii) turnover attributable to, the portion, division or business being transferred is considered as regards the target, and not the entire assets or turnover of the selling entity.

The CCI has clarified that a de-merger of assets or business undertaking, which takes place through a court-approved scheme, will be treated as an acquisition under Section 5(a) of the Competition Act, and the Target Exemption would be available in such cases.

Deal Value Threshold (DVT)

The CAA 2023 has introduced an additional criterion of pre-notification, based on the DVT. Under the DVT limb, transactions that meet the below criterion will require filing a notification with the CCI for its prior approval, irrespective of whether such transaction can avail of the Target Exemption:

- a deal value in excess of INR 2,000 crores; and
- the target has "substantial business operations in India".

Although the provisions relating to DVT have been introduced by way of the CAA 2023, the regulations relating to the applicability of the same are yet to come into force. The CCI, on 5 September 2023 published the draft Competition Commission of India (Combination) Regulations, 2023 (***Draft Regulations***) for public comments, setting out the contours of calculating the DVT. However, as on date, there is no clarity in relation to their notification and consequential coming into effect.

Another significant change that is proposed to come into effect by way of the CAA 2023 is the derogation from standstill obligations for on market purchases. Previously, the CCI's suspensory merger control regime created hurdles for open market purchases/ stock market acquisitions, as such acquisitions must be undertaken instantaneously and without prior disclosure to the public. The requirements to notify the CCI and defer consummation till approval were rendering several such transactions unviable. Recognising these difficulties, the CAA 2023 introduces a derogation from the standstill obligations for open market purchases and other transactions undertaken on stock exchanges, subject to certain conditions. This change is business friendly and should decrease the number of gun-jumping cases involving open market purchases.

Q13. Is there any time period within which the CCI must be notified?

The CCI previously required the parties to notify a combination within 30 calendar days of a "trigger event". However, this requirement has now been done away with by the GoI through a Notification dated 29 June 2017. The parties are now required only to notify and seek approval of the CCI before the consummation of the transaction.[6]

Q14. What is the "trigger event" that requires a filing?

Under Section 6 of the Competition Act, the trigger event for the notification of a proposed transaction to the CCI is the: (i) final approval of the proposed merger or amalgamation by the boards of the enterprises concerned; or (ii) execution of any agreement or other document for an acquisition as per Section 5 (a) of the Competition Act or the acquisition of control.

The Combination Regulations clarify that the "other document" refers to any binding document (regardless of its nomenclature), conveying an agreement or decision to acquire control, shares, voting rights or assets. In the event of a hostile acquisition, the "other document" means any document executed by the acquirer conveying a decision to acquire. Where a public announcement has been made under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 the date of such announcement will be deemed the date of execution of the "other document" for the acquisition.[7]

6 This is now clearly stated in the CAA 2023 under the amended Section 6 of the Competition Act, which is yet to come into effect.

7 The revised framework under the CAA 2023, which is yet to come into effect, is set to remove the obligation for filing a Form III and exempts such transactions.

Q15. Are internal restructurings notifiable?

Among the various types of transactions that are ordinarily exempt under the Combination Regulations, intra-group acquisitions are explicitly exempt from notification to the CCI, except where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.

In respect of intra-group mergers and amalgamations, the Combination Regulations exempt the following transactions from notification to the CCI: (i) where one enterprise holds more than 50% of the shares or voting rights in the other enterprise; and/ or (ii) where enterprises within the same group hold more than 50% of shares or voting rights in each of the parties to the merger or amalgamation. However, this exemption is subject to the condition that the concerned transaction does not result in a transfer from joint to sole control.

Q16. What is the process of merger filing?

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

- **Form I** (i.e., short form) – All notifications are ordinarily required to be filed in a Form I. The parties are required to provide basic information in relation to the combination, with a filing fee of INR 20 lakhs (approx. USD 24,261).
- **Form II** (i.e., long form) – The parties may file the merger notification in Form II along with a filing fee of INR 65 lakhs (approx. USD 78,848). The Combination Regulations recommend that Form II be filed for transactions where:
  - the parties to the combination are competitors and have a combined market share in the same market of more than 15%; or
  - the parties to the combination are active in vertically linked markets and the combined or individual market share in any of these markets is greater than 25%.

Where parties have filed Form I and the CCI believes that it requires detailed information in Form II, it may require parties to file the notice in Form II. In such a case, the review time periods mentioned in the Competition Act and the Combination Regulations will restart.

The CCI also has the power to invalidate a notification form if it is of the opinion that the notification form is not complete or in conformity with the requirements of the Combination Regulations. Parties can also withdraw their notification form with the permission of the CCI at any time prior to the end of the Phase I investigation (as discussed below) and refile.

- **Form III** is a post-completion application form, which must be filed within seven days of an acquisition, share subscription or financing facility entered into by a public financial institution (***PFI***), registered foreign institutional investor (***FII***), bank or registered venture capital funds (***VCF***) under a covenant in a loan agreement or an investment agreement.[8]

The obligation to notify with the CCI lies with the acquiring company in case of an acquisition and jointly with the parties, in case of a merger or amalgamation.

Q17. Is there a "green channel" for non-problematic transactions?

With effect from 15 August 2019, there is a "green channel" route for transactions with no horizontal overlaps, no actual or potential vertical relationship and no complementarity between the parties' products and/ or services. Such transactions, subject to certain safeguards, will be deemed to be approved upon the acknowledgment by the CCI of a filing of the notification form.

Q18. How long will the CCI review process take?

Phase I Investigation

On receipt of a notification, the CCI is required to form a *prima facie* opinion on whether a combination causes or is likely to cause an AAEC within the relevant market in India within a period of 30 working days. If the CCI requires the parties to remove defects in the notification or to provide

8 CAA 2023 has expanded the scope of the provision to include the "value of transaction" in line with the introduction of the DVT, which is yet to come into effect.

additional information, it "stops the clock" until the additional information is provided. The CCI can also reach out to third parties or other statutory authorities during the Phase I investigation, and, in such cases, the time period can be further extended by 15 working days. This means that the CCI can take much longer than 30 days for the CCI to form a *prima facie* opinion. Interestingly, under the revised framework by way of CAA 2023, which is yet to come into effect, in case the CCI does not form a *prima facie* opinion within 30 calendar days of receipt of a notification, no separate final order will be passed. Such transactions will be deemed approved by the CCI.

During this phase, the parties may propose modifications to the combination up front in order to satisfy the CCI that the combination will not cause an AAEC in the relevant market in India. In such a case, the CCI will get an additional 15 days to evaluate the proposed modification.

Typically, the CCI takes up to 3 months for a Phase I approval. In cases where the parties have submitted voluntary modifications to the proposed transaction during the Phase I investigation, the CCI can take up to 8 months to approve the transaction.

Phase II Investigation

If the CCI forms a *prima facie* opinion that a combination is likely to cause an AAEC, it will issue a show cause notice to the parties, seeking an explanation as to why a detailed investigation should not be conducted. Where a detailed investigation is required to be conducted, the parties cannot complete the transaction prior to the following:

- a final decision by the CCI; or
- the expiry of 210 days (from the date of notification to the CCI);

During the Phase II investigation, if the CCI is of the opinion that the combination has or is likely to have an AAEC but that such adverse effect can be eliminated by suitable modification(s) to the combination, it may propose appropriate modification(s) to address such concerns. It should be noted that the notifying parties may volunteer commitments/ modifications in response to the show cause notice (which is a precursor to the detailed Phase II investigation).

Typically, the CCI may take between seven months and one year, or even more, to approve a Phase II transaction.

The CAA 2023 is also set to reduce the CCI's overall review period from 210 calendar days to 150 calendar days. It has also reduced the timelines for almost all other steps in the review process (to accommodate the reduced overall timeline).

Q19. Are there any exemptions from mandatory pre-notification?

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

- **Transactions expressly exempt under the Competition Act:** acquisitions, share subscriptions or financing facilities entered into by PFIs, registered FIIs, banks or registered VCFs, under a covenant in a loan agreement or an investment agreement, are exempted from obtaining prior clearance from the CCI. However, a *post facto* filing in Form III within seven days of completion of acquisition is required.
- **Transactions that are "ordinarily" exempt under the Combination Regulations:** transactions set out in Schedule I of the Combination Regulations are presumed not to cause an AAEC in India, and are normally not required to be notified to the CCI. Such transactions include the following:
  - an acquisition of shares or voting rights which do not entitle the acquirer to hold 25% or more of the target company, made solely for investment purposes or in the ordinary course of business (***OCB***), not leading to the acquisition of control. The Combination Regulations clarify that an acquisition of less than 10% of total shares or voting rights will be treated solely as an investment if: (i) the acquirer is able to exercise only the rights of ordinary shareholders; (ii) the acquirer does not have a seat on the board of directors of the target or the intention to acquire the same; and (iii) the acquirer does not intend to participate in the management of the target;
  - an acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to the acquisition, already holds 25% or more shares or voting rights of the enterprise but does not hold 50% or more of the

shares or voting rights of the enterprise, either prior to, or after such acquisition. This exemption is not available if the acquisition results in the acquisition of sole or joint control of such enterprise by the acquirer or the group;

- an acquisition of shares or voting rights where the acquirer already holds 50% or more of the shares or voting rights in the target enterprise, except in the cases where the transaction results in a transfer from joint control to sole control;
- an acquisition of assets not directly related to the business of the acquirer or made solely as an investment or in the OCB, not leading to control of the target enterprise, except where the assets represent substantial business operations of the target enterprise in a particular location or for a particular product or service, irrespective of whether or not such assets are organised as a separate legal entity;
- intra-group reorganisations;
- an acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the OCB;
- an acquisition of shares or voting rights pursuant to a buyback/ bonus issue/ stock split/ consolidation of face value of shares or subscription to rights issue, not leading to an acquisition of control;
- an amended or renewed tender offer where a notice has been filed by the party making such an offer;
- an acquisition of shares, control, voting rights or assets by a purchaser approved by the CCI (for instance, in case of a divestiture); and
- an acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stockbroker on behalf of its clients, in the OCB and in the process of underwriting or stockbroking.

Apart from the above, certain regional rural banks and nationalised banks are exempt from notification requirements. The GoI has also exempted banking companies that are on the brink of insolvency from filing a merger notification.

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

Q20. Is it possible to have pre-filing discussions with the CCI?

It is possible to have substantive and procedural pre–filing consultations (***PFC***) with the CCI. Parties may also avail of the CCI's assistance to fill-up the relevant notification form. However, such consultations are oral and non-binding on the CCI. An effective PFC could substantially reduce the overall Phase I or II timelines.

Q21. What are the factors that the CCI may take into consideration while determining the AAEC of a combination in India?

Section 20 of the Competition Act sets out certain factors that the CCI shall consider while determining if a combination causes or is likely to cause an AAEC in the "relevant market" in India. These factors include: (i) the actual and potential level of competition through imports in the market; (ii) entry barriers to the market (regulatory and otherwise); (iii) level of concentration in the market; (iv) the degree of countervailing power in the market; (v) the availability of substitutes in the market; (vi) the market shares of each of the parties to the combination (individual and combined); (vii) the likelihood of foreclosure/ removal of competitors; (viii) the extent of vertical integration in the market; (ix) extent of effective competition likely to sustain in a market; and (x) whether parties to the combination would be able to significantly and sustainably increase prices or profit margins by way of the combination.

The CCI is also required to consider the positive effects that a combination could potentially have, such as: (i) the possibility of saving a failing business; (ii) the nature and extent of innovation; (iii) the relative advantage through contribution to economic development; and (iv) whether the benefits of the combination outweigh the adverse impact of the combination.

Q22. What orders can be passed by the CCI in case of merger control?

The CCI can pass an order approving the combination if the combination does not cause an AAEC in the relevant market in India. If the CCI considers that the combination results in an AAEC, it may block such a combination and/ or it can propose suitable modifications (remedies). The parties to the combination have the option of submitting amendments to the modifications proposed by the CCI, which may be approved or blocked by the CCI. The parties can also voluntarily propose remedies in response to a "show cause" notice issued by the CCI, to show why a detailed Phase II investigation should not be conducted in respect of the notified combination. However, the CCI retains the discretion to accept the proposed remedy. It should be noted that the CCI till date, has not blocked any combination. The CCI may also issue interim orders (by way of a temporary injunction) restraining any party from carrying out any act which is or is likely to be in contravention of Section 6 of the Competition Act.

Q23. What are the penalties for failure to notify a notifiable transaction with the CCI?

In case of failure to notify the proposed combination, which exceeds the prescribed thresholds in time or at all, the CCI can impose a penalty up to 1% of the total turnover or assets,[9] whichever is higher. The same range of penalties may also be imposed for gun jumping.

9 The CAA 2023 has expanded the scope of the provision to include the "value of transaction" in line with the introduction of the DVT. However, the increment to this provision made by way of the CAA 2023 is not in force as of date.

14. Insolvency and Bankruptcy

Overview of the insolvency and bankruptcy regime in India

The Insolvency and Bankruptcy Code, 2016 ("**IBC**") has overhauled the legal regime in relation to the insolvency of all companies, limited liability partnerships, partnership firms and individuals in India. The provisions of the IBC relating to the insolvency of corporate entities, personal guarantors, and notified financial service providers are in force.

The IBC provides a framework for the time bound resolution of financially distressed companies, while also opening up avenues for their acquisition as going concerns. The IBC is a significant legislative reform that has improved the "ease of doing business" in India by providing distressed companies a time-bound and efficient exit route.

Q1. What processes have been prescribed under the IBC for corporates in distress?

IBC prescribes a:

- Corporate Insolvency Resolution Process ("**CIR Process**") whereby a committee of creditors (usually comprising unrelated financial creditors of the debtor) explore and finalize a resolution plan for the rescue of incorporated entities in distress (corporate debtor) as a going concern.
- Liquidation process which provides for *inter alia,* piecemeal sale of assets of the debtor. There is no direct entry into liquidation under the IBC and a CIR Process mandatorily precedes the liquidation process of a corporate debtor. The liquidation process only commences if the CIR Process does not culminate in approval of a resolution plan or if no resolution plan is proposed during the defined timelines of the CIR Process.
- The company may also be liquidated if the committee of creditors resolves to liquidate the company during the CIR Process before the confirmation of the resolution plan; or if the company contravenes the terms of an approved resolution plan.
- Pre-packaged Insolvency Resolution Process ("**PRIR Process**") for a speedier and more cost-effective rescue of Micro, Small and Medium Enterprises (MSMEs) as a going concern. This allows the corporate debtor to remain in possession while a committee of creditors selects a resolution plan for the rescue of the MSME debtor. The resolution plan chosen may be a pre-negotiated plan proposed by the debtor itself.
- A Fast-track CIR Process designed for smaller companies with simpler financial structures. This is largely similar to the general CIR Process but with shortened timelines.

Q2. Who can initiate the CIR process under the IBC, and when?

The CIR process may be initiated by:

- Financial creditors- those creditors who have disbursed debt against the time value of money;
- Operational creditors- those creditors who have provided goods and services to the corporate debtor in exchange for money and include workmen, employees, trade creditors or statutory creditors; or
- the corporate debtor itself,

by filing an application before the National Company Law Tribunal ("**NCLT**") (also known as the Adjudicating Authority), which is a quasi-judicial authority empowered to *inter alia* admit an application for initiation of a CIR Process, pass an order accepting the resolution plan approved by the committee of creditors if it meets the minimum requirements provided under the IBC or pass an order liquidating the corporate debtor.

The CIR Process may be initiated against a corporate debtor if there is a default of INR 10 million (approx. USD 121,951) or more, on payment of debt.

- A financial creditor must demonstrate default of the requisite amount in respect of a debt owed to itself or any other financial creditor. If financial creditors are 'creditors in a class' (such as bondholders), an application for initiation of the CIR Process must be filed by at least 100 members of such a class or 10% of the creditors of such a class, whichever is less.
- On the other hand, an operational creditor is first required to issue a demand notice seeking payment. An operational creditor may only initiate a CIR Process if the company fails to pay the amounts due within a period of 10 days from the demand notice, and only if no dispute, suit or arbitration claim is pending with respect to the demand, prior to the issuance of the

demand notice or on the date of filing of the application under the IBC. 'Dispute' does not need to be a formal dispute before a court or an arbitrator.

- A company can itself file an application with the NCLT to initiate the CIR Process with respect to itself along with proof of default. However, at least three-fourths of the shareholders of such company must pass a resolution approving the filing of the application to initiate the CIR Process with respect to itself.

Q3. Which authority adjudicates upon the proceedings under the IBC?

The Adjudicating Authority for the processes relating to incorporated entities is the NCLT. Appeals from orders of the NCLTs lie with the Appellate Authority, which is the National Company Law Appellate Tribunal ("**NCLAT**"). The Adjudicating Authority for the personal insolvency processes is the Debt Recovery Tribunal. Appeals from the orders of the Debt Recovery Tribunal lie with the Debt Recovery Appellate Tribunal, which is the Appellate Authority.

Q4. What is the process upon admission of the insolvency application?

Once an application initiating the CIR Process is admitted, a moratorium is declared. This moratorium prohibits:

- the institution or continuation of pending suits or proceedings against the company;
- any actions for foreclosure, recovery or enforcement of any security interest created by the company in respect of its property;
- transferring, encumbering, alienating, or disposing of any of its assets or any legal or beneficial interest in such assets by the company;
- recovery of any property by an owner or lessee where such property is owned by or in possession of the company;
- termination or suspension of a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;
- termination, suspension or interruption of supply of essential goods and services (which includes electricity, water, telecommunication and information technology services to the extent that these are essential services for the company.); and
- termination, suspension or interruption of supply of goods and services critical to the preservation of the value of the company and its management as a going concern (as determined by the resolution professional), except if they are not paid for during the moratorium period or in such other circumstances as may be specified.

An insolvency professional is also appointed as the interim resolution professional who is tasked with the management of the corporate debtor as a going concern. The powers of the board of directors are suspended and vests with the interim resolution professional ("**IRP**"). The IRP constitutes a committee of creditors comprising unrelated financial creditors of the corporate debtor. The committee of creditors appoints the IRP as the resolution professional ("**RP**") or appoints another insolvency professional as the RP, assesses the viability of the corporate debtor and approves a resolution plan for the rehabilitation of the corporate debtor. A resolution plan may, *inter alia*, provide for the following:

- substantial acquisition of the shares of the company by one or more persons;
- restructuring of the company through a merger, amalgamation or demerger;
- debt restructuring, change in the goods or services provided by the company or change in the technology used by the company;
- issuance of securities of the company for cash, property, claims or other appropriate purposes; or
- corporate restructuring measures, such as merger or de-merger and sale of assets.

The resolution plan is required to contain all relevant terms of the proposed reorganization and its proposed effect on the rights of relevant stakeholders. At the minimum, the resolution plan must:

- provide for payment of insolvency resolution process costs in priority to payment of other debts;
- provide for payment to operational creditors (of amounts equal to at least the payments such operational creditors would have received during a liquidation process or the payment they would have received if the resolution plan value was distributed according to the waterfall in liquidation, whichever is higher) in priority over financial creditors;
- provide for payment to dissenting financial creditors (of amounts equal to at least the payments such dissenting financial creditors would have received during a liquidation process) in priority to any payments to assenting financial creditors;
- provide for management of the affairs of the company after approval of the resolution plan;
- provide for the term and implementation of the resolution plan;
- provide for adequate means for supervision of implementation of the resolution plan;
- provide for a statement as to how the resolution plan has dealt with the interests of all stakeholders of the company;
- provide for a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past;
- not contravene any law in force; and
- demonstrate that it addresses the cause of default, is feasible and viable, has provisions for effective implementation, has provisions for approvals required (and timelines for the same) and that the resolution applicant has the capability to implement the resolution plan.

A brief diagrammatic summary of the timeline for the CIR Process has been highlighted below:

Particulars	Indicative Timeline
Admission of application, appointment of interim Resolution Professional and declaration of moratorium	T (Insolvency Commencement Date)
Public Announcement	T + 3
Submission of creditors' claims	T + 14 up to T + 90
Verification of Creditors' Claims by the interim IRP	T + 21 T + 97 (for Verification post Public Announcement)
Constitution of the Committee of Creditors by the IRP	T + 23
1st meetings of the Committee of Creditors and resolution appointing of the RP by the Committee of Creditors	T + 30
Actions and voting at the Committee of Creditors Meetings	
Appointment of registered valuer to determine fair value and liquidation value of the corporate debtor	On or before T + 47
Determination of avoidance transactions, intimation to Insolvency and Bankruptcy Board of India (**"IBBI"**) and application to the NCLT	Within T + 75 (opinion on avoidance transactions) Within T + 115 (determination on avoidance transactions) Within T+130 (application to NCLT for appropriate relief)
Preparation and submission of information memorandum to the committee of creditors	T + 95
Invitation of Expressions of Interests	T + 60
Submission of Expressions of Interest	T + 75 T + 85 (Provisional List of Resolution Applicants) T + 100 (Final List of Resolution Applicants)

Particulars	Indicative Timeline
Issue of Request for Resolution Plans including the Evaluation Matrix and Information Memorandum	T + 105
Submission of Resolution Plans by Resolution Applicants	T + 135
Submission of Resolution Plan approved by the Committee of the Creditors to the NCLT	T + 165
Approval / Rejection of the Resolution Plan	T =180 (with an upper limit of T + 330, including delays due to litigation)

Q5. Are actors in the insolvency and bankruptcy processes regulated?

The IBBI regulates insolvency professionals, insolvency professional agencies (which are frontline regulators for insolvency professionals) and information utilities (which must accept, record, verify and authenticate information relevant to the insolvency processes under the IBC). The IBBI also frames regulations and guidelines on matters relating to all insolvency and bankruptcy processes as required under the IBC.

Q6. When is a Corporate Debtor liable to be liquidated under the provisions of the IBC?

Under the IBC, a corporate debtor is liable to be liquidated following the CIR Process if no resolution plan is presented for approval within the specified timelines, or if a resolution plan is rejected by the Adjudicating Authority or if the corporate debtor contravenes the terms of a resolution plan approved by the Adjudicating Authority. The corporate debtor may also be liquidated if the committee of creditors resolves to liquidate the corporate debtor during the CIR Process before the confirmation of a resolution plan.

Following the PPIR Process, liquidation may be ordered in exceptional circumstances, i.e. if (a) the corporate debtor contravenes the terms of an approved Resolution Plan, or (b) the corporate debtor has been divested of possession and either no resolution plan is approved by the committee of creditors, the financial creditors resolve to terminate the PPIR Process, the time-period of 90 days from the commencement of the PPIR Process has elapsed without approval of a resolution plan by the financial creditors or the NCLT rejects the resolution plan for not resulting in change in management or control.

Q7. What is the process of liquidation under the IBC?

Once an order of liquidation is passed by the Adjudicating Authority, the RP appointed during the CIR Process is appointed as a liquidator unless otherwise decided by Adjudicating Authority. Subject to the directions of the Adjudicating Authority, the liquidator is required to control and carry out the liquidation process and the powers of the Board and key managerial personnel of the corporate debtor vest with the liquidator. The liquidator has extensive powers to carry out the process, including the power to conduct the business of the corporate debtor for its beneficial liquidation, settle claims of creditors and sell assets of the corporate debtor.

The liquidation process under the IBC requires the liquidator to collect or update claims of creditors, constitute the liquidation estate, attempt the sale of the assets of the corporate debtor and distribute the proceeds of the sale according to the statutory waterfall discussed below. The liquidator also constitutes a stakeholders' consultation committee ("**SCC**") consisting of all creditors of the corporate debtor within sixty days of the commencement of the liquidation process, and until then, the committee of creditors acting in the CIR Process of the corporate debtor acts as the SCC in the liquidation process. The liquidator is required to consult with the SCC on several aspects such as sale of assets in liquidation, fee of the liquidator, manner of pursuing avoidance transactions, etc. The SCC's decisions are not binding on the liquidator; however, the SCC may approach the NCLT to request the replacement of

the liquidator with another eligible insolvency professional.

The liquidator should endeavor to complete the liquidation process within one year from its initiation. A diagrammatic summary of the key stages of the liquidation process is given below:

Particulars	Indicative Timeline
Commencement of liquidation and appointment of liquidator	T - Commencement date
Public announcement	T + 5
Appointment of registered valuers and first meeting of the SCC	T + 7
Submission of claims and intimation of decision on relinquishment of security interest by secured creditors	T + 30
Withdrawal or modification of claim	T + 44
Verification of claims	T + 60
Constitution of SCC	T + 60
Intimation of the decision of acceptance / rejection of claim	T + 67
Filing of the list of stakeholders, filing of the preliminary report with the NCLT and filing of the asset memorandum with the NCLT	T + 75
Submission of Progress Reports by the Liquidator	End of quarter + 15
Distribution of the proceeds to the stakeholders	Date of realisation + 90
Application to the NCLT for disclaimer of onerous property	T + 6 months
Completion of the liquidation of the corporate debtor	T + 365

Q8. Can a secured creditor stand outside liquidation process under the IBC?

The IBC duly recognizes the rights of secured creditors to stand outside the liquidation process and realize their security interest for recovery of its dues irrespective of the commencement of the liquidation process. During a liquidation process, secured creditor(s) may either choose to relinquish their security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator as per the waterfall mechanism set out in the IBC or stand outside of the liquidation process and enforce, realize, settle, compromise or deal with the secured assets in accordance with ordinary civil remedies, subject to verification of the security interest by the liquidator, payment of CIR Process costs due as well as payment of liquidation costs and workmen's dues as they would have shared had they relinquished their security interest.

Q9. What is the distribution waterfall under the IBC?

Section 53 of the IBC puts in place a waterfall mechanism for distribution of proceeds in liquidation which is as follows:

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

Q10. What are the avoidance rules under the IBC?

The IBC provides for avoidance or setting aside of four kinds of pre-insolvency transactions during the CIR Process, PPIR Process or liquidation process:

- preferential transactions: transfers on account of antecedent liabilities that put a person in a better position than they would have been if the distribution of assets was made in accordance with the liquidation waterfall and which are not in ordinary course of business and do not secure new value;
- undervalued transactions: transactions in which the debtor has gifted or transferred property to a person for a value which is significantly less than the value of consideration provided by that person, and this transaction has not taken place in the ordinary course of business;
- extortionate credit transactions: this is intended to cover transactions where credit has been received by the Corporate Debtor on extortionate terms although the transactions where debt has been extended by a person providing financial services in compliance with law, have been exempted; and
- transactions defrauding creditors: undervalued transactions that were deliberately entered into to keep assets beyond the reach of any person entitled to claim against the Corporate Debtor, or adversely affect the interest of such a claimant.

The Adjudicating Authority is vested with wide powers to remedy the effect of such transactions including the power to reverse the transactions, supplant obligations and direct payment of adequate consideration.

Q11. Does the IBC provide for Cross Border Insolvency issues?

The IBC contains enabling provisions for the Central Government to enter into bilateral / reciprocal arrangements for recognition and enforcement of provisions of the IBC. The IBC also provides that in cases where a debtor's assets are located in a country with which there are reciprocal arrangements, the RP, liquidator and / or the bankruptcy trustee may make an application to the Adjudicating Authority, which may then issue a letter of request to the relevant foreign court or authority for necessary assistance. Bilateral arrangements are the only basis for granting assistance or recognition to foreign insolvency processes under the IBC. However, no such arrangements have been made yet.

Despite this, in a recent case of *Jet Airways v State Bank of India* (Comp, App. (AT)(Insolvency) No. 707 of 2019), the Appellate Authority gave access to a foreign insolvency representative who was appointed as the administrator in Dutch insolvency proceedings against the Corporate Debtor, and directed the RP appointed in the corporate debtor's CIR Process to enter into a Cross-Border Insolvency Protocol with the Dutch administrator for the purposes of coordination of the two insolvency proceedings. The Appellate Authority also recognised the Cross Border Insolvency Protocol entered into between the Dutch Administrator and the RP and directed that the Protocol should be treated as the directions of the NCLAT. As such, it may be possible for NCLTs to grant recognition or assistance to foreign insolvency professionals in future cases based on this precedent.

Q12. Is group insolvency allowed under the IBC?

While the IBC does not have an extensive framework to deal with the issues that arise in the insolvency of group companies, judicial precedents have developed regarding dealing with the insolvency of companies in corporate groups. Most significantly, in the matter of *Venugopal N. Dhoot v. State Bank of India* (CA-1022(PB)/2018), first, NCLT, Delhi ordered that different CIR Processes of different Videocon group companies be heard by the same bench of the NCLT, Mumbai in order to ensure procedural coordination. Thereafter, in *State Bank of India v. Videocon Industries Limited and Others* (MA 1306/2018 in CP No. 02/2018), the NCLT, Mumbai ordered the substantive consolidation of the assets of 13 out of 15 companies and observed that on a case to case basis, substantive consolidation of group entities could be considered inter alia basis the following parameters i.e. common control, common directors, common assets, common liabilities, interdependence, interlacing of finance, co-

existence for survival, pooling of resources, intertwined accounts, interloping of debts, singleness of economics of units, common financial creditors and common group of corporate debtors.

Since then, in various cases, the Adjudicating and Appellate Authorities have ordered the initiation of 'group insolvency' proceedings or consolidation of different group entities undergoing insolvency resolution.

Recent challenges in implementation of the IBC and consequential amendments

The IBC has garnered a lot of debate and uncertainty over well-established principles of law governing the treatment of secured creditors both at the stages of resolution as well as liquidation. The Apex Court, in the *Committee of Creditors of Essar Steel Limited vs. Satish Kumar Gupta and Ors*. (Civil Appeal No. 8766-67 of 2019) ("**Essar Steel**") gave a clear verdict which upheld the principle of equitable treatment of different classes of creditors in reference to the value and priority of their inter-se security interest and the amendments brought *vide* Insolvency and Bankruptcy Code (Amendment) Act, 2019 ("**2019 Amendment Act**") where the order of priority and value of security was clarified to be a determining factor for distribution of proceeds under a resolution plan. However, recent jurisprudence under the IBC has given rise to various issues regarding the consideration of value and priority of secured creditors while making distributions under the resolution plan to both assenting and dissenting financial creditors.

In the midst of this controversy is the Supreme Court's decision in the case of *India Resurgence ARC Private Limited v. M/S Amit Metaliks Limited* (Civil Appeal No. 1700 of 2021) ("**India Resurgence**") which *inter alia* held that distribution of proceeds in a resolution plan falls within the realm of commercial wisdom of the committee of creditors and could not be subjected to judicial review. The interpretation adopted by the Apex Court effectively enables the committee of creditors to completely ignore *inter-se* priority amongst creditors and value of security interest of individual creditors while approving a resolution plan. This judgment has also been relied on in *Small Industries Development Bank of India v. Vivek Raheja, RP, M/s. Gupta Exim (India) Pvt. Ltd*. (Comp. App. (AT) (Ins.) No. 570 of 2022) where the NCLAT *inter alia* refused to interfere with the decision of the committee of creditors to distribute the resolution proceeds in proportion to outstanding debt, divorced from inter-se priority amongst secured creditors and security structure. In another case of *Union Bank of India v. Mr. Rajender Kumar Jain, RP of M/s Kudos Chemie Ltd. & Ors*. (Comp. App. (AT) (Ins.) No. 665 of 2022), the NCLAT relied on India Resurgence and held *inter alia* that a dissenting secured creditor cannot demand a higher amount to be paid to it under a resolution plan based on the value of security interest held by it.

Further even during liquidation, inter-se priorities amongst secured creditors under the liquidation waterfall in Section 53 of the IBC have not been recognised once the secured creditor has elected to forego their right of enforcement the security interest. In *Technology Development Board v. Mr. Anil Goel & Ors.* (Comp. App. (AT) (Ins.) No. 731 of 2020), the NCLAT held that during liquidation, the secured creditors upon relinquishment of their security interest lose their inter-se priority and, therefore, all secured creditors are to be treated as one class ranking equally for distribution of proceeds in the order of priority specified, second only to payment of process costs. Any inter-se priorities amongst the secured creditors cannot be sustained once the secured creditor has elected to forgo its right to enforce the security interest. This was followed by the case of *Oriental Bank of Commerce v. Anil Anchalia, Liquidator of M/s. Bala Techno Industries Ltd.* (Comp. App. (AT) (Ins.) No. 547 of 2022), which reiterated a similar interpretation of Section 53 of the IBC. Although these decisions of the NCLAT have been stayed by the Supreme Court of India, in the absence of a final judgment, the position remains unclear.

The Ministry of Corporate Affairs has recently released a discussion paper dated 18 January 2023 proposing amendments to the CIR Process and liquidation process under the IBC to clarify this position and uphold the sanctity of security interest while making distributions under the IBC and inviting comments on the same. These clarifications would be instrumental in avoiding protracted litigation on the subject and will bring necessary clarity in the law by explicitly incorporating the doctrine of priority under the IBC.

15. Intellectual Property

Q1. What is the law relating to protection of intellectual property rights in India?

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

The important legislations governing intellectual property in India are:

- Patents
  - Patents Act, 1970
  - Patent Rules, 2003, as amended by the Patents (Amendment) Rules, 2021
- Designs
  - Designs Act, 2000
  - Designs Rules, 2001 as amended by Designs (Amendment) Rules, 2021
- Trademarks
  - Trade Marks Act, 1999 as amended by Trade Marks (Amendment) Act, 2010
  - Trade Marks Rules, 2017
- Copyright
  - Copyright Act, 1957 as amended by the Copyright (Amendment) Act, 2012
  - Copyright Rules, 2013 as amended by the Copyright (Amendment) Rules, 2021
- Geographical Indications
  - Geographical Indications of Goods (Registration & Protection) Act, 1999
  - Geographical Indications of Goods (Registration & Protection) Rules, 2002
- Plant Varieties
  - Protection of Plant Varieties and Farmers' Rights Act, 2001
  - Protection of Plant Varieties and Farmers' Rights Rules, 2003 as amended by Protection of Plant Varieties and Farmers' Rights (Third Amendment) Rules, 2009
- Semiconductor Integrated Circuits
  - Semiconductor Integrated Circuits Layout- Design Act, 2000
  - Semiconductor Integrated Circuits Layout- Design Rules, 2001
- Biodiversity
  - Biological Diversity Act, 2002
  - Biological Diversity Rules, 2004

Q2. How are computer software and programmes protected in India?

India recognises and protects computer programmes, tables and compilations including computer databases as 'literary works' under the Copyright Act, 1957. Both the object and the source codes can be protected as literary works under the Copyright Act. The protection provides for right to, *inter alia*, reproduce the work in any material form, including the storing of it in any medium by electronic means, to issue copies of the work to the public, to communicate the work to the public, to sell or offer to sell, to give on commercial rental any copy of the computer programme provided the programme itself is an essential object of the rental. Also, under the Copyright Act, the owner of a copyright work is entitled to protect his work against unauthorised use and misappropriation of whole of his work or a substantial part thereof and obtain relief from a court of law including injunction, damages and rendition of accounts of profits. Criminal remedies for infringement of copyright in a computer software or programme include imprisonment for not less than six months but which may extend to three years with a fine, not less than INR 50,000 (approx. USD 610) but which may extend to INR 2,00,000 (approx. USD 2439).

The Patents Act, 1970 prohibits patentability of "computer programme per se" under Section 3(k), which the Patent Office had historically treated as an absolute preclusion on computer implemented method claims. However, pursuant to the 2019 judgement of the Hon'ble Delhi High Court, in Ferid Allani v. Union of India & Ors., 2019 SCC Online Del 11867 and subsequent decisions, it has been clarified that the words 'per se' are used in Section 3(k) to ensure that patent applications concerning genuine inventions, based on computer programmes, are not refused. As per current interpretation, inventions based on computer programmes are considered patentable if they demonstrate a 'technical effect' or a 'technical contribution'. Examples of 'technical effect' include faster operating speed, shorter hard-disk access time, economical memory use, efficient search strategies, compression techniques and user interfaces, etc.

Q3. What patent protection is available to a biotechnology company?

Inventions in the field of biotechnology are subject to the same criteria as any other invention relating to product and process. Patents may not however be secured in respect of plants and animals in whole or part, including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals (some of which are presently protectable under other legislations such as the Protection of Plant Varieties and Farmers' Rights Act, 2001.) The preclusion in patentability of plants and animals does not however extend to microorganisms that are subjected to modification. However, microorganisms that are naturally occurring are statutorily precluded from patentability. Genes and nucleic acid sequences manufactured with human intervention are not considered parts of plants or animals, and are accordingly patentable as products. Similarly, processes for manufacturing or producing transgenic plants or animals are not considered essentially biological processes, and are patentable.

Q4. How are trademarks and service marks protected in India?

The foundations of trade mark law in India are set by the Trade Marks Act, 1999, and the underlying Trade Marks Rules, 2017. The Trade Marks Act, 1999 Act is spread out over 14 chapters, contains 167 sections, and one schedule. The preamble of the act sets out the objective to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for the goods and services and for the prevention of the use of fraudulent marks.

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

With enactment of the Trade Mark Rules, 2017, the requirement for representation of the trade mark was pertinently widened to include sound marks, and three-dimensional marks in the form of an MP3 file, and picture/graphic respectively. Thus, non-conventional marks were also brought into the scope of protection. Notably, the rules also enabled any person to apply to the Registrar for recognition of their mark as "well-known" as per The Trade Marks Act, 1999, subject to the discretion of Registrar, and third-party objections.

Registration under the Trade Marks Act, 1999 confers exclusive rights to use the mark in respect of goods or services, subject to any conditions imposed, and if these rights are infringed, to take action to restrain unauthorised use. A trade mark is said to be infringed by a person, who, not being a permitted user, uses an identical or deceptively similar mark to the registered trade mark without the authorization of the registered proprietor of the trade mark. Indian trade mark law, however, protects the vested rights of a prior user of a trade mark against action by a registered proprietor.

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

Under the Trade Marks Act, 1999, both civil and criminal remedies are simultaneously available against infringement and passing off. Registration of a trade mark is not a pre-requisite in order to sustain a civil or criminal action against violation of trade marks in India.

Civil remedies or reliefs available to trade mark owners, among others, include permanent or temporary injunctions, damages or rendition of account of profits with or without any order of delivery-up of the infringing labels and marks for destruction and erasure, including costs. Apart from the final relief(s), the proprietor of a trade mark may also seek interim relief(s) such as an order of interim injunction and/or appointment of a local commissioner, which is akin to an "Anton Pillar Order", for search, seizure and preservation of infringing goods, account books and preparation of inventory, etc.

Criminal proceedings involve filing of a complaint in the court of a magistrate against unknown persons with a view to secure directions to the police to register a case

and investigate the activity complained of (including a search and seizure operation). Alternatively, one can also file a complaint with the police directly and if it is satisfied that the named entity is committing any of the offences complained of, it may, without the order of the court, carry out a raid/search & seizure operation. In case the infringer is found guilty of any of the aforementioned offences, he is punishable with imprisonment for a term between six months to three years and with fine of INR 50,000 (approx. USD 610) which may extend to INR 2,00,000 (approx. USD 2439). Enhanced punishment for subsequent conviction(s) is also envisaged in the Act.

The latest amendment to the Trade Marks Act, 1999 has been brought by the Tribunals Reforms Act, 2021. This amendment abolished the Intellectual Property Appellate Board (IPAB) as established under Chapter XI of the Trade Marks Act, 1999, which acted as a specialised tribunal for appeals from *inter alia*, the order/s of the Registrar of Trade Marks. The functions of the erstwhile IPAB now vest with the country's commercial courts, and the High Courts.

Q5. How does one protect confidential information and trade secrets in India?

Confidential information and trade secrets are protected in India under the law of contracts, copyright law, common law action of breach of confidence, as well as, the Information Technology Act 2000. The protected information must be such, the release of which would be injurious to its proprietor or of advantage to third parties, it must be confidential or secret, that is, it is not already within the public domain, and the proprietor should have taken reasonable steps to maintain its secrecy or confidentiality. The methods usually used to protect confidential information are confidentiality clauses in employee contracts, non-disclosure agreements with third parties in the course of a business venture, and internal security mechanisms to restrict access and dissemination of trade secrets and confidential information within an organisation.

Available legal recourse includes injunctions restraining disclosure or use of information, return of confidential proprietary information on termination of a contract, and damages and account of profits arising out of unauthorised disclosure or use.

Q6. Can the employees of an Indian company be required to sign confidentiality agreements?

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

Q7. What is the protection available in case of infringement of intellectual property rights?

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

Q8. Does Indian law recognise transactions carried out electronically?

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

The Information Technology Act, 2000 provides legal recognition to electronic records if the information or matter is (a) rendered or made available in an electronic form, and (b) accessible so as to be usable for a subsequent reference. The Information Technology Act, 2000 also provides legal recognition for electronic signatures where information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government.

Q9. How can a company outsourcing its activities to India safeguard intellectual property which is created in the course of performance of an outsourcing contract?

Indian law permits for assignment of rights in intellectual property, either partially or wholly and, in cases of some intellectual property such as copyright, for whole or any part of the duration of protection granted under the relevant legislation. In a case where a company outsources its work to a third party contractor or vendor, it is essential to ensure that the contract mentions ownership and terms of use of intellectual property. The Copyright Act envisages that an assignment or license agreements must be in writing and must specify the term and territory of the assignment or license. In case of intellectual property created by a party generally ownership lies with the party who created it, however, the law prescribes exceptions to this rule, including the presence of an employer-employee relationship, in which case the employer is the first owner of copyright. A third party contractor or vendor may be afforded rights to use the intellectual property through a license agreement during the course of the engagement. The license agreement should contain appropriate terms of use and may be exclusive or non-exclusive. In case of a newly created intellectual property, it is essential to identify who will have ownership of the intellectual property in the contract itself, and whether the vendor will have certain rights regarding its use. Appropriate mechanisms should also be put in place to ensure that the chain of title has been perfected. The intellectual property related terms and conditions must comply with the requirements and provisions as laid down under the respective intellectual property legislations. Additional provisions seeking documentation to perfect title or seek statutory protection should also be sought as part of assignment deeds.

Q10. What are the relevant data protection laws in India?

The Information Technology Act, 2000 contains provisions relating to data protection and imposes civil liability for negligent handling of "sensitive personal data or information" and criminal liability in cases of disclosure of information in breach of a lawful contract. The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 ("**SPDI Rules"**) under the Information Technology Act, 2000 prescribe the procedure to be followed by a body corporate for the protection of personal information including sensitive personal information or data, procedure to be followed for collection of such data and further disclosure of such collected data. The SPDI Rules are applicable to body corporates, or any person located within India.

Unauthorized disclosure is punishable with imprisonment up to three years and a fine up to INR 5 lakhs (approx. USD 6098) or both. Additionally, in 2021, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 were notified, wherein, inter alia, social media intermediaries are required to maintain additional due diligence and new grievance redressal mechanisms have been prescribed. The Intermediary Guidelines have been framed in exercise of powers under section 87(2) of the IT Act and supersede the previous Information Technology (Intermediary Guidelines) Rules, 2011.

Further, the Information Technology Act, 2000 empowers the government to direct any of its agencies to intercept, monitor or decrypt any information in the interest, inter alia, of sovereignty, integrity, defense and security of India. Further, the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, provide that the government may exercise power to issue directions to block an internet site. However, the reasons for blocking have to be recorded in writing and are amenable to judicial scrutiny.

Notably, India's data protection regime is currently undergoing significant changes, with the enactment of a new Digital Personal Data Protection Act, 2023 in August this year. Under the new law, personal data is defined broadly as data about an individual who is identifiable by or in relation to such data. It introduces the concept of a 'data fiduciary' (which is similar to a data controller under the European General Data Protection Regulation (**GDPR**)) as the primary authority responsible for ensuring compliance with the law in respect of any data processing undertaken by it or by a data processor on its behalf. Personal data of data principals (akin to 'data subjects' under the GDPR) may be processed based on their consent or for other legitimate purposes as set out under the law, including for medical emergency, employment, etc. The Digital Personal Data Protection Act empowers the Central Government to establish a Data Protection Board of India as an adjudicatory authority, and also introduces the concept of Consent Managers, who may act as a single point of contact to enable the data principal to give, manage, review and withdraw consent. It also empowers the Central Government to restrict cross border transfer of personal data to certain countries or territories through notification. The new law imposes incremental obligations such as appointment of data protection officer and data auditor on "significant data fiduciaries" that are notified as such by the Central Government, based on the volume of personal data processed, the risks to data principals, etc. The Digital Personal Data Protection Act, 2023 envisages a civil liability regime in case of non-compliance and the penalties range from INR 10,000 (USD 122) to INR 250 crores (USD 30 million).

While the Digital Personal Data Protection Act, 2023 has been enacted, it is yet to be enforced and it will be enforced on such date as may be notified by the Central Government. The law anticipates substantial provisions to be set out in subordinate legislation and empowers the Central Government to prescribe rules to such effect. Until the Digital Personal Data Protection Act is enforced by the Central Government by way of notification, the Information Technology Act read with the SPDI Rules continue as the applicable law for data protection in India.

Additionally, the Indian government is also set to revisit the existing laws on Intermediary Guidelines, content regulation and cybersecurity, by way of a proposed Digital India Act which seeks to replace the Information Technology Act, 2000. Such law may also contain provisions for regulation of emerging technologies including artificial intelligence. However, discussions in this respect are at a preliminary stage and a draft of the proposed law is yet to be released for public consultation.

16. Employment Law

Q1. What is the general framework of employment laws in India?

Labour and employment laws in India comprise of both Central and State laws and can be broadly categorized into (i) laws on wages; (ii) laws on industrial relations; (iii) laws on social security and welfare benefits; and (iv) laws on working conditions, health and safety. Currently, there are 29 Central laws.

The framework of labour and employment laws in India is evolving and is expected to be overhauled. With the objective of ease of doing business in India and a step towards digitalization, the Central Government proposes to replace 29 labour legislations with 4 labour codes namely, the Code on Wages, 2019 ("**Wages Code**"), the Industrial Relations Code, 2020 ("**IR Code**"), the Occupational Safety Health And Working Conditions Code, 2020 ("**OSH Code**") and the Code on Social Security, 2020 ("**SS Code**"). The labour codes are pending to be notified for enforcement. The date of enforcement has not been notified yet. Majority of the Indian States have already formulated draft rules under the labour codes.

An overview of the 4 labour codes is as follows:

- The Wages Code is applicable to all employees, except in the case of provisions relating to bonus which are applicable only to employees drawing wages less than the limit to be prescribed on a later date. The Wages Code has introduced a new definition of wages which has undergone a substantial change. The concept of floor wage has been introduced wherein the Central Government shall have the power to fix a 'floor wage' which can be different for different geographical areas. The Wages Code provides for inspectors-cum-facilitators with powers of inquiry, investigation and advising employers and workers regarding effective means of complying with the law.
- The IR Code increases the threshold for the applicability of standing orders and permission for retrenchment, closure, lay off from 100 to 300. The concept of a sole negotiating union has been introduced which means where there is more than one registered trade union of workers, the trade union having more than 51% of the workers as members would be recognized as the sole negotiating union. The IR Code specifically provides for 'fixed term employment' which will give flexibility to employers, but it also prescribes protection to such employees by prescribing the obligation to provide all the statutory benefits available to a regular worker in proportion to the period of service rendered.
- The OSH Code will be applicable to establishments that employ 10 or more workers. It proposes one registration for an establishment instead of multiple registrations. Presently, 6 labour legislations out of 13 provide for separate registration of the establishment. This will create a centralized database and promote ease of doing business. In case an employer fails to obtain registration of the establishment within the specified time period, the establishment will be deemed to have been registered on the day of expiry of the specified period.
- The SS Code is applicable to (a) workers that are employed by any entity; (b) worker who may also be the owner or the proprietor of an entity or a self-employed unit; (c) international workers; and (d) an Indian citizen, working outside the territory of India, who opts to become a member of social security schemes under the SS Code. It extends to both organized as well as unorganized sectors. The SS Code provides for universal social security including pension, sickness benefit, maternity benefit, disablement benefit, invalidity benefit, dependent's benefit, medical benefit, group insurance benefit, provident fund, unemployment benefit and international worker's pension benefit. It also provides for the constitution of a National Social Security Council of India for reviewing and monitoring the implementation of the SS Code.

The labour laws in India provide for matters such as obligations of employers, rights of employees, benefits payable to the employees, health and safety obligations, and separation-related requirements. Therefore, it is important to understand the labour laws in India since they are indispensable for the running of business or trade operations.

Q2. What are the registrations which are required under labour laws for starting up a business?

- An employer is required to apply for registration of its commercial establishment or shop as applicable under the state specific shops and establishments acts ("**S&E Acts**") within a specified number of days

(ranging from 30 to 90 days, depending on the state) of commencement of business / work. In this regard, it is pertinent to highlight that the Governments of Karnataka, Andhra Pradesh, Kerala, Madhya Pradesh, Rajasthan, Chhattisgarh, Maharashtra, Odisha, Telangana, Gujarat, Haryana, Punjab, Uttar Pradesh and West Bengal have discontinued the requirement of renewing the registration obtained under the respective S&E Acts. Further, the Government of Delhi has integrated the registration portal under the Delhi Shops & Establishments Act, 1954 with the portal maintained by the Ministry of Corporate Affairs, Government of India. As a result, any new company intending to register under the Companies Act, 2013 and undertaking first time registration under the Delhi Shops & Establishments Act, 1954 will now be required to register only on the SPICe+ portal of Ministry of Corporate Affairs, Government of India.

- Manufacturing units are required to obtain registration under the Factories Act, 1948 ("**Factories Act**"). Recently, the States of Haryana, Goa, Himachal Pradesh, Gujarat, Bihar, Assam and Karnataka have increased threshold limit for applicability of the Factories Act from ten or more workers to twenty or more workers for factories operating with the aid of power and from twenty or more workers to forty or more workers for factories operating without the aid of power. Further, the States of Karnataka, Tamil Nadu, Jharkhand, Madhya Pradesh and Puducherry have increased the period of factory license validity to fifteen years.
- If any construction work is being undertaken for setting up of the establishment, registration would be required under the Building and other Construction Workers Act, 1996.
- Depending on the number of employees, the nature of industry and the salary thresholds, registrations would be required under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("**EPF Act**") and Employees' State Insurance Act, 1948 ("**ESI Act**") within the prescribed timeline for contribution towards the social security benefits.
- Any establishment engaging specified number of contract labour (depending on the state - in the States of Maharashtra, Rajasthan, Haryana, Andhra Pradesh, Uttar Pradesh, Gujarat, Tripura, Bihar, Goa, Punjab, Karnataka, Odisha and Himachal Pradesh, this threshold is 50, in the State of Telangana, the threshold is 5, in the State of West Bengal, the threshold is 10, while in the remaining states, the threshold is 20), is required to obtain registration as a principal employer under the CLRA Act. Such registration has to be obtained prior to engaging contract labour. As against the existing regime, the provisions pertaining to contract labour under the OSH Code will apply to establishments in which fifty or more contract labour are employed, or were employed on any day of the preceding twelve months through contract.

Q3. What are the different categories of workers or employees which are protected under labour and employment laws? How are such workers or employees distinguished?

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

- The Factories Act aims to protect workers working in factories against exploitation by their employers. It is applicable to all factories employing more than 10 workers working with the aid of power and to all factories employing more than 20 workers working without the aid of power. It aims to regulate the health, safety, welfare and service conditions of such workers. The state governments are free to make their own set of rules for the implementation of the said legislation.
- The respective state S&E Acts are applicable to employees or workers employed in the shops and commercial establishments located in such state. These legislations aim to regulate the service conditions of such persons including hours of work, holidays and leaves etc., and further lays down the standards for regulating the health and safety of such persons. In certain states, persons holding positions of management are excluded from protections available under the S&E Act.
- Industrial Disputes Act, 1947 ("**Industrial Disputes Act**") aims to protect the employees/workers falling under the category of 'workmen' which includes persons employed in

an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. An employee employed in a managerial or administrative capacity; or in a supervisory capacity drawing wages exceeding INR 10 thousand (approx. USD 122) per month is excluded from the scope of 'workman'.

- Contract workers are provided protection under the CLRA Act. It deals with the registration of the principal employer, licensing of contractors, payment of wages, facilities to be provided to contract workers etc. The state governments are free to make their own set of rules for the implementation of the said legislation. The OSH Code expands the definition of "contract labour" vis-à-vis the previous law by including inter-state migrant workers within its purview, but excluding from it, workers who are regularly employed by the contractor for any activity of his establishment, based on mutually accepted standards of employment. The OSH Code also prohibits employment of contract labour in core activities of any establishment. However, the engagement of contract labour through a contactor in respect of a core activity is permitted if: (a) the normal functioning of the establishment is such that they do not require full time workers for the major portion of the working hours in a day or for longer periods; (b) the activities are such that they do not require full-time workers for the major portion of the working hours or longer periods; (c) or there is a sudden increase in volume of work in the core activity which needs to be accomplished in a specified time.
- The OSH Code, which is yet to come into force, has consolidated the definition of "worker" to mean any person employed in any establishment to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and includes working journalists and sales promotion employees. It excludes persons employed in a managerial or administrative capacity, or in a supervisory capacity with wages exceeding Rs 18,000.

Apart from the above, companies in India also engage other categories of workforce such as consultants, trainees/ interns, apprentices and/or fixed term employees. Typically, consultants are engaged for specific services which regular employees do not carry out. In addition to the said categories of workforce, Indian economy is leaning heavily towards non-conventional workforce such as 'gig-workers' and 'platform workers'. In the code pertaining to welfare benefits, i.e. SS Code, gig-workers have been defined to mean "*a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship*" and the term 'platform work' has been defined to mean as "*an employment form in which organizations or individuals use an online platform to access other organizations or individuals to solve specific problems or to provide specific services in exchange for payment*". Further, the SS Code proposes to formulate social security schemes for gig and platform workers with regard to: (a) life and disability cover; (b) health and maternity benefits; (c) old age protection; and (d) any other benefits as may be determined by the Government.

Q4. Are there any restrictions on employment of foreign nationals in India?

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

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

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

Foreign nationals are eligible for an employment visa if they are coming to India: (i) as consultants on a contract for which the Indian company pays a fixed remuneration, (ii) as self-employed foreign nationals coming to India for providing skilled services as independent consultants, (iii) to provide technical support or services, transfer of know-how or for which the Indian company pays fees or royalty

to the foreign company, (iv) as engineers or technicians coming to install and commission equipment, machines or tools in terms of a contract for the supply of such equipment, machines or tools.

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

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

No change of employer shall be permitted during the term of the employment visa. In cases where the foreign national desires to change the employment to another company or organisation, he or she will have to leave the country and apply for a fresh employment visa. However, in case of transfer within group companies, there is no requirement of leaving the country or applying for a fresh employment visa. In this case, the foreign national would need to seek prior approval of FRRO and submit documents in support of the application.

Q5. Can the foreign nationals be granted business visa?

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

Q6. Is the employer obligated to put down the terms and conditions of the employment in writing?

The S&E Acts of a few states in India mandate that the employer issues an appointment letter setting out the basic information with regard to employee details such as remuneration, employers address, etc. However, as a matter of practice most employers issue employment letters and execute employment contracts capturing the terms and conditions of the employment in detail. Once the OSH Code comes into force, employers would be required to issue appointment letter to every employee of the establishment with the minimum information prescribed by the appropriate Government.

Q7. Can there be any implied terms under the employer and employee relationship?

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

Q8. Does the law prescribe any minimum employment terms and conditions which the employer has to necessarily comply with?

Yes, labour legislations such as the Industrial Disputes Act, Factories Act, Standing Orders Act and S&E Act, lay down the minimum standards with regard to the employment terms such as the working hours, wages, leaves, notice and

termination. Further, there are certain industry specific laws for persons working in cinema, docks, building which also prescribes the minimum terms of employment which are required to be complied.

Q9. What are the statutory working hours prescribed and is there a requirement to pay overtime wages?

Indian labour legislations typically provide for a maximum of nine hours of working each day and 48 hours a week. The Government of Karnataka has recently amended the working hours for establishments. As per the amendment, the working hours has now been amended to 9 hours (instead of 8 hours) on any day and 48 hours in any week with a condition that the total number of hours of work including overtime shall not exceed 10 hours in any day and the total number of overtime hours worked by an employee shall not exceed 50 hours in a period of 3 continuous months. Under the OSH Code, the appropriate Governments have been given the power to prescribe requirements in relation to daily hours, weekly hours, spread-over and rest intervals.

Employment of women employees during night hours is restricted in most states / UTs in India. However, states / UTs such as Andhra Pradesh, Delhi, Gujarat, Haryana, Karnataka, Kerala, Maharashtra, Punjab Rajasthan, Telangana, Uttar Pradesh, Goa, Tamil Nadu, Madhya Pradesh, Meghalaya have made exemptions permitting women employees to work during night hours subject to compliance with the prescribed conditions including provision of transport facilities. Additionally, special exemptions have been made available to Information Technology / Information Technology Enabled Services ("**IT/ITES**") industries. IT/ITES companies are also permitted to have 24 x 7 operations subject to the satisfaction of the conditions prescribed by the respective state government.

Recently, the State Governments of Punjab, Gujarat, Maharashtra, Rajasthan, Tamil Nadu, Telangana, Tripura, West Bengal, Karnataka, Haryana, Chandigarh, Andhra Pradesh, Himachal Pradesh, Meghalaya and Puducherry have now allowed the shops and commercial establishments to open 365 days a year, subject to certain conditions like providing security and transportation facilities, providing weekly day of rest to employees on rotation basis, limiting working hours etc.

Employees who work in excess of the normal working hours are entitled to over-time wages, typically at the rate of twice the ordinary rate of wages. Further, in some states, employees working on national holidays are provided compensatory off in addition to overtime payment. Under the OSH Code, it will be mandatory for an employer to obtain prior written consent of the worker before requiring him / her to work overtime.

Q10. What are the statutory requirements for grant of leave or public holidays?

The Factories Act as well as the state-specific S&E Acts provide for certain number of days as annual leave with wages that the employees are entitled to. Unavailed annual leaves are typically allowed to be carried forward to the next year subject to a prescribed cap. Some of the state-specific S&E Acts also provide for sick and casual leaves. The Government of Karnataka has recently amended the provisions for annual leave with wages pursuant to which, the total number of days of leave that may be carried forward towards a succeeding year has been increased to 45 days for all employees.

Currently, 240 days is the period of work required to determine eligibility of a worker for annual leave with wages. This threshold has been reduced to 180 days under the OSH Code. A worker whose services do not commence on the first day of January is currently entitled to leaves only in case he / she works for two-third of the remainder of that year. This has been reduced to one-fourth under the OSH Code. With respect to unavailed accumulated leaves, the extant law provides for encashment only in case of cessation of employment for various reasons. However, under the OSH Code, the workers will be entitled for encashment of leave at the end of calendar year.

In addition to the weekly holidays and compensatory holidays prescribed under the N&F Holidays Act and the S&E Act of the relevant state, the employees are also entitled to national holidays such as Republic Day (January 26), Independence Day (August 15) and Gandhi Jayanti

(October 2). Employees are further entitled to five to seven holidays from a list of holidays notified by the respective state governments for each calendar year under the Negotiable Instruments Act, 1881.

Q11. Are employees entitled to maternity/paternity leave?

As per the Maternity Benefit Act, 1961, women employees are entitled to 26 weeks of paid maternity leave, if they have worked for at least 80 days in the 12 months preceding the expected delivery date. On June 1, 2021, the Ministry of Labour and Employments has issued an advisory to all state government and union territories to encourage work from home for nursing mothers. The provision for working from home said that where the nature of work is such that she may work from home, the employer may allow her to do so on mutual agreement. It also further requested to allow more nursing mothers to work from home under Sec 5(5) of the Maternity Benefit (Amendment) Act, 2017 to prevent deepening of crisis amidst the pandemic.

Paternity leaves are not statutorily recognised in India. Although, the industry practice in India, especially in the IT/ITES sector, is to give a paternity leave of five to seven days, it can be solely up to the discretion of the employer and may be granted in accordance with its policies.

Q12. Do foreign nationals have to make social security contributions while working in India?

The GOI has extended the applicability of EPF and the Employees' Pension Scheme, 1995 to all international workers. The definition of international workers covers all those employees who work in an establishment in India covered under the EPF Act and hold other than an Indian passport besides Indian employees working overseas.
Every employer who is covered under the EPF Act is required to contribute 24% (12% each for the employer and the employee's share) of the employee's monthly pay towards the provident fund and pension scheme. The employee's share of such contribution can be recovered by the employer from the employee.

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

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

Q13. Can employees of the Indian company be granted employee stock options in a foreign company?

In keeping with the spirit of liberalisation and to promote ease of doing business, the Central Government and the Reserve Bank of India have been progressively simplifying the procedures and rationalising the rules and regulations under the Foreign Exchange Management Act, 1999. In this direction, a significant step has been taken with operationalisation of a new Overseas Investment regime. The Foreign Exchange Management (Overseas Investment) Directions, 2022 (**OI Directions**), notified in August 2022, provide for the new overseas investment regime for India and supersede the erstwhile Master Direction – Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad read with the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004. Further, Foreign Exchange Management (Overseas Investment) Rules, 2022 (**OI Rules**) and Foreign Exchange Management (Overseas Investment) Regulations, 2022 (**OI Regulations**) have also been notified by the Reserve Bank on August 22, 2022, in supersession of the earlier laws.

Under the OI Directions read with OI Rules and OI Regulations, a foreign company can issue employee stock options ("**ESOPs**") to employees of (i) its office or branch

in India, (ii) its subsidiary in India, and (iii) an Indian company in which it has equity, direct or indirect (through a special purpose vehicle or step-down subsidiary), provided that the shares under the ESOP scheme are offered on a globally uniform basis. Further, with the new OI Directions, OI Rules and OI Regulations, the ambit of participation by Indian employees in equity based incentive plans of foreign entities has been further expanded with introduction of the words "employee benefits scheme". "Employee Benefits Scheme" has been defined to mean any compensation or incentive given to the directors or employees of any entity which gives such directors or employees ownership interest in an overseas entity through ESOP or any similar scheme. Thus, now incentives such as Stock Appreciation Rights or Restricted Stock Units or any other incentives which provide ownership interests to Indian employees in a foreign entity can also be awarded.

Further, as per the new regime, if an investment by way of shares/interest under ESOP/Employee Benefit Schemes does not exceed 10 per cent of the paid-up capital/stock of the foreign entity and does not lead to control in such foreign entity, such investment is categorised as Overseas Portfolio Investment ("**OPI**"). For such an investment which qualifies as an OPI, the employer (i.e. the employer entity in India) is required to make a reporting to the authorities in Form OPI (Section A.(B)). However, where the investment does not qualify as OPI, the resident individual concerned is required to report the transaction in Form FC.

As regards the Indian market, ESOPs have evolved over time with detailed regulations and jurisprudence on administration of ESOPs provided both under the Indian Companies Act, 2013 as well as the Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations, 2021 ("**SBEB Regulations"**). The issuance of ESOPs of a publicly listed company is regulated by the provisions of the SBEB Regulations, while privately held unlisted companies are governed by the Companies Act, 2012. When a company grants ESOPs to its employees, it has the potential to reduce employee turnover, enhance job stability, and bolster employee retention. Companies that genuinely prioritize their workforce tend to experience heightened productivity, leading to increased profitability and accelerated growth. Moreover, they may also attract and onboard exceptionally qualified candidates through this incentive.

Q14. Can employment contracts contain restrictive covenants like non-compete?

Any agreement in restraint of trade is void under the provisions of the Indian Contract Act, 1872 ("**Contract Act**"). Restrictive covenants operative during the period of the contract of employment when an employee is bound to serve his or her employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. A restrictive or negative covenant that the employee would not engage himself in a trade or business, or would not get himself employed in any other manner, or perform similar or substantially similar duties for another, is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one-sided. However, any such restraint which extends beyond the terms of this contract is void and not enforceable. The Supreme Court has held that agreements restraining an employee from carrying on the activities that are similar to that of his or her employer upon the termination of such employment would be void and unenforceable, whereas agreements that impose a restraint during the course of employment could be enforceable. While non-compete restrictions in an employment agreement during the term of the employment is valid, however, such restrictions extending beyond the term of employment are invalid and unenforceable under Indian laws. Any agreement, clause or covenant that restricts employee to engage in a business similar to or competitive with that of the employer after the termination of his contract of employment is unenforceable as per Section 27 of the Indian Contract Act, 1872 as the same is also violative of fundamental rights of an individual enshrined under Article 19(1)(g) of the Constitution of India, 1950.

On the other hand, non-solicitation clauses which extend beyond term of the employment agreement are common in employment agreements in India. It has been held to be reasonable to restrain an ex-employee from soliciting employees and customers of the previous employer. However, the practical enforceability of such clauses varies and depends on the facts and circumstances of each case. It

is pertinent to note that while moving an action for breach of non-solicitation clause, the party alleging breach of the non-solicitation clause will have to discharge the burden of proof, prove active solicitation, and establish the breach committed by the defendant and prove damage caused to it by the defendant.

Q15. Can the employer carry out pre-employment background checks on prospective employees?

Yes, the employer is allowed to carry out such verification checks provided the employer takes express consent from the prospective employee in this regard. Also, if the employer collects or deals with employee's sensitive personal data or information in conducting such checks then it has to mandatorily comply with the requirements laid down under the relevant data privacy laws in India. The Digital Personal Data Protection Act, 2023 ("**DPDP Act**") has been passed by the Indian Parliament and is awaiting notification by the Central Government to bring it into force. As per the DPDP Act, an employer may process the personal data of a worker only in accordance with the provisions of the DPDP Act and for a lawful purpose i.e., any purpose that is not expressly forbidden by law. Before processing any personal data, the employer is required to issue a notice to and obtain the consent of the concerned worker. Such data can only be processed for the specific purposes for which the data was collected. In the event, consent of the worker is not obtained, personal data can only be processed for specified reasons which include, *inter alia*, where the employee voluntarily provided the data, where the data is required to fulfil a legal obligation to disclose any information or for complying with any judgement or decree or where the data is required for the purposes of employment or those related to safeguarding the employer from loss or liability.

Q16. How can the services of an employee be terminated?

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

Ordinarily, termination of employment of a 'workman' for reasons other than on account of a disciplinary action, voluntary retirement, resignation, expiry of a fixed term contract or on grounds of continued ill-health would amount to a 'retrenchment' within the meaning of the Industrial Disputes Act, thereby giving rise to the obligation of paying retrenchment compensation to the workman employees, amongst other requirements. Retrenchment is merely the discharge of surplus staff or labour in a running or continuing business or industry, for certain reasons. Thus, where the reason for termination of employment is a 'cause', such termination is a 'termination for cause' and not retrenchment. The process for retrenchment depends upon the nature of establishment. Retrenchment of workmen shall be subject to compliance of applicable requirements under Industrial Disputes Act, which includes providing an employee that may be retrenched a prior notice of 1 to 3 months as applicable or pay in lieu thereof. In an industrial establishment having workmen above a prescribed threshold (100/300 or more workmen, depending on the State threshold), prior permission from competent authority shall be required to be obtained for retrenchment. Before deciding to grant or refuse to grant permission, the appropriate government shall make an inquiry on the manner of retrenchment and also give an opportunity of hearing to the workmen. However, if the number of workmen employees in the establishment is less than 50, no prior intimation will be required to the labour authorities. However, the employees will be entitled to notice/intimation as per the Industrial Disputes Act.

Where there are unionized employees or wage settlement agreements in place between the workers and the employer,

there could be consultation requirements with the trade unions/employee representatives before effecting any retrenchment. The risk of challenge of retrenchment is higher where there are unionized employees. In such cases, entering into a settlement with the employees as to their severance packages in consideration of them supporting the retrenchment process mitigates the risk of push back from these employees.

Further, there are certain intimations required under the labour laws in case of termination under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, State-specific Shops and Establishments Act (depending upon the State where the establishment is located), Employees' State Insurance Act, 1948 etc.

Q17. Are severance payments statutorily required to be paid in India?

Termination of employees and the associated severance payments would depend on whether such employees are classified as workmen or non-workmen. Under the provisions of the Industrial Disputes Act, a workman with at least one year of continuous service is entitled to compensation equal to 15 days average pay for every completed year of continuous service or part thereof in excess of six months, if his or her services are terminated for any reason, except on account of disciplinary proceedings, voluntary retirement, superannuation, nonrenewal of employment contracts or on the ground of continued ill health. Statutory compensation is also payable to workmen in the event of lay off or closure of an undertaking. The IR Code introduces a re-skilling fund for training of retrenched workers. The fund will consist of the contribution of the employer of an amount equal to 15 days wages last drawn by the worker immediately before the retrenchment or such other number of days, as may be notified, and contribution from such other sources as may be prescribed by the appropriate Government. The retrenched employee would be paid from the fund within 45 days from the date of retrenchment. This amount of 15 days wages is in addition to the retrenchment compensation.

The S&E Acts in certain states also provide for payment of severance compensation to employees covered under the legislation on termination of their employment. The Gratuity Act entitles an employee to a gratuity payment upon termination of his or her service after the completion of five years of continuous employment, of an amount equivalent to 15 days wages for each completed year of service subject to a maximum of INR 20 lakhs (approx. USD 24,390). The manner of calculation of retrenchment compensation and gratuity would need to be re-visited once the SS Code comes into force. The ceiling limit of INR 20 lakhs may also be re-visited upon the SS Code coming into force.

Q18. Is there a mandatory requirement to engage apprentices?

As per the Apprentices Act, 1961 ("**Apprentices Act**") and the rules framed thereunder, an employer is required to engage apprentices in the band of 2.5-15% of its total strength of 'workers' within a financial year. The term 'worker' has been defined under the Apprentices Act to include any person working in the premises of the employer, who is employed for wages in any kind of work either directly or through any agency. The requirement to engage apprentices has been made mandatory for an establishment where the number of workers exceeds 30. The employer has an option to engage the prescribed number of apprentices either under the notified designated trades or optional trades.

Lately, active steps are being taken by regulatory authorities to promote and enforce engagement of apprentices. The Board of Apprentices Training ("**BOAT**"), which is the nodal agency, has been issuing notices to organisations which are non-compliant to ensure that they take active steps to comply with the Apprentices Act. Where organisations are found to be in non-compliance, in addition to the penal consequences under the Apprentices Act, it is possible that the regulatory authorities could share the list of defaulters with various other departments under the Government of India for imposing further sanctions on the defaulters. While there are practical challenges in some industries where the operations are highly technical in nature, the expectation is compliance. To this end, the BOAT is open to providing guidance and support so as to facilitate compliance with the Apprentices Act.

Many organizations have understood the value of investing in apprentices to bridge the skill gaps and create a sustainable talent supply chain. Though this is an added cost to business, shifting focus to capacity building, upskilling, re-skilling with the new aged tools of artificial intelligence, cyber security and professional skills such as out of the box thinking, leadership skills, multi-tasking and good communication power can be a lucrative investment for the future of the economy.

Q19. What are the recent significant labour law developments in India?

Supreme Court's judgement on higher pension: The Supreme Court in *Employees Provident Fund Organisation & Ors.* vs. *Sunil Kumar B. & Ors. etc.*, reported in *AIR 2022 SC 634* upheld the right of certain categories of employees to contribute towards pension on their actual salary as opposed to the cap of INR 15,000 (approx. USD 183) by way of a joint option to be exercised by the employer and employee. The judgment stated that the pre-requisite for applying for a higher pension is that both the employer and employee should have been contributing on higher salary towards the provident fund. In furtherance of the Supreme Court judgment, the Employees' Provident Funds Organization has issued circulars which provide for directions and steps required to be taken with regards to those employees who are eligible to opt for higher pensionary benefits.

Enactment of certain provisions of the SS Code: Vide notification dated May 3, 2023, the Ministry of Labour and Employment has enacted certain provisions of the SS Code pertaining to employees' pension fund contributions, to bring the Employees' Pension Scheme, 1995 within the realm of the code effective May 3, 2023. Further, the Ministry has notified the manner of pension fund contributions under the SS Code in respect of employees who were members as of September 1, 2014, and who have exercised joint option for higher pensionary benefits.

Amendments with regards to Work-From-Home in Special Economic Zone Rules, 2006: By way of a notification dated December 8, 2022, the Government of India notified the Special Economic Zones (Fifth Amendment) Rules, 2022. As per the amendment, a unit may allow its employees to work from home or any place outside the SEZs. This notification covers (i) employees of the IT / ITES SEZs units, (ii) temporarily incapacitated employees, (iii) travelling employees and, (iv) employees working offsite. The permission granted to work from home is valid up to December 31, 2023.

Law passed on Rajasthan Gig Workers: The Rajasthan Government passed the Rajasthan Platform-Based Gig Workers (Registration and Welfare) Bill, 2023 ("**Rajasthan Act**") in the Rajasthan Legislative Assembly on July 24, 2023. The Rajasthan Act is yet to receive the assent of the Governor and has yet to come into force. The Rajasthan Act aims to promote welfare and social security of gig workers. The key provisions of the Rajasthan Act are as follows: (a) Platform Based Gig Workers Welfare Board: A welfare board is proposed to be established to oversee the registration of gig workers and aggregators, ensure cess deduction, set up a monitoring mechanism, formulate and notify social security schemes, ensure time bound redressal of grievances related to the rights of platform-based gig workers, engage with registered unions working with platform based gig workers and hold regular consultations with them; (b) Registration of gig workers and aggregators: Aggregators will be required to give the Board their database of all platform-based gig workers onboarded or registered with them. Pursuant to this, gig workers will be automatically registered. Aggregators will need to get registered with the State Government within 60 days of enforcement of the Act; (c) Platform Based Gig Workers Social Security Fund and Welfare Fee: The Fund will be established for the benefit of registered platform-based gig workers which will be funded by, amongst others, welfare fees received from aggregators at a prescribed rate of the value of each transaction related to platform-based gig worker; (d) Rights of registered platform-based gig workers: Platform based gig workers will have the following rights: registration with the Board and allotment of unique IDs, access to general and specific social security schemes, the opportunity to raise grievances and participation in all decisions taken for their welfare; (e) Interest and Penalty: There is a penalty prescribed if any aggregator fails to pay the welfare fee on time which is a simple interest of 12% per annum from the date on which such payment is due. If any other provisions of the Rajasthan Act are violated by the aggregators, the

Rajasthan Act empowers the State Government to impose penalties in terms of fine up to INR 500,000 (USD 6,098) for the first contravention and up to INR 50,000,000 (USD 6,09,756) for subsequent contraventions.

State amendments for building and other construction workers:

- The Himachal Pradesh Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2008 was amended to change Rule 266 (pertaining to membership to the welfare fund) to include the application for registration to be accompanied with appropriate documents from the employer / contractor certifying that the applicant is a construction worker.
- The Punjab Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2008 was amended wherein, *inter alia*, certification for membership to the welfare fund can now be issued by "any person or authority or officer, who is authorised by the Board" in addition to the employer/contractor, and contributions to the welfare fund are required to be remitted in advance for a period of 1 year (as compared to once every 3 months previously) at the time of applying for registration/renewal.

Q20. What are the recent trends in labour laws in India?

Diversity, Equality and Inclusion ("DEI"): Indian workplaces are encouraging diversity by releasing the need to hire consciously, make accommodations to enable a diverse workforce to work without hassles and implement measures to increase inclusivity eventually leading to increased productivity. Recent trends indicate an attention to DEI by implementing internal policies which lay down compliances on diversity and inclusivity along with measures to redress any breach of such policies - such as the equal opportunity policies for transgender employees and employees with disabilities, and anti-sexual harassment policies. In addition, Companies are making infrastructural changes to the premises, such as setting up of gender-neutral washrooms, availability of assisted devices and overhauling of the software and hardware to enable employees with disabilities. Companies are also conducting sensitisation sessions on focused topics as a part of their orientation program for new joinees and refresher sessions on what amounts to sexual harassment, how to address unconscious bias at workplaces, allyship etc. Enabling employees to express their identity through their preferred pronouns in employee on-boarding forms. Setting up of support groups for LGBTQ+ employees and those with disabilities. Appointment of officers and committees to oversee compliances and address any complaints, specifically, the increased trend of hiring for the position of 'chief diversity officer' in India demonstrates that DEI is a priority.

- Regarding the evolving trends with the framework of the Rights of Persons with Disabilities Act, 2016 ("**RPWD Act**"), the Central Government has amended the Rules under the RPWD Act to insert the accessibility standards for various industries such as healthcare industry including government, private and other healthcare institutions and centres, cultural sector, sports complex and residential facilities for sports persons with disabilities and civil aviation. Furthermore, the government has also substituted the standard for public buildings as specified in the Harmonised Guidelines and Space Standards for Barrier Free Built Environment for Persons With Disabilities and Elderly Persons as issued by the Ministry of Urban Development in March 2016 with standard for public buildings as specified in the Harmonised Guidelines and Standards for Universal Accessibility in India, 2021.
- With regards to the Transgender Persons (Protection of Rights) Act, 2019 ("**TP Act**") which requires every employer to implement all measures for providing a safe working environment for transgender persons and to ensure that no transgender person is discriminated in any matter relating to employment, including recruitment, promotion, infrastructural adjustments and employment benefits., many organisations have started implementing anti-discriminatory policies, conducting sessions to create awareness, etc. In 2021, Karnataka became the first state to offer 1% horizontal reservation to transgender persons in civil services posts. In April 2023, Madhya Pradesh included transgender persons in the Other Backward Classes category.
- The Courts of India have time and again paved the way for equality at workplaces through various judgements

such as; equal pay for equal work is a constitutional goal, it is a right of women to be safe and protected at the workplace, women being retired on account of first pregnancy is unlawful, career of women in armed forces cannot end at short service commission, transgender persons are a recognised gender, and decriminalization of homosexuality thereby giving persons with different sexual orientation the right to freely express themselves.

Return to office / Moonlighting: In the aftermath of the COVID pandemic and on account of the issues faced in a remote working environment, organizations are looking to reinstate the traditional working model and return to office. The absence of a constant vigil that comes with a physical workspace has given considerable flexibility to individuals to do other jobs and has led to a surge in moonlighting. In a remote working environment, companies are also facing challenges such as leakage of company's confidential information and difficulties in training and monitoring performance. To address these challenges, companies are adopting a hybrid model of work while clearly setting out the expectations with respect to performance criteria, confidentiality measures and other critical aspects in connection with hybrid working.

17. Direct Tax

Q1. What is the law relating to taxation in India?

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

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

Q2. What is the legislation which governs the levy of income tax in India?

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

Q3. What are the income tax rates in force for individuals in India?

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

The following table provides the default income tax rates applicable for individuals in relation to FY 2023-2024 or AY 2024-25. The effective tax rates in case of individuals are as under:

<table>
<tr><th>Total Income</th><th>Tax Rate</th><th>Surcharge</th><th>Health and education cess</th><th>Marginal Effective Tax Rate</th></tr>
<tr><td>Upto INR 300,000</td><td>Nil</td><td rowspan="6">Nil</td><td>Nil</td><td>Nil</td></tr>
<tr><td>INR 300,000 to INR 600,000</td><td>5% of (total income minus INR 300,000)*</td><td rowspan="6">4% of income tax</td><td>5.20%</td></tr>
<tr><td>INR 600,001 to INR 900,000</td><td>INR 15,000 + 10% of (total income minus INR 600,000)*</td><td>10.40%</td></tr>
<tr><td>INR 900,001 to INR 1,200,000</td><td>INR 45,000 + 15% of (total income minus INR 900,000)</td><td>15.60%</td></tr>
<tr><td>INR 1,200,001 to INR 1,500,000</td><td>INR 90,000 + 20% of (total income minus INR 1,250,000)</td><td>21%</td></tr>
<tr><td>INR 1,500,001 to INR 5,000,000</td><td>INR 150,000 + 30% of (total income minus INR 1,500,000)</td><td>31.20%</td></tr>
<tr><td>INR 5,000,001 to INR 10,000,000</td><td>INR 1,200,000 + 30% of (total income minus INR 5,000,000)</td><td>10% of income tax</td><td>34.32%</td></tr>
</table>

Total Income	Tax Rate	Surcharge	Health and education cess	Marginal Effective Tax Rate
INR 10,000,001 to INR 20,000,000	INR 2,700,000 + 30% of (total income minus INR 10,000,000)	15% of income tax	4% of income tax	35.88%
Above INR 20,000,000	IN 5,700,000 + 30% of (total income minus INR 20,000,000)	25% of income tax		39%

Note:

* *The effective rates are inclusive of health & education cess ("Cess"), which is 4% and applicable surcharge. The surcharge is subject to a marginal relief, which provides that incremental tax payable on account of surcharge shall not be more than such income exceeding the slab rate on account of which surcharge/ incremental surcharge is levied. Under this tax regime, an Indian resident whose total income does not exceed INR 700,000 (approx. USD 8537) is eligible for a rebate of 100% of income tax, subject to a maximum amount of INR 25,000 (approx. USD 305). Further, while most allowances and deductions will not be available under the new default tax regime, a standard deduction on salary income of up to INR 50,000 (approx. USD 610) or the actual salary received, whichever is less, in lieu of deductions on account of transport allowance (except in the case of differently abled persons) and reimbursement of medical expenses will continue to be available.*

Q4. How are corporations taxed in India?

A Corporation is regarded as a resident in India if:

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

In the context of implementation of the concept of POEM based residence rule, the Central Board of Direct Taxes ("**CBDT**") has issued guidance to determine POEM of a foreign company. Corporations that are resident in India are taxed on their worldwide income arising from all sources.

Moreover, the IT Act imposes an additional tax on a domestic company buying back its shares from its shareholders (Buy Back Tax). Such Buy Back Tax is applicable on the income distributed by the company on account of a buyback of shares and is payable on the difference between the consideration paid by the company on buyback shares and the amount, which was received by the company for issue of such shares, determined in the manner as prescribed. Furthermore, income in respect of such buy back by the company is tax exempt in the hands of the shareholders.

Dividends distributed by a company are taxable in the hands of the recipient shareholders at the tax rates applicable to them. In the case of NR shareholders, the IT Act provides for a tax rate of 20% (plus applicable surcharge and Cess) on dividend income. However, NR shareholders may avail the benefit of a lower withholding rate on dividends under the applicable tax treaty, if any (as discussed below).

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

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

Q5. What are the income tax rates in force for Corporations in India?

The effective tax rates applicable to corporations have been summarised below:

Particulars	Tax Rate	Effective Tax Rate*
Corporate Tax Rate		
Domestic Company	30% if turnover exceeds INR 4 billion in FY 2021-22. Lower tax rates are applicable subject to certain conditions (discussed separately below this table)	
• Taxable income up to INR 10 million		31.20%
• Taxable income above INR 10 million		33.38%
• Taxable income above INR 100 million		34.94%
Foreign Company	40% in all cases	
• Taxable income up to INR 10 million		41.60%
• Taxable income above INR 10 million		42.43%
• Taxable income above INR 100 million		43.68%
Buy Back Tax		
Domestic Company	20%	23.30%
Minimum Alternative Tax ("MAT")* **		
Domestic Company	15% in all cases	
• Taxable income upto INR 10 million		15.6% of the book profits
• Taxable income above INR 10 million		16.69 % of the book profits
• Taxable income above INR 100 million		17.47% of the book profits
Foreign Company	15% in all cases	
• Taxable income upto INR 10 million		15.6% of the book profits
• Taxable income above INR 10 million		15.91% of the book profits
• Taxable income above INR 100 million		16.38% of the book profits

Note:

* Including applicable surcharge and Cess. Domestic companies with total income in excess of INR 100 million (approx. USD 1.22 million) are subject to a surcharge at the rate of 12% of income tax. In case the total income of the domestic company is in excess of INR 10 million (approx. USD 121,951) but less than INR 100 million (approx. USD 1.22 million), a surcharge of 7% of the income tax is levied. However, a surcharge of 12% is imposed on Buy Back Tax in all cases, irrespective of the amounts distributed. Foreign companies with total income in excess of INR 100 million (approx. USD 1.22 million) are subject to a surcharge at the rate of 5% of income tax. In case the total income of the domestic company is in excess of INR 10 million (approx. USD 121,951) but less than INR 100 million (approx. USD 1.22 million), a surcharge of 2% of the income tax is levied.

*** Under the MAT regime, corporations are subject to a presumptive tax on their book profits i.e., profits shown in their financial statements), if the tax payable as per the regular provisions of the IT Act is less than 15% of the corporation's book profits. MAT provisions do not apply to the foreign companies which do not have a PE in India, in terms of the tax treaty. The taxpayer can carry forward the MAT credit for 15 AYs. MAT provisions are not applicable to foreign companies whose taxable income in India comprises solely of business profits taxable under specified presumptive taxation regimes (relating to operations of ships and aircrafts, and production of mineral oils) and such income has been offered to tax under such regimes.

Reduced corporate tax rates

The base corporate tax rate has been reduced to 25% in case of domestic companies with turnover up to INR 4 billion (approx. USD 48.78 million) in FY 2021-22.

Further, reduced tax rates are available for domestic companies in certain cases, as set out below[1]:

- Domestic companies now also have the option to pay a lower tax rate of 25.17 % with no requirement to pay MAT by opting to forego its claims to existing tax holidays.
- New domestic manufacturing companies incorporated on or after 1 October 2019 and commencing production on or before 31 March 2024 shall have an option to pay tax at a rate of 17.16%. Further, such companies will not be subject to MAT. Companies claiming this beneficial tax rate however will have to comply with domestic transfer pricing regulations.

Q6. What are the withholding tax rates applicable to non-resident corporations in India?

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

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

Particulars	Tax Rates	Effective Tax Rates
Dividends • Taxable income up to INR 10 million • Taxable income above INR 10 million • Taxable income above INR 100 million	20%	20.80% 21.22% 21.84%
Interest • Taxable income up to INR 10 million • Taxable income above INR 10 million • Taxable income above INR 100 million	40% or 20% in all cases	41.6% or 20.8% 42.43% or 21.22% 43.68% or 21.84%
Royalties and FTS** • Taxable income up to INR 10 million • Taxable income above INR 10 million • Taxable income above INR 100 million	20% on gross basis in all cases	20.80% 21.22% 21.84%

Note:

* The tax rate applicable to interest income depends on the currency in which the debt is denominated.

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

Q7. How are Capital Gains taxed in India?

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

1 The above tax rates will be increased by a flat surcharge of 10% and Cess of 4%.

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

Note:

* *Long term capital gain, exceeding INR 1,00,000/- (approx. USD 1220) is taxed at the rate of 10% (without giving effect to the benefits of indexation and neutralization of foreign exchange fluctuation). For such rate to apply, the sale of shares must be on the stock exchange and such shares should have been acquired pursuant to a transaction which was subject to Securities Transaction Tax ("STT") or such transaction must be a notified transaction. Similarly, in case of units of equity oriented funds and units of business trusts, the 10% rate will apply only if such transaction of sale is subject to STT. Long term capital gains on such shares/ units of mutual funds/ units of business trust upto 31 January 2018 have been grandfathered and are exempt. Short term capital gains tax on such transfers is 15% (plus applicable surcharge and cess). The requirement of payment of STT is done away with in case the transaction is undertaken on recognised stock exchange located in any International Financial Services Centre (IFSC) and where the consideration for such transaction is in foreign currency. Further, to boost inflow of foreign funds in Indian capital markets, the increased surcharge rates of 25% and 37% are not applicable in case of capital gains income earned on (i) long term capital gains; (ii) short term capital gains on transfers subject to STT and (iii) The sale of any security, including derivatives, in the hands of Foreign Portfolio Investors ("FPI").*

* Domestic companies with total income in excess of INR 10 crores (approx. USD 1.22 million) are subject to a surcharge at the rate of 12% of income tax. In case the total income of the domestic company is in excess of INR 1 crore (approx. USD 121,951) but less than INR 10 crores (approx. USD 1.22 million), a surcharge of 7% of the income tax is levied. Moreover, in all cases, domestic companies are subject to a Cess of 4% on the amount of income tax as increased by the surcharge payable by such company. In case of a foreign company with total income in excess of INR 10 crores (approx. USD 1.22 million), a surcharge at the rate of 5% of income tax will be levied. A surcharge of 2% will continue to be levied on foreign companies with total income in excess of INR 1 crore (approx. USD 121,951) but which does not exceed INR 10 crores (approx. USD 1.22 million). In all cases, a Cess of 4% on the amount of income tax as increased by the surcharge will be payable by such company.

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

\# The stated tax rates in the case of NRs are subject to benefit/exemption provided under the relevant tax treaty, to the extent that the tax treaty is more beneficial.

Q8. Does India have General Anti Avoidance Rules?

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

substance, amongst others. GAAR provisions apply on domestic as well as cross-border transactions and have an overriding effect on all the other provisions of the IT Act. In case of an abuse of a tax treaty, GAAR provisions can also override the provisions of the tax treaty.

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

- Transactions where tax benefit does not exceed INR 3 crores (approx. USD 365,853);
- Foreign Institutional Investor ("**FII**") or Foreign Portfolio Investor ("**FPI**") who is an assessee under the IT Act, and does not seek tax treaty benefit and who has invested in listed or unlisted securities with prior approval of competent authority;
- NR who has made investment in the FII or FPI by way of offshore derivative instruments;
- Income arising to any person from transfer of investments made before April 1, 2017;
- Transactions where tax benefit is obtained prior to April 1, 2017.

The onus of proving that a transaction falls within the purview of GAAR is on the income tax authorities.

Q9. Are there transfer pricing restrictions in India?

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

- Comparable uncontrolled price method;
- Resale price method;
- Cost plus method;
- Profit split method;
- Transactional and net margin method; or
- Any other method as may be prescribed by the CBDT[2].

Taxpayers, who enter into international transactions and / or specified domestic transactions[3], are required to maintain prescribed documents and furnish an accountant's report, which includes prescribed details. Under the transfer pricing regulations, if the international transaction or specified domestic transaction is not at arm's length, the difference between the arm's length price and the actual transfer price or transaction price is taxed in the hands of the taxpayer. Further, Indian transfer pricing regulations allow for a 'Secondary Transfer Pricing adjustment', in addition to the primary transfer pricing adjustment in the hands of the taxpayer. Secondary adjustment means an adjustment in the books of accounts of the taxpayer and its AE to reflect that the actual allocation of profits between the two are consistent with the transfer price determined as a result of primary adjustment. Where a primary transfer pricing adjustment results in an increase in total income or reduction in loss of the taxpayer, the excess money (difference between arm's length price determined in the primary transfer pricing adjustment and actual price at which international transaction has been undertaken) which is available with the AE will be deemed to be an advance made by the taxpayer to the AE. If such excess money is not repatriated to India within the prescribed time then interest on such advance will be computed. The primary adjustment not exceeding INR 1 crore (approx. USD 121,951) would not be subject to secondary transfer pricing adjustment.

Q10. What precautions should be taken to avoid transfer pricing disputes in India?

Advance Pricing Arrangement (APA)

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

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

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

Safe Harbour Rules

In addition to APAs, the IT Act also provides for safe-harbour rules, which broadly cover the following business transactions:

- Software development services;
- Knowledge Process Outsourcing ("**KPO**") services;
- Contract research and development services;
- Manufacture and export of core and non-core auto components;
- Intra group loans; and
- Corporate guarantees.

Transfer pricing documentation and Base Erosion and Profit Shifting ("BEPS")

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

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

In line with OECD report on Action 13 of BEPS, Section 286 of the IT Act lays down the provisions for a specific reporting regime in respect of CbC reporting and also the master file. The reporting regime requires furnishing of exhaustive information pertaining to the multinational group and the information is required to be furnished in the prescribed manner either by the overseas parent company of the multinational group or an Indian entity which is part of the group and designated to provide such information in this regard. It is further provided that CbC guidelines will not be applicable to an international group for an accounting year if total consolidated group revenue, based on consolidated financial statements, does not exceed the amount as may be prescribed.

In order to strengthen the CbC framework and to reduce compliance burden of reporting, the Finance Act 2018 has introduced the following amendments with retrospective effect from AY 2017-18:

- The time limit for furnishing the CbC report, in the case of parent entity or the alternate reporting entity ("**ARE**"), resident in India will be 12 months from the end of reporting accounting year;
- A constituent entity resident in India, having a non-resident parent, will also furnish CbC report in case its parent entity outside India has no obligation to file the report in its country within 12 months from the end of reporting accounting year;
- The due date for furnishing of CbC report by the ARE of an international group, the parent entity of which is outside India, with the tax authority of the country of which it is resident, will be the due date specified by that country.

Q11. Does India have Thin Capitalisation Norms?

'Thin Capitalisation Norms' have been introduced in India with effect from FY 2018-19 in line with recommendation of OECD BEPS Action Plan 4. It is now proposed that where an Indian company or a PE of a foreign company in India pays interest in respect of any debt issued by an NR AE exceeding INR 1 crore (approx. USD 121,951), which is otherwise a deductible business expenditure, the interest expense so deductible will be restricted to 30% of its earnings before interest, taxes, depreciation and amortization or actual interest whichever is less.

Further, in case of debt provided by a lender (other than an AE) will also de facto be considered as debt provided by an AE if such debt is implicitly or explicitly guaranteed by the AE or the AE deposits corresponding and matching amount of funds with the lender. However, thin capitalization shall not apply on interest paid in respect of debt provided by a lender which is a PE in India of a foreign company which is engaged in the business of banking.

The carry forward of the aforementioned disallowed interest expense is permitted up to eight AYs immediately succeeding the AY for which the disallowance was first made and is allowed as a deduction against the profits and gains, if any, of any business or profession carried on by the taxpayer to the extent of maximum allowable interest expenditure.

It is relevant to note that the thin capitalisation norms will

not apply to an Indian company or a PE of a foreign company which is engaged in the business of banking or insurance.

Q12. What are some direct tax incentives available in India?

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

Investment-linked incentives

Investment linked incentives are provided on:

- specified businesses; and
- research and development.

The investment-linked tax incentives for specified business are provided by way of allowing 100% deduction in respect of the expenditure of capital nature incurred wholly and exclusively, for the purposes of such 'specified businesses'. 'Specified businesses' includes setting up of cold chain facility, warehousing facility, building and operating of hotels, hospitals (as prescribed by Central Government), laying and operating a cross-country natural gas or crude or petroleum pipeline, developing and building housing project, developing or maintaining and operating or developing, maintaining and operating a new infrastructure facility etc. This deduction is provided in the FY in which such expenditure is incurred and is provided subject to satisfaction of certain conditions provided in the IT Act, including that the asset in respect of which the deduction is provided is used only for the purpose of 'specified business' and is used for eight years beginning from the year in which such asset was acquired or constructed.

Similarly, investment-linked tax incentives for research & development are provided by way of allowing 100% deduction in respect of the expenditure of capital nature incurred wholly and exclusively, for the purposes of certain 'research & development' during the FY in which such expenditure is incurred. Such investment linked tax incentives are also provided if the payment is made to a research association/university, college or other institution for scientific research; or payment is made to an Indian company to be used for scientific research and development that fulfills certain conditions etc. Currently, the IT Act provides for an additional depreciation of 20% (over and above the general depreciation) on the cost of plant and machinery acquired and installed.

Tax Incentives

- A 100% deduction is provided to farm producer companies having a turnover up to INR 100 crores (approx. USD 12.2 million) earning profits from marketing of agricultural produce grown by its members or the purchase and supply of agricultural implements, seeds, livestock or other articles for agriculture or processing of the agricultural produce of its members up to FY 2023-24.
- Currently, a tax exemption has been provided to any income earned by a foreign company from (a) the storage of crude oil in an Indian facility and the sale of crude oil therefrom to an Indian resident, pursuant to a notified agreement with the Central Government; and (b) income arising from sale of leftover stock of crude oil, from the Indian facility, after the expiry of such an agreement. This tax exemption has been extended to income arising from sale of leftover stock of crude oil, from the Indian facility, even if the arrangement is terminated in accordance with the terms mentioned in such agreement.

The income received by a non-resident in the form of royalty or fees for technical services rendered in or outside India to National Technical Research Organisation ("**NTRO**") will be exempt from tax. Accordingly, an NTRO will not be required to withhold tax on such payments.

Q13. Does India provide any special tax incentives to start-ups?

The IT Act provides tax incentives for start-ups, incorporated either as a company or as an LLP, on or after April 1, 2016 but before April 1, 2024 and engaged in a business involving in innovation, development or improvement of products or processes or services, or a scalable business model with a high potential of employment generation or wealth creation, subject to satisfaction of prescribed conditions. The start-ups which qualify for the tax incentive are as follows:

- Whose total turnover (of the business) does not exceed INR 100 crores (approx. USD 12.2 million) in any of the previous years for which such tax incentive/ deduction is claimed; and
- Which hold a certificate of eligible business from the Inter-Ministerial Board of Certification as notified in the Official Gazette by the Central Government.

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

- Deduction of 100% from business profits of such start-ups for any three consecutive AYs out of ten AYs beginning from the year in which such start-up is incorporated.
- Exemption from long term capital gains tax if the gains arising from transfer of the long-term capital asset are invested in units of such specified fund (as may be notified by the Central Government in this behalf) subject to the condition that the amount remains invested for three years, failing which the exemption will be withdrawn. The investment in the units of the specified fund are allowed up to INR 50 lakhs (approx. USD 60,975);
- Exemption from long term capital gains in case of an individual or a Hindu Undivided Family ("**HUF**") in respect of sale of a long term asset, being residential property, if the net sale proceeds are invested in at least 25% shares of a 'start-up' on or before the due date of filing of return of income by the investor and such 'start-up' utilises such investment amount to purchase new prescribed asset(s) within one year of subscription of shares. The exemption is provided subject to certain conditions, including, inter alia, that the transfer of residential property occurs on or before March 31, 2022.
- Additionally, an eligible start-up can carry forward previous years' losses for a period of seven years from its incorporation, even where there is a change in its shareholding (whether or not in excess of 49%) provided that the old shareholders continue in the company.

Q14. What tax incentives does India give to IFSCs?

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

- Long-term capital gains tax in excess of INR 1,00,000 (approx. USD 1220) arising from transaction undertaken in foreign currency on a recognised stock exchange located in IFSC are subject to tax at the concessional rate of 10% irrespective of payment of STT on the same.
- Concessional short-term capital gains tax rate of 15% on capital assets being equity shares, units of equity-oriented funds and units of business trust will be available to the transactions undertaken in foreign currency through a recognised stock exchange located in an IFSC, even where no STT is payable.
- Further, the transactions in foreign currency in the following assets by a NR, or a Category III Alternate Investment Fund ("**AIF**") (units of which are held by non-residents) on a recognized stock exchange located in any IFSC will be exempt from capital gains tax:
  - bond or Global Depository Receipt,
  - rupee denominated bond of an Indian company;
  - derivatives.
- Any interest payable to a non-resident by units located in IFSC in respect of monies borrowed by it on or after September 01, 2019 will be tax exempt. Long term bonds and Rupee denominated bonds listed on IFSC exchanges are taxable at a lower rate of 9%.
- A unit located in IFSC and deriving its income solely in convertible foreign exchange, is chargeable to MAT at the reduced rate of 9%. Even existing units can avail a lower MAT rate of 9% (subject to fulfilment of other conditions). An alternative minimum tax at par with the lower 9% MAT rate has been extended to non-corporate tax payers also.
- IFSC units can avail an exemption of 100% of the income for its approved business for any 10 consecutive assessment years commencing from the year in which permission from relevant regulatory authorities is obtained, out of a block of 15 assessment years.

Q15. Does India tax capital gains arising on the indirect transfer of underlying assets situated in India?

Where a NR earns capital gains from the transfer of shares or interest of a company or a NR entity incorporated or registered outside India, such capital gains will be taxable in India if such shares or interest, derive their value substantially,

whether directly or indirectly, from assets located in India.[4]

A share or interest will be deemed to derive its value "substantially" from assets (whether tangible or intangible) located in India, if on the specified date, the value of Indian assets, exceeds the amount of INR 10 crores (approx. USD 1.22 million) and represents at least 50% of the value of all the assets owned by the company or entity, as the case may be. The following may be noted in this respect:

- Value of an asset means the fair market value of such asset without reduction of liabilities, if any, in respect of the asset.
- The specified date of valuation means the date on which the accounting period of the company or entity, as the case may be, ends preceding the date of transfer. However, if the book value of the assets of the company on the date of transfer exceeds by at least 15% of the book value of the assets as on the last balance sheet date preceding the date of transfer, then instead of the date mentioned above, the date of transfer will be the specified date of valuation.
- The manner of determination of fair market value of the Indian assets and the global assets of the foreign company has been prescribed in the IT Rules.
- The taxation of gains arising on transfer of a share or interest deriving, directly or indirectly, its value substantially from assets located in India will be on proportionate basis. The method for determination of proportionality has been prescribed in the IT Rules.

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

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

An exemption has also been provided for transfer of shares in an offshore amalgamation or demerger subject to certain conditions.[5]

Q16. What are the advantages of the India's Double Taxation Avoidance Agreements (DTAAs) with Mauritius, Singapore, *etc.*? Do NRs require a tax residency certificate to avail of any tax treaty benefits?

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

Particulars	Tax Consequences in India under the India-Mauritius DTAA
Investments in shares prior to April 1, 2017	Capital gains exemptions will continue for shares acquired before April 1, 2017, irrespective of their date of transfer.

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

5 The cost of acquisition and period of holding of the shares of the Indian company in the hands of the resulting foreign company will be the same as the demerged foreign company.

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

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

Both India-Mauritius and India-Singapore DTAA provide for a limitation of benefit ("**LOB**") clause which contains certain conditions for conferring the benefits of the respective DTAAs on tax residents of Mauritius and Singapore.

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

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

Q17. Is prior permission of Indian income tax authorities required before transferring assets?

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

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

This section only applies to cases where the amount of tax or other sum payable or likely to be payable exceeds INR 5,000 (approx. USD 61) and the assets charged or transferred exceed INR 10,000 (approx. USD 122) in value.

Q18. What are the major tax registrations and compliances to be followed by corporations in India?

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

Furthermore, the provisions of the IT Act make it mandatory to quote TAN in all tax deducted at source, tax collection at

source, or annual information returns, payment challans and certificates to be issued by persons under an obligation to deduct tax at source.

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

Filing of corporate tax return	October 31/ November 30*
Filing of tax audit report	September 30/ October 31*
Filing of transfer pricing report	November 30
Filing of tax deducted at source return	Quarterly

*These due dates are applicable if the company is subject to Indian transfer pricing regulations.

Corporate tax liability is required to be estimated and discharged by way of advance tax in four instalments on June 15, September 15, December 15 and March 15. In case a taxpayer fails to file a timely return, the assessee will be ineligible to avail any tax holidays and incentives set out under chapter VIA of the IT Act.

Q19. What is the ordinary appellate dispute resolution channel in India?

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

Commissioner of Income Tax (Appeals)

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

Dispute Resolution Mechanism (DRP)

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

Income Tax Appellate Tribunal (ITAT)

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

High Court

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

Supreme Court

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

Q20. What are other dispute resolution alternatives available to taxpayers?

Board for Advance Rulings

In order to address queries relating to taxability of transactions proposed to be undertaken by an eligible assesse (which include non-residents), an Authority for Advance Rulings was constituted by Central Government by the Finance Act, 1993. However vide Finance Act, 2021, this now will be replaced by a Board for Advance Ruling (once notified), which will carry out the same function. An advance ruling, which is issued by Board for Advance Ruling will be appealable before the High Court of India. Furthermore, the scope of the Board for Advance Ruling includes applications made by resident and NRs on questions relating to GAAR. The Advance Ruling scheme is also available to residents in respect of their own tax liability for transactions with value in excess of INR 100 crores (approx. USD 12.2 million).

Dispute Resolution Committee

The Dispute Resolution Committee ('DRC') is a statutory body introduced by the Finance Act, 2021 which deals with settlement applications filed by taxpayers/ assessee under

the IT Act. An eligible assessee can approach the DRC at any stage of the proceedings for assessment pending before an assessing officer, subject to certain prescribed conditions. The DRC has the power to grant immunity from prosecution from any offence and imposition of penalty under IT Act, in cases where the applicant makes a full and true disclosure of their income or wealth and fulfils certain other prescribed conditions. A taxpayer can approach the DRC only if the income disclosed in the return of income is upto INR 50 lakh (approx. USD 60,976) and proposed variation during assessment proceedings is upto INR 10 lakh (approx. USD 12,195)

Mutual Agreement Procedure (MAP)

MAP is a dispute resolution mechanism provided for under the DTAAs.

MAP can be invoked by the taxpayers where an action of any one of the contracting states to the DTAA results in or will result for him in taxation, which is not in accordance with the DTAA.

Further, recourse to MAP does not deprive the taxpayer of ordinary legal remedies available under the domestic law. There is no time limit prescribed within which the competent authorities of the DTAA are to arrive at a conclusion in respect of the MAP application.

Bilateral Investment Protection Agreements (BIPA)

The objective of BIPA is to promote and protect the interests of investors of either country in the other country. Such agreements increase the comfort level of investors by assuring a minimum standard of treatment in all matters and provide for justifiability of disputes with the host country. Of late, foreign investors have been invoking BIPAs to resolve their disputes with the Indian Government in the sphere of income tax.

Q21. What is Black Money Law? What are its tax implications?

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

18. Indirect Tax

Goods and Service tax ("GST") has been introduced in India with effect from 1 July 2017. GST is a unified indirect tax, levied on the supply of manufactured products, provision of services or both. All goods and services are covered under GST except alcohol for human consumption and specified petroleum products. The taxable event under the GST laws is the supply of goods/services.

In case of intrastate supply of goods and services, GST in India is dually administered by both the state governments and the Federal (Central) government. For taxing intrastate supply of goods and services, the Federal government levies a Central GST ("CGST") while the state governments and union territories levy GST through their individual state GST Acts or Union Territory GST Acts ("SGST" or "UTGST"). While each state has a separate GST Act, at present, all states have adopted uniform tax rates for the purpose of GST [e.g., for intra-state transactions in Maharashtra, provisions of the Maharashtra Goods and Services Tax Act, 2017 are applicable, along with the CGST legislation]. The tax on inter-state supply transaction is levied in terms of the Integrated Goods and Services Tax Act, 2017 ("IGST Act") as ("IGST") and is administered by the Central Government. The mechanics of taxation are explained in the sections below.

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

GST is envisaged as a destination-based tax, where the consolidation of taxes with a seamless flow of credits and cross-utilizations have allowed for greater supply chain efficiency and has facilitated the creation of a single market across the country. Such credits are available against prescribed documents, such as tax invoice (issued in terms of GST laws which contain specified information), GST returns filed, and any other statutory conditions that may be mandated. The Government of India has made electronic invoices mandatory w.e.f. 1 October 2020 for certain classes of registered persons viz. B2B suppliers having a turnover of 5 crore in any financial year [from 1 August 2023]

Electronic invoices primarily involve generation of an invoice in a standard format, which is reported to an Invoice Registration Portal, for the purpose generating a unique invoice reference number ("IRN") and QR code (i.e., Quick Response code) which are then printed on the invoice.

The GST laws also specifically provide for certain other documents that are required to be maintained for undertaking supplies e.g., filing statutory returns, as mentioned above, e-way bills (required for movement of goods) etc.

Q1. What are the GST legislations passed by the Parliament in India?

The Parliament has passed the following legislations in order to implement GST in India:

- Central Goods and Service Tax Act, 2017 (CGST Act)
- Integrated Goods and Service Tax Act, 2017 (IGST Act)
- Goods and Services Compensation to States Act, 2017

Further, as mentioned above, all states and UTs have also passed their respective GST legislations (SGST Acts/ UTGST Acts).

Q2. What are the indirect taxes applicable in India?

GST

As mentioned above, under the GST regime, both the federal government and the state government have concurrent powers to levy tax on supply of goods as well as services except certain specified goods viz. petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel and alcohol for human consumption. Depending upon the place of supply of goods or services, including imports and exports, the supplies under GST laws are taxed either as intra-state supply or inter-state supply.

Intra-State GST/ CGST, SGST and UTGST

GST

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

Inter-State GST/ IGST

Inter-State supply of most goods and services attracts IGST. IGST is a sum total of the Central GST and State GST, which would have been applicable on the intra-state supply of such goods or services. A transaction is treated as an inter-state transaction when the supplier and the place of supply are in different states. Detailed rules have been prescribed under the IGST Act for determining place of supply and location of the supplier in respect of goods and services.

Certain supplies like online supply of content have specific place of supply parameters notified specifically. Certain supplies have been deemed to be an inter-state supply *e.g.*, imports, supply of goods and services to a Special Economic Zone ("SEZ") unit, *etc*.

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

Customs Duty

Customs duty is imposed on the import of goods into India and export of goods outside India. Every person proposing to engage in import of goods into India or export of goods from India is required to obtain an Import Export Code ("IEC") from the Directorate General of Foreign Trade, Ministry of Commerce and Industry ("DGFT").

Customs duty is levied in terms of the Customs Act, 1962 and Customs Tariff Act, 1975, on the transaction value of goods. The transaction value of the goods is the price actually paid or payable for the goods, when sold for export, where the buyer and seller are not related, and price is the sole consideration for the sale, subject to other conditions as may be prescribed in the valuation rules for customs.

In case the buyer and seller are related, special valuation measures and procedures are prescribed to determine whether the transaction value of goods are at arm's length at the time of import (i.e., not influenced by any factors), as per the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007 ("Customs Valuation Rules").

The export and import policy in India are also specified under the Indian Trade Classification (Harmonized System) Code ("ITC (HS)"). All goods imported into, or exported out of India must follow the specific export or import policy for such goods. The export and import policy of goods are regularly updated by the DGFT, on a need basis.

Under the present law in addition to Basic Customs Duty, IGST, Social Welfare Surcharge; other levies such as GST Compensation Cess (applicable only on specified products), Road and Infrastructure Cess (applicable on motor spirits and high speed diesel), Countervailing Duty ("CVD") (applicable only on specified products) and Special Additional Duty ("SAD"") (applicable only on specified products) may also levied at applicable rates. It is important to note that the IGST that is applicable on import of goods, is collected as a duty of customs. However, the same is creditable against domestic output GST liability.

The effective rate of customs duty in case of most non-agricultural products ranges from 16.55% to 42.08% (approximately) depending upon the classification of products. However, taking a mean rate of 18% IGST, and a Basic Customs Duty of 10% with a Social Welfare Cess of 10% on Basic Customs Duty [as is applicable on most goods], the effective rate stands around 30.98%.

The rate of customs duty for each item is specified under the Customs Tariff Act, 1975 and is dependent on the classification of the goods under their respective Customs Tariff Head ["CTH"] determined under the First Schedule of the Customs Tariff Act, 1975. The CTH(s) are aligned with the Harmonized System of Nomenclature, provided by the World Customs Organization.

In order to encourage exports, export duty is levied on very

few items, mentioned under the Second Schedule of the Customs Tariff Act, 1975.

Excise Duty

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

Central Excise Duty

Central excise duty is levied on the specified goods manufactured in India under provisions of the Central Excise Act, 1944 and the Central Excise Tariff Act, 1985. Central excise duty is a modified VAT (also known as Cenvat) wherein a manufacturer is allowed to take credit of the excise duty paid on locally sourced goods, and CVD and SAD on imported goods. The Cenvat credit so availed can be utilized for payment of excise duty on the clearance of dutiable final specified products manufactured in India, if any, applicable in accordance with the Cenvat Credit Rules, 2017.

State Excise Duty

State governments have the power to regulate movement of liquor and other intoxicants and to levy tax on manufacture or production of liquor and other intoxicants by virtue of the Constitution of India, 1950. As a result, movement and sale of liquor and other intoxicants is dependent upon the excise policy of respective states, which is usually revised annually by the state governments.

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

VAT and CST

With the introduction of the GST in India, state levy of VAT has been significantly curtailed. From 1 July 2017, VAT is levied only on the sale, within a state, of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), alcohol for human consumption, natural gas, aviation turbine fuel. CST is levied on the interstate sale of the above goods. VAT rates may vary from 0% to 15%, although there may be further variations depending on the state, as this is a state specific levy. VAT laws are specific to the states in India, and each state has their individual VAT laws.

The VAT or CST on sale of the above goods may be imposed by the Central Government or the state government depending upon the situs of the sale. In case a business is engaged in the above transactions, it has to take a registration under the respective legislation and perform appropriate compliances.

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

Intra-state Sales Tax: VAT

The power to levy sales tax on intra-state sale of specified moveable goods viz. petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel, alcohol for human consumption, is conferred upon state governments under the Constitution of India, 1950. In the event that a sale takes place within a particular state of India, the same would qualify as a local sale or intra-state sale, and would be chargeable to VAT at the applicable rates under the relevant state VAT legislation.

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

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

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

CST

CST is levied on inter-state sale of goods of specified moveable goods *viz*. petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel, and alcohol for human consumption. Where goods move from one state to another pursuant to a contract of sale, or a sale is affected by the transfer of documents of title during the movement of goods from one state to another, such a sale is known as an inter- state sale.

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

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

Professional Tax

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

Further, every company is also required to withhold professional tax on behalf of its employees and deposit the same with the government exchequer. The rate of tax is dependent on the number of employees and their monthly salaries. Every such company is also required to obtain a registration certificate in its capacity as an employer and also obtain an enrolment certificate. The rate slabs of professional tax varies from state to state, subject to the maximum of INR 2,500 (approx. USD 30) per employee per annum [this is consistent in the state legislations]

Q3. What is the concept of 'supply' under GST?

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

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

Q4. What is the rate structure under GST?

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

Q5. Who is a 'taxable person' under GST?

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

Q6. What is the registration requirement under GST?

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

As a general rule, a taxable person supplying goods or/ and services is required to be mandatorily registered with the authorities if the aggregate turnover of such taxable person on a pan-India basis exceeds INR 20 lakhs (approx. USD 24,390) or INR 10 lakhs (approx. USD 12,195), in case of special category states (Manipur, Mizoram, Nagaland and Tripura). Certain exceptions are available to this rule in the GST laws.

Further, certain additional category of persons such as persons liable for paying tax under reverse charge, persons engaged in interstate supply of goods *etc*., are mandatorily required to obtain registration irrespective of the prescribed threshold criterion.

Certain specific service providers, like suppliers of online content based outside the territory of India, also are mandated to take a special GST registration to perform compliance, if they supply services, to individual non GST registered consumers in India.

Suppliers of online money gaming services [where online games are played for stakes on an electronic platform] from outside India to any individual in India are also required to take special registration in India and perform appropriate GST compliances. In case these suppliers fail to do so, the GST laws mandate the blocking of the online platform from providing services in India, among other consequences.

As a general rule, GST laws also allow certain taxpayers having turnover of less than INR 1.5 crores (approx. USD 182,927) (with respect to supply of goods) to register under the composition scheme which allows such taxpayer to discharge GST at a reduced rate, ranging from 1% to 5%. However, the said scheme is subject to various statutory restrictions, *for e.g.* composition scheme disallows the taxpayer to avail and utilize input tax credit of the GST discharged on inward supplies of goods and services, among other restrictions.

Q7. What is the concept of anti-profiteering under GST?

The GST laws mandate that every business must pass on the benefits to its customers that may accrue to it on account of reduced rate of GST or increase in credits in comparison with the erstwhile laws. Such benefit is to be passed by way of proportionate reduction in prices. An authority has been constituted for the said purposes in accordance with GST laws, to ensure that businesses pass on the benefits of GST to the end customer.

Q8. What are the compliances which are required to be undertaken under GST laws?

GST laws mandates a taxpayer to undertake the prescribed compliances, including the following:

Returns

GST laws are based on a self-assessment mechanism where a taxpayer is required to ascertain its own tax liability and discharge the same to the governmental authorities. In support of such self-assessments, the taxpayer is required to file periodical returns with the concerned authorities. Some of the returns which are required to be (electronically) filed by the taxpayer, under the GST laws, are as follows:

Form**	Period	Details	Last date*
GSTR-1	Monthly	Details of outward supplies of goods or services	11th day of the succeeding month
GSTR-3B	Monthly	A summary of all outward and inward supplies of goods and services	20th day of the succeeding month
GSTR-9	Annually	Annual return GSTR-9 is an annual compilation of outward supplies, inward supplies, tax liability and input tax credit availed during a financial year	31st December of the year following the end of the financial year
ITC-02***	-	Details of eligible tax credit claimed by a taxpayer on its registration under GST laws	Within 30 days of becoming eligible to avail input tax credit

& Taxpayers whose aggregate turnover in the financial year 2020-21 is up to INR 2 crore (approx. USD 243,902), are exempted from filing annual GST return 9, for the said financial year

* *The last dates so provided are subject to any extension that may be provided by the concerned authorities.*

** *The government has proposed to overhaul the return filing system which has three main components – one main return (Form GST RET-01) and two separate annexures (Form GST ANX-1 and Form GST ANX-2) for outward and inward providing invoice level details. This is being integrated and introduced in a phased manner.*

*** *Please note that the said form is filed for the transfer of credit in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason.*

In addition to the above, taxpayers having turnover of business from INR 2 crore (approx. USD 243,902) to INR 5 crore (approx. USD 609,756) need to file a self-certified reconciliation with their audited financial statements in a **Form GSTR 9C**. The GSTR-9C has been modified to be a self-certified return for taxpayers from FY 2020-21 onwards. GSTR 9C is exempted for taxpayers with turnover less than INR 2 crore (approx. USD 243,902). If the turnover of the businesses exceeds the turnover of INR 5 crore (approx. USD 609,756), then both the GSTR 9 and GSTR 9C returns are required to be filed in the prescribed form. The last date of filing a GSTR 9C is 31 December of the year following the end of the financial year

E-way bills

As highlighted above, GST laws mandates a taxpayer to generate an e-way bill before undertaking supplies of goods from one place to another. In this regard, it is pertinent to note that e-way bills are required to be generated by every registered person who causes movement of goods having 'consignment value' exceeding INR 50 thousand (approx. USD 610). Detailed rules and regulations have been provided under GST laws with respect to e-way bills.

Q9. What are some the indirect tax incentives available in India?

Customs Laws

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

import duty on various specified goods, depending on their CTH and country of origin.
Other illustrative schemes are highlighted below:

For manufacture of goods in a warehouse, a Manufacture and Other Operations in Warehouse Scheme ["MooWR"] scheme has been introduced which provides for a deferment of Basic Customs Duties and Social Welfare Surcharge, if goods are imported into a bonded warehouse and manufacturing activity takes place of such goods

Project Import Scheme

Project imports are the imports of machinery, instruments, spares (up to 10 percent of the value of machinery), apparatus etc., required for the initial setting up of a manufacturing unit or for substantial expansion of an existing unit. The Central Board of Indirect Taxes and Customs ("CBIC**"**), pursuant to the power conferred under the Customs Act, has rolled out the Project Import Regulations, 1986 which regulate the Project Import Scheme ("PIS") for import of goods in India.

The advantages of importing the goods under PIS is that all the machinery, appliances, instruments etc., imported are charged to duty at a flat concessional rate of duty under an uniform Customs Tariff heading of 98.01 of the Customs Tariff Act, 1975, instead of being classified separately under different tariff headings and liable to different duty structures, at the time of import and clearance.

The primary requirement for being eligible for concessional rate of duty under PIS is that the project should be sponsored by a specified sponsoring authority as designated in the PIS with a detailed itemized list of goods to be imported, duly attested by such sponsoring authority.

GST

Under GST laws, exports and deemed exports are zero rated. There is no output tax subject to the fulfilment of routine conditions and suppliers are entitled to claim refund of GST discharged on inputs and input services, subject to fulfilment of conditions and compliances.

Foreign Trade Policy, 2015-2020 ("FTP")

The current FTP provides for a suite of export promotion schemes. These include:
Reward schemes like the Remission of Duties and Taxes on Exported Products, [**"**RoDTEP Scheme**"**] from 1 January 2021 [to claim refund of various central, state and local duties, taxes, and levies, on goods & services, which remain un-refunded, but are used in production and distribution of the exported product],

Export Promotion Capital Goods Scheme [import of capital goods for set up without import duty, subject to fulfilment of export obligation],

Authorized economic operation ("AEO") scheme for enhanced and prioritized clearance, recognition of Star Export Houses as 'Status Holders' etc.

Incentives are also extended to Exported Oriented Units, Software Technology Parks under the FTP.

The current FTP has come into force from April 2023 and is valid until a replacement is notified by the Government

SEZ

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

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

The SEZ Act will soon be replaced by the Development of Enterprise and Service Hub ["DESH"] Act which aims to be a more investor friendly legislation. The same will come into effect when notified by the Central Government

Investment based incentives

The state governments also provide for various fiscal and

non-fiscal incentives (including indirect tax incentives) on account of any investments made in any specified areas of the state.

The state industrial policies can provide refund of state GST, paid, refund / exemption of other state taxes like stamp duty, etc., depending on the capacity of investment being done for setting up units in the relevant state. The availability, eligibility and quantum of avail incentives under the state industrial policies depends on the factors such as the sector involved, proposed investment, proposed revenue generation horizon, creation of job opportunities for local residents, area where the investment is proposed, sustainable practices to protect the environment, past records and history of the investing company etc.

State Industrial Policies also take into account total Fixed Capital Investment ("FCI"), employment capacity etc. As per the specific state policy and subject to certain factors (importance to the state's growth, overall revenue for the state etc.) tailor-made package scheme of incentives are considered for investors looking to set up units in the relevant state.

For e.g., in the state of Uttar Pradesh, the state government has issued Uttar Pradesh Electronics Manufacturing Policy, 2017 which provides for the following illustrative incentives for setting up a unit in the specified area which has been designated as 'Electronics Manufacturing Zone'. Incentive for setting up such unit is illustratively as follows:

- Reimbursement of SGST, electricity duty, employee provident fund, employee state insurance discharged;
- Exemption from applicable stamp duty;
- Land rebate, *etc*.

Please note that the incentives available under any such incentive schemes is primarily based on the quantum of investments along with the employment opportunities created. Further, the incentives may also be dependent on the structure of the proposed unit.

Performance Linked Incentive ["PLI"] Schemes:

The Central Government also announces PLI schemes for certain industries from time to time, such as textiles, auto industry, electronic components and systems, food processing [Ready to Cook / Ready to Eat], renewable energy [Solar PV Modules], white goods [like air conditioner and LED], pharmaceuticals etc.

These schemes provide financial incentive to boost domestic manufacturing and attract large investments in the relevant sector, for businesses having / setting up units in the manufacturing value chain. The prime objectives of a PLI scheme includes removing sectoral disabilities, creating economies of scale, enhancing exports, creating a robust manufacturing ecosystem and providing means of employment generation. Scheme outlays, for incentives on a yearly basis, depending on the investment proposed, are regularly announced by the Government of India.

Q10. What is the ordinary appellate dispute resolution channel for indirect taxes in India?

Customs and Disputes Related to the Erstwhile Service Tax and Central Excise Laws

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

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

VAT Laws

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

GST Laws

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

- Appeals to Appellate Authority: This is the first level of appellate mechanism. An appeal in this regard can be filed within three months from the date of communication of the order passed by an adjudicating authority.
- Appeal to the Appellate Tribunal: A proposed GST Appellate Tribunal is also being set up to be the Appellate Authority for GST laws. The same will come into force once it is notified by the Central Government
- An appeal to Appellate Tribunal can be filed against an order of the appellate authority or order in revision passed by revisionary authority, by any person aggrieved by such an order. There are two tiers of tribunals that are envisaged under the GST laws – National or Regional Bench and the State Bench or Area Bench. Such appeals have to be filed within three months from the date of receipt of the order.
- High Court - An appeal may be filed before the High Court against the order of State Bench or Area Bench of the Appellate Tribunal within 180 days from the date of receipt of order where the same relates to a substantial question of law. Till the GST Appellate Tribunal is being set up, challenges against the order of Appellate Authority are being filed in the jurisdictional High Courts through writ petition.
- Supreme Court - The Supreme Court is the final appellate authority. An appeal may be filed before the Supreme Court against the order of the National Bench or Regional Bench or against the order of High Court.

Q11. What are other dispute resolution alternatives available to indirect taxpayers?

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

Settlement Commission

The basic objective of setting up of the Settlement Commission is to expedite payments of disputed customs duty, erstwhile Service tax etc., involved in disputes by avoiding costly and time consuming litigation process and to give an opportunity to taxpayers to come out clean. Eligible taxpayers can make an application in such form and in such manner as may be prescribed by the Commission and containing "full and true" disclosure of their duty liability, subject to fulfilment of conditions prescribed in the regard.

The Settlement Commission then hears the matter and after considering reports from the revenue authorities, can settle the matter by quantifying the amount of duty, tax and interest to be paid. Penalties can also be waived by the Settlement Commission subject to the payment of settlement dues quantified.

Authority for Advance Ruling ("AAR") for GST and Customs

Custom Laws

The central legislations governing levy of customs duty provide for a scheme of Advance Ruling, where any person holding an IEC or exporting goods to India etc., may approach the authority on issues such as ascertaining their duty liability, CTH etc. in relation to customs duty.

GST

The AAR constituted under the GST laws provides rulings on the GST implications of any ongoing transactions or activities that are proposed to be undertaken, subject to prescribed legislation under the GST act(s). These rulings are binding only on both the applicant and the GST authorities. However, appeals can be made against the decisions of the authority to an Appellate AAR. Further appeals are possible to the jurisdictional High Court.

19. Privacy and Data Protection

Q1. What is the legislative framework governing Privacy and Data Protection in India?

The Digital Personal Data Protection Act, 2023 ("**DPDP Act**") has been passed by both houses of the Indian parliament, and given assent to by the President of India on 11 August, 2023. However, it is yet to be enforced by the Central Government. The DPDP Act proposes to repeal Section 43A and Section 87(2)(ob) of the Information Technology Act, 2000, ("**IT Act**"), which would also result in the replacement of the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 that currently govern collection and handling of personal information in India. The DPDP Act is not presently in force and does not contain specific transitional provisions, such as timelines for issuance of rules and notifications. Instead, the Central Government has the power to bring into force different provisions on different dates through a notification in the Official Gazette.

Under the DPDP Act: (a) a Data Principal is the individual to whom the personal data ("**PD**") relates; (b) the Data Fiduciary is the entity determining the purposes and means of processing[1] PD; and (c) the Data Processor is the entity which processes the PD on behalf of the Data Fiduciary. The DPDP Act also provides for an adjudicatory body in the form of the Data Protection Board of India ("**Board**"). Please see below the key provisions of the DPDP Act:

Notice for consent

- Section 5(1) of the DPDP Act requires that every request for consent by Data Fiduciary should be accompanied with a notice to Data Principal, which shall contain:
  - a description of the PD sought to be collected;
  - the purpose of processing such PD;
  - information on how Data Principal may
    - exercise their right to withdraw consent,
    - avail of the grievance redressal mechanism, and
  - how they may file a complaint with the Board in a manner prescribed by the Central Government.
- Section 5(2) of the DPDP Act requires Data Fiduciaries to provide Data Principal with a notice in respect of consent obtained by the Data Fiduciary *prior* to the commencement of the DPDP Act. This has to be done as soon as it is 'reasonably practicable', and no specific timeline has been prescribed. Such a notice must be provided in the same manner as prescribed under Section 5(1).
- Section 6(3) of the DPDP Act also requires the Data Fiduciary to (a) implement mechanisms to enable users to request the notice to be provided in any of the Schedule 8 languages of the Constitution of India, 1950 and (b) provide the contact details of the Data Protection Officer ("**DPO**") or any other official responsible for the exercise of the Data Principal's rights.

Data Fiduciary and Data Processor

- Section 8(1) of the DPDP Act requires Data Fiduciaries to ensure compliance with the law in respect of any processing undertaken by it or by a Data Processor on its behalf.
- Section 8(3) of the DPDP Act requires Data Fiduciaries to ensure completeness, accuracy and consistency of PD when such data is likely to be (a) used to make a decision that affects the Data Principal, or (b) disclosed to another Data Fiduciary.
- Section 8(9) of the DPDP Act provides that a Data Fiduciary must publish, the contact information of a DPO.
- Section 8(10) of the DPDP Act provides that Data Fiduciary shall establish an effective mechanism to redress the grievances of Data Principals.

Cross-Border Data Transfers

- Section 16 of the DPDP Act permits the processing of PD outside India, except to any countries or territories notified by the Central Government. Therefore, this provision allows cross border data transfers by default to all jurisdictions except a specified list of countries where such transfers would be restricted.
- The provision also clarifies that if any sector law provides a higher degree of protection or restriction in terms of transfer of PD outside India will supersede the DPDP Act.
- Thus, sectoral laws that impose restrictions on cross border data transfers may prevail over the DPDP Act. For example, RBI's directive on 'Storage of Payment System Data' and the Frequently Asked Questions issued in April 2018 and June 2019 requires regulated entities to store 'payments' data locally, will continue to be applicable.

1 Please note that Section 2(x) of the DPDP Act defines 'processing' as "in relation to personal data, means a wholly or partly automated operation or set of operations performed on digital personal data, and includes operations such as collection, recording, organisation, structuring, storage, adaptation, retrieval, use, alignment or combination, indexing, sharing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction." Further, 'automated' has been defined under Section 2(b) of the DPDP Act as "any digital process capable of operating automatically in response to instructions given or otherwise for the purpose of processing data".

Children's data

- Section 2(f) of the DPDP Act defines 'child' "*an individual who has not completed eighteen years of age*".
- Section 2(j) of the DPDP Act provides that if PD pertains to a child, the parent or lawful guardian of the child would be included in the definition of Data Principal.
- Section 9(1) of the DPDP Act requires Data Fiduciaries to obtain verifiable parental or guardian consent *prior* to processing of such PD. Sections 9(2) and (3) of the DPDP Act prohibit Data Fiduciaries from undertaking the processing of PD that is likely to cause any detrimental effect on the well-being of a child, or against tracking or behavioural monitoring of a child, or targeted advertising directed at children.
- Section 9(5) of the DPDP Act also provides that the Central Government is also empowered to notify the age above which certain Data Fiduciaries will be exempt from these obligations, if it is satisfied that the processing of children's PD is carried out by a Data Fiduciary in a 'verifiably safe' manner.

Data Principal Rights

- Section 11 of the DPDP Act gives Data Principals the right to obtain information about their PD from the Data Fiduciary.
- Section 12 of the DPDP Act gives Data Principals the right to correction, completion, updating and erasure of their PD.
- Section 13 of the DPDP Act gives Data Principals the right to a grievance redressal mechanism.
- Section 14 of the DPDP Act gives Data Principals the right to nominate another individual, who shall, in the event of death or incapacity of the Data Principal, exercise the rights of the Data Principal.

Retention Period

- Under Section 8(7) of the DPDP Act, a Data Fiduciary is required to erase PD
  - upon withdrawal of the Data Principal's consent or
  - as soon as it is reasonable to assume that the specified purpose is no longer being served (whichever is earlier), and
  - cause its Data Processor to erase such PD as well, unless retention of such data is necessary for compliance with any law.
- Accordingly, under Section 8(7), a Data Fiduciary may retain PD for compliance with any law for the time being in force even if the Data Principal has requested erasure of such data. Therefore, different retention periods prescribed under various sectoral laws may be applicable to PD under the DPDP Act.

Q2. What are the liabilities under the framework governing Privacy and Data Protection in India?

The DPDP Act envisages a civil liability regime in case of non-compliance. Penalties have been stipulated in a Schedule under the DPDP Act, and range from INR 10,000 (approx. USD 122) to INR 250 crores (approx. USD 30 million).

- Data Fiduciaries are obligated to maintain reasonable security practices under Section 8(5) of the DPDP Act. Non-compliance with this requirement may result in a penalty extending to INR 250 crores (approx. USD 30 million).
- Tracking or behaviourally monitoring children or directing targeted advertising at them by the Data Fiduciary among other things may result in a penalty extending to INR 200 crores (approx. USD 24 million).
- As per Section 10 of the DPDP Act 'Significant Data Fiduciaries' ("**SDF**") a sub-category of Data Fiduciaries (discussed in detail in Question 6). Non-compliance with prescribed obligations including carrying out periodic audits and appointing a DPO may result in a penalty extending to INR 150 crores (approx. USD 18 million).
- Section 15 of the DPDP Act imposes certain obligations on the Data Principal as well. Non-compliance with prescribed requirements such as not making any false compliant may result in a penalty extending to INR 10 thousand (approx. USD 122).
- The DPDP Act specifies that a breach of a voluntary undertaking (discussed in detail in Question 6) will be deemed to be a breach of the law itself.
- Breach of any other provision of the DPDP Act will be punishable with a penalty extending to INR 50 crores (approx. USD 6 million).

Q3. What are the agencies/ administrative authorities that enforce the Privacy and Data Protection framework in India?

As per the Section 18 of the DPDP Act, the Central Government will establish the Board. The Board's functions include: (a) inquiring into PD breaches and directing urgent remedial or mitigation measures in such cases; (b) inquiring into and imposing penalties

in case of a person's non-compliance with the law; and (c) issuing binding directions to any person for the effective discharge of its functions under the law.

The DPDP Act under Section 29 contains a detailed mechanism on appeals. Persons who are aggrieved by any order or direction passed by the Board may file an appeal before the Telecom Disputes Settlement and Appellate Tribunal, and thereafter to the Supreme Court within specific timelines.

The Government has the power to frame subordinate legislation under the DPDP Act. The Central Government has the power to issue notifications and prescribe rules. This leaves a substantial aspect of the law to be set out in subordinate legislation. Some instances where this power may be exercised by the Central Government:

- the manner of providing notice for consent to the Data Principals,
- the manner of intimating the Data Principal and the Board in case of a PD breach,
- the manner in which the Data Principal may make requests for enforcement of their rights such as the right of erasure of their data and the right to nominate.
- notifying certain Data Fiduciaries (or classes of Data Fiduciaries), including start-ups, as exempt from certain provisions of the law.
- restricting the transfer of PD by a Data Fiduciary to any country or territory outside India.

Q4. What are the requirements with regard to notifying individuals or the administrative authority about security breaches in relation to personal data?

Section 2(u) defines 'personal data breach' as "*any unauthorised processing of personal data or accidental disclosure, acquisition, sharing, use, alteration, destruction or loss of access to personal data, that compromises the confidentiality, integrity or availability of personal data*".

Reporting Data Breaches under the DPDP Act

- Section 8(6) of the DPDP Act requires PD breaches to be reported by the Data Fiduciary, to the Board and all affected Data Principals in the prescribed form and manner.
- Section 8(5) of the DPDP Act requires Data Fiduciaries to prevent PD breaches by maintaining reasonable security practices. Non-compliance of this requirement may result in a penalty extending to INR 250 crores (approx. USD 3 million).
- Section 27(1)(a) of the DPDP Act empowers the Board, in the event of a PD breach, to direct the Data Fiduciary to adopt any urgent remedial or mitigation measures, to inquire into such PD breach and impose penalty as provided under the DPDP Act.

Indian Computer Emergency Response Team

Additionally, cybersecurity incidents must be reported to the Indian Computer Emergency Response Team under the IT Act[2]. The Information Technology (the Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 ("**CERT-In Rules**") and the CERT-In directions on reporting of cybersecurity incidents released on 28 April, 2022 (**CERT-IN Directions**), provide a list of cyber-security incidents which have to be mandatorily reported[3] to the CERT-In within 6 hours of noticing such an incident. These incidents include data breach, unauthorized access of IT systems/data and data leak among others. To

2 'data breach' has also been described under the CERT-In Directions: "A Data Breach is a cyber-incident where information is stolen or taken from a system without the knowledge or authorization of the system's owner. Stolen data may involve sensitive, proprietary, or confidential information such as credit card numbers, customer data, trade secrets, or theft of Intellectual property etc. Most data breaches are caused due to un-plugged vulnerabilities, hacking or malware attacks. Data Breaches primarily results in loss of confidentiality of the information".

3 Mandatorily reportable cybersecurity incidents under the CERT-In Directions are as follows: (i)Targeted scanning/probing of critical networks/systems (ii) Compromise of critical systems/information (iii) Unauthorised access of IT systems/data (iv) Defacement of website or intrusion into a website and unauthorised changes such as inserting malicious code, links to external websites etc. (v) Malicious code attacks such as spreading of virus/ worm/Trojan/Bots/ Spyware/Ransomware/Cryptominers (vi) Attack on servers such as Database, Mail and DNS and network devices such as Routers (vii) Identity Theft, spoofing and phishing attacks (viii) Denial of Service (DoS) and Distributed Denial of Service (DDoS) attacks (ix) Attacks on Critical infrastructure, SCADA and operational technology systems and Wireless networks (x) Attacks on Application such as E-Governance, E-Commerce etc. (xi) Data Breach (xii) Data Leak (xiii) Attacks on Internet of Things (IoT) devices and associated systems, networks, software, servers (xiv) Attacks or incident affecting Digital Payment systems (xv) Attacks through Malicious mobile Apps (xvi) Fake mobile Apps (xvii) Unauthorised access to social media accounts (xviii) Attacks or malicious/ suspicious activities affecting Cloud computing systems/servers/software/applications (xix) Attacks or malicious/suspicious activities affecting systems/ servers/ networks/ software/ applications related to Big Data, Block chain, virtual assets, virtual asset exchanges, custodian wallets, Robotics, 3D and 4D Printing, additive manufacturing, Drones and (xx) Attacks or malicious/suspicious activities affecting systems/ servers/software/ applications related to Artificial Intelligence and Machine Learning.

the extent that any of the mandatorily reportable incidents relate to PD, reporting requirements under CERT- In Rules and CERT-In Directions, along with the requirements under the DPDP Act will be required to be fulfilled.

Cybersecurity Requirements under Sectoral Regulations

Similarly, certain sectoral laws such as the Reserve Bank of India's ("**RBI**") circular on Cyber Security Framework in Banks and the Insurance Regulatory and Development Authority of India's ("**IRDAI**") Information and Cyber Security Guidelines, 2023 require banks and insurance companies to report broad category of 'cyber security incidents' to RBI and the IRDAI. Regulated entities under such frameworks are likely to have to additionally comply with reporting requirements under sectoral laws.

Q5. What are the recent developments with respect to Privacy and Data Protection in India?

The Supreme Court of India in *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*[4] ("Puttaswamy Judgment") declared that the right to privacy is protected as an intrinsic part of the fundamental rights guaranteed under the Constitution of India.

The DPDP Act is an updated version of the draft Digital Data Protection Bill, 2022 which was released by the MeitY for public consultation in November 2022. Both these draft laws were earlier preceded by the Data Protection Bill, 2021 contained in the Report of the Joint Parliamentary Committee on the Personal Data Protection Bill, 2019, as well as the Personal Data Protection Bill, 2019 itself, which was withdrawn from the Parliament in August 2022. The enactment of the DPDP Act comes 6 years after Puttaswamy Judgment recognized the need for a robust legal framework for data protection.

The President of India gave her assent to the DPDP Act, after it was passed by both Houses of the Parliament. The DPDP Act, thereafter, published in the Official Gazette. While the DPDP Act has now been enacted, it is yet to be enforced. The DPDP Act empowers the Central Government to issue notifications and prescribe rules. A significant portion of the law will be set out in subordinate legislation, which is currently awaited.

Q6. What are the proposed changes that the DPDP Act seeks to bring about?

The DPDP Act has overhauled the data protection regime in India by introducing a new framework for data protection. Please refer to our response to Question 1 for the key provisions of the DPDP Act. Please also see below some of the notable changes in the DPDP Act as compared to the SPDI Rules:

Expanded Scope of Application

The DPDP Act applies to the processing of digital PD (defined as PD in digital form). Specifically, the DPDP Act will govern certain processing activities that take place within India. It will also govern extra-territorial processing of digital PD, if such processing is in connection with any activity of offering goods or services to Data Principals within India.

The DPDP Act will apply to processing activities outside India where such processing is carried. This means that foreign- based service providers targeting the Indian market or consumer-base in relation to commerce or profiling activities will be covered under the framework.

The DPDP Act will not apply when PD is made or caused to be made publicly available either by the Data Principal themselves, or by any other person who does so on account of a legal obligation and where processing of PD is only undertaken for personal or domestic purposes.

New Categories of Data Fiduciaries

Significant Data Fiduciaries: Some Data Fiduciaries may be categorised as SDFs based on certain factors such as the volume and sensitivity of personal data processed and risk to the rights of Data Principal. Entities engaging in processing large volumes of data will be designated as SDFs and will be required to undertake several mandatory compliances including appointment of a DPO, conducting regular impact assessments, conducting an independent

4 (2017) 10 SCC 1.

data audit on annual basis, and ensuring maintenance of detailed records relating to data processing activities.

Consent managers: The DPDP Act introduces the concept of 'consent managers', which are envisaged as a single point of contact for Data Principals to give, withdraw and otherwise manage their consent through an 'accessible, transparent and interoperable' platform. A consent manager is required to be registered with the Board and be accountable to the Data Principal. Consent managers can also make complaints to the Board on behalf of the Data Principal and may themselves be subject to inquiry by the Board in the event of a breach of any of their registration conditions.

Voluntary Undertaking

Any person subject to proceedings before the Board relating to non-observance with the DPDP Act can provide a voluntary undertaking to remedy the same. Acceptance of a voluntary undertaking by the Board creates a bar on further proceedings under the DPDP Act regarding the contents of such undertaking.

20. Glossary

AAEC	Appreciable adverse effect on competition in India
AAR	Authority for Advance Rulings
Accidents Act	Fatal Accidents Act, 1855
ACI	Arbitration Council of India
ADR	American Depository Receipt
AD Bank	Authorised Dealer Bank
AE	Associated Enterprise
AEO	Authorized Economic Operation
AIF	Alternative Investment Fund
AoA	Articles of Association
AOP	Association of Persons
Amendment Act	Companies (Amendment) Act, 2019
Anti-Dumping Rules	Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995
APA	Advance Pricing Arrangement
Apprentices Act	Apprentices Act, 1961
APR	Annual Performance Report
Arbitration Act	Arbitration and Conciliation Act, 1996
ACI	Arbitration Council of India
AJP	Artificial Juridical Person
ARE	Alternative Reporting Entity
ARR	Alternative Reference Rate
AY	Assessment Year
Banking Regulation Act	Banking Regulation Act, 1949
BEPS	Base Erosion and Profit Sharing
BIPA	Bilateral Investment Protection Agreements
Black Money Act	Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
BO	Branch Office
BOI	Body of Individuals
Board	Board of Directors
BOAT	Board of Apprentices Training
Bonus Act	Payment of Bonus Act, 1965
CAA 2023	Competition (Amendment) Act, 2023
BSE	Bombay Stock Exchange
CbC	Country by Country
CBDC	Central Bank Digital Currency
CBDT	Central Board of Direct Taxes
CBIC	Central Board of Indirect Taxes and Customs
CCI	Competition Commission of India

CENVAT	Central Value Added Tax
CERT-In	Computer Emergency Response Team
CERT-In Rulesww	(The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013
CESTAT	Customs Excise and Service Tax Appellate Tribunal
CGST	Central GST
CGST Act	Central Goods and Services Tax Act, 2017
CIAC	Construction Industry Arbitration Council
CIC	Core Investment Company
CIR Process	Corporate Insolvency Resolution Process
CLRA Act	Contract Labour (Regulation and Abolition) Act, 1970
CoC	Committee of Creditors
Combination Regulations	CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011
Commercial Courts Act	The Indian Commercial Courts Act, 2015
Companies Act	Companies Act, 2013
Companies Registered Valuers Rules, 2017	Companies (Registered Valuers and Valuation) Rules, 2017
COMPAT	Competition Law Appellate Tribunal
Compensation Act	Employees' Compensation Act, 1923
Competition Act	Competition Act, 2002
Constitution	Constitution of India, 1950
Contract Act	Indian Contract Act, 1872
Copyright Act	Copyright Act, 1957
CPC	Code of Civil Procedure, 1908
CRA	Credit Rating Agencies
CSR	Corporate Social Responsibility
CST	Central Sales Tax
CST Act	Central Sales Tax Act, 1956
CTH	Customs Tariff Head
Customs Tariff Act	Customs Tariff Act, 1975
CVD	Countervailing duty
DDT	Dividend Distribution Tax
DEI	Diversity, Equality and Inclusion
DESH	Development of Enterprise and Service Hub
DG	Director General
DGFT	Directorate General of Foreign Trade
DIAC	Delhi International Arbitration Centre
DIN	Director Identification Number

DIPP	Department of Industrial Policy & Promotion
DPI	Digital Public Infrastructure
DPDP Act	Digital Personal Data Protection Act
DPIIT	Department for Promotion of Industry and Internal Trade
DPA	Data Protection Authority of India
DPO	Data Protection Officer
DPS	Detailed Public Statement
DRAT	Debts Recovery Appellate Tribunal
DRC	Dispute Resolution Committee
DRP	Dispute Resolution Process
DRT	Debts Recovery Tribunal
DTAA	Double Taxation Avoidance Agreements
DVT	Deal Value Threshold
EA	Emergency Arbitrator
ECB	External Commercial Borrowing
EEFC	Exchange Earners' Foreign Currency
EPF Act	Employees' Provident Funds and Miscellaneous Provisions Act, 1952
EPF Amendment	Employees' Provident Funds and Miscellaneous Provisions (Amendment) Bill, 2019
EPFO	Employees' Provident Fund Organization
ESG	Environmental, Social and Governance
ESI Act	Employees' State Insurance Act, 1948
ESIC	Employees' State Insurance Corporation
ESOP	Employee Stock Ownership Plan
ETCDs	Exchange Traded Commodity Derivatives
ETF	Exchange Traded Fund
EURIBOR	Euro Interbank Offered Rate
Equal Remuneration Act	Equal Remuneration Act, 1976
Factories Act	Factories Act, 1948
FATF	Financial Action Task Force
FY	Financial Year
FCCB	Foreign Currency Convertible Bond
FCEB	Foreign Currency Exchangeable Bond
FCI	Fixed Capital Investment
FDI	Foreign Direct Investment
FDI Policy	Consolidated Foreign Direct Investment Policy
FEMA	Foreign Exchange Management Act, 1999
FEMA 20(R)	Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017
FEMA 120	Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004
FII	Foreign Institutional Investor
FLA	Foreign Liabilities and Assets
FLDG	First Loss Default Guarantee
FRO	Foreigners Registration Office
FRRO	Foreigners Regional Registration Office
FOCC	Foreign Owned And Controlled Company
FPI	Foreign Portfolio Investor
FTP	Foreign Trade Policy 2015-2020
FTS	Fees for Technical Services
FVCI	Foreign Venture Capital Investor
GAAR	General Anti Avoidance Rules
GDPR	General Data Protection Regulation
GDR	Global Depository Receipt
GOI	Government of India
Gratuity Act	Payment of Gratuity Act, 1972
GST	Goods and Services Tax
GSTIN	Goods and Service Tax Identification Number
GSTC Cess Act	Goods and Services Tax Compensation Cess Act, 2017
HSN	Harmonised System of Nomenclature
HUF	Hindu Undivided Family
IAMC	International Arbitration and Mediation Centre, Hyderabad
IBA	International Bar Association
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
ICA	Indian Council of Arbitration
ICADR	The International Centre for Alternative Dispute Resolution
ICC	International Chamber of Commerce
ICDR	Issue of Capital and Disclosure Regulations
I&B Ordinance	Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017
IEC	Importer Exporter Code
IFSCA	International Financial Services Centre Authority
IFSC	International Financial Services Centre
IGST	Integrated GST
IGST Act	Integrated Goods and Services Tax Act, 2017
IHC	Investment Holding Companies
IIAC	India International Arbitration Centre

Industrial Disputes Act	Industrial Disputes Act, 1947
Information Technology Act	Information Technology Act, 2000
Insurance Act	Insurance Act, 1938
InVIT	Infrastructure Investment Trust
IOSCO	International Organization of Securities Commissions
IPAB	Intellectual Property Appellate Board
IPO	Initial Public Offering
IR Code	the Industrial Relations Code, 2020
IRDAI	Insurance Regulatory and Development Authority of India
IRN	Invoice Reference Number
IRP	Interim Resolution Professional
IT Act	Income Tax Act, 1961
ISD	Issue Summary Document
ISIN	International Securities Identification Number
ITAT	Income Tax Appellate Tribunal
ITC (HS)	Indian Trade Classification (Harmonized System) Code
IT/ITeS	Information Technology / Information Technology Enabled Services
IT Rules	Income Tax Rules, 1962
JPC	Joint Committee of Parliament
JV	Joint Venture
KPIs	Key Performance Indicators
KPO	Knowledge Process Outsourcing
LCIA	London Court of International Arbitration
Liability Act	Employer's Liability Act, 1938
LIC	Life Insurance Company of India
Limitation Act	Limitation Act, 1963
LLP	Limited Liability Partnership
LLP Act	Limited Liability Partnership Act, 2008
LO	Liaison Office
LOB	Limitation of Benefits
LODR	Listing Obligations and Disclosure Requirements
LRS	Liberalised Remittance Scheme
LWF Acts	State-specific Labour and Welfare Fund Acts
Maharashtra Shops Act	Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017
MAMP	Minimum Average Maturity Period

MAP	Mutual Agreement Procedure
Master Directions on ECB	Master Direction on External Commercial Borrowings, Trade Credits and Structured Obligations dated March 26, 2019 (as amended from time to time)
Master Directions on Foreign Investments	Master Directions on Foreign Investments in India dated January 4, 2018 (as amended from time to time)
MAT	Minimum Alternative Tax
MB Act	Maternity Benefits Act, 1961
MCIA	Mumbai Centre for International Arbitration
MEA	Ministry of External Affairs
MHA	Ministry of Home Affairs
Minimum Wages Act	Minimum Wages Act, 1948
MoA	Memorandum of Association
MoEF	Ministry of Environment and Forests
MoF	Ministry of Finance
MoLE	Ministry of Labour and Employment
MooWR	Manufacture and Other Operations in Warehouse Scheme
MSME	Micro, Small and Medium Enterprise
MNE	Multinational Enterprises
NBFC	Non-Banking Financial Company
NCDS	Non-Convertible Debt Securities
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
NCRPS	Non-Convertible Redeemable Preference Shares
NDHM	National Digital Health Mission
NDI Rules	(Non-Debt Instrument) Rules, 2019
NHAI	National Highways Authority of India
N&F Holidays Act	State-specific Industrial Establishments (National and Festival Holidays and Other Holidays) Act
NOR	Not Ordinarily Resident
NPAC	Nani Palkhivala Arbitration Centre
NR	Non Resident
NRI	Non-resident Indian
NSWS	National Single Window System
NTRO	National Technical Research Organisation
OCB	Overseas Corporate Body
OCI	Overseas Citizen of India
ODI	Overseas Direct Investment

OECD	Organisation for Economic and Co-operation Development
OFS	Offer for Sale
OI Rules	(Overseas Investment) Rules, 2022
OI Regulations	(Overseas Investment) Regulations, 2022
OI Directions	(Overseas Investment) Directions, 2022
OI	Overseas Investment
ONGC	Oil and Natural Gas Corporation
OPC	One-Person Company
OPI	Overseas Portfolio Investment
OSH Code	Code on Occupational Safety, Health and Working Conditions Bill
PAC	Persons acting in concert
PAN	Permanent Account Number
Partnership Act	Partnership Act, 1932
Patents Act	Patents Act, 1970
Paternity Bill	Paternity Bill, 2017
PD	Personal Data
PDP Bill	Personal Data Protection Bill, 2019
PE	Permanent Establishment
PE	Private Equity
PFC	Pre Filing Consultation
PFI	Public Financial Institution
PI	Personal Information
PIS	Project Import Scheme
PLI	Performance Linked Incentive
PO	Project Office
POEM	Place of Effective Management
PPIR	Pre-packaged Insolvency Resolution Process
Previous Companies Act	Companies Act, 1956
QIB	Qualified Institutional Buyers
QR Code	Quick Response Code
RBB	Reverse Book Building Process
RBI	Reserve Bank of India
RDDB Act	Recovery of Debts Due to Banks and Financial Institutions Act, 1993
REITs	Real Estate Investment Trusts
RFC	Resident Foreign Currency
RI	Resident individuals
RoC	Registrar of Companies
RoDTEP	Remission of Duties and Taxes on Exported Products
ROR	Ordinarily Resident
RP	Resolution Professional
RPWD Act	Rights of Persons with Disabilities Act
SAD	Special Additional Duty paid

SARFAESI	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
SBEB	Share Based Employee Benefits and Sweat Equity
SBO	Significant Beneficial Owner
SBOR	Companies (Significant Beneficial Owners) Rules, 2018
SC	Supreme Court
SCC	Stakeholders' Consultation Committee
Scheme	Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019
SDF	Significant Data Fiduciaries
SDS	Step Down Subsidiary
SIAC	Singapore International Arbitration Centre
S&E Acts	Shops and Establishment Acts
SEBI	Securities and Exchange Board of India
SEBI Act	Securities and Exchange Board of India Act, 1992
SEBI Delisting Regulations	Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009
SEBI ICDR Regulations	Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018
SEBI Insider Trading) Regulations	SEBI (Prohibition of Insider Trading) Regulations, 2015
SEBI FII Regulations	Securities and Exchange Board of India (Foreign Institutional Investors) Regulations, 1995
SEBI FPI Regulations	Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019
SEBI FVCI Regulations	Securities and Exchange Board of India (Foreign Venture Capital Investors) Regulations 2000
SEBI Listing Regulations	Securities and Exchange Board of India (Listing Obligations and Disclosure Requirement) Regulations, 2015
SEBI Takeover Regulations	Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011
Sexual Harassment Act	Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
SEZ	Special Economic Zone
SGST	State GST

SGST Acts	State GST legislations
Share Capital Rules	Companies (Share Capital and Debentures) Rules, 2014
SICA	Sick Industrial Companies (Special Provisions) Act, 1985
SME	Small and Medium Enterprises
SMF	Single Master Form
SPAC	Special Purpose Acquisition Companies
SPD	Sensitive Personal Data
SPDI Rules	Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011
SPICe	Simplified Proforma for Incorporating Companies electronically
SPV	Special Purpose Vehicle
SCRR	Securities Contract (Regulation) Rules, 1957
SR Equity Shares	Superior Voting Rights
SSA	Social Security Agreement
SS Code	Social Security Code, 2020
SSEs	Social Stock Exchanges
Standing Orders Act	Industrial Employment (Standing Orders) Act, 1946
STT	Securities transaction tax
TAN	Tax deduction and collection account number

TP Act	Transgender Persons Act
Trade Marks Act	Trade Marks Act, 1999
Trade Union Act	Trade Union Act, 1926
TRC	Tax Residency Certificate
TRIPs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission On International Trade Law
UPSI	Unpublished Price Sensitive Information
UTs	Union Territories
UTGST	Union territory GST
UTGST Act	Union Territory Goods and Services Tax Act, 2017
VAT	Value Added Tax
VC	Venture Capital
VCF	Venture Capital Funds
VCU	Venture Capital Undertaking
Wages Act	Payment of Wages Act, 1936
WD	Working Days
Wages Bill	Labour Code on Wages Bill
Wages Code	Code on Wages, 2019
WOS	Wholly Owned Subsidiary

[The foreign exchange rate used in this Guide is 1 USD = INR 82, which is the average spot rate of the last six months as on September 30, 2023, as provided by the Reserve Bank of India].

About Us

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The Firm has a pan-India presence and has been at the helm of major headline transactions and litigations in all sectors, besides advising major multinational corporates on their entry into the Indian market and their business strategy. Currently, the Firm has over 820 lawyers including 166 Partners, offering legal services through its offices at New Delhi, Mumbai, Gurugram, Ahmedabad, Kolkata, Bengaluru, and Chennai.

'Outstanding'
in 2023-24 for Banking and Finance, Banking and Financial Services, Capital Markets, Competition/Antitrust, Construction, Corporate and M&A, Dispute Resolution, Energy, Insurance, Infrastructure, Pharmaceuticals and Life Sciences, Private Equity, Regulatory, Real Estate, Restructuring and Insolvency, Technology and Telecommunications

'Ranked #1'
by deal count
In the Bloomberg India Capital Markets League Tables 2022

'Ranked #1'
by deal count
In the MergerMarket India League Tables 2022

'Tier 1'
in 2023 for Antitrust and Competition, Banking & Finance, Capital Markets, Corporate / M&A, Dispute Resolution-Arbitration, Insurance, Private Client, Projects and Energy, Real Estate & Construction, Restructuring & Insolvency, Tax, TMT and White Collar Crime

'Tier 1'
in 2023 for Banking, Capital Markets: Equity and Debt, M&A, Private Equity, Project Development: Energy, Infrastructure and Transport, Project Finance, Restructuring & Insolvency

Country Firm of the Year 2022, India

'**Band 1**' in 2023 for
Capital Markets
Competition/Antitrust
Corporate/M&A
Dispute Resolution
Private Equity
Projects, Infrastructure & Energy
Restructuring & Insolvency
White Collar Crime
India National Firm of the Year, 2020

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