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INVESTING IN INDIA

Lakshmikumaran & Sridharan attorneys

exceeding expectations
SINCE 1985

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Investing in India

India is a booming G20 economy. As per the IMF, India's GDP is expected to reach US$ 5 trillion by 2027. It has seen consistent economic growth over the last decade and has a high future potential thanks to its burgeoning middle class with increasing disposable incomes, several high net worth individuals, and a stable democracy. It is also one of the newly industrialized countries of the world and has a large and growing base of educated and skilled manpower.

India's high demographic dividend translates into opportunity for growth, particularly in sectors like telecom, pharmaceuticals, housing, education, healthcare, retail, aviation, and financial services. The improvement in the economic scenario has generated investments in various sectors of the economy. In the first nine months of 2022, the Mergers and Acquisition activity in India witnessed an all-time high of US$ 148 billion while private equity (PE) and venture capital (VC) investments reached US$ 34.1 billion.[1]

Business Environment

The Constitution of India prescribes, and segregates matters to be legislated at the Central level (by the Parliament), State level (by State Legislative Assemblies and Councils), and at both Central and State level.

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

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

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

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

1 Investment in India, Indian Brand Equity Foundation, available at https://www.ibef.org/economy/investments (last accessed on 18 October 2022)

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Labour and employment laws these laws set out the employment conditions, social security and occupational health conditions for employees.

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

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

Rights and protections for foreign investments

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

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

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

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

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

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

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

In her budget speech of 2022-2023, the Hon'ble Finance Minister, highlighted that one of the priorities of the Government for the fiscal year is to facilitate greater investment by increasing the ease of doing business in India and promoting digital economy, fintech, technology-enabled development, energy transition, and climate action. The Government also proposed an Indian Central Bank Digital Currency ("**CBDC**") that uses blockchain and cryptographic technology, to be issued by the Reserve Bank of India for more efficient and cheaper currency management system.

Improving ease of doing business

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

- Streamlined the business incorporation process by introducing the SPICe form (INC-32), which combined the application for the Permanent Account Number (PAN) and the Tax Account Number (TAN) into a single submission.
- Registration under Employee State Insurance Corporation (ESIC), Employee Provident Fund Organisation (EPFO), Contract Labour (Regulation and Abolition) Act, 1970 (CLRA), Building and Other Construction Workers (BOCW) (Regulation of Employment and Conditions of Service) Act, 1996, Inter-State Migrant Workmen Act (ISMW) Act, 1979 are available at Shram Suvidha portal as a common online service.
- Doing away with the incorporation fee for companies with an authorised capital of up to INR 1,500,000.
- Single Window System for the approval of building plans for dealing with construction permits.
- Regulations for protection of minority investors.
- Standardization of the methods of computing taxable income and other

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tax accounting standards.

- Adoption of a new insolvency and bankruptcy code.
- Ease of trading across borders, reduced border compliance through improvement in infrastructure.

Governmental benefits

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

Further, in recent years, the Government of India has launched various initiatives such as:

- "Digital India" programme, for creation of digital infrastructure, delivering services digitally and to increase digital literacy.
- "Make in India" programme, to promote domestic manufacturing.
- "Start-Up" programme, which entails providing special tax incentives to certain start-ups. India has retained its position as the third largest start-up base in the world with over 70,000 recognised start-ups.

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

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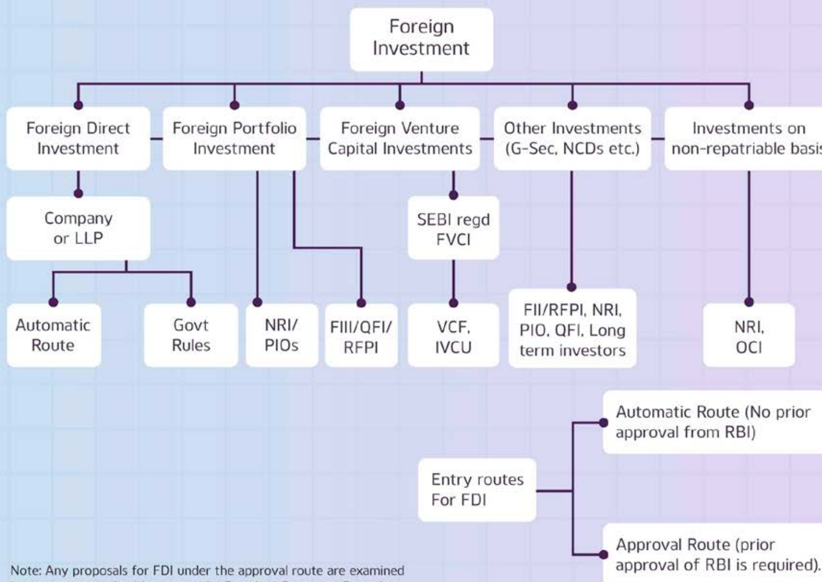
Setting-up Shop:
Foreign Investments in India

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

DPIIT is the competent authority for grant of approvals/rejection of foreign investment proposals requiring Government approval in case of trading (including, inter alia, single, multi brand and food product retail trading).

Investment mechanisms

A foreign investor, broadly, may invest in India through various mechanisms.



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

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FDI Policy

The erstwhile foreign investment framework governing investments into India underwent a significant revision with effect from 15 October 2019 when the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 (TISPRO Regulations) and the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, were repealed, and the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("**NDI Rules**"), were notified. Subsequent to this change, the DPIIT issued a consolidated FDI policy, which is effective from October 15, 2020 ("**FDI Policy**"), and is a compilation of various decisions and policy pronouncements of the Government with regard to FDI in various sectors.

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

- Increase in FDI limits: The Government has increased FDI limits in various sectors, for instance: FDI in insurance intermediaries is now allowed upto 100% under the automatic route (from 49%), FDI in insurance companies is now allowed up to 74% under the automatic route (from 49%).

- To facilitate raising of capital, start-ups are allowed to issue convertible notes to foreign venture capital investors (FVCI) for a minimum amount of INR 2.5 million.

- Issue of shares against non-cash consideration like import of capital goods/ machinery/ equipment and pre-operative/ pre-incorporation expenses is now permitted under the automatic route in case of sectors under the automatic route (as opposed to being permitted under the approval route earlier).

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

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

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

Contours of foreign investment in India

The FDI Policy prescribes the maximum permissible limit on foreign investment that can be made in Indian entities operating in various sectors, along with the conditions of entry and manner of investment. Sectors in which FDI is not specifically prohibited under the FDI Policy and NDI Rules, and sectors, in respect of which no limits have been prescribed in the FDI Policy and NDI Rules, are sector in which 100% FDI is typically permitted under the automatic route.

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

Sector	FDI Limit	Entry
Agriculture[1]	100%	Automatic Route
Banking- Private Sector	74%	Up to 49% Automatic Route; Government Route beyond 49% and up to 74%
Civil Aviation (Airports)	100%	Automatic Route
Construction Development: Townships, Housing, Built-up Infrastructure	100%	Automatic Route
Defence Industry subject to Industrial license under the Industries (Development and Regulation) Act, 1951 and Manufacturing of small arms and ammunition under the Arms Act, 1959	100%	Up to 74% Automatic Route; above 74% Government Route wherever it is likely to result in access to modern technology or for other reasons to be recorded.

1 FDI is only allowed in the following agriculture sector or activity: (a) Floriculture, Horticulture and Cultivation of vegetables and mushrooms under controlled conditions;(b) Development and production of seeds and planting material; (c) Animal Husbandry (including breeding of dogs), Pisciculture, Aquaculture and Apiculture; and (d) Services related to agro and allied sectors.

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E-Commerce (B2B E-commerce activities) (Market place model of E-commerce)	100%	Automatic Route
Insurance Company	74%	Automatic Route
Life Insurance Corporation of India	20%	Automatic Route
Insurance intermediaries	100%	Automatic Route
Manufacturing	100%	Automatic Route
Mining and Exploration of Metal and Non-Metal Ores	100%	Automatic Route
Multi Brand Retail Trading	51%	Government Route
NBFCs (registered with RBI)	100%	Automatic Route
Petroleum and Natural Gas	100%	Automatic Route
Railway Infrastructure	100%	Automatic Route
Single Brand Product Retail Trading	100%	Automatic Route above 49% Government Route
Telecom	100%	Automatic Route
Private Security Agencies	49%	Government Route
Private Security Agencies	100%	Greenfield - Automatic Route Brownfield - Upto 74%Automatic Route, and above 74% Government Route

Prohibited Sectors

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

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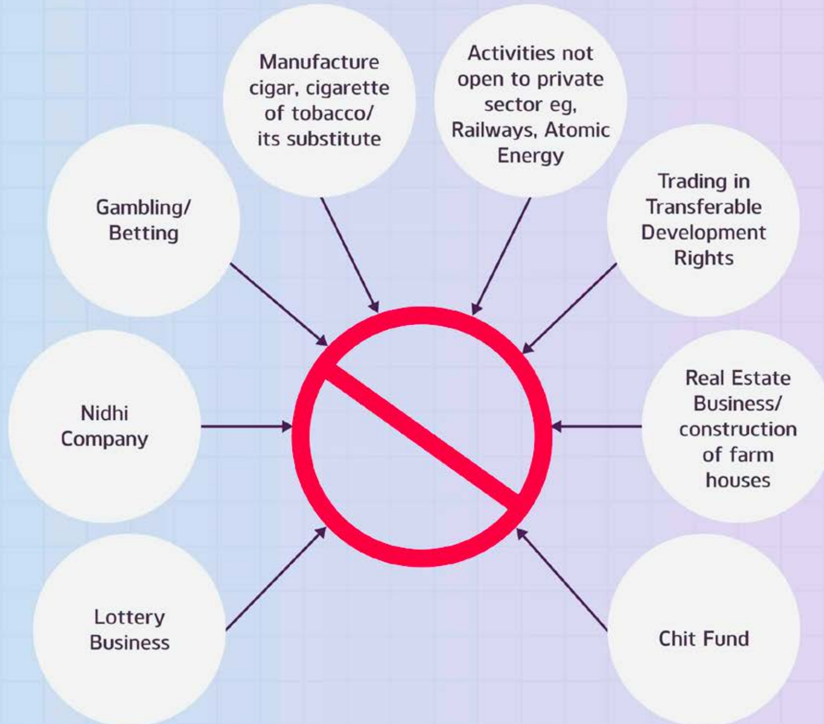

In addition to the aforementioned list, foreign technology collaborations in any form including licensing for franchise, trademark, brand name, and management contract is also prohibited for lottery business and gambling and betting activities.

Eligible Investee Entities

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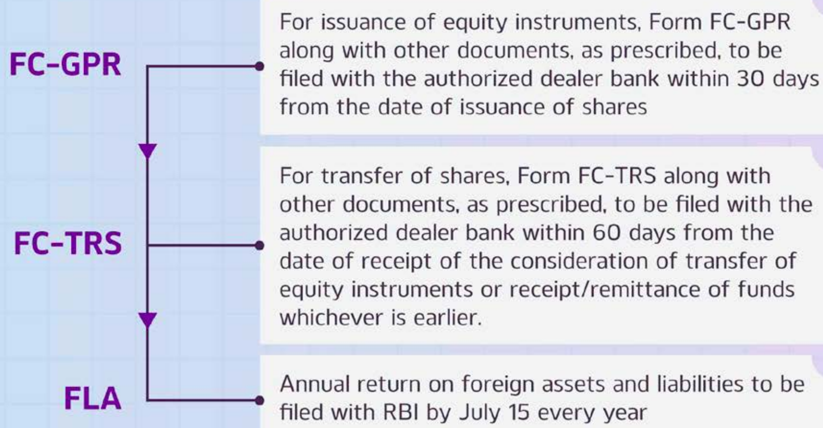
Reporting Requirements

All FDI in India proposed to be made by an investor must mandatorily conform with the guidelines prescribed under the NDI Rules. Currently, all filings required to be made under the NDI Rules are being made through Foreign Investment Reporting and Management System (FIRMS) portal vide a Single Master Form (SMF) i.e., a one-stop destination for all such filings required under the NDI Rules. Some of the filings required to be made under the NDI Rules are provided as under:



Violations Under Fema

As per the provisions under FEMA, any violation of regulations prescribed thereunder can result in a penalty up to thrice the sum involved in such contravention (where such amount is quantifiable), or up to INR 2,00,000 (where the amount is not quantifiable), and where such contravention is a continuing one, further penalty which may extend to INR 5,000 for every day after the first day during which the contravention continues.

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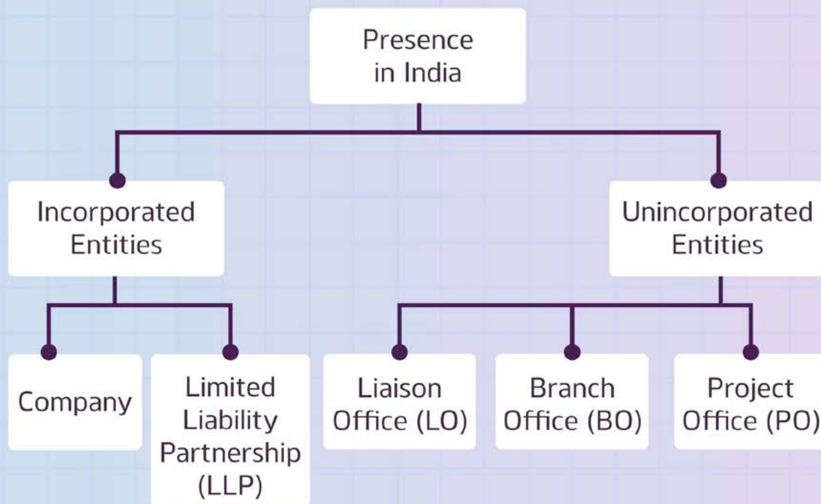
Setting-up Shop:
Establishment of presence in India

There are various categories of entities through which a foreign investor can establish a presence in India.

The entities that foreign investors may set up in India may either be unincorporated or incorporated.



Below stated is a brief overview of various business models in India:

Unincorporated entities

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

A. Liaison Office

A liaison office ("**LO**") acts as a representative of the parent foreign company in India. An LO cannot undertake any commercial activities and it must maintain itself from the remittances received from its parent foreign company. The approval for setting up an LO is generally valid for 3 years and can be extended by making application to the authorized dealer bank before the expiry of the validity of the approval.

B. Branch Office

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

C. Project Office

A project office ("**PO**") is a place of business in India to represent the interests of the foreign company executing a project in India. A foreign company, subject to obtaining approval from the authorized dealer bank, may set up a PO in India under the automatic route subject to certain conditions being fulfilled including existence of a contract with an Indian company to execute a project in India.

Incorporated entities

Incorporated entities are corporate bodies with separate legal identity in the eyes of law. They are governed by separate laws and can carry out a much wider spectrum of activities as compared to an LO, BO or PO. Investment in incorporated entities - whether subsidiaries, joint ventures or otherwise - is the most common mode of foreign investment in India.

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

A. Limited Liability Partnership

A limited liability partnership ("**LLP**") is a form of partnership with features of a company, wherein the liability of partners is limited to the contribution made by them to its capital. The incorporation of an LLP is governed by the provisions of the LLP Act. Every LLP is required to have a minimum of two partners who can be individuals or corporate bodies. Further, every LLP is required to have

a minimum of two designated partners who are individuals and one of whom shall be a person resident in India.

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

B. Company

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

Companies may either be ‘private limited companies’ or ‘public limited companies’.

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

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

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

S. No	Particulars	Private Company	Public Company
1	Minimum members	2 (two)	7 (seven)
2	Maximum members	200	No limit
3	Minimum number of directors	2	2

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4	Transfer of securities	Not freely transferable	Freely transferable
5	Restriction of borrowing	No restriction on borrowing	Approval of shareholders for borrowing beyond the prescribed threshold
6	Payment of remuneration to senior management	No restriction	Limit of maximum remuneration payable
7	Special privileges with respect to annual compliances such as forms to be filed with ROC etc.	Enjoys several benefits from compliances under the CA 2013.	No benefits

Incorporation process

In 2015, as a part of the Government's ease of doing business initiative, the Ministry of Corporate Affairs ("**MCA**") brought in a major reform to simplify the process of incorporating a company by introducing a single, integrated e-form INC 29 to be filed as against five e-forms previously required.

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

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

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

In addition, in case a national from a Neighbouring Country is seeking an appointment as a director in an Indian company, he/she is required to obtain security clearance from the Ministry of Home Affairs, Government of India and

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attach such clearance along with his/her consent while applying, in Form DIR-2. This change has also been introduced in the process of obtaining a director identification number under Form DIR-3, which is essentially the first step for seeking directorship in an Indian company.

Financing a company

Types of Securities

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

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

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

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

For the purposes of FDI, fully and compulsorily convertible preference shares and debentures are treated on par with equity and need not comply with the external commercial borrowings (“**ECB**”) guidelines (“**ECB Guidelines**”). The ECB Guidelines place certain restrictions and requirements on the use of ECB. Indian companies are permitted to avail ECB, upto USD 750 million per company per year in under the automatic route depending on the sectors the companies are doing business. However, the RBI has temporarily enhanced the limit of borrowing through ECB in a financial year, from US$ 750 million to US$ 1500 million, till 31 December 2022.

In order to raise ECB, the Indian company and the foreign financier must fulfill

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the criteria of an eligible borrower and a recognized lender respectively, under the ECB Guidelines. Further, there are restrictions on the average maturity period and the permitted end-uses of such ECB.

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Getting Started with Business: Labour Laws in India

There is no dearth of human resource in India. Foreign investors can find cost-effective manpower for their operations in India. India has an established labour welfare law in place that ensures that the rights of the blue-collar employees are protected. It is the duty of the employer and employee to duly comply with the applicable labour legislations in India.

At present, there are tens of Central laws and over a hundred State laws that govern the conditions of work between the employer and workmen, wages, resolution of disputes, termination process, etc.

Current labour welfare legislations

It is critical for investors and employers to be aware of the relevant labour welfare legislations, which could impact businesses in India.

- The Industrial Disputes Act, 1947 (“**ID Act**”) lays down a clear definition of a workman. This classification is important because a majority of the labour legislations are applicable only to ‘workmen’. Those who are not workmen are governed by the terms of their employment contract. The ID Act, among other provisions, provides for the manner of terminating workmen, the manner of settling disputes, the process to be followed in case of lay-offs, lockouts, strikes and retrenchment.

- The Trade Unions Act, 1926 gives the workers the right to form an association amongst themselves and have effective bargaining power with the management of an organisation.

- Gratuity is a type of benefit payable to the employee in lieu of the services rendered by such employee. As per the Payment of Gratuity Act, 1972 (“**Gratuity Act**”) gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, (i) on his superannuation, or (ii) on his retirement or resignation. Further, in case of death or disablement due to accident or disease, of an employee, the completion of continuous service of five years shall not be necessary and the gratuity is required to be paid to the employee’s nominee or his heirs. Under the Gratuity Act, for every completed year of service or

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part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee.

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

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

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

- The Payment of Bonus Act, 1965 ("**Bonus Act**") provides for the maximum and minimum bonus that is payable to a workman in India. As per the provisions of the Bonus Act, a confirmed employee, who has completed thirty working days of service in the relevant year and drawing salary or wage not exceeding INR 21000, is entitled to a minimum bonus of 8.33% of total salary or wage earned by the employee during the accounting year or one hundred rupees, whichever is higher.

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

- The Industrial Employment (Standing Orders) Act, 1946 is another beneficial piece of legislation that lays down that any industrial establishment that employs 100 or more workmen must have certified standing orders in place. In certain States in India, the Government has issued notifications pursuant to which industrial establishments employing less than 100 workmen are also

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required to have their standing orders certified by the certifying authority. The standing orders of a company lay down the formal conditions of employment in a workplace between the employer and the employee.

Employing Foreign Nationals

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

Labour Reforms

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

The key changes brought in by the Labour Codes are set out below:

- **The Code on Wages, 2019:** It will regulate wage and bonus payments across different types of employment. Some of the significant changes include, inter alia, redefining 'wages' in terms of express inclusions and exclusions, with house rent allowance, conveyance allowance, overtime allowance, social security contributions, gratuity, retrenchment compensation, etc. being kept out of the purview. The Code on Wages has done away with a wage threshold for its applicability to employees, thereby, expanding its scope to all employees across sectors, such as, service sector (IT, hospitality, transportation etc.), domestic workers, unorganized workers, teachers, workers in railways, mines,

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oil fields, etc. It has also introduced the concept of floor wage to be notified by the Central Government. The State Governments are obligated to not to fix minimum wages in their sphere below the floor wage so notified.

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

- **The Code on Social Security, 2020:** It seeks to amend and consolidate the laws relating to social security with the goal to extend social security to all employees and workers either in the organised sector or the unorganised sector. Some of the significant changes include, inter alia, extension of horizons of various social security legislations, thereby paving way for social security for workers in both organised as well as unorganized sector, provisions concerning EPF Act and ESIC Act can be made applicable voluntarily to establishments having less than the minimum number of employees required for applicability, if the employer and the majority of employees in the establishment agree for such coverage and make an application to the Director-General of ESIC for opting in for such coverage. Further, Code on Social Security, 2020, mandates registration of gig workers, platform workers, and unorganised workers to be eligible for the social security schemes.

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

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Getting Started with Business: Environmental Law

The environmental regulations in India primarily focus on the following two key aspects: (i) protection and conservation of wildlife and natural habitats including forests and coastline; and (ii) sustainable functioning of industries without causing pollution. Some of the key principles in environmental law are the polluter-pays principle, precautionary principle, sustainable development, and absolute liability. These are crucial for companies who are setting up their manufacturing base in India and investors should be aware of implications relating to expansion into certain areas and industries.

Laws relating to Environmental Protection

The Ministry of Environment, Forest and Climate Change (“**MoEFCC**”), Government of India and the respective State authorities are responsible for framing the Acts, rules, policies, etc. related to environment protection. The Central Pollution Control Board (“**CPCBs**”), State Pollution Control Board (“**SPCBs**”), and Union Territory Pollution Control Boards (“**UTPCBs**”) are responsible for the effective implementation of the environmental acts and regulations.

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

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

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

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Constitutional Provisions: Fundamental Rights (Articles 21, 32 and 226 of the Constitution of India); Directive Principles of State Policy (Articles 47, 48A and 49 of the Constitution of India); Fundamental Duties (Article 51A(g) of the Constitution of India)

Special Laws: Environment and Pollution Laws

General Laws: EPA, Civil Procedure Code, Indian Penal Code, Criminal Procedure Code

Administrative Framework: MoEFCC, CPCB, SPCBs, UTPCBs, etc.

Policies: National Environment Policy 2006, National Forest Policy, National Agriculture Policy, etc.

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

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The EPA is the umbrella Act for environment protection and conservation which empowers the Government to set national standards for ambient environmental quality and for controlling discharges to regulate industrial locations, to prescribe procedure for management and handling of hazardous substance, to collect and disseminate information regarding environmental pollution, etc.

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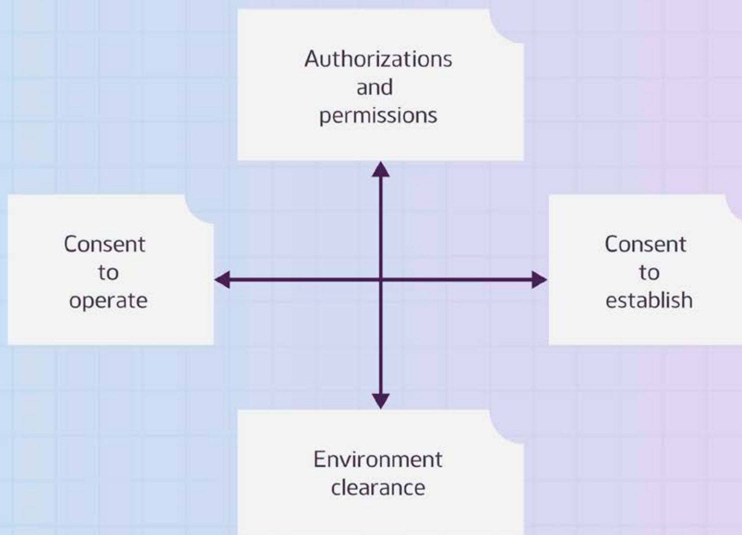
The National Green Tribunal Act, 2010 (“**NGT Act**”) has been established under Section 3 of the NGT Act, with an objective to reduce the burden on the existing judicial system as well as to ensure effective and speedy implementation of environmental legislation. It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues.[1]

In terms of the Public Liability Insurance Act, 1991 (“**PLI Act**”) owners of any entity having control over handling of hazardous substances at the time of accident shall be responsible for taking an insurance policy for a minimum prescribed quantity against liability to give relief in case of any accident or mishap at the workplace while handling hazardous substances. The Central Government may by notification exempt government authorities as well as corporations owned or controlled by the Government from the application of the PLI Act.

Key environmental approvals for setting-up an industry or project



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

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Effect of non-compliance

There are multiple environmental regulations in India which are required to be complied with by industries. No industry can commence its operations without seeking the consent of relevant authorities under applicable environmental laws. Non-compliance with the applicable environmental laws can have serious implications in terms of delay in setting up a business, increase in project cost, depreciation of public image, threat to business continuity, and criminal liability.

The NGTs, CPCB, and SPCBs have the power to take serious actions like revocation of consent to operate, inspection of the facilities, disconnecting water/electricity, fines and/or imprisonment, and even closure of industry for non-compliance with environmental regulations. The major challenges in achieving environmental compliance include identification of applicable environmental regulations, identification and assessment of the associated environmental risks, lack of a culture of environmental compliance, lack of resources, lack of awareness, and financial constraints. The use of a wide range of chemicals and rapid depletion of potable water reserves has led to growing awareness in India about the imperative of following a path of sustainable industrial development. In light of various judicial pronouncements, the CPCB and SPCBs have embarked on various initiatives like installation of online continuous environmental monitoring systems, zero liquid discharge, etc. Identification of the applicable regulations and continuous compliance with the prescribed conditions are critical for achieving overall compliance with the environmental laws and for achieving business continuity.

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

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

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

Indian regulators are now proactively integrating ESG factors in their policies.

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In this context the RBI and the Securities and Exchange Board of India (**"SEBI"**) have already introduced initiatives such as Business Responsibility and Sustainability Reporting ("**BRSR**"), priority sector lending ("**PSL**") scheme, etc. Investors and other stakeholders are promoting technology-enabled service companies and traditional companies are also shifting towards more sustainable sources. In order to emerge as a global leader, strengthening the ESG regulatory framework in India becomes an important step in this direction.

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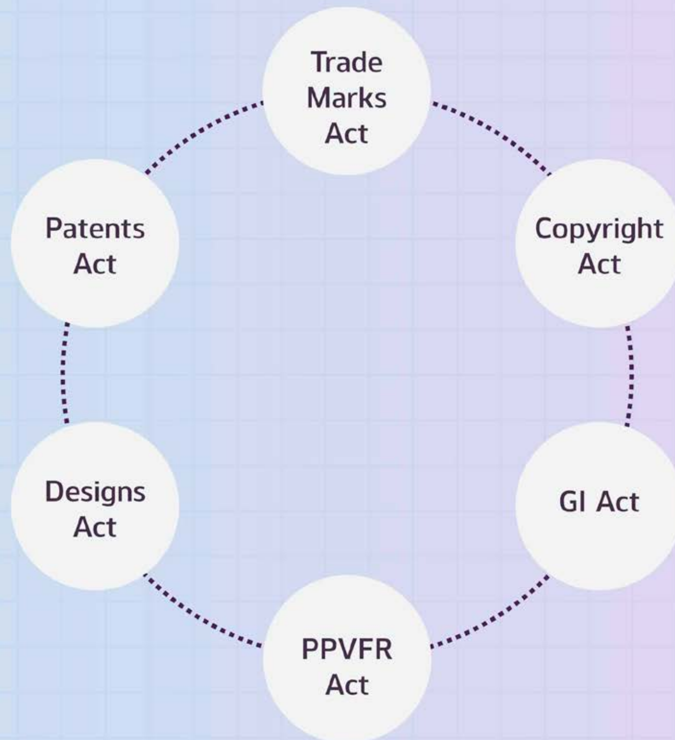
Safeguarding your business interest: Intellectual Property law in India

Broadly, the Intellectual Property Rights (“**IPRs**”) protection framework in India comprises of the following legislations:



Trademarks

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

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

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

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

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

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

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

Further, pursuant to enactment of the Tribunals Reforms Act, 2021, the Delhi High Court notified the creation of the Intellectual Property Division (“**IPD**”) in the High Court of Delhi, to specifically deal with matters related to Intellectual

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Property. The High Court of Delhi further notified the Delhi High Court Intellectual Property Rights Division Rules 2022 ("**IPD Rules**") on February 24, 2022 to provide specific procedures for matters related to intellectual property including trademarks. Other High Courts are yet to formulate specific rules to adjudicate matters related to intellectual property.

Copyright

A copyright is a bundle of exclusive rights given in respect of original expression of works such as literary, artistic, musical, sound recording, cinematograph work, etc. The relevant statute which governs copyright in India is the Copyright Act, 1957 ("**Copyright Act**"). Under Section 14 of the Copyright Act, all the said categories of the works and the extent of the respective rights are defined.

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

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

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

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

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the power has been transferred to High Court. Furthermore, IPD Rules of Delhi High Court are applicable for institution of suits before the Delhi High Court.

RELIEF FOR COPYRIGHT INFRINGEMENT

Civil Injunction, profits and damages under section 55, Copyright Act

Criminal Imprisonment or fine under section 63, Copyright Act

Patents

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

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

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

It is noteworthy that under the recent amendments to the Patent Rules, India brought in various changes to the Patent Rules for faster disposal of applications.

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

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

The Tribunals Reforms Act has also transferred the power of the IPAB under the Patents Act to the High Courts. Powers of revocation of patents, rectification of patents and appeals against the decisions of the Controller of Patents vest solely with the High Courts. Since patent applications are filed in the Delhi, Mumbai, Chennai, and Kolkata patent offices, appeals against orders from these offices can be instituted before the respective High Courts where the application was originally filed. Apart from the IPD Rules, the Delhi High Court has also framed Rules Governing Patent Suits 2022 which govern the institution and proceedings of patent suits filed before the Delhi High Court.

Design

The protection for the aesthetic appeal or novel *'design'* of any finished article is conferred under the Designs Act, 2000 ("**Design Act**"). The benefits of design registration are that the registered owner gets an exclusive right to apply the design to the article, the right to sue for piracy, and the right to license the design as legal property for consideration or royalty. A registered design is valid up to 10 years from the date of registration and is extendible by 5 years. Section 4 of the Designs Act provides for a list of designs that cannot be registered. These include reasons such as a design not being new or original; or a design having been disclosed to the public anywhere in India or in any other country; or a design which is not significantly distinguishable from known designs or a combination of known designs, etc.

Piracy of a registered design during the existence of the copyright would attract

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a liability of a sum not exceeding twenty-five thousand rupees recoverable as a contract debt, under Section 22 of the Design Act. Piracy includes acts such as unauthorized application of a registered design or any fraudulent imitation of any article for sale, import, publication or exposure for sale of such article. This Section also provides for the right of a proprietor to bring a suit for the recovery of damages, and for an injunction against the repetition of such an act. The expedited enforcement under the new commercial courts law referred to above applies to these matters as well.

At present, the prosecution of design applications in India is only done in the Kolkata Patent Office. Hence, an appeal against the order of the Design Controller regarding a design application vests with the Calcutta High Court.

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Running Operations: Direct Taxation In India

Direct tax is an important parameter that investors must factor in while making investment decisions and structuring investments. The following sections detail not only domestic tax provisions but also the provisions from DTAA so as to provide a holistic view on India's taxing rights on various streams of income earned by foreign resident businesses.

In India, the Central Government levies a tax on the income earned by the taxpayer during the financial year. The Central Government presents a finance bill to the Parliament in the month of February. This bill contains the rate of taxes in relation to various categories of taxpayers and streams of income as well as amendments proposed by the Central Government in the Income Tax Act, 1961 (“**IT Act**”). Income tax is levied on the income earned by individuals, companies, partnership firms, and artificial juridical persons.

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

Tax Incentives

The IT Act provides for various tax incentives to taxpayers engaged in certain types of business or carrying business from certain specified areas in India.

- **Concessional tax rate for manufacturing companies:** Manufacturing companies set up and registered after October 1, 2019, and who commence manufacturing before April 1, 2024, subject to certain other conditions, will be eligible for a concessional tax rate of 15% (plus surcharge and cess as applicable).

- **Concessional tax rate for all domestic companies:** Domestic companies subject to certain conditions can opt to pay tax at the rate of 22% (plus surcharge and cess as applicable) w.e.f. FY 2019-20.

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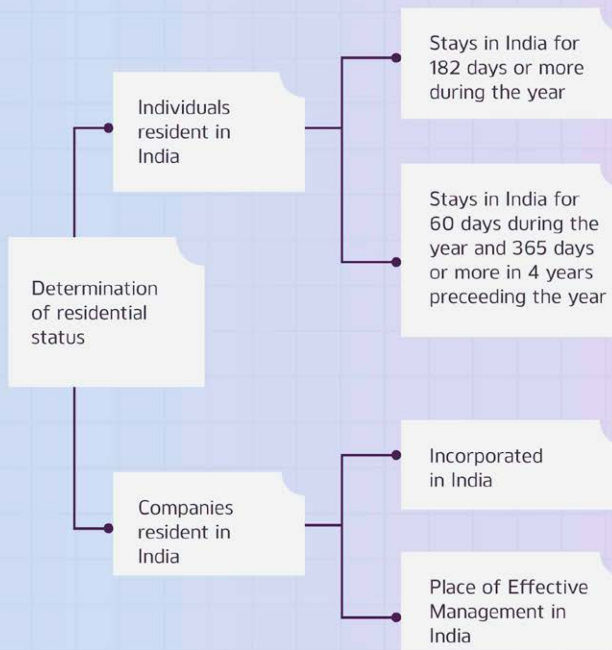
- **Tax exemption for units in IFSC at GIFT City:** 100% tax exemption for 10 years out of a 15-year block.

- **Expenditure on scientific research:** 100% deduction of the expenditure (not being expenditure in the nature of cost of any land or building) on scientific research on approved in-house research and development facility incurred on or after April 1, 2021.

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

As per the IT Act, the residents of India are taxed in respect of both the income earned within India and income earned outside India. On the other hand, non-residents are taxed only for income accruing or arising in India, income deemed to accrue or arise in India or income received in India.



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

INCOME FROM BUSINESS CONNECTION IN INDIA

- Transfer of capital asset situated in India
- Interest from monies borrowed in India
- Dividend | Salaries earned in India
- Royalty | Fee for technical service

Double Tax Avoidance Agreements ("DTAA")

Non-residents are eligible to benefit from the provisions of the DTAA. Under the IT Act, a non-resident should be taxed by application of the most beneficial provisions from amongst the IT Act and the DTAA. The DTAA will be applicable not only to determine taxability in India but also to determine the applicable tax rate. As per the DTAA, business income can be taxed in India only if such income is earned from a Permanent Establishment in India. Details of country-specific DTAAs and their application can be requested from our firm.

General Anti Avoidance Rule ("GAAR")

GAAR is applicable to transactions which are considered to be impermissible avoidance arrangements structured to achieve tax avoidance. The provisions of GAAR will prevail over the provisions of Double Taxation Avoidance Agreement. The aim is to look at the real intention of the parties in determining tax consequences, irrespective of the legal structure of the arrangement.

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IMPERMISSIBLE AVOIDANCE ARRANGEMENT

Main purpose is Tax benefit, and:

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

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

Lacks or deemed to lack commercial substance, or

Not entered into or carried out for bona fide purposes

Acquisition and Restructuring

While, amalgamation and de-merger are tax neutral, other options of restructuring may result in capital gains. For example, when an investor acquires control over the affairs of an Indian company by purchasing its shares, there might be the creation of gains, which would be taxed as income in the hands of the transferor.

CAPITAL ASSET	PERIOD OF HOLDING	TAXATION				
	Short term capital asset	Long term capital asset Short term capital gains	Short term capital gains		Long term capital gains	
			Resident	Non-Resident	Resident	Non-Resident
Listed equity shares	Not more than 12 months	More than 12 months	15%*	15%*	10%* without indexation	10%* without indexation
10%* without indexation (Tax treaty to be evaluated)	Not more than 24 months	More than 24 months	30%*	30%* (Tax treaty to be evaluated)	20%* with indexation	

*Rates for individual taxpayers *Surcharge and Cess as applicable

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Generally, as per the DTAA, if shares in an Indian Company are held by a foreign resident and they derive some gains from the alienation of such shares, the gains may be taxed in India.

Similarly, a slump sale involves transfer of one or more undertakings for a lump sum consideration without values being assigned to the individual assets and liabilities in such sale. The transferor's profits are chargeable to tax as capital gains, whose calculation will be undertaken in accordance with the prescribed valuation methodology. Further, an investor can acquire individual assets of a business in India instead of acquiring the going concern as a whole. Taxation of gains on transfer differs based on whether a capital asset is a depreciable asset or a non-depreciable asset.

Tax Compliance

Due dates of filling Income Tax Return

- For an Indian company engaged in international transaction – 30 November
- For an Indian company not engaged in international transaction – 31 October

Consolidated returns

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

Easy of business

- India has an advance pricing agreement (APA) scheme and allows for unilateral, bilateral and multilateral APA

Dependent agent permanent establishment

The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“**MLI**”) has widened the scope of Dependent Agent Permanent Establishment (“**DAPE**”). As per MLI, if a person, acting on behalf of an enterprise, habitually concludes contracts, or habitually plays the principal role, leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, subject to other conditions, it will lead to constitution of a Permanent Establishment. Consequently, in respect of the countries that accept the above clause of MLI,

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their DTAA with India will also stand amended. To bring the scope of business connection under the IT Act in line with the provisions of MLI, an amendment has been made in the IT Act.

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

Equalisation levy:

In order to widen the Indian tax base, Indian tax authorities vide Finance Act 2020 introduced equalisation levy provisions. The levy imposes 2 percent tax liability on all consideration received by non-resident e-commerce operators from e-commerce supply or services made to the Indian residents.

Significant economic presence:

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

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

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

Supreme court settles the issue around software royalty

The Supreme Court of India, in its recent decision, has finally decided the dispute around taxation of software royalty. In its decision, the Supreme Court has held that payment for the sale or use of software without any right of reproduction is merely sale or use of a copyrighted article and not the exploitation of copyright. Accordingly, such payments will not qualify as royalty under tax treaties.

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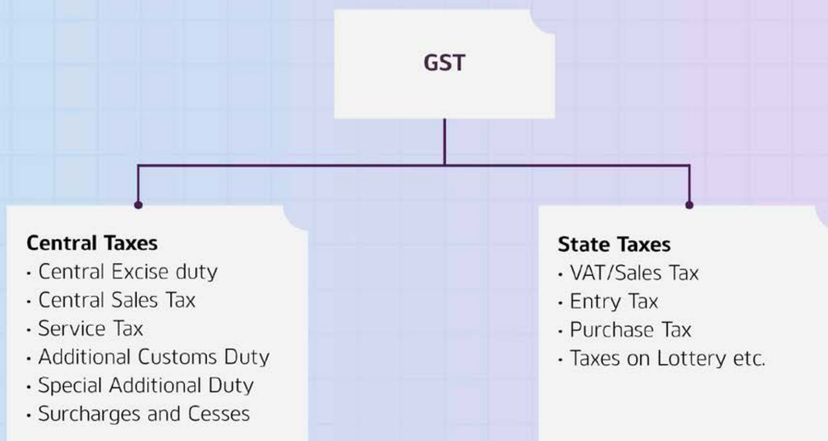
Running Operations:
Indirect Taxation

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

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



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

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Central Goods and Services Tax

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

Taxes such as Central Excise Duty, Central Sales Tax, Service Tax, and Special

Additional Duty of Customs has been subsumed in CGST.

State Goods and Services Tax

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

The SGST replaces State VAT, Entertainment and Amusement Tax which used to be levied by state authorities under the erstwhile regime.

Integrated Goods and Services Tax

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

IGST is also leviable on imports.

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

Compensation Cess

Compensation Cess is levied on certain items like high-end cars, goods such as tobacco and pan masala, aerated drinks etc. for compensating states for loss of revenue due to introduction of GST, or a period up to 31.03.2026.

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

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

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Tax exemptions

The GST laws provide for tax exemptions to certain categories of industries and products. Some of the goods and services which enjoy GST exemption are as follows:

- Fresh milk and pasteurized milk, including separated milk, milk, and cream, not concentrated nor containing added sugar or other sweetening matter, excluding ultra-high temperature milk;
- Postal items, like envelope, post card etc., sold by the Government;
- Curd, lassi, butter milk, natural honey (excluding honey which is pre-packaged and labelled);
- Services supplied by electricity distribution utilities by way of construction, erection, commissioning, or installation of infrastructure for extending electricity distribution networks for agricultural use;
- Storage or warehousing of cereals, pulses, fruits, and vegetables;
- Services by the Department of Posts in relation to post cards, inland letters, book posts and ordinary posts (only extended to envelopes weighing less than 10 grams);
- Training or coaching in recreational activities relating to arts or culture by an individual;
- Veterinary clinics;
- Health care services by a clinical establishment, an authorized medical practitioner or paramedics (excluding the service of providing rooms wherein room charges exceed INR 5000 per day), ambulance services;

Economic benefits of GST

The salient features of Indian GST are as follows:

1) Free flow of Tax Credit

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

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permitted to set-off the GST paid on the purchase of goods and services through a tax credit mechanism.

2) Mitigation of cascading effect of taxes

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

3) Ease of doing Business & standardization

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

4) Increase of investment in India

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

Threshold Registeration

- Under the GST Law, a business with a turnover of more than INR 2 million per annum is required to register as a normal taxable person.
- The turnover threshold for registering in special category States, such as the States of Manipaur, Mizoram, Nagaland and Tripura, is more than INR 1 million per annum.
- For persons dealing in exclusive supply of goods, the threshold is more than INR 4 million per annum for registration.
- Under the GST Law, manufacturers and traders who have a conglomerate with an annual turnover of up to INR 15 million per annum in the preceding financial year can register as composition dealers under the Composition Scheme, pursuant to which, small taxpayers can get rid of tedious GST formalities and pay GST at a flat rate of 1%.
- A dealer opting for the Composition Scheme:

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» cannot avail Input Tax Credit;

» cannot supply goods which are not taxable under GST (such as alcohol); and

» Form GST CMP08 to be filed every quarter on 18th of the month following the quarter.

Tax Compliance:

1. Form GSTR 1
    - To be filed on the 11th of every month.
2. Form GSTR3B
    - To be filed on the 20th of every month.
3. Form GSTR9/GSTR9C - Annual return
    - To be filed on 31st December of the relevant year.
4. E-invoicing
    - E-invoicing mandatory for business with a turnover exceeding INR 500 million per annum.
    - From 1st October 2022 onwards, e-invoicing is mandatory for businesses with a turnover exceeding INR 100 million.

Business restructuring

Internal restructuring

A. Investment/Diversification/Expansion

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

Location-based Incentives

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

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

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

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

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

2. Haryana State Electric Vehicle Policy, 2022

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

Product based incentives

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

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

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

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

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

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

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

B. Relocation of Factory

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

a) Special Economic Zones

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

b) Operations in Custom Warehouse

Under this program, a unit can import goods (both inputs and capital goods) under customs duty deferment with no interest liability. There is no investment threshold or export obligation. The duties are fully remitted if the goods resulting from such operations are exported. Import duty is payable only if the resulting goods or imported goods are cleared in the domestic market (ex-bonding).

External restructuring

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

A. Slump Sale

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

B. Itemized Sale

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

Resolve, Revive, Empower: The Insolvency and Bankruptcy Code

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

When IBC was first brought into force, India was languishing at 137/190 in the ‘Ease of Doing Business’ Index. However, IBC streamlined the entire insolvency process and significantly reduced the time required for completing the process. The process of insolvency resolution in India would unfold over 4.5 years on average in India as against 1 and 1.5 years respectively in the United States and the United Kingdom. In 2019, the World Bank hailed India’s efforts in undertaking business reforms, including resolving insolvency and by 2020, India had raced up to the 63rd position in the ‘Ease of Doing Business’ rankings.

Between its inception and March 2022, IBC had come to the rescue of 480 corporate debtors, of whom, a third were in deep distress. These 480 corporate debtors had collective assets to the tune of INR 1310 billion and resolution plans involving them yielded INR 2340 billion (which is around 178% of the liquidation value of these corporate debtors). The assets of 328 companies that were liquidated till March 2022 were valued at INR 28.04 billion, of which around INR 27 billion was realized through liquidation proceedings under IBC. The 480 companies which underwent the Corporate Insolvency Resolution Process (“**CIRP**”) took an average of 450 days (excluding the time excluded by the Adjudicating Authority) and the liquidation process took an average of 456 days for closure. To the credit of the Adjudicating Authority/National Company Law Tribunal, about 21,100 applications for initiation of CIRP for defaults aggregating to INR 609.48 trillion were resolved before their admission.

Corporate Insolvency Resolution Process

IBC specifies a strict timeline of 330 days for completion of the entire insolvency

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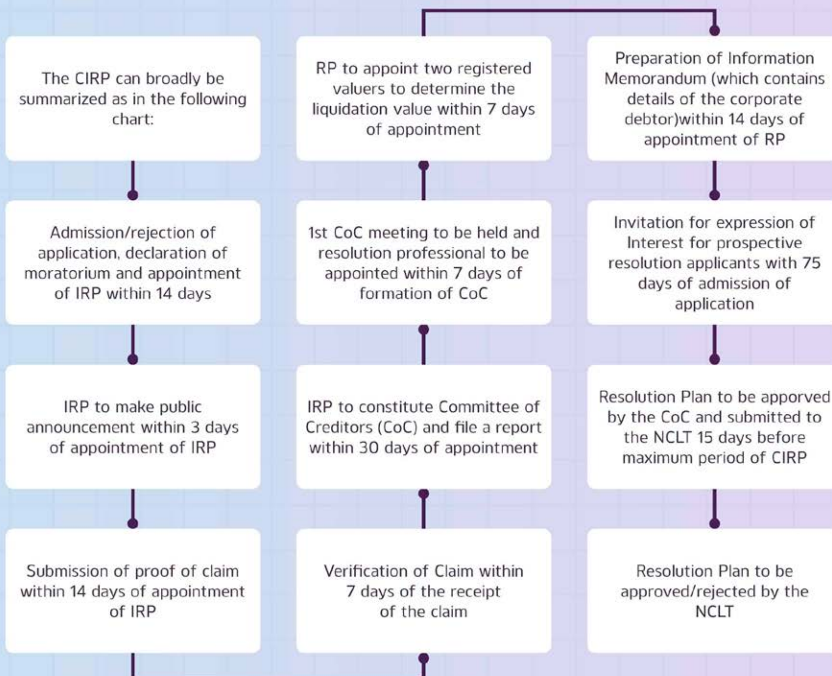
resolution process. The process for resolution of insolvency and liquidation under IBC rests on four pillars. The first is a class of regulated persons, the insolvency professionals (IPs), who play a key role in the efficient working of the insolvency, liquidation, and bankruptcy process. The second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



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

Implications for Foreign Investors and Creditors under IBC

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

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

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

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

IBC redefines the balance of power among the stakeholders of a company. While the shareholders enjoy complete control of the company when the debt is serviced, the control shifts to the creditors in the event of default who can take effective steps to ensure recovery of debt. It is because of this paradigm

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shift in the debtor-creditor relationship under IBC regime that many debtors today prefer to resolve financial distress at an early stage and avoid letting the company go into CIRP.

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

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Quick and Effective: Arbitration Law in India

The Indian judiciary is overburdened because of a high number of cases and the long time it takes for cases to be disposed of. Therefore, Alternate Dispute Resolution methods such as arbitration, mediation, conciliation and *Lok Adalats* (people's court) have become key to speedy resolution of disputes in India.

The legislature has formally recognised arbitration in extension of India's commitments as a signatory to the New York Convention. To better facilitate resolution of commercial disputes, India adopted the UNCITRAL Model Law on International Commercial Arbitration in its entirety, except for a few variations, and enacted the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). This single piece of legislation addresses both international and domestic arbitration. The shortcomings of the Arbitration Act led to a set of amendments embodied in the Arbitration and Conciliation (Amendment) Act, 2019 that was passed in August 2019. It provides for the creation of an independent body called the 'Arbitration Council of India', which would grade arbitral institutions and accredit arbitrators.

Further, pursuant to the Commercial Courts Act, 2015, special commercial divisions have been set up in High Courts having original jurisdiction and commercial courts have been set up in the District Courts to hear and dispose of arbitration matters involving commercial disputes of a specified value (the current lower limit is INR 300,000).

Institutional Arbitrations

Institutional arbitration is still at a nascent stage in India and at present, a majority of the arbitration in India is conducted on an ad hoc basis. The experience around the world suggests that institutional arbitration is more efficient and effective when compared to *ad hoc* arbitration. Some of the institutional arbitration centres in India are listed below.

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Nani Palkhivala Arbitration Centre (NPAC) Established 2005

Mumbai Centre for International Arbitration (MCIA) Established in 2016

Court annexed Arbitral Institutions Eg: Delhi International Arbitration Centre, the Madras High Court Arbitration Centre

Indian Council of Arbitration (ICA) Established 1965

The New Delhi International Arbitration Centre Act of 2019 ("**NDIAC**") provides for the establishment of the New Delhi International Arbitration Centre, an institution to better manage domestic and international arbitration in the country. The NDIAC is set to be declared as an institution of national importance. The NDIAC has also been mandated to establish a Chamber of Arbitration which will empanel arbitrators. Further, the NDIAC may also establish an Arbitration Academy to train arbitrators.

Seat outside India

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

Reference to Arbitration

Since the 2015 amendment, courts in India have been encouraging arbitration by applying the rule of *Kompetenz-Kompetenz* which provides that the jurisdiction of an arbitral tribunal can be decided by such tribunal itself. Whenever a party approaches a court for the appointment of an arbitral tribunal under Section 8 or Section 11 of the Arbitration Act, the court is required to refer the matter

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to arbitration unless a valid arbitration agreement is *prima facie* non-existent. Similarly, even if the question of arbitrability of the dispute is raised by a party such dispute is required to be referred to arbitration as long as it does not *prima facie* fall within the exceptions to arbitrability (such as disputes relating to criminal offenses; matrimonial and family disputes; insolvency and winding-up matters; testamentary matters, etc.). *"When in doubt, refer to arbitration"* is the rule of thumb that applies.

Anti-Arbitration Injunction

Anti-arbitration injunctions have always been a matter of concern around the world. While the Indian judiciary typically favours arbitration, there have been instances where the courts have granted anti-arbitration injunctions.

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

Recent judgments (for example, by the Division Bench of the Delhi High Court in *MC Donald's India Pvt. Ltd. v. Vikram Bakshi*[1] or by the Supreme Court of India in *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd*[2]) have held that the power to grant anti-arbitration injunctions should be used sparingly and not in cases where there is a valid arbitration agreement. This is in line with the amended Arbitration Act and reinforces the pro-arbitration approach taken by the Indian judiciary in recent times.

Interim Measures of Protection

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

- The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
- Securing the amount in dispute in the arbitration;
- Order for detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in the arbitration;

1 (2016) 232 DLT 394.

2 (2014) 11 SCC 639.

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- Interim injunction or the appointment of receiver; and
- Such other interim measure of protection as may appear to be just and convenient to the court or arbitral tribunal.

Further, the arbitral tribunal has the same power to issue orders as a court of law has in relation to proceedings before it.

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

Emergency Awards

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

Enforcement Of Awards

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

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Level Playing Field: Competition Law

Regulatory Overview

The principal legislation governing competition law in India is the Competition Act, 2002 ("**Competition Act**"). It contains specific provisions regulating (i) anti-competitive agreements, (ii) abuse of dominant position, and (iii) mergers and acquisitions (merger control). The Competition Commission of India ("**CCI**") is the regulatory authority enforcing the Competition Act.

Merger Control

India has a mandatory and suspensory merger control regime. The Competition Act along with the CCI (Procedure regarding the Transaction of Business Relating to Combinations) Regulations, 2011 ("**Combination Regulations**") form the legislative framework for merger control. The Competition Act also empowers the Central Government of India to issue notifications pertaining to the merger control regime in India.

Notifiability

- In terms of Section 5 of the Competition Act, a merger, acquisition or amalgamation is notifiable when it breaches the prescribed financial thresholds ("Combination"). Such Combinations may involve the following structures:

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

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

  » a merger or amalgamation between or among enterprises.

- While joint ventures are not specifically mentioned in the Competition Act, they may also be subject to notification requirements if a joint venture is in

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the form of a Combination and breaches the prescribed financial thresholds.

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

Jurisdictional Thresholds for Notification

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

- India

Test	Parties	Assets		Turnover
Parties test	Acquirer and Target	INR 20 billion (~USD 251 million)	or	INR 60 billion (~USD 753 million)
Group test	Acquirer group and Target	INR 80 billion (~USD 1 billion)	or	INR 240 billion (~USD 3.01 billion)

- Worldwide

Test	Parties	Assets		Turnover
Parties test	Acquirer and Target	USD 1 billion with at least INR 10 billion in India (~USD 125 million)	or	USD 3 billion with at least INR 30 billion in India (~USD 376 million)
Group test	Acquirer group and Target	USD 4 billion with at least INR 10 billion in India (~USD 125 million)	or	USD 12 billion with at least INR 30 billion in India (~USD 376 million)

Exemptions under the Competition Act

- The Central Government has introduced a de minimis exemption in relation

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to Combinations involving target enterprises which have low assets and turnover values. The de minimis exemption can be availed when the value of assets and turnover of the target enterprise in India is less than INR 3.5 billion (~USD 44 million) and INR 10 billion (~USD 125 million), respectively.

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

  (a) Public Sector Enterprises in the oil and gas industry.[1]

  (b) Reconstitution, transfer (whole or part), amalgamation of nationalised banks.[2]

  (c) Amalgamation of regional rural banks.[3]

- The Combination Regulations also prescribe a list of Combinations which do not require notification even if the financial thresholds are met, on the basis that typically such Combinations do not cause appreciable adverse effect on competition (“**AAEC**”) in India.

Notification Process

- **Form I** is the short form which is typically filed by the parties if the transaction is notifiable under the Competition Act, including for transactions notifiable under the green channel route. The fee for filing Form I is INR 2 million (~USD 25,088).

- **Form II** is the long form of notification, which is filed when the parties to the transaction have significant overlaps, i.e., where the combined market share of the parties: (i) exceeds 15% in horizontally overlapping markets; or (ii) exceeds 25% in vertically overlapping markets. The fee for filing Form II is INR 6.5 million (~USD 81,529).

- **Form III** is a post-transaction form which is required to be filed only for certain identified transactions such as acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan or investment agreement.

1 Ministry of Corporate Affairs (“**MCA**”), Notification No. 3714(E)

2 MCA, Notification No. 2828(E)

3 MCA, Notification No. 2561(E)

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

Inter-connected Transactions

In case of a Combination involving multiple inter-connected steps, the determination of notification obligations is based on the substance of the transaction and the "*ultimate intended effect*" of the steps comprising the transaction In such a scenario, when one or more of the inter-connected steps amount to a Combination, a single notice is required to be filed providing details of all the steps comprising the Combination.

Factors for Review

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

- actual and potential level of competition in the market – size and influence of existing competitors;
- extent of barriers to entry into the market;
- level of combination in the market – incentive and ability to foreclose competition in the market, or to influence profit margins/ increase prices;
- degree of countervailing power in the market.

Review Timelines

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

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the CCI; or (ii) lapse of 210 days from the date of notification to the CCI, subject to an extension of 60 additional working days based on the conditions set out under the Competition Act.

Extraterritorial Jurisdiction

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

Gun-jumping

Under the suspensory regime, no Combination can be consummated in part or entirely, before receiving an approval from the CCI or lapse of 210 days since filing the notice. The CCI has the power to penalize parties for part or complete consummation of a notifiable transaction with fines of up to 1% of the total turnover or assets of the enterprises/ persons involved.

Final Verdict

The end of the regulatory process is marked by the passing of an '*order*' by the CCI either approving or invalidating the combination. Parties can also end the regulatory process by informing the CCI that the proposed transaction has been abandoned by the parties.

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

The CCI has previously imposed structural as well as behavioural remedies. In cases of structural remedies involving divestment, the CCI may also appoint independent monitoring agencies to ensure that the remedies or modifications are being complied with by the parties [4].

Appeals

Parties have the right to appeal the final decision of the CCI before the National Company Law Appellate Tribunal ("**NCLAT**") within 60 calendar days. Appeals

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

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may lie with respect to the CCI's orders pertaining to (i) blocking/rejection of a Combination, (ii) any penalties imposed, or (iii) any modifications ordered. Orders of the NCLAT may be appealed before the Hon'ble Supreme Court of India ("**SC**"), the final appellate authority.

Anti-Competitive Agreements and Practices

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

- Anti-competitive horizontal agreements and cartels (in terms of Section 3(3)) – An agreement between or amongst enterprises that are engaged in identical or similar trade of goods or provision of services (i.e., competitors) which directly or indirectly result in determination of price, supply, distribution, etc., division of markets or bid-rigging are covered under this provision. Such agreements are presumed to have an AAEC and are per se anti-competitive under the Competition Act.

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

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

Investigation and Adjudication by the CCI

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

Upon receipt of information, the CCI can form a *prima facie* view to either direct an investigation by the Director General ("**DG**") or dismiss the information and close the matter. At the end of an inquiry, the DG submits a report to the CCI. Thereafter, the CCI can issue one of three orders: (i) an order under Section 26(6) finding no violation; (ii) an order under Section 26(8) directing further

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investigation by the DG; or (iii) an order under Section 27 finding a violation of the Competition Act. Under Section 27, the CCI can impose penalties, direct parties to cease and desist from their anti-competitive actions and seek rectification of the anti-competitive conduct by the parties.

Penalty for anti-competitive conduct

The penalties for anti-competitive agreements and abuse of dominance can be up to 10% of the average turnover of the concerned enterprises for the preceding three financial years. In case of cartels, the penalty can be up to three times the profit of the concerned enterprises for continuance of such agreement, or 10% of the turnover of such enterprises for each year during the continuance of such agreement, whichever is higher.

Leniency Regime

To encourage cartel detection through whistle-blowers, the Competition Act has a leniency provision, whereby the CCI has the power to reduce penalties (including offering a complete waiver) in lieu of *'full, true and vital disclosures'* made regarding the existence of a cartel.

Appeals

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

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

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Over the last 37 years, the firm has worked with over 15,500 clients which range from start-ups, small & medium enterprises, to large Indian corporates and multinational companies. The professionals have experience of working in both traditional sectors such as commodities, automobile, pharmaceuticals, petrochemicals and modern sectors such as e-commerce, big data, renewables. The firm is proud to combine knowledge of the law with industry experience to design legal solutions for their clients to implement.

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