Shardul Amarchand Mangaldas

Doing Business in India | 2020-21

Shardul Amarchand Mangaldas

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Introduction

Shardul Amarchand Mangaldas

The Covid-19 pandemic has dominated every aspect of human and business life in 2020. While the full extent and scale of its impact on corporate India is yet to be fully assessed, the Indian economy was expected to face stresses even before the pandemic hit. The Gross Domestic Product in India had fallen to an 11 year low of 4.2% in F.Y 2019-2020. The economy grew by 3.1% in the January-March quarter of F.Y 2019-2020 against 5.7% the same time a year ago, the slowest pace in the last eight years. Covid-19 is likely to depress these figures even further.

There are two key indicators from a business perspective that will require a close watch. First is the stress in the financial sector. Second is the size and volume of deal activity.

The resolution of the stress in the financial sector will eventually boil down to how well India's intuitional lenders such as banks and non-banking financial companies are able to tackle their burgeoning exposures to non-performing assets ("**NPAs**"). This is not a new battle and many efforts have been made in the past two decades. The introduction of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") was viewed as a structural shift in the resolution of NPAs in India. However, Covid-19 is expected to result in a surge in NPAs in the coming few months. Rating agency CRISIL has estimated that bad loans will rise to 11-11.5% by March 2021 from the 9.5% expected for FY20.

With slowdown in economic activity and limited scope of revival of businesses during the suspension/moratorium period, entrepreneurs may find themselves struggling to make payments when the temporary relaxations are lifted. Several efforts have been made by policymakers to dampen the adverse impact of these concerns. The government suspended fresh filings under the IBC as a relief measure for businesses that will be impacted by the pandemic. The Reserve Bank of India ("**RBI**") further placed moratoriums on loan and installment payments. Measures such as these are only temporary balms but not a permanent cures, and may even have served to obfuscate the true scale of a looming NPA crisis.

This time off from recovery proceedings is reportedly being used by policymakers to make structural changes that will be able to absorb the upcoming shocks. The industry has called for efforts to be made towards incentivizing restructurings with banks, and easy liquidation of companies that do not have the ability to recover from the effects of the pandemic.

On the deal activity front, the volume and size of private equity ("**PE**"), venture capital ("**VC**") and mergers & acquisitions ("**M&A**") transactions have slowed down significantly. The number of announced M&A deals globally decreased from 2,349 in February 2020 to 1,984 in March 2020, while the deal value decreased from US$151.2 billion to US$129.9 billion.

It is also predicted that the Indian PE/VC markets in 2020 are expected to be in the range of US$19 billion to US$26 billion, a reduction of 45%-60% from 2019 levels. At the same time, PE/VC exits are also expected to shrink considerably. While some of the previous drivers of deal activity may remain muted for a while (such as infrastructure and real estate), some may see accentuated growth (technology, consumer goods pharmaceuticals). These pockets of growth may hide opportunities for vigilant and nimble investors.

Significant penetration is predicted in the technology sector, which may very well turn out to be the biggest winner of this pandemic. Growth is expected not only in the traditional retail space but also in the grocery segment as well as the startup sectors of edtech, healthtech, gaming and cloud services. There is a prediction that the pandemic will cause a shift towards digitisation of Small and Medium Businesses ("**SMBs**"). Amazon has announced a US$1 billion investment to digitise 10 million SMBs, by 2025. This by itself is representative of India's potential in the foreseeable future.

What we're witnessing today is a stark reminder of the financial adage - when China sneezes, the world catches a cold. The pandemic has reignited interest among multinationals to shift base away from China. This is an opportunity for India to emerge as a leader.

Foreign investors looking at substitutes are left with very few countries with strong governments that are also capable of replacing China as an important source of cheap, skilled labor. Arguably, India and Indonesia should top the list of those candidates. They are the large countries located near China. India also has impressive entrepreneurial talent, a large internal market and thriving private enterprises.

One enduring problem has been India's comparative reticence towards foreign investment. According to an OECD index, covering 68 countries, India possesses the eighth most restrictive FDI regime. To be able to replace China effectively, India needs a fundamental shift in its attitude towards trade and foreign investment.

India's cost advantage comes alongside its democratic fabric, with an emphasis on transparency and rules-based international order. India's willingness to meet its supplier obligations without weaponising trade provides the global business community with predictability and fair trade. This can very well put India on the path to becoming the next leader in business.

To enable this, the government should adopt a phased strategy, while prioritizing several immediate, medium and long-term components. For immediate measures, easy availability of land is important. As a medium-term measure, low hanging fruits with domestic supply chains should be targeted, such as pharmaceuticals, mobile phones, machinery and other sectors with a robust network of SMBs. As a long-term measure, the government should engage in more commercial diplomacy. The pandemic should be viewed as opportunity to fix what's broken and come out stronger than before.

I. General

Q1. What is the legal system in India?

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

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

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

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

In addition to the central and the state legislatures, other governmental bodies such as RBI and SEBI are empowered by specific central laws to issue delegated legislations, including rules, regulations, and notifications.

Q3. What are the business related laws in India?

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

The key business related legislations in India are the:

- Companies Act, which governs the incorporation, management, restructuring and dissolution of companies;
- LLP Act, which governs the incorporation and dissolution of LLPs;

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

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

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

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

Sole Proprietorship

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

Partnership

Partnerships in India are of two kinds: (a) those which are regulated under the Partnership Act, and where partners have unlimited liability; and (b) LLP which are regulated under the LLP Act, and where the liability of the partners is limited. Unlimited partnerships are generally not the preferred business entity, and are typically used by professional services firms on account of regulatory reasons. LLP is increasingly becoming common because of limitation of liability, and characteristics that are similar to that of a company, such as incorporation, and perpetual succession. The partners in a LLP need not be individuals, and can be corporate entities. Both unlimited and partnership and LLP require registration.

Company

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

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

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

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

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

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

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

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

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

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

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

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

II. Companies

Q1. How are companies regulated in India?

The Companies Act is the primary legislation governing companies in India. The provisions of the Companies Act have been notified and implemented by the GOI in a phased manner and have substantially replaced the provisions of the Previous Companies Act. Some provisions of the Companies Act are yet to be notified.

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

Pursuant to the Amendment Act (a) certain offences under the Companies Act have been re-categorized, (b) the jurisdiction of the regional director has been expanded, and (c) certain powers have been shifted from the NCLT to the central government thereby unclogging the NCLT. The offences which are procedural, technical or routine in nature have been shifted from a 'fine' regime to a 'penalty' regime. For example, the punishment for (a) failure or delay in filing of a notice for alteration of share capital, (b) failure or delay in filing of annual returns, (c) failure or delay in filing of financial statements, and (d) accepting directorship beyond the specified limit, are now subject to 'penalty' instead of 'fine'. Additionally, the central government has been empowered to dispose of applications relating to change of financial year of a company and conversion of a public company into a private company. The jurisdiction of regional director has also been enhanced for compounding of offences.

The Companies Act is further proposed to be amended by the Companies (Amendment) Bill, 2020 ("**Companies Bill**"), which was introduced in the lower house of the Parliament (i.e., Lok Sabha) on March 17, 2020, and is currently pending in the Parliament. The Companies Bill, amongst others, seeks to (a) remove the penalty for certain offences, (b) remove the imprisonment for certain offences, (c) reduce the amount of fine payable for certain offences, (d) establish additional benches of the NCLAT, (e) permit certain classes of public companies to list certain classes of securities in foreign jurisdictions, (f) make provisions for payment of adequate remuneration to non-executive directors, and (g) revise provisions related to CSR.

In addition to the Companies Act, listed companies or to-be-listed companies are also governed by the provisions of the SEBI Act and rules, regulations, notifications and circulars issued thereunder, such as the SEBI ICDR Regulations and the SEBI Listing Regulations, as amended from time to time.

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

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

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

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

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

The concept of an OPC has been introduced under the Companies Act, and allows a natural person who is an Indian citizen and also resident in India to set up a company. The concept has been introduced with the aim of benefitting small entrepreneurs, since these companies are, exempt from certain filing requirements and requirements in relation to meetings, *etc*.

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

Companies may be:

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

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

Based on control and holding structure, a company (in connection with another company) may be categorized as a holding company, a subsidiary company or an associate company. Other types of companies that receive mention in the Companies Act are foreign companies, small companies, government companies, banking companies, producer companies, nidhi companies and dormant companies.

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

Q3. What is the incorporation process?

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

Under the new web service SPICe+ (Simplified Proforma for Incorporating Company Electronically Plus: INC-32), which was implemented with effect from February 23, 2020, applicants can make a single application for availing the following services simultaneously:

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

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

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

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

Pursuant to the Amendment Act, with effect from November 2, 2018, every company having share capital and incorporated after this date is not permitted to commence any business or exercise any borrowing powers unless:

- a declaration is filed by a director, within a period of 180 days of the date of incorporation of the company (in such form as may be prescribed), with the RoC, that every subscriber to the MoA has paid the value of the shares agreed to be taken by him on the date of making of such declaration. However, in light of the Covid-19 pandemic, an additional 180 days have been allowed for this compliance; and
- the company has filed the verification of its registered office with the RoC.

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

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

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

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

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

- an individual shall be considered to hold a right or entitlement indirectly in the reporting company if he satisfies any of the following criteria in respect of a member of the reporting company, namely:
  - where the member of the reporting company is a body corporate (whether incorporated or registered in India or abroad), other than a limited liability partnership, and the individual (a) holds majority stake in that member; or (b) holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member;
  - where the member of the reporting company is a HUF (through karta), and the individual is the karta of the HUF;
  - where the member of the reporting company is a partnership entity, either under the Partnership Act or LLP Act, (through itself or a partner) and the individual (a) is a partner; or (b) holds majority stake in the body corporate which is a partner of the partnership entity; or (c) holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership entity;
  - where the member of the reporting company is a trust (through trustee) and the individual (a) is a trustee in case of a discretionary trust or a charitable trust; (b) is a beneficiary in case of a specific trust; (c) is the author or settlor in case of a revocable trust;
  - where the member of the reporting company is (a) a pooled investment vehicle; or (b) an entity controlled by the pooled investment vehicle, based in member state of the Financial Action Task Force on Money Laundering and the regulator of the securities market in such member state is a member of the International Organization of Securities Commissions, and the individual in relation to the pooled investment vehicle, is a general partner; or is an investment manager; or is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.

- The related filing requirements are as follows:
  - Every SBO is required to file a declaration with the company in which he holds the SBO;
  - Every reporting company shall find out any SBO and cause him to file a declaration;
  - Every company which receives any declaration as mentioned above, is required to file a return with the RoC in respect of such declaration;
  - Each company is required to maintain a register of SBOs which shall be available for inspection to the shareholders.

- Following are exempt from the application of SBOR:
  - the authority constituted under sub-section (5) of Section 125 of the Companies Act (for administration of the Investor Education and Protection Fund);

- its holding reporting company (subject to the requirement that the details of such holding reporting company are reported in prescribed form);
- the central government, state government or any local authority;
- a reporting company or a body corporate or an entity controlled by the central government or by any state government(s), or partly by the central government and partly by one or more state government(s);
- SEBI registered investment vehicles such as mutual funds, alterative investment funds, real estate investment trusts and infrastructure, investment trusts;
- Investment Vehicles regulated by RBI, or IRDA, or Pension Fund Regulatory and Development Authority.

Further, SBOs who do not make relevant disclosures and companies that do not comply as per the SBOR and other requirements under the Companies Act, are subject to fines as per the provisions under the Companies Act.

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

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

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

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

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

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

Q7. How are minority shareholders protected under Indian law?

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

The Companies Act protects minority shareholders from the oppression and mismanagement by the majority shareholders. Chapter XVI of the Companies Act contains the relevant provisions relating to the prevention of oppression and mismanagement. Under Section 241 of the Companies Act, read with Section 244 of the Companies Act, (i) 100 members of the company or 10% of the number of members of the company, whichever is less, or any member(s) holding not less than 10% of the issued share capital or (ii) 20% of the number of members, in case of a company not having a share capital, may apply to the NCLT in relation to situations wherein (a) the affairs of the company have been or are being conducted in a manner prejudicial to the public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or (b) a material change (not brought about by or in the interests of any creditors, including debenture holders or any class of shareholders of the company) has taken place in the management or control of the company, whether by an alteration in the Board, or manager, or in the ownership of the company's shares (or if it has no shares, in its membership) or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members. The NCLT may, upon application, dispense with the requirements set out in (i) and (ii) above.

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

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

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

Certain provisions under the SEBI Listing Regulations are also aimed at protecting the interest of minority shareholders, such as, the requirement to obtain the approval of the majority of the minority shareholders for matters involving the payment of royalty or for brand usage of more than 5% of the annual consolidated turnover of the listed entity (as per the last audited financial statements) to its related party(ies).

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

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

The approval of the shareholders by way of a special resolution (*i.e.* resolutions requiring the approval of 3/4th majority of the shareholders of the company entitled to and voting at any general meeting) is required for various matters such as:

- alteration of the AoA;
- further issue of share capital by an offer of shares to persons other than the existing shareholders or employees by the company;
- variation of the rights attached to the share of any particular class, in case the share capital of a company is divided into different classes of shares;
- reduction of share capital;

- disposal of undertaking or borrowing above a certain threshold (except in case of private companies).

The shareholders of a company may approve several matters of business by way of an ordinary resolution (*i.e.* requiring approval of a majority of the shareholders entitled and voting), including:

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

Accordingly, shareholders holding 75% or more of a company's voting rights are able to control the approval of proposals which are required to be approved by a special resolution, and the shareholders holding more than 50% of the company's voting rights have the ability to control decisions regarding proposals which are required to be approved by an ordinary resolution.

Q9. How does one fund a subsidiary in India?

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

- By subscribing to instruments such as:
  - equity shares;
  - fully, compulsorily and mandatorily convertible debentures;
  - fully, compulsorily and mandatorily convertible preference shares;
  - share warrants;
  - convertible notes, in the context of startup companies;
  - depository receipts; and/or
- By subscribing to other types of preference shares and/ or debentures i.e. redeemable, non-convertible, optionally convertible or partially convertible and/or borrowings from foreign shareholders subject to compliance with external commercial borrowings norms.

Q10. What types of shares can a company issue?

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

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

In light of the Companies (Share Capital and Debentures) Amendment Rules, 2019, certain relaxations have been provided with respect to the issuance of shares with differential rights. For example, the existing cap of 26% of the post issue paid up equity share capital has been replaced with a revised cap of 74% of the total voting power, including voting power in respect of equity shares with differential rights issued at any point in time. Further, the erstwhile condition of having a consistent track record of distributable profits for the last three years (for issuance of shares with differential voting rights) has also been done away with.

Further, SEBI has approved a framework for issuance of differential voting rights shares / superior voting rights shares (SR Shares) by public listed companies, and to give effect to the framework, has made certain amendments to the relevant SEBI regulations (such as the SEBI Listing Regulations and the SEBI Takeovers Regulations).

Some of the key amendments to the SEBI Listing Regulations are as follows:

- If a listed entity has outstanding SR Shares, at least half of its Board should comprise of independent directors;
- If a listed entity has outstanding SR shares, its audit committee should comprise only of independent directors and the nomination and remuneration committee, the stakeholders relationship committee and the risk management committee should have at least two thirds independent directors;
- A listed entity cannot issue shares in any manner that may confer on any person; superior or inferior rights as to dividend vis-à-vis the rights on equity shares that are already listed or inferior voting rights vis-à-vis the rights on equity shares that are already listed. However, a listed entity having SR Shares issued to its promoters or founders can issue SR shares to its SR shareholders only through a bonus, split or rights issue in accordance with the SEBI ICDR Regulations and the Companies Act;
- SR equity shares should be treated at par with ordinary equity shares in all respects (including dividend), except in case of voting on resolution;
- The total voting rights of SR shareholders (including ordinary shares) in the issuer upon listing, pursuant to an initial public offer, should not exceed 74% at any point of time;
- SR equity shares should be treated like ordinary equity shares in terms of voting rights in certain prescribed circumstances, for e.g., appointment and removal of independent directors or auditors; related party transactions involving a shareholder holding SR Shares, etc.;
- SR Shares should be converted to equity shares having voting rights at par with ordinary shares on the fifth anniversary of the listing of ordinary shares of the listed entity. Conversion prior to this period is also permitted at the option of the SR shareholder. SR Shares may be valid for an additional period five years if a resolution to that effect is passed, where SR shareholders have not been permitted to vote;
- SR Shares will be compulsory converted to equity shares having voting rights at par with ordinary shares on the occurrence of specified events.

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

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

Under the Companies Act, only an individual can be appointed as a director of a company in India. A person proposed to be appointed as a director of a company is required to give his consent to hold the office as a director. Such a person is also required to obtain and maintain a DIN. A person cannot hold office as a director, including alternate directorship, in more than 20 companies at the same time. The maximum number of public companies in which a person can be appointed as a director is 10.

Yes, a non-resident can be appointed as a director of an Indian company. However, under the Companies Act, at least one director of the Board is required to stay in India for a total period of at least 182 days during the financial year. In case of a newly incorporated company, such a requirement would apply proportionately at the end of the financial year in which such company is incorporated. However, in light of the Covid-19 pandemic, non-compliance with such minimum residency requirement by at least one director of every company will not be treated as a non-compliance for the financial year 2019-2020.

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

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

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

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

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

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

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

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

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

- a net worth of at least INR 500 crores (approx. USD 67 million) or
- a turnover of at least INR 1,000 crores (approx. USD 134 million); or
- a net profit of at least INR 5 crores (approx. USD 670,000),

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

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

The Amendment Act also seeks to amend the provisions on CSR under the Companies Act to the effect that, amongst others, the relevant company would be required to transfer any unspent CSR amount in a financial year to a specified account and spend the same within three financial years from the date of transfer, failing which, such amount should be transferred to a specified fund under Schedule VII of the Companies Act. The Amendment Act also provides penal consequences for non-compliance with the CSR obligations by a company. While the amendment on utilization of unspent CSR amount has not yet been notified, the amendment on penal consequences is proposed to be withdrawn by the Ministry of Corporate Affairs.

Q14. Are there any corporate governance norms?

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

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

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

- *Reporting requirements*, such as reporting outcomes of Board meetings where they pertain to specified items, reporting the occurrence of a prescribed category of events to the stock exchanges as and when they occur and submission of quarterly corporate governance compliance reports;
- Monitoring requirements, such as requiring periodic review of the policy on related party transactions, requiring prior approval of the audit committee (whether in omnibus form or otherwise) for related party transactions and requiring material related party transactions (i.e. those crossing specified thresholds) to be approved by a shareholders resolution;
- Internal control requirements, including requiring the audit commit to review financial statements of subsidiaries and requiring reporting of deficiencies in internal controls to the audit committee by the chief executive officer and compliance officer.

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

Certain key exemptions available to private companies are as follows:

- The holding company, subsidiary company or associate company of a private company, or the subsidiary of a holding company to which a private company is a subsidiary, are not considered as related parties of such private company – thereby ensuring that they are exempt from restrictions on related party transactions.
- A private company can issue shares with differential voting rights without compliance with the Share Capital Rules if it is allowed to do so under its charter documents.
- A private company can issue further shares to employees under an employee stock option plan scheme by passing an ordinary resolution at a meeting of its shareholders and is not required to obtain a special resolution for the same.
- Provisions under the Companies Act on giving of notice of general meetings, statements to be annexed to such notice, quorum for general meetings, chairman, proxies, restrictions on voting rights, voting by show of hands and demand for poll are not applicable to a private company (if so specified in its AoA).
- Certain provisions under the Companies Act which require the Board of a company to take actions only with the approval of the company by a special resolution do not apply to private companies.

Q16. Can voting rights be exercised by proxy?

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

Q17. Can statutory meetings be held through electronic means?

Under the Companies Act, a company is permitted to conduct a Board meeting through video conferencing or other audio-visual means, provided the procedure prescribed in the Companies Act is complied with. However, there are certain matters which cannot be dealt with by the Board in a meeting conducted through video conferencing, such as, the approval of annual financial statements, the approval of the board's report and the approval of matters relating to amalgamation, merger, demerger, acquisitions and takeovers. In light of the Covid-19 pandemic, the MCA has permitted companies to deal with such matters in Board meetings convened through video-conferencing or other audio-visual means, till September 30, 2020. It is expected that this relaxation may further be extended.

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

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

A 'virtual meeting' of the shareholders, that is, a meeting without any physical venue, is not permissible under the Companies Act, as minimum quorum requirements, which are applicable to shareholders' meetings of public and private companies, require the requisite number of members to be personally present at the venue of the meeting. However, in light of the Covid-19 pandemic, companies have been permitted to convene their extra-ordinary general meetings through video-conferencing or other audio-visual means till September 30, 2020, subject to compliance with certain specified conditions. Similarly, companies have been permitted to convene their annual general meetings through video-conferencing or other audio-visual means during the calendar year 2020, subject to compliance with certain specified conditions. It is expected that such relaxations may further be extended.

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

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

A company is not permitted to declare or pay dividends:

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

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

The Board is also permitted to declare an interim dividend during any financial year out of surplus and profits of the financial year in which such interim dividend is sought to be declared. Where the company has incurred losses during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, then the rate of interim dividend declared cannot be higher than the average dividend declared by the company during the immediately preceding three financial years.

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

SEBI Listing Regulations provide that a listed company must declare and disclose the dividend on a per share basis only. The top 500 listed entities based on market capitalization (calculated as on March 31 of every financial year) are required to formulate a dividend distribution policy which is required to be disclosed in their annual reports and on their websites. In case a listed entity proposes to declare dividend on the basis of parameters in addition to what has been prescribed in its dividend distribution policy or proposes to change such additional parameters, it is required to disclose such changes, along with the rationale for the same, in its annual report and on its website.

Q19. How can a company be listed in India?

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

Companies proposing to be listed in India are required to, in addition to compliance with the Companies Act and the SEBI ICDR Regulations, comply with the SEBI Act and various regulations including the SEBI Listing Regulations, and guidelines issued by SEBI thereunder.

A company is eligible to undertake an IPO only if:

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

- it meets the following criteria:
  - It has net tangible assets of at least INR 3 crores (approx. USD 402,000), calculated on a restated and consolidated basis, in each of the preceding three full years, of which not more than 50% is held in monetary assets (unless the IPO is entirely through an offer for sale). Where more than 50% of the net tangible assets are held in monetary assets, the company needs to have either utilized or made firm commitments to utilize the excess monetary assets in its business or project;
  - It has an average operating profit of at least INR 15 crores (approx. USD 2.01 million), calculated on a restated and consolidated basis, during the preceding three years with operating profit in each year;
  - It has a net worth of at least INR 1 crore (approx. USD 134,000) in each of the preceding three years, calculated on a restated and consolidated basis;
  - If it has changed its name within the last one year, at least 50% of the revenue, calculated on a restated and consolidated basis, for the preceding one full year has been earned by it from the activity indicated by its new name.
- Where a company does not satisfy the conditions set out above, it is eligible to undertake an IPO only if the issue is made through the book building process and the company undertakes to allot at least 75% of the net offer to qualified institutional buyers and to refund the full subscription money if it fails to do so.

With effect from July 29, 2019, if a company has issued SR equity shares (i.e., equity shares of a company having superior voting rights compared to all other equity shares issued by that company) to its promoters/ founders, then such company will be allowed to do an IPO of only ordinary shares for listing on the main board, subject to compliance with the relevant provisions of the SEBI ICDR Regulations. Further, with effect from March 19, 2020, if a company has issued SR equity shares and is seeking listing of its ordinary shares, it is mandatorily required to list its SR equity shares on the same stock exchange along with the ordinary shares being offered to the public.

A company undertaking an IPO is required to ensure that:

- It has made an application to one or more stock exchanges seeking an in-principle approval for listing its specified securities on such stock exchanges and has chosen one of them as the designated stock exchange;
- It has entered into an agreement with a depository for dematerialization of the specified securities already issued and proposed to be issued;
- All its specified securities held by the promoters are in dematerialized form prior to filing of the offer document;
- All its existing partly paid-up equity shares have either been fully paid up or have been forfeited;
- It has made firm arrangements of finance through verifiable means towards 75% of the stated means of finance for a specified project proposed to be

funded from the issue proceeds, excluding the amount to be raised through the IPO or through existing identifiable internal accruals; and

- The amount for general corporate purposes, as mentioned in the objects of the issue in the draft offer document and the offer document shall not exceed 25% of the amount being raised by the company.

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

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

IPO-bound companies typically undergo a fairly rigorous process to meet all requirements for seeking listing. This usually entails changes to the composition of their Board, amendments to their AoA, the constitution of committees, implementation of various policies, dematerialization of physical shares among other things including adhering to some restrictions on the kind of publicity they can undertake while in IPO-mode. SEBI registered merchant bankers are mandatorily required to be appointed by companies seeking to list and they, along with their counsel, guide companies through this process.

Any company coming out with an IPO is required to file a draft offer document (or draft red herring prospectus) along with prescribed fees with SEBI at least 30 days prior to registering the prospectus, red herring prospectus or shelf prospectus with the relevant RoC. Subsequent to filing the draft offer document, the issuer is required to obtain an in-principle approval from recognized stock exchanges (including at least one such stock exchange having nationwide terminals, in case of an IPO).
The draft red herring prospectus filed with SEBI is required to be made public, for comments, if any, for a period of at least 21 days from the date of such filing, by hosting it on the websites of SEBI, relevant stock exchanges and merchant bankers associated with the issue.

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

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

The bidding period can extend for a minimum of three working days and a maximum of 10 working days, including in case of a revision in the price band. During the bidding period prospective investors will place their bids for the issuer's securities at different price points within the price band.

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

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

The SEBI Listing Regulations and the Securities Contract (Regulation) Rules, 1957 (SCRR) specify that a listed company is required to have a minimum public shareholding in its share capital (except for entities listed on institutional trading platform without making a public issue). Accordingly:

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

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

- Issuance of shares to public through prospectus;
- Offer for sale of shares held by promoters to public through prospectus;
- Sale of shares held by promoters through the secondary market;
- Institutional Placement Programme in terms of Chapter X of the SEBI ICDR Regulations;
- Rights issue to public shareholders, with promoter or promoter group shareholders forgoing their entitlement to equity shares that may arise from such issue;
- Bonus issues to public shareholders, with promoter or promoter group shareholders forgoing their entitlement to equity shares that may arise from such issue;
- Share sale up to 2% of the total paid-up equity share capital of the listed entity in the open market subject to five times' average monthly trading volume of shares of the listed entity in terms of the conditions as approved by SEBI from time to time;
- Allotment of eligible securities under qualified institutions placement in terms of Chapter VI of the SEBI ICDR Regulations;
- Any other method as may be approved by SEBI on a case to case basis. In this regard, listed entities may approach SEBI with appropriate details.

Companies failing to comply with the minimum level of public shareholding within the time period set forth in the SCRR and the SEBI Listing Regulations can face penalties such as compulsory delisting, suspension of trading, monetary penalties, *etc*.

In light of the Covid-19 pandemic, SEBI has granted certain relaxations in relation to compliance with these requirements. For example, SEBI has granted relaxation to such listed entities for whom the deadline for compliance with the minimum public shareholding requirement falls between the period March 1, 2020 and August 31, 2020. It has also advised stock exchanges to not take penal action against any company for such non-compliance during this period.

III. Foreign Investment

Q1. What is foreign investment?

Foreign investment means any investment made by a person resident outside India on a repatriable basis in "**Equity Instruments**" of an Indian company or in the capital of a LLP. Please see our response to question 5 of this Chapter for a detailed description of Equity Instruments.

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

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

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

Q2. How is foreign investment regulated in India?

Foreign investment in India is primarily regulated by:

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

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

The key regulators that monitor foreign investment in India include:

- Central Government
  - which specifies permissible capital account transactions not involving debt instruments and frames rules in relation to the same in accordance with the provisions of FEMA.
- Reserve Bank of India ("**RBI**"):
  - which classifies permissible capital account transactions involving debt instruments and frames regulations in relation to the same in accordance with the provisions of FEMA; and
  - which is empowered to administer the NDI Rules, and interpret and issue directions, circulars, instructions and clarifications to implement the NDI Rules.

- DPIIT, which is:
  - responsible for making policy pronouncements on foreign investment; and
  - instrumental in administering the applications falling under the approval route, including referring these to the competent Ministry or Department of the GOI (Competent Authority), and holding joint reviews on pending proposals. To this end, DPIIT has established the Foreign Investment Facilitation Portal.
  - DPIIT's concurrence is mandatory for a Competent Authority to reject applications made under the Approval Route, and also for imposing additional conditions not provided in the FDI Policy or sectoral laws or regulations. Please see our response to question 4 of this Chapter for a detailed discussion on automatic and approval route.
- Competent Authority:
  - which considers applications for approval of foreign investment in the sectors over which it exercises oversight and monitors foreign investment in such sectors, in accordance with the FDI Policy, such as Ministry of Defense for defense sector related approvals, Ministry of Information and Broadcasting for broadcasting sector, and Ministry of Civil Aviation for the civil aviation sector. Previously, the task of granting approvals to applications for foreign investment was entrusted to the Foreign Investment Promotion Board, which was abolished in June 2017.

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

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

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

Q5. What are the recent changes in the foreign direct investment regime in India enforced under Press Note 3 of 2020 and the Foreign Exchange Management (Non-debt Instruments) Amendment Rules, 2020?

- The GOI issued Press Note 3 (2020 Series) on April 17, 2020 ("**Press Note**") and the corresponding Foreign Exchange Management (Non-debt Instrument) Amendment Rules, 2020 were also notified on April 22, 2020 ("**Amendment Rules**"), amending the foreign investment regime to curb the opportunistic takeovers / acquisitions of Indian companies. As per the Amendment Rules read with the Press Note, any foreign investment by or from an entity of any country sharing land borders with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, will require prior approval from GOI. The Amendment Rules and the Press Note also prescribe the requirement to obtain prior GOI approval where subsequent changes in beneficial ownership (by way of direct or indirect transfers) of any existing or future FDI would result in such beneficial ownership falling within the purview of such restriction. The Press Note and the Amendment Rules are unclear on several aspects, including in relation to, the definition and the scope of the term 'beneficial owner' and the requirement of prior approval from GOI for investments from Hong Kong, and clarifications in respect of the Press Note and the Amendment Rules are awaited from the GOI.

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

- In accordance with the NDI Rules, a foreign investor can invest in the following instruments (Equity Instruments):
  - equity shares (including partly paid equity shares);
  - fully, compulsorily and mandatorily convertible preference shares;
  - fully, compulsorily and mandatorily convertible debentures;
  - share warrants; and
  - depository receipts issued by foreign depositories against eligible securities .
- Partly paid shares issued to non-residents should be fully called-up within 12 months of such issue (except in certain limited cases). Furthermore, 25% of the total consideration amount (including share premium, if any) in respect of such shares should be received upfront. In case of share warrants at least 25% of the consideration should be received upfront and the remainder should be received within 18 months of issuance of share warrants.
- For convertible instruments the price or conversion formula should be determined upfront at the time of issue of the said instruments.
- Issuance of preference shares or debentures that are non-convertible, optionally convertible or partially convertible are considered as ECB and would be subject to compliance with extant regulations pertaining to ECB, discussed at question 20 of this Chapter.
- Equity Instruments can contain an optionality clause subject to a

minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price.

- An eligible foreign investor may invest in the units of Investment Vehicles such as Real Estate Investment Trusts, Infrastructure Investment Trusts, Alternative Investment Funds, mutual funds which invest more than 50% in equity.
- A foreign investor, not being a foreign portfolio investor or an FVCI, may make a capital contribution or acquire the profit share of an LLP in which FDI up to 100% is permitted under the automatic route and there are no FDI linked performance conditions attached, in accordance with FDI Policy and NDI Rules.

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

Foreign direct investment is prohibited in the following sectors:

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

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

Yes, the maximum permissible limit for foreign investment in an Indian company or sectoral cap (the extent of a specified percentage of the total capital of an entity) is determined by the sector in which the company is operating.

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

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

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

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

Foreign investment in India can be undertaken through the following ways:
Issuance of permissible instruments by a company:

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

Acquisition by way of transfer of existing shares:

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

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

- Resident to Non-resident: A person resident in India can transfer, by way of sale, Equity Instruments or units of an Investment Vehicle to a person resident outside India, subject to compliance with the conditions stipulated under NDI Rules and the FDI Policy (including sectoral caps, pricing guidelines, documentation and reporting requirements). Gift of such instruments by a resident to a person resident outside India will require the prior approval of RBI.
- Non-resident on the Stock Exchange: A person resident outside India can sell the Equity Instruments of an Indian company or units of Investment Vehicles (in case the same are listed) held by it on a repatriable basis, on a recognised stock exchange in India in the manner prescribed by SEBI.
- Further, a non-resident investor who has already acquired and continues to hold the control of an Indian company, in accordance with SEBI Takeover Regulations, can acquire shares of the listed Indian company on the stock exchange, subject to FDI Policy and NDI Rules.
- Purchase and sale of Equity Instruments of an Indian Company, capital of an LLP, convertible notes issued by start-ups or units of Investment Vehicles, by an NRI or an OCI, on non-repatriation basis, under NDI Rules, is deemed to be domestic investment at par with the investment made by residents. Further, a company, trust, and partnership firm incorporated outside India and owned and controlled by NRIs can invest in India under the special dispensation available to NRIs or OCIs under the FDI Policy and NDI Rules.

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

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

- Issue of Equity Instruments – the price of Equity Instruments issued to a person resident outside India should not be less than:
  - In case of an Indian company listed on a recognised stock exchange in India – the price worked out in accordance with the SEBI guidelines.
  - In case of an Indian company going through a delisting process – the offer price per share determined through a book building process under the SEBI Delisting Regulations wherein the floor price per share is determined in accordance with provisions of the SEBI Takeover Regulations relating to determination of "offer price".
  - In case of an Indian company not listed on a recognised stock exchange in India – the price of Equity Instruments issued to a non-resident cannot be less than the value of Equity Instruments determined as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a merchant banker (registered with SEBI) or a chartered accountant or a practicing cost accountant.
  - Where the issue of instruments is pursuant to a rights issue:
    - of a listed company, the issue price, subject to SEBI ICDR Regulations, is the price determined by the company;

    - where the investee company is not listed, the issue price cannot be less than the price offered to resident shareholders; and
    - after renunciation of rights from a person resident outside India, in accordance with the pricing guidelines for issuance of equity instruments (other than share warrants).
  - In case of convertible equity instruments, the price or conversion formula of the instrument is required to be determined upfront at the time of issue of the instrument. The price at the time of conversion should not in any case be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with NDI Rules.
  - However, where non-residents (including NRIs) are making investments in an Indian company by way of subscription to its MoA (subject to such non-resident's eligibility to invest under the FDI Policy), such investments may be made at face value.

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

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

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

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

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

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

certified by a merchant banker (registered with SEBI) or a chartered accountant or a practicing cost accountant.

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

Pricing for Swap of equity instruments

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

Pricing of optionality clauses

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

Pricing for LLPs

- Investments by foreign investors in LLPs are also subject to the applicable pricing guidelines as provided in Schedule 6 of NDI Rules.
- Investment in an LLP either by way of capital contribution or by way of acquisition or transfer of profit shares, should not be less than the fair price worked out in accordance with any valuation norm which is internationally accepted or adopted in accordance with market practice and a valuation certificate to that effect should be issued by a chartered accountant or by a practicing cost accountant or by an approved valuer from the panel maintained by the central government.
- In case of transfer of capital contribution or profit share of an LLP:
  - from a person resident in India to a person resident outside India, the transfer should be for a consideration not less than the fair price of capital contribution/ profit share of an LLP.
  - from a person resident outside India to a person resident in India, the transfer should be for a consideration which is not more than the fair price of the capital contribution/profit share of an LLP.

Pricing of partly paid shares and share warrants

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

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

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

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

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

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

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

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

- The reporting of transfer of shares from a person resident in India to a person resident outside India and vice versa has to be made in Form FC-TRS, which should be submitted by the transferor/ transferee who is resident in India, within 60 days of transfer of Equity Instruments or receipt or remittance funds whichever is earlier. The onus of reporting is on the resident transferor/transferee or the person resident outside India holding Equity Instruments on a non-repatriable basis, as the case may be.
- SMF had been made effective from September 1, 2018 for filing five forms, including Form FC-GPR, Form FC-TRS, Form LLP-I, Form LLP-II and Form CN, for facilitating the ease of doing business in India. Other four forms viz., ESOP, DI, DRR and InVi have now been made available for filing subsequently.
- In the event there is any delay in such reporting, the person/entity responsible for such reporting will be liable for payment of late submission fee, as may be determined by RBI.

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

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

The foreign portfolio investor needs to have a valid registration as long as it continues to hold securities or derivatives in India, however, a foreign portfolio investor whose registration is not valid and who is holding securities or derivatives in India is permitted to sell such securities or wind up their open position in derivatives till September 22, 2020.

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

- As Category I foreign portfolio investors, if such persons are:
  - Government and government related investors such as central banks, sovereign wealth funds, international or multilateral organizations or agencies including entities controlled or at least 75% directly or indirectly owned by such government and government related investor(s);
  - Pension funds and university funds;
  - Appropriately regulated entities such as insurance or reinsurance entities, banks, asset management companies, investment managers, investment advisors, portfolio managers, broker dealers and swap dealers;
  - Entities from the financial action task force member countries or from any country specified by the central government by way of any order

or an agreement or treat with other sovereign governments, which are – appropriately regulated funds; unregulated funds whose investment manager is appropriately regulated and registered as a Category I foreign portfolio investor (Provided that the investment manager undertakes the responsibility of all the acts of commission or omission of such unregulated fund); and university related endowments of such universities that have been in existence for more than five years;

   – An entity (A) whose investment manager is from the financial action task force member country and such an investment manager is registered as a Category I foreign portfolio investor; or (B) which is at least seventy-five per cent owned, directly or indirectly by another entity, eligible under the aforementioned sub-clauses of Category I foreign portfolio investors, and such an eligible entity is from a financial action task force member country: (Provided that such an investment manager or eligible entity undertakes the responsibility of all the acts of commission or omission of the applicants seeking registration under this criteria.)

- As Category II foreign portfolio investors, if such persons are not eligible under Category I foreign portfolio investors.
- An applicant incorporated or established in an international financial services center is deemed to be appropriately regulated for the purposes of the SEBI FPI regulations.

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

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

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

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

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

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

- All transactions of the FPI are subject to process restrictions and specifications prescribed by SEBI and must necessarily be through stock brokers registered with SEBI, except in certain cases.

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

Q17. Who is an FVCI?

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

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

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

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

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

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

- An FVCI is required to designate its investible funds for investment into India at the time of seeking registration. Accordingly, the investment conditions and restrictions would be applicable with respect to such investible funds. The conditions concerning investible funds are required to be satisfied by the end of its life cycle;

- A registered FVCI must maintain a prescribed asset composition of its investible funds:
  - where 66.67% of its investible funds must be invested in unlisted equity shares or equity linked instruments (i.e. instruments convertible into equity shares or share warrants, preference shares, debentures compulsorily or optionally convertible into equity) of VCUs (i.e. Indian companies whose shares are not listed on any recognised stock exchange in India and which are not engaged in certain specified business) or investee companies;
  - whilst 33.33% of its investible funds may be invested, inter alia, by way of subscription to an IPO of a VCU or investee company, whose shares are proposed to be listed or debt or debt instruments of VCU or investee company in which FVCI already has investment by way of equity or through preferential allotment of equity shares of a listed company (subject to a lock-in period of one year) or through special purpose vehicles which are created for the purpose of facilitating or promoting investment in accordance with the SEBI FVCI Regulations.
- An FVCI can invest its total funds committed in one VCF or Category I AIF or units of a scheme or of a fund set up by a VCF or by a Cat-I AIF.
- An FVCI may, however, not invest in securities of a VCU engaged in most categories of NBFCs, gold financing, activities or any other activity not permitted under the industrial policy of the GOI. Presently, FVCIs are permitted to invest in securities of companies which are not listed on stock exchanges at the time of issuance and which are engaged in any sector out of a list of 10 prescribed sectors. These are biotechnology, IT related to hardware and software development, nanotechnology, seed research and development, research and development of new chemical entities in pharmaceutical sector, dairy industry, poultry industry, production of bio-fuels, hotel-cum-convention centres with seating capacity of more than 3,000, and infrastructure sector.

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

Pursuant to the GOI's stated objective of promoting the ease of doing business and contributing to an eco-system conducive for growth of entrepreneurship, RBI has brought about necessary amendments to enable start-up initiatives, irrespective of the sector in which they are engaged, to receive foreign venture capital investment. FVCIs registered under the SEBI FVCI Regulations, have now been permitted to invest in equity, equity linked instruments or debt instruments issued by eligible start-ups, irrespective of the sector in which such start-up is engaged, without seeking any prior approval of RBI. Further, FVCIs have been permitted to acquire from, or transfer any security or instrument held by them to, any resident or non- resident at a price mutually acceptable to the parties.

Further, NDI Rules enables foreign investors (not being entities or persons who are registered in or are citizens, as applicable, of Pakistan and Bangladesh) to purchase convertible notes issued by eligible start-up companies (that is, duly formed private companies recognised as start-ups by the DPIIT) for an amount of INR 25 lakhs (approx. USD 33,500) or more in a single tranche. Issue of shares against such convertible notes would have to be in accordance with Schedule I of NDI Rules. Acquisition or transfer by way of sale of convertible notes by a person resident outside India to or from another person resident in or outside India, would take place in accordance with pricing guidelines prescribed by RBI. If such eligible start-up companies are engaged in sectors which are in the approval route, prior approval from government would have to be obtained for such issuance or transfer of convertible notes.

Q21. What are the ECB norms in India?

ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, *etc*. Foreign investment in partially or optionally or non-convertible preference shares, bonds, debentures, is also construed as an ECB and would be subject to the ECB norms under FEMA. The ECB framework is not applicable in respect of investments in non-convertible debentures in India made by FPI.

ECBs are governed by RBI's Master Directions on ECB and various regulations issued under FEMA, including the Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and the Foreign Exchange Management (Guarantees) Regulations, 2000. The parameters apply in totality and not on a standalone basis.

The RBI has also issued the Foreign Exchange Management (Debt Instruments) Regulations, 2019 on October 17, 2019, which governs investments by FPIs, NRIs and OCIs in debt instruments such as government securities, treasury bills, non-convertible debentures/ bonds issued by an Indian company, security receipts issued by asset reconstruction companies, debt instruments issued by banks that are eligible for inclusion in regulatory capital, bonds issued by PSUs, amongst others.

The Master Directions on ECB enable permitted resident entities to borrow from recognized non-resident entities in the following forms:

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

ECBs may be accessed under two routes:

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

The revised framework for raising loans through ECB comprises the following options:

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

Under the new framework, all entities eligible to receive FDI are considered as eligible borrowers. Further, the following entities are also eligible to raise ECB:

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

Recognised lenders and investors under the new framework should be resident of FATF or IOSCO compliant country, including on transfer of ECBs. However,

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

RBI has prescribed the all-in-cost ceiling in of the ECBs through a spread over the benchmark, *i.e.*, 450 basis points per annum. Benchmark rate in case of foreign currency denominated ECB refers to six-month London Interbank Offered Rate (LIBOR) rate of different currencies or any other six-month interbank interest rate applicable to the currency of borrowing, for *eg.*, Euro Interbank Offered Rate (EURIBOR). Benchmark rate in case of Rupee denominated ECB will be prevailing yield of the GOI securities of corresponding maturity.

RBI has stipulated the MAMP as three years. However, manufacturing sector companies may raise ECBs with MAMP of one year for ECB up to USD 50 million or its equivalent per financial year. Further, if the ECB is raised from foreign equity holder and utilised for working capital purposes, general corporate purposes or repayment of Rupee loans, MAMP would be five years. ECBs with a MAMP of 10 years can be raised for working capital purposes and general corporate purposes. Borrowing by NBFCs for the above maturity for on lending for the above purposes is also permitted. ECBs with a MAMP of seven years can be availed for repayment of Rupee loans availed domestically for capital expenditure as also by NBFCs for on-lending for the same purpose. For repayment of Rupee loans availed domestically for purposes other than capital expenditure and for on-lending by NBFCs for the same, the MAMP is required to be 10 years.

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

ECB for Start-Ups

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

- **Recognised Lender**

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

- **Amount, All-in-Costs, End-Use Restrictions**

  ECB raised under this framework should not exceed USD 3 million per financial year and may be raised in any freely convertible currency or INR or combination of both. No all-in-cost ceiling has been prescribed and can be mutually agreed upon between the lender and the borrower and ECB under this framework may be raised for any expenditure in connection with the business of the borrower.

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

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

Non-convertible or optionally convertible preference shares and bonds are treated as an ECB and the rate of interest has to be within the limits provided in the ECB policy.

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

IV. Overseas Investments

Q1. How are overseas investments regulated?

Overseas investment from India is primarily regulated by:

- FEMA; and
- the regulations and directions issued by way of notifications by RBI under FEMA including in particular the FEMA 120 read with the RBI's Master Directions on Direct Investment by Residents in Joint Venture / Wholly Owned Subsidiary Abroad dated January 1, 2016, as amended from time to time.

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

FEMA prescribes two categories of overseas investments:

- direct investment outside India; and
- investments in foreign securities other than by way of direct investment.

Overseas investments may be made through the following two routes:

- the automatic route (i.e. without the approval of RBI); or
- the approval route (i.e. with the approval of RBI).

Indian residents also have general permission to:

- purchase foreign securities out of funds in their resident foreign currency (RFC) accounts, in accordance with applicable law;
- acquire bonus shares on existing holding of foreign securities, held in accordance with applicable law;
- purchase foreign securities from their foreign currency resources outside India, when not permanently resident in India;
- sell foreign securities purchased or acquired in accordance with (i) to (iii) above; and
- acquire foreign securities under the LRS formulated by RBI. Please refer to question 21 of this Chapter for further information on the LRS.

Q3. What is direct investment outside India?

ODI refers to investments by eligible residents by way of contribution to the capital or subscription to the MoA of a foreign entity or by way of purchase of existing shares of a foreign entity, either by market purchase or private placement or through stock exchanges, but does not include "portfolio investment".

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

ODI can be made by any of the following persons (Indian Party) under the automatic route:

- a company incorporated in India;

- a body created under an Act of Parliament;
- a partnership firm registered under the Partnership Act;
- an LLP registered under the LLP Act; or
- any other entity as may be notified by RBI.

Eligible resident individuals (RIs) have been permitted to undertake ODI in the equity shares and compulsorily convertible preference shares of a JV / WOS outside India. Investments by such RIs must be within the overall limit prescribed by RBI under LRS and must be subject to other prescribed conditions. In addition to the above, an RI may acquire foreign securities in other ways detailed under our response to question 22 of this Chapter.

Q5. In which sectors is ODI permitted?

ODI is permitted in relation to bona fide activities in all sectors (other than as specified below) subject to the regulations governing the same.

ODI by Indian Parties in entities engaged in the 'real estate business' and 'banking business' is not permitted without prior permission of RBI. 'Real estate' business means buying and selling of real estate or trading in transferable development rights, but does not include development of townships, construction of residential or commercial premises, roads or bridges.

An overseas entity, having direct or indirect equity participation by an Indian Party, must not offer financial products linked to the Indian Rupee without the specific approval of RBI.

Special conditions are applicable to investment by Indian Parties engaged in financial services sector (in addition to the general conditions as applicable to ODI described below) including *inter alia*:

- the Indian Party should have earned net profit during the preceding three financial years from financial services activities;
- the Indian Party should be registered with the regulatory authority in India for conducting the financial services activity;
- the Indian Party should obtain approval from the concerned regulatory authorities both in India and abroad, for investment in such financial sector activities;
- the Indian Party should fulfill the prudential norms relating to capital adequacy as prescribed by the concerned regulatory authority in India.

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

In terms of FEMA 120 and applicable notifications issued by RBI, ODI made by an Indian Party is subject to, *inter alia*, the following conditions:

- The 'total financial commitment' of the Indian Party in the JV or WOS must not exceed the eligible limit, i.e. 400% of the net worth of the Indian Party as on the date of the last audited balance sheet. This eligible limit of

400% may be changed by RBI from time to time. However, any financial commitment in excess of USD 1 billion, or its equivalent, in a financial year, would require prior approval of RBI even when the total financial commitment is within the eligible limit.

- The ceiling of 400% of the net worth is not applicable to the investments made out of balances held in EEFC Accounts and out of the proceeds of ADR or GDR issue.
- ODI should be made in an overseas JV or WOS engaged in a bona fide business activity.
- ODI should not be in companies engaged in real estate or banking business, as explained above.
- The Indian Party should not be on RBI's exporters' caution list or list of defaulters to the banking system circulated by RBI or the Credit Information Bureau (India) Ltd. or any other credit information company as approved by RBI or under investigation by any investigation or enforcement agency or regulatory body.
- The Indian Party must route all transactions relating to the investment through only one branch of an authorised dealer bank to be designated by it.
- The Indian Party must submit up to date returns in respect of all its overseas investments.
- Investments or financial commitments in Pakistan by Indian Parties are permissible under the approval route. Investments in Nepal can be only in Indian Rupees. Investments in Bhutan are allowed in Indian Rupees and in freely convertible currencies.
- The Indian Party or entity may extend a loan or guarantee only to an overseas JV or WOS in which it has equity participation, as detailed below.
- Investments or financial commitments by an Indian Party are not permitted in an overseas entity (set up or acquired abroad directly as JV or WOS or indirectly as step down subsidiary) located in the countries identified by the FATF as "non-cooperative countries and territories" as per the list available on the FATF website (www.fatf-gafi.org) or as notified by RBI from time to time.
- An Indian Party can neither set up a step-down subsidiary/joint venture in India through its foreign entity (WOS/JV), nor acquire a WOS or invest in a JV that already has direct or indirect investment in India under the automatic route. However, the Indian parties may choose to approach the RBI for prior approval, through their authorized dealer bank.

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

For the purposes of determining the 'total financial commitment' of the Indian Party in all JVs or WOS, the following are, *inter alia*, to be reckoned:

- 100% of the amount of equity shares and/ or Compulsorily Convertible Preference Shares;
- 100% of the amount of other preference shares;
- 100% of the amount of loan;
- 100% of the value of guarantees (other than performance guarantee) issued by the Indian Party to or on behalf of the JV or WOS;

- 50% of the value of performance guarantees issued by the Indian Party to or on behalf of its overseas JV or WOS, provided that if the outflow on account of invocation of performance guarantee results in the breach of the eligible limit of the financial commitment in force, prior permission of RBI must to be obtained before remitting funds from India beyond the limit prescribed for the total financial commitment.
- 100% of the value of the bank guarantee(s) issued by a resident bank on behalf of an overseas JV or WOS of the Indian Party, which is backed by a counter guarantee or collateral by the Indian Party.

Net worth, for the purposes of ODI, means paid up capital and free reserves. For the purposes of reckoning net worth of an Indian Party, the net worth of its holding company (holding at least 51% stake in the Indian Party) or its subsidiary company (in which the Indian Party holds at least 51% stake) may be taken into account, to the extent not availed by the holding company or the subsidiary, independently. Further, such holding company or subsidiary company is required to furnish a letter of disclaimer to this effect in favour of the Indian Party.

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

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

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

Investment in an overseas JV or WOS may be funded out of one or more of the following sources:

- drawal of foreign exchange from an authorised dealer bank in India;
- swap of shares undertaken, where valuation is done in the manner specified in the answer to question 10 below;
- capitalisation of exports and other dues and entitlements;
- proceeds of ECBs or FCCBs;
- in exchange of ADRs or GDRs;
- out of balances held in EEFC accounts; or
- proceeds of foreign currency funds raised through ADR or GDR issues.

As stated above, (i) the ceiling of 400% of the net worth is not applicable to the investments made out of balances held in EEFC Accounts and out of the proceeds of ADR or GDR issue; and (ii) persons resident in India are allowed to purchase or acquire foreign securities:

- out of funds in their RFC accounts;
- as bonus shares on existing holding of foreign securities;
- from foreign currency resources outside India, when not permanently resident in India.

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

In case the shares of an existing company outside India are being acquired, partially or fully, valuation of the shares should be undertaken by:

- If the investment is more than USD 5 million, by a Category I merchant banker registered with SEBI, or an investment banker or a merchant banker outside India and registered with appropriate regulatory authorities in the country in which the JV or WOS is registered or incorporated; and
- In all other cases, by a chartered accountant or a certified public accountant.

In case of investment by swap of shares, irrespective of the amount, the valuation of shares of the foreign company must be undertaken by a Category I merchant banker registered with SEBI or an investment banker / merchant banker outside India registered with the appropriate regulatory authority in the host country.

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

An Indian Party eligible under the automatic route to make the proposed investment may remit earnest money deposit or bid bond guarantee for acquisition of a foreign company through bidding and tender procedure. Parties who are not eligible under the automatic route need to apply to RBI for its approval.

In the event that the Indian Party is successful in the tender process but the terms are: (a) not in conformity with the provisions of relevant regulations; or (b) different from those for which approval was previously obtained under applicable regulations; then under such circumstances the Indian Party may make an application to RBI for its approval. In the event that the Indian Party is successful in the tender process and the terms and conditions of acquisition are: (a) in conformity with the relevant regulations; or are (b) the same as those for which approval was obtained, the Indian Party only needs to report the details of remittance made after effecting final remittance, in the prescribed manner.

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

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

- prima facie viability of the JV or WOS outside India;
- contribution to external trade and other benefits which will accrue to India through the investment;
- financial position and business track record of the Indian investor and the foreign entity; and

- expertise and experience of the Indian Party in the same or related line of activity of the JV or WOS outside India.

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

Indian Parties are permitted to issue guarantees on behalf of JVs or WOSs in which the Indian Party has equity participation. Guarantees may also be provided by the Indian Party's promoter company, group company or sister concern or associate entities in India. Guarantees furnished may be corporate or personal or performance based. However, all financial commitments including all forms of guarantees (except performance guarantees as set out below) should be within the overall limit of 400% of the net worth of the Indian Party. No guarantee can be 'open ended', that is, the amount and period of the guarantee must be specified upfront. In case of performance guarantee, time specified for the completion of the contract shall be the validity period of the related performance guarantee.

Subject to the conditions that financial commitment of the Indian party is within the prescribed limit, Indian Parties are permitted to issue corporate guarantees on behalf of their first level step down operating JV or WOS set up by their JV or WOS operating either as an operating unit or as an SPV, under the automatic route. Such guarantees are required to be reported to the RBI through the authorized dealer category-I bank at the time of issuance of such guarantees. Further, the issuance of corporate guarantee on behalf of second generation or subsequent level step down operating subsidiaries will be considered under the approval route (that is, with the approval of RBI) if the Indian Party indirectly holds 51% or more stake in the overseas subsidiary for which such guarantee is intended to be issued.

Further, where the invocation of performance guarantee breaches the prescribed limit of financial commitment in force, prior permission of RBI must be obtained before executing remittances beyond the prescribed limit. Subject to the above discussions, if the ODI has been made under the automatic route, then no further approval is required at the time of enforcement of the guarantee. If the ODI has been made under the approval route, and RBI's approval has already been sought and obtained for remittances under the guarantee; then the enforcement of the same would not require further RBI approval.

Indian companies or their authorised dealer banks are not allowed to issue any direct or indirect guarantee or create any contingent liability or offer any security in any form for borrowings by their overseas holding, associate, subsidiary or group companies, except for the purposes explicitly permitted. Additionally, funds so raised by such overseas holding, associate, subsidiary or group companies with the support of Indian company or authorised dealer banks cannot be used in India, unless they conform to general or specific permissions or requirements under relevant regulations.

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

Indian banks are permitted to extend financial assistance to Indian companies for acquisition of equity in overseas JVs or WOSs or in other overseas companies, new or existing, as strategic investment. Indian Parties also have the option of funding overseas acquisitions through ECBs subject to compliance with the regulations governing ECB and satisfaction of the conditions applicable to ODI under the automatic route. In such a case, the acquirer must comply with provisions of Section 186 of the Companies Act, which contains restrictions on loans and investments.

Q15. Is an Indian Party permitted to pledge its shares in the offshore JV or WOS?

An Indian Party is permitted to pledge the shares it holds in its JV, WOS or step down subsidiary abroad as security for availing fund based or non-fund based facilities for itself or for the JV, WOS or step down subsidiary from an authorised dealer banks or a public financial institution in India or an overseas lender, subject to terms and conditions prescribed in this regard. Further the value of facility (fund based or non-fund based) so availed, will be reckoned as financial commitment of the Indian Party. Where the facility in this regard is being availed from an overseas lender, such overseas lender should be supervised and regulated as a bank as per the law of the host country.

Q16. Can the investment in the overseas JV or WOS be made through an SPV?

RBI has permitted the establishment of SPVs for further establishment or acquisitions of JV or WOS abroad under the automatic route, subject to the condition that the Indian Party is not included in RBI's caution list or under investigation by the Directorate of Enforcement (ED) or included in the list of defaulters to the banking system circulated by RBI or any credit information company as approved by RBI. Indian Parties whose name appears in the defaulters list require prior approval of RBI for investment.

Direct investment through the medium of an SPV is permitted under the automatic route, for the sole purpose of investment in JV or WOS overseas. Where the JV or WOS has been established through an SPV, all funding to the operating step down subsidiary should be routed through the SPV only. However, in the case of guarantees to be given on behalf of the first level step down operating subsidiary, these can be given directly by the Indian Party provided such exposures are within the permissible financial commitment of the Indian Party.

Q17. Can an Indian Party make overseas investment by way of exchange or swap of shares of an Indian company?

Yes. In case an Indian Party makes an ODI by way of swap of shares, approvals may be required under the NDI Rules depending on the sectors in which the companies operate.

Q18. What are the reporting requirements incumbent on the investor in relation to ODI?

The investor is required to make an application for remittance of foreign exchange to the authorised dealer bank under the automatic route in the prescribed form for ODI. For investment in the financial services sector, the prescribed form would have to be accompanied by the requisite approvals, proof of registration etc.

An APR, is required to be submitted to RBI through the authorised dealer bank, every year on or before December 31, based on the audited annual accounts of the JV or WOS for the preceding year. Where the law of the host country does not mandatorily require auditing of the books of account of JV or WOS, the APR may be submitted based on the un-audited annual accounts of the JV or WOS provided the same is certified by the statutory auditors of the Indian Party, and the un-audited accounts of the JV or WOS have been adopted and ratified by the Board of the Indian Party. The said exemption is not available in respect of JV or WOS in a country which is either under the observation of the FATF or in respect of which enhanced due diligence is recommended by FATF or any other country as prescribed by RBI.

Q19. Apart from the reporting and approval requirements, are there any other obligations which an Indian Party needs to fulfil in relation to ODI?

An Indian Party which has made direct investment abroad is required to:

- receive share certificates or any other document as an evidence of investment in the foreign entity within six months (extendable by RBI), from the date of effecting remittance or the date on which the amount to be capitalised became due to the Indian Party or on the date on which the amount due was allowed to be capitalised;
- repatriate to India all dues receivable from the foreign entity such as dividends, royalties, technical fees etc., within 60 days (extendable by RBI) of its falling due;
- report the details of the decisions taken by a JV or WOS regarding diversification of its activities, setting up of step down subsidiaries, or alteration in its share holding pattern within 30 days of the approval of those decisions by the competent authority of the JV or WOS concerned in terms of local laws of the host country and include the same in the APR;
- submit the APR to the AD, based on the annual accounts of the JV or WOS for the preceding year; and
- submit an annual return on foreign liabilities and assets to RBI.

Q20. Is Portfolio investment overseas by a listed Indian entity permitted?

Listed Indian companies are permitted to invest up to 50% of their net worth (determined as on the date of the last audited balance sheet) in:

- shares issued by listed overseas companies; and
- bonds or fixed income securities, rated not below investment grade by accredited or registered credit rating agencies, issued by listed overseas companies.

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

RBI has given general permission to Indian RIs to acquire foreign securities in the manner specified in the answer to question 22 below.

Under the LRS, RIs are permitted to remit up to USD 250,000 per financial year (April to March) outside India to undertake any permitted current or capital account transaction or a combination of both which includes acquisition of shares, debt instruments of overseas listed companies or otherwise, and hold immoveable property subject to certain conditions. Further, please refer to our above discussions, under this Chapter where we have discussed permissions granted to eligible RIs to undertake ODI.

In all other cases, not covered by the general or special permission, an RI would need to obtain approval from RBI before acquiring a foreign security.

Q22. What kind of overseas investments other than direct investments outside India are permissible under Indian law?

A person resident in India, being an individual, (that is, an RI) may acquire foreign securities by way of:

- gift from a person resident outside India;
- inheritance from a person who may or may not be a resident in India;
- issuance by a foreign company under the cashless ESOP scheme, provided it does not involve any remittance from India;
- rights issue made by a foreign company provided that the rights shares are being issued by virtue of holding shares in accordance with applicable law;
- qualification shares for holding post of a director in the foreign company, to the extent prescribed as per the law of the host country where the company is located provided it does not exceed the ceiling as prescribed under the LRS at the time of acquisition;
- purchase of foreign securities under an ESOP scheme where the investor is an employee or director in (a) an Indian office or branch of a foreign company; or (b) an Indian subsidiary of a foreign company; or (c) an Indian company in which there is foreign equity holding, direct or indirect (through an SPV or step-down subsidiary), irrespective of the percentage of the direct or indirect equity stake in the Indian company, provided that the shares under the ESOP scheme are offered (A) globally on a uniform basis; and (B) an annual return is submitted by the Indian company to RBI giving details of remittances and beneficiaries etc.;
- purchase of foreign securities where such person is an employee or

director of an Indian software company which is a promoter of a foreign JV or WOS; provided that: (a) the consideration for purchase does not exceed the ceiling as stipulated by RBI from time to time; (b) the shares so acquired do not exceed 5% of the paid-up capital of the JV or WOS outside India; and (c) after allotment of such shares, the shares held by the Indian promoter company together with the shares allotted to its employees is not less than the percentage of shares held by the Indian promoter company prior to such allotment; and

- purchase of foreign securities under ADR or GDR linked stock option schemes by resident employees (including working directors) of Indian companies in the knowledge based sectors, provided that the purchase consideration does not exceed the ceiling as stipulated by RBI from time to time.

V. Acquisition of Shares

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

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

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

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

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

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

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

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

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

The issuance of such shares should also be authorised by the AoA of such company. The preferential allotment will also have to comply with the provisions of the Companies Act governing the private placement of securities which includes the requirement of issuance of a private placement offer cum application letter, restrictions on the number of people to whom the offer may be made, limitations on the release of public advertisements or marketing of the offer, *etc*. The Companies (Prospectus and Allotment of Securities) Rules, 2014 also restrict the utilization of monies raised through private placement (retained in a designated bank account) until allotment is made and the return of allotment is filed with the RoC within 15 days from the date of allotment, and prescribe the penalty for non-filing of return of allotment within prescribed time period. The Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2018 also dispensed with the erstwhile minimum investment size of at least INR 20 thousand (approx. USD 268) of the face value of securities.

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

- the eligibility requirement for the acquirer to participate in a preferential allotment;
- the process and the approvals of the shareholders and the stock exchanges required for such preferential allotment;
- the time period within which the allotment process is required to be completed;
- the process for determination of the price at which the acquirer can subscribe to the shares; and
- the lock-in on the pre-preferential shareholding of the acquirer and the lock-in on the shares and instruments convertible into shares, that are preferentially allotted to non-promoters or promoters of the company as the case may be.

The necessity for obtaining regulatory approvals in the case of foreign investors seeking to subscribe to shares under the FDI route or the FPI route would be dependent on the activities of the target company and whether investment in companies carrying out such activities is permitted to be made under the automatic route under the applicable FEMA regulations. A post facto filing in the prescribed form would have to be made to RBI reporting the subscription of shares as discussed in our Chapter 3 on Foreign Investment.

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

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

- Negotiated sale off the exchange: A seller may sell its shares to resident Indians or non-residents through a negotiated deal. In this regard, please note the following:
  - Non-resident to Non-resident: A person resident outside India (other than an NRI or an OCI or an erstwhile OCB) can transfer, by way of

sale or gift, Equity Instruments (as defined under Foreign Exchange Management (Non-debt Instruments) Rules, 2019 ("NDI Rules")) of an Indian company or units held by it to any person resident outside India.

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

- Qualified IPO or sponsored ADR / GDR:
  - In case the target company is an unlisted company, the seller may require that the company undertake an IPO and list the shares on a stock exchange. In such cases, the seller would have the option to offer for sale its shareholding in the target company as part of the listing process or exit thereafter. However, such an exit would be subject to compliance with the SEBI ICDR Regulations and the SEBI Listing Regulations which typically require special rights to fall away at listing as well. There would also be considerations in terms of the SEBI Insider Trading Regulations particularly in view of the offer document which will be released to the public at which time no other UPSI can be made available to specific persons.

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

- Buy-back by the company: The target company may buy-back the shares held by the seller. Under the Companies Act, a company can buy-back only up to 25% of its total paid-up equity share capital in a single financial year, and not more than 25% of the company's paid up capital and free reserves. The buy-back may only be funded out of the proceeds of a fresh issue of securities (other than securities of the variety being bought back), the securities premium account or the company's free reserves. The debt owed by the company should not exceed twice its capital and free reserves after such buy-back. Further, unless the buy-back is of 10% of the total paid-up equity capital and free reserves or less, it would require the approval of the shareholders at a general meeting by way of a special resolution. The buy-back offer is required to be made on a pro-rata basis to the existing shareholders. Listed companies would have to additionally comply with the provisions of SEBI (Buy-back of Securities) Regulations, 2018. Companies with non-resident shareholders would have to ensure compliance with the NDI Rules and applicable foreign exchange regulations.
- On an Indian stock exchange: In the case of target companies which are listed, a seller (including a non-resident seller) is permitted to sell its investment on the stock exchange subject to the conditions specified under the NDI Rules. Subject to the sale being at the prevailing market price, the investor may freely repatriate the sale proceeds outside India upon payment of applicable taxes.

A sale of shares on the floor of a stock exchange cannot typically be made to an identified buyer. A special provision has however been made for the consummation of large transactions on the exchange which are pursuant to private arrangements concluded off the exchange for the sale and purchase of shares of listed companies. Such transactions are required to be completed on the 'block trade' window of the stock exchange, which is operational for a specified period of the day, and is required to be done between an identified buyer and an identified seller. A revised mechanism has been put in place by SEBI with effect from January 1, 2018 in respect of block deals. Under the revised mechanism, the transaction has to be concluded at a price which is within 1% of the applicable block reference price. The reference price for execution of block deals in the morning block deal window will be the previous day closing price or adjusted previous close price (on account of corporate action) of the security. If security is not traded on the previous day then the latest available close price will be considered. The reference price for block deals in the afternoon block deal window will be the volume weighted average market price of the trades executed in the stock in the cash segment between 1:45 PM to 2:00 PM. If trades are not executed between 1:45 PM to 2:00 PM, the reference price considered will be previous close price of that security. The minimum order value for block deal should be INR 10 crores (approx. USD 1.34 million). There is no specific requirement of minimum order quantity applicable for a block deals. Further, by way of an amendment to the SEBI Takeover Regulations, with effect from July 1, 2020, SEBI has now permitted acquirers to acquire such shares of listed companies through preferential issue or through the stock exchange settlement process through the block trade mechanism as well, subject to compliance with certain conditions.

Please refer to Chapter III on Foreign Investments for further details on transfer of equity instruments by non-residents.

Remittance of profits

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

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

Please refer to our response to question 10 under Chapter 3 on Foreign Investments, for a discussion on pricing restrictions applicable to foreign investors in case of subscription as well as acquisition of shares and other equity instruments.

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

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

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

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

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

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

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

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

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

Please refer to Chapter III on Foreign Investments for further discussion on Equity Instruments with optionality clauses.

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

In practice, an acquirer enters into a shareholders' agreement with the other shareholders of the company for setting out terms and conditions of operation and management of a company. As is standard practice globally, a shareholders' agreement, typically, records and sets out, amongst others, the mutual rights and obligations inter se the shareholders; the manner in which the company would be managed and governed including matters concerning the right to appoint directors, affirmative voting rights, restrictive covenants and transfer restrictions on the shares held by the parties to the agreement. As an additional step to make such agreements binding and enforceable on the company, provisions of such agreements are also incorporated into the AoA of the company. The issue of enforceability of transfer restrictions in case of the shares of a public company has been the subject matter of judicial scrutiny and conflicting judgments. However, the Companies Act clarifies that any contract or arrangement between two or more persons in respect of transfer of securities of a public company would be enforceable as a contract inter se the parties. However, as indicated above, in the event such company proposes to undertake an IPO, special rights granted to any shareholder including in relation to governance and transfer of equity shares, will have to cease to exist with effect from the date of listing of the equity shares on the relevant stock exchanges. Such rights may be revived post listing subject to approval of the shareholders of the company. Recently, SEBI introduced amendments to SEBI Regulations to clarify the treatment of shares with superior voting rights ("**SR Equity Shares**"). SEBI has now permitted certain categories of listed entities with SR Equity Shares issued to their promoters or founders, to issue further SR Equity Shares to its shareholders who already hold SR Equity Shares only through a bonus, split or rights issue in accordance with the provisions of the SEBI ICDR Regulations and the Companies Act. Such companies are also subject to a higher standard of corporate governance under the Listing Regulations (for instance, at least half the board of such listed company shall comprise of independent directors, and the audit committee of such listed company is required to comprise of independent directors only).

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

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

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

An act of subscribing, buying, selling, dealing, or agreeing to subscribe, buy, sell, deal in any listed securities by any person, whether principal or agent, would be 'trading' in securities for the purpose of SEBI Insider Trading Regulations. The communication of UPSI in furtherance of a legitimate purpose, performance of duties or discharge of legal obligations is not prohibited. All such information is to be shared on a need to know basis.

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

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

- Every listed, or proposed to be listed company is mandatorily required to maintain a digital database containing the names and Legal Identifiers (as defined under the SEBI Insider Trading Regulations) of all persons or entities who receive the company's UPSI; and

- The Board of every listed company is required to formulate a code of conduct in accordance with the SEBI Insider Trading Regulations.

The SEBI Insider Trading Regulations have been further amended by the Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2020 which has sought to strengthen the digital database to be maintained by the listed companies by requiring it to contain the nature of UPSI and the names of the persons who have shared the information and the names of the persons with whom such UPSI has been shared together with their PAN or other identifiers. Such database is also not permitted to be outsourced and is required to be maintained internally with adequate internal controls and checks such as time stamping and audit trails to ensure non-tampering of the database. Further, such database is also required to be preserved for period of at least 8 years after completion of the relevant transactions. In the event of any investigation or enforcement proceedings such database is required to be preserved till the completion of such proceedings.

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

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

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

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

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

- Investing companies with foreign investment / foreign owned operating cum investing companies are not permitted to leverage funds from the domestic market for making downstream investments in India;
- Prohibition on the use of foreign debt for investment in capital markets under the end-use restrictions imposed by the guidelines governing ECB;
- Restrictions under the Banking Regulation Act, 1949 on banks holding

shares in a company beyond a prescribed threshold, including as a pledgee, mortgagee or absolute owner.

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

The SEBI Takeover Regulations, the SEBI Listing Regulations and the SEBI Insider Trading Regulations prescribe continual and periodic disclosures in relation to acquisitions or changes to shareholding by shareholders holding above prescribed thresholds, to be made in the prescribed format to the target company and the stock exchange(s). Separate disclosure as well as reporting requirements under the foreign exchange rules would apply depending upon the route for the investment. Please refer to the response to question 15 under the Chapter on Takeovers.

VI. Private Equity

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

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

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

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

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

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

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

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

AIFs are categorized as follows:

- *Category I AIFs*: Funds which invest in start-ups, early stage ventures, social ventures, small or medium enterprises, infrastructure or other areas which the government or regulators consider as socially or economically desirable. This includes venture capital funds, SME funds, social venture funds, angel funds and infrastructure funds.
- *Category II AIFs*: Funds which do not fall within Category I or Category II, and which does not undertake leverage or borrowing other than to meet day-today operational requirements and as permitted. PE funds typically fall within this category.
- *Category III AIFs*: Funds which invest in employs diverse or complex trading strategies and may employ leverage including through investment in listed or unlisted derivatives. This includes hedge funds or funds which trade with a view to make short term returns.

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

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

- Category I and II AIFs can invest not more than 25% of the investable funds in one investee company.
- Category III AIFs can invest not more than 10% of the investable funds in one investee company.
- AIFs cannot invest in associates except with the approval of 75% of investors by value of their investment in the AIF.

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

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

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

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

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

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

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

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

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

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

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

Typically, PE investors seek wide ranging rights, but in certain situations such rights may have to be curtailed so that the PE investor does not acquire 'control' over the Indian company. Such situations include the following.

- Investment in a listed company, where the PE Investor does not want to trigger an "open offer." Please see Chapter VII (*Takeovers)* for further details.
- Investment in a company where the sectoral regulations require such company to be Indian owned and controlled.
- The PE Investor does not want to become a 'promoter' of the Indian company.

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

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

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

- Right to appoint limited nominee directors on the board of directors and their committees (whose presence is essential to constitute quorum);
- Right to appoint an independent director, to ensure good corporate governance;
- Limited affirmative voting rights on certain reserved matters (*see Q13 below*);
- Anti-dilution rights, to prevent dilution of the investor's shareholding;
- Liquidation preference, where the investor is given payout in preference to other shareholders;
- Pre-emptive rights, right of first offer or the right of first refusal (investors usually prefer a right of first offer) and tag rights;
- A pre-decided exit mechanism which can include IPO, strategic sale, buyback; and
- Information rights.

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

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

- Right to appoint majority of board of directors and their committees (whose presence is essential to constitute quorum);
- Right to appoint a chairman to the board of directors (with or without casting vote);
- Right to appoint independent directors, to ensure good corporate governance;
- Right to appoint the key employees of a company;
- Extensive affirmative voting rights (*see Q13 below*);
- Anti-dilution rights, to prevent the dilution of controlling interest of the investor;
- Liquidation preference, where the investor is given payout in preference to other shareholders;
- Pre-emptive rights, right of first offer or the right of first refusal (investors usually prefer a right of first offer) and drag rights;
- A pre-decided exit mechanism which can include IPO, strategic sale, buyback; and
- Extensive information rights.

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

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

These rights may include the following:

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

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

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

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

Negative covenants in a shareholder's agreement typically include non-compete, non-solicitation, anti-disparagement and confidentiality obligations. Under Indian contract law, agreements that are 'in restraint of trade' are void and unenforceable. Non-compete contracts are questionably in restraint of trade. On exception, non-compete contracts involving sale of goodwill are expressly enforceable, but are subject to limitations in terms of geography, time and scope.

Even though a non-compete clause has limited enforceability in India in the context of a PE investment, having a non-compete restriction is a standard ask in shareholders' agreements, to impress an obligation on the promoter group to refrain from anti-competitive activities.

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

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

VII. Takeovers

Tender offer obligations only arise with respect to public companies that are listed on a recognised stock exchange in India (Target). Such tender offer(s) are governed by the SEBI Takeover Regulations, as amended from time to time.

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

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

- Any acquisition of shares or voting rights which entitles an acquirer, together with PACs, to exercise 25% or more of the voting rights of the Target (directly or indirectly);
- Where an acquirer (together with PAC) has already acquired 25% or more of the voting rights of a Target but less than 75% of the shares or voting rights of the Target, acquires further shares or voting rights exceeding 5% of the voting rights of the Target in any financial year ending on March 31 of that year, whether directly or indirectly; or
- The acquisition of 'control' over the Target, irrespective of whether there has been an acquisition of shares or voting rights. 'Control' includes the right to appoint the majority of the directors on the board of the Target, or to control the management or policy decisions exercisable by a person individually or acting in concert, directly or indirectly, or by virtue of shareholding, management rights, shareholders/voting agreements or in any other manner. A director or officer of a Target is not considered to be in 'control' over such Target, merely by virtue of holding such position.

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

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

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

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

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

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

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

For 'indirect acquisitions' which is not a deemed 'direct acquisition' (as described above), some flexibility has been provided with respect to timing, pricing and other compliances. A key difference between direct acquisitions (and deemed direct acquisitions) on the one hand and indirect acquisitions on the other hand, is that in case of an indirect acquisition, the open offer process is 'paused' after the issuance of the public announcement until the underlying transaction is completed. Once the underlying transaction is completed, the acquirer needs to issue the detailed public statement within 5 working days from such completion, and the open offer process (and timelines) resume. For the 'paused' period, the acquirer needs to add an interest component to the offer price (as described in the question relating to offer price). In contrast, the underlying transaction in case of direct acquisitions (and deemed direct acquisitions) can only be completed within 26 weeks from the date on which payment is made to the tendering shareholders in the open offer (i.e., post open offer). The exception to this rule is if the acquirer deposits 100% of the open offer consideration (assuming full tender) into the escrow account in cash, in which case the underlying transaction can be completed any time prior to the completion of the tender offer but after 21 working days from the date of the detailed public statement.

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

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

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

Yes, unsolicited or hostile offers are allowed under the SEBI Takeover Regulations. Any person can make an open offer by announcing an intent to acquire more than 25% shares of the Target, which will trigger a mandatory open offer with a minimum size of 26% shares of the Target.

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

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

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

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

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

Q7. What is "creeping acquisition"?

Shareholders holding between 25% and 75% (*i.e*. the maximum permissible non-public shareholding) of a Target may consolidate their shareholding or voting rights by way of acquisitions of up to 5% of the voting rights of the Target in each financial year without triggering a mandatory open offer. This acquisition may be made through negotiated transfers, preferential allotments or on-market transactions. The 5% limit is calculated by way of an aggregation of the gross acquisitions of the acquirer and PACs without netting off any sales or dilution owing to fresh issue of shares by the Target. In case the aggregate acquisition of shares during a financial year exceeds 5% of the total voting rights of the Target, the acquirer is required to make an open offer under the SEBI Takeover Regulations.

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

Yes, the SEBI Takeover Regulations permit the acquirer to declare an intent to delist the Target in the detailed public statement and, upon such declaration, the tender offer process pauses and the delisting process under the relevant SEBI regulations commences. If the delisting process succeeds in accordance with the relevant SEBI regulations, then the acquirer can proceed to delist the shares of the Target. If the delisting process fails in accordance with the relevant SEBI regulations, then the acquirer will need to issue the draft letter of offer to SEBI within 5 working days (from such failure), with which the tender offer process resumes. The acquirer will need to add an interest component of 10% p.a. to the offer price for the period of suspension of the tender offer process.

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

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

- inter-se transfer of shares amongst qualifying persons (such as transfer amongst immediate relatives, persons named as promoters in the shareholding pattern filed by the Target under the Indian listing regulations for not less than three years prior to the proposed acquisition, PACs for not less than three years prior to the proposed acquisition (and such PACs having been disclosed under the listing regulations) etc.);

- acquisition by way of transmission, succession and inheritance;
- increase in voting rights in a Target pursuant to corporate actions (such as rights issues and buy-backs) subject to certain conditions;
- acquisitions made in the ordinary course of business by inter alia an underwriter pursuant to an underwriting agreement and a registered market maker of a stock exchange in receipt of shares for which he is the market maker during the course of market making;
- acquisition pursuant to an approved resolution plan under the IBC;
- increase in the voting rights in the Target without any acquisition of control pursuant to conversion of equity shares with superior voting rights of the Target into ordinary equity shares; and
- acquisition pursuant to schemes of arrangements (such as those involving the Target as a transferor or transferee company, or reconstruction of the Target, including amalgamation, merger or demerger, pursuant to an order of a court or a tribunal under any law or regulation, Indian or foreign).

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

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

The SEBI Takeover Regulations set out detailed methods of computation of the minimum price that is required to be offered to the public shareholders in a takeover offer. These methods vary depending on whether it is a direct acquisition (including deemed direct acquisition) or an indirect acquisition of shares. For direct acquisitions of shares or voting rights in or control over the Target and indirect acquisitions (which are deemed to be direct acquisitions), the minimum offer price is the highest of the following:

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

such other parameters as are customary for valuation of shares of such companies; and

- The per share value of the Target taken into account for an indirect acquisition of the Target (in cases of indirect acquisitions which are deemed direct acquisitions), if applicable.

The minimum offer price for indirect acquisition of shares or voting rights in or control over the Target is the highest of the following:

- The highest negotiated price per share for any acquisition under the agreement attracting the obligation to make the open offer.
- The volume weighted average price paid or payable for acquisitions by the acquirer or PACs during the 52 weeks immediately prior to the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or decision to make primary acquisition is announced in the public domain.
- The highest price paid or payable for any acquisition by the acquirer or PACs during the 26 weeks immediately prior to the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or decision to make primary acquisition is announced in the public domain.
- The highest price paid or payable for any acquisition, whether by the acquirer or any PAC(s), between the earlier of: (i) the date on which the primary acquisition is contracted and the date on which the intention or decision to make a primary acquisition is announced in the public domain; and (ii) the date of the public announcement of the open offer for shares of the Target made under the SEBI Takeover Regulations.
- The volume weighted average market price of the shares for a period of 60 trading days immediately prior to the earlier of the date on which the primary acquisition is contracted and the date on which the intention or decision to make primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the Target are recorded during such period (for frequently traded shares).
- The per share value of the Target taken into account for an indirect acquisition of the Target (in cases of indirect acquisitions which are deemed direct acquisitions), if applicable.

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

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

Furthermore, for direct as well as indirect acquisitions, the price paid for shares of the Target includes any price paid or agreed to be paid for the shares or voting rights in, or control over the Target, in any form whatsoever, whether stated in the agreement for acquisition of shares or in any incidental, contemporaneous or collateral agreement, whether termed as control premium or as non-compete fees or otherwise. Where any acquisition by the acquirer is undertaken at a higher price than the price offered to the public shareholders during the offer period or within 26 weeks after the tendering period, the price offered to the public shareholders is required to be enhanced to such higher price.

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

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

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

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

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

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

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

If the acquirer or PACs acquire or agree to acquire shares during the 52 week period prior to the public announcement of the open offer constituting more than 10% of the voting rights in the Target and the consideration is paid in cash, the open offer documents must provide an option to the tendering shareholders to receive payment in cash.

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

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

Upon receipt of the DPS, the board of directors of the Target is required to constitute a committee of independent directors to provide reasoned recommendations on the open offer. Such recommendation needs to be published by the Target at least two working days prior to the commencement of the tendering period in the manner as prescribed under the SEBI Takeover Regulations.

During the offer period, the Target or its subsidiaries are not permitted to undertake certain actions without the approval of the shareholders by way of a special resolution through postal ballot. These actions, subject to certain exceptions, include alienation of any material assets (whether by way of sale, lease, encumbrance or otherwise) or entering into any agreement outside the ordinary course of business, effecting any material borrowings outside the ordinary course of business, issuance or allotment of any authorised but unissued securities entitling the holder to voting rights, undertaking any buyback of shares or effecting any other change to the capital structure of the Target, or entering into, amending or terminating any material contracts to which the Target or any of its subsidiaries is a party, outside the ordinary course of business or accelerating any contingent vesting of a right of any person to whom the Target or any of its subsidiaries may have an obligation, whether such obligation is to acquire shares of the Target by way of employee stock options or otherwise. In addition, during the offer period, a person representing the acquirer or any person acting in concert can be appointed as a director of the Target. If the acquirer or any person acting in concert is already represented by a director on the board of the Target, such director cannot participate in any deliberations of the board of directors or vote on any matter in relation to the open offer.

The Target is prohibited from fixing any record date for a corporate action on or after the 3rd working day prior to the commencement of the tendering period and until the expiry of the tendering period. The Target needs to furnish to the acquirer a list of shareholders as per the register of members of the Target containing names, addresses, shareholding and folio number, in electronic form, wherever available, and a list of persons whose applications, if any, for registration of transfer of shares are pending with the Target within two working days from the Identified Date (*as defined below*).

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

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

S. No.	Particulars	Direct	Indirect	Responsibility
1.	Signing of the Stock Purchase Agreement OR public announcement of an intent to acquire more than 25% shares, or control, of the Target	X	X	
2.	Public announcement to be made to all the stock exchanges on which the shares of the Target are listed.	X	X + 4 WD	Acquirer or Manager
3.	Copy of the public announcement to be sent to SEBI and the Target.	X + 1 WD	Within X+ 5 WD Y = Closing of underlying transaction	Acquirer
4.	The acquirer shall open an escrow account. The amount to be deposited in escrow shall be 25% of the open offer consideration (assuming full tender) up to Rs. 500 cr. + 10% of the balance open offer consideration. The escrow can be in the form of: • Cash. • 1% of the open offer consideration in cash + bank guarantee or frequently traded and freely transferable equity shares of a value equivalent to the escrow amount	X + 3 WD	Y + 3 WD	Acquirer
5.	Publication of the DPS through the manager in newspapers (English, Hindi and regional language daily with wide circulation).	X + 5 WD	Y + 5 WD	Acquirer or Manager

S. No.	Particulars	Direct	Indirect	Responsibility
6.	Submission of one copy of the DPS to: • SEBI, through the manager; • All stock exchanges where the Target is listed; and • The Target (at the registered office), and the Target is required to forthwith circulate it to the members of its board.	X + 5 WD	Y + 5 WD	Acquirer or Manager
7.	Draft letter of offer to be filed with (and prescribed non-refundable fee to be paid to) SEBI along with the manager's due diligence certificate through the manager and copy sent to (i) the Target at its registered office; and (ii) the stock exchanges where the shares of the Target are listed.	X + 10 WD	Y + 10 WD	Acquirer or Manager
8.	Upon receipt of DPS, the Board of the Target is required to constitute a committee of independent directors to provide reasoned recommendations on the open offer.	Any time after receipt of the DPS by the Target		Target
9.	SEBI to provide its comments on the draft letter of offer (if any) within 15 working days from the filing of the draft letter of offer with SEBI (as specified above) and in the event SEBI specifies any changes, the manager and the acquirer will incorporate the same before dispatching the draft to the shareholders as specified below and the timeline will be extended to the 5th working day from the receipt of satisfactory reply to the clarification or information sought.	X + 25 WD	Y + 25 WD	SEBI or Manager or Acquirer
10.	The Target, will furnish to the acquirer, a list of shareholders as per its register of members, within two working days from the Identified Date.**	X + 29WD	Y + 29 WD	Target

S. No.	Particulars	Direct	Indirect	Responsibility
11.	Dispatch of letter of offer to the shareholders (whose name appear on the register of members of the Target on the Identified Date).	X + 32 WD	Y + 32 WD	Acquirer or Manager
12.	Publication of the written reasoned recommendations on the open offer to the shareholders of the Target (in a specified format) by the independent directors of the Target to be sent to the (i) SEBI; (ii) all the stock exchanges where the shares of the Target are listed; (iii) the manager of the open offer (and where there are competing offers, to the manager of the open offer for every competing offer).	X + 35 WD	Y + 35 WD	Target
13.	Issue of advertisement in a specified format announcing the schedule of activities for open offer, status of statutory and other approvals, if any, unfulfilled conditions, if any, and their status, the procedure for tendering acceptances and such other material detail as may be specified.	X + 36 WD	Y + 36WD	Acquirer or Manager
14.	Offer opens for tender of shares	X + 37 WD	Y + 37 WD	Acquirer or Manager
15.	Offer closes for tender of shares	X + 47 WD	Y + 47 WD	Acquirer or Manager

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

S. No.	Particulars	Direct	Indirect	Responsibility
19.	Completion of the acquisition contracted under any agreement attracting the obligation to make an open offer to be not later than 26 weeks from the expiry of the offer period.	X + 57WD + 26 weeks	Y + 57 WD + 26 weeks	

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

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

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

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

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

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

Under the SEBI Takeover Regulations, the acquirer is required to disclose (within two working days of receipt of intimation of allotment (in case of subscriptions) or acquisition or the disposal of shares or voting rights in the Target):

- its aggregate shareholding and voting rights in case of an acquisition which results in such shareholding or voting rights of the acquirer and its PACs aggregating to 5% or more of the shares of such Target;
- any subsequent change in shareholding or voting rights of 2% or more, as compared to the level of shareholding or voting rights at the time when the last disclosure was made.
- its aggregate shareholding and voting rights as of March 31st of each year, in a specified format, in case the acquirer together with its PACs holds shares or voting rights entitling it to exercise 25% or more of the voting rights in the Target.

For the purpose of disclosures, any acquisition of convertible securities are considered an acquisition of shares and the appropriate disclosures will therefore be necessary. Similarly, a creation of an encumbrance in favor of a person is considered as an acquisition of shares by that person, and release of encumbrance is considered as a disposal of shares, and the appropriate disclosures will need to be made by such person.

Promoters (along with the PACs) are required to make the following disclosures to the stock exchange where the shares of the Target are listed and the Target (at its registered office):

- an annual disclosure of their shareholding in the Target as of March 31st of each year; and
- details of encumbered shares in the Target, (i.e. pledge or lien) and the invocation and release of such encumbrance, within seven working days from the creation, invocation or release of the encumbrance, as the case may be.

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

Further, with effect on and from October 1, 2019, the promoters of every listed company are required to disclose to the stock exchanges where the shares of the company are listed and to the listed company detailed reasons of encumbrance(s) (in the format specified) if the combined encumbrance by the promoter (along with PACs) equals or exceeds 50% of their shareholding in the Target or 20% of the total share capital of the Target.

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

VIII. Delisting

Delisting of securities means removal of securities of a listed company from a stock exchange. As a consequence of delisting, the securities of that company would no longer be traded at that stock exchange. It is governed by the Securities And Exchange Board of India (Delisting Of Equity Shares) Regulations, 2009 (“**Delisting Regulations**”) as amended.

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

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

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

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

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

- pursuant to buyback of equity shares by the company; or
- pursuant to preferential allotment made by the company; or
- prior to expiry of three years from the listing of that class of equity shares on any recognized stock exchange; or
- if any instruments issued by the company, which are convertible into the same class of equity shares that are sought to be delisted, are outstanding; or
- if any entity belonging to the promoter(s) or promoter group has sold equity shares of the company during a period of six months prior to the date of the Board meeting in which the delisting proposal was approved.

Further, delisting of convertible securities is not permitted.

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

A company may delist its equity shares from all the recognized stock exchanges where they are listed by providing all the public shareholders, holding equity shares of the class which are sought to be delisted, an exit opportunity in accordance with the Chapter IV of the Delisting Regulations. Further, a company may delist its equity shares from the only recognized stock exchange where they are listed. In case, if the shares are proposed to be delisted from some exchanges, but continue to remain listed on any recognized stock exchange with a nationwide trading terminal (*i.e.* BSE Limited, National Stock Exchange of India Limited or any other recognized stock exchange which may be specified by SEBI in this regard), an exit opportunity is not required to be given to the public shareholders.

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

- pass an ordinary resolution to such effect;
- the company must publish a public notice of the proposed delisting in at least one English national daily with wide circulation, one Hindi national daily with wide circulation and one regional language newspaper of the region where the concerned stock exchanges are located. This public notice should include the names of recognized stock exchanges from which the equity shares are intended to be delisted, the reasons for such delisting and the fact of continuation of listing of equity shares on recognized stock exchange having nationwide trading terminals.
- apply to the concerned recognized stock exchanges from which the delisting is sought (the application must be disposed of by the stock exchange within 30 days from the date of receipt of such application, complete in all respects); and
- disclose the fact of delisting in the first annual report of the company prepared after the delisting.

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

- the board of directors make a disclosure to the recognized stock exchange on which such equity shares of the company are listed that the promoter(s) or the acquirer(s) propose to delist the company;
- the board of directors shall appoint a merchant banker for the purpose of due-diligence and make a disclosure to this effect to the recognized stock exchanges on which the equity shares of the company are listed;
- obtain details of trading in shares of the company for a period of two years prior to the date of the board meeting by top 25 shareholders as on the date of the board meeting convened to consider the proposal for delisting, from the recognized stock exchanges and details of off market transactions of such shareholders for a period of two years and furnish such information to the merchant banker for carrying out the due diligence;
- upon carrying out the due diligence the merchant bankers shall submit a report to the board of directors of the company certifying that the trading carried out by any of the promoter(s) or the acquirer(s) or promoter group entity or their related entities are in compliance or not, with the applicable provisions of the security laws and that any of the promoter(s) or the acquirer(s) or promoter group entity or persons acting in concert or their

related entities have carried out or not any transaction to facilitate the success of the delisting offer by way of employing any device, scheme or artifice to defraud any shareholder or any other person; or by engaging in any transaction or practice that operates as a fraud or deceit upon any shareholder or other person or by engaging in any act or practice that is fraudulent, deceptive or manipulative in connection with the delisting sought or permitted or exit opportunity given or other acquisitions of shares made under the Delisting Regulations;

- pass a board resolution approving the delisting and appointing a merchant banker and other intermediaries;
- obtain prior approval of shareholders of the company by a special resolution passed through postal ballot, after disclosure of all material facts in the explanatory statement sent to the shareholders in relation to such resolution (with votes in favor of the resolution being at least two times the votes cast against it);
- the board while approving the proposal of delisting should certify that the company is in compliance with the applicable provisions of the securities laws and the acquirer(s) or promoter(s) or promoter group or their related entities have not employed any device, scheme or artifice to defraud any shareholder or any other person; or is not engaged in any transaction or practice that operates as a fraud or deceit upon any shareholder or other person or is not engaged in any act or practice that is fraudulent, deceptive or manipulative in connection with the delisting sought or permitted or exit opportunity given or other acquisitions of shares made under the Delisting Regulations. Further, the board should ensure that the delisting is in the interest of the shareholders of the company.
- apply to the concerned recognized stock exchanges for in-principle approval in the form specified by such recognized stock exchanges;
- the application seeking in-principle approval for delisting shall be disposed of by the concerned recognized stock exchange within a period not exceeding five working days from the date of receipt of such application complete in all respects;
- make the final application to the concerned recognized stock exchange in the form specified by such recognized stock exchanges should be made within one year of passing of the special resolution;
- an application seeking in-principle approval for delisting shall be accompanied by an audit report as required under regulation 55A of the Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 in respect of the equity shares sought to be delisted, covering a period of six months prior to the date of application;
- compute the floor price in accordance with the SEBI Takeover Regulations and the promoter(s) or acquirer(s) to deposit the total estimated amount calculated on the basis of the floor price and number of equity shares outstanding with the public shareholders into an escrow account (either in cash or by way of bank guarantee in favor of the merchant banker, or a combination of both);

- the promoter(s) or acquirer(s) must make a public announcement of the delisting followed by dispatch of letters of offer to the public shareholders not later than two working days from the date of public announcement;
- the bidding period will open within seven working days of the public announcement, and the offer will remain open for five working days for public shareholders to submit their tender;
- the promoter(s) or acquirer(s) shall facilitate tendering of shares by the shareholders and settlement of the same, through the stock exchange mechanism as specified by the SEBI;
- the offer shall be deemed to be successful if the post offer promoter shareholding (along with the persons acting in concert with the promoter) taken together with the shares accepted through the eligible bids at the final price determined reached 90% of the total issued shares of that class excluding the shares which were held custodian and against which depository receipts have been issued overseas and at least 25% of the public shareholders holding shares in the dematerialized mode as on date of the board meeting in which the delisting of equity shares was approved;
- the promoter(s) or acquirer(s) may or may not accept the discovered price;
- if the discovered price is not accepted by the promoter(s) or acquirer(s), and no counter offer is made by the promoter(s) or acquirer(s) within two working days of the price discovery, the delisting offer fails;
- if the discovered price is accepted by the promoter(s) or acquirer(s) (or the promoter(s) or acquirer(s) choose to pay a higher amount in order to meet minimum bid conditions), the promoter(s) or acquirer(s) must (a) make a public announcement to this effect, (b) deposit additional money into the escrow account based on the final accepted price and (c) make payment to all public shareholders who have tendered their shares at a price equal to or higher than the discovered price;
- if the discovered price is not accepted by the promoter(s) or acquirer(s), they may make a counter-offer provided that the counter offer price shall not be less than the book value of the company as certified by the merchant banker;
- if the acquirer(s) or promoter(s) decide not to accept the offer price, the acquirer(s) or promoter(s) shall not acquire any equity shares tendered pursuant to the offer and the equity shares deposited or pledged by a shareholder shall be returned or released to him within ten working days of closure of the bidding period. Further, the company shall not make the final application to the exchange for delisting of the equity shares and the acquirer(s) or promoter(s) may close the escrow account opened for the delisting purpose.

In case the discovered price is accepted and the offer is successful, an application must be made to the stock exchanges for delisting the shares of the company. The remaining shareholders, who did not participate in the offer, of the company will be entitled to tender their shares to the promoter(s) or acquirer(s) for a period of one year at the final accepted price.

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

Chapter IV of the Delisting Regulations (above noted procedure) do not apply to voluntary delisting by a small company. A small company is (a) a company with paid up capital not exceeding INR 10 crores (approx. USD 1.34 million) and net worth not exceeding INR 25 crores (approx. USD 3.35 million) (b) a company whose number of equity shares traded, on all the recognized stock exchanges on which the equity shares of the company are listed, during the twelve calendar months immediately preceding the date of the board meeting in which the proposal for delisting is considered is less than 10% of the total number of shares and (c) which company has not been suspended for any non-compliance from any of the recognized stock exchanges having nationwide trading terminals in the preceding one year ("**Small Company**"). In such cases, the company is not required to follow the reverse book building process. The promoter(s) or acquirer(s) of Small Company can decide the exit price in consultation with the merchant banker. The exit price cannot be less than the floor price determined as per the relevant provisions of the SEBI Takeover Regulations. The promoter(s) or acquirer(s) is required to write to all public shareholders informing them of the proposal for delisting, stating the exit price and its justification and seeking consent of such public shareholders for the delisting. The public shareholders, irrespective of their numbers, holding 90% or more of the public shareholding give their consent in writing to the proposal and have consented to either sell their equity shares at the offered price or to remain holders of the equity shares even if they are delisted. The positive consents in this regard should be received within 75 working days from the date of first communication. Once the requisite consents of shareholders is received in writing, the promoter(s) or acquirer(s) makes payment of consideration in cash within 15 working days from the date of expiry of the 75 working days. Upon receiving the approval of the concerned recognized stock exchange, the shareholders can exit and the delisting process is completed.

Q5. How is the reverse book building process effected?

Reverse book building is a process used for efficient price discovery wherein offers are collected from the shareholders at a price equal to or above the floor price determined in accordance with the SEBI Takeover Regulations. The final offer price is one that takes the shareholding of the promoter(s) or acquirer(s) (along with persons acting in concert with him) to 90% of total issued shares of that class (excluding the shares held by custodian and against which depository receipts have been issued). The promoter(s) or acquirer(s) has the option to accept the discovered price or reject the same. If the final offer price is accepted then the promoter(s) or acquirer(s) is required to accept all shares tendered where the corresponding bids placed are at final price or at a price which is lesser than the final price. A price higher than the discovered price may also be accepted in order to meet the minimum bid threshold. Alternatively, if the discovery price is not acceptable to the promoter(s) or acquirer(s), a counter offer may also be made, provided that the counter offer price is not be less than the book value of the company, as certified by the merchant banker.

Those investors who do not participate in the reverse book building process have an option to offer their shares for sale to the promoter(s) or acquirer(s) at the same exit price for a period of one year from the date of delisting.

SEBI recently floated a consultation paper which discusses a possible exemption for subsidiaries of listed companies[1]. However as of August 19, 2020, the Delisting Regulations have not been amended to reflect this proposal.

Q6. When is a delisting offer successful?

Except in case where no counter offer has been made by the acquirer or promoter under the SEBI Delisting Regulations, a voluntary delisting offer is deemed to be successful only if:

- the post offer promoter(s) or acquirer(s) shareholding (along with the persons acting in concert with him) taken together with the shares accepted through eligible bids at the discovered price or the counter offer price, as the case may be, reaches 90% of the total issued shares of that class, excluding the shares which are held by a custodian and against which depository receipts have been issued overseas; and
- at least 25% of the public shareholders holding shares in the dematerialized mode (as on date of the Board meeting where the proposal for delisting has been approved) who had participated in the book building process. This requirement is not applicable to cases where the acquirer and the merchant banker demonstrate to the stock exchanges that they have delivered the letter of offer, as specified in the SEBI Delisting Regulations, to all the public shareholders.
- it is to be noted that in case of a delisting offer under the provisions of SEBI Takeover Regulations, the threshold limit of 90% for a successful delisting offer is calculated by taking into consideration the post offer shareholding of the acquirer taken together with the existing shareholding, shares to be acquired which attracted the obligation to make an open offer and shares accepted though eligible bidding at the final price determined under the provisions of the SEBI Delisting Regulations.
- if a counter offer is made by the promoter(s) or acquirer(s), the offer is deemed to be successful only if post offer promoter(s) or acquirer(s) shareholding (along with the persons acting in concert with them) taken together with the shares accepted at the counter offer price reaches 90%, of the total issued shares of that class excluding the shares which are held by a custodian and against which depository receipts have been issued overseas.

1 SEBI floated a consultation paper listing proposed amendments to Delisting Regulations for schemes of arrangements. As per the paper, SEBI has proposed to exempt a listed company from following the Delisting Regulations in case of its merger with a listed holding firm, provided the shareholders of the subsidiary entity are receiving shares of the parent. It would apply to cases where a listed holding company is merging with its listed subsidiary and the subsidiary is desirous of being delisted without following the provisions of delisting regulations. The listed parent entity is required to integrate the business of its listed subsidiary with that of its own by providing a share swap to all the shareholders of the listed subsidiary through a scheme of arrangement. Thus, in such a scenario the listed subsidiary would become an unlisted wholly-owned subsidiary of the parent listed entity.

Q7. How is a company compulsorily delisted?

A recognized stock exchange may order the delisting of shares of a company for reasons such as losses incurred by the company during the preceding three years and a negative net worth, suspension of trading of the company's securities for more than six months, infrequent trading of the company's shares during the preceding three years, public shareholding in the company falls below 25% and the company has failed to raise public holding to the required level within the timelines prescribed by the stock exchange, *etc*., after providing a reasonable opportunity to the company to explain its position. The decision of delisting is required to be taken by a panel constituted by the stock exchange.

Prior to making an order for delisting, the stock exchange is required to issue a notice of delisting of the company in one English national daily and one regional language newspaper where the concerned stock exchange is located, to provide an opportunity to persons aggrieved by the proposed delisting to make representations before the stock exchange. The stock exchange will consider the representations (received within a period of 15 days), if any, made by the company and other aggrieved persons pursuant to the aforesaid notices while passing the order for delisting of the equity shares of the company.

Additionally, the stock exchange is required to undertake the following actions:

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

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

- appoint a valuer to determine the fair value of the delisted equity shares and such valuation shall be done in the same manner as in case of voluntary delisting;
- publish a notice in one English national daily and one regional language newspaper where the concerned stock exchange is located, of such delisting along with disclosure of the name and address of the company, the fair value of the delisted equity shares determined by the valuer, and the names and addresses of the promoter(s) of the company who would be liable to purchase shares from the public shareholders; and

- inform all other stock exchanges where the equity shares sough to be delisted are listed, about such delisting.

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

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

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

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

In case of winding up proceedings of a company whose equity shares are listed on a recognized stock exchange, a necessary corollary of such proceedings is delisting of such company. The rights, if any, of the shareholders of such company will be in accordance with the laws applicable to such proceedings.

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

The SEBI (Delisting of Equity Shares) (Amendment) Regulations, 2018 provides that, an exit option provided to shareholders of a company being delisted pursuant resolution plan approved by the IBC should be at a price not less than the liquidation value, as determined under the provisions of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, after paying off dues in the order of priority in accordance with the provisions of IBC. It is further clarified that the existing public shareholders are required to be provided an exit opportunity at a price which is not less than the price at which exit opportunity is provided to the promoter(s).

Further, the details of delisting of such shares along with the justification for exit price for the proposed delisting is required to be disclosed to the recognized stock exchanges within one day of resolution plan being approved under the IBC.

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

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

According to Regulation 28A of the Delisting Regulations, inserted by way of an amendment dated April 17, 2020, SEBI may exempt any person or class of persons from the operation of all or any of the provisions of the Delisting Regulations for periods not exceeding 12 months, for furthering innovation in technological aspects through testing new products, processes, services, business models, etc. in live environment of regulatory sandbox in the securities markets. Further, any exemption granted by SEBI shall be subject to the applicant satisfying such conditions as may be specified by SEBI including conditions to be complied with on a continuous basis[2].

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

Upon voluntary delisting of its equity shares, a company cannot seek listing of any of its delisted equity shares for a period of five years from the date of such delisting. In case a company has been compulsorily delisted, the company cannot seek to list their delisted equity shares or access the securities market, directly or indirectly, for a period of 10 years from the date of such delisting. Similar restriction is imposed on all the whole time directors and promoter(s) (including any companies promoted by any of them) of the company whose shares have been compulsorily delisted.

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

- a Small Company seeking to re-list its delisted shares;
- such application is pursuant to a recommendation made by the Board for Industrial and Financial Restructuration under the SICA; or
- the application for listing of delisted shares is made by a company which has undergone a corporate insolvency resolution process under the IBC.

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

IX. Business and Asset Transfers

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

The primary difference between a business transfer (generally known as a 'slump sale') and an asset sale is that in the former, the purchaser acquires the entire business undertaking of the seller consisting of assets, liabilities, employees and goodwill, taken as a whole, on a 'going concern basis', whilst in the latter, the purchaser can acquire specific identified assets and/or liabilities (often described as 'cherry picking'). A business transfer (i.e. slump sale) typically involves a lump-sum consideration without values being assigned to individual assets and liabilities (save and except, the determination of value of assets and liabilities, as applicable for the purpose of payment of stamp duty, registration fee and similar purposes), whilst in an asset sale, the price of each asset would be specifically identifiable.

* For the purposes of this section, the term 'business transfer' and 'slump sale' have been used interchangeably.

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

Generally, a business transfer (which qualifies as a 'slump sale' for the purpose of the IT Act) is more cost efficient than an asset sale on account of the following:

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

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

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

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

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

If a public company is undertaking a "slump sale" or an "asset sale", that is, as a "transferor", in addition to obtaining the approval of its Board, an approval of the specified majority of its shareholders (unless a higher threshold is prescribed in the constitutional documents) would be required, provided the said transfer satisfies certain materiality parameters prescribed under the Companies Act and SEBI Listing Regulations (in case of listed public companies).

Specific approvals from the lenders, employees, third parties and regulatory authorities may be required, for undertaking the transfers by way of "slump sale" and "asset sale", as applicable.

Additionally, Indian labour laws also provide protection for 'workmen' working in certain "undertakings" in the event of transfer of such "undertakings". Such transfer normally attracts a retrenchment compensation and prior notice obligations, as prescribed, unless: (a) the workman are absorbed in the transferred undertaking and the services of the workman are not interrupted for such transfers; (b) the terms of employment in the transferred undertaking are no less favourable than those applicable to the transferred employees at the time of their employment at the transferor and (c) under the terms of transfer, in the event of retrenchment of the workman, the new employer is liable to pay to the workman, compensation on the basis that his service has been continuous and has not been interrupted by the transfer. .

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

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

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

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

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

Separate and independent approvals of the shareholders', creditors, regulatory authorities and third parties would be required for the transfer of the undertaking, licenses and other business related agreements through a private arrangement. This could be a time consuming process.

One of the logistical advantages of undertaking the transfer of business/assets as part of a court scheme, is that the shareholders' approval and creditors' approval may be obtained collectively in the court convened meetings.

X. Court based restructuring

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

Sections 230 to 232 of the Companies Act, 2013 ("**Companies Act**") provide for a company to enter into a compromise or arrangement with its creditors and/ or members. The terms compromise and arrangement have been interpreted judicially to be very broad so as to encompass any sort of contractual arrangement with creditors and/or members involving give and take. Accordingly, several types of restructuring, whether of the business (including mergers, demergers and spin-offs or slump sales), capital (including reduction of capital, buy back of securities, consolidation of shares of different class or division of shares into different classes) and corporate debt restructuring can be achieved through a process involving sanction by the National Company Law Tribunal ("**NCLT**") under the relevant provisions of the Companies Act. The restructuring of business and capital reorganization can be achieved in a composite manner. The basic process involves the filing of a scheme of arrangement setting out the terms of the reorganization with the NCLT and seeking NCLT's sanction after obtaining the approval of the shareholders and the creditors (secured and unsecured), as required in each type of restructuring. The NCLT will examine (after seeking the views of the central government, relevant sectoral regulators including the Competition Commission of India and the Income Tax department) whether the proposed restructuring is procedurally as well as substantively fair. Schemes for mergers, demergers and slump sales, or a combination of the three, are the most common kinds of restructuring that are undertaken under Sections 230 to 232 of the Companies Act. . However, the provisions of the Companies Act are broadly worded and include any arrangement between a company and its creditors and/or its shareholders.

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

In addition, the Companies Act permits merger between two or more small companies or between a holding company and its wholly owned subsidiary ("**WOS**"), without requiring the approval of the NCLT under Section 233 of the Companies Act. The provisions of Section 233 *mutatis mutandis* apply in respect of a scheme of compromise or arrangement referred to in section 230 or division or transfer of a company referred to Section 232(1)(b). The basic process involves approval of the scheme of arrangement by shareholders holding at least 90% of the total number of shares and 9/10th in value of the creditors or class of creditors of the respective companies. The approved scheme is filed with the central government, RoC and the official liquidator. If there are no objections to the scheme, it is registered by the central government, through its regional directors. On direction by the central government, the NCLT may look into such a scheme if the matter is referred to them under Sections 233(5) and (6) of the Companies Act as either bearing further scrutiny or not being in the public interest or the interest of creditors.

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

Under the SEBI Listing Regulations and the circulars issued by SEBI dated March 10, 2017 and January 3, 2018 ("**SEBI Circulars**") and as amended by SEBI circular dated September 12, 2019, and read with the relevant clarifications issued by SEBI, any scheme of arrangement proposed to be filed by a listed company before the NCLT under Sections 230 to 232 or other relevant provisions of the Companies Act including Section 66, has to be filed before the designated stock exchange, for approval, at least one month before it is presented to the NCLT. However, schemes which provide for merger of a WOS with the parent company or for demerger/hive-off of a division of a WOS with its parent company do not require approval of the relevant stock exchanges. Such schemes are however, required to be filed with relevant stock exchanges for the limited purpose of disclosures.

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

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

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

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

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

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

- **Beneficial Tax Treatment**: 'Amalgamations' and 'demergers' are specifically defined under the IT Act and if implemented in accordance with the conditions specified would, inter alia, provide the following benefits:
    - they would not give rise to any capital gains tax incidence on the transferor / de-merged company or its shareholders (who are issued shares in consideration for the merger or demerger), provided the resulting company is an Indian company. However, in context of outbound cross border mergers permitted under the Companies Act, the IT Act does not contain an exemption from capital gains tax to the transferor company or its shareholders, when the transferee company is a foreign company. The period of holding required to determine whether the shares sold are a long term capital asset or a short term capital asset will be computed by including the period for which that shareholder held shares of the amalgamating / demerged company, prior to the scheme;

  - subject to fulfilment of certain conditions, the amalgamated company may carry forward the accumulated business loss and unabsorbed depreciation of the amalgamating company (ies) for eight years and an indefinite period from the date of amalgamation, respectively;
  - the companies can amortise the expenses of the amalgamation over five years from the date of amalgamation/demerger;
  - generally, tax holidays or other tax benefits available to the amalgamating / demerged company (ies) as of the date of amalgamation / demerger will be available to the amalgamated / resulting company.
- **Single window clearance**: Reduces multiplicity of approvals for matters separately provided for in the Companies Act.
- **Exemption from mandatory tender offer requirements**: Acquisition of shares under a scheme of arrangement is exempt from the mandatory tender offer requirements under the SEBI Takeover Regulations.
- **Transaction Costs**: In certain states within India, there is a cap on the stamp duty charges that are payable for a transfer implemented under an NCLT sanctioned scheme of arrangement. However in certain other states, transfer of properties would be stamped separately as a conveyance, unless a specific entry is made in the relevant State Stamp Act, e.g. Bombay Stamp Act, 1958.

The main disadvantages in this process are:

- **Timelines**: The time period for completion by the NCLT is typically six to nine months (provided that NCLT in convinced about the urgency for listing and hearing and the requirement of convening of all meetings is dispensed by the NCLT) and can be further delayed because of objections raised by statutory authorities, shareholders or creditors before the NCLT. However, now objection by shareholders or creditors to a scheme can be made only by persons holding not less than 10% of the shareholding or having outstanding debt amounting to not less than 5% of the total outstanding debt in accordance with the latest audited financial statements of the company. Further, in case of a listed company, obtaining clearances from the designated stock exchange (pre-filing) may delay the proposed scheme;
- **Disclosures**: Particularly in the case of unlisted and listed companies undertaking court based restructurings, the nature of disclosures is akin to an abridged prospectus and may seem onerous; and
- **Confidentiality**: Being court documents, the terms of the arrangement are in the public domain and therefore open to scrutiny and challenge. The NCLT also has the power to modify the scheme prior to sanctioning the same, which changes may not be commercially desirable. The parties however have the ability to withdraw the scheme and are not obliged to implement the scheme in the event that the modifications are not acceptable.

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

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

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

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

Q5. How are classes of shareholders and creditors determined?

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

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

Voluntary amalgamations between two banking companies are governed by the Banking Regulation Act and are administered by the RBI. In brief, the process would be as follows:

- the draft scheme of amalgamation needs to be approved individually by the boards of directors of the two banking companies by a two thirds majority of the total strength of the board of directors (and not just those present at the meeting);
- the scheme of amalgamation would then have to be approved by the shareholders of each banking company by a resolution passed by a majority in number representing two-thirds in value of the shareholders, present in person or by proxy, at a meeting called for that purpose;
- after the scheme of amalgamation is approved by the requisite majority of shareholders, it must be submitted to the RBI for its sanction, together with certain other information, including a valuation report (with a detailed computation), details of the price of the shares, where the amalgamated company is listed and such other information as the RBI may request;

- in the event of the scheme being sanctioned by the RBI, a dissenting shareholder is entitled to make a claim on the concerned banking company with respect to the shares held by him, on the basis of their value as determined by the RBI when sanctioning the scheme.

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

The board of directors have to approve the scheme of the arrangement including consideration payable, whether in the form of cash or shares (i.e., consideration other than cash).

- Stock exchanges (in case of a listed company) need to accord their 'no-objection' to the scheme. A draft of the scheme of arrangement has to be submitted to the stock exchanges at least 30 days prior to the scheme being filed with the NCLT. However, schemes which provide for merger of a WOS with the parent company or for demerger/ hive-off of a division of a WOS with its parent company will not require approval of the relevant stock exchanges. Such schemes are however, need to be filed with relevant stock exchanges for the limited purpose of disclosures.
- The NCLT will direct that meetings of the various classes of shareholders and creditors be convened to approve the scheme. However, the NCLT may dispense with meeting of creditors, if creditors holding 90% value agree to the scheme by way of a consent affidavit. The NCLT in terms of its inherent powers may also dispense with the shareholder meeting if all shareholders consent in writing. It is important to highlight that different benches of the NCLT have taken differing views in relation to their ability to provide dispensations and there is no uniform practice across all benches.
- After the majority in number and three-fourth in value of the voting shareholders and / or creditors (or classes) have approved the scheme (if dispensation of class meetings is not granted), the petition for sanction of the scheme is filed with the NCLT.
- Mandatory notification of the scheme is made to multiple regulatory authorities, including central government, income tax authorities, the RBI, CCI and other relevant sectoral regulators. Such authorities are provided 30 days to make their representations on the proposed scheme, failing which, it is presumed that they have no representation to make. This, however, is not strictly implemented in case responses are expected to be received from the income tax department and government agencies where transfer of statutory licenses are involved.
- Subject to the receipt of any regulatory and contractual approvals that may be required, the sanction order of the NCLT must be filed with the RoC within 30 days of receipt of order from the NCLT.

Q8. Are cross border mergers allowed in India?

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

XI. Litigation

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

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

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

The Constitution provides for an integrated system of administration of justice as opposed to separate hierarchies of federal and state judiciary. The Supreme Court is the highest court of the land and has its seat in New Delhi, India's capital. Immediately subordinate to the Supreme Court in the judicial hierarchy are the High Courts of various states, which in turn exercise administrative and judicial control over the district or sessions courts constituted at the state level. Further, sub-ordinate to the district or sessions courts are the courts of the civil or sub-judges and magistrates of first or second class.

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

Articles 124 to 147 of the Constitution provide for the constitution, composition and jurisdiction of the Supreme Court. The Supreme Court acts as a court of record and has wide powers including the power to punish for its contempt. The Supreme Court exercises original jurisdiction, appellate jurisdiction (civil and criminal), writ jurisdiction and jurisdiction to grant special leave to appeal. Additionally, the Supreme Court exercises original jurisdiction in respect of any dispute (a) between the GOI and one or more states; or (b) between the GOI and any state or states on one side and one or more other states on the other; or (c) between two or more states. The Supreme Court is also vested with the extraordinary jurisdiction to entertain writ petitions in cases involving violation of fundamental rights arising out of legislative or executive actions. Further, under Article 143 of the Constitution, the President of India may refer to the Supreme Court, a question of law or fact which, he thinks, is of public importance.

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

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

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

The district, sessions and subordinate courts are the courts of first instance and their constitution or structure is determined by the respective state governments or union territories on the basis of population density and other myriad range of factors. Within the hierarchy of district, sessions and subordinate courts, there are further sub-divisions for civil, criminal and revenue cases. The district / sessions courts additionally exercise appellate jurisdiction over the sub-ordinate courts under certain statutes.

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

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

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

The Indian legal system generally upholds the sanctity of contractual provisions, unless they are contrary to Indian law. Further, the courts rarely rewrite or ignore the terms of a contract. Further, the law of evidence provides that when the terms of a contract have been reduced into writing, then in such cases oral and other contemporaneous evidence cannot be admitted to contradict or vary the terms of such a contract, except in exceptional circumstances. Further, specific performance of contracts is the general rule and damages for breach can be claimed in the alternative.

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

The Limitation Act generally governs and provides for the limitation period for the filing of civil cases in India. Further, certain special enactments and statutes prescribe their own limitation period. Under the Limitation Act and many such statutes, the courts are generally vested with the power to condone delay under certain specified circumstances, upon sufficient cause being shown.

In criminal cases, limitation is provided for in cases where an offence is punishable with imprisonment for up to three years. However, no limitation is provided for taking cognizance of an offence punishable with imprisonment exceeding three years.

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

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

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

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

Q11. Are Court fees payable in India?

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

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

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

Q13. How are judgments or decrees enforced in India?

In respect of civil cases, the CPC provides the mode and manner of execution of decrees. In case of disobedience of a decree, the executing courts have the power to order attachment and sale of property and arrest of a judgment debtor, amongst others. Further, in certain cases, the courts have also invoked the contempt jurisdiction as against errant parties where undertakings given before a court are breached.

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

Q14. How are foreign judgments enforced in India?

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

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

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

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

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

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

During the lockdown period, Indian courts have displayed promptness and innovation in embracing technology and providing access to justice. Virtual hearings are being held in most courts not only in extremely urgent matters, but also in other types of matters as well. Most courts have also framed rules to institutionalise and simplify the procedures for e-filing and virtual hearing of matters. It is expected that systems of e-filing and virtual hearings would continue even post the pandemic, at least for certain classes of disputes and/or cases.

XII. Arbitration

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

The increase in international trade and vulnerable economic norms have played the role of a catalyst in growth of cross border commercial disputes. Given the need for an efficient dispute resolution mechanism, international commercial arbitration has emerged as the preferred option for resolving cross-border commercial disputes and preserving business relationships through a speedy resolution mechanism. India is actively taking steps to make the country a hub for international arbitration and move up the ladder in the ease of doing business index.

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

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

- Part I sets out general provisions on arbitrations seated in India. Certain provisions of Part I are applicable to arbitrations seated outside India as well. The provisions applicable to international commercial arbitrations, even if the place of arbitration is outside India are Section 9 (interim measures by court *etc.*), Section 27 (court assistance in taking evidence), Section 37 (1)(a) and Section 37 (3) (appealable orders);
- Part II deals with the enforcement of foreign awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) or the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention);
- Part III deals with conciliation; and
- Part IV sets out certain supplementary provisions.

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

Conciliation is a method of resolving a dispute, wherein an independent person, that is a conciliator, helps the parties to arrive at a negotiated amicable settlement. Part III of the Arbitration Act provides for a process of conciliation.

Under Section 65 of the Arbitration Act, a 'conciliator' may request each party to submit to him a brief written statement describing the "general nature of the dispute and the points at issue". He can ask for supplementary statements and documents. A conciliator is required to assist the parties in an independent and impartial manner and should be guided by principles of objectivity, fairness and justice, giving consideration, among other things, to the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. Further, a conciliator can formulate terms of a possible settlement if he feels there exist elements of a settlement.

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

Q4. What is an international commercial arbitration?

An 'international commercial arbitration' is defined as an arbitration where at least one of the parties is:

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

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

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

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

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

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

Indian courts have time and again upheld a high threshold for refusal to enforce a foreign award. Sections 48 and 57 of the Arbitration Act enumerate the kinds of objections which a party may take against the recognition and enforcement of a foreign award passed under the New York Convention or the Geneva Convention, respectively. Enforcement of the foreign award may be refused if a party was under some incapacity, the arbitration agreement was not valid under the applicable law, notice was not given to the party for appointment of an arbitrator, the party was not given an opportunity to present its case, the award passed was out of the scope of the submissions to arbitration, the composition of the arbitral tribunal or the procedure was not according to the agreement or if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Further, the sections provide two additional grounds when the court can set aside the award, *i.e.* the subject-matter is not capable of settlement by arbitration and the award is in conflict with the public policy of India. An award is said to be in conflict with public policy of India, only in limited circumstances where the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81 of the Arbitration Act, in contravention with fundamental policy of Indian law or in conflict with the most basic notions of morality or justice. It has been clarified that, a contravention of the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

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

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

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

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

Examples of arbitral institutions include the ICC, the LCIA, the SIAC, the DIAC, the MCIA, the ICA and the NPAC.

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

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

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

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

In international commercial arbitrations where the parties fail to appoint an arbitrator within 30 days from the receipt of the request to do so, or the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, either party may request an arbitral institution designated by the Supreme Court to make the appointment. In the case of domestic arbitrations, any arbitral institution designated by the High Court will have the power to make the appointment upon a request made by either party.

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

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

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

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

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

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

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

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

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

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

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

Parties can determine the procedural rules to govern the arbitration. If it is an institutional arbitration, the arbitrator will also be bound by the procedural rules of the arbitral institution. If no such procedure is agreed upon, the tribunal may conduct the proceedings in such manner as it considers appropriate. However, parties cannot agree to a procedure in contravention of the mandatory provisions of Indian law. However, the Civil Procedure Code and the Indian Evidence Act do not apply to an arbitration.

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

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

- Under Section 8 of the Arbitration Act to refer the parties to arbitration;
- Under Section 9 of the Arbitration Act for interim relief, before the constitution of the tribunal or even after that, if circumstances exist which may lead to the remedy of interim measures by a tribunal to be not efficacious. Section 9 of the Arbitration Act also makes it mandatory for parties to commence arbitration proceedings within 90 days if the court passes an order for any interim measure of protection;
- Under Section 11 of the Arbitration Act for appointment if the parties are unable to appoint an arbitrator on their own;
- The courts can also decide a challenge to the appointment of the arbitrator if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay under Section 14 of the Arbitration Act;

- During the arbitration proceedings, the parties can take the court's assistance in taking evidence under Section 27 of the Arbitration Act;
- Once the proceedings are over, the parties can file applications to set aside the award in court under Section 34 of the Arbitration Act. Any order of the court whether setting aside or refusing to set aside the award can be appealed under Section 37 of the Arbitration Act. Once the objections to the award are dismissed, the court enforces the award in the same manner as a decree of the court; and
- The provisions of Section 9 (interim measures by court etc.), Section 27 (court assistance in taking evidence), Section 37 (1)(a) and Section 37 (3) (appealable orders) are also available in international commercial arbitrations where the seat is outside India.

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

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

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

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

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

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

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

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

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

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

There have been cases where Indian courts have granted injunctions restraining proceedings started overseas in breach of an arbitration agreement. The approach of the Indian courts has been to draw a balance between protecting interest of parties. The threshold to be met for such an injunction is very high. Indian Supreme Court has in several decisions reminded subordinate courts to avoid granting an injunction against an arbitration.

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

The arbitral tribunal can order for disclosure of documents or attendance of witnesses (factual or expert) upon an application filed by one of the parties. It is also open for the arbitral tribunal or any party involved in arbitration with the approval of the arbitral tribunal, to apply to the court for assistance in taking evidence. The application should include the details of the parties and the arbitrator along with the evidence or the details of the witness whom the parties want to produce. The requirement of involving the arbitral tribunal in taking assistance of the court is not a mere formality. It puts an obligation on the tribunal to apply its mind before itself making, or allowing any application to be made, before the court.

Q21. What final remedies are available from the tribunal?

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

The tribunal can also correct and interpret certain portions of the award.

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

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

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

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

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

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

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

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

The Section provides two further grounds when the court can set aside the award, even if the party has not pleaded them, *i.e*. the subject-matter is not capable of settlement by arbitration, and the award is in conflict with the public policy of India. An award is said to be in conflict with public policy of India, only if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81 of the Arbitration Act, in contravention with fundamental policy of Indian law or in conflict with the most basic notions of morality or justice. Arbitral awards arising out of arbitrations other than international commercial arbitrations may also be set aside on the ground of conflict with public policy of India if the court finds that the award is vitiated by patent illegality appearing on the face of the award.

The procedure under Section 34 of the Arbitration Act requires a party to file an application to set aside an award under one of the grounds mentioned above. Such an application has to be filed within three months from the date of the award. An extended period of 30 days can be granted by the court, if the court is satisfied that there was sufficient reason for the delay. An advance notice has to be mandatorily given to the opposing party.

If the party filing the application also seeks a stay of the enforcement of the arbitral award, a separate application will have to be filed. The court may order a stay, subject to conditions as it may deem fit. Very often, Indian courts may order deposit of the award amount or a part thereof.

Q25. Can the appointment of an arbitrator be challenged? What are the grounds to challenge the appointment of an arbitrator?

The appointment of the arbitrator can be challenged under Section 13 of the Arbitration Act if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or he does not possess the qualifications agreed to by the parties. If the challenge is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award and thereafter the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34 of the Arbitration Act.

The grounds which give rise to justifiable doubts as to the independence or impartiality of an arbitrator are enumerated in the Fifth Schedule of the Arbitration Act, whereas the person will not be eligible for appointment as an arbitrator under categories specified in the Seventh Schedule of the Arbitration Act.

Section 14 of the Arbitration Act further provides that the mandate of the arbitrator shall be terminated if he becomes *de jure* or *de facto* unable to perform his functions or fails to act without undue delay. The arbitrator may also withdraw from the office or the parties may agree to end his mandate.

Q26. How is an arbitral award enforced?

An arbitral award is final and binding on the parties. An arbitral award issued in an India seated arbitration can be enforced under Section 36 of the Arbitration Act as follows:

- After the expiry of three months (extendable by 30 days) from the date of receipt of the arbitral award, if no application has been filed under Section 34 of the Arbitration Act for setting aside the arbitral award; or
- If an application for setting aside the arbitral award under Section 34 of the Arbitration Act has been filed along with an application seeking stay of the operation of the arbitral award under Section 36 of the Arbitration Act, and no stay is granted by the court.

The arbitral award is enforced like a decree of a civil court under the Civil Procedure Code.

Q27. What legal fee structures can be used to remunerate an arbitral tribunal? Are fees fixed by law?

The 2019 Amendment requires arbitral institutions to determine the fees and manner of payment of the arbitral tribunals based on the Fourth Schedule to the Act. However, this provision does not apply to international commercial arbitration or in situations where the parties choose to follow an arbitral institution's framework on fees.

Q28. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Section 31A(2) of the Arbitration Act provides that the general rule is that the unsuccessful party shall pay the costs of the successful party. However, the court or arbitral tribunal may decide otherwise for reasons to be recorded in writing.

The 'costs' include the fees and expenses of the arbitrator, court and witnesses; legal fees and expenses; administration fees of the institution or any other expenses in connection with the arbitral award. While awarding these costs, the arbitral tribunal considers the conduct of the parties, whether the parties have made any frivolous claims, whether the party made any reasonable offer to settle the dispute which was refused by the other party and whether a party has partly succeeded in the case.

Q29. In what circumstances can a party that is not a party to an arbitration agreement be joined to the arbitration proceedings?

The Arbitration Act grants no powers to a tribunal to enjoin a third party to pending arbitration proceedings. Non-signatories to the arbitration agreement can be bound to the arbitration agreement under the 'groups of companies' doctrine, where a clear intent to bind such non-signatories can be established. This doctrine was established by the Supreme Court in *Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Ors*, which held that 'under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties'. Further, in *GMR Energy Limited v. Doosan Power Systems India Private Limited,* the Delhi High Court ruled that a non-party to the arbitration agreement could be made part of the arbitral proceedings on the grounds that it acted as an *alter ego* to the contracting party.

However, in the recent case of *Reckitt Benckiser India Private Limited v. Reynders Label Printing India (2019)*, the Supreme Court refused to apply the 'group of companies' doctrine. Reckitt India had impleaded a Belgian based affiliate of Reynders India ("**Reynders Belgium**") despite it being a non-signatory to the arbitration agreement; both Reynders India and Reynders Belgium were part of the same group of companies known as Reynders Label Printing Group. Based on the correspondence exchanged between the parties relating to the arbitration agreement, the Supreme Court found that there was no mutual intention to bind the non-signatory and refused to extend the arbitration agreement.

Q30. In what circumstances can a party that is not a party to an arbitration agreement compel a party to the arbitration agreement to arbitrate disputes under the arbitration agreement?

Section 8 of the Arbitration Act empowers parties to the arbitration agreement, to apply to a judicial authority to refer the matter to arbitration. The Arbitration Act now also allows any person claiming through or under a party that is a party to the arbitration to apply to a judicial authority to refer the matter to arbitration. Therefore, non-signatories who are claiming through or under a party to the arbitration agreement can apply to the court to refer parties to arbitration.

Q31. Are there any legal requirements relating to the qualifications of arbitrators?

The 2019 Amendment lays down certain minimum qualifications and general norms for arbitrators. For instance, officers of the Indian Legal Service or advocates, cost accountants, chartered accountants or company secretaries with at least 10 years of experience would qualify to act as an arbitrator. However, this provision has not yet come into effect.

Q32. Are there any requirements relating to arbitrators' independence and/or impartiality?

The arbitrator appointed is duty bound to disclose the existence of circumstances that give rise to justifiable doubt as to his independence and impartiality under Section 12 of the Arbitration Act. These circumstances are listed in the Fifth Schedule of the Arbitration Act and are broadly based on the IBA Guidelines on Conflict of Interest in Arbitration. If the disclosures are of those circumstances, which are listed in the Seventh Schedule of the Arbitration Act, the person will not be eligible for appointment as an arbitrator, unless the parties expressly decide to waive the conflict after the dispute has arisen.

Q33. Does the law prohibit any types of disputes from being resolved through arbitration?

The Arbitration Act does not explicitly exclude any category of disputes as non-arbitrable. However, the courts have held that the following disputes are generally treated as non-arbitrable:

- Disputes falling within the exclusive jurisdiction of a special court under a special statute excluding the jurisdiction of an ordinary civil court; and
- Disputes which are generally considered by the courts as appropriate for decision by public fora, for instance, disputes pertaining to rights in rem.

Examples of such disputes are as follows:

- patent, trademarks and copyright;
- antitrust or competition laws;
- insolvency or winding up;
- trust deeds;
- bribery or corruption (in this regard allegations of fraud are arbitrable unless serious and complex in nature);
- eviction and tenancy matters;
- guardianship and matrimonial matters; and
- criminal matters.

Certain matters such as consumer disputes are arbitrable at the option of the aggrieved party. In *Emaar MGF Land v. Aftab Singh (2018)*, the Supreme Court held that the aggrieved party may elect to approach the courts or choose to arbitrate in the first instance, if a valid arbitration agreement exists.

Q34. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

Prior to the 2019 Amendment, confidentiality of the arbitral proceedings was not expressly recognized under the Arbitration Act and it was common practice to include a confidentiality clause in the arbitration agreement. The 2019 Amendment imposes a statutory obligation upon the parties, the arbitrators and the arbitral institution to maintain the confidentiality of the arbitral proceedings. However, the confidentiality requirement is waived during the implementation and enforcement of the arbitral award.

Q35. What is the effect on the arbitration of pending insolvency of one or more of the parties to the arbitration?

IBC is the governing legislation for all the insolvency proceedings initiated in India. As per Section 14 of the Indian Insolvency and Bankruptcy Code, upon commencement of the insolvency proceedings, the adjudicating authority has the power to suspend proceedings against the insolvent company. This suspension will persist till such time the corporate insolvency resolution process is completed.

Q36. Which arbitral institutions are commonly used to resolve commercial disputes in India?

The following foreign arbitral institutions are commonly used to resolve commercial disputes in India:

- SIAC
- ICC
- LCIA

Further, the following Indian arbitral institutions are commonly used to resolve commercial disputes:

- DIAC
- MCIA
- ICA
- Construction Industry Arbitration Council (CIAC)
- The International Centre for Alternative Dispute Resolution (ICADR)
- NPAC

Q37. What are the recent changes that have been brought to the Indian Arbitration and Conciliation Act, 1996?

The GOI constituted a 10-member committee under Justice B. N. Srikrishna to suggest ways to promote and facilitate arbitration in India. The committee submitted a report on July 31, 2017 and the Union Cabinet approved the Arbitration Amendment Bill 2018, based on its recommendations. However, the 2018 Bill lapsed due to the dissolution of the Parliament.

The Arbitration Amendment Act, 2019 was subsequently introduced with minor changes and it came into force on August 9, 2019. The latest amendment clarifies that the Amendment Act, 2015 will have prospective application and aims to make India a global hub for arbitration.

The salient features of the Amendment Act 2019 are discussed below:

- The 12-month period prescribed under Section 29A to complete the arbitration will commence from the date of completion of the parties' pleadings.
- The parties will be mandatorily required to submit the respective pleadings within six months from the date of appointment of the arbitrator(s).
- This 12-month time period will only apply to domestic arbitrations and not to international commercial arbitrations.
- An application to set aside an award under Section 34 only needs to be substantiated by the record of the arbitral tribunal and no separate proof is required.
- The parties, arbitral institution and the arbitrators will be statutorily bound by confidentiality of the arbitral proceedings.
- The ACI will be established to promote and strengthen institutional arbitration in India.
- Certain minimum qualifications and general norms are provided for arbitrators.

XIII. Competition Law

Q1. What are the laws governing competition/ anti-trust in India?

Competition law in India is governed by the Competition Act, 2002 (***Competition Act***) and associated rules, regulations and guidance notes. The Competition Act aims to prevent anti-competitive practices, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in markets.

Q2. What is the scope of the Competition Act?

The Competition Act prohibits anti-competitive practices, which cause or are likely to cause an appreciable adverse effect on competition (***AAEC***) in India. It primarily seeks to regulate the following:

- anti-competitive agreements (Section 3);
- abuse of dominance (Section 4); and
- combinations (Sections 5 and 6).

Q3. What is the institutional framework for governing the Competition Act?

The Competition Act provides for the establishment of the Competition Commission of India (***CCI***), the nodal authority for the monitoring, enforcement and implementation of competition law in India. Orders made by the CCI may be appealed to the National Company Law Appellate Tribunal (***NCLAT***)[1] and the orders made by the NCLAT may be appealed to the Supreme Court.

Q4. What is meant by "relevant market" under the Competition Act?

The Competition Act defines the relevant market as the market which may be determined by the CCI with reference to the "relevant product market" or the "relevant geographic market" or both. "Relevant product market" is defined as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. "Relevant geographic market" is defined as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

Q5. What are "anti-competitive agreements"?

Section 3 of the Competition Act prohibits and renders void agreements entered into between enterprises or persons or associations of persons with respect to the production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an AAEC

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1 The orders of the CCI were initially appealable to the Competition Appellate Tribunal (COMPAT). On May 26, 2017, the COMPAT merged with NCLAT, and the appellate functions of the COMPAT were conferred on the NCLAT.

in India. Under the Competition Act, horizontal agreements (*i.e.*, agreements between competitors), including cartels, once proven, are presumed to have an AAEC. This presumption, however, is rebuttable. There is no presumption of an AAEC in vertical agreements (*i.e.*, agreements between enterprises which are engaged at different levels of the production or supply chain).

Q6. What is an abuse of a dominant position?

Section 4 of the Competition Act prohibits the abuse of a dominant position by an enterprise or a group. A "dominant position" is defined to mean a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market or to affect its competitors or consumers or the relevant market in its favour.

An enterprise or group will abuse its dominant position if it:

- imposes unfair prices (including predatory pricing) or unfair conditions on sale or purchase of goods or services;
- limits or restricts production or technical development so as to detrimentally affect consumers;
- denies market access to other players in the market;
- makes conclusion of contracts subject to the acceptance of supplementary obligations which have no connection with the subject of such contracts; or
- uses its dominant position in one relevant market to enter into, or protect, another relevant market.

Q7. What are the factors that the CCI may take into consideration while determining the AAEC in cases involving anti-competitive agreements and abuse of dominant position?

Section 19(3) of the Competition Act sets out certain factors that the CCI is to consider in determining whether an agreement has an AAEC under Section 3, including creation of entry barriers, foreclosure of competition or removal of competitors, accrual of benefits to consumers, improvements in production or distribution of goods or services, and promotion of technical, scientific and economic development.

Section 19(4) of the Competition Act sets out certain factors that the CCI is to consider while determining whether an enterprise enjoys a dominant position under Section 4, including market share, size and resources of the enterprise and its competitors, economic power including commercial advantages over competitors, extent of vertical integration, dependence of consumers, entry barriers (regulatory and otherwise), countervailing buyer power, market structure and size, social obligations and social costs and relative advantage by way of contribution to economic development by the dominant enterprise.

Q8. What are the penalties for contravention of the antitrust provisions of the Competition Act?

Liability of Enterprise

If an enterprise is found to be in breach of Section 3 of the Competition Act (anti-competitive agreements), the CCI may order a number of remedies. These include requiring the enterprises concerned to "cease and desist" from the illegal activity and imposing penalties. The "standard" penalty is up to 10% of the average turnover of the enterprise for the last three financial years. In the case of agreements entered into by cartels, the CCI may alternatively impose upon each participant in the cartel a penalty of up to three times of its profit or 10% of its turnover (whichever is higher) for each year of continuance of such agreement.

If an enterprise is found to be in breach of Section 4 of the Competition Act (abuse of dominance), the CCI may order the enterprise to discontinue the abuse and impose a penalty which may be up to 10% of the average turnover for the last three financial years. It may also order division of an enterprise enjoying a dominant position to ensure that such enterprise does not abuse its dominant position.

Further, a failure to furnish information or providing false information can result in a penalty between INR 50 lakhs (approx. USD 67,000) and INR 1 crore (approx. USD 134,000).

Individual Liability

Individuals may also be fined where a company has breached the provisions of the Competition Act.

A person who, at the time of the contravention, was in charge of, and was responsible to, the company for the conduct of its business, shall be deemed to be guilty and punished accordingly. However, there will be no liability where it is proved that the contravention was committed without his/her knowledge or that he/she had exercised all due diligence to prevent the breach. In addition, where any director, manager, secretary or other officer of the company has connived at or consented to the breach, or the breach is attributable to his neglect, such person shall also be deemed to be guilty of the contravention and be punished accordingly.

Leniency

Section 46 of the Competition Act provides for the imposition of a lesser penalty on a member of a cartel who makes full, true and vital disclosure in respect of the cartel. Under the CCI (Lesser Penalty) Regulations, 2009, the first party to make such disclosure to the CCI can benefit from a reduction in penalty of up to 100%, if the disclosure enables the CCI either (a) to form a prima facie opinion regarding the existence of a cartel, or (b) to establish a cartel in a matter under investigation where the Director General (***DG***) or

CCI did not have sufficient evidence to do so at the time of the application. The second applicant can gain up to a 50% reduction in fines. There is no upper limit on the number of subsequent applicants and each of them can gain up to a 30% reduction in fines if they disclose evidence that provides significant added value to the evidence already in possession of the CCI or DG. Individuals, including employees or ex-employees, can also benefit from the lesser penalty provisions, by either themselves applying for lesser penalty or being included in the leniency application filed by their employer (leniency applicant). . A leniency applicant must co-operate until the completion of the proceedings before the CCI or DG in order to secure a reduction in penalty.

Q9. What is the merger control regime in India?

From 1 June 2011, any acquisition, merger or amalgamation, where the parties or their groups cross the jurisdictional thresholds (based on assets or turnover) specified in the Competition Act must be pre-notified to the CCI. These transactions – referred to as “combinations” - are subject to Sections 5 and 6 of the Competition Act which prohibit a combination which causes or is likely to cause an AAEC in the relevant market in India and treat it as void. The merger control regime in India is mandatory and suspensory, and transactions subject to review by the CCI cannot be concluded until merger clearance in India has been obtained or a review period of 210 calendar days (taking account of various stops to the clock has passed, whichever is earlier. The CCI in its orders has made it clear that even global transactions with an Indian element qualifying as combinations cannot be concluded without obtaining clearance from the CCI.)

Q10. What are the transactions that require notification to the CCI?

Section 5 of the Competition Act covers three broad categories of combinations.

First, the acquisition by one or more persons of control, shares (including convertible instruments), voting rights or assets of one or more enterprises, where the parties or the group to which the target will belong post-acquisition meet specified assets or turnover thresholds (see below). It should be stressed that acquisitions not involving a change of control can be caught.

Second, the acquisition by a person of control over an enterprise where the person concerned already has direct or indirect control over another enterprise engaged in the production, distribution or trading of similar or identical or substitutable goods, or in the provision of a similar or identical or substitutable service, where the parties, or the group to which the target will belong post-acquisition, meet specified assets or turnover thresholds (see below).

Third, mergers or amalgamations, where the enterprise remaining, or enterprise created, or the group to which the enterprise will belong after the merger or amalgamation, meets specified assets or turnover thresholds (see below).

The CCI seeks to capture innovative structuring of transactions designed to avoid notifications to the CCI. The Combination Regulations provide that a notification requirement must be assessed with respect to the substance of the transaction and that any structure of a transaction comprising a combination which has the effect of avoiding a filing requirement will be disregarded by the CCI. The scope of this anti-avoidance provision is unclear. However, parties will have to ensure that transaction structures are not devised in a manner which has the effect of avoiding a filing requirement.

Q11. What are the jurisdictional thresholds under the Competition Act?

The jurisdictional thresholds are prescribed in Section 5 of the Competition Act for the Parties and the Group, and are set out in detail below. It should be noted that there is currently little formal guidance from the CCI on the calculation of assets and turnover in order to assess whether the thresholds are met.

Thresholds

Parties Test:

- the Parties have combined assets in India of INR 2,000 crores (approx. USD 268 million)[2] or combined turnover in India of INR 6,000 crores (approx. USD 804 million); or
- the Parties have combined worldwide assets of USD 1,000 million including combined assets in India of INR 1,000 crores (approx. USD 134 million) or combined worldwide turnover of USD 3,000 million including combined turnover in India of INR 3,000 crores (approx. USD 402 million); OR

Group Test:

- the Group has assets in India of INR 8,000 crores (approx. USD 1,072 million); or turnover in India of INR 24,000 crores (approx. USD 3,215 million); or
- the Group has worldwide assets of USD 4,000 million including assets in India of INR 1,000 crores (approx. USD 134 million) or worldwide turnover of USD 12,000 million including turnover in India of INR 3,000 crores (approx. USD 402 million).

The government has issued a *de minimis* target based filing exemption (***Target Exemption***) notification on 27 March 2017, under which acquisitions, mergers and amalgamations where the target has either assets in India of less than INR 350 crores (approx. USD 46.9 million) or turnover in India of less than INR 1,000 crores (approx. USD 134 million) do not need to be notified to the CCI. The Target Exemption is valid for a period of 5 years.

For the purposes of assessing whether the Target Exemption applies, and for assessing the jurisdictional thresholds specified in Section 5 of the

2 Conversion rates are based on the average spot rate of the last six months quoted by the RBI and will therefore change over time.

Competition Act, only the value of assets of, and turnover attributable to, the portion, division or business being transferred will be counted as regards the target, and not the entire assets or turnover of the selling entity.

The CCI has clarified that a de-merger of assets or business undertaking, which takes place through a court approved scheme, will be treated as an acquisition under Section 5(a) of the Competition Act, and the Target Exemption would be available in this case.

Q12. Is there any time period within which the CCI must be notified?

The CCI previously required the parties to notify a proposed transaction within 30 calendar days of a "trigger event". However, this requirement has now been done away with by the Government in a Notification dated 29 June 2017 and the parties are now required only to notify and seek approval of the CCI before the consummation of the transaction.

Q13. What is the trigger event that requires a filing?

Under the Competition Act, the trigger event for the notification of a proposed transaction to the CCI is: final approval of the proposed merger or amalgamation by the Boards of the enterprises concerned; or execution of any agreement or other document for acquisition or acquiring of control.

The Combination Regulations clarify that the "other document" referred to above shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets. Where a public announcement has been made under the SEBI Takeover Regulations, the date of such announcement will be deemed to be the date of execution of the "other document" for acquisition.

In the event of a hostile acquisition, the "other document" means any document executed by the acquirer conveying a decision to acquire.

Q14. Are internal restructurings notifiable?

Among the various types of transactions that are ordinarily exempt under the Combination Regulations, intra-group acquisitions are explicitly exempt from notification to the CCI except where the acquired enterprise is jointly controlled by enterprises that are not part of the same group. In respect of intra-group mergers and amalgamations, the Combination Regulations exempt from notification transactions: (i) where one enterprise holds more than 50% of the shares or voting rights in the other enterprise; and/or (ii) where enterprises within the same group hold more than 50% of shares or voting rights in each of the parties to the merger or amalgamation. It should be noted, however, that the exemption will not apply where the merger or amalgamation results in the transfer from joint control to sole control.

Q15. What is the process of merger filing?

The Combination Regulations prescribe three forms for filing a merger notification:

- Form I (i.e. short form) – All notifications are ordinarily required to be filed in Form I. The parties are required to provide basic information in relation to the combination, with a filing fee of INR 20 lakhs (approx. USD 27,000).
- Form II (i.e. long form) – The parties are free to file the merger notification in Form II along with a filing fee of INR 65 lakhs (approx. USD 87,000). The Combination Regulations recommend that Form II be filed for transactions where:
  - the parties to the combination are competitors and have a combined market share in the same market of more than 15%; or
  - the parties to the combination are active in vertically linked markets and the combined or individual market share in any of these markets is greater than 25%.
- Where parties have filed Form I and the CCI believes that it requires information in Form II, it may require parties to file notice in Form II. In such a case, the time periods mentioned in the Competition Act and the Combination Regulations will restart.
- The CCI also has the power to invalidate a notification form if it is of the opinion that the notification is not complete, or is not in conformity with the requirements of the Combination Regulations. Parties can also withdraw their notification form with the permission of the CCI at any time prior to the end of Phase I investigation (as discussed below) and refile.
- Form III is a post-completion application form, which must be filed within seven days of an acquisition, share subscription or financing facility entered into by a public financial institution, registered foreign institutional investor, bank or registered venture capital funds under a covenant in a loan agreement or an investment agreement.
- The obligation to notify the CCI lies with the acquiring company in case of an acquisition and jointly with the parties, in case of a merger or amalgamation.

Q16. Is there a "green channel" for non-problematic transactions?

With effect from August 15, 2019, there is a "Green Channel" for transactions with no horizontal overlap, no actual or potential vertical relationship and no complementarity of the parties' products and/or services. Such transactions will, subject to certain safeguards, be deemed to be approved upon the acknowledgment by the CCI of the filing of the notification form.

Q17. How long will the CCI review process take?

Phase I Investigation

On receipt of a notification, the CCI is required to form a prima facie opinion on whether a combination causes or is likely to cause an AAEC within the relevant market in India within a period of 30 working days. If the CCI requires the parties to remove defects in the notification or to provide additional information, it "stops the clock" until the additional information is provided.

The CCI can also reach out to third parties or other statutory authorities during the Phase I investigation and, in such cases, the time period can be further extended by 15 working days. This means that it can take much longer than 30 days for the CCI to reach an opinion.
At this stage, the parties are also free to propose modifications to the combination up front in order to satisfy the CCI that the combination will not cause an AAEC in the relevant market in India. In such a case, the CCI will get an additional 15 days to evaluate the proposed modification.

Typically, the CCI takes up to 3 months for a Phase I approval. In cases where the parties have submitted voluntary modifications to the proposed transaction during the Phase I investigation, the CCI can take up to 8 months to approve the transaction.

Phase II Investigation

If the CCI forms a prima facie opinion that a combination is likely to cause an AAEC, it will issue a show cause notice to the parties seeking an explanation as to why a detailed investigation should not be conducted. Where a detailed investigation is conducted, the parties cannot complete the transaction until the earlier of:

- a final decision by the CCI; or
- the expiry of 210 days (from the date of notification to the CCI.)
- during the Phase II Investigation, if the CCI is of the opinion that the combination has or is likely to have an AAEC, but such adverse effect can be eliminated by suitable modification(s) to the combination, it may propose appropriate modification(s) to address such concerns.

It should be noted that the notifying parties may volunteer commitments/ modifications in response to the show cause notice (which is a pre-cursor to the detailed Phase II investigation).

The CCI has stated that it will endeavour to clear combinations within 180 calendar days of filing a notice. However, typically, it may take between seven months and one year, or even more, to approve a Phase 2 transaction.

Q18. Are there any exemptions from mandatory pre-notification?

In addition to the transactions that can avail of the Target Exemption, transactions falling under the following two categories are generally exempt from prior notification under the Competition Act:

- Transactions expressly exempt under the Competition Act: acquisitions, share subscriptions or financing facilities entered into by public financial institutions, registered foreign institutional investors, banks or registered venture capital funds, under a covenant in a loan agreement or an investment agreement, are exempted from obtaining prior clearance from the CCI, but a post facto filing in Form III within seven days of completion of acquisition is required.

- Transactions that are "ordinarily" exempt under the Combination Regulations: transactions set out in Schedule I of the Combination Regulations are presumed not to cause an AAEC in India, and normally do not require to be notified. Such transactions are:
  - acquisition of shares or voting rights which do not entitle the acquirer to hold 25% or more of the target company, made solely for investment purposes or in the ordinary course of business, not leading to control. The Combination Regulations clarify that an acquisition of less than 10% of total shares or voting rights will be treated solely as an investment if: (a) the acquirer is able to exercise only the rights of ordinary shareholders; (b) the acquirer does not have a seat on the Board; and (c) the acquirer does not intend to participate in the management of the target;
  - an acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to the acquisition, already holds 25% or more shares or voting rights of the enterprise, but does not hold 50% or more of the shares or voting rights of the enterprise, either prior to or after such acquisition. This exemption is not available if the acquisition results in the acquisition of sole or joint control of such enterprise by the acquirer or the group;
  - acquisition of shares or voting rights where the acquirer already holds 50% or more of the shares or voting rights in the target enterprise, except in the cases where the transaction results in a transfer from joint control to sole control;
  - acquisition of assets not directly related to the business of the acquirer or made solely as an investment or in the ordinary course of business, not leading to control of the target enterprise, except where the assets represent substantial business operations of the target enterprise in a particular location or for a particular product or service, irrespective of whether or not such assets are organised as a separate legal entity;
  - intra-group reorganisations;
  - acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business;
  - acquisition of shares or voting rights pursuant to a buyback or a bonus issue or a stock split or consolidation of face value of shares or subscription to rights issue, not leading to an acquisition of control;
  - amended or renewed tender offer where a notice has been filed by the party making such an offer;
  - acquisition of shares, control, voting rights or assets by a purchaser approved by the CCI (for instance, in case of a divestiture); and
  - acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stockbroking.

Apart from the above, regional rural banks and nationalized banks are exempted from notification requirements. The government has also exempted banking companies that are on the brink of insolvency from filing a merger notification. Central public sector enterprises operating in the oil and gas sectors are also exempt from filing a notification.

Foreign to foreign transactions satisfying the standard assets and turnover thresholds under the Competition Act and not covered by any of the above exemptions will have to be notified even if there is no local nexus and effect on markets in India.

Q19. Is it possible to have pre-notification discussions with the CCI?

It is possible to have substantive and procedural pre–notification consultations (***PFC***) with the CCI. Parties may also avail the assistance of the CCI to fill-up the relevant form for filing. However, such consultations are oral and non-binding on the CCI. An effective PFC could substantially reduce the overall Phase 1 or 2 timelines.

Q20. What are the factors that the CCI may take into consideration while determining the AAEC of a combination in India?

Section 20 of the Competition Act sets out certain factors that the CCI shall consider while determining if a combination causes or is likely to cause an AAEC in the "relevant market" in India, including the actual and potential level of competition through imports in the market, entry barriers to the market (regulatory and otherwise), degree of countervailing power in the market, availability of substitutes in the market, market shares of each of the parties to the combination (individual and combined), likelihood of foreclosure/removal of competitors and extent of vertical integration in the market. The CCI is also required to consider the positive effects that a combination could potentially give rise to, such as the possibility of saving a failing business, the nature and extent of innovation and the relative advantage through contribution to economic development.

Q21. What orders can be passed by the CCI in case of merger control?

The CCI can pass an order approving the combination if the combination does not cause an AAEC in the relevant market in India. In the event that the CCI considers that the combination results in an AAEC, it may block such a combination and/or it can propose suitable modifications (remedies). The parties to the combination have the option of submitting amendments to the modifications proposed by the CCI, which may be approved or blocked by the CCI. The parties can also voluntarily propose remedies in response to a "show cause" notice issued by the CCI to show why a detailed Phase II investigation should not be conducted in respect of the notified combination. However, the CCI retains the discretion to accept the proposed remedy. It should be noted that the CCI has not to date blocked any combination. The CCI may also issue interim orders (by way of a temporary injunction) restraining any party from carrying on any act which is or is likely to be in contravention of Section 6 of the Competition Act.

Q22. What are the penalties for failure to notify a notifiable transaction with the CCI?

In case of failure to notify the proposed combination which exceeds the prescribed thresholds in time or at all, the CCI can impose a penalty up to 1% of the total turnover or assets of a combination, whichever is higher. The same range of penalties may also be imposed for gun jumping.

XIV. Insolvency and Bankruptcy

Q1. Overview of the insolvency and bankruptcy regime in India

IBC has overhauled the legal regime in relation to the insolvency of companies, partnership firms (both limited liability and unlimited liability), proprietorship firms, personal guarantors and individuals in India. The provisions of the IBC relating to the insolvency of corporate entities, personal guarantors, and notified financial service providers are in force.

The IBC provides a framework for the time bound resolution of distressed assets, while also opening up avenues for acquisition of companies as going concerns. The IBC is a significant legislative reform that improves the "*ease of doing business*" in India. However, on account of the Covid-19 pandemic, initiation of the CIR Process has been suspended for all defaults occurring for a period of six months (extendable up to a year) starting on 25th March, 2020.

Q2. What processes have been prescribed under the IBC for corporates in distress?

IBC prescribes a

- CIR Process for a committee of creditors (usually comprising of the financial creditors of the debtor) to explore and finalize, a resolution plan for the going concern rescue of incorporated entities in distress (Corporate Debtor).
- Liquidation process which provides for inter alia, piecemeal sale of assets of the debtor. There is no direct entry into liquidation under the IBC. It only commences if the CIR Process does not culminate in approval of a Resolution Plan or if no Resolution Plan is proposed during the defined timelines of the CIR Process. The company may also be liquidated, if the committee of creditors resolves to liquidate the company during the CIR Process before the confirmation of the Resolution Plan; or the company contravenes the terms of an approved Resolution Plan.

Q3. Who can initiate the CIR process under the IBC, and when?

The CIR process may be initiated by:

- financial creditors- those creditors who have lent money against the consideration for its time value;
- operational creditors- workmen, employees, trade creditors or statutory creditors; or
- the Corporate Debtor itself,

by filing an application before the Adjudicating Authority, which is a quasi-judicial authority empowered to *inter alia* admit an application for initiation of a CIR Process and pass an order accepting the resolution plan approved by the committee of creditors, if it meets the minimum requirements provided under the IBC.

The CIR Process may be initiated against a Corporate Debtor if there is a default of INR 1 crore (approx. USD 134,000) or more, on payment of debt.

- A financial creditor must mandatorily submit a record of the default from an information utility set up under the IBC to track the financial information of companies. If Financial Creditors are 'creditors in a class' (such as bondholders), an application for initiation of the CIR Process must be filed by at least 100 members of such a class or 10% of the creditors of such a class, whichever is less.
- On the other hand, an Operational Creditor is first required to issue a demand notice seeking payment. An Operational Creditor may only initiate a CIR Process if the company fails to pay the amounts due within a period of 10 days from the demand notice, and only if no dispute, suit or arbitration claim is pending with respect to the demand, prior to the issuance of the demand notice or the date of filing of the application under the IBC. 'Dispute' does not need to be a formal dispute before a court or an arbitrator.
- A company can itself file an application with the NCLT to initiate the CIR Process with respect to itself along with proof of default provided that at least three-fourths of the shareholders of such company pass a resolution approving the filing of the application to initiate the CIR Process with respect to itself.

Q4. Which authority adjudicates upon the proceedings under the IBC?

The Adjudicating Authority for the processes relating to incorporated entities is the NCLT. Appeals from orders of the NCLTs lie with the appellate authority, which is the NCLAT. The Adjudicating Authority for the personal insolvency processes is the Debt Recovery Tribunal. Appeals from the orders of the Debt Recovery Tribunal lie with the Debt Recovery Appellate Tribunal, which is the Appellate Authority.

Q5. What is the process upon admission of the insolvency application?

Once an application initiating the CIR Process is admitted, a moratorium is declared. This moratorium prohibits:

- the institution or continuation of suits or proceedings against the company;
- any actions for foreclosure, recovery or enforcement of any security interest created by the company in respect of its property;
- transferring, encumbering, alienating, or disposing of any of its assets or any legal or beneficial interest in such assets by the company;
- recovery of any property by an owner or lessee where such property is owned by or in possession of the company;
- termination or suspension of a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force,

on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

- termination, suspension or interruption of supply of essential goods and services (which includes electricity, water, telecommunication and information technology services to the extent that these are essential services for the company.); and
- the termination, suspension or interruption of supply of goods and services critical to the preservation of the value of the company and its management as a going concern (as determined by the resolution professional), except if they are not paid for during the moratorium period or in such other circumstances as may be specified.

An insolvency professional is also appointed as the interim resolution professional who is put in-charge of the management of the corporate debtor and is vested with powers of the board of directors or partners, while their powers are suspended. The IRP constitutes a CoC comprising of the Financial Creditors of the Corporate Debtor which appoints the Resolution Professional, assesses the viability of the corporate debtor and approves a resolution plan. A resolution plan may, *inter alia*, provide for the following:

- substantial acquisition of the shares of the company by one or more persons;
- restructuring of the company through a merger, amalgamation or demerger;
- debt restructuring, change in the goods or services provided by the company or change in the technology used by the company;
- issuance of securities of the company for cash, property, claims or other appropriate purposes; or
- corporate restructuring measures, such as merger or de-merger and sale of assets.

The Resolution Plan is required to contain all relevant terms of the proposed reorganisation and its proposed effect on the rights of relevant stakeholders. At the minimum, the resolution plan must:

- provide for payment of insolvency resolution process costs in priority to payment of other debts;
- provide for payment to Operational Creditors (of amounts equal to at least the payments such Operational Creditors would have received during a liquidation process or the payment they would have received if the resolution plan value was distributed according to the waterfall in liquidation) in priority over financial creditors;
- provides for payment to dissenting Financial Creditors (of amounts equal to at least the payments such dissenting Financial Creditors would have received during a liquidation process) in priority to any payments to assenting Financial Creditors;
- provides for management of the affairs of the company after approval of the Resolution Plan;

- provides for the term and implementation of the Resolution Plan;
- provides for adequate means for supervision of implementation of the Resolution Plan;
- provides for a statement as to how the Resolution Plan has dealt with the interests of all stakeholders of the company;
- does not contravene any law in force; and
- that it is feasible and viable

A brief diagrammatic summary of the timeline for the CIR Process has been provided below:

Particulars	Indicative Timeline
Admission of application, appointment of interim Resolution Professional and declaration of moratorium	T (Commencement Date)
Public Announcement	T + 3
Submission of creditors' claims	T + 14 up to T + 90
Verification of Creditors' Claims by the interim Resolution Professional	T + 21 T + 97 (for Verification post Public Announcement)
Constitution of the Committee of Creditors by the interim Resolution Professional	T + 23
1st meetings of the Committee of Creditors and ratification / appointment of the Resolution Professional	T + 30
Actions and Voting at the Committee of Creditors Meetings	
Fair Value and Liquidation Value Calculation	On or before T + 47
Determination of avoidance transactions, intimation to IBBI and application to the NCLT	T + 75 (opinion on avoidance transactions) T + 115 (determination on avoidance transactions and application to NCLT)
Preparation and Submission of Information Memorandum	T + 54
Invitation of Resolution Plan	T + 75

Particulars	Indicative Timeline
Submission of Expressions of Interest	T + 90 T + 100 (Provisional List of Resolution Applicants) T + 115 (Final List of Resolution Applicants)
Request for Resolution Plans	T + 105
Submission and Approval of Resolution Plan by the Committee of Creditors	T + 135
Submission to the NCLT	T + 165
Approval / Rejection of the Resolution Plan	T + 270 (with an upper limit of T + 330, including delays due to litigation)

Q6. Are actors in the insolvency and bankruptcy processes regulated?

The IBBI regulates, insolvency professionals, insolvency professional agencies (which are frontline regulators for insolvency professionals) and information utilities (which must accept, record, verify and authenticate information relevant to the insolvency processes under the IBC). The IBBI also frames regulations and guidelines on matters relating to all insolvency and bankruptcy processes as required under the IBC.

Q7. When is a Corporate Debtor liable to be liquidated under the provisions of the IBC?

Under the IBC, a Corporate Debtor is liable to be liquidated when no Resolution Plan is presented for approval within the specified timelines, when a resolution plan is rejected by the Adjudicating Authority or when the Corporate Debtor contravenes an approved Resolution Plan. The Corporate Debtor may also be liquidated if the Committee of creditors resolves to liquidate the Corporate Debtor during the CIR Process before the confirmation of the Resolution Plan.

Q8. What is the process of liquidation under the IBC?

Once an order of liquidation is passed by the Adjudicating Authority, the RP appointed during the CIR Process is appointed as a Liquidator unless otherwise decided by Adjudicating Authority. Subject to the directions of the Adjudicating Authority, the Liquidator is required to control and carry out the liquidation process. Upon commencement of the liquidation process, the powers of the Board and key managerial personnel of the Corporate Debtor cease to have effect and the same vest with the Liquidator. The Liquidator has extensive powers, including the power to carry on the business of the Corporate Debtor for its beneficial liquidation, settle claims of creditors and sell assets.

The liquidation process under the IBC requires the Liquidator to collect or update claims of creditors, constitute the liquidation estate, attempt the sale of the assets of the company and distribute the proceeds of the sale according to the statutory waterfall discussed below. The Liquidator should endeavour to complete the liquidation process within one year from its initiation. A diagrammatic summary of the key stages of the liquidation process are given below:

Particulars	Indicative Timeline
Commencement of liquidation and appointment of Liquidator	T Commencement date
Public announcement	T + 5
Appointment of registered valuers	T + 7
Submission of claims and Intimation of decision on relinquishment of security interest by Secured Creditors	T + 30
Verification of claims	T + 60
Constitution of a Stakeholders' Consultation Committee	T + 60
Intimation of the decision of acceptance / rejection of claim	T + 67
Filing of the list of stakeholders with the NCLT and announcement to public	T + 75
Filing of the preliminary report with the NCLT	T + 75
Filing of the asset memorandum with the NCLT	T + 75
Submission of Progress Reports by the Liquidator	End of quarter + 15
Distribution of the proceeds to the stakeholders	Date of realisation + 90
Application to the NCLT for disclaimer of onerous property	T + 6 months
Completion of the liquidation of the corporate debtor	T + 365

Q9. Can a secured creditor stand outside liquidation process under the IBC?

IBC duly recognizes the rights of a secured creditor to stand outside liquidation process and realize its security for recovery of its dues irrespective of the commencement of the liquidation process. During a liquidation process, secured creditor(s) may either choose to relinquish their security interest to the liquidation estate and receive proceeds from the sale of assets by the Liquidator as per the waterfall mechanism set out in the IBC or stand outside of the liquidation process and enforce, realize, settle, compromise or deal with the secured assets in accordance with ordinary civil remedies, subject to verification of the security interest by the Liquidator, payment of CIR Process costs due as well as payment of and Liquidation costs and workmen's dues as they would have shared had they relinquished their security interest.

Q10. What is the distribution waterfall under the IBC?

Section 53 of the IBC puts in place a waterfall mechanism for distribution of proceeds in liquidation. The waterfall changes the long-established priority for debts owed to the government. Additionally, it accords first priority to the insolvency resolution process costs and the liquidation costs, incentivising availability of interim finance for stressed companies. The waterfall is as follows:

- the insolvency resolution process costs and the liquidation costs to be paid in full;
- debts owed to a secured creditor in the event such secured creditor has relinquished security and workmen's dues for the period of 24 months before liquidation;
- wages and any unpaid dues owed to employees other than workmen for the period of 12 months before liquidation;
- financial debts owed to unsecured creditors;
- dues to the governments and debts owed to secured creditors for unpaid amounts following the enforcement of security interest outside liquidation;
- any remaining debts;
- preference shareholders, if any; and
- equity shareholders or partners, as the case may be.

Q11. What are the avoidance rules under the IBC?

IBC provides for avoidance of certain suspect transactions which are, namely, (i) preferential transactions, (ii) undervalued transactions, (iii) extortionate credit transactions, and (iv) transactions defrauding creditors. In summary:

- preferential transactions: transactions that put any person in a better position than they would have been in the distribution priority provided under the IBC in the event of a liquidation and which are not in ordinary course of business;
- undervalued transactions: transactions in which the debtor has gifted or transferred the property to a person for a value which is significantly less than the value of consideration provided by that person;
- extortionate credit transactions: this is intended to cover transactions where credit has been extended on extortionate terms although the transactions where debt has been extended by a person providing financial services in compliance with law, have been exempted; and
- transactions defrauding creditors: undervalued transactions that were deliberately entered into to keep assets beyond the reach of any person entitled to claim against the company, or adversely affect the interest of such a claimant

The Adjudicating Authority is vested with wide powers to remedy the effect of such transactions including the power to reverse the transactions, supplant obligations and direct payment of adequate consideration.

Q12. Does the IBC provide for Cross Border Insolvency issues?

IBC contains enabling provisions for the central government to enter into bilateral/ reciprocal arrangements for recognition and enforcement of provisions of the IBC. The IBC also provides that in cases where a company's assets are located in a country with which there are reciprocal arrangements, the RP and/or the Liquidator may make an application to the Adjudicating Authority, which may then issue a letter of request to the relevant foreign court or authority for necessary assistance. Bilateral arrangements are the only basis for granting assistance or recognition to foreign insolvency processes under the IBC. However, no such arrangements have been made yet.

Despite this, in a recent case of *Jet Airways v State Bank of India*, the Appellate Authority gave access to a foreign insolvency representative and directed the Resolution Professional to enter into a Cross-Border Insolvency Protocol with the administrator of Dutch proceedings. The Appellate Authority also recognised the Cross Border Insolvency Protocol entered into between the Dutch Administrator and the Resolution Professional and directed that the Protocol should be treated as the directions of the NCLAT. As such, it may be possible for NCLTs to grant recognition or assistance in future cases based on this precedent.

Q13. Is group insolvency allowed under the IBC?

While the IBC does not have an extensive framework to deal with the issues that arise in the insolvency of group companies, judicial precedents have developed on how situations relating to insolvency of companies in corporate groups may be dealt with. Most significantly, in the matter of Videocon industries, first, NCLT, Delhi ordered that different CIR Processes of different companies be heard by the same bench of the NCLT, Mumbai in order to ensure procedural coordination. Thereafter, the NCLT, Mumbai ordered the substantive consolidation of the assets of 13 out of 15 companies and observed that on a case to case basis, substantive consolidation of group entities could be considered inter alia basis the following parameters i.e. common control, common directors, common assets, common liabilities, interdependence, interlacing of finance, co-existence for survival, pooling of resources, intertwined accounts, interloping of debts, singleness of economics of units, common financial creditors and common group of corporate debtors.

Since then, in various cases, the Adjudicating and Appellate Authorities have ordered the initiation of 'group insolvency' proceedings or consolidation of different group entities undergoing insolvency resolution.

Q14. Recent challenges in implementation of the IBC and consequential amendments

Since its enactment, two significant challenges in the implementation of the IBC related to uncertainty on whether differential payments to creditors in creditors with different pre-insolvency entitlements were justified, and uncertainty on how disputed and unmatured claims against a Corporate Debtor would be treated after the approval of a resolution plan.

In the Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta, the Supreme Court clarified that Resolution Plans may provide that differential payments be made to creditors in different classes, who have different pre-insolvency entitlements. The Supreme Court also upheld the constitutional validity of the amendments made to the IBC toclarify this position. The Court also clarified that the approval of the Resolution Plan would give the new resolution applicant a 'clean slate' and all claims prior to the approval of the Resolution Plan against the company will be deemed to have been settled.

A key challenge has also been preserving the estate of the corporate debtor from actions of enforcement agencies and government authorities that grant concessions and other licenses both during the CIR Process and after it is successfully resolved. To resolve these challenges, legislative amendments were made that:

- Clarified that during the moratorium under the CIR Process, licenses and similar grants cannot be terminated and required that critical supplies (as determined by the Resolution Professional) would have to continue uninterrupted;
- Protected the company and its property from enforcement action on account of offences committed prior to the Insolvency Commencement Date, after a Resolution Plan is approved, provided the Resolution Plan meets certain criteria.

New challenges have emerged in context of the Covid-19 pandemic, and the consequent national lockdown. The Government has passed an Ordinance to prevent the initiation of the CIR Process against Corporate Debtors for defaults occurring for a period of six months (extendable up to a year) starting on 25th March, 2020. It has also been provided that no application shall ever be filed for initiation of the CIR Process for such a default. The scope of this exemption is likely to be a source of litigation. The Ordinance also prevents an action for wrongful trading from being filed against a director or partner of a corporate debtor in respect of such default against which initiation of the CIR Process is suspended. These measures have been supplemented by increasing the threshold for initiation of the CIR Process to INR 1 crore (approx. USD 134,000) from INR 1 lakh (approx. USD 1,339) to make it more difficult to initiate the CIR Process under the IBC.

For Corporate Debtors that are undergoing the CIR Process, there have been challenges in complying with the strict timelines under the IBC. The IBBI has notified amendments to regulations, by virtue of which the period of lockdown imposed by the Central Government in wake of Covid-19 outbreak shall not be counted for the purposes of the time-frame of any activity in the CIRP or liquidation process prescribed under the Regulations that could not be completed due to such lockdown. This exclusion of time, however, is subject to limits prescribed under the IBC which have not been relaxed. Taking note of this situation, the Appellate Authority has passed an order on 30 March 2020, holding that the period of lockdown shall be excluded in calculating the period of CIR Process which is limited to 180 days extendable upto 270 days (with an outer limit of 330 days including time taken in legal proceedings).

Another challenge that is likely to gain significance in the coming months relates to whether resolution plans that have been approved by the Committee of Creditors can be modified or withdrawn in the context of the changed macro-economic scenario, and will have to be evaluated on a case-by-case basis.

XV. Intellectual Property

Q1. What is the law relating to protection of intellectual property rights in India?

Intellectual property is protected under various legislations in India as well as at common law. As a signatory to the TRIPs Agreement and keeping in line with India's obligations, amendments have been made in the existing legislations for compliance, such as the introduction of the Patents (Amendment) Act, 2005 and the Patents (Amendment) Rules, 2016 and a new trade mark law regime.

The important legislations governing intellectual property in India are:

- Patents
  - Patents Act, 1970 as amended by the Patents (Amendment) Act, 2005
  - Patent Rules, 2003, as amended by the Patents (Amendment) Rules, 2019
- Designs
  - Designs Act, 2000
  - Designs Rules, 2001 as amended by Designs (Amendment) Rules, 2014
- Trademarks
  - Trade Marks Act, 1999 as amended by Trade Marks (Amendment) Act, 2010
  - Trade Marks Rules, 2017
- Copyright
  - Copyright Act, 1957 as amended by the Copyright (Amendment) Act, 2012
  - Copyright Rules, 2013
- Geographical Indications
  - Geographical Indications of Goods (Registration & Protection) Act, 1999
  - Geographical Indications of Goods (Registration & Protection) Rules, 2002
- Plant Varieties
  - Protection of Plant Varieties and Farmers' Rights Act, 2001
  - Protection of Plant Varieties and Farmers' Rights Rules, 2003 as amended by Protection of Plant Varieties and Farmers' Rights (Third Amendment) Rules, 2009
- Semiconductor Integrated Circuits
  - Semiconductor Integrated Circuits Layout- Design Act, 2000
  - Semiconductor Integrated Circuits Layout- Design Rules, 2001
- Biodiversity
  - Biological Diversity Act, 2002
  - Biological Diversity Rules, 2004

Q2. How are computer software and programmes protected in India?

India recognises and protects computer programmes, tables and compilations including computer databases as 'literary works' under the Copyright Act. Both the object and the source codes can be protected as literary works under the Copyright Act. The protection provides for right to, *inter alia*, reproduce the work in any material form, including the storing of it in any medium by electronic means, to issue copies of the work to the public, to communicate the work to the public, to sell or offer to sell, to give on commercial rental any copy of the computer programme provided the programme itself is an essential object of the rental. Also, under the Copyright Act, the owner of a copyright work is entitled to protect his work against unauthorised use and misappropriation of whole of his work or a substantial part thereof and obtain relief from a court of law including injunction, damages and rendition of accounts of profits. Criminal remedies for infringement of copyright in a computer software or programme include imprisonment for not less than six months but which may extend to three years with a fine, not less than INR 50 thousand (approx. USD 670) but which may extend to INR 2 lakhs (approx. USD 2,679).

The Patents Act prohibits patentability of "computer programme *per se*" under Section 3(k), which the Patent Office, in most cases, has treated as an absolute preclusion on computer implemented method claims. Guidelines published by the Controller General of Patents, Designs, and Trade Marks set out that a claim is allowable if, taken as a whole, in substance, the claim does not fall in the excluded categories. As such, generally, inventions directed at computer programmes coupled with a novel hardware, or enabling the hardware to perform a certain function may be allowable, if such an invention meets all other conditions of patentability. System claims are allowable as hardware enabling functionality. Claims to commercial or non-technical solutions or output are likely to be rejected for lacking technical problem-solution content. In 2019, the Hon'ble Delhi High Court, in *Ferid Allani v. Union of India & Ors.*, clarified that the words '*per se*' are used in Section 3(k) to ensure that patent applications concerning genuine inventions, based on computer programmes, are not refused. The Hon'ble Court ruled that inventions based on computer programmes are patentable if they demonstrate a 'technical effect' or a 'technical contribution'.

Q3. What patent protection is available to a biotechnology company?

Inventions in the field of biotechnology are subject to the same criteria as any other invention relating to product and process. Patents may not however be secured in respect of plants and animals in whole or part, including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals (some of which are presently protectable under other legislations such as the Protection of Plant Varieties and Farmers' Rights Act, 2001.) The preclusion in patentability of plants and animals does not however extend to microorganisms that are subjected to modification. However, microorganisms that are naturally occurring are statutorily precluded from patentability. Genes and nucleic acid sequences manufactured with human intervention are not considered parts of plants or animals, and are accordingly patentable as products. Similarly, processes for manufacturing or producing transgenic plants or animals are not considered essentially biological processes, and are patentable.

Q4. How are trademarks and service marks protected in India?

Under the Trade Marks Act, a trade mark is defined as a mark that is capable of both: a) a graphical representation, and b) distinguishing the goods or services of one undertaking from another. The definition of mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

Registration under the Trade Marks Act confers exclusive rights to use the mark in respect of goods or services, subject to any conditions imposed, and if these rights are infringed, to take action to restrain unauthorised use. A trade mark is said to be infringed by a person, who, not being a permitted user, uses an identical or deceptively similar mark to the registered trade mark without the authorization of the registered proprietor of the trade mark. Indian trade mark law, however, protects the vested rights of a prior user of a trade mark against action by a registered proprietor.

Apart from or in addition to registration, a person can also obtain rights in an unregistered mark. By virtue of use of a trade mark, a proprietor acquires valuable goodwill which is protectable at common law by way of a passing off action. The protection also extends to unauthorised use in relation to trade names and domain names.

Under the Trade Marks Act, both civil and criminal remedies are simultaneously available against infringement and passing off. Registration of a trade mark is not a pre-requisite in order to sustain a civil or criminal action against violation of trade marks in India.

Civil remedies or reliefs available to trade mark owners, among others, include permanent or temporary injunctions, damages or rendition of account of profits with or without any order of delivery-up of the infringing labels and marks for destruction and erasure, including costs. Apart from the final relief(s), the proprietor of a trade mark may also seek interim relief(s) such as an order of interim injunction and/or appointment of a local commissioner, which is akin to an “Anton Pillar Order”, for search, seizure and preservation of infringing goods, account books and preparation of inventory, etc.

Criminal proceedings involve filing of a complaint in the court of a magistrate against unknown persons with a view to secure directions to the police to register a case and investigate the activity complained of (including a search and seizure operation). Alternatively, one can also file a complaint with the police directly and if it is satisfied that the named entity is committing any of the offences complained of, it may, without the order of the court, carry out a raid/search & seizure operation. In case the infringer is found guilty of any of the aforementioned offences, he is punishable with imprisonment for a term between six months to three years and with fine of INR 50,000 (approx. USD 670) which may extend to INR 2,00,000 (approx. USD 2,679). Enhanced punishment for subsequent conviction(s) is also envisaged in the Act.

Q5. How does one protect confidential information and trade secrets in India?

Confidential information and trade secrets are protected in India under the law of contracts, copyright law, common law action of breach of confidence, as well as, the Information Technology Act 2000 The protected information must be such, the release of which would be injurious to its proprietor or of advantage to third parties, it must be confidential or secret, that is, it is not already within the public domain, and the proprietor should have taken reasonable steps to maintain its secrecy or confidentiality. The methods usually used to protect confidential information are confidentiality clauses in employee contracts, non-disclosure agreements with third parties in the course of a business venture, and internal security mechanisms to restrict access and dissemination of trade secrets and confidential information within an organisation.

Available legal recourse includes injunctions restraining disclosure or use of information, return of confidential proprietary information on termination of a contract, and damages and account of profits arising out of unauthorised disclosure or use.

Q6. Can the employees of an Indian company be required to sign confidentiality agreements?

Yes. Confidentiality provisions may be included in the employment terms to bind the employee to keep the information received during the course of employment confidential. Such terms may also include requirements to return all confidential information and materials to the employer at the time of termination of employment. Additionally, requirements preventing such personnel from utilising such confidential information in their new job may also be imposed.

Q7. What is the protection available in case of infringement of intellectual property rights?

All the relevant statutes on intellectual property have provisions relating to remedies and reliefs available to an owner in case of infringement including injunction, damages or rendition of accounts. In addition to civil remedies, the owner is also, in some cases, entitled to criminal remedies for infringement of copyright and trademarks. There are detailed provisions relating to such offences which are punishable with imprisonment and fine.

Q8. Does Indian law recognise transactions carried out electronically?

The Information Technology Act provides for, *inter alia*, legal recognition of transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as “electronic commerce”. Such communication maybe an alternative to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the government agencies and for connected or incidental matters.

The Information Technology Act provides legal recognition to electronic records if the information or matter is (a) rendered or made available in an electronic form, and (b) accessible so as to be usable for a subsequent reference. The Information Technology Act also provides legal recognition for electronic signatures where information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the central government.

Q9. How can a company outsourcing its activities to India safeguard intellectual property which is created in the course of performance of an outsourcing contract?

Indian law permits for assignment of rights in intellectual property, either partially or wholly and, in cases of some intellectual property such as copyright, for whole or any part of the duration of protection granted under the relevant legislation. In a case where a company outsources its work to a third party contractor or vendor, it is essential to ensure that the contract mentions ownership and terms of use of intellectual property. The Copyright Act envisages that an assignment or license agreements must be in writing and must specify the term and territory of the assignment or license. In case of pre-existing intellectual property, generally ownership lies with the party who created it, however, the law prescribes exceptions to this rule. A third party contractor or vendor may be afforded rights to use the intellectual property through a license agreement during the course of the engagement. The license agreement should contain appropriate terms of use and may be exclusive or non-exclusive. In case of a newly created intellectual property, it is essential to identify who will have ownership of the intellectual property in the contract itself, and whether the vendor will have certain rights regarding its use. Appropriate mechanisms should also be put in place to ensure that the chain of title has been perfected. The intellectual property related terms and conditions must comply with the requirements and provisions as laid down under the respective intellectual property legislations.

Q10. What are the relevant data protection laws in India?

The Information Technology Act contains provisions relating to data protection and imposes civil liability for negligent handling of "sensitive personal data or information" and criminal liability in cases of disclosure of information in breach of a lawful contract. The SPDI Rules prescribe the procedure to be followed by a body corporate for the protection of personal information including sensitive personal information or data, procedure to be followed for collection of such data and further disclosure of such collected data. The SPDI Rules are applicable to body corporates or any person located within India. Unauthorised disclosure is punishable with imprisonment up to three years and a fine up to INR 5 lakhs (approx. USD 6,697) or both.

Additionally, the Information Technology Act empowers the government to direct any of its agencies to intercept, monitor or decrypt any information in the interest, *inter alia*, of sovereignty, integrity, defense and security of India. Further, the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, provide that the government may exercise power to issue directions to block an internet site. However, the reasons for blocking have to be recorded in writing and are amenable to judicial scrutiny. It may be noted that India's data protection regime is likely to undergo a change soon. In the year 2018, a committee of experts led by eminent judge Justice BN Srikrishna, submitted a draft Personal Data Protection Bill, 2018 (Draft Bill) to the government. This bill will form the basis for India's data protection laws, laying down how organizations should collect, process, and store citizens' data with due regard for the privacy of citizens. This proposed Draft Bill, *inter alia*, seeks to empower the Indian central government to notify such categories of critical personal data which would be required to be processed only within India. Such data can only be transferred out of India for provision of health services or emergency services where such transfer is strictly necessary, or to a particular country, *etc*. or through contractual provisions pre-approved by the government. The Draft Bill leaves it to the discretion of the government to notify the restriction on cross border flow of data.

The Draft Bill is currently in the process of undergoing several rounds of governmental and parliamentary review before it is finalized.

XVI. Employment Law

Q1. What is the general frame work of employment laws in India?

The Indian parliament as well as the legislature of the relevant state has power to concurrently legislate on the subject of labour. Broadly, the key labour legislations in India can be grouped as follows:

Group I

- Laws in relation to working conditions, health and safety of workers:
- Shops and Establishments Acts (S&E Acts) in force in various states;
- Factories Act;
- CLRA Act;
- Inter-State Migrant Workmen (Regulation of Employment & Conditions of Service) Act, 1979;
- Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996; and
- Apprentices Act.

Group II

- Laws for promoting industrial peace, harmony, conciliation and adjudication of industrial disputes:
- Industrial Disputes Act;
- Standing Orders Act; and
- Trade Unions Act.

Group III

- Laws dealing with wages of employees:
- Equal Remuneration Act;
- Minimum Wages Act;
- Wages Act; and
- Bonus Act.

Group IV

- Laws providing for social security and welfare of employees:
- EPF Act;
- ESI Act;
- Gratuity Act;
- MB Act;
- Compensation Act;
- Employer’s Liability Act, 1938;
- Fatal Accidents Act, 1855; and
- State specific Labour Welfare Fund Acts (LWF Acts).

Group V

- Laws dealing with child and women labour:
- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013; and
- Child and Adolescent (Prohibition and Regulation) Act, 1986.

Group VI

- Laws providing for protective discrimination of certain categories of workers:
- Rights of Persons with Disabilities Act, 2016; and
- Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989.

Group VII

- Laws providing for welfare of workers:
- Industrial Establishments (National and Festival Holidays and Other Holidays) Act (N&F Holidays Act).

Group VIII

- Laws dealing with miscellaneous matters:
- Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959

Group IX

- General Laws:
- Constitutional provisions relating to fundamental rights enshrined in the Constitution; and
- Contract Act.

Q2. Recent developments

Introduced changes

Some of the major reforms that have been introduced in the labour and employment law regime include:

Standing Orders Act

- on May 6, 2020, the Governor of Madhya Pradesh promulgated The Madhya Pradesh Labour Laws (Amendment) Ordinance, 2020 amending The Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 and The Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982. Details of the Ordinance are as below:
  - The Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 has now been made applicable to every undertaking wherein the number employees on any day during twelve months preceding is more than hundred instead of fifty as it stood prior to the amendment
  - A new provision has been added empowering the Government to exempt any establishment or any category of establishment from any or all of the provisions of The Madhya Pradesh Shram Kalyan Nidhi Adhiniyam, 1982 by issuing a notification subject to the conditions specified.

- the States of Goa, Bihar, Karnataka have implemented the central amendments on Industrial Employment (Standing Orders) Central (Amendment) Rules, 2018 in the state, which amends item 1 under "Schedule" of The Industrial Employment (Standing Orders) Act, 1946 which substitutes the "fixed-term employment workmen in the apparel manufacturing sector;" to "fixed-term employment". The amendment also incorporates the provision of Rule 3(A) under The Industrial Employment (Standing Orders) Central Rules, 1946 which provides that employer of an industrial establishment shall not convert the posts of the permanent workmen to fixed-term employment and similarly included "fixed-term employment workman" with conditions of facilities such as hours of work, wages, allowances and other statutory benefits shall not be lesser than the facilities for the permanent workman;
- on July 24, 2019, the State Government of Haryana has issued a notification under the Standing Orders Act introducing a new requirement for principal employers and contractors to file an undertaking of compliance with the Standing Orders Act in order to obtain a registration or license under the CLRA Act; the Interstate Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; and the Motor Transport Workers Act, 1961;
- the Government of Karnataka issued a notification dated May 25, 2019 extending the exemption granted to knowledge-based industries – including information technology (IT), information technology enabled services (ITES), start-ups, animation, gaming, computer graphics, telecom, business process outsourcing and knowledge process outsourcing under the Standing Orders Act for another five years.

MB Act

- the State Government of Karnataka has notified the Karnataka Maternity Benefit (Amendment) Rules, 2019 on July 15, 2019. The key provisions of the rules include:
  - Every establishment having 50 or more employees is required to have one crèche for every 30 children of less than six years of age.
  - The crèche is required to be located within the premises of the establishment or within 500 meters from the entrance gate of the establishment.
  - The crèche should be made of heat resisting materials on the ground floor, safe and waterproof with proper ventilation. It should be built as per certain prescribed height and area specifications. It should also have an attached kitchen and adjoining bathroom with adequate fixtures and facilities as prescribed.
  - The crèche should be open as per the shifts of the women employees, in two or more shifts, depending on the working hours of the mothers, while not exceeding eight hours a shift.
  - Only women qualified and trained in Early Childhood Care and Education (ECCE) or Teachers Course Higher (TCH) or equivalent are allowed to be work as crèche-in charge during the absence of the warden or their mothers.

  - Each child should be medically examined before admission and once every two months thereafter. Records relating to these medical check-ups should be maintained.
  - The rules provide for several other specifications with respect to supply of milk and refreshment, supply of clothes, soap and oil, and outdoor play facilities.
- the State Government of Haryana has issued the draft Haryana Maternity Benefit (Amendment) Rules, 2018. The key highlights of the rules include:
  - Every establishment having 50 or more employees is required to maintain crèche facilities to its employees.
  - The crèche is required to be located within the vicinity of the establishment or within 500 meters from the entrance gate of the establishment.
  - The crèche should be made of heat resisting materials and should be waterproof with proper ventilation. It should be built as per certain prescribed height and area specifications.
  - Each child should be medically examined once every month and nursing mothers should be medically examined once every two months. Records relating to these medical check-ups should be maintained.
  - A register of complaints is required to be maintained in the crèche.
  - The rules provide for several other specifications with respect to amenities, supply of milk and refreshment, and crèche staff.

S&E Acts

- State/UT Governments of (a) Punjab, (b) Gujarat, (c) Maharashtra, (d) Rajasthan, (e) Tamil Nadu, (f) Telangana, (g) Tripura, (h) West Bengal, (i) Karnataka, (j) Haryana, and (k) Chandigarh have amended the S&E Acts to allow establishments to remain open for 365 days in a year subject to fulfilling the prescribed conditions. This change has been introduced in keeping with the objective to improve working conditions, increase job opportunities for women and provide a favourable environment for business, with the overall goal of increasing jobs, especially in the retail, IT, hospitality and services sectors;
- the Governments of Karnataka, Andhra Pradesh, Kerala, Madhya Pradesh, Rajasthan, Chhattisgarh, Maharashtra, Odisha, Telangana, Gujarat, Haryana, Punjab and West Bengal have discontinued the requirement of renewing the registration obtained under the respective S&E Acts;
- the Gujarat Shops and Establishments Act, 1948 stands repealed with the notification of the Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2019 (New Act) on May 1, 2019 by the Government of Gujarat. The New Act provides for flexibility in terms of the opening and closing hours to establishments located in different areas. The New Act also provides for the benefit of women workers by providing them flexibility in terms of working for longer hours provided adequate safety measures including transportation facilities are provided and by providing for crèche facilities in establishments. On June

23, 2020, the Government of Gujarat has released the Gujarat Shops and Establishments (Regulation of Employment and Conditions of Service) Rules, 2020 thereby repealing The Gujarat Shops And Establishments Rules, 1962. The Rules have introduced new compliances emphasizing environment, health and safety in shops and establishments in Gujarat;

- the Government of Assam has granted exemption from the provisions on daily and weekly hours under the Assam Shops And Establishments Act, 1971, subject to the condition that total number of the working hours in one day shall not exceed 12 hours.

Factories Act

- Working hours have been extended to twelve hours for certain period of time in the States/UTs of Assam, Goa, Gujarat, Haryana, Himachal Pradesh, Karnataka (withdrawn), Madhya Pradesh, Maharashtra, Odisha, Punjab, Chandigarh, Rajasthan (withdrawn), Uttarakhand, Uttar Pradesh (withdrawn), Tripura and Dadra And Nagar Haveli And Daman And Diu;
- the States of Haryana, Goa, Himachal Pradesh, Gujarat, Bihar, Assam and Karnataka have increased threshold limit for applicability to the Factories Act from ten or more workers to twenty or more workers for factories operating with the aid of power and from twenty or more workers to forty or more workers for factories operating without the aid of power;
- the Government of Madhya Pradesh has amended the Madhya Pradesh Factories Rules, 1962. As per the notification, the due date to file an annual return has been amended from January 15 to February 01 every year to be filed online as prescribed;
- the Government of Karnataka has amended the Karnataka Factories Rules, 1969. As per the notification, the license may be granted or renewed for a period of ten years or more but not exceeding fifteen years on payment of respective prescribed fees;
- the Government of Uttarakhand has amended the Uttar Pradesh Factories Rules, 1950 (as applicable to the state of Uttarakhand). As per the amendment, the arrangement of separate toilets for men and women, sanitary napkins, disposable bins in women's toilet with lids and measures for disposal of waste as per approved procedure from Chief Inspector has been mandated. The amendment has further increased the registration fees and amended various other provision under the rules;
- the Government of Tripura has amended the Tripura Factories Rules, 2007. As per the amendment, the arrangement of sanitary napkins, disposable bins in women's toilet with lids and measures for disposal of waste as per approved procedure from Chief Inspector has been mandated. It further mandates to provide personal protective equipment such as safety helmets, protective footwear, safety goggles and spectacles, equipment for eye protection, gloves and protective clothing, ear protection, respiratory protection etc to all workers and the equipment shall also conform to the relevant national standards;
- the Government of Puducherry has amended the Puducherry Factories Rules, 1964 by introducing online system for approval of site, construction

or extension of a factory, registration, renewal and amendment of license through the web portal of the Chief Inspectorate of Factories and Boilers, Puducherry. The amendment also allows maintenance of returns in electronic form through the on-line portal of the Chief Inspectorate of Factories and Boiler or personally delivered to the Office of the Chief Inspectorate of Factories and Boilers. The amendment further states that all the books, registers and records required to be maintained under the said rules, stipulated under the Factories Act, 1948 shall at the discretion of the occupier/manager may be maintained in electronic form;

- the Government of Tamil Nadu has amended the Tamil Nadu Factories Rules, 1950 where earlier period of license validity from ten years has been extended to fifteen years;
- the Government of Jharkhand has amended the Jharkhand Factories Rules, 1950 where license granted or renewed under this chapter shall remain valid or be in force for a minimum period of one year to maximum period of fifteen years as applicable. The licence so granted or renewed shall remain valid up to December 31 of the applied period.

Industrial Disputes Act

- on August 11, 2020, the Governor of Punjab has promulgated The Industrial Disputes (Punjab Amendment) Ordinance, 2020 amending the Industrial Disputes Act. As per the ordinance, the existing applicability of Chapter V-A of the Industrial Disputes Act, which specifies provisions relating to layoffs, retrenchment, closure of certain establishments, wherein the number of workmen employed is not less than one hundred workmen has been increased to three hundred workmen. In addition to the above, as per the provisions relating to the conditions of retrenchment, the existing compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months, an additional condition which will be an amount equivalent to last three months average pay has been introduced;
- on July 09, 2020, the Governor of Himachal Pradesh has promulgated The Industrial Disputes (Himachal Pradesh Amendment) Ordinance, 2020 amending the Industrial Disputes Act. As per the ordinance, the provision of the prohibition of strikes and lock-outs now includes non-public utility service as well along with public utility service within the provisions of the Industrial Disputes Act. In addition, the conditions for retrenchment compensation has been enhanced to sixty days from the earlier fifteen days average pay for every completed year of continuous service or any part thereof more than six months;
- on July 03, 2020, the Governor of Gujarat has promulgated the Industrial Disputes (Gujarat Amendment) Ordinance, 2020 amending section 25 K of Industrial Disputes Act. As per the ordinance, the applicability of Chapter V-A of the Industrial Disputes Act, which specifies provisions relating to layoffs, retrenchment, closure of certain establishments, an industrial establishment where the number of workmen employed are not less than

one hundred workmen has been increased to three hundred workmen. In addition to the above, as per the provisions relating to the conditions of retrenchment, the existing compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months, an additional condition which will be an amount equivalent to last three months average pay has been introduced;

- on July 02, 2020, the Governor of Bihar has promulgated The Industrial Disputes (Bihar Amendment) Ordinance, 2020 amended section 25 K of Industrial Disputes Act. As per the ordinance the Chapter V-A of the Industrial Disputes Act, which specifies provisions relating to layoffs, retrenchment, closure of a certain establishment, will be applicable to an industrial establishment where the number of workmen employed is not less than three hundred workmen instead of the existing two hundred workmen.

CLRA Act

- the State Governments of Maharashtra, Rajasthan, Haryana, Andhra Pradesh, Uttar Pradesh, Gujarat, Tripura, Bihar, Goa, Punjab and Karnataka have increased the threshold of applicability of the CLRA Act from 20 contract labour to 50 contract labour and the State of Himachal Pradesh has increased it to 30 contract labour;

ESI Act

- the MoLE has issued a notification dated June 13, 2019 amending the Employees' State Insurance (Central) Rules, 1950 to reduce the rate of the contribution required to be made under the ESI Act from 6.5% to 4% with effect from July 1, 2019;
- the MoLE has amended the Employees' State Insurance (Central) Rules, 1950 to increase the limit of average daily wages for exemption from payment of employee's contribution to up to INR 176 (approx. USD 2.36) previously INR 137 (approx. USD 1.84).

EPF Act

- the EPF Act has been amended to permit provident fund members to withdraw 75% of their accumulations after a period of one month of continuous unemployment instead of two months.

Employees' Compensation Act

- with effect from January 03, 2020, wage ceiling for the purposes of calculating compensation under the Employees' Compensation Act has been increased from INR 8000 (approx. USD 107) to INR 15000 per month (approx. USD 201).

Laws pertaining to wages

- the MoLE has amended the central rules under the Industrial Disputes Act, Bonus Act, Minimum Wages Act and Wages Act to include the requirement of filing unified annual return on the web portal of the central government in the MoLE before February 1 in each year giving information as to the particulars specified in respect of the preceding year.

Apprentices Act

- the Apprentices (Amendment) Rules, 2019 have been notified on September 25, 2019. The key changes introduced by the amendment are as follows:
  - At least 4 workers required in order to engage apprentices. Employers with 30 or more workers mandatorily required to engage apprentices.
  - Period of apprenticeship training: 6 months to 3 years.
  - Apprentices not entitled to employee benefits.
  - Employer to engage apprentices in a band of 2.5% to 15% of total strength of the establishment.
  - Minimum rate of stipend prescribed.

Transgender Persons Act

- the Transgender Persons Act came into force with effect from January 10, 2020. Under the Transgender Persons Act, an employer is required to ensure that there is no discrimination against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues; designate a person to be a complaint officer to deal with the complaints relating to violation of the provisions of the Act; and provide such facilities to transgender persons as may be prescribed under the rules. The Act prescribes penalties for a person who (a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government; (b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use; (c) forces or causes a transgender person to leave household, village or other place of residence; and (d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse. The penalty for the said offences is imprisonment ranging from six months to two years and fine;
- the Ministry of Social Justice and Empowerment on July 13, 2020 issued a notification publishing the draft Transgender Persons (Protection of Rights) Rules, 2020, and sought "objections and suggestions" within a 30-day period before the official gazetted notification.

Miscellaneous changes

- on August 06, 2020, the Government of Punjab has exempted industrial establishments of Punjab engaged in the continuous process industry from the provisions of the Punjab Industrial Establishment (National And Festival Holidays And Casual And Sick Leave) Act, 1965;

- on July 31, 2020, the Governor of Karnataka has promulgated The Industrial Disputes and Certain other laws (Karnataka Amendment) Ordinance, 2020 to amend the Industrial Disputes Act, the Factories Act, the CLRA Act. Below mentioned are the brief description on the changes brought in by the ordinance:
  - Provisions relating to layoffs, retrenchment, closure of the certain establishment, under Section 25K of the Industrial Disputes Act will now be applicable to an industrial establishment where the number of workmen employed is not less than three hundred workmen instead of the existing provision of one hundred workmen.
  - The threshold limit for applicability to the Factories Act has now been increased from ten or more workers to twenty or more workers for factories operating with the aid of power and from twenty or more workers to forty or more workers for factories operating without the aid of power.
  - The number of hours allowed to work overtime has been increased from seventy-five hours to one hundred and twenty-five hours in any quarter.
  - The applicability of the CLRA Act for establishments has been increased from twenty or more workmen to fifty or more workmen.
- the Government of Tamil Nadu vide notification no G.O. (Ms) No.111 has implemented The Tamil Nadu Rationalisation of Forms and Reports under Certain Labour Laws Rules, 2020. As per the rules, the following important compliances forms for registration, renewal, notice of commencement by principle employer/contractor, notice of completion by principle employer/contractor have been consolidated and amended under Tamil Nadu Contract Labour (Regulation and Abolition) Rules, 1975, Tamil Nadu Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Rules, 2006, Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) (Tamil Nadu) Rules, 1983;
- the Administrator of Chandigarh has introduced Transparent Inspection Policy-2020 under ease of doing business and business reform plan. According to the policy, the following factories and establishments have been exempted from physical inspection under all labour laws (a) All the factories and establishments employing less than fifty workers and who have opted for the "Self Certification Scheme" and have submitted a single return under various labour laws (b) All start-up establishments shall be exempted for a period of two years from the date of commencement of work/business except the inspections covered under the Building and other Construction Workers (Regulation of Employment and Condition of Service) Act, 1996 (c) All the establishments having no employee that is employing family members only to be exempted (d) Any other establishments which are specifically exempted by Chandigarh Administration from time to time. The policy also provides the following Inspection criteria (a) Every major accident hazardous unit shall be inspected once in a year (b) All the hazardous unit involving fire, explosion, toxic release are to be inspected

once in two years (c) The rest of the units which are non-hazardous are to be inspected once in five years. Furthermore, the inspection under Shops and establishments is categorized as follows (a) Shops and establishment employing up to four-person shall be exempted from inspection (b) Shops and establishment employing five or more person shall be inspected once in a year (c) Shops and establishments employing hundred or more person shall be inspected once in every two years;

- the Government of Goa has introduced scheme known as 'Self Certification Scheme' to simplify compliance for the Factories covered section 2(m) (i) or section 2(m) (ii) or covered under section 85 of the Factories Act, 1948 except for the factories categorized as "major accident hazards (MAH) installations" as defined under clause (ja) of rule 2 of the Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989. The scheme shall be valid for five calendar years including the calendar year when the scheme was used. The scheme may be renewed for further five-calendar year after completion of the tenure of the scheme. Therefore, occupier may get enrolled for this scheme at any time in a calendar year by submitting an application in Form – I. After being enrolled to the scheme, the occupier/manager of the factory shall file the Returns online through Goa Online e-District portal. Once after enrolling under this scheme employer is exempted from maintenance of registers as list below in hard copy format and shall be maintained in soft copy format as mentioned i.e (i) Record of lime washing, painting, etc. in Form No. 08; (ii) Humidity Register in Form No. 9; (iii) Register of Compensatory Holidays in Form No. 17; (iv) Overtime muster roll for exempted workers in Form No. 18; (v) Register of adult workers in Form No. 20; (vi) Register of child workers in Form No. 22; (vii) Register of leaving with Wages in Form No. 23; (viii) Leave Book in Form No. 24; (ix) Nomination for Payment of Wages due for a period of leave with wages in the event of the death of a worker in Form No. 25; (x) Muster Roll in Form No. 36; (xi) Register of accidents and dangerous occurrences in Form No. 37; and (xii) Inspection Book in Form No. 38. The Occupier/manager shall submit compliance to the inspection report within one month from the date of receipt Inspection Report. Once inspected, the same factory will not be inspected again during the remaining period of the validity of the scheme unless there is the occurrence of a fatal accident or accident causing serious bodily injury or dangerous occurrence takes place or any specific complaint/grievance is received regarding violation of the law during the said period.

Short-term changes in light of the COVID-19 pandemic

With the onset of the coronavirus diseases pandemic-2019 (COVID-19), the businesses have faced challenges in dealing with employee-related costs. In order to ease the burden of the employers, the Government of India and State Government have announced the following short-term reforms to the labour and employment law regime:

- keeping in view the COVID-19 situation and to further ease the compliance procedure, Employees' Provident Fund Organization (EPFO) has decided to accept KYC attestation, transfer claim attestation etc., through email also. An employer can send the scanned copy of the duly signed request letter to the concerned Regional Office through the mail. Further, such establishments, whose authorized officers have approved digital signatures but are not able to locate the dongle, can login to the employer portal and register their e-sign through the link for registration of already registered authorized signatories. If their name against the approved digital signature is same as that in their Aadhar card, the registration of e-sign will not require any further approval. Other authorized signatories can register their e-signs and send the request letters approved by the employers and seek approval of the concerned EPFO Offices;

- the MOLE has announced that electronic-challans-cum-returns under the EPF Act can now be filed by an employer without the need of simultaneous payment of contributions and contributions may be paid later by the employer. The above change will entail convenience to the employers as well as the employees covered under the EPF Act and schemes;
- considering the difficulty faced by the establishments in the timely deposit of contributions or administrative charges due for any period during the lockdown, the EPFO has decided that such delays due to operational or economic reasons shall not be treated as default and penal damages should not be levied for such delay;
- EPFO stated through its website that if an application has been made for any other claim which is not settled so far, one can still file an online provident fund withdrawal claim under Outbreak of Pandemic-COVID-19 for faster relief.

Proposed changes

Certain big ticket reforms have been proposed by the MoLE to consolidate, simplify and make the labour legislations investor friendly. Some of these reforms are set out below. However, we have not seen much development in the past one year on account of disruptions of COVID-19. That said, the Finance Minister of India, Ms. Nirmala Sitharaman, while announcing the second tranche of COVID-19 economic stimulus in May, 2020, emphasized on the upcoming labour reforms including the much-awaited labour codes.

Labour Codes

- The Wages Code which aims to consolidate multiple laws on the subject of wages i.e. Wages Act, Minimum Wages Act, the Bonus Act, and the Equal Remuneration Act. The Code on Wages Bill was introduced in Lok Sabha on July 23, 2019. The Bill was passed by the Lok Sabha on July 30, 2019 and by the Rajya Sabha on August 2, 2019. It received presidential assent on August 8, 2019 and is now awaiting notification by the MoLE. The key highlights of the Wages Code include:
  - Applicability and coverage – The Wages Code is applicable to all employees, except in case of provisions relating to bonus which are applicable only to employees drawing wages less than the limit to be

prescribed on a later date. Under the Wages Code, the definition of 'employee' includes all individuals in supervisory and managerial role irrespective of the wages payable to such individuals. Under the existing regime, different legislations prescribe different applicability criteria, i.e. the Wages Act is applicable to employees earning wages less than INR 24 thousand (approx. USD 321) and the Bonus Act is applicable to employees earning wages less than INR 21 thousand (approx. USD 281). Additionally, the Wages Act, which is currently applicable only to 'industrial or other establishment' is now applicable to 'establishment' which term has a broader connotation and means any place where any industry, trade, business, manufacture or occupation is carried on.

– Definition of wages – The Wages Code has introduced a new definition of wages which has undergone a substantial change. Under the Wages Code, 'wages' means all remuneration whether by way of salary, allowances or otherwise, expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes – (i) basic pay; (ii) dearness allowance; and (iii) retaining allowance, if any. However, the term 'wages' does not include (a) any bonus payable under any law for the time being in force, which does not form part of the remuneration payable under the terms of employment; (b) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the appropriate government; (c) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon; (d) any conveyance allowance or the value of any travelling concession; (e) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; (f) house rent allowance; (g) remuneration payable under any award or settlement between the parties or order of a court or tribunal; (h) any overtime allowance (i) any commission payable to the employee; (j) any gratuity payable on the termination of employment; (k) any retrenchment compensation or other retirement benefit payable to the employee or any ex gratia payment made to him on the termination of employment (together Wage Definition Exclusions). The definition of 'wages' under the Wages Code also provides that in case the Wage Definition Exclusions exceed 50% or such other per cent, to be prescribed on a later date, of the total remuneration paid to the employee, the difference between the Wage Definition Exclusions and 50% or such other per cent will be considered as 'wages'.
– Bonus and eligibility thereof – The provisions pertaining to payment of bonus under the Wages Code are applicable to establishments in which twenty or more persons are employed or were employed on any day during an accounting year. Under the Wage Code, all employees drawing wages less than the ceiling amount fixed by the appropriate government

are entitled to bonus at the rate of 8.33% of the wages earned by such employee. Given that the ceiling amount under the Bonus Act is INR 21 thousand (approx. USD 281) and it is possible that the ceiling amount to be fixed under the Wages Code is higher than INR 21 thousand (approx. USD 281), employers may need to re-visit the coverage of its employees for the purposes of payment of bonus – depending on whether the new ceiling amount is higher than INR 21 thousand (approx. USD 281). Even with respect to calculation of bonus, the Wages Code provides for fixing of a ceiling amount. Pursuant to this, such ceiling amount or the minimum wage fixed by the state government, whichever is higher would be taken into account for calculating bonus. Additionally, conviction for sexual harassment is now an additional disqualification for the payment of bonus.

- Equal remuneration – The Equal Remuneration Act provides for prohibition of discrimination between men and women in the work place in matters of remuneration, recruitment and for matters connected therewith or incidental thereto. By introduction of the expression 'on grounds of gender', the third gender is also protected against discrimination in the aforesaid matters.
- Floor Wage – Under the existing law, the state governments have the power to fix the minimum wage limit, however, the Wages Code provides that the central government shall now have the power to fix a 'floor wage' which can be different for different geographical areas. The state governments are required to fix minimum wages for areas falling under their jurisdiction provided such wages should be equal to or greater than the floor wages.
- Records, returns and notices – The Wages Code provides for maintenance of registers, displaying of notices and issuing wage slips. The format of these registers and notices will be prescribed in the rules framed under the Wages Code. Therefore, from a compliance perspective, the system of registers and notices may need an overhauling.
- Inspectors-cum-facilitators – The Wages Code provides for inspectors-cum-facilitators, in place of the earlier provision for appointment of inspectors, with powers of inquiry, investigation and advising employers and workers regarding effective means of complying with the law.
- Under the Wages Code, there is a substantial increase in monetary penalties as well as introduction of compounding provisions.
- The limitation period for raising claims has been increased to three years as opposed to the current six months to two years.
- Recently, the MoLE published the draft rules framed for the implementation of the Wages Code. The new draft rules have been circulated afresh for public comments and suggestions for a period of 45 days from the date of publishing, July 07, 2020. The draft rules under the Wages Code provide for procedural and compliance-related requirements pursuant to the Wages Code.

- OSH Code was introduced in the Lok Sabha on July 23, 2019 and was referred to Standing Committee on October 9, 2019. The OSH Code seeks to consolidate the law already covered under the Factories Act, Mines Act, 1952, Dock Workers (Safety, Health and Welfare) Act, 1986, Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, Plantations Labour Act, 1951, Contract Labour (Regulation and Abolition) Act, 1970, Inter-State Migrant workmen (Regulation of Employment and Conditions of Service) Act, 1979, Working Journalist and other News Paper Employees (Conditions of Service and Misc. Provision) Act, 1955, Working Journalist (Fixation of rates of wages) Act, 1958, Motor Transport Workers Act, 1961, Sales Promotion Employees (Condition of Service) Act, 1976, Beedi and Cigar Workers (Conditions of Employment) Act, 1966, and Cine Workers and Cinema Theatre Workers Act, 1981. the changes proposed by the OSH Code are as follows:
  - Applicability – The OSH Code will be applicable to establishments that employ 10 or more workers.
  - One registration – The OSH Code proposes one registration for an establishment instead of multiple registrations. Presently, six labour legislations out of 13 provide for separate registration of the establishment. This will create a centralized database and promote ease of doing business. In case an employer fails to obtain registration of the establishment with the specified time period, the establishment will be deemed to have been registered on the day of expiry of the specified period.
  - Duties of employers – Under OSH Code, employers are required to (a) provide free of cost annual health checks-up for employees above prescribed age for prescribed tests and for prescribed establishments, (b) issue appointment letter to every employee of the establishment with the minimum information prescribed by the appropriate government; (c) ensure disposal of hazardous and toxic waste in prescribed manner.
  - Working hours and overtime – Under the OSH Code, the appropriate governments have been given the power to prescribe requirements in relation to daily hours, weekly hours, spread-over and rest intervals. However, it will now be mandatory for an employee to obtain prior written consent of the worker before requiring him / her to work overtime.
  - Thresholds for applicability of welfare provisions – There are different applicability thresholds exists for welfare provisions like crèche, canteen, first aid, welfare officer etc. under different legislations. However, the OSH Code provides for uniform threshold for welfare provisions for all establishment as far as practicably feasible.
  - Employment of women in night shifts – Women shall be permitted to work beyond 7 PM and before 6 AM subject to the safety, holidays, working hours or any other condition as prescribed by the appropriate government in respect of prescribed establishments.
  - The provision of one license and one return in place of multiple licenses and returns in existing labour laws subsumed in the OSH Code to save time, resources and efforts of establishments.

- The multiple committees under five labour Acts have been substituted by one National Occupational Safety and Health Advisory Board.
- Under the OSH Code, there is a substantial increase in monetary penalties as well as introduction of compounding provisions.
- The limitation period for making complaint has been increased to six months as opposed to the current three months under various Acts.

- Labour code on Industrial Relations which seeks to consolidate the Industrial Disputes Act, the Trade Union Act and the Standing Orders Act into one single piece of legislation. The Labour Code on Industrial Relations was Introduced in Lok Sabha on November 28, 2019 and was sent for recommendation to a parliamentary standing committee on December 23, 2019. The key highlights include:
  - Industrial Disputes – The threshold above which it is necessary to obtain government approval for termination of employment or closure of an establishment is proposed to be increased from 100 to 300 workmen. For employers employing less than 50 workmen, the requirement to provide a minimum of one months' notice and retrenchment compensation is sought to be removed. Retrenchment compensation for workmen is sought to be increased to an amount equivalent to 45 days' average salary for every year of service from the current 15 days' average salary for every year of service. Taking of casual leave by 50% or more of the workers employed in an industry on any given day shall be treated as a 'strike'. The monetary penalties for non-compliance is proposed to be enhanced;
  - Trade Unions – At least 10% of the members of the establishment or industry must be members of the trade union seeking registration. The trade union will be deemed to have been registered in case of non-communication of the decision of the Registrar within 60 days; and
  - Standing Orders – Applicability of the Standing Orders chapter cannot be extended to establishments or undertakings employing less than 100 employees, even by notification. Matters to be covered by the Standing Orders have been increased. The procedure for drafting and certification of Standing Orders, while remaining largely similar, has been slightly more streamlined.
- Labour Code on Social Security consolidates a total of 15 labour laws including EPF Act, ESI Act, MB Act, Gratuity Act, Compensation Act, Unorganised Workers' Social Security Act, 2008, and various Welfare Cess / LWF Acts. The draft Labour Code on Social Security Introduced in Lok Sabha on December 11, 2019 and referred to Standing Committee on December 23, 2019. The key highlights of the said Code include:
  - Applicability – (a) workers that are employed by any entity; (b) worker who may also be the owner or the proprietor of an entity or a self-employed unit; international workers; and (c) an Indian citizen, working outside the territory of India, who opts to become a member of social security schemes under the Code. Extends to both organised as well as unorganised sector;

- Constitution of National Social Security Council of India - For reviewing and monitoring the implementation of the Code;
- Claims and objections for the unclaimed amount of the preceding financial year within a period of minimum six months, following which the amount will be confiscated;
- Social security measures: The Code provides for universal social security including pension, sickness benefit, maternity benefit, disablement benefit, invalidity benefit, invalidity, dependent's benefit, medical benefit, group insurance benefit, provident fund, unemployment benefit and International worker's pension benefit.
- Aadhar-based registration service for registration of workers and providing a portable Social Security account, to be named as Vishwakarma Karmik Suraksha Khata (VIKAS), which will be linked to Aadhar number of the worker; and
- Unless an employer is registered under the Code, once enforced, it cannot employ any workers, after the expiry of such period as may be stipulated from the date on which the entity was liable to be registered.
- The Standing Committee of the Parliament on Labour, in its report dated July 31, 2020 on Code on Social Securit, has recommended that the eligibility period for payment of gratuity to an employee after termination be reduced and has also recommended for unemployment benefit for the unorganized sector, among other things.
- In relation to the Code on Social Security, it is pertinent to highlight that the Paternity Benefit Bill, 2017 (Paternity Bill) was introduced in the Parliament as a private member bill. The Paternity Bill is proposed to provide paternity benefit for 15 days of which not more than seven days shall precede the date of expected delivery provided that paternity benefit shall be availed up to three months from the date of delivery of child. The Paternity Bill also provides to a father, similar benefits including crèche facilities, protection from dismissal during absence etc. that are provided to women under the MB Act. It provides for formulation of Paternal Benefit Scheme and Paternal Benefit Scheme Fund by central government. At this stage, there is no indication with respect to the status of passage/approval of the Paternity Bill. Given that it is a private member bill and since it has not found place in the Code on Social Security, the likelihood of the bill becoming a low is low.

Some of the other major reforms that have been proposed in the labour and employment law regime include:

EPF Act

- MoLE has published the EPF Amendment on August 23, 2019 and has invited public comments. The EPF Amendment has proposed the following changes to the EPF Act:
  - Employers will be required to calculate provident fund contributions

on 'wages', the definition of which is similar to the one prescribed under the Wages Code. The existing law provides for calculation of provident fund contributions on 'basic wages, dearness allowance and retraining allowance'.

- The central government will be allowed to prescribe different rates of employees' contributions for different classes of employees, however, the employer's contribution will continue to be 12%.
- There will be a limitation period of five years for initiating inquiries from the date the alleged amount is due.
- There will be a tenfold increase in monetary penalties as well as introduction of compounding provisions in case of minor offences.

ESI Act

- The Employees' State Insurance Corporation has issued draft regulations to amend the Employees' State Insurance (General) Regulations, 1950 whereby (i) the employees are required to submit Aadhar Numbers in respect of themselves and their family members to the employer at the time of entering the employment, and (ii) the employers are required to link the Aadhar Numbers of the insured persons and their family members on the ESIC online portal.

Factories Act

- Amendments proposed to the Factories Act to increase the overtime limit from 50 hours to 100 hours in a quarter. The Bill for amendment has been passed by the Lok Sabha on August 9, 2017.

CLRA Act

- Amendments proposed to the CLRA Act providing for changed definitions of 'contract labour' and 'contractor', changed 'licensing of contractor' provision, information to be given by contractor to the appropriate government regarding work order, enhanced penalty, i.e. increase of fine from INR 500 (approx. USD 7) to INR 5 thousand (approx. USD 67) for obstructing inspector or refusal to produce documents, etc.

Q3. What are the registrations which are required under labour laws for starting up a business?

An employer is required to apply for registration of its commercial establishment or shop as applicable under the state specific S&E Act within a specified number of days (ranging from 30 to 90 days, depending on the state) of commencement of business / work. Manufacturing units are required to obtain registration under the Factories Act. Further, if any construction work is being undertaken for setting up of the establishment, registration would be required under the Building and other Construction Workers Act, 1996. Depending on the number of employees, the nature of industry and the salary thresholds, registrations would be required under the EPF Act and ESI

Act within the prescribed timeline for contribution towards the social security benefits. Any establishment engaging specified number of contract labour (depending on the state - in the States of Maharashtra, Rajasthan, Haryana, Andhra Pradesh and Uttar Pradesh, this threshold is 50 while in the remaining states, the threshold is 20), is required to obtain registration as a principal employer under the CLRA Act. Such registration has to be obtained prior to engaging contract labour.

Q4. What are the different categories of workers or employees which are protected under labour and employment laws? How are such workers or employees distinguished?

Different legislations aim to protect the rights of different categories of employees or workers depending upon the nature of work undertaken by them, the type of industry, location and the remuneration received by them. The major categories under which employees or workers can be distinguished are: permanent employees, fixed term employees, part term employees, casual workers, contract workers, and apprentices. A few of the major labor legislations dealing with the rights of such workers or employees are as follows:

- The Factories Act aims to protect workers working in factories against exploitation by their employers. It is applicable to all factories employing more than 10 workers working with the aid of power and to all factories employing more than 20 workers working without the aid of power. It aims to regulate the health, safety, welfare and service conditions of such workers. The state governments are free to make their own set of rules for the implementation of the said legislation.
- The respective state S&E Acts are applicable to employees or workers employed in the shops and commercial establishments located in such state. These legislations aim to regulate the service conditions of such persons including hours of work, holidays and leaves etc., and further lays down the standards for regulating the health and safety of such persons. In certain states, persons holding positions of management are excluded from protections available under the S&E Act.
- Industrial Disputes Act aims to protect the employees/workers falling under the category of 'workmen' which includes persons employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward. An employee employed in a managerial or administrative capacity; or in a supervisory capacity drawing wages exceeding INR 10 thousand (approx. USD 134) per month is excluded from the scope of 'workman'.
- Contract workers are provided protection under the CLRA Act. It deals with the registration of the principal employer, licensing of contractors, payment of wages, facilities to be provided to contract workers etc. The state governments are free to make their own set of rules for the implementation of the said legislation.

Q5. Are there any restrictions on employment of foreign nationals in India?

Employment of foreign nationals is permitted in India subject to possession of a valid employment visa by such foreign national.

Employment visa is not granted for jobs for which qualified Indians are available or for routine, ordinary, secretarial or clerical jobs. It is granted to highly skilled/ qualified professionals or to persons engaged or appointed on contractual or employment basis.

A foreign national being sponsored for an employment visa in any sector should draw a salary in excess of USD 25,000 per annum. However, this condition of an annual floor limit on income will not apply to: (i) ethnic cooks, (ii) language teachers (other than English language teachers) or translators, (iii) staff working for the concerned Embassy or High Commission in India, and (iv) foreigners, eligible for 'E' visa for honorary work with non-governmental organisations registered in the country, without salary.

Foreign nationals are eligible for an employment visa if they are coming to India: (i) as consultants on a contract for which the Indian company pays a fixed remuneration, (ii) as self-employed foreign nationals coming to India for providing skilled services as independent consultants, (iii) to provide technical support or services, transfer of know-how or for which the Indian company pays fees or royalty to the foreign company, (iv) as engineers or technicians coming to install and commission equipment, machines or tools in terms of a contract for the supply of such equipment, machines or tools.

If the employment visa is issued for a period of more than 180 days, a registration with the concerned 'Foreigners Regional Registration Office' is required within 14 days of arrival.

The duration for which an employment visa is granted varies from two to five years, depending upon the purpose for which the foreign national is coming to India.
No change of employer shall be permitted during the term of the employment visa. In cases where the foreign national desires to change the employment to another company or organisation, he or she will have to leave the country and apply for a fresh employment visa.

Q6. Can the foreign nationals be granted business visa?

Yes, business visa can be granted to foreign nationals. However, foreign nationals on business visa are not allowed to take full time employment in India. Furthermore, foreign nationals will be granted business visa only under specific conditions such as that the foreign national should be a person of assured financial standing and have expertise in the field of his business. A business visa is granted in case the foreign national is coming to India: (i) to explore the possibility of setting up or actually establishing a business venture in India, (ii) to transact business related to the purchase or sale of goods, (iii) for attending meeting or Board meetings or other general meetings for providing business service support, (iv) for coming to recruit manpower, and (v) to participate or for consultations in exhibitions, trade fairs or business fairs.

Q7. Is the employer obligated to put down the terms and conditions of the employment in writing?

The S&E Acts of a few states in India mandate that the employer issues an appointment letter setting out the basic information with regard to employee details such as remuneration, employers address, *etc*. However, as a matter of practice most employers issue employment letters and execute employment contracts capturing the terms and conditions of the employment in detail.

Q8. Can there be any implied terms under the employer and employee relationship?

Yes, certain terms and conditions can be considered as implied due to custom, usage and practice prevalent in the relevant industry or business. Few courts in India have acknowledged the obligations of an employee with regard to confidentiality and non-disclosure towards the employer as part of implied terms of an employer-employee relationship. Therefore, it is recommended that all terms and conditions of employment are encapsulated in the employment contract. It is pertinent to note that under certain legislations the employer needs to comply with certain procedural requirements before changing the terms of employment.

Q9. Does the law prescribe any minimum employment terms and conditions which the employer has to necessarily comply with?

Yes, labour legislations such as the Industrial Disputes Act, Factories Act, Standing Orders Act and S&E Act, lay down the minimum standards with regard to the employment terms such as the working hours, wages, leaves, notice and termination. Further, there are certain industry specific laws for persons working in cinema, docks, building which also prescribes the minimum terms of employment which are required to be complied.

Q10. What are the statutory working hours prescribed and is there a requirement to pay overtime wages?

Indian labour legislations typically provide for a maximum of nine hours of working each day and 48 hours a week.

Employment of women employees during night hours is restricted in most states / UTs in India. However, states / UTs such as Andhra Pradesh, Delhi, Gujarat, Haryana, Karnataka, Kerala, Maharashtra, Punjab Rajasthan, Telangana, Uttar Pradesh have made exemptions permitting women employees to work during night hours subject to compliance with the prescribed conditions including provision of transport facilities. Additionally, special exemptions have been made available to IT/ITES industries. IT/ITES companies are also permitted to have 24 x 7 operations subject to the satisfaction of the conditions prescribed by the respective state government.

Employees who work in excess of the normal working hours are entitled to over-time wages, typically at the rate of twice the ordinary rate of wages. Further, in some states, employees working on national holidays are provided compensatory off in addition to overtime payment.

Q11. What are the statutory requirements for grant of leave or public holidays?

The Factories Act as well as the state-specific S&E Acts provide for certain number of days as annual leave with wages that the employees are entitled to. Unavailed annual leaves are typically allowed to be carried forward to the next year subject to a prescribed cap. Some of the state-specific S&E Acts also provide for sick and casual leaves.

In addition to the weekly holidays and compensatory holidays prescribed under the N&F Holidays Act and the S&E Act of the relevant state, the employees are also entitled to national holidays such as Republic Day (January 26), Independence Day (August 15) and Gandhi Jayanti (October 2). Employees are further entitled to five to seven holidays from a list of holidays notified by the respective state governments for each calendar year under the Negotiable Instruments Act, 1881.

Q12. Are employees entitled to maternity/paternity leave?

Pursuant to the recent amendment to the MB Act, women employees are entitled to 26 weeks of paid maternity leave, if they have worked for at least 80 days in the 12 months preceding the expected delivery date.

Paternity leave are not statutorily recognised in India. However, the proposed Paternity Bill once passed, will provide for 12 weeks of paid paternity leave. Although, the industry practice in India, especially in the IT/ITES sector, is to give a paternity leave of five to seven days, it can be solely up to the discretion of the employer and may be granted in accordance with its policies.

Q13. Do foreign nationals have to make social security contributions while working in India?

The GOI has extended the applicability of EPF and the Employees' Pension Scheme, 1995 to all international workers. The definition of international workers covers all those employees who work in an establishment in India covered under the EPF Act and hold other than an Indian passport besides Indian employees working overseas.

Every employer who is covered under the EPF Act is required to contribute 24% (12% each for the employer and the employee's share) of the employee's monthly pay towards the provident fund and pension scheme. The employee's share of such contribution can be recovered by the employer from the employee.

However, international workers who are contributing to a social security program in their home country with whom India has entered into an SSA are not required to contribute to the provident fund in India on the satisfaction of specified conditions set out in such SSAs.

An international worker can withdraw the full amount in his or her provident fund account only at the time of retirement or when reaching the age of 58 years, whichever is later, or on account of permanent and total incapacity. However, with respect to members covered under an SSA, the withdrawal from provident fund is possible on the termination of assignment in India, subject to the conditions of the SSA.

Q14. Can employees of the Indian company be granted employee stock options in a foreign company?

A foreign company can issue employee stock options to employees of (i) its office or branch in India, (ii) its subsidiary in India, and (iii) an Indian company in which it has equity, direct or indirect (through a special purpose vehicle or step-down subsidiary), irrespective of the percentage of the direct or indirect equity stake in the Indian company, provided that the shares under the employee stock option scheme are offered (a) globally on a uniform basis, and (b) an annual return in the prescribed format, is submitted by the Indian company to RBI through an authorised dealer bank giving details of remittances and beneficiaries.

Indian employees are permitted to subscribe to equity shares of a foreign company under a cashless employee stock option scheme subject to the condition that it does not involve remittance from India.

RBI had announced the LRS in February 2004 as a step towards further simplification and liberalisation of the foreign exchange facilities available to resident individuals. The LRS is amended from time to time and the remittance limits are changed. As per the latest amendment, resident individuals may remit up to USD 250,000 per financial year for any permitted capital and current account transactions or a combination of both.

Q15. Can employment contracts contain restrictive covenants like non-compete?

Any agreement in restraint of trade is void under the provisions of the Contract Act. Restrictive covenants operative during the period of the contract of employment when an employee is bound to serve his or her employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. A restrictive or negative covenant that the employee would not engage himself in a trade or business, or would not get himself employed in any other manner, or perform similar or substantially similar duties for another, is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one-sided. However, any such restraint which extends beyond the terms of this contract is void and not enforceable. The Supreme Court has held that agreements restraining an employee from carrying on the activities that are similar to that of his or her employer upon the termination of such employment would be void and unenforceable, whereas agreements that impose a restraint during the course of employment could be enforceable.

Q16. Can the employer carry out pre-employment background checks on prospective employees?

Yes, the employer is allowed to carry out such verification checks provided the employer takes express consent from the prospective employee in this regard. Also, if the employer collects or deals with employee's sensitive personal data or information in conducting such checks then it has to mandatorily comply with the requirements laid down under the Information Technology Act, and the relevant rules thereunder.

Q17. How can the services of an employee be terminated?

The applicability of labour legislations pertaining to termination in India are dependent on various factors which inter alia include the nature of the establishment, the category of employees (whether workman or non-workman), and the location of the establishment. While the Industrial Disputes Act provides for the termination of workmen category employees, the termination of non-workmen category is regulated by the state-specific S&E Acts, along with the terms of his or her employment contract and company policies. The relevant laws prescribe the minimum notice period, payment in lieu of notice and severance payments to be given to the employee at the time of termination. Termination for misconduct or gross misconduct will need to be preceded by a domestic enquiry following the principles of natural justice. A full and final settlement will have to be done by the employer by making payment of all the statutory and contractual dues to the employee.

Q18. Are severance payments statutorily required to be paid in India?

Termination of employees and the associated severance payments would depend on whether such employees are classified as workmen or non-workmen. Under the provisions of the Industrial Disputes Act, a workman with at least one year of continuous service is entitled to compensation equal to 15 days average pay for every completed year of continuous service or part thereof in excess of six months, if his or her services are terminated for any reason, except on account of disciplinary proceedings, voluntary retirement, superannuation, nonrenewal of employment contracts or on the ground of continued ill health. Statutory compensation is also payable to workmen in the event of lay off or closure of an undertaking. The S&E Acts in certain states also provide for payment of severance compensation to employees covered under the legislation on termination of their employment. The Gratuity Act entitles an employee to a gratuity payment upon termination of his or her service after the completion of five years of continuous employment, of an amount equivalent to 15 days wages for each completed year of service subject to a maximum of INR 20 lakhs (approx. USD 27,000).

Q19. Is there a mandatory requirement to engage apprentices?

As per the Apprentices Act and the rules framed thereunder, an employer is required to engage apprentices in the band of 2.5-15% of its total strength of 'workers' within a financial year. The term 'worker' has been defined under the Apprentices Act to include any person working in the premises of the employer, who is employed for wages in any kind of work either directly or through any agency. The requirement to engage apprentices has been made mandatory for an establishment where the number of workers exceed 30. The employer has an option to engage the prescribed number of apprentices either under the notified designated trades or optional trades.

XVII. Direct Tax

Q1. What is the law relating to taxation in India?

The Constitution empowers the Central, State and local authorities to levy taxes over specified subject matters. Presently, the Central Government levies direct taxes – personal income tax, corporate tax, and indirect taxes – customs duty, central goods and services tax, integrated goods and services tax, central excise duty and central sales tax (CST) (for certain specified products such as petroleum crude, high speed diesel, petrol, aviation turbine fuel *etc*.). Indian States are empowered to levy state goods and services tax, value added tax (VAT) (on specified products such as alcoholic liquor for human consumption, petroleum crude, *etc*.). Some local authorities are also empowered to levy municipal taxes on entertainments and amusements.

The Central Government and the State Governments enact their respective Finance Acts annually to establish modified tax rates for the particular fiscal year. At the Central Government level, taxes are administered through the Ministry of Finance and at the state and local levels, taxes are administered by the state or local authorities comprising state tax commissions and revenue departments.

Q2. What is the legislation which governs the levy of income tax in India?

The law relating to income tax is incorporated under the Income-tax Act, 1961 (IT Act). The IT Act undergoes changes every year with amendments brought out through an annual Finance Act passed by the Indian Parliament. The Indian financial year runs from April 1 to March 31. The said period is commonly referred to as 'Fiscal Year' (FY) or 'Previous Year'. The year following the Previous Year is known as 'Assessment Year' (AY).

Q3. What are the income tax rates in force for individuals in India?

Taxability in India is governed by tax residency of an individual during a fiscal year, which is based on the number of days an individual is physically present in India in a fiscal year and previous fiscal years. Tax residency can be categorised as Ordinarily Resident (ROR), Not Ordinarily Resident (NOR) and Non Resident (NR). Subject to any tax treaty benefits, NOR and NR are generally taxed on Indian sourced income. ROR are taxed on their worldwide income in India.

The following table provides the income tax rates applicable for individuals in relation to FY 2020-2021 or AY 2021-22. The effective tax rates in case of individuals are as under:

Total Income	Tax Rate	Surcharge	Health and education cess	Marginal Effective Tax Rate*
Upto INR 250,000**	Nil	Nil	Nil	Nil
INR 250,001 to INR 500,000	5% of (total income minus INR 250,000)*		4% of income tax	5.20%
INR 500,001 to INR 1,000,000	INR 12,500 + 20% of (total income minus INR 500,000)			20.80%
INR 1,000,001 to INR 5,000,000	INR 112,500 + 30% of (total income minus INR 1,000,000)			31.20%
INR 5,000,001 to INR 10,000,000	INR 1,312,500 + 30% of (total income minus INR 5,000,000)	10% of income tax		34.32%
INR 10,000,001 to INR 20,000,000	INR 2,812,500 + 30% of (total income minus INR 10,000,000)	15% of income tax		35.88%
INR 20,000,001 to INR 50,000,000	INR 5,812,500 + 30% of (total income minus INR 20,000,000)	25% of income tax		39%
Above INR 50,000,000	INR 14,812,500 + 30% of (total income minus INR 50,000,000)	37% of income tax		42.74%

Note:

* *The effective rates are inclusive of health & education cess (Cess), which is 4% and applicable surcharge. The surcharge is subject to a marginal relief, which provides that incremental tax payable on account of surcharge shall not be more than such income exceeding the slab rate on account of which surcharge/ incremental surcharge is levied. An Indian resident whose total income does not exceed INR 5 lakhs (approx. USD 6,697) is eligible for a rebate of 100% of income tax, subject to a maximum amount of INR 12,500 (approx. USD 167). Further, a standard deduction on salary income of up to INR 50,000 (approx. USD 670) or the actual salary received, whichever is less, in lieu of deductions on account of transport allowance (except in the case of differently abled persons) and reimbursement of medical expenses is also provided.*

** *The exemption limit for resident individuals above 60 years of age and below 80 years is INR 3 lakhs (approx. USD 4,018). In case of a resident individual of age of 80 years or above, the basic exemption limit is INR 5 lakhs (approx. USD 6,697).*

The Finance Act, 2020 provides for new marginal tax rates for Individuals, without any changes in the rates for surcharge and cess. An individual taxpayer can opt for the new marginal tax rates upon foregoing various deductions. The effective tax rates under this option are as under:

Total Income	Tax Rate	Surcharge	Health and education cess	Marginal Effective Tax Rate
Upto INR 250,000	Nil		Nil	Nil
INR 250,001 to INR 500,000	5% of (total income minus INR 250,000)*			5.20%
INR 500,001 to INR 750,000	INR 12,500 + 10% of (total income minus INR 500,000)			10.40%
INR 750,001 to INR 1,000,000	INR 37,500 + 15% of (total income minus INR 750,000)	Nil		15.60%
INR 1,000,001 to INR 1,250,000	INR 75,000 + 20% of (total income minus INR 1,000,000)			20.80%
INR 1250001 to INR 1500000	INR 125,000 + 25% of (total income minus INR 1,250,000)		4% of income tax	26%
INR 1500001 to INR 5000000	INR 187500 + 30% of (total income minus INR 1,500,000)			31.20%
INR 5,000,001 to INR 10,000,000	INR 1,237,500 + 30% of (total income minus INR 5,000,000)	10% of income tax		34.32%
INR 10,000,001 to INR 20,000,000	INR 2,737,500 + 30% of (total income minus INR 10,000,000)	15% of income tax		35.88%
INR 20,000,001 to INR 50,000,000	INR 5,737,500 + 30% of (total income minus INR 20,000,000)	25% of income tax		39%
Above INR 50,000,000	INR 14,737,500 + 30% of (total income minus INR 50,000,000)	37% of income tax		42.74%

Q4. How are Corporations taxed in India?

A Corporation is regarded as a resident in India if:

- It is incorporated in India; or
- It is not incorporated in India but its place of effective management (*i.e.* a place where the key management and commercial decisions that are necessary for the conduct of the business of any entity as a whole are, in substance, made), during the relevant fiscal year, is in India.

In the context of implementation of the concept of POEM based residence rule, the CBDT has issued guidance to determine POEM of a foreign company. Corporations resident in India are taxed on their worldwide income arising from all sources.

Moreover, the IT Act imposes an additional tax on a domestic company buying back its shares from its shareholders (Buy Back Tax). Such Buy Back Tax is applicable on the income distributed by the company on account of a buyback of shares and is payable on the difference between the consideration paid by the company on buyback shares and the amount, which was received by the company for issue of such shares, determined in the manner as prescribed. Furthermore, income in respect of such buy back by the company is tax exempt in the hands of the shareholders. Earlier Buy Back Tax was applicable only on unlisted companies. However, the Finance Act, 2019 has made the same is applicable to listed companies as well. The Government has introduced a partial roll-back of such levy in cases where a public announcement for a buy-back was made prior to 5 July 2019 *vide* the Taxation Laws (Amendment) Ordinance, 2019 ("**Ordinance**")

The Finance Act 2020 has abolished the dividend distribution tax ("**DDT**") levy of 20.56 per cent on the distribution of dividend by domestic companies. The tax burden is shifted from company to the shareholders at the rates applicable to the shareholders.

NR corporations are essentially taxed on the income earned from a business connection in India or from other Indian sources. If a tax treaty exists between India and the country of residence of the taxpayer, the provisions of the IT Act or the tax treaty, whichever is more beneficial, will apply. Accordingly, the taxability of NRs in India, if any, under the IT Act, may be restricted or modified and lower tax rates may apply, having regard to beneficial provisions of a tax treaty. NR corporations are not subject to Buy Back Tax.

In general, India's tax treaties provide that residents of other countries are subject to Indian tax on business profits derived from a business in India only if the NR has a PE in India.

Q5. What are the income tax rates in force for Corporations in India?

The effective tax rates applicable to Corporations have been summarised below:

Particulars	Tax Rate	Effective Tax Rate*
Corporate Tax Rate		
Domestic Company Taxable income up to INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	30% if turnover exceeds INR 4 billion (approx. USD 37.5 million) in FY 2017-18.	 31.2% 33.38% 34.94%
Foreign Company Taxable income up to INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	40% in all cases	 41.60% 42.43% 43.68%
Buy Back Tax		
Domestic Company	20%	23.30%
Minimum Alternative Tax (MAT)*		
Domestic Company Taxable income upto INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	15% in all cases *vide* the Ordinance	15.6% of the book profits 16.69 % of the book profits 17.47% of the book profits
Foreign Company Taxable income upto INR 10 million Taxable income above INR 10 million Taxable income above INR 100 million	18.5% in all cases	19.24% of the book profits 20.59 % of the book profits 21.55% of the book profits

Note:

* Including applicable surcharge and Cess. Domestic companies with total income in excess of INR 100 million are subject to a surcharge at the rate of 12% of income tax. In case the total income of the domestic company is in excess of INR 10 million but less than INR 100 million, a surcharge of 7% of the income tax is levied. However, a surcharge of 12% is imposed on DDT and Buy Back Tax in all cases, irrespective of the amounts distributed.

*** Under the MAT regime, corporations are subject to a presumptive tax on their book profits (i.e. profits shown in their financial statements), if the tax payable as per the regular provisions of the IT Act is less than 18.5% of the corporation's book profits. MAT provisions do not apply to the foreign companies which do not have a PE in India, in terms of the tax treaty. The taxpayer can carry forward the MAT credit for 15 AYs. MAT provisions are not applicable to foreign companies whose taxable income in India comprises solely of business profits taxable under specified presumptive taxation regimes (relating to operations of ships and aircrafts, and production of mineral oils) and such income has been offered to tax under such regimes.

The corporate tax rate has been reduced to 25% in case of domestic companies with turnover up to INR 400 crores (approx. USD 53.6 million) in FY 2017-18.

Further, *vide* the Ordinance, reduced tax rates have been introduced with effect from FY 2019-20 in certain cases, as set out below[1]:

- Domestic companies now also have the option to pay a lower tax rate of 22% with no requirement to pay MAT by opting to forego its claims to existing tax holidays.
- New domestic manufacturing companies incorporated on or after 1 October 2019 and commencing production on or before 31 March 2023 shall have an option to pay tax at a rate of 15%. Further, such companies will not be subject to MAT. Companies claiming this beneficial tax rate however will have to comply with domestic transfer pricing regulations.

Q6. What are the withholding tax rates applicable to non-resident corporations in India?

NRs are taxed on their business income if they have a PE in India to the extent the income is attributable to the PE. In addition, NRs are taxed on interest, royalties and FTS sourced in India on a gross basis, at specified rates. However, where royalties and FTS are attributable to the NR's PE in India, the same are subject to tax as business profits on a net basis under the IT Act.

The applicable withholding tax rates for foreign companies are as follows. The tax rates are subject to any beneficial rates available under the applicable tax treaty.

Particulars	Tax Rates	Effective Tax Rates
Dividends*		
Taxable income up to INR 10 million	20%	20.80%
Taxable income above INR 10 million		21.22%
Taxable income above INR 100 million		21.84%
Interest		
Taxable income up to INR 10 million	40% or 20% or 5%** in all cases	41.6% or 20.8% or 5.2%
Taxable income above INR 10 million		42.43% or 21.22% or 5.3%
Taxable income above INR 100 million		43.68% or 21.84% or 5.46%
Royalties and FTS***		
Taxable income up to INR 10 million	10% on gross basis in all cases	10.4%
Taxable income above INR 10 million		10.61%
Taxable income above INR 100 million		10.92%

Note:

* The Finance Act 2020 has abolished DDT levy of 20.56 per cent on the distribution of dividend by domestic companies. The tax burden is shifted from company to the shareholders and dividend would now be subject to tax withholding.

1 The above tax rates will be increased by a flat surcharge of 10% and health and education cess of 4%.

** NRs are subject to income tax on interest income at the rate of 40% (plus applicable surcharge and Cess). However, NRs may avail of special rates of 20% or 5% applicable to interest income under the IT Act in certain cases.

*** Royalties and FTS, received by an NR which carries on business in India through a PE in India (in case of a foreign company) or performs professional services from a fixed pace of profession in India (in case of an NR other than foreign company), and the right, property or contract in respect of which such royalty or FTS is paid is effectively connected with such PE or fixed place of profession, the royalty or FTS is taxable as business income on a net income basis (instead of gross basis) at the normal rates applicable to foreign corporations.

Q7. How are Capital Gains taxed in India?

Capital gains earned by the seller of a capital asset (being the sale consideration less the cost of acquisition, cost of improvement and sale-related expenses), are subject to capital gains tax. Capital gains can be classified into (a) short term or (b) long term, depending on the period of holding.

Nature of Gains	Period of Holding security (other than a unit) listed on a recognised stock exchange in India, unit of the Unit Trust of India, unit of an equity oriented fund or a zero coupon bond	Period of Holding (unlisted shares of a company and any immoveable property)	Period of Holding (all other assets)	Applicable Rates # (excluding applicable surcharge and cess)*
Long Term	>1 year	> 2 years	> 3 years	20%**
Short Term	≤ 1 year	≤ 2 years	≤ 3 years	40%*** (30% in case of a domestic company)

Note:

* *In case of transfer of listed securities on market, where STT is payable, long term capital gains tax is exempt. Such exemption will be available only if the acquisition of shares is chargeable to STT or the acquisition of shares falls under the category of transfers that are specifically notified by the Central Government. The type of transfers that are specifically notified include IPO issuances, rights or bonus issue etc. However, this exemption has been withdrawn from April 1, 2018 (with a limited grandfathering benefit) and long term capital gain, exceeding INR 1,00,000 (approx. USD 1339) is now taxed at the concessional rate of 10% (without giving effect to the benefits of indexation and neutralization of foreign exchange fluctuation). For the concessional rate to apply, the sale of shares must be on the stock exchange and such shares should have been acquired pursuant to a transaction*

which was subject to STT or such transaction must be a notified transaction. Similarly, in case of units of equity oriented funds and units of business trusts, the 10% concessional rate will apply only if such transaction of sale is subject to STT. Short term capital gains tax on such transfers is 15% (plus applicable surcharge and cess). The requirement of payment of STT is done away with in case the transaction is undertaken on recognised stock exchange located in any International Financial Services Centre (IFSC) and where the consideration for such transaction is in foreign currency. Further note that vide the Ordinance, *the increased surcharge of 25% and 37% will not be applicable in case of capital gains earned on (i) the transfer of shares, unit of an equity oriented fund or unit of a business trust subject to STT, in the hands of an individual, Association of Persons ("***AOP***"), Body of Individuals ("***BOI***") and Artificial Juridical Person ("***AJP***"); (ii) The sale of any security, including derivatives, in the hands of Foreign Portfolio Investors ("***FPI***").*

* Domestic companies with total income in excess of INR 10 crores (approx. USD 1.34 million) are subject to a surcharge at the rate of 12% of income tax. In case the total income of the domestic company is in excess of INR 1 crore (approx. USD 134,000) but less than INR 10 crores (approx. USD 1.34 million), a surcharge of 7% of the income tax is levied. Moreover, in all cases, domestic companies are subject to a Cess of 4% on the amount of income tax as increased by the surcharge payable by such company.

In case of a foreign company with total income in excess of INR 10 crores (approx. USD 1.34 million), a surcharge at the rate of 5% of income tax will be levied. A surcharge of 2% will continue to be levied on foreign companies with total income in excess of INR 1 crore (approx. USD 134,000) but which does not exceed INR 10 crores (approx. USD 1.34 million). In all cases, a Cess of 4% on the amount of income tax as increased by the surcharge will be payable by such company.

** Rate of 10% is applicable in case of listed security and zero coupon bonds where benefit of indexation is foregone by the taxpayer. Further, in case of an NR, long term capital gains on unlisted securities or shares of a closely held company is taxable at the rate of 10% subject to conditions;

*** The stated tax rate of 40% in the case of a foreign company is subject to rates provided under the relevant tax treaty, to the extent that the tax treaty is more beneficial.

Q8. Does India have General Anti Avoidance Rules?

The IT Act contains GAAR, which codify the 'substance over form' doctrine. With a view to check tax evasion and avoidance, anti-avoidance provisions in the form of GAAR were introduced by Finance Act 2013, as Chapter X-A of the IT Act. The implementation of GAAR was repeatedly postponed after its introduction; however, the rules have finally been made effective from FY 2017-18 onwards. GAAR empowers the Income Tax Authorities to determine the tax consequences for a taxpayer, after disregarding or re-characterising an arrangement or transaction, including any step therein (by declaring the same as 'impermissible avoidance arrangement'), if such arrangement or transaction or a step therein, has been entered into by the taxpayer for the main purpose of obtaining tax benefit and lacks commercial substance, amongst others. GAAR provisions apply on domestic as well as cross-border transactions and have an overriding effect on all the other provisions of the IT Act. In case of an abuse of a tax treaty, GAAR provisions can also override the provisions of the tax treaty.

GAAR provisions do not apply to the following transactions or taxpayers:

- Transactions where tax benefit does not exceed INR 3 crores (approx. USD 402,000);
- Foreign Institutional Investor (FII) or Foreign Portfolio Investor (FPI) who is an assessee under the IT Act, and does not seek tax treaty benefit and who has invested in listed or unlisted securities with prior approval of competent authority;
- NR who has made investment in the FII or FPI by way of offshore derivative instruments;
- Income arising to any person from transfer of investments made before April 1, 2017;
- Transactions where tax benefit is obtained prior to April 1, 2017.

The onus of proving that a transaction falls within the purview of GAAR is on the Income Tax Authorities.

Q9. Are there transfer pricing restrictions in India?

Under India's transfer pricing regulations, any international transaction and/ or a specified domestic transaction between two or more AEs, including PEs, must be at an arm's length price. Transfer pricing regulations require the application of the most appropriate amongst the following prescribed methods, for determination of the arm's length price:

- Comparable uncontrolled price method;
- Resale price method;
- Cost plus method;
- Profit split method;
- Transactional and net margin method; or
- Any other method as may be prescribed by the CBDT[2].

Taxpayers, who enter into international transactions and / or specified domestic transactions[3], are required to maintain prescribed documents and furnish an accountant's report, which includes prescribed details. Under the transfer pricing regulations, if the international transaction or specified domestic transaction is not at arm's length, the difference between the arm's length price and the actual transfer price or transaction

2 CBDT has prescribed a sixth method for determination of arm's length price. The sixth method allows the taxpayer to adopt any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction between unrelated parties, under similar circumstances.

3 The domestic transfer pricing rules will only apply in situations where one of the parties is claiming specified tax incentives.

price is taxed in the hands of the taxpayer. Further, Indian transfer pricing regulations allow for a 'Secondary Transfer Pricing adjustment', in addition to the primary transfer pricing adjustment in the hands of the taxpayer. Secondary adjustment means an adjustment in the books of accounts of the taxpayer and its AE to reflect that the actual allocation of profits between the two are consistent with the transfer price determined as a result of primary adjustment. Where a primary transfer pricing adjustment results in an increase in total income or reduction in loss of the taxpayer, the excess money (difference between arm's length price determined in the primary transfer pricing adjustment and actual price at which international transaction has been undertaken) which is available with the AE will be deemed to be an advance made by the taxpayer to the AE. If such excess money is not repatriated to India within the prescribed time then interest on such advance will be computed. The primary adjustment not exceeding INR 1 crore (approx. USD 134,000) would not be subject to secondary transfer pricing adjustment.

Q10. What precautions should be taken to avoid transfer pricing disputes in India?

Advance Pricing Arrangement (APA)

The IT Act empowers the CBDT to enter into an APA to determine the arm's length price or the manner of determining the arm's length price in relation to international transactions to be entered into by a person for a period specified in such APA, not exceeding five consecutive years. The Finance Act, 2014 also introduced a roll-back mechanism under which an APA may also apply up to four previous years prior to the first effective year of such APA.

Safe Harbour Rules

In addition to APAs, the IT Act also provides for safe-harbour rules, which broadly cover the following business transactions:

- Software development services;
- KPO services;
- Contract research and development services;
- Manufacture and export of core and non-core auto components;
- Intra group loans; and
- Corporate guarantees.
- Transfer Pricing Documentation and BEPS

India has been an active member of BEPS initiative by OECD. The BEPS Report by the OECD recommends that countries should adopt a standardised approach to transfer pricing documentation. A three-tiered structure has been mandated which comprises:

- A master file containing standardised information relevant for all multinational enterprises (MNE) group members;
- A local file referring specifically to material transactions of the local taxpayer;
- A CbC report containing specific information regarding global allocation of MNE's income in accordance with the economic activity of the MNE.

In line with OECD report on Action 13 of BEPS, Section 286 of the IT Act lays down the provisions for a specific reporting regime in respect of CbC reporting and also the master file. The reporting regime requires furnishing of exhaustive information pertaining to the multinational group and the information is required to be furnished in the prescribed manner either by the overseas parent company of the multinational group or an Indian entity which is part of the group and designated to provide such information in this regard. It is further provided that CbC guidelines will not be applicable to an international group for an accounting year if total consolidated group revenue, based on consolidated financial statements, does not exceed the amount as may be prescribed.

In order to strengthen the CbC framework and to reduce compliance burden of reporting, the Finance Act 2018 has introduced the following amendments with retrospective effect from AY 2017-18:

- The time limit for furnishing the CbC report, in the case of parent entity or ARE, resident in India will be 12 months from the end of reporting accounting year;
- A constituent entity resident in India, having a non-resident parent, will also furnish CbC report in case its parent entity outside India has no obligation to file the report in its country within 12 months from the end of reporting accounting year;
- The due date for furnishing of CbC report by the ARE of an international group, the parent entity of which is outside India, with the tax authority of the country of which it is resident, will be the due date specified by that country.

Q11. Does India have Thin Capitalisation Norms?

'Thin Capitalisation Norms' have been introduced in India with effect from FY 2018-19 in line with recommendation of OECD BEPS Action Plan 4. It is now proposed that where an Indian company or a PE of a foreign company in India pays interest in respect of any debt issued by an NR AE exceeding INR 1 crore (approx. USD 134,000), which is otherwise a deductible business expenditure, the interest expense so deductible will be restricted to 30% of its earnings before interest, taxes, depreciation and amortization or actual interest whichever is less.

Further, in case of debt provided by a lender (other than an AE) will also *de facto* be considered as debt provided by an AE if such debt is implicitly or explicitly guaranteed by the AE or the AE deposits corresponding and matching amount of funds with the lender. However, thin capitalization shall not apply on interest paid in respect of debt provided by a lender which is a PE in India of a foreign company which is engaged in the business of banking.

The carry forward of the aforementioned disallowed interest expense is permitted up to eight AYs immediately succeeding the AY for which the disallowance was first made and is allowed as a deduction against the profits and gains, if any, of any business or profession carried on by the taxpayer to the extent of maximum allowable interest expenditure.

It is relevant to note that the thin capitalisation norms will not apply to an Indian company or a PE of a foreign company which is engaged in the business of banking or insurance.

Q12. What are some direct tax incentives available in India?

To give an impetus to India's economy, the IT Act provides tax incentives such as, tax holidays, deductions and rebates. These incentives are aimed at encouraging exports and research activities, setting up of new industrial undertakings, development of infrastructural facilities, software industry, research activities and development of backward areas. Examples of some tax incentives follow.

Tax Holidays for SEZ[4]

Nature of business undertaken	Quantum of Deduction
Undertaking located in SEZ and engaged in manufacture or production of articles or things or provision of service	100% deduction in respect of export profits for a period of five years. For subsequent 10 years, deduction of 50% profits is allowed (for last five years, deduction subject to transfer of profits to investment reserve), provided that the manufacturing operation commences on or before March 31, 2021.
Offshore Banking Units and IFSCs located in SEZs	100% deduction of its income for five years and 50% for the next five years

Investment-linked incentives

Investment linked incentives are provided on:

- specified businesses; and
- research and development.

The investment-linked tax incentives for specified business are provided by way of allowing deductions, ranging between 100% and 150%, in respect of the expenditure of capital nature incurred wholly and exclusively, for the purposes of such 'specified businesses'. 'Specified businesses' includes setting up of cold chain facility, warehousing facility, building and operating of hotels, hospitals (as prescribed by Central Government), laying and operating a cross-country natural gas or crude or petroleum pipeline, developing and building housing project, developing or maintaining and operating or developing, maintaining and operating a new infrastructure facility *etc*. This deduction

4 SEZs are especially delineated duty free enclaves deemed to be foreign territory for the limited purposes of trade operations and duties and tariffs. Under the SEZ scheme, the Government of India aims to promote export-led growth of the economy, supported by integrated infrastructure for export production and a package of incentives to attract foreign and domestic investment. Though a tax holiday is enjoyed by units in a SEZ, they are required to pay MAT on book profits.

is provided in the FY in which such expenditure is incurred and is provided subject to satisfaction of certain conditions provided in the IT Act, including that the asset in respect of which the deduction is provided is used only for the purpose of 'specified business' and is used for eight years beginning from the year in which such asset was acquired or constructed.

Similarly, investment-linked tax incentives for research & development are provided by way of allowing deductions, ranging between 100% and 150%, in respect of the expenditure of capital nature incurred wholly and exclusively, for the purposes of certain 'research & development' during the FY in which such expenditure is incurred. Such investment linked tax incentives are also provided if the payment is made to a research association/university, college or other institution for scientific research; or payment is made to an Indian company to be used for scientific research and development that fulfills certain conditions *etc*.

Currently, the IT Act provides for an additional depreciation of 20% (over and above the general depreciation) on the cost of new plant and machinery acquired and installed.

- Tax Incentives
  - A 100% deduction is provided to farm producer companies having a turnover up to INR 100 crores (approx. USD 13.4 million) earning profits from marketing of agricultural produce grown by its members or the purchase and supply of agricultural implements, seeds, livestock or other articles for agriculture or processing of the agricultural produce of its members up to FY 2024-25.
  - Currently, a tax exemption has been provided to any income earned by a foreign company from (a) the storage of crude oil in an Indian facility and the sale of crude oil therefrom to an Indian resident, pursuant to a notified agreement with the Central Government; and (b) income arising from sale of leftover stock of crude oil, from the Indian facility, after the expiry of such an agreement. This tax exemption has been extended to income arising from sale of leftover stock of crude oil, from the Indian facility, even if the arrangement is terminated in accordance with the terms mentioned in such agreement.

The income received by a non-resident in the form of royalty or fees for technical services rendered in or outside India to NTRO will be exempt from tax. Accordingly, an NTRO will be required to withhold tax on such payments.

Q13. Does India provide any special tax incentives to Start-ups?

The IT Act provides tax incentives for start-ups, incorporated either as a company or as an LLP, on or after April 1, 2016 but before April 1, 2021, and engaged in a business involving innovation, development, deployment or commercialisation of new products, process or services which is driven by technology or intellectual property, subject to satisfaction of prescribed conditions. The start-ups which qualify for the tax incentive are as follows:

- Whose total turnover (of the business) does not exceed INR 100 crores (approx. USD 13.4 million) in any of the previous years for which such tax incentive/ deduction is claimed; and
- Which hold a certificate of eligible business from the Inter-Ministerial Board of Certification as notified in the Official Gazette by the Central Government.

Subject to satisfaction of the certain conditions provided under the IT Act, the following tax incentives are provided:

- Deduction of 100% from business profits of such start-ups for any three consecutive AYs out of ten AYs beginning from the year in which such start-up is incorporated;
- Exemption from long term capital gains tax if the gains arising from transfer of the long term capital asset are invested in units of such specified fund (as may be notified by the Central Government in this behalf) subject to the condition that the amount remains invested for three years, failing which the exemption will be withdrawn. The investment in the units of the specified fund are allowed up to INR 50 lakhs (approx. USD 67,000);
- Exemption from long term capital gains in case of an individual or a Hindu undivided family in respect of sale of a long term asset, being residential property, if the net sale proceeds are invested in at least 25% shares of a 'start-up' and such 'start-up' utilises such investment amount to purchase a new asset on or before the due date of filing of return of income by the investor. The exemption is provided subject to certain conditions, including, inter alia, that the transfer of residential property occurs on or before March 31, 2021.
- Additionally, an eligible start-up can carry forward previous years' losses for a period of seven years from its incorporation, even where there is a change in its shareholding (whether or not in excess of 49%) provided that the old shareholders continue in the company.

Q14. What tax incentives does India give to IFSCs?

With a view to incentivise the growth of IFSCs, the IT Act contains the following tax incentives:

- Long-term capital gains tax in excess of INR 1,00,000 (approx. USD 1339) arising from transaction undertaken in foreign currency on a recognised stock exchange located in IFSC are subject to tax at the rate of 10% irrespective of payment of STT on the same.
- Concessional short-term capital gains tax rate of 15% on capital assets being equity shares, units of equity oriented funds and units of business trust will be available to the transactions undertaken in foreign currency through a recognised stock exchange located in an IFSC, even where no STT is payable.
- Further, the transactions in foreign currency in the following assets by an NR, or a Category III AIF (units of which are held by non-residents) on a recognized stock exchange located in any IFSC will be exempt from capital gains tax:
  - bond or Global Depository Receipt,
  - rupee denominated bond of an Indian company;
  - derivatives.

- Any interest payable to a non-resident by units located in IFSC in respect of monies borrowed by it on or after September 01, 2019 shall be exempt.
- A unit located in IFSC and deriving its income solely in convertible foreign exchange, is chargeable to MAT at the rate of 9%. Even existing units can avail a lower MAT rate of 9% (subject to fulfilment of other conditions). An alternative minimum tax at par with the lower 9% MAT rate has been extended to non-corporate tax payers also.

Q15. Does India tax capital gains arising on the indirect transfer of underlying assets situated in India?

Where an NR earns capital gains from the transfer of shares or interest of a company or an NR entity incorporated or registered outside India, such capital gains will be taxable in India if such shares or interest, derive their value substantially, whether directly or indirectly, from assets located in India[5].

A share or interest will be deemed to derive its value "substantially" from assets (whether tangible or intangible) located in India, if on the specified date, the value of Indian assets, exceeds the amount of INR 10 crores (approx. USD 1.34 million) and represents at least 50% of the value of all the assets owned by the company or entity, as the case may be. The following may be noted in this respect:

- Value of an asset means the fair market value of such asset without reduction of liabilities, if any, in respect of the asset.
- The specified date of valuation means the date on which the accounting period of the company or entity, as the case may be, ends preceding the date of transfer. However, if the book value of the assets of the company on the date of transfer exceeds by at least 15% of the book value of the assets as on the last balance sheet date preceding the date of transfer, then instead of the date mentioned above, the date of transfer will be the specified date of valuation.
- The manner of determination of fair market value of the Indian assets and the global assets of the foreign company has been prescribed in the IT Rules.
- The taxation of gains arising on transfer of a share or interest deriving, directly or indirectly, its value substantially from assets located in India will be on proportionate basis. The method for determination of proportionality has been prescribed in the IT Rules.

Further, the following exemptions have been provided in respect of taxation of indirect transfers:

- Exemption to transferor in case company or entity, whose share or interests are transferred, directly owns Indian assets: An exemption is available to the transferor of a share of, or interest in, a foreign entity if he along with his AEs, at any time in the 12 months preceding the date of transfer - (i)

5 NRs will not be subject to capital gains tax on the transfer (whether by way of sale or redemption) of investment, held directly or indirectly, in SEBI registered Category-I and Category-II foreign portfolio investments. Further, it also provides that transfer of rupee denominated bonds issued outside India from an NR to another NR outside India will also be exempt from capital gains tax.

neither holds the right of control or management; (ii) nor holds voting power or share capital or interest exceeding 5% of the total voting power or total share capital, in the foreign company.

- Exemption to transferor in case company, whose share or interests are transferred, indirectly owns Indian assets: An exemption is available to the transferor if he along with his AEs, at any time in the 12 months preceding the date of transfer - (i) neither holds the right of management or control in relation to such company or the entity; (ii) nor holds any rights in such company which would entitle it to either exercise control or management in the company or entity that directly holds Indian assets or entitle it to voting power exceeding 5% in the company or entity that directly holds Indian assets.

An exemption has also been provided for transfer of shares in an offshore amalgamation or demerger subject to certain conditions[6].

Q16. What are the advantages of the India's Double Taxation Avoidance Agreements (DTAAs) with Mauritius, Singapore, *etc*.? Do NRs require a tax residency certificate to avail of any tax treaty benefits?

Typically, investments into India are routed through an intermediate holding company set up in such tax jurisdictions which have a tax friendly regime under the respective DTAA with India. The India-Mauritius DTAA, up to FY 2016-17, provided an exemption from tax in India on capital gains earned by a tax resident of Mauritius from the alienation of shares of an Indian company. However, after protracted negotiations, the governments of India and Mauritius have signed a protocol amending the India-Mauritius DTAA which now provides for phasing out of the aforesaid capital gains tax exemption in India, in the following manner:

Particulars	Tax Consequences in India under the India-Mauritius DTAA
Investments in shares prior to April 1, 2017	Capital gains exemptions will continue for shares acquired before April 1, 2017, irrespective of their date of transfer.
Concessional tax rate from April 1, 2017 to March 31, 2019	Capital gains from shares (acquired after April 1, 2017) transferred before March 31, 2019, will be taxed at 50% of the domestic tax rate of India subject to fulfilling the conditions stipulated in the LOB clause. The concessional tax rate will however, be subject to GAAR.
Transfer of shares (acquired after April 1, 2017) after March 31, 2019	Taxable in India at full domestic tax rate

6 The cost of acquisition and period of holding of the shares of the Indian company in the hands of the resulting foreign company will be the same as the demerged foreign company.

Similarly, India has also renegotiated the India-Singapore DTAA bringing the DTAA at par with the India-Mauritius DTAA providing for capital gains tax on capital gains from shares acquired after April 1, 2017.

Both India-Mauritius and India-Singapore DTAA provide for an LOB clause which contains certain conditions for conferring the benefits of the respective DTAAs on tax residents of Mauritius and Singapore.

The Indian Government has also entered into a revised DTAA with Cyprus which has replaced the existing India-Cyprus DTAA signed between the two countries on June 13, 1994. The new India-Cyprus DTAA provides for source based taxation of capital gains arising from the alienation of shares (similar to the India-Mauritius DTAA), instead of residence based taxation provided under the previous India-Cyprus DTAA. For investments made prior to April 1, 2017, a grandfathering clause has been introduced according to which all the investments prior to April 1, 2017 will be taxed only in the country in which the taxpayer is a resident.

In order to avail tax treaty benefit, NR taxpayers are required to furnish a TRC and a self-declaration in the prescribed form, in some cases. Income tax authorities may ask a taxpayer for additional documents to substantiate a claim for tax treaty benefits.

Q17. Is prior permission of Indian income tax authorities required before transferring assets?

Section 281 of the IT Act states that where a taxpayer during the pendency of any proceeding under the IT Act or after the completion thereof, but before the service of notice of recovery, transfers any of his assets in favour of another person, such transfer is void as against any claim in respect of any tax or any other sum payable by such taxpayer as result of the completion of the said proceeding or otherwise. However, such a transfer will not be void if:

- the transfer is for an adequate consideration and the transferee does not have notice of the pendency of any proceeding or, as the case maybe, of such tax or other sum payable by the assessee; or
- it is undertaken with the previous permission of the Assessing Officer.

This section only applies to cases where the amount of tax or other sum payable or likely to be payable exceeds INR 5 thousand (approx. USD 67) and the assets charged or transferred exceed INR 10 thousand (approx. USD 134) in value.

Q18. What are the major tax registrations and compliances to be followed by corporations in India?

A company doing business in India must obtain a PAN and a TAN.

It is mandatory to quote PAN on returns of income and all correspondence with any income tax authority. For enforcing the requirement to obtain PAN registrations, the IT Act provides that in case the taxpayer does not provide

PAN, the deductor will withhold tax at the higher of, rates in force (including treaty rates) or at the rate of 20%. As per recent amendments to the IT Act, an NR deductee is not subject to higher tax in respect for payments for interest, royalty, FTS, and transfer of capital assets, where the NR deductee has furnished TRC and tax identification number in the country of residence along with the name and address of the NR deductee.

Furthermore, the provisions of the IT Act make it mandatory to quote TAN in all tax deducted at source, tax collection at source, or annual information returns, payment challans and certificates to be issued by persons under an obligation to deduct tax at source.

The key compliances to be followed by corporations under the IT Act are as follows:

Filing of corporate tax return	September 30
Filing of tax audit report	September 30
Filing of transfer pricing report	November 30
Filing of tax deducted at source return	Quarterly

Corporate tax liability is required to be estimated and discharged by way of advance tax in four instalments on June 15, September 15, December 15 and March 15. In case a tax payer fails to file a timely return, the assessee will be ineligible to avail any tax holidays and incentives set out under chapter VIA of the IT Act.

Q19. What is the ordinary appellate dispute resolution channel in India?

The ordinary appellate dispute resolution procedure in India includes the following forums:

- Commissioner of Income Tax (Appeals)
- A taxpayer may file an appeal before the Commissioner Income Tax (Appeals) within a period of 30 days against any order passed against such taxpayer by the Assessing Officer in the course of assessment proceedings.
- Dispute Resolution Mechanism (DRP)
- The IT Act has constituted a DRP for eligible taxpayers viz. taxpayers with transfer pricing disputes and all foreign companies, irrespective of the nature of their dispute. The assessing officer is required to forward a copy of the draft assessment order to the eligible taxpayer if it is proposed to make a variation in the income/loss of the eligible taxpayer, which is prejudicial to such taxpayer.
- Income Tax Appellate Tribunal (ITAT)
- An appeal may be filed against the order of the Commissioner of Income Tax (Appeals) or the final assessment order after directions from DRP are issued before the ITAT on any question of fact or law both. The ITAT is a fact finding authority.
- High Court
- An appeal may be filed before the High Court against the order of the ITAT within 120 days, where the same relates to a substantial question of law.

- Supreme Court
- The Supreme Court is the final appellate authority. An appeal may be filed before the Supreme Court against an order of the High Court.

Q20. What are other dispute resolution alternatives available to taxpayers?

Authority for Advance Rulings (AAR)

An advance ruling, which is issued by an independent adjudicatory body called the AAR, is binding on the person seeking it in relation to the specific transaction and the revenue authorities cannot challenge the same unless there is a change in facts or applicable law. An advance ruling is only binding on the parties to whom it applies, although it does have a persuasive value for other transaction. Furthermore, the scope of the AAR has been widened to include applications made by resident and NRs on questions relating to GAAR. The AAR mechanism has also been extended to residents in respect of their own tax liability for transactions with value in excess of INR 100 crores (approx. USD 13.4 million).

Though statutorily no appeal can be preferred from the ruling of an AAR, remedies under the Constitution, such as writ petitions can be availed to challenge an AAR ruling.

Settlement Commission

The Settlement Commission is a statutory body and deals with the settlement applications filed by the assessee under the IT Act. An assessee can approach the Settlement Commission at any stage of the proceedings for assessment pending before an assessing officer, subject to certain prescribed conditions. The Settlement Commission has the power to grant immunity from prosecution from any offence under IT Act and also from imposition of penalty under the IT Act or under the Indian Penal Code, 1860 or any other Central Acts, in cases where the applicants make a full and true disclosure of their income or wealth and fulfils certain other prescribed conditions.

The order passed by the Settlement Commission is conclusive as to the matters stated therein and no appeal lies to any authority against the order passed by the Settlement Commission.

Mutual Agreement Procedure (MAP)

MAP is a dispute resolution mechanism provided for under the DTAAs.

MAP can be invoked by the taxpayers where an action of any one of the Contracting States to the DTAA results in or will result for him in taxation, which is not in accordance with the DTAA.

Further, recourse to MAP does not deprive the taxpayer from ordinary legal remedies available under the domestic law. There is no time limit prescribed within which the Competent Authorities of the DTAA are to arrive at a conclusion in respect of the MAP application.

Bilateral Investment Protection Agreements (BIPA)

The objective of BIPA is to promote and protect the interests of investors of either country in the other country. Such agreements increase the comfort level of investors by assuring a minimum standard of treatment in all matters and provide for justifiability of disputes with the host country. Of late, foreign investors have been invoking BIPAs to resolve their disputes with the Indian Government in the sphere of income tax.

Q21. What is Black Money Law? What are its tax implications?

The Black Money Act levies tax on undisclosed assets held aboard by a person who is resident of India at a rate of 30% of the value of such assets, provides for a penalty of 90% of the value of such assets, and also provides for rigorous imprisonment of 3 to 10 years for willful attempt to evade tax in relation to undisclosed foreign income or asset. The residency of a person, for the purpose of Black Money Act, is to be determined in accordance with the provisions of the IT Act.

XVIII.Indirect Tax

GST has been introduced in India with effect from July 1, 2017. While each state has a separate GST Act, at present all states have adopted a uniform tax rate for the current fiscal year.

GST has revamped the complicated and multi-layered indirect tax regime by subsuming and consolidating most central and state indirect taxes into a single 'Goods and Services Tax'. Till the introduction of GST, different taxable events in the Indian supply chain attracted different taxes. For instance, manufacture of goods attracted excise duty, sale of goods attracted VAT or CST depending upon situs of sale, whereas provision of services attracted service tax. Most of such taxes could not be cross-utilized to offset tax liability of other central or state taxes thereby leading to cascading effect of taxes *i.e.* payment of tax on tax.

Under GST, consolidation of taxes with seamless flow of credits and cross-utilizations has allowed for greater supply chain efficiency and facilitated the creation of a single market across the country. Such credits are available against prescribed documents, such as tax invoice, issued in terms of GST laws containing specified information. In this regard, it is pertinent to note that the GST authorities are proposing to introduce e-invoicing with effect from 1 October 2020 f for specified class of taxpayers.

The GST laws specifically provide for documents that are required to be maintained for undertaking supplies e.g. filing statutory returns, e-way bills (required for movement of goods) *etc*.

Q1. What are the GST legislations passed by the Parliament in India?

The Parliament has passed the following legislations in order to implement GST in India:

- CGST Act;
- IGST Act;
- GSTC Cess Act.

Further, all states and UTs have also passed their respective GST legislations (SGST Acts/ UTGST Acts).

Q2. What are the indirect taxes applicable in India?

GST

Under the GST regime, both the centre and the states have concurrent powers to levy tax on supply of goods as well as services except certain specified goods *viz.* petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel and alcohol for human consumption. Depending upon the place of supply of goods or services, the supplies under GST laws are taxed either as intra-state supply or inter-state supply.

Intra-State GST/ Central Goods and Services Tax, State Goods and Services Tax and Union Territory Goods and Services Tax

Intra-State supply of most goods and services attracts CGST and SGST or UTGST. A transaction is treated as an intra-state transaction when the supplier and the place of supply are in the same state or union territory. Detailed rules have been prescribed under the GST laws for determining place of supply and location of supplier in respect of goods and services.

Inter-State GST/ Integrated Goods and Services Tax

Inter-State supply of most goods and services attracts IGST. IGST is a sum total of the Central GST and State GST, which would have been applicable on the intra-state supply of such goods or services. A transaction is treated as an inter-state transaction when the supplier and the place of supply are in different states. Detailed rules have been prescribed under the IGST Act for determining place of supply and location of supplier in respect of goods and services. Further certain supplies have been deemed to be an inter-state supply *e.g.*, imports, supply of goods and services to an SEZ unit, *etc*.

In addition to the above, certain supplies of goods and services also attract a GST Compensation Cess which has been levied specifically to fund the compensation payable to states on account of any losses which the states may suffer post the implementation of GST. Such GST Compensation Cess is applicable for a period of five years and is applicable on select goods such as motor vehicles, tobacco, coal *etc*.

Customs Duty

Customs duty is imposed on the import of goods into India and export of goods outside India. Every person proposing to engage in import of goods into India or export of goods from India is required to obtain an IEC from the Directorate General of Foreign Trade, Ministry of Commerce and Industry. Customs duty is levied in terms of the Customs Act, 1962 and Customs Tariff Act on the transaction value of goods. Under the present law in addition to basic customs duty, IGST, social welfare surcharge, GST Compensation Cess (applicable only on specified products), road and infrastructure cess (applicable on motor spirits and high speed diesel), Countervailing Duty (CVD) (applicable only on specified products) and Special Additional Duty paid (SAD) (applicable only on specified products) are also levied at applicable rates. It is important to note that the IGST that is applicable on import of goods is collected as a duty of customs. However, the same is creditable against domestic output GST liability. The effective rate of customs duty in case of most non-agricultural products ranges from 16.55% to 42.08% (approximately) depending upon the classification of products.

The rate of customs duty for each item is specified under the Customs Tariff Act and is dependent on the classification of the goods determined under the First Schedule of the Customs Tariff Act, which is aligned with the Harmonized System of Nomenclature provided by the World Customs Organization. In order to encourage exports, export duty is levied on very few items, mentioned under the Second Schedule of the Customs Tariff Act.

Excise Duty

Excise duty is imposed on the manufacture of specified goods in India. The power to levy excise duty primarily remains with the central government, though the power to levy excise duty on alcoholic products and other intoxicants has been conferred upon state governments. With the introduction of GST, the power to levy central excise duty has been restricted to specified products *viz.* petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, and aviation turbine fuel.

Central Excise Duty

Central excise duty is levied on the specified goods manufactured in India under provisions of the Central Excise Act, 1944 and the Central Excise Tariff Act, 1985. Central excise duty is a modified VAT (also known as Cenvat) wherein a manufacturer is allowed to take credit of the excise duty paid on locally sourced goods, and CVD and SAD on imported goods. The Cenvat credit so availed can be utilized for payment of excise duty on the clearance of dutiable final specified products manufactured in India, if any, applicable in accordance with the Cenvat Credit Rules, 2017.

State Excise Duty

State governments have the power to regulate movement of liquor and other intoxicants and to levy tax on manufacture or production of liquor and other intoxicants by virtue of the Constitution. As a result, movement and sale of liquor and other intoxicants is dependent upon the excise policy of respective states, which is revised annually.

The scope of the state excise policies and regulations includes *inter alia* regulating import, export, transport, possession and sale of liquor within the concerned state. State excise legislations also empower the state governments to issue licenses by way of tender, auction, and tender-cum-auction or by any other prescribed mechanism. State excise policies often contain rules governing filing of statutory returns and other compliances which vary from state to state.

Sales Tax

Sale of specified moveable goods *viz.* petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel, and alcohol for human consumption in India is chargeable to a levy of Value Added Tax (VAT) or CST. Import of these goods into or export of goods outside India or sale in the course of import or export of goods are not exigible to State VAT or CST. Under the federal structure of India, tax on sale of goods may be imposed by the central government or the state government depending upon the situs of the sale.

Intra-state Sales Tax/ Value Added Tax

The power to levy sales tax on intra-state sale of specified moveable goods *viz*. petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel, alcohol for human consumption, is conferred upon state governments under the Constitution. In the event that a sale takes place within a particular State of India, the same would qualify as a local sale or intra-state sale, and would be chargeable to VAT at the applicable rates under the relevant State VAT legislation.

Under the VAT regime, the VAT paid on goods purchased from within the state is typically eligible for input VAT credit. The input VAT credit can be utilized against the VAT or CST payable on the sale of goods subject to fulfilment of conditions in this regard. It is, thus, ensured that cascading effect of taxes is avoided and value addition alone is taxed.

VAT rates are dependent on the relevant State VAT Legislation. Every dealer engaged in sale or purchase of specified goods over and above the specified threshold limit in a particular state is required to obtain VAT or CST registration in each of such states and undertake necessary compliances in this regard.

Rules concerning filing of VAT returns vary from state to state. Statutory returns are normally filed on a yearly, quarterly or monthly basis (depending upon the taxable turnover of the dealer). These returns are filed with the jurisdictional VAT officer.

Central Sales Tax

CST is levied on inter-state sale of goods of specified moveable goods *viz*. petroleum crude, high speed diesel, motor spirit, natural gas, aviation turbine fuel, and alcohol for human consumption. Where goods move from one state to another pursuant to a contract of sale, or a sale is affected by the transfer of documents of title during the movement of goods from one state to another, such a sale is known as an inter- state sale.

The power to levy CST is conferred on the central government by the Constitution. The levy of CST is governed by the CST Act. CST is chargeable at the concessional rate of 2% on submission of requisite statutory form (Form C), in specified cases *viz*. telecommunication, mining, generation or distribution of electricity, resale or manufacture of goods for sale. In case Form C cannot be furnished, then CST would be levied at the applicable VAT rate.

The power to collect CST is in the hands of the state governments. Further, the CST Act provides that amongst others, the provisions relating to returns, provisional assessment, advance payment of tax, registration and penalties *etc*. under the local VAT law in a particular state shall also be applicable for compliances under the CST Act.

Professional Tax

Certain states in India also levy a tax on every person engaged in any profession, trade, calling or employment in the said state. Every person liable to pay professional tax is required to obtain an enrolment certificate under the professional tax laws and undertake necessary compliance in this regard.

Further, every company is also required to withhold professional tax on behalf of its employees and deposit the same with the government exchequer. The rate of tax is dependent on the number of employees and their monthly salaries. Every such company is also required to obtain a registration certificate in its capacity as an employer and also obtain an enrolment certificate. The rate slabs of professional tax vary from state to state subject to the maximum of INR 2,500 (approx. USD 33) per employee per annum.

Q3. What is the concept of 'supply' under GST?

The taxable event under GST is 'supply' of goods or services. The term 'supply' has been defined broadly to cover all forms of supply of goods or services or both and includes sale, transfer, barter, exchange, license, rental, lease *etc*. As a general rule, such supplies should be made for a consideration and must be made in the course or furtherance of business. However, in certain exceptional cases such as supplies between related parties or distinct persons, free supplies where credit has been availed on goods supplied, *etc*. 'supplies without consideration' have also been made taxable. Such supplies have been enumerated in Schedule I of the CGST Act. In view of the deeming provisions, self-supplies of goods or services inter-se between two offices of the same company may also be exposed to GST liability.

All taxes paid on procurement of inputs, input services and capital goods are allowed to be offset against output liabilities except in so far as the credit on particular goods and services is restricted under the GST laws.

Q4. What is the rate structure under GST?

Inter-state supply or intra-state supply of goods and services attracts GST at a uniform rate pan-India. While in terms of GST laws, the maximum rate of GST (excluding compensation cess) can go up to 40%, four major rates have been prescribed currently – 5%, 12%, 18% and 28%. However, there is a rate of 3% and 0.25% stipulated for semi-precious and precious metals. Additionally, GST Compensation Cess is also levied at prescribed rates.

Q5. Who is a 'taxable person' under GST?

Under GST laws, a taxable person is any person who is registered or liable to be registered in terms of CGST Act. This includes a person with aggregate turnover above the prescribed threshold and also persons who are mandatorily required to obtain registration such as persons liable to pay tax under reverse charge *etc*.

Q6. What is the registration requirement under GST?

The GST laws require businesses to take a registration and undertake compliances in each state from where supply of taxable goods or services is made.

As a general rule, a taxable person supplying goods or/and services is required to be mandatorily registered with the authorities if the aggregate turnover of such taxable person on a pan-India basis exceeds INR 20 lakhs (approx. USD 27,000) or INR 10 lakhs (approx. USD 13,400), in case of special category states (Manipur, Mizoram, Nagaland and Tripura). Certain exceptions are available to this rule.

Further, certain additional category of persons such as persons liable for paying tax under reverse charge *etc*., are mandatorily required to obtain registration irrespective of the prescribed threshold criterion.

As a general rule, GST laws also allow certain taxpayers having turnover of less than INR 1.5 crores (approx. USD 201,000) (with respect to supply of goods) to register under the composition scheme which allows such taxpayer to discharge GST at a reduced rate, ranging from 2% to 5%. However, the said scheme is subject to various statutory restrictions, *for e.g.* composition scheme disallows the taxpayer to avail and utilize input tax credit of the GST discharged on inward supplies of goods and services *etc*.

Q7. What is the concept of Anti-Profiteering under GST?

The GST laws mandate that every business must pass on the benefits to its customers that may accrue to it on account of reduced rate of GST or increase in credits in comparison with the erstwhile laws. Such benefit is to be passed by way of proportionate reduction in prices. An authority has been constituted for the said purposes in accordance with GST laws, to ensure that businesses pass on the benefits of GST to the end customer.

Q8. What are the compliances which are required to be undertaken under GST laws?

GST laws mandates a taxpayer to undertake the prescribed compliances, including the following:

Returns

GST laws are based on a self-assessment mechanism where a taxpayer is required to ascertain its own tax liability and discharge the same to the governmental authorities. In support of such self-assessments, the taxpayer is required to file periodical returns with the concerned authorities. Some of the returns which are required to be (electronically) filed by the taxpayer, under the GST laws, are as follows:

Form**	Period	Details	Last date*
GSTR-1	Monthly	Details of outward supplies of goods or services	10th day of the succeeding month
GSTR-3B	Monthly	A summary of all outward and inward supplies of goods and services	20th day of the succeeding month
GSTR-9	Annually	Annual return	31st December of the year following the end of the financial year
ITC-02***	-	Details of eligible tax credit claimed by a taxpayer on its registration under GST laws	Within 30 days of becoming eligible to avail input tax credit

* *The last dates so provided are subject to any extension that may be provided by the concerned authorities.*

** *The government has recently proposed to overhaul the return filing system and has come out with new forms which are to be introduced in a phased manner.*

*** *Please note that the said form is filed for the transfer of credit in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason.*

In addition to the above, taxpayers having turnover of above INR 2 crore (approx. USD 268,000) are required to get their books of accounts audited and electronically submit their audited books of accounts along with a reconciliation statement, in FORM GSTR-9C.

E-way bills

As highlighted above, GST laws mandates a taxpayer to generate an e-way bill before undertaking supplies of goods from one place to another. In this regard, it is pertinent to note that e-way bills are required to be generated by every registered person who causes movement of goods having 'consignment value' exceeding INR 50 thousand (approx. USD 670). Detailed rules and regulations have been provided under GST laws with respect to e-way bills.

Q9. What are some the indirect tax incentives available in India?

Customs

There are various schemes and incentives available under customs laws for various sectors including power, oil and gas, transportation, fertilisers, renewable sources of energy *etc*. Further, India has also signed Free Trade Agreements with various countries for exemptions from import duty on various specified goods.

GST

Under GST laws, exports and deemed exports are zero rated and suppliers are entitled to claim refund of GST discharged on inputs and input services, subject to fulfilment of conditions and compliances.

Foreign Trade Policy, 2015-2020 (FTP)

The current FTP which has come in to effect from April 1, 2015 provides for a suite of export promotion schemes such as the Merchandise Exports from India Scheme, the Service Exports from India Scheme, the Export Promotion Capital Goods Scheme, recognition of Star Export Houses as 'Status Holders' *etc*. Incentives are also extended to Exported Oriented Units, Software Technology Parks *etc*.

SEZ

Subject to conditions prescribed in this regard, developers of an SEZ and units established in an SEZ are entitled to various indirect tax benefits *inter-alia* including:

- Exemption from payment of import duties on imported goods;
- Supplies to SEZ are zero rated under GST laws;
- Exemption from excise duty on goods manufactured by an SEZ;
- Drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the domestic tariff area into an SEZ or unit;
- Exemption from CST on the sale or purchase of goods if such goods are meant to carry on the authorized operations; and
- Exemption from VAT on supply of goods to an SEZ developer or unit. This is subject to the respective sales tax/VAT legislation of the state in which the SEZ is set up.

Investment based incentives

The state government also provide for various fiscal and non-fiscal incentives (including indirect tax incentives) on account of any investments made in any of the specified areas. *For e.g.* in the State of Uttar Pradesh, the state government has issued Uttar Pradesh Electronics Manufacturing Policy, 2017 which provides for the following illustrative incentives for setting up a unit in the specified area which has been designated as 'Electronics Manufacturing Zone':

- Reimbursement of SGST, electricity duty, employee provident fund, employee state insurance discharged;
- Exemption from applicable stamp duty;
- Land rebate, *etc*.

Please note that the incentives available under any such incentive schemes is primarily based on the quantum of investments along with the employment opportunities created. Further, the incentives may also be dependent on the structure of the proposed unit.

Q10. What is the ordinary appellate dispute resolution channel for indirect taxes in India?

Customs and Excise Laws

The ordinary appellate dispute resolution procedure in India includes the following forums:

- Appeals to Commissioner of Customs / Central Excise (Appeals): This is the first level of appellate mechanism. An appeal in this regard can be filed within 60 days from the date of receipt of the order passed by an adjudicating authority lower than the rank of Commissioner.
- Appeal to the Appellate Tribunal – CESTAT: An appeal to CESTAT can be filed against an order of the Commissioner (Adjudication) or Commissioner (Appeals). Such appeals have to be filed within three months from the date of receipt of the order.
- High Court - An appeal may be filed before the High Court against the order of the CESTAT within 180 days, where the appeal relates to a substantial question of law. However, appeals against a CESTAT order on the issues of classification or valuation are not admissible before High Court and are required to be filed directly before Supreme Court.
- Supreme Court - The Supreme Court is the final appellate authority. An appeal may be filed before the Supreme Court against the order of the CESTAT (only in matters of valuation and classification) or against the order of High Court.

The ordinary appellate dispute resolution channel with respect to VAT and other local levies may depend on local VAT legislation which may vary from state to state.

GST Laws

The ordinary appellate dispute resolution procedure in India includes the following forums:

- Appeals to Appellate Authority: This is the first level of appellate mechanism. An appeal in this regard can be filed within three months from the date of communication of the order passed by an adjudicating authority.
- Appeal to the Appellate Tribunal: An appeal to Appellate Tribunal can be filed against an order of the appellate authority or order in revision passed by revisionary authority, by any person aggrieved by such an order. There are two tiers of tribunals that are envisaged under the GST laws – National or Regional Bench and the State Bench or Area Bench. Such appeals have to be filed within three months from the date of receipt of the order.
- High Court - An appeal may be filed before the High Court against the order of State Bench or Area Bench of the Appellate Tribunal within 180 days from the date of receipt of order where the same relates to a substantial question of law.
- Supreme Court - The Supreme Court is the final appellate authority. An appeal may be filed before the Supreme Court against the order of the National Bench or Regional Bench or against the order of High Court.

Q11. What are other dispute resolution alternatives available to indirect taxpayers?

Apart from the above, with respect to central levies *i.e*. customs, GST and excise laws, the following dispute resolution alternatives are available:

Settlement Commission

The basic objective of setting up of the Settlement Commission is to expedite payments of customs and excise duties involved in disputes by avoiding costly and time consuming litigation process and to give an opportunity to tax payers to come out clean. Eligible assessees can make an application in such form and in such manner as may be prescribed by the Commission and containing "full and true" disclosure of their duty liability which has not been disclosed before the proper officer having jurisdiction subject to fulfilment of conditions prescribed in the regard.

AAR

The central legislations governing levy of customs provide for a scheme of Advance Ruling where any person holding an IEC or exporting goods to India etc., may approach the authority on issues such as ascertaining their tax liability in relation to customs.

The AAR constituted under the GST laws provides rulings on the GST implications of any ongoing transactions or activities that are proposed to be undertaken. These rulings are binding on both the applicant and the GST authorities. However, appeals can be made against the decisions of the authority.

XIX. Privacy and Data Protection

Q1. What is the legislative framework governing Privacy and Data Protection in India?

The Information Technology Act, 2000 as amended by the Information Technology (Amendment) Act, 2008 (the ***IT Act***), together with rules issued under it, set out provisions in relation to privacy, data protection, and information security in India and require any entity using data and information stored on computers, computer systems, computer networks, and computer resources to comply with data protection and privacy standards laid under it.

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (***SPDI Rules***), is applicable to personal information[1] (***PI***) including sensitive personal data/information[2] (***SPDI***) and requires entities handling PI and SPDI to provide and publish a privacy policy. Additionally, any individual, organization or corporate entity that collects, handles SPDI is required to comply with, among other things, the following obligations:

a) Publish a privacy policy on its website:
   Rule 4 of the SPDI Rules require that a privacy policy be maintained and disclosed to the individuals whose PI including SPDI is collected. This privacy policy is to be published on the website with specifications such as statements of practices and policies, type of SPDI collected, purpose of collection and usage of the data, rules for disclosure of the information and security practices and procedures followed for protection of the SPDI. This privacy policy needs to be clear and easily accessible.

b) Obtain prior written consent of an individual for collection, disclosure, and transfer of SPDI, along with other conditions:
   <u>Collection:</u> Rule 5 of the SPDI Rules require the prior consent of the individual to be obtained before collection of the SPDI, with an option to withdraw the consent being made available to the individual at all times. Consent can be obtained by any mode of electronic communication as

1 Personal information under the SPDI Rules has been defined as "*any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.*"

2 Sensitive personal data/information under the SPDI Rules has been defined as "*personal information consisting of information relating to (i) password; (ii) financial information such as Bank account or credit card or debit card or other payment instrument details; (iii) physical, physiological and mental health condition; (iv) sexual orientation; (v) medical records and history; (vi) Biometric information; (vii) any detail relating to the above clauses as provided to body corporate for providing service; and (viii) any of the information received under above clauses by body corporate for processing, stored or processed under lawful contract or otherwise.*" Information that is freely available publicly, or furnished under the Right to Information Act, 2005, or furnished under any other law falls outside the scope of SPDI.

well. At the time of collection of the information, the individual is required to be intimated of the following:

- The fact that the information is being collected;
- The purpose for collection;
- The intended recipients of the information; and
- The details of the agency collecting the information and the agency retaining the information.

In addition, Rule 5 of the SPDI Rules require that the entity holding the SPDI not retain it for any longer period than is required for the purposes for which the same may be lawfully used or is otherwise required under any other law for the time being in force.

Disclosure: Rule 6 of the SPDI Rules requires that the prior written permission from the providers of such information is obtained prior to disclosure to any third party, unless such disclosure has been agreed to in a contract between the entity and the provider or where the disclosure is necessary for compliance of a legal obligation. Rule 6 also states that the third party recipient of the SPDI is not permitted to further disclose the information received.

Transfer: Rule 7 of the SPDI Rules allows an entity to transfer SPDI collected by it only to those Indian or foreign bodies corporate that ensure an equivalent level of data protection. Moreover, such transfer may be permitted only for the lawful performance of a contract entered into with the provider of information or where the provider has consented to the transfer.

c) Maintain data protection levels and implement reasonable security practices and procedures:
Rule 8 of the SPDI Rules mandates *inter alia* the implementation of reasonable security standards and maintenance of information security programs and policies that contain managerial, technical, operational and physical control measures which are commensurate with the nature of the business. The SPDI Rules suggest IS/ISO/IEC 27001 as one such standard that can be implemented. Further, security audits of the technical systems by independent auditors approved by the Government of India are required to be carried out at least once a year and as and when the process and computer systems undergo significant upgradation.

d) Appoint a grievance officer:
Rule 9 of the SPDI rules requires an entity to address any discrepancies and grievances of information providers with respect to the processing of information in a time bound manner. For this purpose, entities are required to appoint a grievance officer and display the name and contact details on its website.

Apart from the IT Act, the following sectoral laws and rules, amongst others, also govern personal data use and collection:

a) The data localization directive issued by the Reserve Bank of India (***RBI***) on April 6, 2018 and subsequent FAQs issued by the RBI on June 26, 2019 governs the handling of data related to payments systems and information relating to payment transactions by payment system operators as well as banks. It requires that the entire data related to payment systems including full end-to-end transaction details, information collected, carried or processed as part of the message or payment instruction be stored in India.

b) The Aadhaar (Targeted Delivery of Financial and Other Subsidiaries, Benefits, and Services) Act 2016 as amended by the Aadhaar and Other Laws (Amendment) Act, 2019 governs usage of an individual's personal information including biometric information for the purposes of identity verification and authentication.

A new data protection framework is currently in the process of being adopted and the Government of India has released the Personal Data Protection Bill, 2019 (the ***PDP Bill***).

Q2. What are the liabilities under the framework governing Privacy and Data Protection in India?

The IT Act and Rules framed thereunder provide for offences and contraventions, such as:

- **Liability for data breaches**: Section 43A of the IT Act places liability on a body corporate that is negligent in implementing and maintaining reasonable security practices and thereby causes wrongful loss or gain to any person. Such a body corporate would be liable to pay damages by way of compensation.
- **Liability for breach of confidentiality and privacy**: Under Section 72 of the IT Act, any person who, in pursuance of power conferred under this Act, has secured access to any electronic record, book, register, information etc. without the consent of the person concerned discloses such information to any other person is liable to be punished with imprisonment for a term which may extend to 2 years, or with fine which may extend to INR 1 lakh (approx. USD 1,339) or with both.
- **Liability for malicious disclosure**: Under Section 72A of the IT Act, if a person providing services under a lawful contract and having access to personal information, discloses such information to a third party without consent, with the intent to cause or knowing that he is likely to cause any wrongful gain or loss, such person can be punished with imprisonment which may extend to a terms of 3 years or with fine up to INR 5 lakhs (approx. USD 6,697) or both.
- **Residuary penalty**: Under Section 45 of IT Act, whoever contravenes any rules or regulations made under IT Act, is liable to pay a compensation not exceeding INR 25 thousand (approx. USD 335) to the person affected by such contravention, or suffer a penalty not exceeding the same amount.

Q3. What are the agencies/ administrative authorities that enforce the Privacy and Data Protection framework in India?

India does not currently have a dedicated privacy or data protection regulating authority. Individuals who are aggrieved may approach state-level adjudicating officers who are empowered to hear cases under the civil provisions of the IT Act (for e.g. under Section 43A of the IT Act discussed above). However, in case the claim of injury or damages exceeds INR 25 crores (approx. USD 3.35 million), an aggrieved person would have to approach court of competent jurisdiction. Criminal complaints would proceed under the normal criminal process and would be initiated by a complaint to the police or a local magistrate (for e.g. under Section 72A of the IT Act discussed above). Additionally, the India Computer Emergency Response Team (***CERT-In***) is India's nodal agency authorized under Section 70B of the IT Act and acts as the first responder of cyber security incidents and spreads awareness among stakeholders on best practices to secure the nation's cyber security infrastructure.

Q4. What are the requirements with regard to notifying individuals or the administrative authority about security breaches in relation to personal data?

The IT Act and rules thereunder do not require entities to notify the government or individuals about personal data breaches. However, under Section 12(1)(a) of the Information Technology (the Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013 (***CERT-In Rules***), any individual, organization or corporate entity may report a cyber security incident to CERT-In. Further, certain cyber security incidents that are identified in the annexure to the CERT-In Rules need to be mandatorily reported by the affected entity as early as possible. An illustrative list of such cyber-security incidents are as follows–

- Compromise/attacks of critical systems/information
- Unauthorized access of IT systems/data
- Defacement of website or intrusion into a website and unauthorized changes such as inserting malicious code, links to external websites, etc.
- Identity theft, spoofing, and phishing attacks
- Attacks on applications such as e-governance, e-commerce, etc.

Q5. What are the recent developments with respect to Privacy and Data Protection in India?

The Supreme Court of India in *Justice K.S. Puttaswamy (Retd.)* v. *Union of India*[3] (***Puttaswamy judgment***) declared that the right to privacy is protected as an intrinsic part of the fundamental rights guaranteed under the Constitution of India. The Court specifically recognized the right to privacy to include the three aspects of spatial control, decisional autonomy and informational privacy which includes protection of personal data of an individual. The Court upheld the principle of informed consent as being central to informational

3 (2017) 10 SCC 1.

self-determination. The *Puttaswamy* judgment explicitly recognised the right of an individual to control the dissemination of personal information and to know the purpose of the usage of their personal information with the ability to correct and amend it. It also recognised that the dangers to informational privacy can originate from non-state actors as well, thereby leaving scope for horizontal application of the fundamental right to privacy in future (i.e., against private entities as well).

Further, as mentioned earlier, the Government of India has released the PDP Bill, key provisions of which are elaborated below.

Q6. What are the proposed changes that the PDP Bill seeks to bring about?

The PDP Bill is the proposed data privacy legislation prepared by the Government of India post the declaration of the right to privacy as a fundamental right under the Constitution of India, by the Supreme Court of India. The PDP Bill establishes a Data Protection Authority of India (***DPA***) for enforcement and monitoring of the PDP Bill. Some salient proposals in the PDP Bill are as follows:

Expanded Scope of Application

- Compliance with the new framework proposed by the PDP Bill will be required in respect of (i) data processing activities within India, (ii) processing by private and public Indian entities *as well as* (iii) certain processing activities which take place outside India.
- Specifically, the PDP Bill will apply to processing activities outside India where such processing is carried out 'in connection with any business carried on in India, or any systematic activity of offering goods or services to data principals within India' **or** 'in connection with any activity which involves profiling of data principals within the territory of India'. This means that foreign-based service providers targeting the Indian market or consumer-base in relation to commerce or profiling activities will be covered under the proposed framework.

Processing of Data

- The data fiduciaries, *i.e.* data processing entities will have to follow detailed obligations pertaining to collection of data, processing it in complete, accurate, specific, lawful manner as well as retaining it under a regulated system.
- The PDP Bill frames consent as the primary ground for processing personal data[4] (PD) and sensitive personal data[5] (SPD). Valid consent is required to

4 Personal data under the PDP Bill has been defined as *"data about or relating to a natural person who is "directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any other information, and shall include any inference drawn from such data for the purpose of profiling"*

5 Sensitive personal data under the PDP Bill has been defined as *"personal data, which may, reveal, be related to, or constitute—(i) financial data; (ii) health data; (iii) official identifier; (iv) sex life; (v) sexual orientation; (vi) biometric data; (vii) genetic data; (viii) transgender status;*

be free, informed, specific, clear and capable of being withdrawn. For SPD, explicit consent needs to be obtained which has a higher threshold.

- Data fiduciaries are obligated to: process personal data fairly and reasonably; process personal data only for purposes that are clear, specific, and lawful; only collect personal data necessary for a particular purpose; only process personal data based on a valid ground (such as consent, for purposes related to employment, for functioning of the State, or for emergencies); provide clear and concise notice to data principals of information relating to their data processing activities including types of data collected, purposes of collection, grievance redress, and rights of the data principal; ensure that personal data is retained only as long as may be necessary to satisfy the purpose for which it is processed; etc.

New Categories of Data Fiduciaries

- **Significant data fiduciaries**: Entities engaging in processing large volumes of data will be designated as significant data fiduciaries and will be required to undertake several mandatory compliances including appointment of a data protection officer, conducting regular impact assessments, conducting an independent data audit on annual basis, and ensuring maintenance of detailed records relating to data processing activities.
- **Social media intermediaries**: They have been defined as an intermediary who primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information. The definition aims to target social media companies and exclude e-commerce companies, telecom service providers and search engines. Such companies may be notified as significant data fiduciaries, who have higher obligations under law. Every social media intermediary notified as a significant data fiduciary is mandated to enable voluntary verification of users of their service and provide a mark of verification visible to all users. The assessment of compliance with this provision will be included in data audits of such intermediaries.
- **Consent managers**: The PDP Bill introduces consent managers, who are data fiduciaries who enable a data principal to gain, withdraw, review and manage their consent through an accessible, transparent and interoperable platform. These entities serve the purpose of communicating consent to data fiduciaries on behalf of data principals, and will need to be registered with the Data Protection Authority.

Data Localisation / Cross Border Transfer of Data:

- Sensitive personal data may be transferred outside India for processing, but will need to be stored in India. Cross border transfer of such data may be made only with explicit consent of the data principal, and when one of the following additional grounds are fulfilled:

(ix) intersex status; (x) caste or tribe; (xi) religious or political belief or affiliation; or (xii) any other data categorised as sensitive personal data"

  - the transfer is made pursuant to a contract or intra group schemes approved by the DPA;
  - adequacy determination for a specific country, class of entities, or international organization;
  - the DPA has permitted transfer for a particular purpose.
- Critical personal data, which will be notified by the Central Government, is subject to hard localisation, in that it may be processed only in India. No guidelines for the kind of data to be considered critical has been provided.
- Critical personal data may be transferred out of India only when such transfer is:
  - to a person or entity engaged in the provision of health services or emergency services or when such transfer is necessary for "prompt action" under Section 12 (processing of personal data without consent). This term is not defined in the PDP Bill.
  - on the basis of adequacy determination of a specific country or international organization or class of entities.

The PDP Bill was introduced in the Parliament of India in December 2019, and sent to the Joint Parliamentary Committee (***JPC***). Once the JPC makes it recommendations, a revised version of the bill may be tabled in an appropriate Parliamentary Session of the Government's choosing. If the PDP Bill were to receive legislative assent from both Houses of Parliament followed by the President of India, the Government could notify any of its provisions at any time and it will replace the current framework under the IT Act & Rules. There are no formal or official timelines for the passage of the PDP Bill through the parliamentary processes.

Glossary

AAEC	Appreciable adverse effect on competition in India
AAR	Authority for Advance Rulings
Accidents Act	Fatal Accidents Act, 1855
ADR	American Depository Receipt
AE	Associated Enterprise
Amendment Act	Companies (Amendment) Act, 2019
Anti-Dumping Rules	Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995
AoA	Articles of Association
APA	Advance Pricing Arrangement
Apprentices Act	Apprentices Act, 1961
APR	Annual Performance Report
Arbitration Act	Arbitration and Conciliation Act, 1996
ACI	Arbitration Council of India
ARE	Alternative Reporting Entity
AY	Assessment Year
Banking Regulation Act	Banking Regulation Act, 1949
BEPS	Base Erosion and Profit Sharing
BIPA	Bilateral Investment Protection Agreements
Black Money Act	Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
BO	Branch Office
Board	Board of Directors
Bonus Act	Payment of Bonus Act, 1965
CbC	Country by Country
CBDT	Central Board of Direct Taxes
CCI	Competition Commission of India
CESTAT	Customs Excise and Service Tax Appellate Tribunal
CGST	Central GST
CGST Act	Central Goods and Services Tax Act, 2017
CIC	Core Investment Company
CIR Process	Corporate Insolvency Resolution Process

CLRA Act	Contract Labour (Regulation and Abolition) Act, 1970
CoC	Committee of Creditors
Combination Regulations	CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011
Companies Act	Companies Act, 2013
Companies Registered Valuers Rules, 2017	Companies (Registered Valuers and Valuation) Rules, 2017
COMPAT	Competition Law Appellate Tribunal
Compensation Act	Employees' Compensation Act, 1923
Competition Act	Competition Act, 2002
Constitution	Constitution of India, 1950
Contract Act	Indian Contract Act, 1872
Copyright Act	Copyright Act, 1957
CPC	Code of Civil Procedure, 1908
CSR	Corporate Social Responsibility
CST	Central Sales Tax
CST Act	Central Sales Tax Act, 1956
Customs Tariff Act	Customs Tariff Act, 1975
CVD	Countervailing duty
DDT	Dividend Distribution Tax
DG	Director General
DIAC	Delhi International Arbitration Centre
DIN	Director Identification Number
DIPP	Department of Industrial Policy & Promotion
DPIIT	Department for Promotion of Industry and Internal Trade
DPS	Detailed Public Statement
DRAT	Debts Recovery Appellate Tribunal
DRP	Dispute Resolution Process
DRT	Debts Recovery Tribunal
DTAA	Double Taxation Avoidance Agreements
ECB	External Commercial Borrowing
EEFC	Exchange Earners' Foreign Currency
EPF Act	Employees' Provident Funds and Miscellaneous Provisions Act, 1952

EPF Amendment	Employees' Provident Funds and Miscellaneous Provisions (Amendment) Bill, 2019
ESI Act	Employees' State Insurance Act, 1948
Equal Remuneration Act	Equal Remuneration Act, 1976
Factories Act	Factories Act, 1948
FATF	Financial Action Task Force
FY	Financial Year
FCCB	Foreign Currency Convertible Bond
FCEB	Foreign Currency Exchangeable Bond
FDI	Foreign Direct Investment
FDI Policy	Consolidated Foreign Direct Investment Policy
FEMA	Foreign Exchange Management Act, 1999
FEMA 20(R)	Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017
FEMA 120	Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004
FII	Foreign Institutional Investor
FPI	Foreign Portfolio Investor
FTP	Foreign Trade Policy 2015-2020
FTS	Fees for Technical Services
FVCI	Foreign Venture Capital Investor
GAAR	General Anti Avoidance Rules
GDR	Global Depository Receipt
GOI	Government of India
Gratuity Act	Payment of Gratuity Act, 1972
GST	Goods and Services Tax
GSTC Cess Act	Goods and Services Tax Compensation Cess Act, 2017
HSN	Harmonised System of Nomenclature
IBBI	Insolvency and Bankruptcy Board of India
IBC	Insolvency and Bankruptcy Code, 2016
ICA	Indian Council of Arbitration
ICC	International Chamber of Commerce
I&B Ordinance	Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017
IEC	Importer Exporter Code

IFSC	International Financial Services Centre
IGST	Integrated GST
IGST Act	Integrated Goods and Services Tax Act, 2017
Industrial Disputes Act	Industrial Disputes Act, 1947
Information Technology Act	Information Technology Act, 2000
Insurance Act	Insurance Act, 1938
IPO	Initial public offering
IRDA	Insurance Regulatory and Development Authority of India
IRP	Interim Resolution Professional
IT Act	Income Tax Act, 1961
ITAT	Income Tax Appellate Tribunal
IT Rules	Income Tax Rules, 1962
JV	Joint Venture
LCIA	London Court of International Arbitration
Liability Act	Employer's Liability Act, 1938
Limitation Act	Limitation Act, 1963
LLP	Limited Liability Partnership
LLP Act	Limited Liability Partnership Act, 2008
LO	Liaison Office
LOB	Limitation of Benefits
LRS	Liberalised Remittance Scheme
LWF Acts	State-specific Labour and Welfare Fund Acts
Maharashtra Shops Act	Maharashtra Shops and Establishments (Regulation of Employment and Conditions of Service) Act, 2017
MAMP	Minimum Average Maturity Period
MAP	Mutual Agreement Procedure
Master Directions on ECB	Master Direction on External Commercial Borrowings, Trade Credits and Structured Obligations dated March 26, 2019 (as amended from time to time)
Master Directions on Foreign Investments	Master Directions on Foreign Investments in India dated January 4, 2018 (as amended from time to time)
MAT	Minimum Alternative Tax
MB Act	Maternity Benefits Act, 1961

MCIA	Mumbai Centre for International Arbitration
MHA	Ministry of Home Affairs
Minimum Wages Act	Minimum Wages Act, 1948
MoA	Memorandum of Association
MoEF	Ministry of Environment and Forests
MoLE	Ministry of Labour and Employment
MSME	Micro, Small and Medium Enterprise
NBFC	Non-Banking Financial Company
NCLT	National Company Law Tribunal
NCLAT	National Company Law Appellate Tribunal
N&F Holidays Act	State-specific Industrial Establishments (National and Festival Holidays and Other Holidays) Act
NOR	Not Ordinarily Resident
NPAC	Nani Palkhivala Arbitration Centre
NR	Non Resident
NRI	Non-resident Indian
NTRO	National Technical Research Organisation
OCI	Overseas Citizen of India
ODI	Overseas Direct Investment
OECD	Organisation for Economic and Co-operation Development
OSH Code	Code on Occupational Safety, Health and Working Conditions Bill
PAC	Persons acting in concert
PAN	Permanent Account Number
Partnership Act	Partnership Act, 1932
Patents Act	Patents Act, 1970
Paternity Bill	Paternity Bill, 2017
PE	Permanent Establishment
PE	Private Equity
PO	Project Office
POEM	Place of Effective Management
Previous Companies Act	Companies Act, 1956
RBI	Reserve Bank of India
RDDB Act	Recovery of Debts Due to Banks and Financial Institutions Act, 1993

RoC	Registrar of Companies
ROR	Ordinarily Resident
SAD	Special Additional Duty paid
SARFAESI	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
SBO	Significant Beneficial Owner
SBOR	Companies (Significant Beneficial Owners) Rules, 2018
Scheme	Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019
SIAC	Singapore International Arbitration Centre
S&E Acts	Shops and Establishment Acts
SEBI	Securities and Exchange Board of India
SEBI Act	Securities and Exchange Board of India Act, 1992
SEBI Delisting Regulations	Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009
SEBI ICDR Regulations	Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018
SEBI Insider Trading Regulations	SEBI (Prohibition of Insider Trading) Regulations, 2015
SEBI FII Regulations	Securities and Exchange Board of India (Foreign Institutional Investors) Regulations, 1995
SEBI FPI Regulations	Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019
SEBI FVCI Regulations	Securities and Exchange Board of India (Foreign Venture Capital Investors) Regulations 2000
SEBI Listing Regulations	Securities and Exchange Board of India (Listing Obligations and Disclosure Requirement) Regulations, 2015
SEBI Takeover Regulations	Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011
Sexual Harassment Act	Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
SEZ	Special Economic Zone
SGST	State GST
SGST Acts	State GST legislations

Share Capital Rules	Companies (Share Capital and Debentures) Rules, 2014
SICA	Sick Industrial Companies (Special Provisions) Act, 1985
SPDI Rules	Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011
SPICe	Simplified Proforma for Incorporating Companies electronically
SSA	Social Security Agreement
Standing Orders Act	Industrial Employment (Standing Orders) Act, 1946
STT	Securities transaction tax
TAN	Tax deduction and collection account number
Trade Marks Act	Trade Marks Act, 1999
Trade Union Act	Trade Union Act, 1926
TRC	Tax Residency Certificate
UPSI	Unpublished Price Sensitive Information
UTGST	Union territory GST
UTGST Act	Union Territory Goods and Services Tax Act, 2017
VAT	Value Added Tax
VCU	Venture Capital Undertaking
Wages Act	Payment of Wages Act, 1936
Wages Bill	Labour Code on Wages Bill
Wages Code	Code on Wages, 2019
WOS	Wholly Owned Subsidiary

[The foreign exchange rate used in this Guide is 1 USD = INR 74.66, which is the average spot rate of the last six months as on October 1, 2020, as provided by the Reserve Bank of India].

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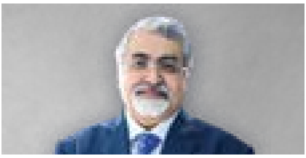
Notes

Firm Management



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