MANSUKHLAL HIRALAL & CO

ADVOCATES & SOLICITORS

DOING BUSINESS IN INDIA

- A SUCCINCT GUIDE

Index

- Preface
- Chapter 1 Introduction
- Chapter 2 Modes of Creating a Presence In India and Foreign Direct Investment
- Chapter 3 Mergers and Acquisitions
- Chapter 4 Intellectual Property Rights
- Chapter 5 Employment Laws
- Chapter 6 Real Estate Laws in India
- Chapter 7 Taxation
- Chapter 8 Dispute Resolution in India
- Chapter 9 Insolvency and Bankruptcy Code
- Chapter 10 Data Protection
- Glossary

MH CO LAW 100 YEARS ADVOCATES & SOLICITORS

Preface

This quick guide is intended to provide foreign investors and their advisors a broad legal perspective on doing business in India. The quick guide is written in general terms and its application to specific situations will depend on the particular circumstances involved. This guide is divided into the following chapters:

1. Introduction to Indian Economy and Political Structure
2. Modes of creating a presence in India and FDI
3. Mergers and Acquisitions
4. Intellectual Property Rights
5. Employment Laws
6. Real Estate Laws
7. Taxation
8. Dispute Resolution
9. Insolvency And Bankruptcy Code and
10. Data Protection.

Please note that this is not an exhaustive account but merely a primer that seeks to provide familiarity on certain aspects of Indian law that would impact an entity seeking to do business in India.

About Manshukhlal Hiralal & Company

Mansukhlal Hiralal & Company (MHCO) is a boutique law firm providing legal services to its clients for more than 100 years. We specialize in strategic legal, regulatory, and tax advice coupled with industry expertise in an integrated manner.
We focus on niche areas in which we provide significant value and are invariably involved in select highly complex, innovative transactions.
Our practice areas include Corporate & Securities Law, General Advisory, Dispute Resolution, Mergers & Acquisitions, Corporate Restructuring and Insolvency, Estate Planning and Trusts, Banking & Finance, Cyber Law, Privacy, Data Protection; Information Technology, Tax, Employment, and Labour Laws, Intellectual Property, and Real Estate.

Disclaimer

Readers should obtain their own independent professional advice and this guide should not be seen as replacing the need to seek such specific legal advice. Neither MCHO nor any of its partners or its employees involved in the preparation of this guide makes any representation or warranty in relation to the subject matter contained herein.

Contact

For any help or assistance please email us on contact@mhcolaw.com
or visit our website www.mhcolaw.com.

Chapter 1 - Introduction

1. Economy: The Indian Economy has been growing steadily since its liberalization in 1991 and has witnessed tremendous economic growth, buoyant exports, and a steady increase in now of foreign investment. It had a GDP growth of 5% in the year 2019-20 and according to the United Nations Conference on Trade and Development, FDI innows reached $ 50 billion in the financial year 2019-20. The current BJP Government, led by Prime Minister Mr. Narendra Modi, is committed to facilitating the ease of doing business and has implemented several
measures towards the furtherance of this objective, such as the introduction of the 'Make In India' initiative, construction of smart cities, introduction of GST, etc., all of which have significantly improved the business environment in India and increased investor confidence.

2. Political Structure

2.1. India has adopted a written Constitution on 26 January 1950 which provides for three branches of government i.e. (a) Legislature; (b) Executive; and (c) Judiciary, each of which is independent of the others.

2.2. The Legislature is bicameral in nature and consists of 2 houses i.e. (a) Lok Sabha, and (b) Rajya Sabha. Members of the Lok Sabha are directly elected by citizens, whereas members of the Rajya Sabha are indirectly elected by an electoral college.

2.3. The Executive comprises of the President, who is the constitutional head of the nation, the Prime Minister, and the Council of Ministers.

2.4. The Judiciary consists of the Supreme Court, which is the apex court of India, the High Courts of various states, and several lower courts. Several judicial and quasi-judicial tribunals and special courts, such as the Income Tax Tribunal, National Company Law Tribunal, Consumer Courts, etc., have been constituted for speedy disposal of disputes. The financial system in India is regulated by independent regulatory bodies established by the Government.

2.5. Financial Regulators: The main financial regulatory bodies in India are:

2.5.1. Reserve Bank of India: RBI is the Central Bank of the Country. Since its nationalization in 1949, the Reserve Bank is fully owned by the Government. The main functions of the RBI are to regulate the issue of banknotes, formulate monetary policy, ensure the availability of adequate reserves to secure monetary stability in India, and operate the currency and credit system of the country to its advantage. Under FEMA, permission of the RBI is required for certain foreign exchange transactions, such as investment in foreign companies, capital account transactions, etc.

2.5.2. Securities and Exchange Board of India: SEBI was established on 12 April 1992 in accordance with the provisions of the SEBI Act. The main functions of SEBI are to protect the interest of investors in securities and promote the development of, and regulate the securities market in India. Since 2016, the commodities market also falls within the purview of SEBI which was earlier under the jurisdiction of the Forward Markets Commission.

2.5.3. Insurance Regulatory Development Authority of India: IRDA is a national agency of the Government of India established to regulate the Indian insurance industry, to protect the interests of the policyholders, and ensure orderly growth of the industry. IRDA is empowered to regulate key aspects of an insurance company's operations in areas like solvency, investments, expenses, and commissions and to formulate regulations for payment of commission and control of management expenses.

2.5.4. Telecom Regulatory Authority of India: TRAI was established to regulate telecom services, including taxation/revision of tarifs for telecom services which were earlier vested in the Central Government. One of the main objectives of TRAI is to provide a fair and transparent policy environment that promotes a level playing field and facilitates fair competition.

Chapter 2 - Modes of Creating a Presence in India and Foreign Direct Investment

Operations of a Foreign Company: A foreign entity may carry on operations in India by establishing either (a) Liaison office; (b) Project office; or (c) Branch office in the country; or (d) setting up a company in India (e) Setting up a limited liability partnership in India.

1.1. Liaison Office

1.1.1. A Liaison office can only act as a channel of communication between the Head Office of the foreign company abroad and parties in India. It is not allowed to undertake any commercial/trading/industrial activity, whether directly or indirectly, in India and cannot earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office outside India received via normal banking channels.

1.1.2. A company, incorporated outside India, is required to obtain the permission of the RBI for the establishment of a liaison office in India. If the principal business of the foreign entity falls under sectors where 100 percent FDI is permissible under the automatic route, the application is considered only by the RBI. In other cases, the application is considered by the RBI in consultation with the Ministry of Finance.

1.1.3. Foreign insurance companies can establish Liaison Offices in India only after obtaining approval from the IRDA.

1.1.4. Foreign banks can establish Liaison Offices in India only after obtaining approval from the Department of Banking Regulation and RBI.

1.1.5. An entity looking to establish a liaison office must also have a profit-making record, in the preceding three years in its home country and must possess a net worth of $50,000 or more. An exception, in this regard, has been carved out for financially unsound subsidiaries which need to submit a Letter of Comfort from their parent company satisfying the prescribed criterion for net worth and profit.

1.1.6. The approval for setting up a Liaison Office is valid for 3 years. However, the same can be extended by the foreign entity by applying for a further extension before the date of expiry of validity.

1.2. Branch Office:

1.2.1. The conditions for securing approval to open a branch office in India, are the same as those of a liaison office (enumerated above). However, entities looking to open a branch office in India must possess a profit-making track record during the immediately preceding 5 financial years in the home country and a net worth of $10,000 or higher.

1.2.2. Companies engaged in manufacturing and trading are allowed to set up branch offices in India which can carry out limited activities. Retail trading activities of any nature are not allowed for a Branch Office in India.

1.2.3. A Branch Office is not allowed to carry out business activities/ transactions in India, directly or indirectly. Profits earned by the Branch Offices are freely remittable from India, subject to payment of applicable taxes.

1.3. Project Office:

The RBI has granted general permission to foreign companies to establish Project Offices in India, provided they have secured a contract from an Indian company to execute a project in India and subject to the following:

1.3.1. The project is funded directly by inward remittance from abroad; or

1.3.2. The project is funded by a bilateral or multilateral International Financing Agency (being the World Bank or the International Monetary Fund or any similar other body); or

1.3.3. The project has been cleared by an appropriate authority; or

1.3.4. The company or entity in India awarding the contract has been granted a term loan by a Public Financial Institution or a bank in India for the project.

The RBI vide a notification dated 21 January 2019 (“RBI Notification”) has eased the requirement of the entities looking to open a branch office, a liaison office or a project office, or any other place of business in India, with their primary business in the following sectors: Defense, Telecom, Private Security and Information and Broadcasting sectors. Now, entities in the above-mentioned sectors would not require prior approval of the RBI, in cases where the government approval or license/permission by the concerned ministry/regulator has already been granted. Further, as per this RBI Notification in the case of a proposal to open a project office relating to the defense sector, no separate reference or approval of the government of India is required if the non-resident applicant has been awarded a contract by, or has entered into an agreement with, the Ministry of Defense or Service Headquarters or Defense Sector Undertakings. However, if the above criteria are not met, the foreign entity has to approach the Central Office of the RBI for approval.

1.4. Reporting Requirements:

1.4.1. All new entities setting up a Liaison Office/Branch Office/Project Office must submit a report containing the information prescribed by the RBI to the DGP of the State concerned in which the office is established, within 5 working days of the office becoming functional.

1.4.2. Branch Offices/Liaison Offices/ Project Offices have to file Annual Activity Certificates from Chartered Accountants by 31st March, along with the audited Balance Sheet on or before September 30 of that year with their authorized dealers. The designated AD Category - I bank shall scrutinize the Annual Activity Certificate and ensure that the activities undertaken by the office are being carried out by the terms and conditions of the approval given by the Reserve Bank.

1.4.3. Additionally, the foreign company establishing a Project Office in India is to furnish a report through the concerned AD branch, to the concerned Regional Office of RBI under whose jurisdiction the Project Office is set up, incorporating the information prescribed by the RBI.

2. Limited Liability Partnerships

2.1. An LLP is a legal entity independent from the partners constituting it and its members have limited liability, as opposed to a regular partnership where the partners bear unlimited liabilities for the losses of the partnership firm. In India, LLPs are governed by the Limited Liability Partnership Act, 2008.

2.2. A foreign citizen may invest in an LLP, operating in a sector where 100% FDI is allowed through the automatic route and there are no FDI- linked performance conditions.

2.3. An Indian company having foreign investment, is also permitted to make downstream investment in an LLP only if both the company as well as the LLP, are operating in sectors in which 100% FDI is allowed under the automatic route and there are no FDI-linked performance conditions. An LLP with FDI shall not be eligible to make any downstream investments in any entity in India.

2.4. Any FDI in an LLP, direct or indirect (regardless of nature of 'ownership' or 'control' of an Indian Company), shall require prior approval of the Government/Foreign Investment Facilitation Portal. LLPs shall not be permitted to avail ECB.

3. Companies:

3.1. A foreign company can also establish a presence in India by incorporating an Indian company. A company in India is governed by the Companies Act, 2013.

3.2. Kinds Of Companies

3.2.1. Private Company: A private company is one whose transferability of shares is restricted. It is restricted from inviting the public to subscribe to any of its securities. It cannot have more than 200 shareholders. A private company must have a minimum of 2 members and 2 directors. Since its shareholders do not include members of the public, private companies are subject to less stringent requirements as compared to public companies.

3.2.2. Public Company: A public company is one whose shares are freely transferable. Its securities can be listed on various stock exchanges by way of an IPO. A public company must have a minimum of 7 members and 3 directors. There is no cap on the maximum number of members. Companies listed on stock exchanges are required to comply with the listing agreements prescribed by the exchange, as well as the regulations laid down by SEBI.

3.2.3. Small Company: A small company is a company whose (i) paid-up share capital does not exceed Rs 5 million or such higher amount as may be prescribed which shall not be more than Rs 50 million; or (ii) turnover of which as per its last profit and loss account does not exceed Rs 200 million.

3.2.4. One person Company: The Companies Act also allows incorporation of One Person Company. However, a foreign entity is not permitted to set up a One Person Company.

3.3. Process of incorporation of a Company: In an attempt to reduce red-tapism and facilitate the ease of doing business, the government has recently introduced a single form for the incorporation of a company, Form INC-29, as opposed to the multiple forms required to be filed earlier. Persons desirous of incorporating a company in India are required to first obtain a digital certificate issued by the certifying authorities approved by the MCA for its directors. Next Form INC-29 is to be filed, which provides for the allotment of a DIN for up to 3 directors and reservation of the Company's name. The Memorandum and Articles of Association along with other incorporation documents are to be filed with Form INC -29.

3.4. Types of Share Capital which may be issued by a Company

3.4.1. Equity Shares: Equity shares carry voting rights and are eligible to receive dividends, depending on the performance of the Company.

3.4.2. Preference Shares: Preference Shares carry a fixed rate of dividend, and preference shareholders have a preferential right compared to equity shareholders, as to dividends and return of capital of the company in case of winding-up. Preference shares can be convertible, i.e. converted to equity shares at the end of its tenure, or non-convertible i.e. it is required to be redeemed at the end of its tenure. An Indian Company can only issue compulsorily convertible preference shares to a non-resident. Other types of preference shares issued to non-residents are considered debt and shall have to adhere to the guidelines prescribed for ECB.

3.4.3. Equity Shares with differential voting rights: Such shares can be issued by a public or private company and need not be traditional equity/preference shares. A public company must meet stringent conditions for the issue of equity shares with differential rights.

3.5. Allotment of Securities: Securities can be allotted via a public offer, private placement, rights issue, or bonus issue. Private companies can only issue shares using the last three methods.

3.5.1. Public Offer: Public offer refers to a listing of a company's shares on a recognized stock exchange and inviting the public to purchase the same by means of a prospectus. The Companies Act prescribes the information required to be stated in the prospectus. Companies are liable for prosecution if misleading statements are stated in their prospectus.

3.5.2. Private Placement: A company may make an offer to a maximum of 200 persons to purchase shares in it, via a private placement offer letter. If a company makes an offer or enters into an agreement to allot securities to more than 200 persons, the same shall be considered a public offer.

3.5.3. Rights Issue: A rights issue is an issue of shares to existing shareholders of the company. Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered first to persons who are equity shareholders of the company in the proportion of, or as nearly as circumstances admit, to the paid-up share capital on those shares.

3.5.4. Bonus Issue: A company may issue fully paid-up bonus shares to its members out of its free reserves, Securities Premium Account, and Capital Redemption Reserve Account.

3.6. Regulatory Requirements of Companies

3.6.1. Meetings: Companies are required to hold an annual general meeting each year, a minimum of 4 board meetings each year, and file the resolutions passed in the meetings with the ROC.

3.6.2. Audit Committee: All public companies with a paid-up capital of Rs 100 million or more or having turnover of Rs 1 billion or more; and all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding Rs 500 million or more are required to constitute an Audit Committee. The Audit Committee consists of a minimum of 3 directors with the majority of the directors being independent directors. Some of the functions of the Audit Committee include examination of the financial statements and auditors' report thereon, scrutiny of inter-corporate loans and investments, the recommendation for appointment and remuneration of auditors, approval of transaction of the company with related parties, etc.

3.6.3. Nomination and Remuneration Committee: Every listed company and every other public company having paid-up capital of Rs 1 billion or more; or which has, in aggregate, outstanding loans or borrowings or debentures or deposits exceeding Rs 500 million is required to constitute a Nomination and Remuneration

Committee which shall consist of minimum three non-executive directors, half of which shall be independent directors. The Nomination and Remuneration Committee shall identify persons who are qualified to become directors and may be appointed in senior management as per the criteria laid down and recommend to the Board their appointment and removal. The Nomination and Remuneration Committee must also formulate and recommend to the Board a policy relating to the remuneration of directors, key managerial personnel, and other employees.

3.6.4. Stakeholders Relationship Committee: A company that consists of more than one thousand shareholders, debenture-holders, deposit-holders, and any other security holders at any time during a financial year shall constitute a Stakeholders Relationship Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by its Board. The Stakeholders Relationship Committee shall consider and resolve the grievances of security holders of the company.

3.6.5. Mandatory Resident Director: Every company is required to have at least one director who has stayed in India for 182 days in the previous year.

4. Foreign Direct Investment

4.1. A non-resident entity can invest in India, subject to the FDI Policy, FEMA Act, 1999, and the rules and regulations framed thereunder except in prohibited sectors/activities.

4.2. Entry Route for Foreign Investments: Investments can be made by non-residents in equity shares / fully, compulsorily, and mandatorily convertible debentures / fully, compulsorily, and mandatorily convertible preference shares of an Indian company, through the Automatic Route or the Government Route. Under the Automatic Route, investments in an Indian company, do not require any prior approvals. Under the Government Route, prior approval of the Government of India is required for an investment in an Indian company. Proposals for foreign investment under the Government route are considered by the Foreign Investment Facilitation Portal, Department of Economic Affairs (DEA), Ministry of Finance, or Department of Industrial Policy & Promotion, as the case may be.

4.3. Prohibited Sectors for Foreign Investment: FDI is prohibited in the following sectors:(a) lotteries (b) gambling and betting, including casinos, etc. (c) Chit funds (d) Nidhi companies (e) Trading in Transferable Development Rights (f) Real Estate Business or Construction of Farm Houses [Real estate business' shall 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.] (g) Manufacturing of cigars, cheroots, cigarillos, and cigarettes, of tobacco or of tobacco substitutes. (h) Activities /sectors not open to private sector investment e.g. (I) Atomic Energy and (II) Railway operations

4.4. Permitted Sectors for Foreign Investment: Foreign investment in certain sectors is permitted under the automatic route up to a certain percentage of investment.

5. Eligible Investee Entities

5.1. FDI in Indian Companies: Indian companies can issue capital against FDI.

5.2. FDI in Trusts: FDI is not permitted in Trusts other than in 'Venture Capital Funds' registered and regulated by SEBI and in 'Investment vehicles'.

5.3. FDI in Partnership Firm / Proprietary Concern

5.3.1. An NRI or a PIO resident outside India may invest by way of contribution to the capital of a firm or a proprietary concern in India on a non-repatriation basis, (i.e. the amount invested shall not be eligible for repatriation outside India) provided it meets the conditions laid down by the RBI in this regard.

5.3.2. NRIs / PIOs may invest in sole proprietorship concerns/partnership firms with repatriation benefits only with the prior approval of the Secretariat for Industrial Assistance and the RBI.

5.3.3. No person resident outside India other than NRIs/PIOs can make any investment by way of contribution to the capital of a firm or a proprietorship concern or any association of persons in India. However, the RBI may, on an application made to it, permit a person resident outside India to make such investment subject to such terms and conditions as may be considered necessary.

5.4. FDI in LLPs: FDI in LLPs is permitted under the automatic route, in LLPs operating in sectors where 100% FDI is allowed and there are no FDI-linked performance conditions. FDI in LLPs is subject to compliance with the conditions of the LLP Act, 2008.

5.5. Investment Vehicle: An entity being an 'investment vehicle' is registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose including Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (InvIts) governed by the SEBI (InvIts) Regulations, 2014, Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012 and notified under Schedule 11 of Foreign Exchange Management (Transfer or Issue of Security by a Person
Resident outside India) Regulations, 2000 is permitted to receive foreign investment from a person resident outside India (other than an individual who is citizen of or any other entity which is registered / incorporated in Pakistan or Bangladesh), including an RFPI or an NRI. However, the same can only be received against a swap of capital instruments of a Special Purpose Vehicle (SPV) proposed to be acquired by such an Investment Vehicle.

5.6. Startup Companies: Start-ups can issue equity or equity-linked instruments or debt instruments to an FVCI against receipt of foreign remittance, as per the FEMA Regulations. In addition, startups can issue convertible notes to person resident outside India subject to certain conditions as prescribed.

5.7. FDI in other Entities: FDI in resident entities other than those mentioned above is not permitted.

6. Downstream Investment

6.1. Downstream investment means indirect foreign investment, by an Indian company/LLP, which is owned or controlled by non-residents, into another Indian company/LLP, by way of subscription or acquisition of shares.

6.2. As per the FDI policy such downstream investment is also required to comply with the same norms as applicable to direct FDI in the initial Indian Company / LLP.

6.3. Companies are considered to be 'owned' by foreign investors if they hold more than 50% of the capital of the company and are deemed to be foreign 'controlled' if the foreign investors have a right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreement or voting agreement.

6.4. Similarly, in cases of LLPs, an LLP is considered to be 'owned' by foreign investors if their contribution is more than 50% of the capital of the LLP and have majority profit share and further, are deemed to be foreign controlled' if the foreign investors have the right to appoint a majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of an LLP.

7. Transfer Of shares from Residents to Non-Residents and Vice Versa

7.1. Transfer or issue of shares of an Indian company to a non-resident will be subject to certain pricing guidelines. These guidelines have been laid down by the RBI and by SEBI. In case of the issue of shares that are listed on a recognized stock exchange in India, the price of the shares is to be determined by the issuer company in consultation with the lead merchant banker or through the book-building process. In such cases, the price of the shares issued to the non-resident shall be the price worked out in accordance with the relevant SEBI guidelines in case of a listed Indian company, the price at which a preferential allotment of shares can be made under the SEBI Guidelines, as applicable, in case of a listed Indian company or in case of a company going through a delisting process - as per the SEBI (Delisting of Equity Shares) Regulations, 2021.

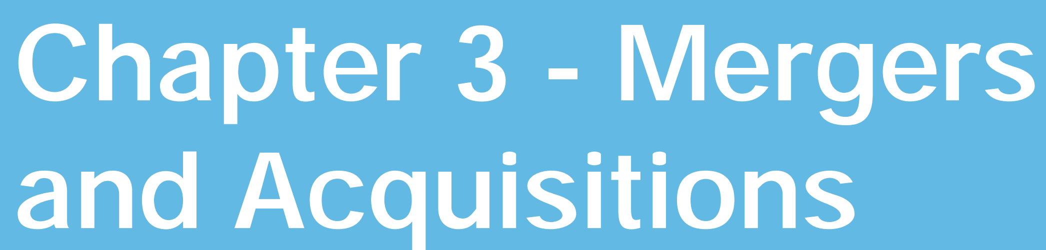
7.2. For the issue of shares that are not listed on any recognized stock exchange in India, the price of the shares issued to the non-resident shall be the fair valuation of shares as per any internationally accepted pricing methodology for valuation on an arm's length basis, duly certified by a SEBI registered merchant banker or a chartered accountant.

7.3. The pricing guidelines will not apply for (i) investment in shares by a person resident outside India on a non-repatriation basis and (ii) any transfer by way of sale done in accordance with SEBI regulations where the pricing is prescribed by SEBI.

7.4. The investment amount is normally remitted through normal banking channels or by debit to the NRE/FCNR Account maintained by the AD Category I Bank or debit to the non-interest-bearing Escrow account in Indian Rupees in India which is maintained by the AD Category I Bank. For transfer of shares from a resident to a non-resident or vice-versa Form FC-TRS (Foreign Currency Transfer of Shares) should be submitted to the AD Category-I Bank, within 60 days from the date of receipt of the amount of consideration.

7.5. The onus of submission of the Form FC-TRS within the given timeframe would be on the transferor/ transferee resident in India. The Indian company is required to issue its securities within 60 days from the date of receipt of foreign investment. If the Indian company fails to do so, the investment so received must be refunded to the person concerned within this time- frame.

7.6. To ease doing business in India, the RBI has launched a module for reporting of ARF, Form FC- GPR, and Form FC-TRS which are required under the FDI scheme through the eBiz portal of the Ministry of Commerce and Industry, Government of India.



Chapter 3 - Mergers and Acquisitions

1. Introduction

1.1. A merger is the consolidation of two or more entities into a single entity whereas an acquisition is a process whereby one or more entities are taken over by another, who obtains a controlling interest in the acquired entity.

1.2. The following laws primarily govern mergers and acquisitions in India:

1.2.1. The Companies Act;

1.2.2. The Takeover Code; and

1.2.3. The Competition Act, 2002

2. Companies Act:

2.1. The Companies Act lays down the procedure to be followed while implementing schemes of mergers, amalgamations, and arrangements. All schemes of mergers, amalgamations, and acquisitions are affected through the National Company Law Tribunal (NCLT).

2.2. Companies are required to obtain the consent of each separate class of shareholders and creditors to the proposed scheme, by way of a 75% majority of the shareholders and creditors present and voting, in court convened meetings, held to approve the scheme. However, shareholders holding less than 10% of the total issued share capital of the Company or creditors, having less than 5% of the total outstanding debt cannot object to the scheme. Companies are also required to give notice of the proposed scheme to the appropriate regulatory and tax authorities, in order to allow them to raise objections if any.

2.3. Mergers and amalgamations between a holding company and its wholly-owned subsidiary require the approval of 90% of each class of shareholders and creditors of both companies.

2.4. Merger or amalgamation of an Indian Company with a foreign company: The same procedure that applies to the merger or amalgamation of two domestic companies shall apply to the merger or amalgamation of an Indian Company with a foreign one. However, the Companies are required to obtain prior approval of RBI.

3. Takeover Code

3.1. The Takeover Code governs the direct or indirect acquisition of shares or voting rights in a listed company.

3.2. Takeover Code lays down that no acquirer of a target company shall, together with persons acting in concert with him/it, acquire 25% or more of the shares or voting rights in the target company unless the acquirer makes a public announcement or open offer to the public shareholders of the target company, in accordance with the Takeover Code.

3.3. Further, no acquirer, who together with persons acting in concert with him, has acquired or holds shares or voting rights in a target company entitling them to exercise 25% or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire any additional shares or voting rights in such target company entitling them to exercise more than 5% of the voting rights, within any financial year unless the acquirer makes a public announcement or open offer to the public shareholders of the target company, in accordance with the Takeover Code.

3.4. Such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take his aggregate shareholding pursuant to the acquisition, above the maximum permissible non-public shareholding.

3.5. Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with the Takeover Code.

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

3.7. Requirements of a public announcement:

3.7.1. Prior to making a public announcement, the acquirer shall appoint a Merchant Banker registered with SEBI, to act as a manager to the open offer.

3.7.2. The public announcement shall contain such information as may be specified, including the offer price, the number of shares to be acquired from the public, the identity of the acquirer, the purposes of acquisition, the future plans of the acquirer, if any, regarding the target company, the change in control over the target company, if any, etc.

3.7.3. The public announcement shall be sent to all the stock exchanges on which the shares of the target company are listed and a copy of the public announcement shall be sent to SEBI and the target company at its registered office within one working day of the date of the public announcement.

3.7.4. The offer price for acquiring shares shall be determined in accordance with the manner prescribed in the Takeover Code. The offer price may be paid in cash or by an issue, exchange, or transfer of listed equity shares, listed secured debt instruments, or convertible debt securities of the acquirer or a combination of the above.

3.7.5. The acquirer shall file a draft letter of offer with SEBI and the consideration payable under the open offer shall be calculated at the offer price. The acquirer shall open an Escrow Account towards security for the performance of his obligations. After receiving the comments from SEBI, the letter of offer shall be dispatched to the shareholders whose names appear on the register of members of the target company and the acquirer shall issue an advertisement in the newspaper announcing the schedule of activities for the open offer, the status of statutory and other approvals, the procedure for tendering acceptances and such other material details as may be specified.

3.7.6. The acquirers are required to complete the payment of consideration to shareholders who have accepted the offer within 10 working days from the date of closure of the offer.

3.8. Exempted from the obligation to make an open offer: The following transactions inter alia are exempted from making an open offer:

3.8.1. Allotment to an underwriter pursuant to any underwriting agreement;

3.8.2. Acquisition of shares in the ordinary course of business by (a) Registered stockbrokers on behalf of clients (b) Registered Market makers (c) Public financial institutions on their own account(d) Banks and Financial Institutions as pledgees;

3.8.3. Acquisition of shares by way of transmission on succession or by inheritance;

3.8.4. Acquisition of shares by Government companies;

3.8.5. Acquisition pursuant to a scheme framed under section 18 of Sick Industrial Companies (Special Provisions) Act, 1985;

3.8.6. Acquisition pursuant to a scheme of arrangement restructuring, including amalgamation or merger or de-merger under any law or Regulation Indian or Foreign;

3.8.7. Acquisition of preference shares;

3.8.8. An acquisition, pursuant to an inter-se transfer of shares amongst, immediate relatives, promoters, a company, and its holding company, a company and its subsidiary, and certain other qualifying transactions prescribed in the Takeover Code.

3.9. The main objective of making a Public Announcement is to ensure that the shareholders of the target company are aware of the exit opportunity available to them in case of a takeover / substantial acquisition of shares of the target company and on the basis of the disclosures made therein, they may decide to either continue with the target company or decide to exit from it.

4. Competition Act, 2002

Under the Competition Act, 2002, if the assets or turnover of the acquirer, target, or the merged entity exceed certain specified thresholds, the combination must be approved by the Competition Commission of India and they will determine whether the combination has an appreciable adverse effect on competition.

5. Acquisition of Assets

5.1. An alternate method for a company to take over another is an acquisition of assets of the other company, as opposed to an acquisition of shares to avoid the liabilities of the said company.

5.2. Such an asset acquisition may be in one of the following ways (i) where one company purchases the assets of another (ii) where one company purchases the entire business of the other company (i.e., all its assets and liabilities) on a going concern basis.

5.3. In an asset acquisition the tax implications are important and must be considered.

Chapter 4 - Intellectual Property Rights

1. Introduction: India has a robust IPR regime, which seeks to protect patents, trademarks, copyrights, designs, geographical indicators, etc.

2. Trademark: The Trademark Act along with the rules thereunder governs the law of trademarks in India. Under the Trademark Act, 1999 the term 'mark' is defined to include 'a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or, the combination of colors, or any combination thereof.'

2.1. Procedure for registering Trademark in India: The procedure for obtaining a Trademark in India is laid down under the Trademark Act and the rules thereunder and is as follows:

2.1.1. The first step is carrying out a trademark search of the mark or logo at the Trademarks Registry in respect of which registration is sought, to ensure that the logo or mark is not identical or similar to an existing trademark.

2.1.2. The next step is filing an application with the Trademarks Registry for registration. A single application may be made for the registration of a trademark for different classes of goods and services. The application must be filed by the applicant or his agent who must be an attorney or a person registered as a trademark agent.

2.1.3. Once the application is filed, a trademark application allotment number is provided and the application can also be tracked online. This number is deemed to be the registration number. The application will be allotted to a trademarks officer who will then review the application and either allow for trademark journal publication or object to the trademark registration application. The Trademarks Registry sends the "Official Examination Report" asking for clarifications, if any, and also cites identical or deceptively similar marks already registered or pending registration.

2.1.4. The proposed trademark is then published in the Trademark Journal, making it open to the public for objections. It may be opposed within four months by filing a notice of opposition in the prescribed format.

2.1.5. If the trademark registration application is opposed by a third party, there will be a hearing where both the applicant and the opposing party shall appear and provide justifications for registration or rejection, as the case may be. Accordingly, the Trademarks hearing officer will determine the same.

2.1.6. Once the objections are removed, the Trademarks Registry shall enter the trademark in the Register of Trademarks and a Trademark Registration Certificate shall be issued.

2.2. Rights conferred by registration of a Trademark: The registration of a trademark gives the registered proprietor the exclusive right to use the trademark in relation to the goods or services for which it is registered and to obtain relief with respect to infringement of the same. Registration acts as a public notice to the public, informing them that they should not use the trademarks which are registered or pending for registration.

2.3. Term of registration of a Trademark: The registration is valid for 10 years and is renewable for a subsequent period of 10 years. Non-renewal leads to a lapse of registration.

2.4. Provision for assignment and transmission of a Trademark: A registered trademark can be assigned or transmitted either with or without the goodwill of the business concerned and in respect of either or all of the goods or services in respect of which the trademark is registered. An unregistered trademark can be assigned or transmitted with or without the goodwill of the business concerned. However, in respect of the assignment of trademarks (registered or unregistered) without the goodwill of the business concerned, the assignee shall apply to the Registrar of Trademarks and advertise the assignment as per the direction of the Registrar. The assignment or transmission must be recorded with the Registrar of Trademarks.

2.5. Infringement and passing off in relation to Trademarks | Appropriate Remedies:

2.5.1. A Trademark is said to be infringed when a registered trademark is used by a person who is not the proprietor or licensee of the said trademark, in relation to the goods or services for which it is registered.

2.5.2. Passing off action arises when an unregistered trademark is used by a person who is not the proprietor of the said trademark in relation to the goods or services of the trademark owner. Passing off in India is a tort actionable under common law and is mainly used to protect the goodwill attached with unregistered trademarks. Both civil and criminal remedies are available in the infringement or passing off action.

2.5.3. Under the Trademark Act, the court may grant reliefs such as permanent or interim injunction, damages, or account of profits, together with or without any order for the delivery up of the infringing labels and marks for destruction or erasure. Infringement and passing off are also punishable with criminal activity which includes imprisonment or fine or both.

2.6. Recognition of foreign well-known marks in India: Indian Courts have, in various decisions protected the intellectual property of foreign companies, even if the products are not available in India. Thus, international trademarks, having no commercial presence in India can be enforced in India if a trans-border reputation with

respect to such trademarks can be shown to exist. Well-known marks such as Whirlpool have received protection through judicial decisions.

3. Copyrights: The Copyright Act read with the Copyright Rules is the law governing copyright protection in India. Under Copyright Act, copyright subsists in an original literary, dramatic, musical, or artistic work, cinematograph films, and sound recordings.

3.1. Rights conferred under Copyright Act and Rules: Copyright refers to a bundle of exclusive rights vested in the owner of copyright by virtue of Section 14 of the Copyright Act. These rights can be exercised only by the owner of the copyright or by any other person who is duly licensed in this regard by the owner of the copyright. These rights include the right of adaptation, right of reproduction, right of publication, right to make translations, communication to the public, etc.

3.2. Copyright protection is conferred on all original literary, artistic, musical or dramatic, cinematograph, and sound recording works. Original means, that the work has not been copied from any other source.

3.3. Copyright protection commences the moment a work is created, and its registration is optional. However, it is always advisable to obtain a registration for better protection. Copyright registration does not confer any rights and is merely a prima facie proof of an entry in respect of the work in the Copyright Register maintained by the Registrar of Copyrights. The rights granted under the Copyright Act to a creator include the right to stop or authorize any third party from reproducing the work, using the work for a public performance, making copies/recordings of the work, broadcasting it in various forms, and translating the work to other languages.

3.4. The term of copyright in India is, in most cases, the lifetime of the creator plus 60 years thereafter.

3.5. One of the main advantages of copyright protection is that protection is available in several countries across the world, although the work is first published in India. This is by virtue of India being a member of the Berne Convention.

3.6. Protection is given to works first published in India, in respect of all countries that are member states to treaties and conventions to which India is a member. Thus, without formally applying for protection, copyright protection is available to works first published in India, across several countries.

3.7. Also, the government of India has by virtue of the International Copyright Order, 1999, extended copyright protection to works first published outside India.

3.8. Special rights are granted to the author of the work under the Copyright Act: Section 57 grants certain special rights to the author independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right (a) to claim authorship of the work; and (b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work which is done before the expiration of the term of copyright if such distortion, mutilation,

modification or other act would be prejudicial to his honor or reputation. Such right other than the right to claim authorship of the work may be exercised by the legal representatives of the author.

3.9. Copyright infringed and remedy available: A copyright is infringed when any person without a license granted by the owner of the copyright or the Registrar of Copyrights does anything, the exclusive right to do which is conferred upon the owner of the copyright. However, there are certain exceptions to the above rule such as fair dealing, private use including research, etc. The Copyright Act provides for both civil and criminal remedies for copyright infringement. In the event of infringement, the copyright owner is entitled to remedies by way of injunction, damages, and order for seizure and destruction of infringing articles. Criminal remedies include imprisonment and a fine.

4. Patents: The Patent Law in India is governed by the Patents Act and the Patents Rules.

4.1. Patentable Invention: An invention relating to a product or a process that is new, involving an inventive step, and capable of industrial application can be patented in India. However, it must not fall into the category of inventions that are non-patentable as provided under Section-3 and 4 of the Patents Act. A patent is an exclusive right given by law to inventors to make use of, and exploit, their inventions and prevents others from making, using, importing, or selling the invention without the permission of the patentee for a limited period of time.

4.2. Process of registering a Patent | Person who can register a patent in India: In order to obtain registration of a patent, the inventor has to file an application with the Patent Office in the prescribed form along with the necessary documents. The application for a patent for an invention can be made by (i) the true and first inventor (ii) the assignee of the inventor or (iii) the legal representative of the inventor. If an application is to be filed abroad, without filing in India, it should be made only after taking written permission from the Controller of Patents.

4.3. Term of a Patent: The term of every patent will be 20 years from the date of filing of the patent application, irrespective of whether it is filed with provisional or complete specification and the renewal fee is to be paid every year to keep the patent in force.

4.4. Rights granted to a patentee after registration:

4.4.1. Where a patent covers a product, the grant of a patent gives the patentee the exclusive right to prevent others from performing, without authorization, the act of making, using, offering for sale, selling, or importing that product in India.

4.4.2. Where a patent covers a process, the patentee has the exclusive right to exclude others from performing, without his authorization, the act of using that process, and the act of using and offering for sale, selling or importing for those purposes, the product obtained directly by that process in India.

4.5. Patent infringement and remedies available: Infringement of a patent consists of the unauthorized making, importing, using, offering for sale, or selling any patented invention within India. Under the Patents Act, only a civil action can be initiated in a court of law, such as injunctions, damages, etc.

4.6. Compulsory licensing: At any time after the expiration of 3 years from the date of the sealing of a patent, any person interested may make an application to the Controller of Patents for grant of compulsory license of the patent, on the grounds that reasonable requirements of the public with respect to the patented inventions have not been satisfied, or the patented invention is not available to the public at reasonably affordable prices, or the invention is not exploited commercially to the fullest extent within the territory of India. It is important to note that an application for compulsory licensing may be made by any person notwithstanding that he is already the holder of a license under the patent.

5. Designs: Industrial designs in India are protected under the Designs Act, 2000. As per the Designs Act, “design” means only the features of shape, configuration, pattern, ornament, or composition of lines or colors applied to any “article” whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye.

5.1. Purpose of the Designs Act: The sole purpose of the Designs Act is the protection of the intellectual property right of the original design for a period of 10 years renewable for a further period of 5 years. International classification based upon Locarno classification has been adopted in the Designs Act wherein the classification is based on articles that are the subject matter of design. The Designs Act incorporates the minimum standards for the protection of industrial designs, in accordance with the TRIPS agreement.

5.2. Remedies in case of infringement: Designs Act provides for civil remedies in cases of infringement of copyright in a design but does not provide for criminal actions. The civil remedies available in such cases are injunctions, damages, compensation, or delivery of the infringing articles. A company must ensure that its intellectual property is not only protected in India, but also in the country where it carries on its business.

6. Geographic Indicators: The registration and protection of Geographical Indications (GI) are based on the Geographical Indications of Goods (Registration and Protection) Act, 1999 (GI Act). As per the GI Act, Geographical Indications refers to an indication that identifies goods as agricultural, natural, or manufactured goods as originating, or manufactured in a definite geographical territory, where a given quality, reputation, or other characteristics of such goods is essentially attributable to its geographical origin; in case of manufactured goods, one of the activities of either production or processing or preparation takes place in such territory, region or locality. The Department for Promotion of Industry and Internal Trade (DPIIT), in order to encourage the

promotion and marketing of Indian products, registered GI launched a GI Logo and Tagline. The DPIIT has released guidelines for permitting the use of GI Logo and Tagline laying out the procedure and for filing a GI application.

Chapter 5 - Employment Laws

1. Introduction: As a general principle, the framework of Indian labour law differentiates between an employee, a workman (persons falling below the specified income level), and an apprentice with most labour legislation focusing on workmen. The relationship between an employer and employee is generally regulated by contract law. The provisions relating to working conditions vary depending upon whether the establishment in question is a factory, a shop, or other kind of industrial/commercial establishment.

2. Labour Legislations: The broad areas which are covered by special labour legislations include:

2.1. Industrial Relations

2.1.1. Industrial Disputes Act, 1947: This statute applies to workers carrying out the manual, unskilled, technical, operational, or supervisory work and does not apply to workers earning more than Rs 10,000 per month carrying out managerial or supervisory work. In addition, the worker must have had continuous service of at least one year, in order to avail of certain benefits under the statute. It also provides for the investigation and settlement of disputes between employers and workmen, such as retrenchment, lay-offs, lock-outs, strikes, closure of business, and unfair labor practices, and also prescribes penalties for the same.

2.1.2. Industrial Employment (Standing Orders) Act, 1946: This statute applies to every industrial establishment wherein 100 or more workmen are employed. It requires employers in an industrial establishment to formally define the conditions of employment under them which have to be certified by the concerned labour department and thereafter re-enacted.

2.1.3. Trade Unions Act, 1926: Trade Unions Act provides for the registration of trade unions and lays down the law relating to registered trade unions.

2.1.4. The Industrial Relations Code, 2020 (IR Code): The IR Code is a comprehensive code that seeks to amend and consolidate the laws relating to trade unions, conditions of employment in industrial establishment or undertaking, investigation, and settlement of industrial disputes and the matters connected therewith.

The IR Code has been passed by both the Houses of Parliament and has received Presidential assent. However, the Government is yet to notify the date on which the provisions of the Code would come into effect. Once notified, the Code would repeal the following acts: The Industrial Disputes Act, 1948, the Industrial Employment (Standing Orders) Act, 1946, and the Trade Unions Act, 1926. Some of the salient features of the IR Code are as follows:

a) The IR Code has expanded the definition of 'workers' which now not only covers all persons employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical, or supervisory work for hire or reward, whether the terms of employment be express or implied but also covers working journalists defined under Working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955, sales promotion employees as defined in clause (d) of section 2 of the Sales Promotion Employees (Conditions of Service) Act, 1976 and persons who are employed in a supervisory capacity drawing wages less than Rs 18,000 per month.

b) The IR Code defines an 'employee', which was absent in the Industrial Disputes Act. It has been defined to include persons doing managerial, clerical, supervisory, and technical work, thereby covering a larger pool of persons engaged by industrial establishments.

c) The term 'employer' has been expanded to include contractors and the legal representative of deceased employers as well. As per the revised definition, 'employer' now means and includes the head of the department, occupier of the factory, manager of the factory, managing director, contractor, and legal representatives of a deceased employer. These provisions were missing in the definition of 'employer' under the Industrial Disputes Act.

d) The provisions relating to Standing Orders have been amended to apply to only such industrial establishments wherein three hundred or more than three hundred workers, are employed, or were employed on any day of the preceding twelve months.

e) Similarly, the provisions relating to lay-off, retrenchment, and closure have been amended to apply to such industrial establishments (not being establishments of a seasonal character or in which work is performed only intermittently) in which not less than three hundred workers, or such higher number of workers as may be notified by the appropriate Government, were employed on an average per working day in the preceding twelve months.

f) While a Grievance Redressal Committee (GRC) is constituted for an establishment with 20 or more workers, a Works Committee (WC) is envisioned for an establishment with 100 or more workers. While they are broadly similar, they differ in certain aspects. One such aspect is that there is a compulsory and proportional representation of women envisioned in the GRC, which is absent in a WC.

g) The IR Code provides for the constitution of Industrial Tribunals and a National Industrial Tribunal to adjudicate disputes which may arise in the labor industry.

h) The IR Code requires all persons to give prior notice of 14 days' before a strike or a lockout. As per the IDA, this criterion was only applicable for public utility services. The definition of the strike has been amended to include within its ambit, 'concerted casual leave on a given day by 50% or more workers employed in an industry'.

i) As per the IR Code, when there is more than one trade union in the establishment, the trade union with 51% of the workers as its members will be recognized as the sole negotiation union. This trade union shall be authorized solely to bargain with the employer and reach an agreement. In cases where none of the trade unions have 51% membership of the workers, then a Negotiating Council shall be set up by the employer.

2.2. Working Conditions

2.2.1. Factories Act, 1948 ("Factories Act"): The Factories Act has been enacted to consolidate and amend the law regulating workers in factories and applies to every factory wherein 20 or more workers are ordinarily employed. It prescribes certain standards with regard to safety, health, welfare, working hours of workers, overtime and leave.

2.2.2. Shops Acts: These statutes are enacted in each state to regulate conditions of work and employment in shops, commercial establishments, and residential hotels, restaurants, eating houses, theatres, places of public amusement/entertainment, and other establishments located within the state. These statutes prescribe the minimum conditions of service and benefits for employees, including working hours, rest intervals, overtime, overtime wages, holidays, leave, termination of service, and other rights and obligations of an employer and employee.

2.2.3. Child Labour (Prohibition and Regulation) Act, 1986: This statute prohibits the engagement of children below the age of 14 in certain employments and regulates the conditions of work for children in sectors where they are not prohibited from working.

2.2.4. Contract Labour (Regulation and Abolition) Act, 1970: This statute applies to (i) all establishments employing 20 or more persons (or that have employed 20 or more persons) on any day of the preceding 12 months, and (ii) contractors who are employing (or have employed) 20 or more workmen on any day of the preceding 12 months. The statute does not govern establishments where work of a casual or intermittent nature is carried out. It regulates the conditions of employment of contract labour, the duties of a contractor and
principal employer, and provides for abolition of contract labour in certain circumstances.

2.3. Remuneration

2.3.1. Minimum Wages Act, 1948: This statute provides for the fixing and revising of minimum wages in certain employments. The Central Government is empowered to fix the minimum wage for certain employments such as railways, mines, ports, oilfields, etc. while the state governments of each state are empowered to fix the minimum wage for all other employments. Therefore, the minimum wage differs in each state, depending on the state government's policy.

2.3.2. Payment of Wages Act, 1936: This statute regulates the payment of wages and applies to employed persons drawing wages not exceeding Rs 24000 per month. The statute applies to factories, railways, tramways, motor transport services, docks, wharves, jetty, inland vessels, mines, plantations, quarries and oil fields, workshops, establishments involved in construction work, establishments in which articles are produced, and other establishments as notified by the appropriate state governments.

2.3.3. Payment of Bonus Act, 1965: The Payment of Bonus Act, 1965 provides for the payment of bonuses to persons employed in certain establishments on the basis of profits or on the basis of production and applies to every factory and establishment in which 20 or more persons are employed on any day during an accounting year. Currently, the bonus is payable to every employee drawing a salary up to Rs 21000 per month. It further prescribes certain provisions such as the minimum amount of bonus payable, the time limit for payment of bonus, deductions, etc. Presently, the minimum bonus payable is 8.33% of the salary or wage earned by the employee in an accounting year or Rs 100, whichever is higher. The maximum bonus including a productivity-linked bonus that can be paid in any accounting year shall not exceed 20% of the salary/wage of an employee.

2.3.4. The Code on Wages, 2019 (Code): The Code is a comprehensive code that seeks to amend and consolidate the laws relating to wages and bonuses and matters connected therewith. The Code has been passed by both the Houses of Parliament and has received the Presidential assent. However, the Government is yet to notify the date on which the provisions of the Code would come into effect. Once notified, the Code would repeal the following acts: The Payment of Wages Act, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965, and the Equal Remuneration Act, 1976. Some of the salient features of the Code are as follows:

a) The Code is applicable to all the employees, employed in both the organized and the unorganized sector. The Code is applicable to all employees irrespective of their wages.

b) The definition of 'wages' varies across labour legislations in India. The Code seeks to provide a single uniform definition of 'wages'. The Code defines the term 'wages' inclusive of the salaries, allowances, or other components which are expressed in monetary terms. The travel allowances, house rent allowances, etc., have been excluded from the purview of wages under the Code. While the Central Government shall look into wages for the employment of workers in railways, mines, oilfields etc., the State Government shall have the power to make decisions with respect to the wages for the employment in other establishments, which are inclusive of private establishments.

c) The Code makes provisions for fixation of a floor wage by the Central Government taking into consideration, the living standards of the workers. Different floor wages may be set for different states/geographical areas.

d) The Code has provided express provisions for the employer to fix the wage period for the employees on a daily, weekly, fortnightly, or monthly basis, and stipulates the time limits for payments by the employer under each of such wages.

e) The Code prescribes the burden of proof in case of claims of non-payment or deficient payment of wages or bonus is to be on the employer.

2.3.2. Payment of Wages Act, 1936: This statute regulates the payment of wages and applies to employed persons drawing wages not exceeding Rs 24000 per month. The statute applies to factories, railways, tramways, motor transport services, docks, wharves, jetty, inland vessels, mines, plantations, quarries and oil fields, workshops, establishments involved in construction work, establishments in which articles are produced, and other establishments as notified by the appropriate state governments.

2.3.3. Payment of Bonus Act, 1965: The Payment of Bonus Act, 1965 provides for the payment of bonuses to persons employed in certain establishments on the basis of profits or on the basis of production and applies to every factory and establishment in which 20 or more persons are employed on any day during an accounting year. Currently, the bonus is payable to every employee drawing a salary up to Rs 21000 per month. It further prescribes certain provisions such as the minimum amount of bonus payable, the time limit for payment of bonus, deductions, etc. Presently, the minimum bonus payable is 8.33% of the salary or wage earned by the employee in an accounting year or Rs 100, whichever is higher. The maximum bonus including a productivity-linked bonus that can be paid in any accounting year shall not exceed 20% of the salary/wage of an employee.

2.3.4. The Code on Wages, 2019 (Code): The Code on Wages is a comprehensive code that seeks to amend and consolidate the laws relating to wages and bonuses and matters connected therewith. The Code has been passed by both the Houses of Parliament and has received the Presidential assent. However, the Government is yet to notify the date on which the provisions of the Code would come into effect. Once notified, the Code would repeal the following acts: The Payment of Wages Act, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965, and the Equal Remuneration Act, 1976. Some of the salient features of the Code are as follows:

a) The Code is applicable to all the employees, employed in both the organized and the unorganized sector. The code is applicable to all employees irrespective of their wages.

b) The definition of 'wages' varies across labour legislations in India. The Code seeks to provide a single uniform definition of 'wages'. The Code defines the term 'wages' inclusive of the salaries, allowances, or other components which are expressed in monetary terms. The travel allowances, house rent allowances, etc., have been excluded from the purview of wages under the Code. While the Central Government shall look into wages for the employment of workers in railways, mines, oilfields etc., the State Government shall have the power to make decisions with respect to the wages for the employment in other establishments, which are inclusive of private establishments.

c) The Code makes provisions for fixation of a floor wage by the Central Government taking into consideration, the living standards of the workers. Different floor wages may be set for different states/geographical areas.

d) The Code has provided express provisions for the employer to fix the wage period for the employees on a daily, weekly, fortnightly, or monthly basis, and stipulates the time limits for payments by the employer under each of such wages.

e) The Code prescribes the burden of proof in case of claims of non-payment or deficient payment of wages or bonus is to be on the employer.

2.4. Equality and Women Empowerment

2.4.1. Equal Remuneration Act, 1976: This Act provides for payment of equal remuneration to male and female employees and the prevention of discrimination on the ground of sex in matters of employment.

2.4.2. Maternity Benefit Act, 1961: This Act regulates the employment of women in certain establishments for certain periods before and after child-birth and seeks to provide maternity benefit and certain other benefits. It applies to all shops and establishments in which 10 or more persons are employed and factories, mines, plantations, and circuses. The Maternity Benefits Act entitles a pregnant woman to claim maternity benefit i.e. payment at the rate of 3 months' average pay, during her absence from work, for up to 26 weeks, including a maximum period of 8 weeks preceding the date of delivery.

2.4.3. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013: This Act aims at providing protection of women against sexual harassment at the workplace and prescribes detailed guidelines for employers and employees for the prevention and redressal of complaints of sexual harassment. The Act, inter alia, applies to government bodies, private and public sector organizations, non-governmental organizations, organizations carrying out commercial, vocational, educational, industrial activities, hospitals, nursing homes, and even to a dwelling place. The Act gives a detailed definition of 'Sexual Harassment at work place'. Further, under the act, the term 'employee' covers regular, temporary, ad hoc employees, individuals engaged on a daily wage basis, either directly or through an agent, contract laborers, co-workers, probationers, trainees, and apprentices. The Act mandates employers to constitute an internal complaints committee to investigate complaints of sexual harassment occurring at the workplace. Under this Act, the workplace includes any place visited by the employee arising out of or during the course of employment including transportation provided by the employer. The Act provides for punishments such as withholding pay rise, termination of service etc., and also for paying compensation to the aggrieved woman. If an employer having being previously being convicted of an offence under the Act, subsequently commits the same offence, a fine of up to Rs. 50,000 may be imposed and the entity may lose its license to conduct its business.

2.4.4. Occupational Safety, Health, and Working Conditions Code, 2020: The Occupational Safety, Health and Working Conditions Code is a comprehensive code that seeks to subsume (1) the Factories Act, 1948 (2) The Contract Labour (Regulation and Abolition) Act, 1970 (3) The Mines Act, 1952 (4) The Dock Workers (Safety, Health, and Welfare) Act, 1986 (5) The Building & Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (6) The Plantations Labour Act, 1951 (7) The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 (8) The Working Journalist and other Newspaper Employees (Conditions of Service and Miscellaneous Provision) Act, 1955 (9) The Working Journalist (Fixation of rates of wages) Act, 1958 (10) The Cine Workers and Cinema Theatre Workers Act, 1981 (11) The Motor Transport Workers Act, 1961 (12) The Sales Promotion Employees (Conditions of Service) Act, 1976 (13) The Beedi and Cigar Workers (Conditions of Employment) Act, 1966. However, the Occupational Safety, Health, and Working Conditions Code, 2020 is still not in force. Some of the salient features of the Occupational Safety, Health, and Working Conditions Code are as follows:

a) Duties and Rights of Employers includes ensuring that the workplace is free from hazards, complying with occupational safety and health standards, providing annual health examinations, compulsory reporting of diseases and accidents, etc.

b) Duties of employees include taking reasonable care for the health and safety of themselves and co-operating with the employer in meeting the statutory obligations.

c) The employer is required to provide and maintain welfare activities for employees including sanitation facilities for male and female employees separately, sitting arrangements, first-aid boxes, etc. The Central Government has been conferred the right to make rules in this regard. The employer is also entitled to make provisions for cleanliness and hygiene, ventilation, temperature and humidity, potable drinking water, lighting, adequate standards to prevent overcrowding, etc.

d) The Occupational Safety, Health, and Working Conditions Code has modified the number of minimum contract labour to fifty (50) from twenty (20) for the code to apply. It has further been clarified that no contractor is permitted to engage in any contract labour if they do not procure a license under the code. e) The contractors are obliged to extend all benefits as are available to a worker under the various labour laws to inter-state migrant workers as well. They are also required to pay to such workers a lump sum fare for to and fro journey to their native place. f) Authorities: For effective implementation of the Occupational Safety, Health, and Working Conditions Code, the appointment of Inspector-cum-Facilitators has been prescribed. Additionally, National and State Occupational Safety and Health Advisory Boards will be constituted to advise and assist the Government on matters relating to occupational safety and health.

2.5. Social Security

2.5.1. The Payment of Gratuity Act, 1972: This Act provides for payment of gratuity to employees engaged in factories, mines, oil fields, plantations, ports, railway companies, shops, and commercial establishments where 10 or more persons are employed or were employed on any day of the preceding 12 months. An employee is entitled to receive gratuity upon the termination of his employment after he has rendered continuous service of 5 years (except on death or disablement).

2.5.2. EPF Act: This Act is one of India’s most important social security legislations which provides for the institution of the pension fund, provident funds, and deposit-linked insurance fund for employees in factories and other establishments. An employee whose basic salary is less than Rs 15,000 per month, or who has an existing provident fund membership based on previous employment arrangement is eligible for benefits under the EPF Act. The statute applies to establishments having at least 20 employees and both the employer and employee contribute to the provident fund.

2.5.3. ESI Act: This ESI Act is social welfare legislation enacted with the object of providing certain benefits to employees in case of sickness, maternity, and employment injury. Under this ESI Act, employees receive medical relief, cash benefits, maternity benefits, pension to dependents of deceased workers, and compensation for fatal or other injuries and diseases. It applies to all factories, industrial and commercial establishments, hotels,l

restaurants, cinemas, and shops. Every employee drawing wages up to Rs. 21000 per month is required to be insured under the ESI Act. The ESI Act also mandates the payment of a certain percentage of the wages to the Employee's State Insurance Corporation by both the employer and the employee.

2.5.4. Code on Social Security, 2020 (SS Code): The SS Code is a comprehensive code that seeks to subsume nine regulations relating to social security, retirement, and employee benefits, viz., (i) The Employees Compensation Act, 1923; (ii) The Employees State Insurance Act, 1948; (iii) The Employees Provident Fund and Miscellaneous Provisions Act, 1952; (iv) The Employees Exchange (Compulsory Notification of Vacancies) Act, 1959; (v) The Maternity Benefit Act, 1961; (vi) The Payment of Gratuity Act, 1972; (vii) The Cine Workers Welfare Fund Act, 1981; (viii) The Building and Other Construction Workers Cess Act, 1996; and (ix) The Unorganized Workers' Social
Security Act, 2008. Some of the salient features of the SS Code are as follows:

a) Aggregator has been defined as a digital intermediary or a marketplace for a buyer or user of a service to connect with the seller or the service provider.

b) Gig Worker under the SS Code has been defined as a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationships

c) Platform work has been defined as a work arrangement outside of a traditional employer-employee relationship in which organizations or individuals use an online platform to access other organizations or individuals to solve specific problems or to provide specific services, in exchange for payment.

d) Social Security under the SS Code means the measures of protection afforded to employees, unorganized workers, gig workers, and platform workers to ensure access to health care and to provide income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner.

e) Unorganised Sector means an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs or with less than 10 workers.

f) Benefits to Gig Workers and Platform Workers: The SS Code confers the right on the Central Government and State Government to notify schemes for such workers related to life and disability cover, health and maternity, provident fund, employment injury benefit, housing, etc. The SS Code mandates that the schemes may be funded through a combination of contributions from the central government, state governments, and Aggregators.

g) Employees' Provident Fund (EPF): The SS Code has altered the applicability of the Employees' Provident Fund Scheme which will be applicable to every establishment in which 20 or more employees are employed. The Central Government may establish a provident fund where the contributions paid by the employer shall be 10% of the wages for the time being payable to each of the employees. The employee's contribution shall be equal to the employer.

h) Gratuity: As per the SS Code, employees shall be eligible to gratuity, provided 10 or more employees are employed or were employed, on any day in the preceding 12 months. The SS Code provides that in the case of fixed-term employees, the employer shall pay gratuity on a pro-rata basis and not on the pre-existing requirement of continuous service of five years.

i) Employees State Insurance: The SS Code makes provisions for Employees State Insurance Corporation and allows for voluntary registration under the Employee State Insurance if the employer and majority of the employees agree. Further, the Government has the power to extend the Employee State Insurance Scheme to any hazardous occupation irrespective of the number of employees employed. The SS Code also provides for coverage of Gig Workers and Unorganised Sectors under the Employee State Insurance Scheme.

j) Maternity Benefit: The SS Code provides for mandatory maternity leave for six weeks immediately following the day of delivery, miscarriage, or medical termination of pregnancy. It provides for maternity benefit of a maximum of 26 weeks of which not more than 8 weeks shall precede the expected day of delivery. It also provides for a medical bonus of Rs. 3500 or as prescribed by the Central Government. It allows a woman to take two breaks of prescribed duration till the child attains 15 months of age.

3. Non-Compete & Non-Solicit Agreements

3.1. Non-compete agreements restrict an employee from pursuing a similar profession, business, or trade or from engaging with a competitor, during or after cessation of his employment. Whereas non-solicit agreements restrict or restrain an employee's ability to contact present, past, or sometimes even prospective clients of the previous employer.

3.2. While non-compete clauses during the term of employment are generally enforceable in India, a post-termination non-compete clause is generally not enforceable since they are considered to be in 'restraint of trade or business under Section 27 of the Indian Contract Act, 1872, thus making the clause void.

3.3. In determining the enforceability of a non-compete clause operating beyond the term of employment, the courts in India have generally taken the view that such clauses shall not be enforceable if they are unconscionable or excessively harsh or unreasonable, or one-sided.

3.4. However, an exception is available in cases where a sale of goodwill is involved, that is where the reputational aspects of the business undertaking are also sold or transferred. The qualifier to the above statement is that the courts should consider that action reasonable to the nature of the business.

4. Employee Stock Options

4.1. Employee stock option plans (ESOPs) refer to the option given to an employee purchase at a future date, the shares offered by a company, directly or indirectly, at a pre-determined price.

4.2. In the case of a company, other than a listed Indian company, permanent employees (working in India or abroad), directors may be granted stock options/shares subject to certain restrictions prescribed from time to time. However, independent directors and directors who hold more than 10% of the equity shares of the Company (except startups) are not eligible to avail of employee stock options.

4.3. There are no requirements as regards pricing of the options/shares, however, the pricing should conform to the applicable accounting policies, if any.

4.4. Further, certain other requirements such as a minimum period of 1 year between the grant of the option and the vesting of the option, and in case of grant of a share, a minimum lock-in period of 1 year from the date of allotment, are required to be complied with.

4.5. In the case of listed companies, in addition to the aforementioned requirements, additional requirements as provided under the Securities Exchange Board of India ("SEBI") regulations must also be complied with.

Chapter 6 - Real Estate Laws in India

1. Introduction: India is one of the emerging economies and has large-scale real estate and land development taking place across the country. The government has framed various laws and policies, to regulate transactions related to land and the real estate sector and further, to protect the interest of the investors investing in the real estate sector. Central acts govern the transfer of immovable properties in the entire country, whereas state acts govern matters related to immovable properties, like tenancy, rent control etc., within their jurisdiction.

2. Central Acts: Following are some of the Central Acts that every investor should know about before making an investment in land or the Real Estate Sector:

2.1. Transfer of Property Act, 1882 (“TOPA”): This act regulates the transfer of immovable, and in some cases, movable, property, by one or more persons, in the present or in the future, in favour of one or more other persons, and/or to himself/itself in some other capacity, subject to certain exceptions as are stated therein. The following are the different ways, under the TOPA, through which a person can transfer his immovable property:

2.1.1 Sale of immovable property: Sale of immovable property covers all transactions, whereby a person transfers the ownership of the immovable property to another, in exchange for consideration as agreed upon between them in this regard.

2.1.2 Mortgage: A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement that may give rise to a pecuniary liability.

2.1.3 Charge: Where an immovable property of one person is, by an act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.

2.1.4 Leases of immovable property: A lease is a transfer of a right to enjoy the concerned property for a specified period of time against the payment of fee. Under the leasehold right, the lessee has a right to further sub-let the premises / immovable property during the term of the lease, subject to the lease agreement.

2.1.5 Exchange of property: When two persons mutually transfer the ownership of one thing for the ownership of another, neither things nor both things being money only, the transaction is called an "exchange". A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale.

2.1.6 Gift of Immovable Property: A gift is a transfer of existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by, or on behalf of the donee.

2.2 The following are the different ways, not covered under the TOPA, in which rights can be created over immovable properties:

2.2.1 License: A license is a limited right to do or to continue doing in or upon immovable property, something which would in the absence of such license be unlawful. A license may be granted by anyone to the extent and to which he may transfer his interests in the immovable property affected by the license. The grant and revocation of a license are governed by the Indian Easement Act, 1882.

2.2.2 Contractual Tenancy: Contractual tenancy is a tenancy whereby the tenant occupies the tenanted property until the termination of the contract and such termination is by virtue of Sections 16, 17, and 18 of the Maharashtra Rent Control Act, 1999 in the state of Maharashtra and analogous provisions contained in statutes of other states.

2.2.3 Statutory Tenancy: Statutory tenancy is recognized in certain states like Maharashtra. A statutory tenant pays rent for the premises occupied by him and he cannot be evicted except for reasons mentioned in the relevant statute.

2.2.4 Easement: An easement is a right which the owner or occupier of certain land possesses, for the beneficial enjoyment of that land, to do and continue doing something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land which is not his own. The permitted kinds of uses are limited, the most important of which being rights of way and rights concerning flowing waters. An easement is normally for the benefit of adjoining lands, no matter who the owner is, and not for the benefit of a specific individual. A common example of the right of way is the right of a property owner who has no direct access to the front road to use a particular segment of a neighbor's land by which he can gain access to the road. Easements are governed by the Indian Easement Act, 1882.

2.3 The Indian Registration Act, 1908 ("IR Act"): The IR Act lays down the procedure for registration of documents related to the transfer of immovable properties with the designated registration authorities. As per the provisions of the IR Act, all transactions with reference to any particular property are recorded in a register maintained by an officer appointed by the State Government.

The IR Act has been implemented to (a) ensure that all documents regarding the sale and purchase of land are recorded and maintained; (b) assure a clear title, and (c) prevent fraud in property-related transactions.

2.4 Real Estate (Regulation and Development) Act, 2016 ("RERA"):

2.4.1 RERA has been recently introduced by the Central Government to protect buyers of flats from unscrupulous builders, and to bring about transparency and fair practice in the real estate sector.

2.4.2 Prior to the introduction of RERA, there were various issues plaguing the real estate sector. One of the main issues was the lack of transparency and accountability, as the dealings in the real sector were opaque as regards price, construction delay, construction quality, ownership (title), and litigations. The purchasers of flats were often misled as regards the carpet area of the flats to be purchased and further, as regards the amenities to be offered.

2.4.3 Furthermore, there were indefinite delays as regards the delivery of possession of the newly constructed flats to the purchasers. However, with the introduction of RERA, the Government of India has sought to redress these issues.

2.4.4 Under RERA, a developer is bound to register its project with the Real Estate Regulatory Authority of the relevant state if the land proposed to be developed exceeds 500 square meters or the number of apartments proposed to be developed exceeds 8.

2.4.5 Some of the important provisions of RERA are as follows: (a) Compulsory disclosures and registration of the real estate projects by builders with the Real Estate Regulatory Authority, so as to eliminate any scope for misconduct on the part of the builders, thereby making the projects more transparent and accountable;
(b) Depositing of 70% of the amount realized through purchasers of flats by builders in a separate account with a scheduled bank, so as to prevent misuse of funds and/or to prevent the builders from using the proceeds of one project towards the construction of another; (c) Penalties for builders defaulting in delivering the possession of flats to the purchasers within the agreed deadline, etc.

3. State Acts: Like the aforesaid central acts, each state has its own laws governing certain aspects of land and real estate transactions. For example, in Maharashtra, the construction, sale, and purchase of flats are regulated by The Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management, and transfer) Act, 1963. All states have analogous laws to regulate the sale and purchase of flats. Further, each state can also amend certain provisions of the RERA, in accordance with its policies and local laws. State governments along with local authorities, also decide the Floor Space Index ("FSI") i.e., is the ratio of the built-up space on a plot to the area of the plot. The FSI is amended from time to time in order to control the densification and growth pattern of a particular city.

4. FDI in Real Estate

4.1 Township: FDI is permitted in an entity engaged or proposed to be engaged in the development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, townships. Further, earning of rent/income on lease of the property, not amounting to transfer, will not amount to real estate business for the purpose of FDI and thus would be permitted. In such activities, 100% FDI is permitted under the automatic route. The foreign investor has also been given liberty to exit the project even before its completion or development of basic infrastructure subject to a lock-in period of 3 years.

4.2 However, FDI is not permitted in an entity that is engaged or proposes to engage in real estate business, construction of farmhouses, and trading in transferable development rights.

4.3 FDI in operation and management: Apart from the above, FDI Policy has clarified that 100% FDI under automatic route is permitted in completed projects for operation and management of townships, malls/ shopping complexes, and business centers. Consequent to foreign investment, transfer of ownership and/or control of the investee company from residents to non-residents is also permitted subject to certain restrictions.

4.4 Real Estate Investment Trust (“REIT”): SEBI has notified the SEBI (Real Estate Investment Trusts) Regulations, 2014 with the intent of attracting retail funding in the real estate sector. REITs are business trusts which own and operate income-generating real estate assets through direct or indirect holding in special purpose vehicles. REITs have been given a pass-through status for the purpose of taxation under the Indian Tax Laws. REITs are subjected to some minimum thresholds i.e. the value of assets owned by such entities should not be less than Rs 5 billion and the initial offer size of the unit is required to be at least Rs 2.5 billion. REITs have been allowed to invest up to 20% of their investments in under-construction projects.

Chapter 7 - Taxation

There are various direct (i.e. based on income) and indirect (i.e. based on consumption) taxes that are levied and collected by the Centre and State Governments.

1. Direct Taxes

1.1. Direct Taxes in India are governed by the Income Tax Act, 1961 and the basis of levying Income Tax in India is (a) Residence; (b) Source; (c) Receipt. Any income earned by a person who is an ordinary resident in India is taxable irrespective of its source country.

1.2. An individual is said to be resident in India, in a particular year if (a) he is in India for a period of 182 days or more during the said year; or (b) he has been in India for a period amounting to 365 days or more in the past four years and has been in India for at least 60 days, during the financial year in which tax is sought to be levied. Condition (b) is not applicable to an Indian citizen who is leaving India for the purpose of employment or as a part of the crew on an Indian ship or to an Indian citizen/person of Indian origin who ordinarily resides abroad. However, such exemption is not applicable if such person is having income from Indian sources exceeding Rs 1.5 million. For such persons, 60 days condition is diluted to 120 days. (c) A citizen of India having Indian Income exceeding Rs 1.5 million during the said year shall be deemed to be resident in India if he is not a tax resident of any other country for the year. A person resident in India has to be further classified into ordinarily resident or not ordinarily resident based on the residential status and number of days stay in the past 10 years. However, a person not falling under criteria (a) above and considered resident solely based on the 1.5 million criteria as mentioned in condition (b) or (c) above are considered as not ordinary residents. An ordinary resident will be charged tax in India on his global income i.e. income earned in India as well as income accrued outside India. A person not ordinarily resident and a Non-resident has been spared from taxation of foreign income.

1.3. A foreign company is said to be resident in India if its place of effective management is in India. Place of effective management means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made.

1.4. Applicable Tax Rates

1.4.1. Individuals, are generally taxed at slab-wise rates of 10%, 15%, or 25% based on the total income earned by them in the financial year. Individuals are also given an option of alternate slabs of 5%, 10%, 15%, 20%, 25%, 30% on certain conditions prescribed, inter alia, not claiming certain exemptions / incentives / deductions. Additionally, a surcharge (if applicable) and health and education cess of 4% is also applicable. The rate income too and applicability of surcharge is as under: -

i. Up to 2,50,000 - Nil;
ii. 2,50,000 to 5,00,000 - 5%;
iii. 5,00,000 to 10,00,000 - 20%;
iv. Above 10,00,000 - 30%;

1.4.2. In all other cases, the tax rate for domestic companies is 30%. Additionally, the surcharge is applicable at the rate of 7% (if income above 10 million but up to 100 million) or 12% (if income exceeds 100 million) of the tax. Tax payable is further increased by health and education cess of 4% of income tax + surcharge.

1.4.3. Further, as per the Finance Act, 2021, domestic companies have the option to pay tax at the rate of 22% (general) or 15% (for new manufacturing companies) from FY 2019-20 onwards, if such companies adhere to certain condition prescribed, inter alia, not claiming certain exemptions/incentives/deductions. However, in such cases, the surcharge applicable on the income tax paid would be 10%, irrespective of the income. Health and Education cess of 4% will also be applicable.

1.4.4. In case the tax payable under the normal provisions of law by a company, other than those exercising option as per para 2.4.3 above, are less than 15% of its book profits calculated in the prescribed manner, then domestic companies are required to pay a Minimum Alternate Tax (MAT) @ 15% (+ applicable surcharge @7% or 10% (refer point 2.4.2) as per the quantum of book profits + cess @ 4%). The MAT paid will be available for carrying forward and set off against tax payable under normal provision of the law in future years exceeding MAT Rate up to a maximum of 15 years.

1.4.5. A foreign company is taxed on 40% of its income and the total amount of tax increases by 2% of such tax when the income of the Company is between Rs 10 million and Rs 100 million and 5% of such tax where the income of the company exceeds Rs 100 million. Further, the amount of income tax and the applicable surcharge shall be further increased by health and education cess calculated at the rate of 4% of such income tax and surcharge.

1.5. Dividend Distribution Tax ("DDT"):

1.5.1. Until 31 March 2020, domestic companies had to pay a Dividend Distribution Tax (DDT) of 15% on the dividend declared. Additionally, a surcharge of 12% on DDT, Education cess of 2%, and Secondary and Higher Education cess of 1% was also levied.

1.5.2. The Finance Act, 2020 provides that DDT will not be payable in respect of dividends declared, distributed, and paid by a domestic company after March 31, 2020, and the same will be fully taxed in the shareholder's hands at normal rates.

1.6. Capital Gains Tax

1.6.1. Capital gains tax, (a kind of income tax) is a tax chargeable on profits and gains arising out of the sale of capital assets such as land, houses, jewelry, intellectual property, securities, etc.

1.6.2. Capital assets are of two kinds:

i. Short Term: An asset that is held for 36 months or less is a short-term capital asset (24 months in case of unlisted shares and immovable property such as lands, buildings, or house property, 12 months in case of listed securities or units of an equity-oriented fund or zero-coupon bond).

ii. Long Term: A capital asset other than the short-term capital asset is a long-term capital asset.

1.6.3. Taxability of Capital Gains

i. Long Term Capital Gains: Gains from the sale of long-term capital assets are taxable at 20%, except on sale of listed equity shares/units of equity-oriented funds, on which capital tax leviable is 10% plus applicable surcharge and cess.

ii. Short Term Capital Gains: If the short-term capital gains arising out of a sale of listed shares or securities on which STT is applicable, tax is levied on the same at 15% plus applicable surcharge and cess. Any other kind of short-term capital gains is added to the total income of the assessee which is then chargeable to tax at the normal rates applicable to the assessee.

1.6.4. Virtual Digital Assets

i. While the Virtual Digital Assets continue to remain unregulated in view of the impending introduction of The Cryptocurrency and Regulation of Official Digital Currency Bill ("Crypto Bill"), the Finance Bill, 2022 seeks to introduce certain changes to the Income Tax Act to provide clarity as to how these assets may be treated from a tax angle.

ii. The Finance Bill, 2022 proposes to define "Virtual Digital Assets" as "any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account including its use in any financial transaction or investment, but not limited to investment scheme; and can be transferred, stored or traded electronically; (b) a non-fungible token or any other token of similar nature, by whatever name called; (c) any other digital asset, as the Central Government may, by notification in the Official Gazette specify". More specifically, "non fungible tokens" have been said to mean "such digital asset as the Central Government may, by notification in the Official Gazette, specify". Furthermore, the Central Government has retained powers to exclude any digital asset from the definition of "virtual digital asset.".

iii. As per the Union Budget, 2022, Virtual Digital Assets are sought to be taxed at 30% on the transfer of virtual digital assets. However, such tax treatment does not allow any expenditure deductions, except for the cost of acquisition of such assets. Further, any loss from the transfer of such virtual digital assets are not allowed to be set off against other income.

1.7. Double Tax Avoidance Agreements ("DTAA"): India has entered into DTAA with over 85 countries to ensure that tax-payers in India and the contracting states are not taxed twice for the same income, earned in India and/or the other contracting state. Provisions of DTAA will prevail over the Income Tax Act if the same is beneficial to the taxpayer. The income tax Act also provides for double tax relief in respect of income from countries with whom no DTAA is entered into by India.

1.8. Withholding of Taxes: Any person responsible for making certain payments to residents or any payments, to non-residents who constitute income subject to tax are obligated to deduct tax thereon at the prescribed or applicable rates, as the case may be, at the time of making such payments. Where any person, who is liable to deduct such tax at source, fails to do so, or after deducting the same, fails to pay the whole or any part of the tax then such person shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax.

2. Indirect Taxes | GST

2.1. The Government has introduced the Goods and Services Tax with effect from ("GST") from 1 July 2017.

2.2. GST is a uniform integrated indirect tax that will subsume various central and state indirect taxes such as Central Excise Duty, Additional Excise Duty, Service Tax, Purchase Tax, Luxury Tax, and State Value Added Tax.

2.3. The slabs of tax to which various goods and services are subject to are- 5%, 12%, 18%, and 28%.

2.4. GST ensures that indirect tax rates remain uniform throughout the country. Therefore, foreign companies would not need to factor in the various tax rates in different states before deciding to establish a presence in India.

2.5. GST allows suppliers and manufacturers to avail input tax credit for tax already paid. This eliminates the cascading effect of tax.

2.6. Mandatory Registration: Any business whose turnover in a financial year exceeds Rs 40 lacs (in case of goods) or Rs 20 lacs (in case of service) is bound to obtain GST registration. However, certain categories of persons, inter alia, e-commerce operators, are bound to obtain GST registration irrespective of their turnover. In the case of certain special categories, the lower limit of 20 lacs (for normal category states) and 10 lacs (for special category states) has been prescribed.

2.7. Different registrations in different states: In the case of an assessee having a presence in multiple states, he would need to obtain separate GST registration in each such state.

2.8. Liability of paying GST to the Government: Normally, the liability of paying the GST collected is on the supplier of goods or services. However, in specified cases like imports and other notified supplies, the liability may be cast on the recipient under the reverse charge mechanism

Chapter 8 - Dispute Resolution in India

1. Introduction

1.1. India has a well-established judicial system for the enforcement of legal rights. At the apex of the judicial system is the Supreme Court which has wide and supervisory powers over all courts in the country. The Supreme Court is a court of record, which lays down precedential law for all the judicial and quasi-judicial authorities in the country. The judgments of the Supreme Court have the force of law and are binding on all courts in India.

1.2. Followed by the Supreme Court are High Courts, which have been set up in every state. However, a single High Court may be set up for several states. The High Courts have appellate and supervisory jurisdiction over all the courts in the state in which the High Court is situated. Furthermore, the High Courts are also courts of record. The decisions of the High Court are binding only upon the other courts in that State.

1.3. Below such High Courts lies a hierarchy of subordinate courts. At the top of such hierarchy are District and Sessions Courts, which are the principal courts having original jurisdiction over civil and criminal matters respectively. Below these courts lie several other courts with varying pecuniary and subject matter jurisdictions. For example, the Small Causes Court in Mumbai has jurisdiction over petty matters, where the value of the dispute is less than or equal to Rs 10,000. Further, for criminal matters, Courts of Judicial Magistrates are vested with the jurisdiction to deal with certain kinds of offenses.

1.4. Further, apart from the aforesaid judicial setup, several tribunals have been set up under various laws for speedy disposal of civil matters and matters requiring technical expertise and specialization. Some of the important tribunals are (a) National Company Law Tribunal (b) Securities Appellate Tribunal; (c) Competition Appellate Tribunal; (d) National Green Tribunal; (e) Cyber Appellate Tribunal; and (f) Copyright Board.

1.5. Further, to resolve consumer disputes, the Consumer Protection Act, 1986 mandates the establishment of the Consumer Disputes Redressal Commission at the Center, in each state as well as district levels.

Each of these forums have stipulated pecuniary jurisdictions and consumers can approach the aforesaid forums, as per the value of the subject matter, for redressal of consumer disputes.

2. Commercial Courts, Commercial Division and Commercial Appellate Division

2.1. Despite the number of forums available for dispute redressal, dispute resolution is a slow and time-consuming process in India and therefore results in inordinate delays in the disposal of cases. Such inordinate delays in the disposal of cases had made it difficult for foreign as well as domestic investors to resolve their disputes relating to trade and investment in India.

2.2. Thus, to allay such apprehensions and overhaul the process of commercial dispute resolution, the parliament, in 2015, passed the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015, ("Commercial Courts Act") in pursuance of its 'ease of doing business initiative and to make dispute resolution of commercial matters a swift and speedy process.

2.3. The Commercial Courts Act specifies strict timelines for the conduct of commercial cases and mandates setting up of Commercial Division in all High Courts, thereby eliminating any scope for delay. However, the Commercial Courts Act only covers those disputes, where the value of the subject matter is Rupees Three Lacs or more.

2.4. However, prior to the institution of suits (which does not contemplate any urgent interim relief) under the Commercial Courts Act, it is mandatory for the litigant instituting such suit to exhaust the remedy of pre-institution mediation in accordance with the manner set out therein.

3. Enforcement of a Foreign Decree

3.1. The courts in India also recognize judgments/decrees passed by a foreign court. However, the enforceability of such decrees depends upon whether the judgment has been passed by a court in a "reciprocating territory" or not. A reciprocating territory is a country that has been notified by the Government of India as a "reciprocating territory" under section 44A of the Civil Procedure Code. For example, the United Kingdom has been notified by the Government of India as a reciprocating territory.

3.2. The decree of a foreign court is enforced on the principle that where a court of competent jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy the claim. Decrees of courts in reciprocating territories can be enforced directly by initiating execution proceedings as if these decrees were decrees passed by an Indian court.

3.3. However, a foreign judgment/decree passed by a court situated in a non-reciprocating territory can also be enforced in India provided that a suit is filed based on the foreign judgment/decree.

4. Alternative Method |Arbitration

4.1. Since litigation is a time-consuming process in India, arbitration has become one of the most preferred modes of dispute resolution (especially for commercial disputes) due to its convenient nature and speedy disposal of cases.

4.2. In India, arbitrations are regulated by the Arbitration Act, 1996 ("Arbitration Act") which governs both domestic as well as international commercial arbitration.

4.3. Unlike courts of law, arbitral tribunals are not bound by strict rules of procedure and evidence. The parties to the dispute are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. For example, the Parties to the arbitration proceedings have the liberty to choose whether to argue the case or to let the arbitrator decide the dispute, based on the written submissions of the parties. Further, the parties can also choose the seat, language, and venue of the arbitration.

4.4. Pursuant to the submissions made by the parties, the arbitral tribunal passes an award, which is final and binding on the parties to the dispute. Such an award may only be challenged on certain limited grounds as laid down under Section 34 of the Arbitration Act. Every final Arbitral Award made by the arbitral tribunal is enforced in the same manner as if it were a decree of a civil court.

4.5. It is pertinent to note that recently, by way of a much-needed amendment, and also, in pursuance of its 'ease of doing business' initiative, the Parliament has amended the Arbitration Act, stipulating that parties to an arbitration agreement can apply for dispute resolution through a 'Fast Track Arbitration' by agreeing to the same in writing, at any stage before or at the time of appointment of Arbitral Tribunal. The arbitral award, in such cases, should be made within 6 months from the date on which the arbitral tribunal enters upon the reference. The parties may further consent to extend the period for making an award to a period not exceeding 6 months.

4.6. Further, a party to the arbitration agreement may make an application for interim measures in the course of the arbitral proceedings. The power to grant interim reliefs is vested with the arbitral tribunal as well as the court having original jurisdiction. The court can grant interim measures prior to the constitution of the arbitral tribunal and even after the award has been made but prior to its enforcement. A party can also approach the arbitral tribunal for interim measures, after the constitution of the tribunal and up to the point in time at which an award is made by the tribunal. The powers of an arbitral tribunal to grant interim reliefs are at par with those of the court.

4.7. As regards international arbitrations, India is a party to the New York Convention of 1958 on the recognition and enforcement of Foreign Arbitral Awards and has adopted the UNCITRAL Model Law throughout the Arbitration Act. Similarly, India is also a party to the Geneva Convention 1923 for the execution of Foreign Arbitral Awards. Thus, if a party receives a binding award from another country that is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory that has been notified as a convention country by India, the award would then be enforceable in India.

Chapter 9 - Insolvency and Bankruptcy Code

6. Introduction

6.1. The Insolvency and Bankruptcy Code, 2016 ("IBC") is a very recent legislation, enacted with the purpose of consolidating and amending the laws relating to insolvency and bankruptcy in India, in relation to companies, individuals, partnership firms, and limited liability partnerships.

6.2. The specialty of this law is that it aims to conclude the entire insolvency resolution process in a time-bound manner as compared to the other bankruptcy laws in India, such as Sick Industrial Companies Act, Securitization, and Reconstruction of Financial Assets, and Enforcement of Security Interest Act, etc.

6.3. It is a law primarily for initiation of the insolvency resolution process for reviving and restructuring the companies in financial difficulty, rather than merely being a recovery mechanism for creditors. In the case of liquidation, it further provides for a waterfall mechanism for the distribution of liquidation proceeds to protect the interest of all the stakeholders.

7. Overview

7.1. Amount of Debt: Under the IBC, in order to initiate corporate insolvency resolution process ("CIRP") against a corporate person who owes a debt ("Corporate Debtor"), the minimum amount of default stipulated by the IBC is Rs 1,00,00,000.

7.2. Adjudicating Authority: For adjudicating matters relating to insolvency and bankruptcy of corporate debtors, the National Company Law Tribunal ("NCLT") has been granted exclusive jurisdiction. For initiating CIRP against a corporate debtor, the creditors need to file an application before the NCLT. In case of insolvency and bankruptcy of individuals and partnership firms, the Debt Recovery Tribunal ("DRT") has been granted exclusive jurisdiction.

7.3. Duration of Resolution Process: As per the IBC, the CIRP shall be completed within 180 days from the date of admission of the application to initiate such process and this period may be extended for such further period by the NCLT on an application filed with the consent of the prescribed majority of creditors.

7.4. Types of Creditors

7.4.1 Financial Creditor: This means a person to whom a financial debt is owed & includes a legally assigned and transferred debt. Financial debt means debt along with interest which is disbursed against the consideration for the time value of money and includes loans, bonds, debentures, receivables sold or discounted, lease or hire purchase contracts, derivative transactions etc.

7.4.2 Operational Creditor: Means a person to whom an operational debt is owed & includes a legally assigned and transferred debt. Operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law and payable to the Central Government, any State Government, or any local authority.

7.4.3 Other Creditors: This class includes creditors which do not fall under either of the types of creditors, i.e. financial or operational creditors.
It is pertinent to note that only Financial Creditors or Operational Creditors can initiate CIRP against a Corporate Debtor.

7.5. Mechanism for CIRP against a Corporate Debtor (being a Company)

7.5.1 Application to initiate CIRP: A Financial Creditor or an Operational Creditor or the Corporate Debtor itself may make an application to the NCLT in case of default by a Corporate Debtor.

7.5.2 Acceptance or Rejection: In the case of an application filed by Financial Creditors, the NCLT may reject the application if it believes, no default has occurred. In case of an application filed by Operation Creditors, the NCLT may reject the application against the Corporate Debtor, if there exists a dispute or any arbitration/suit in relation to such dispute between the Corporate Debtor and the Operational Creditor. The NCLT must admit or reject the application within 14 days.

7.5.3 Process: Upon accepting the application, the adjudicating authority shall cause a public announcement of the insolvency resolution process to be made and appoints an interim resolution professional ("IRP"). The public announcement also specifies the last day for submission of claims of the creditors of the Corporate Debtor.

7.5.4 Moratorium: Once the application is accepted, the Adjudicating Authority shall declare a moratorium, prohibiting the institution of or continuation of pending suits or legal proceedings against the Corporate Debtor. The Moratorium also prohibits the Corporate Debtor from transferring, alienating, or disposing of any of its assets or interest therein.

7.5.5 IRP and Committee of Creditors: The IRP takes over the management of the Corporate Debtor. The IRP shall also endeavor to preserve the value of assets of the Corporate Debtor and manage its operations as a going concern. The IRP further, after collation of all claims received against the Corporate Debtor, constitutes a committee of creditors ("CoC"). The CoC consists of all financial creditors of the Corporate Debtor. The insolvency professional has to submit an information memorandum to the CoC for formulating a resolution plan.

7.5.6 Resolution Plan: A resolution plan is prepared by the Resolution Applicant and must be approved by 66 % of the voting share of the financial creditors who are part of the Committee of Creditors.

7.5.7 Approval of Resolution Plan: The resolution plan may be approved by the adjudicating authority which shall then be binding on the Corporate Debtor, its employees, members, creditors, and other stakeholders involved in the resolution plan.

7.5.8 Liquidation: In case of rejection of the resolution plan by the adjudicating authority or in case if the NCLT does not receive a resolution plan before the expiry of the CIRP period, it shall pass an order to liquidate the Corporate Debtor and appoint a liquidator to carry out the liquidation process. The liquidator then collates all the claims within the stipulated time and as per the provisions of the IBC, liquidates the assets of the Corporate Debtor. The proceeds from the sale of liquidation of assets shall be distributed in the order of priority provided under the IBC.

8. IBC in light of COVID-19

8.1. Due to the COVID-19 pandemic, the President promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 on 5 June 2020 ("Ordinance"). The Ordinance prohibits all kinds of creditors from initiating CIRP against a corporate debtor for any default arising on or after March 25 2020 for a period of 6 months.

8.2. The Ordinance mainly inserts Section 10A in the IBC which deals with selectively suspending the applicability of Section 7, 9, and 10 of the IBC to protect defaulters on account of situations beyond their control, from being pushed into insolvency proceedings under the IBC. The newly added Section 10A of IBC mainly deals with two aspects which are as follows:

8.2.1 No application shall be filled for invoking any default arising on or after 25 March 2020 for a period of 6 months or such further period not exceeding 1 year;

8.2.2 No application shall ever be filed for initiation of CIRP for defaults occurring during the said period.

8.3. The Ordinance also inserts sub-section (3) to section 66 of the IBC prohibiting the resolution professional from filing an application under Section 66(2) of the IBC. Section 66 of the IBC deals with fraudulent trading or wrongful trading i.e. transactions that are done to defraud the creditors.

MH CO LAW
100 YEARS
ADVOCATES & SOLICITORS

9. Pre-Packaged Insolvency Process for Micro, Small and Medium Enterprises ("MSMEs")

9.1. Due to the impact of the COVID-19 Pandemic on small businesses, which have been ravaged by Covid-19 pandemic-induced disruptions, the President promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 on 4 April 2021 ("Ordinance 2").

9.2. It is an informal arrangement for the resolution of the debt of a distressed company through an agreement between creditors and debtor, without initiation of formal insolvency proceedings.

9.3. The main aim behind the introduction of the Pre-packaged Insolvency Process is to provide an alternative insolvency resolution process to the bankrupt MSMEs in a timely and efficient manner. It provides them with the opportunity to restore their liabilities and start afresh while safeguarding the rights of the stakeholders and further, provides enough protection to prevent any potential misuse by the firms to avoid making payments to the creditors.

9.4. As notified, an MSME Corporate Debtor (CD) (as per Section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006) having defaulted for an amount more than Rs 10 Lakhs is eligible to make an application to initiate a Pre-pack insolvency process, provided that such the CD is also eligible to submit a resolution plan under Section 29A of the Code.

Chapter 10 - Data Protection

1. Introduction

1.1 Data protection of personal information is a sub-set of the right to privacy, embedded in Article 21 of the Constitution of India. We are in the information age where electronic forms of data, including sensitive personal data, can be accessed at will through multiple communication devices across locations. Rampant illegal access and misuse of personal data uploaded on social media have highlighted the need to have systems in place to protect the personal information and data of individuals.

1.2 In India, there is no law yet, passed by Parliament or the State Legislatures exclusively dealing with the right to privacy and data protection. However, these safeguards are achieved through various legislations in India that mandate confidentiality, security, integrity, and the protection of personal information disclosed to various service providers governed by such laws for the time being in force.

2. Historical Developments and Constitutional Recognition

2.1 Pre-2017, there are numerous Supreme Court judgments dealing with the right to privacy as a constitutional right but their conclusions were contradictory leading to confusion on the exact nature of this right.

2.2 In 2017, the Supreme Court constituted a 9-judge bench in KS Puttaswamy v Union of India (2017) 10 SCC 1 to put to rest the confusion relating to the nature of the right to privacy. Pursuant to the decision of the Supreme Court in the aforementioned matter, the right to privacy was recognized as a fundamental right. Privacy is now a constitutionally protected right under Article 21 of the Constitution of India.

3. Information Technology Act, 2000 (ITA)

3.1 The general law on data protection in India was introduced through an amendment to the ITA in 2009 and the enactment of the IT Rules (as defined below) in 2011.

3.2 The ITA was enacted on 9 June 2000 to address the growth of electronic-based transactions, to provide legal recognition of e-commerce and e-transactions, to facilitate e-governance, to prevent computer-based crimes, and ensure security practices and procedures in the context of the increased use of information technology worldwide. In 2009, the ITA was amended by the Information Technology (Amendment) Act, 2008 (IT Amendment). The primary objectives of the Amendment were protection of personal data and information and implementation of security practices.

3.3 In keeping with its objectives, the IT Amendment introduced the following important provisions in the ITA:

3.3.1 Section 43-A of the ITA provides that where a body corporate, processing, dealing or handling any SENSITIVE Information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate would be liable to pay damages by way of compensation to the person so affected.

(a) “body corporate” is defined as any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;

(b) “reasonable security practices and procedures” are defined to mean security practices and procedures designed to protect such information from unauthorized access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practice and procedures, as may be prescribed by the Central Government;

(c) “sensitive personal data or information” is defined to mean such personal information as may be prescribed by the Central Government.

3.3.2 Section 66-C of the ITA provides that whoever fraudulently or dishonestly makes use of the electronic signature, password, or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to Rs 1 lakh.

3.3.3 Section 66-D of the ITA provides that whoever, by means of any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.

3.3.4 Section 72-A of the ITA provides that save as otherwise provided in the ITA or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of a lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be

punished with imprisonment which may extend to three years, or with fine which may extend to Rs. 5 lakhs or with both.

4. The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (IT Rules)

4.1 Under the IT Rules:

4.1.1 "personal information" is defined to mean 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;

4.1.2 "sensitive personal data or information of a person" means such personal information which consists 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 a body corporate for providing service; (viii) any of the above information received by a body corporate for processing, stored or processed under a lawful contract or otherwise ("Sensitive Information"). It is provided that any information freely available or accessible in the public domain would not be regarded as Sensitive Information.

4.1.3 Under Rule 4 of the IT Rules, the body corporate or any person who on behalf of the body corporate collects, receives, possesses, stores, deals with or handles information of the provider of information must (a) have a privacy policy for handling of or dealing in personal information including Sensitive Information; (b) ensure that the policy is available for view by such providers of information who have provided such information under a lawful contract.

4.2 Under Rule 5 of the IT Rules:

4.2.1 Before the collection of information, the body corporate or any person on its behalf must obtain consent in writing from the provider of sensitive information regarding the purpose of usage before collecting such information;

4.2.2 A body corporate or person on its behalf must not collect Sensitive Information unless: (a) the information is collected for a lawful purpose connected with a function or activity of the body corporate or any person on its behalf; (b) the collection of the Sensitive Information is considered necessary for the purpose;

4.2.3 While collecting information directly from the person concerned, the body corporate or any person on its behalf must take steps as are, in the circumstances, reasonable to ensure that the person concerned has the knowledge of (a) the fact that the information is being collected; (b) the purpose for which the information is being collected; (c) the intended recipients of the information; (d) the name and address of: (i) the agency that is collecting the information; and (ii) the agency that will retain the information;

4.2.4 The body corporate or any person on its behalf must permit the providers of information, as and when requested by them, to review the information they have provided and ensure that any Sensitive Information found to be inaccurate or deficient is corrected or amended as feasible. In this regard, the body corporate is not responsible for the authenticity of the information provided;

4.2.5 The body corporate or person on its behalf must prior to the collection of information (including sensitive data or information) provide an option to the provider of information not to provide such information or data sought to be collected. The provider of the information shall, at any time while availing the services of the body corporate, have the option to withdraw (in writing) its consent given earlier to the body corporate. In such circumstances, the body corporate may choose not to provide the services.

4.2.6 The body corporate must set up a mechanism to address the discrepancies and grievances of the person providing the information in a time-bound manner. A Grievance Officer must be appointed whose details are provided on the body corporates website and such Grievance Officer must redress the grievances of the provider of information within one month of receipt of the grievance.

4.3 Under Rule 6 of the IT Rules, disclosure of Sensitive Information by the body corporate to any third party shall require prior permission from the provider of such information, who has provided such information under lawful contract or otherwise unless such disclosure has been agreed to in the contract between the body corporate and provider of information or where the disclosure is necessary for compliance of a legal obligation provided such information may be shared with a Government entity without obtaining the prior consent of the provider of such information;

4.4 It is also stated that any sensitive personal data on Information shall be disclosed to any third party by an order under the law for the time being in force.

4.5 Under Rule 7 of the IT Rules a body corporate or any person on its behalf may transfer Sensitive Information including any information to any other body corporate or person in India, or located in any other country, that ensures the same level of data protection that is adhered to by the body corporate as provided under the IT Rules. Such transfer is allowed only if it is necessary for the performance of the lawful contract between the body corporate or any person on its behalf and provider of such information or where such person has consented to such data transfer.

4.6 Under Rule 8 of the IT Rules:

4.6.1 A body corporate or any person on its behalf would be considered to have complied with reasonable security practices and procedures if they have implemented such security practices and standards and have a comprehensively documented information security programme.

4.6.2 The International Standard IS/ISO/IEC 27001 on "Information Technology – Security Techniques – Information Security Management System – Requirements" is one such standard that if adopted by the body corporate is deemed to be a reasonable security practice and procedure.

4.6.3 The body corporate or a person on its behalf who have implemented either IS/ISO/IEC 27001 standard or the codes of best practices for data protection as approved and notified under sub-rule (3) shall be deemed to have complied with reasonable security practices and procedures provided that such standard or the codes of best practices have been certified or audited on a regular basis by entities through an independent auditor, duly approved by the Central Government.

5. Personal Data Protection Bill, 2021 ("Bill")

5.1 The Bill, is a proposed law, which is yet to be passed by the Indian Parliament. Once passed, the Bill would govern the processing of data by entities in India. The Bill seeks to regulate the processing of 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, or any combination of such features, or any combination of such features with any other information ("Personal Data"). The Bill also grants extraterritorial jurisdiction in certain cases where the processing of Personal Data is done outside India if such processing is done in connection with any business carried out within India or in connection with any activity involving profiling of natural persons within the territories of India. Once brought into force, the Bill would repeal Section 43A of the ITA. Please find below certain salient features of the Bill.

5.2 Consent: The consent of the natural person to whom the Personal Data relates to (Data Principal) must be acquired no later than the commencement of the processing of data. The burden of proof to establish the validity of consent shall lie solely on the person receiving / processing the Data (Data Fiduciary). The Data Fiduciary would also be required to give notice to the Data Principal at the time of collecting Personal Data, inter alia specifying the purpose of collecting Personal Data, entities/individuals with whom such data may be shared, and information regarding any cross-border transfer of the Personal Data that it intends to carry out.

5.3 Data Processor: If the Data Fiduciary wants to engage any other entity or individual to process Personal Data on its behalf (Data Processor), it can do so only after entering into a contract with such Data Processor. The Data Processor, appointed or engaged, must further not engage any other Data Processor unless the consent of the Data Fiduciary has been obtained.

5.4 Storage of Data: According to the Bill, the Data Fiduciary would be required to undertake a periodic review to determine whether it is necessary to retain the Personal Data in its possession and shall not retain any Personal Data beyond the period necessary to satisfy the purpose for which it was processed unless the consented by the Data Principal.

5.5 Financial Data is defined as any number or other personal data used to identify an account opened by, or card or payment instrument issued by a financial institution to a data principal or any personal data regarding the relationship between a financial institution and a data principal including financial status and credit history.

5.6 Sensitive Personal Data means personal data revealing, related to, or constituting, as may be applicable (a) passwords; (b) financial data; (c) health data; (d) official identifier; (e) sex life; (e) sexual orientation; (f) biometric data; (g) genetic data; (h) transgender status; (i) intersex status; (j) caste or tribe; (k) religious or political belief or affiliation; or (l) any other category of data specified by the Data Protection Authority of India (Authority) under Section 22 of the Bill.

5.7 Cross Border Transfer of Data: Sensitive Personal Data may be transferred outside India but shall continue to be stored in India. Sensitive Personal Data only be transferred outside India for the purpose of processing, when explicit consent is given by the data principal for such transfer, and where:-

(a) The transfer is made subject to standard contractual clauses or intra-group schemes that have been approved by the Data Protection Authority of India (Authority); or

(b) The Central Government, after consultation with the Authority, has prescribed those transfers to a particular country, or to a particular international organisation is permissible; or

(c) The Authority approves a particular transfer as permissible due to a situation of necessity; or

(d) In addition to clause (i) or (ii) being satisfied, the Data Principal has consented to such transfer of Personal Data or sensitive Personal Data.

5.8 Further, the Central Government has the power to declare certain categories of Personal Data as "Critical Personal Data" and processing of such data must be done in India.

5.9 Safeguards & Privacy Policy: The Data Fiduciary should have a privacy policy in place, specifying, inter alia, the managerial, organizational, business practices and technical systems designed to anticipate, identify and avoid harm to the Data Principal. The privacy policy must also be displayed on the website of the Data Fiduciary. The Company shall implement necessary security safeguards like encryption, steps to prevent unauthorized access to Personal Data/hacking, in order to avoid any risk associated with Personal Data. Further, the Company must also undertake a review of its security safeguards periodically.

5.10 Data Protection Authority: The Central Government must establish an authority to be called the Data Protection Authority of India ("Authority"). It shall be the duty of the Authority to protect the interests of the Data Principals, prevent any misuse of Personal Data, and promote awareness of data protection. The Authority takes on both an advisory as well as a managerial role in various aspects of the Bill. The Authority also has the power to issue directions to various data processors and Data Fiduciaries. A Data Fiduciary must inform the Authority about a breach of any Personal Data processed by it.

5.11 Penal Provisions: Stringent punishments and penalties have been prescribed for contravention of the rules laid down for processing of Personal Data with fines extending up to 4% of the total worldwide turnover of the contravening party The bill, inter alia prescribes the following penalties for non-compliance of its provisions:

a) Failure to take appropriate action in case of breach of Personal Data - penalty which may extend up to five crore rupees (INR 5,00,00,000) or two per cent of its total worldwide turnover of the preceding financial year, whichever is higher;

b) Failure to implement security safeguards or cross-border transfer of Personal Data, in contravention of the conditions specified in the Bill - penalty which may extend to fifteen crore rupees (INR 15,00,00,000) or four per cent of its total worldwide turnover of the preceding financial year, whichever is higher.

5.12 Furthermore, the Data Principal has been given the right to claim compensation in case of any harm incurred from the contravening actions of the Data Fiduciary or the data processor.

Glossary

A

- AD - Authorized Dealer
- Arbitration Act - The Arbitration and Conciliation Act, 1996
- ARF - Advance Remittance Form

B

- Bill - Personal Data Protection Bill, 2018

C

- Companies Act - Companies Act, 2013
- Contract Act - The Indian Contract Act, 1872.
- Copyright Act - The Copyrights Act, 1957
- Copyright Rules - The Copyright Rules, 2013
- CPC - The Code of Civil Procedure, 1908

D

- DDT - Dividend Distribution Tax
- DEA - Department of Economic Affairs
- Designs Act - The Designs Act, 2000
- DGP - Director General of Police
- DIN - Director Identification Number
- DRT - Debt Recovery Tribunal
- DTAA - Double Tax Avoidance Agreements

E

- ECB - External Commercial Borrowings
- EPF Act - Employees Provident Fund and Miscellaneous Provisions Act, 1952
- ESI Act - Employees’ State Insurance Act, 1948
- ESOP's - Employee Stock Option Plans

F

- FCNR - Foreign Currency Non-resident
- FCNR Account - Foreign Currency Non-resident Account
- FIPB - Foreign Investment Promotion Board
- FDI - Foreign Direct Investment
- FEMA - Foreign Exchange Management Act,1999
- FVCI - Foreign Venture Capital Investor

G

- GDP - Gross Domestic Product
- GST - Goods and Services Tax

I

- IBC - The Insolvency and Bankruptcy Code, 2016
- IPR - Intellectual Property Rights
- IRDA - Insurance Regulatory and Development Authority
- ITA - Information Technology Act, 2000
- IT Rules - The Information Technology (Reasonable Security Practices
- and Procedures and Sensitive Personal Data or Information) Rules, 2011

L

- LLP - Limited Liability Partnership
- LLP Act - Limited Liability Partnership Act, 2008
- LTCG - Long Term Capital Gains

M

- MCA - Ministry of Corporate Affairs

Glossary

N

- NCLT - National Company Law Tribunal
- NRE - Non-Resident External Rupee
- NRE Account - Non-resident External Account
- NRI - Non-Resident Indian

P

- Patents Act - The Patents Act, 1970
- Patents Rules - The Patents Rules, 2003
- PIO - Person of Indian Origin

R

- ROC - Registrar of Companies
- RBI - Reserve Bank of India
- REIT - Real Estate Investment Trust
- RERA Act - The Real Estate (Regulation and Development) Act, 2016
- RFPI - Registered Foreign Portfolio Investor

S

- SEBI - Securities and Exchange Board of India
- Shops Act - The Shops and Commercial Establishment Acts enacted in various Indian states
- STCG - Short term Capital Gains
- STT - Securities Transaction Tax

T

- Takeover Code - SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
- Trademark Act - The Trademarks Act, 1999
- TRAI - Telecom Regulatory Authority of India
- TRIPs - Trade Related Aspects on Intellectual Property Rights

MANSUKHLAL HIRALAL & CO

ADVOCATES & SOLICITORS

CONTACT

Mumbai Office

Surya Mahal, 2nd Floor,
5, Burjorji Bharucha Marg Fort,
Mumbai - 400 023, India

+91 22 4056 5252
contact.mumbai@mhcolaw.com

Delhi Office

C-9, Lower Ground Floor,
Jangpura Extension,
New Delhi - 110 014

+91 11 4019 6496
contact.delhi@mhcolaw.com