AZB & PARTNERS
ADVOCATES & SOLICITORS

FREQUENTLY ASKED QUESTIONS: DOING BUSINESS IN INDIA

Essential Answers on Establishing and Operating a Business in India

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PREFACE

India is a highly diverse country - in languages, religions, traditions, cuisine, and demographics. The country is divided into 28 states and 8 union territories. Each state and union territory has its own distinct language, culture, and administrative set-up. There are 22 scheduled languages, 120 major languages, and 1,600 minor languages spoken across the country. India has a total population of nearly 1.484 billion, making India the world's most populous country with a population density of approximately 492 people per km². The country has a young demography with over half of India's population being under the age of 30; only 7% are 65 years or older. The median age is about 28.7 years.

India is predominantly Hindu (about 80%) yet has the world's second-largest Muslim population (14.2%), as well as significant Christian, Sikh, Buddhist, and Jain communities. There are hundreds of ethnic groups, each with distinct traditions, dress, and food habits. Practices, festivals, and cuisines vary significantly between regions.

As of 2025, India has around 65 metropolitan cities, which are major urban centers with populations over 1 million. These include Mumbai, Delhi, Chennai, Bangalore, Hyderabad, Ahmedabad, and Pune. India has about 12 major ports, with key ones being Mumbai, Chennai, Kolkata, Visakhapatnam, and Kochi. Additionally, there are over 200 minor and intermediate ports spread across the coast.
India has around 135 operational airports as of 2025, including major international hubs in Delhi, Mumbai, Kolkata, Chennai, Bengaluru, Hyderabad, and others.
India has one of the world's largest railway networks. The Indian Railways operates over 68,000 route kilometers with more than 7,000 stations, connecting virtually every part of the country.

This resource is designed to help foreign investors, entrepreneurs, and multinational organizations navigate the key legal and regulatory considerations essential for establishing and operating a business in India's dynamic market. Whether you are new to India or seeking to expand your operations, this FAQ aims to clarify the complexities of India's regulatory environment and empower you with practical insights for informed decision-making.

The questions in the FAQ are arranged topically as follows:

- Navigating entry routes.
- Understanding the corporate structure of a limited company and a limited partnership.
- Foreign direct investment into India.
- Introduction to M&A routes.
- Employment: Law and Practice.
- Laws on Data Privacy.
- Overview of Intellectual Property Right Protection in India.
- Introduction to Anti-trust laws.

Snapshot of the Indian Economy

India is one of the fastest-growing economies globally, with a GDP growth of around 6.2% in the fiscal year ending March 2025. In 2025, India became the world's 4th largest economy, surpassing Japan in nominal terms. Given its heavy manufacturing history, India attracts substantial domestic and foreign investments due to a large skilled workforce, a massive consumer base, improved ease of doing business, and a stable political environment. Policy reforms and government incentives, such as single window clearance and relaxed FDI norms have eased doing business in India.

The top Indian states receiving the most Foreign Direct Investment (FDI) in recent years are Maharashtra, Karnataka, Gujarat, Delhi, and Tamil Nadu. These five states dominate India's FDI landscape, collectively accounting for the majority of inbound foreign investment.

- **Maharashtra**: The top destination for FDI. The clear leader by GDP and FDI inflows, with major hubs in Mumbai and Pune. It offers advanced infrastructure, a large skilled workforce, and a diversified industrial base—key for automotive, electronics, pharmaceuticals, and IT manufacturing. Maharashtra hosts many global investors due to pro-business policies and its status as India's commercial heart.

- **Karnataka:** The Silicon Valley of India. It has a global reputation as an IT and innovation hub, thriving startup ecosystem, and strong industrial corridors for aerospace, biotechnology, and electronics. It has received about 15-20% of India's total FDI. Bengaluru anchors a robust ecosystem including aerospace PSUs and foreign R&D centers. The state's high innovation profile and skilled talent make it especially attractive for foreign high-tech and specialized manufacturing investments
- **Gujarat**: Third highest FDI destination of India. Gujarat attracts investment through its advanced industrial parks, ports and proactive state government. The GIFT City is also located in Gujarat.
- **Delhi**: Fourth highest FDI destination of India. The National Capital Region's business climate, world-class infrastructure, and policy incentives support strong inflows into IT-BPM, health care, and manufacturing. This region is a vital automotive and electronics hub, with major export-oriented industrial estates. The NCR offers foreign companies' proximity to India's largest consumer market and advanced infrastructure for both production and warehousing.
- **Tamil Nadu**: Fifth highest FDI destination of India. Renowned for its strong manufacturing sector across automobiles, electronics, textiles, and engineering. Chennai and adjacent industrial corridors host several foreign automotive and electronics giants (e.g., Foxconn, Tata). With the largest number of factories in India, Tamil Nadu benefits from three major ports, a robust logistics backbone, and proactive state incentives—making it a top choice for global manufacturers.

Indian Regulatory Landscape

India's regulatory framework is characterized by a quasi-federal system featuring both central (Union) and state-level regulations. The Constitution of India is the source of legal authority and empowers Parliament and the Legislatures of States and Union Territories to enact statutes. There is also a vast body of laws known as subordinate legislation in the form of rules, regulations, and by-laws made by Central and State Governments and local authorities like Municipal Corporations, Municipalities, Gram Panchayats and other local bodies. This subordinate legislation is made under the authority conferred or delegated either by Parliament or the concerned Legislature of the State or Union Territory. The decisions of the Supreme Court are binding on all Courts within the territory of India.

Enactment Of Laws

Article 246 of the Constitution addresses the distribution of legislative powers between the Union legislature (Parliament) and state legislatures. The Seventh Schedule of the Constitution contains three lists: a Union List, a State List, and a Concurrent List. These lists set out the various subjects on which Parliament and State Legislatures are empowered to make laws.

The Indian Parliament has the power to make laws on matters enumerated in the Union List. State Legislatures have the power to make laws on matters enumerated in the State List. Both the Centre and States have the power to legislate on matters enumerated in the Concurrent List, with the laws made by the Parliament prevailing over any repugnancy or conflict between the laws made by the Parliament and the States. Parliament has power to make laws on matters not included in the State List or the Concurrent List.

All laws passed by the Parliament shall come into force only on receiving the assent of the President and in the case of state laws, the laws passed by the state legislature shall come into force on receiving the assent of the Governor.

Applicability Of Laws

Laws made by Parliament may extend throughout or in any part of the territory of India and those made by State Legislatures generally apply only within the territory of the State concerned. Hence, variations are likely to exist from State to State in provisions of law relating to matters falling in the State and Concurrent Lists.

Judiciary

One of the unique features of the Indian Constitution is that, notwithstanding the adoption of a federal system and existence of Union and State Acts in their respective spheres, it provides for a single integrated system of courts to administer both Union and State laws. At the apex of the entire judicial system is the Supreme Court of India followed by the High Courts in each State or group of States. Under the administration of each High Court are the District Courts. Village/Panchayat Courts also function in some States under various names like Nyaya Panchayat, Gram Nyayalaya, Gram Kachheri to decide civil and criminal disputes of petty and local nature. Each State is divided into judicial districts

presided over by a District and Sessions Judge, which is the principal civil court of original jurisdiction and can try all offences including those punishable with death. The District and Sessions Judge is the highest judicial authority in a district. District Courts have courts of civil jurisdiction, presided over by judges known in different States as Munsifs, Sub-Judges, Civil Judges. Similarly, the classes of criminal courts include the Chief Judicial Magistrates and Judicial Magistrates of First and Second Class.

Regulatory Governance

Independent regulators govern large sectors of the Indian economy from foreign investment, tax, financial markets, anti-trust, etc. and the regulations, rules, guidelines and notifications issued by these regulators form an important part of the institution of governance in India and are key to the understanding of the legal framework for doing business in India. The list of key financial and tax regulators is set out below:

Tax regulators

- Central Board of Indirect Taxes & Customs
- Central Board of Direct Taxes

Foreign direct investment

- Reserve Bank of India
- Directorate General of Foreign Trade
- Ministry of Finance
- Ministry of Commerce
- Department for Promotion of Industry and Internal Trade

Company or LLP compliance

- Director General of Corporate Affairs
- Registrar of Companies

Securities laws

- Securities and Exchange Board of India

AML

- Directorate of Revenue Intelligence
- Directorate of Enforcement
- Central Bureau of Investigation
- Financial Intelligence Unit-India
- Serious Fraud Investigation Office

Anti-trust

- Competition Commission of India

Insolvency and Winding up

- Insolvency and Bankruptcy Board of India

We now present this resource to enable the reader to have an overview of the regulatory landscape for doing business in India.

NAVIGATING ENTRY ROUTES.

Q1. What are the legal forms of entities to do business in India?

(a) **Company limited by shares** – A company is a legal person that enjoys rights and is subject to obligations that are distinct from those enjoyed or borne by its members or shareholders. The company is not an agent of its members or vice versa. Therefore, the liability of the company is not as such the liability of its members. The liability of the members of the company is limited to the share capital they hold in the company. All companies have to be incorporated and registered as such under the Companies Act, 2013. A company is capable of holding property in its own name, suing and being sued in its own name, and has perpetual succession i.e. it is unaffected by the death of a shareholder or the exit of a shareholder from a company. A company is managed by its shareholders and its board of directors.

There are two broad types of companies limited by shares in India:

(i) Private Limited Company

(ii) Public Limited Company.

The key differences are set out in Q7.

Every company limited by shares can receive foreign direct investment, subject to the sectoral and pricing conditions explained in Q21, 22 and 24.

(b) **Limited Liability Partnership Act ("LLP")** – As suggested by the name, LLPs are entities where the liabilities of the partners are limited. LLPs are hybrid entities, incorporating the features of both partnerships and companies. Similar to a company, an LLP has a board of designated partners (analogous to the board of directors of a company) and the body of partners (analogous to the shareholders of a company). An LLP is required to have a minimum of 2 (two) designated partners and at least 1 (one) of them should be an Indian Resident. Foreign investment is allowed in LLPs operating in sectors where one hundred percent (100%) Foreign Direct Investment is allowed through the automatic route and there are no FDI-linked performance conditions.

(c) **Partnership** – 2 (two) or more persons can form a partnership under the Indian Partnership Act, 1932 and agree to share the profits or losses arising out of the business carried on by them. A partnership is based on the law of agency with each partner becoming the agent of the other. A partnership is not a separate legal entity similar to a sole proprietorship and unlike a company structure. Therefore, the partners of a partnership firm have unlimited liability for all acts done by or through the partnership firm. Under the provisions of the Indian Partnership Act, 1932 read with the Registration Act, 1908, it is not mandatory to register the partnership unless the partnership firm holds immovable property in its name. Registration also enables the firm and the partners to file a suit by or in the capacity of a firm or as a partner of a firm. Foreign investment is not allowed in partnership firms. NRIs may set up partnership firms with funds earned and held in India, and such investments are not repatriable abroad. It will be treated as a domestic investment.

(d) **Sole Proprietorship** – A sole proprietorship is legally indistinguishable from its owner, meaning the owner has unlimited liability. In India, such businesses don't require mandatory registration to start a business in India. Foreign investment is not allowed in sole proprietorships. NRIs may set up proprietorships with funds earned and held in India, and such investments are not repatriable abroad. It will be treated as a domestic investment.

Q2. Can a foreign company set up a presence in India without incorporating a new entity?

With the prior approval of the Reserve Bank of India, a foreign company can set up a branch office, or a project office, or a liaison office in India without setting up another legal entity in India. The Foreign

Exchange Management (Establishment in India of a Branch Office or a Liaison Office or a Project Office or any Other Place of Business) Regulations, 2016, regulates the manner in which these offices can be set up as well as the functions of such offices. The foreign company which seeks to set up the office shall make an application in form FNC to an Authorised Dealer Category-I Bank. Once the approval is provided, if the foreign company was not able to open the branch/project/liaison office within 6 (six) months from the date of approval, the approval will stand cancelled automatically. If such failure to open within the time frame was attributable to reasons beyond the control of the foreign company, the Authorised Dealer Category- I Bank may at its discretion consider granting a further extension by 6 (six) months. Any extension of time beyond the additional 6 (six) months will require the prior approval of Reserve Bank of India.

The differences between a branch office, project office and a liaison office are set out below:

	Branch Office	**Project Office**	**Liaison Office**
Eligibility	A person resident outside India having a profit-making track record during the immediately preceding 5 (five) financial years in the home country and net worth of not less than USD 100,000 or its equivalent. Net worth shall mean the total paid up capital and free reserves, less intangible assets as per the latest audited balance sheet or account statement certified by a Certified Public Accountant or any Registered Accounts Practitioner by whatever name called. An applicant that does not meet the criteria and is a subsidiary of another company who meets the criteria may submit a letter of comfort from the parent company, basis which the eligibility shall be met.	The Foreign entity has secured a contract to execute a project in India from an Indian company, and the project is funded through either one of the following means: (a) directly by inward remittance from abroad. (b) by a bilateral or multilateral International Financing Agency that has been cleared by an appropriate authority. (c) the India entity awarding the contract has been granted term loan by a Public Financial Institution or a Bank in India for the Project.	A person resident outside India having a profit-making track record during the immediately preceding 3 (three) financial years in the home country and net worth of not less than USD 50,000 or its equivalent. An applicant that does not meet the criteria and is a subsidiary of another company who meets the criteria may submit a letter of comfort from the parent company, basis which the eligibility shall be met.
Permitted activities	(a) Export/import of goods. (b) Rendering professional or consultancy services. (c) Carrying out research work in which the parent company is engaged. (d) Promoting technical or financial collaborations between Indian companies and parent or overseas group company. (e) Representing the parent company in India and acting as	Meant to represent the interests of the foreign company executing a project in India, hence permitted activities are limited to that project.	(a) Representing the parent company/group companies in India. (b) Promoting export/import from/to India. (c) Promoting technical/financial collaborations between parent/group companies and companies in India. (d) Acting as a communication channel between the

	Branch Office	Project Office	Liaison Office
	buying/selling agent in India. (f) Rendering services in Information Technology and development of software in India. (g) Rendering technical support to the products supplied by parent/group companies. (h) Representing a foreign airline/shipping company.		parent company and Indian companies.
Restricted Sectors	BO/PO/LO cannot be set up for the following sectors: • Lottery Business including Government/private lottery, online lotteries, etc. • Gambling and Betting including casinos etc. • Chit funds • Nidhi company • Trading in Transferable Development Rights (TDRs) • Real Estate Business or Construction of Farm Houses • Atomic Energy • Railway operations • Legal profession Setting up a BP/PO/LO in the sectors of Defence, Telecom, Private Security and Information and Broadcasting sector will require prior government approval.		
Shelf-life of approval	No statutory time limit has been prescribed, valid till voluntary Closure of office or winding up.	No statutory time limit has been prescribed, valid till voluntary Closure of office or winding up.	For a period of 3 (three) years and may extend the approval for another 3 (three) years by approaching the AD Category-I bank, provided Annual Activity Certificates for the previous years have been duly filed and account of the LO maintained with the designated AD Cat-I is in accordance to the approval letter. However, NBFCs and entities engaged in construction and development sectors validity is for 2 (two) years, with no further extension (excluding infrastructure development companies) and must either close down or be converted into a Joint Venture/Wholly Owned Subsidiary in conformity with the extant FDI policy.

	Branch Office	Project Office	Liaison Office
Permitted credits to LO/BO/PO's bank account	Funds from head office through normal banking channels for meeting office expenses. Legitimate receivables arising in the process of its business operations.	Foreign currency receipts from the Project Sanctioning Authority. Remittances from parent/group company abroad or bilateral/ multilateral international financing agency.	Funds from head office through normal banking channels for meeting office expenses Refund of security deposits paid from LO's account Refund of taxes, duties, etc Sale proceeds of assets of the LO
Permitted debits from LO/BO/PO's bank account	Only for meeting the local expenses of the office. Remittance of profit/winding up proceeds.	Project related expenditure	Only for meeting the local expenses of the office
Remittance of profit or surplus including on closure of office	Profits may be remitted outside India net of applicable Indian taxes, provided the following documents are produced to the satisfaction of the AD Cat-I handling the remittance: (a) A certified copy of the audited Balance Sheet and Profit and Loss account for the relevant year. (b) A certificate from a Chartered Accountant certifying that the entire remittal profit has been earned through permitted activities, that such profit does not include any profit arising from revaluation of the branch's assets, and detailing the manner in which the remittal profit has been determined. (c) Assets on closure or remittance of its winding up proceeds may also be remitted by submitting documents listed below: (d) A copy of the Reserve Bank's permission for establishing the branch office in India, wherever applicable; (e) Auditor's certificate: (i) indicating the	Intermittent remittances by pending winding up/completion of the project may be remitted outside India by applying to AD Cat-I bank by submitting the following documents: (a) certified copy of the final audited project accounts; (b) the statutory auditor's certificate showing the manner of arriving at the remittal surplus and confirming that sufficient provisions have been made to meet the liabilities in India including Income Tax, etc.; and (c) An undertaking from the project office that the remittance will not, in any way, affect the completion of the project in India and that any shortfall of funds for meeting any liability in India will be met by inward remittance from abroad.	Assets on closure or remittance of its winding up proceeds may also be remitted by submitting documents listed below: (a) A copy of the Reserve Bank's permission for establishing the branch office in India, wherever applicable; (b) Auditor's certificate: indicating the manner in which the remittal amount has been arrived and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets; (i) confirming that all liabilities in India including arrears of gratuity and other benefits to the employees etc., of the branch/office have been either fully met or adequately provided for; (ii) confirming that no income accruing from sources outside India (including

	Branch Office	Project Office	Liaison Office
	manner in which the remittal amount has been arrived and supported by a statement of assets and liabilities of the applicant, and indicating the manner of disposal of assets; (ii) confirming that all liabilities in India including arrears of gratuity and other benefits to the employees etc., of the branch/office have been either fully met or adequately provided for; (iii) confirming that no income accruing from sources outside India (including proceeds of exports) has remained un-repatriated to India; and (iv) confirming that the branch/office has complied with all regulatory requirements stipulated by the Reserve Bank of India from time to time regarding functioning of such offices in India. (f) A confirmation from the applicant that no legal proceedings are pending in any Court in India and there is no legal impediment to the remittance; and (g) A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the office in India.		proceeds of exports) has remained un-repatriated to India; and (iii) confirming that the branch/office has complied with all regulatory requirements stipulated by the Reserve Bank of India from time to time regarding functioning of such offices in India. (c) A confirmation from the applicant that no legal proceedings are pending in any Court in India and there is no legal impediment to the remittance; and (d) A report from the Registrar of Companies regarding compliance with the provisions of the Companies Act, 2013, in case of winding up of the office in India.

Q3. What is a foreign company under the Companies Act, 2013?

A "*foreign company*" is defined under the Companies Act, 2013 as, any company or body corporate incorporated outside India which has a place of business in India whether by itself or through an agent, physically or through electronic mode; and conducts any business activity in India.

Therefore, a foreign company that does not have an office or a legal entity in India and yet has operations and a presence in India, is required to register as a "foreign company" under the provisions of the Companies Act, 2013.

Every foreign company within 30 (thirty) days of the establishment of its place of business in India, deliver to the Registrar of Companies, for registration of the following documents:

(a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language;

(b) the full address of the registered or principal office of the company;

(c) a list of the Directors and secretary of the company containing such particulars as may be prescribed;

(d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;

(e) the full address of the office of the company in India which is deemed to be its principal place of business in India;

(f) particulars of opening and closing of a place of business in India on earlier occasion or occasions; and

(g) declaration that none of the Directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad.

Every foreign company operating in India is required to clearly display its name and the country of incorporation outside each of its offices or business locations in India, using legible English characters as well as characters of the local language commonly used in that area.

Additionally, the company must include its name and country of incorporation in English on all business letters, billheads, letter paper, notices, and other official publications. If the liability of the members of the company is limited, it must also disclose this fact in all abovementioned documents and publications in legible English, and prominently display the same outside each office or place of business in both English and the local language.

Every calendar year, foreign companies are required to file with the Registrar of Companies, their annual balance sheet and profit and loss account and the list of all places of business established by them in India as of the date of the balance sheet. If the documents are not in English, a certified translation of the same in the English language should be filed.

Foreign companies must maintain at its registered office books of account and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices, if any, and explain the transactions effected both at the registered office and its branches and such books shall be kept on accrual basis and according to the double entry system of accounting.

Foreign companies including every director, officer or other employee of the company, are required to render all assistance to the Registrar or inspector when they call for the books of account and other books and papers and furnish them with such statements, information or explanations to the Registrar

or inspector in such form as may require in connection with such inspection.

Foreign companies are also required to register any charges on properties they create or acquire within 30 (thirty) days, following the prescribed process. They must also inform the Registrar in the prescribed form within 30 (thirty) days when any registered charge is fully paid or satisfied.

Where fifty percent (50%) or more of the paid-up share capital of a foreign company is held by one or more citizens, companies or bodies corporate incorporated in India, singly or in the aggregate, must also additionally issue a prospectus offering to subscribe to securities of the foreign company. Before circulating or publishing a prospectus it has to be dated and signed, and must contain the following particulars, in addition to the ones required for a regular prospectus of an Indian company:

(i) the instrument constituting or defining the constitution of the company;

(ii) the enactments or provisions by or under which the incorporation of the company was effected;

(iii) address in India where the said instrument, enactments or provisions, or copies thereof, and if the same are not in the English language, a certified translation thereof in the English language can be inspected;

(iv) the date on which and the country in which the company would be or was incorporated; and

(v) whether the company has established a place of business in India and, if so, the address of its principal office in India.

Any statement purporting to be made by an expert in a prospectus, must be accompanied by their written consent to the issue of the prospectus with the statement included in the form. Such a prospectus should not be circulated unless a certified copy of the prospectus (approved by the company's chairperson and two directors) is submitted to the Registrar for registration. The prospectus must clearly state that this copy has been delivered, and it must include any required consents and other prescribed documents.

Q4. Factors on choice of entity

Factors	Company	LLP
Separate Legal Entity	Yes	Yes
Registration Required	Yes (ROC, MCA SPICe+)	Yes (ROC)
Minimum Members	2 (private), 7 (public)	2 partners
Liability Protection	Limited	Limited to partner act
Audit Requirements	Yes (threshold-based)	Yes (turnover-based)
Suitable for VC/PE	Yes	Difficult
Exit Options	Multiple, clear via law	Transfer/ dissolution
Statistics (2025)	2M registered companies	<200K LLPs
Personal Asset Risk	No (except fraud/ director liability)	No (except misconduct)

Market Perception	High credibility	Growing in services

To conclude, promoters and investors often prefer the company structure for its comprehensive combination of governance, liability protection, funding flexibility, scalability, and exit options — all of which support ambitious growth and external investment needs better than LLPs, partnerships, or sole proprietorships. The LLP is ideal for a small number of individuals who intend to maintain the business with everyone involved in its management, making the division of management between the board and the shareholders as applicable in a company unnecessary and cumbersome. The LLP would be more suited for family run businesses which are meant to be closely held.

Q5. Process for setting up BO, LO, PO

The application for establishing BO/LO/PO in India may be submitted by the non-resident entity in Form FNC to a designated AD Category - I bank (i.e. an AD Category – I bank identified by the applicant with whom they intend to pursue banking relations).

The AD Category-I bank conducts due diligence in respect of the applicant's background, adherence to the eligibility criteria, antecedents of the promoter, nature and location of activity of the applicant, sources of funds, compliance with the extant KYC norms, etc.

The AD Category-I bank shall forward a copy of the Form FNC along with the details of the approval proposed to be granted by it to the General Manager, Reserve Bank of India, CO Cell, New Delhi, for allotment of Unique Identification Number (UIN) to each BO/LO.

After receipt of the UIN from the Reserve Bank, the AD Category-I bank shall issue the approval letter to the non-resident entity for establishing BO/LO in India.

There is a general permission to non-resident companies to establish POs in India, provided they have secured a contract from an Indian company to execute a project in India. Also, the project must have secured the necessary regulatory clearances; and is funded directly by inward remittance from abroad; or the project is funded by a bilateral or multilateral International Financing Agency, or a company or entity in India awarding the contract has been granted Term Loan by a Public Financial Institution or a bank in India for the Project.

On receiving the approval to set up a BO/LO/PO, the non-resident entity shall inform the designated AD Category I bank as to the date on which the BO/LO/PO has been set up.

All applications for establishing a BO/LO in India by foreign banks and insurance companies will be directly received and examined by the Department of Banking Regulation (DBR), Reserve Bank of India, Central Office and the Insurance Regulatory and Development Authority (IRDA), respectively. No UIN for such representative offices is required from the Foreign Exchange Department, Reserve Bank of India.

There is a general permission to non-resident companies for establishing BO in the Special Economic Zones (SEZs) to undertake manufacturing and service activities subject to the conditions that:

(a) such BOs are functioning in those sectors where 100% FDI is permitted;

(b) such BOs comply with the provisions applicable to foreign companies (see Q3) under the Companies Act, 2013; and

(c) such BOs function on a stand-alone basis.

UNDERSTANDING THE CORPORATE STRUCTURE OF A LIMITED COMPANY AND A LIMITED PARTNERSHIP.

Q6. Differences between a limited liability company and an LLP.

Criteria	Company	LLP
Legislation	Companies Act, 2013 and various Rules made thereunder.	The Limited Liability Partnership Act, 2008 and various Rules made thereunder.
Minimum directors / designated partner	Minimum two directors in case of Private company and minimum three in case of public company.	Minimum 2 (two) Designated Partner
Minimum partners/ shareholders	Minimum two shareholders in case of private company and minimum seven in case of public company.	Minimum 2 (two) partners.
Who can be a director / designated partner	Any individual who is not disqualified under section 164 of Companies Act, 2013 and if a citizen of a land bordering country, has a security clearance. Every individual who is seeking to be appointed as a director must have a Director Identification Number as a precondition to the appointment.	Every designated Partner must be an individual and obtain Designated Partner Identification Number (DPIN).
Residency requirement of director/ designated partners	At least one Director shall be a resident - who has stayed in India for not less than 182 days during the financial year. (For newly incorporated companies, the 182 days shall apply proportionately at the end of the financial year in which it is incorporated). **Security Clearance requirement-** Provided further that in case the person seeking appointment is a national of a country which shares land border with India, necessary security clearance from the Ministry of Home Affairs, Government of India, shall also be attached along with the consent.	At least one designated partner shall be a resident - who has stayed in India for not less than 120 days during the financial year.
Limited liability	Shareholders have limited liability- they are only liable up to the amount they have invested in the company.	Partner's liability is limited to the amount of capital contribution, except in cases of fraud or wrongful acts.
Articles of association – what should it contain, how much of the content is dictated by law. Table F	AOA shall contain regulations for management of the Company which at the minimum shall have such provisions as set out in Table F of the Companies Act, 2013.	LLP is governed by the LLP Agreement, which outlines the rights and duties of partners, the form of contribution, profit sharing ratio and any other matter that the partners agree on in relation to the management of the LLP. The LLP Agreement is entirely contractual,

Criteria	Company	LLP
		and the law does not provide for any minimum stipulations other than as set out in the First Schedule of the LLP Act, 2008 in the event the partners have not arrived at an agreement.
How to raise capital	• Public Issue - IPO, FPO, Debentures and Bonds. • Private Placement of share capital or securities • Rights Issue of shares	Funds can be raised through partner contributions and loans.
Nexus of shareholding percentage and profit entitlement	Profit entitlement is based on shareholding percentage and shareholders receive dividends proportional to their shareholding.	Profit sharing is determined by the LLP Agreement, which specify profit sharing ratios irrespective of capital contribution.
Transfer of Shares /Interest	The shares of a private limited company are not freely transferable. The shares can be subject to such restrictions as set out in the articles or any other contract between the shareholders. Further, any transfer of shares has to be approved by the board of directors of the company of a private limited company. The shares of a public limited company are freely transferable, unless shareholders enter into contracts amongst themselves imposing restrictions on each other. The onus of complying with such contracts are on the shareholders and not on the company. Transfer of shares has to be approved by the board of directors of the company of a public unlisted company. Shares of a listed company are freely transferable, unless shareholders enter into contracts amongst themselves imposing restrictions on each other. The onus of complying with such contracts are on the shareholders and not on the company.	The law does not require the approval of the partners or the designated partners as a precondition to the transfer of partnership interest. Partnership interest means the rights to share in the profits and losses of the LLP and to receive distributions. A partnership interest can be transferred in whole or in part. The transfer of any right does not by itself cause the disassociation of the partner or a dissolution and winding up of the LLP. The transferring partners will have to surrender their partnership interest, and the new partners enter the LLP by executing a revised LLP agreement.
Brief list of compliances	• Pre-condition for appointment of a new director, declaration in DIR-8 form that he is not disqualified to be appointed as Director and consent letter in DIR-2. • Conduct Board meetings and gap between 2 consecutive board meetings shall not be more than 120 days. Minimum 4 meetings in a year. • Disclosure by a director regarding their concern or interest in any company firm. • The company shall not enter into any contract or arrangement with a Related party except with the consent of the Board given by a resolution at a meeting.	• Filing of statement of Account and Solvency within a period of 6 months from the end of each financial year - **Form 8** • Filing Annual return within 60 days from the date of closure of financial year - **Form 11.** • Any changes in LLP Agreement including change in contribution of has to be filed with ROC - **Form 3.** • LLP shall ensure that decisions taken by it are recorded in the minutes within thirty days of taking such

Criteria	Company	LLP
	Statutory filing: • DIR-3 KYC: Mandatory for all the individuals holding Director Identification Number. • AOC-4: Filing of Financial Statements. • MGT-7: Annual Returns. • DIR-12: Appointment/Resignation of Directors. • MGT-14: Approval of financial statements and Board's report by the Board of Directors. • ADT-1: Appointment of Auditor. • DPT-3 (Return of Deposit): Mandatory for companies who have received money and loan which is due. • PAS-3: Return of Allotment. • SH-7: Change in Authorized Share Capital. • CHG-1: Creation or modification of charges.	decisions and are kept and maintained at the registered office of the limited liability partnership.

Q7. Key differences between a private limited company and a public limited company.

Point of Difference	Private Company	Public Company
Definition	A "*private company*", as defined in Section 2(68) of the Companies Act, is a company whose articles of association: (a) restrict the transferability of its shares; (b) limit its membership (other than a One Person Company) to no more than 200 individuals, treating joint holders of shares as a single member and excluding from the headcount any current or former employees who remain members after their employment ends; and (c) prohibit any invitation to the public to subscribe for its securities.	Section 2(71) of the Act defines a public company as: a company which: (a) is not a private company; and (b) has a minimum paid-up share capital as may be prescribed, provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be a public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.
Number of Members	Minimum 2, maximum 200 members.	Minimum 7, no maximum limit.
Name/Suffix	The name of the company must have its last words as 'Private Limited' (for example XYZ Private Limited).	The name of the company must have its last word as only 'Limited' For example, XYZ Limited.
Kinds of Share Capital	The share capital will be of the following kinds, namely – (a) equity share capital: (i) with voting rights (ii) with differential rights as to dividend, voting or otherwise.	The share capital will be of two kinds, namely – (a) equity share capital: (i) with voting rights (ii) with differential rights as to dividend, voting or otherwise.

Point of Difference	Private Company	Public Company
	(b) preference share capital any other securities as the memorandum or articles of the company may provide, such as convertible notes, zero voting shares, warrants, etc.	(b) preference share capital
Voting	Voting can either be one member one vote or one share one vote, as the articles of association determine. Preference shareholders can vote on a fully diluted basis and on all matters that an equity holder votes on, provided that the articles of association of the company provide such rights. If the articles are silent, then (a) voting if done by show of hands, will be one member equals one vote. (b) Voting by poll shall be in proportion to the shareholding percentage. (c) Preference shareholders can only vote on matters that directly affect the rights attached to the preference shares, winding up of the company, repayment or reduction of its equity or preference share capital. On a voting by poll, their voting shall be proportionate to their shareholding in the preference share capital of the company and not on a fully diluted basis. The articles of association can determine the voting process. In a private limited company, the voting can be made reflective of the shareholding proportions, by ensuring that the articles only stipulate voting by poll.	Voting, if by show of hands, will always be one member equals one vote. Voting by poll shall be in proportion to the shareholding percentage. Preference shareholders can only vote on matters that directly affect the rights attached to the preference shares, winding up of the company, repayment or reduction of its equity or preference share capital. On a voting by poll, their voting shall be proportionate to their shareholding in the preference share capital of the company and not on a fully diluted basis. Voting shall be by show of hands unless a poll is demanded in which case voting will be by poll.
Issue of Securities	The private company may issue securities by way of a rights issue/bonus issue or preferential allotment through private placement. A private company is not permitted to issue securities to more than 200 members in the aggregate in a financial year. However, this limit does not include offers or invitations made to qualified institutional buyers, or to employees of the company under a scheme of	A public company may issue securities: (a) to the public through prospectus (“Public Offer”) (if listed); (b) by way of right issue/bonus issue; and (c) by way of preferential allotment through private placement.

Point of Difference	Private Company	Public Company
	employees' stock option.	
Dematerialization	Every private company which is not a small company as per audited financial statements of a financial year ending on or after March 31, 2023, shall within 18 months of closure of such financial year, dematerialize all of its securities.	All shares of a public company that is not a wholly owned subsidiary of another body corporate (including of foreign companies) are required to be dematerialized on and from the date of incorporation.
Share Transferability	The shares of a private limited company are not freely transferable. The shares can be subject to such restrictions as set out in the articles or any other contract between the shareholders. Further, any transfer of shares has to be approved by the board of directors of the company of a private limited company.	The shares of a public limited company are freely transferable, unless shareholders enter into contracts amongst themselves imposing restrictions on each other. The onus of complying with such contracts are on the shareholders and not on the company. Transfer of shares has to be approved by the board of directors of the company of a public unlisted company. Shares of a listed company are freely transferable, unless shareholders enter into contracts amongst themselves imposing restrictions on each other. The onus of complying with such contracts are on the shareholders and not on the company.
Company Secretary certification	Annual return filed by a private limited companies are required to be signed by a director and a company secretary.	Annual return filed by a public limited company having a paid up capital of INR 10 Crores or more <u>or</u> turnover of INR 50 crores or more, and annual returns filed by all listed companies, shall be certified by a company secretary, stating that the annual return discloses the facts correctly and adequately and that the company has complied with all provisions of the Companies Act, 2013.
Chairman	Chairman can be from the directors or the shareholders as the company determines in its articles of association	Chairman can be from the shareholders of the Company on a show of hands. Subsequent chairman can be elected on poll.
Internal auditor	Private limited companies having a turnover of INR 200 crores during the preceding financial year or, outstanding loans from banks or public financial institutions of INR 100 crores during the preceding financial year or, shall appoint an internal auditor	Every listed company and unlisted public limited companies having a paid up capital of INR 50 crores during the preceding financial year, turnover of INR 200 crores during the preceding financial year or, outstanding loans from banks or public financial institutions of INR 100 crores during the preceding financial year or, outstanding deposits of INR 50 crores during the preceding financial year, shall appoint an internal auditor

Point of Difference	Private Company	Public Company
Audit and Auditors	A private limited company, (a) having paid up share capital of rupees 50 (fifty) crore or more; or (b) having public borrowings from financial institutions, banks or public deposits of INR 50 (fifty) crores or more are not permitted to appoint (i) individual auditors for one term of 5 consecutive years and (ii) audit firms for a period exceeding two terms of 5 consecutive years. After expiration of the abovementioned term, the individual auditor or the audit firm cannot be appointed as auditors for a period of 5 years from the date of expiry of their previous term.	All listed companies and unlisted public companies that have: i. paid up share capital of rupees 10 (ten) crore or more; or ii. public borrowings from financial institutions, banks or public deposits of INR 50 (fifty) crores or more; are not permitted to appoint (i) individual auditors for one term of 5 consecutive years and (ii) audit firms for a period exceeding two terms of 5 consecutive years. After expiration of the abovementioned term, the individual auditor or the audit firm cannot be appointed as auditors for a period of 5 years from the date of expiry of their previous term.
Minimum number of directors	2 directors.	(a) For Unlisted Company 3 (three) directors. (b) For Listed Company: (i) Every listed public company of the top 2000 (two thousand) listed entities must have a minimum of 6 (six) directors[1]. (ii) The board shall have not less than fifty percent (50%) of the board as non-executive directors.
Woman director	Not applicable	Every listed company and unlisted public limited companies having a paid up capital of INR 100 crores or turnover of INR 300 crores, shall have at least one women director. The Board of directors of the top 1000 listed entities shall have at least one independent woman director.
Independent director	Not applicable	Every listed company shall have 1/3rd of its directors as independent directors, if chairman is a non-executive director and ½ of its board as independent directors if chairman is an executive director. Unlisted public limited companies having a paid up capital of INR 10 crores or, turnover of INR 100 crores or, outstanding loans from banks or public financial institutions of INR 50 crores shall have at least 2 (two) independent directors.
Mandatory	Not applicable	2/3 of the board of directors shall be

[1] The top 2000 entities shall be determined on the basis of market capitalization as at the end of the immediate previous financial year.

Point of Difference	Private Company	Public Company
retirement of directors by rotation		liable to retire by rotation and every annual general meeting 1/3rd of the board of directors shall retire by rotation
Committees	Not applicable	Unlisted Public Company: The Board of directors of the following classes of public companies are required to constitute an Audit Committee, a Nomination and Remuneration Committee in accordance with the provisions of the Act: (i) having a paid-up share capital of INR 10) crores or more; or (ii) having a turnover of INR 100 crores or more; or (iii) having public borrowings from financial institutions, banks or public deposits of INR 50 crores.[2] Listed Public Company: Every listed entity shall constitute an audit committee, nomination and remuneration committee and stakeholders relationship committee.
Mandatory Key Managerial Personnel	Not applicable	Every listed company and a public company that has a paid up capital of INR 10 crores or more, shall have whole time key managerial personnel as follows: (a) Managing Director or CEO or Manager and in their absence a whole time director (b) CFO. Company Secretary (applicable to private limited companies as well having a paid up capital of INR 10 crores or more)
Ceiling on remuneration to KMP.	Not Applicable	The total managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager cannot exceed eleven percent (11%) of the annual net profits. Further, except with the seventy five (75%) shareholder approval, the remuneration of one managing director; or whole-time director or manager cannot exceed five percent (5%) of the annual net profits of the company and if there is more than one managing director; or whole-time director or manager,

[2] Please note that in terms of the notification dated 05 July 2017 issued by the MCA this provision is not applicable to following classes of unlisted public company namely: - (a) a joint venture; (b) a wholly owned subsidiary; and (c) a dormant company as defined under section 455 of the Act.

Point of Difference	Private Company	Public Company
		it should not exceed ten percent (10%) of the net profits, to all such directors taken together. The remuneration payable to directors who are not MDs or WTDs cannot exceed one percent (1%) of the net profit if such company has a managing director and shall not exceed three percent (3%) in case such company does not have a managing or whole-time director.

Q8. What is the process for incorporating a private limited company in India, as a wholly owned subsidiary of a foreign body corporate?

Note: Every document containing a physical signature (such as certified extracts of resolutions), every proof of identity or address and all other supporting documents need to be attested if the signatory is not an Indian resident: (a) By the embassy of his native country (if the applicant is outside his native country); or (b) Notarized and apostilled by the native country (if country is a part of The Hague Convention); or (c) Notarized and consularized by the native country (if the country is not a part of The Hague Convention). Where documents are not in English, a translation will be required for submission. The translation will also need to be attested, notarized, and apostilled.

Incorporation of a company in India is governed by the provisions of Chapter II of the Companies Act, 2013 read with the Companies (Incorporation) Rules, 2014 (**"Incorporation Rules"**) and the Companies (Registration Offices and Fees) Rules, 2014 (**"Fee Rules"**), as amended from time to time.

Where a holding company holds hundred percent (100%) of the shareholding/total voting power of its subsidiary (directly and/or indirectly through one or more nominee shareholders), such subsidiary is called a wholly owned subsidiary ("**WOS**"). This query presupposes a structure whereby a foreign entity is a first subscriber to a WOS in India in which it holds majority of the shareholding directly, and the beneficial ownership of the remaining shareholding (for example, through one or more nominee shareholders).

A WOS is possible only in sectors notified by the Government as eligible to receive 100% foreign direct investment under the automatic route. In all other cases, Central Government's approval will have to be sought to establish a WOS. Where shares in an Indian WOS are issued to persons resident outside India by way of subscription to the memorandum of association, such issue shall be made at face value. Please refer to Q15 to Q35 for more details on the foreign exchange law regime in India.

CHARACTERISTICS OF A WOS WHICH IS A PRIVATE LIMITED COMPANY

A private limited company is a company which, by its articles/bylaws:

(a) restricts the right to transfer its shares; and

(b) prohibits any invitation to the public to subscribe to any securities of the Company.

It can be formed with a minimum of 2 (two) shareholders and a maximum of 200 (two hundred). A shareholder in a private limited company can either be an individual or a body corporate. Amongst the shareholders, shares can be held in any proportion and there is no minimum shareholding requirement for a shareholder, unless required by the extant foreign exchange control regulations of India in specified sectors.

A private limited company is required to appoint a minimum of 2 (two) directors and can appoint a maximum of 15 (fifteen) directors (maximum number can be increased after passing a special

resolution). Only individuals can be appointed as directors. A private limited company is required to have at least 1 (one) director who has stayed in India for a total period of not less than 182 (one hundred eighty-two) days during the financial year (resident director).

The liability of shareholders in a private company limited by shares is limited to the capital invested by them in the company. However, if at any time the number of members of a company is reduced to below 2 (two) and the company continue carries its business for more than 6 (six) months with the reduced number, every person who is a member of the company during the time that it so carries on business after 6 (six) months and is cognizant of the fact that it is carrying on business with less than 2 (two) members, is severally liable for the payment of the whole debts of the company contracted during that time.[3]

PROCESS OF INCORPORATION

Incorporation is a 5-step process, consisting of the following stages:

1. Obtaining a Digital Signature Certificate ("**DSC**").

2. Application for name reservation.

3. E-form filing of SPICe+ Part B (Form INC-32) with the Registrar of Companies ("**ROC**").

4. Verification of documents by the ROC.

5. Issuance of Certificate of Incorporation by the ROC.

All documents relating to incorporation are required to be submitted electronically on the Ministry of Corporate Affairs ("**MCA**") portal.

Step I: Obtaining a DSC

Every proposed director or manager or secretary of the company and every subscriber and witness to the Memorandum of Association ("**MOA**") and Articles of Association ("**AOA**") of the company is required to obtain a DSC from licensed certifying authorities appointed by the Controller of Certifying Authorities under the Information Technology Act, 2000. On the MCA's Version 3 ("**V.3**") portal, each director is required to open a user account on V.3 and associate/register the DSC on the MCA Portal – i.e., the DSC must be mapped to each director's user ID.

(a) *Fees*: Will vary based on the certifying agency.

(b) *Timeline*: Will vary from 3 (three) to 7 (seven) business days from date on which all documents are made available, based on the certifying agency. Live video verification is required as part of the process, and these timelines assume that the video verification is done correctly, and in compliance with the certifying agency's requirements.

(c) *Validity*: 1 (one) to 2 (two) years, depending on the term applied for, renewable periodically.

Directors, manager and secretary of the company should register their DSC on the MCA portal. On registration of the DSC, the MCA system captures the details of the DSC against the DIN/ PAN of the individual, as the case may be. This information will be used to authenticate the digital signature for role-check purposes.

Step II: Application for name availability

Every Company proposed to be incorporated can make an application for reservation of name and incorporation through Part A of the SPICe+ form. Two names can be proposed in case the application is being made only for name reservation i.e., by submitting SPICe+ Part A individually. The applicant

[3] Section 3A, Companies Act, 2013.

(usually a company secretary on behalf of a proposed director or subscriber of a company) will be required to login into their MCA/create a 'business user' account first before this service can be used. Once logged in, the applicant may click on the icon "SPICe+" under the head 'MCA Services' and follow the process therein, including payment of applicable fees.

Once the name reservation request is submitted, the ROC will check the name and, if found feasible, the name will be approved by the Central Registration Centre ("**CRC**"). An email from the CRC containing the outcome of the name reservation request will be received by the applicant. This email will also set out the validity period of that name.

In each case, the proposed name(s) should satisfy all statutory requirements prescribed under the Incorporation Rules.

In order to file an application to reserve names, the following are mandatory details/attachments (all documents to be notarized and apostilled):

(a) Main objects of the proposed company;

(b) Certified true copies of the board resolutions from the parent company(ies) setting up the India entity, along with certificates of incorporation of the parent company(ies); and

(c) Where the proposed name of the company includes a term which is a trademark (registered or pending registration), a no-objection certificate (NOC) or approval certificate from the owner of such trademark, along with the Trademark certificate and certificate of incorporation of such trademark owner.

A reserved name is valid for 20 (twenty) days (initial term) and the validity period can be extended for a further period of 20 (twenty) days (or) a further period of 40 (forty) days, based on payment of appropriate fees before the expiry of the initial term of 20 (twenty) days.

Step III: E-filing SPICe+ Form INC-32 with the ROC

On receipt of the DSC and once a name has been approved, an authorized director (*person named in the AOA as director*) can file SPICe+ Form INC-32 with the ROC within whose jurisdiction the registered office of the company is proposed to be situated.

Where subscribers to the proposed subsidiary are foreign companies, documents to be submitted include their certificates of incorporation and charter documents (original and English translations); and board resolutions (or equivalent) evidencing*, inter alia*, each foreign company's intention to incorporate the subsidiary, the proposed name(s) of the subsidiary, the proposed shareholding, and the authorized representative of each subscriber.

Every proposed director of the WOS must have a Director Identification Number ("**DIN**"). If any of the proposed directors do not have a DIN, then this can be applied for and obtained through SPICe+ Form INC-32 for a maximum of 3 directors.

SPICe+ Form INC-32 will be accompanied by a linked form AGILE-PRO-S (INC-35) which is an Application for Goods and Services Tax Identification Number, Employees State Insurance Corporation registration, Employees Provident Fund Organization registration, Profession Tax registration, opening of bank account and Shops & Establishment registration (*Rule 38A of the Incorporation Rules*).

Fees: For companies with a share capital up to INR 15,00,000 (Indian Rupees Fifteen Lakhs only), no filing fee is payable for SPICe+ Form INC-32 or for registration of MOA and AOA. A state-specific stamp duty that will be payable.

Step IV: Verification of documents by the ROC

The ROC will examine the SPICe+ e-Form and make a decision within 30 (thirty) days from the date of its filing, except in cases in which approval from the Central Government or the Regional Director or

any other competent authority is required.

If necessary, the ROC may call for additional information. Further, if the ROC finds the application or any supporting documents to be defective or incomplete in any manner, he/she will return the application with a resubmission request, requiring the applicant to furnish such further information or remove the defects and re-submit the Form within 15 (fifteen) days of such communication by the ROC.

A maximum of 2 (two) resubmissions are permitted. If the ROC is of the opinion that, despite 2 (two) resubmissions, the Form/supporting documents are defective or incomplete in any respect, the Form will be rejected and the incorporation process must be restarted.

The ROC has the discretion to request any additional information that he/she deems necessary.

Step V: Issuance of Certificate of Incorporation by the ROC

On approval of SPICe+ forms, the Certificate of Incorporation (CoI) is issued with Permanent Account Number (PAN) and Tax Deduction and Collection Account Number (TAN) as allotted by the Income Tax Department.

An email with Certificate of Incorporation (CoI) as an attachment, along with PAN and TAN details, will be sent to the user[4].

POST INCORPORATION STEPS

On incorporation of the company, the following initial actions must be taken:

I. *Registered office*:

If the company had not designated its registered office at the time of filing Form INC-32, it must ensure it has a registered office within 30 (thirty) days from the date of issue of certificate of incorporation. The company must furnish a verification of such registered office to the ROC, in e-Form INC-22 within 30 (thirty) days of incorporation. An authorized director or manager or secretary named in the AOA can file this Form.

II. *First board meeting*:

The first board meeting of the company must be held within 30 (thirty) days from the date of issue of its certificate of incorporation. At such board meeting, resolutions to be passed would include, among other things, opening of bank account, appointment of first auditors, adoption of common seal (if any), taking note of first directors, approving allotment of MOA subscription shares to the subscribers to the MOA etc.

III. *Appoint auditor*:

The first auditor of the company must be appointed by its board of directors within 30 (thirty) days from the date of issue of its certificate of incorporation.

IV. *Subscribe to paid-up capital*:

The company shall:

(a) open a bank account,

(b) ensure that the subscribers to the MOA and AOA subscribe to the share capital by remitting the corresponding subscription consideration to the company's bank account through normal

[4] Please note, only PAN and TAN numbers will be allotted. A copy of the PAN card and TAN card must be separately obtained by applying to the relevant tax departments.

banking channels. The purpose of remittance must be expressly stated as "Towards share application money for issuance of fully paid equity shares of [insert name of company]"

(c) issue and deliver letter of allotment to the subscribers corresponding to the shares subscribed to by them within 60 (sixty) days from the date of receipt of consideration,

(d) if the board of directors fail to appoint the auditor within the time prescribed, the board shall inform the shareholders who in turn may appoint the first auditor within 90 days.

(e) file Form FC-GPR online vide the Single Master Form (SMF) on the RBI's FIRMS portal, along with specified annexures within 30 (thirty) days from the date of issue of shares to the initial subscribers.

If any of the subscribers to the MOA of the proposed subsidiary will hold beneficial interest in shares owned by another person and/or hold shares through a nominee shareholder, certain additional filings will be required.

Under Indian law, with effect from 01 July 2025, it is mandatory to dematerialize the shares of the subscribers. This process takes place through an intermediary referred to as the Registrar and Share Transfer Agent (RTA).

V. *Commencement of Business*:

Section 10A of Companies Act, 2013, read with Rule 23A of the Incorporation Rules, mandate that any company incorporated on or after 02 November 2018 can commence business or exercise borrowing powers only after:

(a) A director of the company files a declaration in Form INC-20A, within a period of 180 (one hundred and eighty) days from the date of incorporation stating that that every subscriber to the MOA has paid the value of the shares agreed to be taken by him as on the date of making such declaration; and

(b) The company has filed a verification of its registered office with the ROC in Form INC-22, as discussed above.

Failure to file the declaration in Form INC-20A within 180 (one hundred and eighty) days will empower the ROC to strike off the name of the Company if it has reasonable cause to believe that the company is not carrying on any business or operations.

VI. *Form DIR-3KYC*:

Every individual who has been allotted a DIN as on 31 March of a financial year shall submit Form DIR-3-KYC to the Central Government on or before 30 April of immediate next financial year.

Fees: Calculated based on the date of allotment of the DIN and the status of the DIN.

VII. Compliances relating to significant beneficial ownership: Please refer to responses to Q12.

Q9. What is the process for incorporating a limited liability partnership firm in India?

Note: Every document containing a physical signature (such as certified extracts of resolutions), every proof of identity or address and all other supporting documents need to be attested if the signatory is not an Indian resident:(a) By the embassy of his native country (if the applicant is outside his native country); or (b) Notarized and apostilled by the native country (if country is a part of The Hague Convention); or (c) Notarized and consularized by the native country (if the country is not a part of The Hague Convention). Where documents are not in English, a translation will be required for submission. The translation will also need to be attested, notarized, and apostilled.

Incorporation of a limited liability partnership firm ("**LLP**") in India is governed by the provisions of Chapter III of the Limited Liability Partnership Act, 2008 ("**LLP Act**") read with the LLP Rules, 2009 ("**LLP Rules**"), as amended from time to time.

An LLP is an artificial legal person – it is a body corporate formed and incorporated under the LLP and is a separate legal entity independent from its partners. It has perpetual succession and can sue and be sued in its own name.

CHARACTERISTICS OF AN LLP

Every LLP must have a minimum of 2 (two) partners (the term "partners" in the context of an LLP is analogous to the term "shareholders" in relation to companies).

Any individual or body corporate can be a partner in a limited liability partnership. For an individual to be eligible to be a partner, he/she must (a) not be found to be of unsound mind by a Court of competent jurisdiction; (b) not be an undischarged insolvent; or (c) not have applied to be adjudicated as an insolvent.

The liability of partners in an LLP is limited to their respective capital contributions to the LLP. However, if at any time the number of partners in an LLP is reduced below 2 and the limited liability partnership carries on business for more than 6 months with the reduced number, the person who is the only partner of the limited liability partnership during the time that it so carries on business after those six months and has the knowledge of the fact that it is carrying on business with him alone, shall be liable personally for the obligations of the limited liability partnership incurred during that period.

Every LLP must have a minimum of 2 (two) designated partners (the term "designated partner" in the context of an LLP is analogous to the term "director" in relation to companies). At least 1 (one) designated partner must be an Indian resident, i.e., an individual who has stayed in India for a total period of not less than 182 (one hundred and eighty two) days during the financial year.

The law does not impose a cap on the number of partners or designated partners in an LLP.

PROCESS OF INCORPORATION

Incorporation is a 5-step process, consisting of the following stages:

1. Obtaining a Digital Signature Certificate ("**DSC**").

2. Application for name reservation.

3. E-form filing of Form FiLLiP with the Registrar of Companies ("**ROC**").

4. Verification of documents by the ROC.

5. Issuance of Certificate of Incorporation by the ROC.

All documents relating to incorporation are required to be submitted electronically on the Ministry of Corporate Affairs ("**MCA**") portal.

Step I: Obtaining a DSC

Every proposed partner and designated partner of the LLP are required to obtain a DSC from licensed certifying authorities appointed by the Controller of Certifying Authorities under the Information Technology Act, 2000. On the MCA's Version 3 ("**V.3**") portal, each individual is also required to open a user account on V.3 and associate/register their DSC with their login/user account.

(a) *Fees*: Will vary based on the certifying agency.

(b) *Timeline*: Will vary from 3 (three) to 7 (seven) business days from date on which all documents are

made available, based on the certifying agency. Live video verification is required as part of the process, and these timelines assume that the video verification is done correctly, and in compliance with the certifying agency's requirements.

(c) *Validity*: 1 (one) to 2 (two) years, depending on the term applied for, renewable periodically.

Step II: Application for name availability

Every LLP proposed to be incorporated can make an application for reservation of name and incorporation through Form RUN-LLP. Two names can be proposed at a time to check for availability and reserve a name.

The applicant (usually a company secretary on behalf of a proposed designated partner or partner) will be required to login into their MCA/create a 'business user' account first before this service can be used. Once logged in, the applicant may click on the icon "Form RUN-LLP" under the head 'MCA Services' and follow the process therein, including payment of applicable fees.

Once the name reservation request is submitted, the ROC will check the name and, if found feasible, the name will be approved by the Central Registration Centre ("**CRC**"). An email from the CRC containing the outcome of the name reservation request will be received by the applicant. This email will also set out the validity period of that name.

In each case, the proposed name(s) should satisfy all statutory requirements prescribed under the LLP Rules.

In order to file an application to reserve names, the following are mandatory details/attachments (all documents to be notarized and apostilled):

(a) Significance of abbreviated or coined words in the proposed names

(b) Main objects of the proposed LLP

(c) Certified true copies of the board resolutions from the parent company(ies) setting up the LLP, along with certificates of incorporation of the parent company(ies); and

(d) Where the proposed name of the LLP includes a term which is a trademark (registered or pending registration), a no-objection certificate (NOC) or approval certificate from the owner of such trademark, along with the trademark certificate and certificate of incorporation of such trademark owner.

A reserved name is valid for 3 (three) months from the date on which the name reservation letter is issued.

Step III: E-filing of Form FiLLiP with the ROC

On receipt of the DSC and once a name has been approved, an authorized designated partner can file Form FiLLiP with the ROC within whose jurisdiction the registered office of the LLP is proposed to be situated.

Where the proposed partners are foreign companies, documents to be submitted include their certificates of incorporation and charter documents (original and English translations); and board resolutions (or equivalent) evidencing, *inter alia*, each foreign company's intention to incorporate the LLP, the proposed name(s) of the LLP, the proposed capital contribution and profit sharing ratio, and the authorized representative of each partner.

Every proposed designated partner of the WOS must have a Director Identification Number ("**DIN**") or a Designated Partner Identification Number ("**DPIN**"). If any of the proposed designated partners do not have a DIN or a DPIN, then a DPIN can be applied for and obtained through Form FiLLiP for a maximum of 5 designated partners.

Form FiLLiP must contain, among other things, the following details:

(a) the name of the LLP (*as reserved through Form RUN-LLP*);

(b) the proposed business of the LLP, including details of the NIC code;

(c) the address of the registered office of the LLP;

(d) name and address of each of the persons who are to be partners of the LLP on incorporation, with appropriate identity and address proof; and

(e) name and address of the persons who are to be designated partners of the LLP on incorporation, with appropriate identity and address proof.

Fees: The fees payable at the time of filing Form FiLLiP varies based on the proposed initial capital contribution to the LLP.

(a) Capital contribution does not exceed INR 1,00,000: INR 500

(b) Capital contribution exceeds INR 1,00,000 but does not exceed INR 5,00,000: INR 2,000

(c) Capital contribution exceeds INR 5,00,000 but does not exceed INR 10,00,000: INR 4,000

(d) Capital contribution exceeds INR 10,00,000 but does not exceed INR 25,00,000: INR 5,000

(e) Capital contribution exceeds INR 25,00,000 but does not exceed INR 1,00,00,000: INR 10,000

(f) Capital contribution exceeds INR 1,00,00,000: INR 25,000

Step IV: Verification of documents by the ROC

The ROC will examine the Form FiLLiP and make a decision within 14 (fourteen) days from the date of its filing, except in cases in which approval from the Central Government or any other competent authority is required.

If necessary, the ROC may call for additional information. Further, if the ROC finds the application or any supporting documents to be defective or incomplete in any manner, he/she will return the application with a resubmission request, requiring the applicant to furnish such further information or remove the defects and re-submit the Form within 15 (fifteen) days of such communication by the ROC.

A maximum of 2 (two) resubmissions are permitted. If the ROC is of the opinion that, despite two resubmissions, the Form/supporting documents are defective or incomplete in any respect, the Form will be rejected and the incorporation process must be restarted.

The ROC has the discretion to request any additional information that he/she deems necessary.

Step V: Issuance of Certificate of Incorporation by the ROC

On approval of Form FiLLiP, the Certificate of Incorporation (CoI) is issued with Permanent Account Number (PAN) and Tax Deduction and Collection Account Number (TAN) as allotted by the Income Tax Department.

An email with Certificate of Incorporation (CoI) as an attachment, along with PAN and TAN details, will be sent to the user[5].

[5] Please note, only PAN and TAN numbers will be allotted. A copy of the PAN card and TAN card must be separately obtained by applying to the relevant tax departments.

POST INCORPORATION STEPS

On incorporation, every LLP must file information relating to the limited liability partnership agreement in Form 3 with the Registrar within thirty days of the date of incorporation.

Q10. Is there a restriction on the number of layers of downstream investments or subsidiaries that a company can have in India?

A company incorporated in India is prohibited from making investments through more than 2 (two) layers of investment companies. This does not affect a structure, where the Indian company has acquired a company abroad and the acquired company has investment subsidiaries beyond two layers as per the laws of such country. This will also not affect a subsidiary company from having an investment subsidiary for the purpose of meeting a requirement under law.[6]

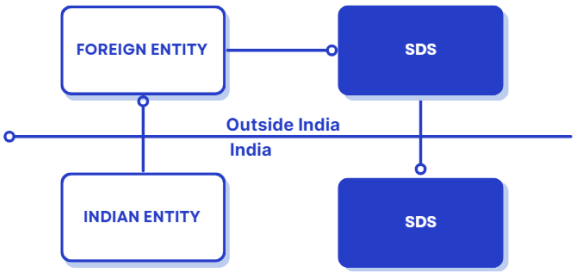
A company incorporated in India cannot have more than 2 (two) layers of subsidiaries.[7] This does not affect a structure, where the Indian company has acquired a company abroad and the acquired company has subsidiaries beyond 2 (two) layers as per the laws of such country. The exceptions to this restriction are as follows:

(a) For the purpose of computing the number of layers, 1 (one) layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account.
(b) This rule shall not apply to banking companies, registered non-banking financial companies that are systemically important or NBFCs - Upper Layer, insurance companies and a Government company.

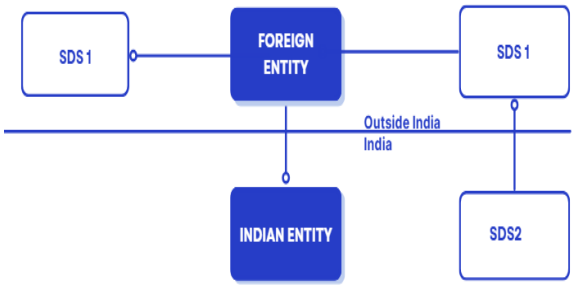
Q11. Are there any restriction on the number of layers of subsidiaries or investments an Indian company can make abroad?

An Indian company cannot invest or hold investment in a company abroad that has invested or invests into India at the time of the Indian company making the investment abroad or at any time thereafter, when the resultant structure will have more than two layers of subsidiaries abroad.[8]

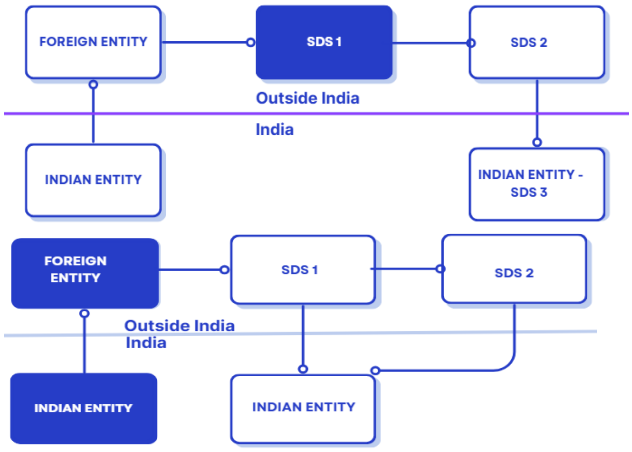
Illustrations of structures permitted:



[6] Section 186 of the Companies Act, 2013.
[7] Rule 2 of the Companies (Restriction on number of layers) Rules, 2017.
[8] Rule 19(3) of the Foreign Exchange Management (Overseas Investment) Rules, 2022.



Illustrations of structures not permitted:



Q12. What is the compliance around significant beneficial owner under Companies Act, 2013.

Under the Companies Act, 2013, Section 90, along with the Companies (Significant Beneficial Owners) Rules, 2018, and its 2019 amendments ("**SBO Rules**"), mandates the identification and disclosure of Significant Beneficial Owners ("**SBO**") to enhance transparency in corporate ownership. An SBO is an individual who, alone or with others, holds indirectly (or with direct holdings) at least ten percent (10%) of a company's shares, voting rights, or dividend rights, or exercises significant influence or control over the company. Reporting companies must identify SBOs, maintain a register in Form BEN-3, and file declarations in Form BEN-2 with the Registrar of Companies (RoC) within 30 (thirty) days of receiving SBO declarations (Form BEN-1).

Q13. What are the rights of a 51% versus a 75% shareholder in a company?

The Companies Act, 2013, requires the consent of seventy five percent (75%) of the shareholders or seventy five percent (75%) of the holders of the voting power of the share capital of the Company, present and voting for certain actions, such as:

(a) alteration of the articles and memorandum of association of the company;
(b) reduction of share capital;
(c) buyback of shares;
(d) issuance of shares to persons (not being a rights or a bonus issue);
(e) public offering of shares;
(f) removal of an auditor;
(g) removal of an independent director;
(h) increasing the strength of the board in excess of 15 directors;
(i) merger and amalgamation or arrangement of the Company with the approval of the National Company Law Tribunal as explained in Q36;
(j) issuance of sweat equity shares;
(k) payment of managerial remuneration in excess of specified limits in case of inadequate profit/loss;
(l) granting loans and advances in excess of sixty percent (60%) of its paid up capital and reserved;
(m) winding up of the company.

A 50% shareholder can pass any other matter including, appointment of directors, auditors, rights issue, declaration of dividend, approval of annual financial statements.

The distinction between the rights associated with a seventy five percent (75%) shareholding as opposed to a 51% shareholding serves as a foundational consideration for structuring M&As and joint ventures (JVs), whether as a 50:50, 70:30, or 76:24 partnership. Attaining a seventy five percent (75%) shareholding typically triggers enhanced decision-making authority, while simultaneously affording statutory minority protection rights to the twenty five percent (25%) shareholder. In a 70:30, such minority protections may be less robust, as the 30% shareholder retains the capacity to block resolutions requiring a seventy five percent (75%) supermajority. By contrast, a 50:50 generally provides for equal voting rights, thereby preserving a balance of power between the shareholders.

Q14. Brief overview of corporate compliance

A. General actions to be carried out post-incorporation:

S. No.	Section/Rule reference	Compliance requirement
1.	-	**Bank Account**: The Company's bank account must be opened with a bank which will also serve as the Company's authorized dealer bank for foreign exchange transactions.
2.	Section 10A of the Companies Act, 2013 read with Rule 23A of the Companies (Incorporation) Rules, 2014	**Commencement of Business**: Any company incorporated on or after 2 November 2018 can commence business or exercise borrowing powers only after: (a) A director of the company files a declaration in Form INC-20A, within a period of 180 (one hundred and eighty) days from the date of incorporation stating that that every subscriber to the MOA has paid the value of the shares agreed to be taken by him as on the date of making such declaration. (b) The company has filed a verification of its registered office with the ROC in Form INC-22 within 30 (thirty) days of date of incorporation (if registered office was not already finalized at the time of incorporation).
3.	Section 21 of the Companies Act, 2013	**Authorization Resolution**: Any key managerial personnel[9] (KMP) or employee or officer of the Company must be authorized by the board to sign documents, contracts or proceedings on behalf of the company. As and when the director changes, a resolution authorizing the newly appointed director must be passed from time to time.

B. Share Capital

S. No.	Section/Rule reference	Compliance requirement
1.	Section 56(3)(a) and 56(6) of the Companies Act, 2013	**First share capital from subscribers and Share Certificates**: (a) Every subscriber to the Memorandum of Association of the Company must infuse share capital within a period of 180 (one hundred and eighty) days from the date of incorporation; and (b) the Company must complete delivery of share certificates, within 2 (two) months from the date of

[9] As per section 2(51) of the Companies Act, 2013- 'Key Managerial Personnel' in relation to a company means- (i) Chief Executive Officer or the managing director or the manager; (ii) the company secretary; (iii) the whole-time director; (iv) the Chief Financial Officer; (v) such other officer, not more than one level below the Directors who is in whole-time employment, designated as key managerial personnel by the Board; and (vi) such other officer as may be prescribed.

S. No.	Section/Rule reference	Compliance requirement
		incorporation.
2.	Section 56(4) and 56(6) of the Companies Act, 2013	**Share Certificates**: Every company must deliver share certificates: (a) within a period of 2 (two) months from the date of incorporation, in the case of subscribers to the memorandum; (b) within a period of 2 (two) months from the date of allotment, in the case of any subsequent allotment of any of its shares (through private placement/preferential allotment, rights issue, bonus issue etc). (c) within a period of 1 (one) month from the date of receipt by the company of the instrument of transfer or notification of transmission. This provision applies only to private companies (a) that are not mandatorily required to dematerialize their securities; and (b) before the timeline for mandatory dematerialization becomes effective.
3.	Regulation 4 (1) of the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 and Section 13 of Foreign Exchange Management Act, 1999	**Foreign exchange filing for allotment of shares**: The company shall File Form FC-GPR (Foreign Currency Gross Provisional Return) online through the Single Master Form (SMF) on the Reserve Bank of India's (RBI) FIRMS portal, along with prescribed annexures within 30 (thirty) days from the date of issue of shares to the initial subscribers.
4.	Section 56 of the Companies Act, 2013	**Transfer of shares**: A duly stamped share transfer form, executed by the transferor and transferee, containing prescribed details, must be delivered to the Company, along with the relevant share certificate(s). The Board will take the transfer on record and relevant updates will be made to the entries in the statutory registers of the Company. For private companies, all transfers will be subject to the transfer restrictions in the charter documents. If a private company was, on last day of a financial year, ending on or after 31 March, 2023, is not a small company as per audited financial statements for such financial year, then it shall have dematerialized its securities within 18 (eighteen) months from closure of such financial year. This provision came into effect on 01 July 2025. Post dematerialization, transfers will take place through delivery instruction slips provided to Depository Participants or through Transnet facilities. Depositories have imposed certain conditions to protect share transfer restrictions under the Articles of Association of a private company. For instance, NSDL (NSDL/POLICY/2025/0071) requires a letter from the private company consenting to the transfer and confirming details of the demat account holders.
5.	Regulation 4(3) of the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019	**Foreign Currency-Transfer of Shares (FC-TRS)**: This form must be filed when shares of an Indian company are transferred between a person/persons resident in India and a person/persons resident outside India. The onus of filing is on the resident transferor/transferee, although the Company can also

S. No.	Section/Rule reference	Compliance requirement
		undertake this transfer for and on behalf of such resident. The form FCTRS must be filed within sixty days of transfer of equity instruments or receipt / remittance of funds whichever is earlier.
6.	Section 88 of the Companies Act, 2013	**Register of Members**: Every company must maintain a Register of Members in Form MGT-1. The register of members along with the index of names shall be preserved permanently and kept in the custody of the company secretary of the company or any other person authorized by the Board for such purpose. Once a private company completes its dematerialization of its securities, the Statement of Beneficial Position (BENPOS) issued by the Depository/Depository Participant will subsume and replace the Register of Members.
7.	Section 89 of the Companies Act, 2013, read with Rule 9 of the Companies (Management and Administration) Rules, 2014	**Declaration of beneficial interest in shares**: (a) A person whose name is entered in the register of members of a company as a shareholder, but who does not hold the beneficial interest in such shares must submit a declaration in Form MGT-4 to the Company. (b) A person who holds beneficial interest in shares of a company but is not reflected in the register of members as the registered shareholder, must submit a declaration in Form MGT-5 to the Company. (c) When a declaration is received by the Company, the company shall make a note of such declaration in the register of members and file, within a period of 30 (thirty) days from the date of receipt of declaration by it, a return in Form MGT-6.
8.	Section 90 of the Companies Act, 2013, read with Rule 4 and 5 of the Companies (Significant Beneficial Owners) Rules, 2018	**Compliances where there are significant beneficial owners**: (a) Where a company has one or more significant beneficial owners ("SBOs"), each SBO must submit Form BEN-1 to the Company. (b) The Company is then required to file an online return with the ROC in Form BEN-2. (c) Details of the SBO are maintained by the Company in a register in the format set out in Form BEN-3. (d) Where no SBO has provided details to the Company, but the Company has reasonable cause to believe that a person is/was an SBO, then the Company must send such person a notice in Form BEN-4, requesting the prescribed information.
9.	Regulation 4(2) of the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019	**Annual Return on Foreign Liabilities and Assets (FLA):** An Indian Company which has received Foreign Direct Investment (FDI) in the preceding year must submit the Foreign Liabilities and Assets (FLA) Return on or before the 15th day of July of each year to the RBI.

C. Shareholders and Shareholder meetings

S. No.	Section/Rule reference	Compliance requirement
1.	Section 96 of the Companies Act, 2013 along with Secretarial Standard 2	**Annual General Meeting (AGM):** • The Company shall hold an AGM once each year during business hours (between 9:00AM and 6:00pm) on any day that is not a national holiday. • Notice not less than 21 (twenty one) clear days' notice either in writing or through E-mail. • Shorter notice period is allowed, as long as it is permitted in the AOA and at least ninety five percent (95%) of the shareholders agree to it • The AGM can be held at the registered office or any other place within the city, town or village in which the registered office of the company is located[10]. • Not more than 15 (fifteen) months must elapse between two AGMs. • The first AGM of a newly incorporated company must be held within 9 (nine) months from the date of closing of the first financial year of the company. • On request by the Company for an extension, the ROC may, extend the time within which an AGM (other than the first AGM), shall be held, by a period not exceeding 3 (three) months. However, the discretion to grant the extension lies with the ROC.
2.	Section 100 of the Companies Act, 2013	**Extraordinary General Meeting (EGM)**: • Every shareholder meeting which is not an Annual General Meeting is an Extraordinary General Meetings (EGM). • Notice not less than 21 (twenty one) clear days' notice either in writing or through E-mail. • Shorter notice period is allowed, as long as it is permitted in the AOA and at least ninety five percent (95%) of the shareholders agree to it • For private companies which are wholly owned subsidiaries, the Board may, with the consent of **all** shareholders, convene an EGM at any place within or outside India. For other companies, an EGM must be held within India.
3.	Section 102(2) of the Companies Act, 2013	**Shareholder resolutions:** There are 4 (four) main businesses (referred to as Ordinary Business) that are carried out in an AGM. They are as below: • Consideration of financial statements and the reports of the Board of Directors and Auditors • Declaration of dividends • Appointment of directors in place of those retiring; and • Appointment and fixing of remuneration of Auditors. All ordinary businesses require ordinary resolutions (i.e., 51% votes in favour). Any business other than an Ordinary Business is a Special Business and Special Businesses can be conducted at an AGM or EGM. All special businesses require an explanatory statement.

[10] The Registrar issued a circular dated 19 September 2024 clarifying that Shareholder Meetings can be held through Video conferencing or other audio visual means up to 30 September 2025.

S. No.	Section/Rule reference	Compliance requirement
4.	Section 114 of the Companies Act, 2013	**Ordinary and Special Resolutions**: An ordinary resolution is a resolution which is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, in favour of the resolution, including the casting vote, if any, of the Chairman, by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, exceed the votes, if any, cast against the resolution by members, so entitled and voting. A Special Resolution is a resolution in which the number of votes in favour must be three times the number of votes against it (i.e., 75% vote). The notice calling the general meeting must contain the intention to propose the resolution as a special resolution.
5.	Section 107(1) of the Companies Act, 2013	**Manner of voting:** There are two mechanisms through which voting takes place at a shareholders' meeting: • voting by show of hands – where every shareholder gets 1 (one) vote irrespective of shareholding; and • voting by poll which means every shareholder gets a vote proportional to his/her shareholding. At any general meeting, a resolution put to the vote of the meeting shall be decided on a show of hand, unless a poll is demanded or the voting is carried out electronically.
6.	Section 117 of the Companies Act, 2013 read with rule 24 of the Companies (Management and Administration) Rules, 2014	**Resolutions to be filed:** Section 117 of the Company Act, 2013 states the resolutions and agreements that are required to be filed with the registrar. They are: • all special resolutions; • resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions; • any resolution of the Board of Directors of a company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of appointment, of a managing director; • resolutions or agreements which have been agreed to by any class of members but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by a specified majority or otherwise in some particular manner; and all resolutions or agreements which effectively bind such class of members though not agreed to by all those members; • resolutions requiring a company to be wound up voluntarily passed in pursuance of section 59 of the Insolvency and Bankruptcy Code, 2016; and • Any other resolution or agreement as may be prescribed and placed in the public domain. • A copy of every agreement which has the effect of altering the articles of the Company along with a copy of such resolution passed thereof. A copy of every resolution, or any agreement required to be filed, together with the explanatory statement shall

S. No.	Section/Rule reference	Compliance requirement
		be filed with the registrar within 30 (thirty) days of the passing in Form MGT-14.

D. Board of Directors

S. No.	Section/Rule reference	Compliance requirement
1.	Section 149(3) and 152(3) of the Companies Act, 2013	**Board of Directors**: • Every company shall have at least 1 (one) resident director who has stayed in India for not less than 182 (one hundred and eighty two) days during the financial year. • Company must ensure that each director has a valid Director Identification Number (DIN) and a Digital Signature Certificate (DSC). • Each financial year, the directors of the Company must furnish the following to the Company at the first board meeting of each financial year and at the first board meeting after any change in the facts previously disclosed: (i) a declaration that he is not disqualified to become a director in Form DIR-8. (ii) his interest in other firms or bodies corporate in Form MBP-1. These forms are not filed with a regulator, but form part of the Company's records.
2.	Section 153 of the Companies Act, 2013 read with Rule 12A of the Companies (Appointment and Qualifications of Directors) Rules, 2014	**Form DIR-3 KYC:** Every individual who has been allotted a DIN as on 31st March of a financial year shall submit Form DIR-3-KYC to the Central Government on or before 30th September of immediate next financial year. The fees will be calculated based on the date of allotment of the DIN and the status of the DIN.
3.	Section 179 of the Companies Act 2013 read with Rule 3 of the Companies (Meetings of the Board and its Powers) Rules, 2014	**Power of Directors:** The directors of a company shall make all decisions except for those where the law or charter documents require shareholders' consent. Board meetings can take place physically, virtually, or through a combination of physical and audio-visual means.
4.	Section 118 and Section 173 of the Companies Act, 2013 along with Secretarial Standard 1.	**Board meetings**: • A minimum of 4 (four) board meetings must be held every year. • The gap between two board meetings must not exceed 120 (one hundred and twenty) days. • A board meeting can be convened by giving not less than 7 (seven) days' notice in writing to every director and may be held either in person or video conferencing or other audio-visual means. • With the consent of the directors in writing, where the notice specifically states that the meeting is being convened at a shorter notice, such shorter-notice meeting can be convened.
5.	Section 188 of the Companies Act, 2013 and Rule 15 of the Companies (Meeting of Board and its Powers) Rules, 2014	All related party transactions have to be on arms length basis unless approved otherwise by a shareholders resolution or unless they are in the ordinary course of business.
6.	Section 135 of the Companies Act,	**Corporate Social Responsibility (CSR):** If the

S. No.	Section/Rule reference	Compliance requirement
	2013	Company meets the following thresholds, the Company may be subject to CSR compliances: • Net worth of INR 500,00,00,000 or more; or • Turnover of INR 1000,00,00,000 or more; or • Net profit of INR 5,00,00,000 or more. There is a detailed set of compliances under law once a company crosses any of these thresholds, including the requirement to have a CSR policy, set up a CSR committee, set aside a certain prescribed portion of funds, and invest funds in certain types of projects within certain timelines.

E. Accounts, Audit, and Dividend

S. No.	Section/Rule reference	Compliance requirement
1.	Section 139(6) of the Companies Act, 2013 read with Rule 4(2) of the Companies (Audit and Auditor) Rules 2014	**Appointment of auditor**: • First auditor of the company must be appointed by its board of directors within 30 (thirty) days from the date of issue of its certificate of incorporation. If the board fails to appoint such auditor, it shall inform the members of the company, who shall within 90 (ninety) days at an EGM appoint such auditor and such auditor shall hold office till the conclusion of the first AGM. • For all subsequent appointments and re-appointments of the auditor, the Company must file Form ADT-1 with the ROC, with prescribe supporting documents.
2.	Section 128 of the Companies Act, 2013	**Books of Accounts:** Every company shall prepare and keep at its registered office books of account and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company. The books of accounts will be open to inspection at the registered office during business hours.
3.	Section 92 of the Companies Act, 2013 read with Rule 11 of the Companies (Management and Administration) Rules, 2014	**Annual Returns:** Every company shall file with the Registrar a copy of the annual return in Form MGT-7, • within 60 (sixty) days from the date on which the AGM is held or • where no AGM is held in any year within 60 (sixty) days from the date on which the annual general meeting should have been held, along with a statement stating the reason for not holding the AGM.
4.	Section 137 of the Companies Act, 2013 read with Rule 12of the Companies (Accounts) Rules, 2014	**Financial Statements**: A copy of the financial statements in Form AOC-4, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the AGM of the company, shall be filed with the Registrar within 30 (thirty) days of the date of AGM.
5.	Section 123 and 127 of the Companies Act, 2013	**Dividend**: Dividends are primarily of 2 (two) types: • interim dividend- declared by the board. • final dividend- recommended by the board of directors and declared by the shareholders. Shareholders cannot declare dividends unless it is

S. No.	Section/Rule reference	Compliance requirement
		recommended by the board.

FOREIGN DIRECT INVESTMENT INTO INDIA

Q15. What is Foreign Direct Investment or FDI?

FDI is defined[11] to mean

(a) investment through equity instruments by a person resident outside India in an unlisted Indian company, or

(b) the acquisition of 10% or more of the post-issue paid-up equity capital on a fully diluted basis[12], of a listed Indian company.

If the foreign direct investment in a listed company subsequently falls below the 10% threshold of post-issue paid-up capital on a fully diluted basis, the investment will continue to be treated as FDI.

Q16. What is the law that governs Foreign Direct Investment in India?

Foreign direct investment or FDI, is governed by,

(a) Foreign Exchange Management Act, 1999 ("**FEMA**");

(b) Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, issued by the Ministry of Finance, Government of India ("**FEMA NDI Rules**");

(c) Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, issued by the Reserve Bank of India;

(d) Consolidated FDI Policy Circular of 2020, issued by the Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, Government of India; and

(e) Circulars/ press notes/ press releases which are issued by the Department for Promotion of Industry and Internal Trade.

The FEMA NDI Rules, govern the transfer and issuance of equity securities by and to non–residents. The payment of inward remittance and reporting requirements in relation to any foreign investment in India are stipulated under the Foreign Exchange Management (Mode of Payment and Reporting of Non–Debt Instruments) Regulations, 2019 issued by the RBI.

The Department for Promotion of Industry and Internal Trade ("**DPIIT**"), Ministry of Commerce & Industry, Government of India makes policy pronouncements on FDI through Consolidated FDI Policy circulars/ press notes/ issued by the DPIIT. These notifications take effect from the date of issue of the press notes / press releases, unless specified otherwise therein.

The current Consolidated FDI Policy was published by the Government on October 28, 2020 ("**Consolidated FDI Policy 2020**"), with effect from 15 October 2020, which consolidates and subsumes the Consolidated FDI Policy, and all earlier press notes, press releases, clarifications and circulars, issued by DPIIT from time to time, which were in force as on 15 October 2020.

Q17. What is a foreign portfolio investment?

Foreign Portfolio Investment is defined[13] to mean any investment by a person resident outside India through equity instruments in a listed Indian company, where such investment is below ten percent (10%) of the post-issue paid-up equity capital on a fully diluted basis or below ten percent (10%) of the paid-up value of each series of equity instruments.

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[11] Rule 2(r) of the FEMA NDI Rules.
[12] Fully diluted basis means the total number of shares that would be outstanding of all possible sources of conversion into equity shares are exercised.
[13] Rule 2(t) of the FEMA NDI Rules.

Q18. Who is a foreign portfolio investor and how is its investment in an Indian listed company distinct from a foreign portfolio investment?

A foreign portfolio investor is a foreign entity that is registered with the Indian securities regulator, the Securities Exchange Board of India ("**SEBI**") under the SEBI (Foreign Portfolio Investors) Regulations, 2019, in order to invest in regulated securities without establishing an Indian entity or being registered as an alternative investment fund with SEBI.

The investment by an FPI in an Indian unlisted company will be treated as a foreign direct investment. The investment by an FPI in an Indian listed company in excess of ten percent (10%) of the post issue paid up capital of the listed company on a fully diluted basis will also be treated as a foreign direct investment. In order for the investment by an FPI to be treated as a foreign portfolio investment under the FEMA NDI Rules, the investment should be in the equity instruments of a listed Indian company, where such investment is below 10% of the post-issue paid-up equity capital on a fully diluted basis or below ten percent (10%) of the paid-up value of each series of equity instruments.

Q19. Who can make a foreign direct investment?

Eligible investor entities include any entity, companies, trusts, and partnership firms incorporated outside India and owned and controlled by non–resident Indians; Foreign portfolio investors, foreign venture capital investors, in accordance with the requirements prescribed under the Consolidated FDI Policy 2020 and the NDI Rules.

Any foreign investment by or from any entity of a country, which shares land border with India including China, Hong Kong, Macau (and excluding Taiwan) ("**Neighboring Country**"), or where the beneficial owner of an investment into India who is situated in, or is a citizen of, any Neighboring Country, can be made only with prior government approval. Further, any direct or indirect transfer of ownership of any existing or future FDI in an entity in India which results in the beneficial ownership being transferred to any of such restricted entities or persons also requires government approval.

Q20. Who is an eligible investee under the FEMA NDI Rules?

Foreign investment is permitted in companies limited by shares, limited liability companies, any registered alternative investment fund or collective investment vehicle in accordance with the FEMA NDI Rules and the Consolidated FDI Policy as amended from time to time. Foreign direct investment is not allowed in any other structure including partnership firms, sole proprietorships, societies or trusts.

Q21. What are the sectors in which foreign direct investment is prohibited in India?

(a) Lottery business including Government or private lottery, online lotteries, etc.

(b) Gambling and betting including casinos, etc.

(c) Chit funds

(d) Nidhi company

(e) Trading in Transferable Development Rights

(f) Real estate business or construction of farm houses. Real estate business does not include leasing of immovable property, development of townships, construction of residential or 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 or sectors that are not open to private sector investment e.g. (I) Atomic energy and (II)

Railway operations

(i) Foreign technology collaborations in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for lottery business and gambling and betting activities.

Q22. What are the permitted sectors for foreign direct investment?

Permitted sectors fall within 3 categories:

(a) **100% automatic**: Companies in these sectors can freely receive foreign direct investment up to 100% of its share capital, without any approvals or FDI-Performance linked conditions on the investment or the company.

(b) **Automatic with a sector specific cap or that have FDI-Performance linked conditions**: Companies in these sectors can receive foreign direct investment,

(i) Up to the sector specific cap. Therefore, if the cap is 30%, the company can receive foreign direct investment, where the total equity held by all foreign investors in the post-investment share capital of the company does not exceed the specified cap; or

(ii) Only on satisfying and maintaining the FDI-Performance linked conditions set out for such sector. For example, if the sector requires that the company receiving the investment should be dealing only with customers who have a GST registration, this is a condition that has to be met at the time of receiving the investment until the divestment to a resident person.

(c) **Approval route, with or without a sector specific cap**: Companies in these sectors can receive foreign direct investment, only with the approval of the Government of India, and the investment will be restricted to such sector specific cap as indicated.

An overview of the three categories of sectors is set out below:

100% automatic, including with or without FDI-linked performance conditions	**Automatic with a sector specific cap with or without FDI-Performance linked conditions**		**Approval route and cap**	
	Sectors	**Sectoral Cap (Automatic route)**	**Sectors**	**Sectoral Cap**
Agriculture and Animal Husbandry	Petroleum refining by the Public Sector Undertakings (PSUs), without any disinvestment or dilution of domestic equity in the existing PSUs.	**49 %**	Mining and mineral separation of titanium bearing minerals and ores, its value addition, and integrated activities	**100%**
Plantation	Defence	**74%**	Beyond seventy four percent (74%) in Defence	**100%**
Mining (excluding titanium-bearing minerals and its ores); Coal and lignite mining	Regional Air Transport and Scheduled Air Transport Service/Domestic Scheduled Passenger Airline	**49%** (NRIs **100%)**	Terrestrial Broadcasting FM (FM Radio) and Broadcasting Content Services up-Linking of 'News & Current Affairs' TV Channels	**49%**

100% automatic, including with or without FDI-linked performance conditions	Automatic with a sector specific cap with or without FDI-Performance linked conditions		Approval route and cap	
	Sectors	Sectoral Cap (Automatic route)	Sectors	Sectoral Cap
Petroleum and Natural Gas exploration, infrastructure, marketing, refining in the private sector; market study; LNG re-gasification	Space sector: Satellites-Manufacturing Operation, Satellite Data Products, Ground Segment and User Segment	**74%**	Broadcasting Content Services uploading/Streaming of News and Current Affairs through Digital Media	**26%**
Non-Scheduled Air Transport Services; Helicopter services, seaplane services requiring DGCA approval; other services under civil aviation sector.	Space sector: Launch Vehicles and associated systems or sub-systems and Creation of Spaceports for launching and receiving Spacecraft	**49%**	Publishing facsimile edition of foreign newspapers and publishing or printing of Scientific and Technical Magazine or specialty journals or periodicals, compliant with appropriate legal framework	**100%**
Broadcasting Carriage Services, Cable Networks and content services up-linking of Non-'News & Current Affairs' TV Channels/Downlinking of TV Channels	Brownfield Pharmaceuticals	**74%**	Publishing of newspaper, periodicals and Indian editions of foreign magazines dealing with news and current affairs.	**26%**
Manufacturing	Banking - Private sector	**49%**	Beyond forty nine percent (49%) in Regional Air Transport and Scheduled Air Transport Service/Domestic Scheduled Passenger Airline	**100%**
Construction Development: Townships, Housing, Built-up infrastructure	Infrastructure Companies in the Securities Market	**49%**	Beyond seventy four percent (74%) in Space sector: Satellites-Manufacturing Operation, Satellite Data Products, Ground Segment and User Segment	**100%**
Industrial Parks	Commodities Spot Exchange	**49%**	Beyond forty nine percent (49%) Space sector: Launch Vehicles and associated systems or sub-systems and Creation of	**100%**

100% automatic, including with or without FDI-linked performance conditions	Automatic with a sector specific cap with or without FDI-Performance linked conditions		Approval route and cap	
	Sectors	Sectoral Cap (Automatic route)	Sectors	Sectoral Cap
			Spaceports for launching and receiving Spacecraft	
Space Sector - Manufacturing of components and systems or sub-systems for satellites, Ground Segment and User Segment	Power Exchanges	**49%**	Private Security Agencies	**49%**
Cash and Carry Wholesale Trading/Wholesale Trading (including sourcing from MSEs)	Life Insurance Corporation of India	**20%**	Multi Brand Retail Trading (MBRT)	**51%**
Duty Free Shops	Pension Sector	**49%**	Beyond seventy four percent (74%) in Brownfield Pharmaceuticals	**100%**
Greenfield Pharmaceutical	Insurance Company	**74%**	Beyond forty nine percent (49%) in Banking - Private sector	**74%**
E-Commerce (Marketplace model)			Banking - Public Sector	**20%**
Railway Infrastructure			Investment companies (whether or not registered with RBI), holding companies without operations	**100%**
Asset Reconstruction Companies				
Credit Information Companies				
Insurance Intermediaries				
Other regulated Financial services				
White Label ATM Operations (WLAO)				
Telecom services, including Telecom Infrastructure Providers Category-I				
Single Brand Product Retail Trading				

Q23. What is the process of procuring approval for foreign direct investment in the approval route?

If a proposed investment requires approval, the company in which such foreign investment is sought to be made have to make an application to the relevant competent authorities (concerned administrative

ministries / departments, as the case may be) as specified under the Consolidated FDI Policy 2020, segregated in respect of the sector/ activity of the proposed investment for grant of its approval.

The approval is granted on a case–to–case basis at the discretion of the competent authority, and in approving an investment proposal, the competent authority ordinarily considers factors, such as the inflow and outflow of foreign exchange, general benefit to the Indian economy, induction of technology, export potential, potential for large–scale employment, etc.

Applications to the competent authority are to be made either in the prescribed form online, as an e–filing, or as a submission of the signed physical copy of the proposal. Proposals are examined by Competent Authorities, as per the Standard Operating Procedure laid down by the DPIIT (available at http://www.fifp.gov.in/Forms/SOP.pdf). It is generally advisable to include a fairly detailed cover letter setting out the salient details of the proposal and providing details of the foreign collaborator and its past track record internationally. In particular, the following factors usually favorably influence the competent authority:

(a) Long term benefits to the Indian economy

(b) Technological development

(c) High initial investment

(d) Export earnings

(e) Import substitution

(f) Employment generation

(g) Global reputation and presence

(h) Human resources training

In case of proposals with total foreign equity inflow of more than INR 5000 crore (approximately USD 600 million), the competent authority would place the same for consideration of the Cabinet Committee on Economic Affairs ("**CCEA**"). The CCEA also considers the proposals referred to it by the Minister–in–charge of the competent authority.

In respect of proposed investment, where the competent authority proposes to reject the proposal or in cases where conditions for approval are stipulated in addition to the conditions laid down in the Consolidated FDI Policy 2020 or sectoral laws/ regulations, the concurrence of DPIIT shall compulsorily be sought by the competent authority.

In normal circumstances, approval from the competent authority would require 8 (eight) to 10 (ten) weeks.

Additional FDI into the same entity within the approved foreign equity percentage or into a wholly owned subsidiary did not previously require fresh government approval. However, the Consolidated FDI Policy 2020 provides that such additional FDI beyond a cumulative amount of INR 5000 crore (approximately USD 600 million) will require government approval.

Reporting of FDI transactions

(a) The Single Master Form consolidates the extant reporting norms for various types of foreign investment in India.

(b) In case of an issuance of equity instruments, the Indian company is required to file the Form FC–GPR within 30 (thirty) days of the issuance. In case of a transfer of equity instruments to a non–resident investor by a resident investor, the resident investor is required to file the Form FC–TRS within 60 (sixty) days to report such a transfer. There are no reporting requirements if the transfer

occurs between two non–resident investors.

(c) In the event of a delay, if the delay is less than or equal to 3 (three) years, the authorized dealer banks will approve the form, subject to payment of late submission fee. If the delay is more than 3 (three) years, the authorized dealer bank will approve the forms, subject to compounding of the contravention for which the applicant may approach the RBI.

(d) In the event of rejection of the form, the remarks of the authorized dealer bank will be communicated to the applicant through a system generated e–mail and the same can also be viewed on the FIRMS portal.

(e) The reporting requirements for any investment in India by a person resident outside India has been provided in the Foreign Exchange Management (Mode of Payment and Reporting) Regulations, 2019. It has further been provided that unless otherwise specifically stated, all reporting shall be made through or by an Authorized Dealer bank.

Q24. Do the laws on foreign direct investment stipulate any requirements of valuation or pricing?

(a) Pricing – Entry Through Primary Subscription of Shares

(i) The price at which the issuance takes place should not be less than:

(a) in the case of shares of an Indian company which are not listed on a recognized stock exchange in India and on an International Exchange, the fair valuation of shares determined as per any internationally accepted valuation method and as certified by a Securities and Exchange Board of India ("**SEBI**")–registered Category I Merchant Banker or a chartered accountant or a practicing cost accountant; or

(b) in case of shares of an Indian company which is listed on a recognized stock exchange in India and on an International Exchange, pricing worked out in accordance with the relevant SEBI guidelines.

(ii) In the case of any convertible equity instruments i.e., fully, compulsorily and mandatorily convertible debentures or preference shares or share warrants, the price / conversion formula of the convertible equity instruments is required to be determined up front at the time of issue of the instruments and the price at the time of conversion of the equity instruments should not, in any case, be lower than the fair value worked out, at the time of issuance of such instruments, in accordance with the extant NDI Rules.

(iii) If the Indian investee company is engaged in a sector covered under the automatic route under the FDI policy, the non–residents can also subscribe to shares of such company against the following, subject to the relevant conditions prescribed in each case:

- swap of equity instruments; or
- import of capital goods or machinery or equipment (excluding second–hand machinery); or
- pre–operative or pre–incorporation expenses (including payments of rent, etc.)

(b) Pricing – Entry Through the Acquisition of Existing Shares

(i) In case of a transfer from a resident to a non–resident, the price at which the transfer takes place should not be less than:

- In the case of shares of an Indian company which are not listed on a recognized stock exchange in India and on an International Exchange, the fair valuation of shares

determined as per any internationally accepted valuation method and as certified by a SEBI–registered Category I Merchant Banker or a chartered accountant or a practicing cost accountant. Further, not more than twenty five percent (25%) of the total consideration can be paid on a deferred basis within a period not exceeding 18 (eighteen) months from the date of the transfer agreement[14]; or

- in the case of shares of an Indian company which are listed on a recognized stock exchange in India and on an International Exchange, the price at which preferential allotment of shares can be made under the guidelines prescribed by SEBI.

(ii) In the case of a transfer between two non–residents, no pricing guidelines shall apply.

(iii) Other Considerations

- Where a foreign investor proposes to invest in a listed company, whether by way of a primary subscription to or secondary acquisition of shares of the listed company, certain additional issues related to takeover and insider trading disclosures and public offer requirements, if the relevant thresholds have been crossed, would also need to be considered under the relevant securities legislations.

- Please note that the definition of "control" as contained in the Consolidated FDI Policy 2020 may impact whether or not governmental approval is required for investments or transfers of shares in certain sectors.

Q25. What are the tax implications of an investment

(a) Investment into an Indian company may be undertaken by way of a primary infusion (subscription to shares) or by way of secondary purchase. A purchase of Indian shares should be undertaken having regard to the fair market value, as determined by valuation rules prescribed under the (Indian) Income Tax Act, 1961 ("**ITA**"). This is because per Section 56(2)(x) of the **ITA** where any person (including a non–resident) receives any property (including shares or securities) for a consideration which is less than its fair market value (computed as per the prescribed valuation rules), the difference between the fair market value of the property and the aggregate consideration paid for such property (if it exceeds INR 50,000) (approximately USD 574.77) would be taxable in the hands of the person receiving such property, as income from other sources at the applicable rates. Accordingly, Section 56(2)(x) may apply where a non–resident company acquires shares of an Indian company for consideration less than the fair market value of such shares, in which case the difference between the fair market value of such shares and the aggregate consideration paid may be subject to income-tax in the hands of such non-resident company at the rate of 35%, plus applicable surcharge and cess. (subject to benefits, if any, available under the applicable tax treaty).

(b) Resident companies are generally taxed at the rate of thirty percent (30%) (plus applicable surcharge and cess) on a net income basis. However, there is a lower corporate tax rate of twenty five percent (25%) (plus applicable surcharge and cess) applicable to all Indian companies whose total turnover or gross receipts did not exceed INR 4 billion (approximately USD 45.9 million) in the relevant base year as specified under income tax law. Further, if the tax payable by a company is less than fifteen percent (15%) of its book profits, subject to certain adjustments, the company will be liable to pay a minimum alternate tax at the rate of fifteen percent (15%) (plus applicable surcharge and cess) of such book profits.

Resident Companies

[14] As per the Consolidated FDI Policy 2020 for this purpose, if agreed to between the buyer and seller, (i) an escrow arrangement may be made between the buyer and the seller; or (ii) if the total consideration is paid by the buyer to the seller, the seller may furnish an indemnity, for an amount not more than 25% of the total consideration for a period of 18 (eighteen) months from the date of the transfer agreement.

CIT rate (%)								
Turnover does not exceed INR 4 billion in relevant base year as specified under income tax law					Other resident companies			
Income (in INR)	**Basic (%)**	**Surcharge (%)**	**Cess (%)**	**Effective tax rate (ETR) %**	**Basic (%)**	**Surcharge (%)**	**Cess (%)**	**ETR (%)**
Less than INR 10 million (USD 0.11 million)	25	NA	4	26	30	NA	4	31.2
More than INR 10 million (USD 0.11 million) but less than INR 100 million (USD 1.1 million)	25	7	4	27.82	30	7	4	33.38
Above INR 100 million (USD 1.1 million)	25	12	4	29.12	30	12	4	34.94

(c) Further, certain concessional tax rates have also been provided under the ITA in terms of a reduced corporate tax rate of twenty two percent (22%) (plus applicable surcharge of ten percent (10%) and cess) for all Indian companies, provided they do not avail certain tax exemptions/ holidays/ deductions/ set offs. No Minimum Alternate Tax is applicable to companies availing of the lower tax rate.

(d) Further, where dividends are paid by an Indian company to its shareholders, such dividend income will be taxable in the hands of the shareholders. The withholding tax rate on dividends paid to non–residents will be twenty percent (20%) (plus applicable surcharge and cess). This will be subject to benefits available, if any, under a tax treaty applicable to the non–resident shareholder.

(e) Any transaction between a foreign investor and the Indian company shall be subject to Indian transfer pricing regulations, if the parties qualify as associated enterprises under the ITA. The Indian entity will also be obliged to undertake appropriate benchmarking studies and prepare adequate transfer pricing documentation with respect to its international transactions.

Q26. What are the stipulations on foreign direct investment in an LLP

Investment in Limited Liability Partnerships ("**LLP**") by non–residents (other than citizens of or entities incorporated in Pakistan or Bangladesh, FPIs or FVCIs) by way of contribution to the capital of the LLP, does not require government approval, if the LLP operates in sectors / activities where 100% FDI is permitted under the automatic route and there are no FDI–linked performance conditions.

An LLP owned or controlled by non–residents is permitted to make downstream investment in an Indian company operating in sectors where 100% FDI is allowed under the automatic route and there are no FDI–linked performance conditions.

The Consolidated FDI Policy 2020 and the FEMA NDI Rules also permit the conversion of an LLP, having foreign investment and operating in sectors/ activities where 100% FDI is allowed through automatic route and there are no FDI–linked performance conditions, into a company under the automatic route. Similarly, the conversion of a company, having foreign investment and operating in

sectors/ activities where 100% FDI is allowed through the automatic route and there are no FDI–linked performance conditions, into an LLP is also permitted under the automatic route.

Tax Considerations

(a) Indian LLPs are taxed at the rate of thirty percent (30%) (plus applicable surcharge and cess) on a net income basis. Further, if the tax payable by an LLP is less than eighteen and a half percent (18.5%) of its adjusted total income, the LLP will be liable to pay an alternate minimum tax at the rate of eighteen and a half percent (18.5%) (plus applicable surcharge and cess) of such adjusted total income. The method of computing the adjusted total income has been prescribed under the ITA.

(b) There is no tax on distribution of post–tax profits by an LLP to its partners, either for the LLP or the partners. However, remuneration received from the LLP by a partner may be liable to tax in the hands of the partner.

(c) The transactions between the foreign investor and the LLP shall be subject to Indian transfer pricing regulations if the parties qualify as associated enterprises as per the provisions of the ITA.

Q27. What are the different types of instruments that a foreign investor can invest through?

(a) all investments in equity instruments in incorporated entities: public, private, listed and unlisted;

(b) capital participation in LLP;

(c) all instruments of investment recognized in the FDI policy notified from time to time;

(d) investment in units of Alternative Investment Funds (AIFs), Real Estate Investment Trust (REITs) and Infrastructure Investment Trusts (InvIts);

(e) investment in units of mutual funds or Exchange-Traded Fund (ETFs) which invest more than fifty percent in equity;

(f) junior-most layer (i.e. equity tranche) of securitization structure;

(g) acquisition, sale or dealing directly in immovable property;

(h) contribution to trusts; and

(i) depository receipts issued against equity instruments;

“equity instruments” means equity shares, convertible debentures, preference shares and share warrants issued by an Indian company;

Equity shares issued in accordance with the provisions of the Companies Act, 2013 shall include equity shares that have been partly paid. “Convertible debentures” means fully, compulsorily and mandatorily convertible debentures.
“Preference shares” means fully, compulsorily and mandatorily convertible preference shares.

Share Warrants are those issued by an Indian company in accordance with the regulations by the Securities and Exchange Board of India.

Equity instruments can contain an optionality clause subject to a minimum lock-in period of one year or as prescribed for the specific sector, whichever is higher, but without any option or right to exit at an assured price.

Partly paid shares that have been issued to a person resident outside India shall be fully called-up within twelve months of such issue or as may be specified by the Reserve Bank from time to time. Twenty-five percent (25%) of the total consideration amount (including share premium, if any) shall be received

upfront.

In case of share warrants, at least twenty-five percent (25%) of the consideration shall be received upfront and the balance amount within eighteen months of the issuance of share warrants.

Q28. When does an investment by an Indian company that has received foreign investment, be treated as a downstream foreign investment.

Any investment made by an Indian entity (IE) which has received foreign investment in it, or an investment vehicle in the capital instruments or the capital, as the case may be, of another Indian entity, shall be treated as an indirect foreign investment or a "downstream investment" if such IE is (i) not owned and not controlled by resident Indian citizens or (ii) is owned or controlled by persons resident outside India; or (iii) is an investment vehicle whose sponsor or manager or investment manager (a) is not owned and not controlled by resident Indian citizens or (b) is owned or controlled by persons resident outside India.

Only companies or LLPs can receive downstream investment. Therefore, any alternative investment fund is excluded from receiving downstream investment.

Downstream investment by an LLP not owned and not controlled by resident Indian citizens or owned or
controlled by persons resident outside India is allowed in an Indian company operating in sectors where foreign investment up to one hundred percent is permitted under automatic route and there are no FDI linked performance conditions.

Guidelines for calculating total foreign investment in Indian companies are as follows:

(a) any equity holding by a person resident outside India resulting from conversion of any debt instrument under any arrangement shall be reckoned for total foreign investment;

(b) FCCBs and DRs having underlying of instruments in the nature of debt shall not be reckoned for total foreign investment.

(i) "*ownership of an Indian company*" shall mean beneficial holding of more than fifty percent of the equity instruments of such company and "ownership of an LLP" shall mean contribution of more than fifty percent in its capital and having majority profit share;

(ii) "*company owned by resident Indian citizens*" shall mean an Indian company where ownership is vested in resident Indian citizens and/ or Indian companies, which are ultimately owned and controlled by resident Indian citizens and "LLP owned by resident Indian citizens" shall mean an LLP where ownership is vested in resident Indian citizens and/ or Indian entities, which are ultimately owned and controlled by resident Indian citizens;

(iii) "*company owned by persons resident outside India*" shall mean an Indian company that is owned by persons resident outside India and "LLP owned by persons resident outside India" shall mean an LLP that is owned by persons resident outside India;

(iv) "*control*" shall mean the right to appoint 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 and for the purpose of LLP, "control" shall mean the right to appoint majority of the designated partners, where such designated partners, with specific exclusion to others, have control over all the policies of an LLP;

(v) "*company controlled by resident Indian citizens*" means an Indian company, the control of which is vested in resident Indian citizens and/ or Indian companies which are ultimately owned and controlled by resident Indian citizens and "LLP controlled by resident Indian citizens" shall mean an LLP, the control of which is vested in resident Indian citizens and/or Indian entities, which are ultimately owned and controlled by resident Indian citizens;

(vi) "*company controlled by persons resident outside India*" shall mean an Indian company that is controlled by persons resident outside India and "LLP controlled by persons resident outside India" shall mean an LLP that is controlled by persons resident outside India.

Q29. Calculation of the amount of foreign investment in a downstream investment.

The entire downstream investment made by the Indian entity that has received the foreign investment, into an Indian company or LLP will be counted as foreign investment in the investee company or LLP. However, if such Indian company is a wholly owned subsidiary of the investing Indian company, then the foreign investment in the wholly owned subsidiary is limited to the total foreign investment received by the investing Indian company making the downstream investment.

Q30. Restrictions on the source of funds for making a downstream investment

The Indian entity making the downstream investment shall bring in requisite funds from abroad and not use funds borrowed in the domestic markets and the downstream investments may be made through internal accruals and for this purpose, internal accruals shall mean profits transferred to reserve account after payment of taxes.

Q31. Transfer of downstream investments – are they subject to pricing guidelines?

An Indian company transferring its downstream investment to:

(a) a person resident outside India shall be subject to the reporting requirements as specified by the Reserve Bank, as it will be treated as a transfer from a resident to a non-resident under FEMA NDI Rules;

(b) a person resident in India subject to adherence to pricing guidelines, as it will be treated as a transfer from a non-resident to a resident under FEMA NDI Rules; and

(c) an Indian company which has received foreign investment and is not owned and not controlled by resident Indian citizens or owned or controlled by persons resident outside India, without the application of any pricing guidelines or reporting formalities as set out under FEMA NDI Rules.

Q32. Reporting formalities in relation to downstream investments

The Indian company making the downstream investment shall obtain a certificate from its statutory auditor on an annual basis on compliance with the FEMA NDI Rules and such compliance of these rules shall be mentioned in the Director's report in the Annual Report of the Indian company. In case statutory auditor has given a qualified report, the same shall be immediately brought to the notice of the regional office of the Reserve Bank in whose jurisdiction the Registered Office of the company is located and shall also obtain acknowledgement from the Registered Office.

Every Indian company making a downstream investment shall file a Form DI with the valuation report for the investment, within 30 (thirty) days of making the downstream investment.

Q33. What are the different methods of repatriation of proceeds of investment?

Movement of monies from India to outside India is governed by the provisions of FEMA. Set out below are the commonly adopted mechanisms for repatriation of amounts:

<u>Royalty Payments For Technology Transfer</u>

(a) The Consolidated FDI Policy 2020 permits all payments for royalty, lump sum fees for transfer of technology and payments for use of trademark / brand name, under the automatic route without any limits on amounts that may be paid. The quantum of such payments was earlier capped by the regulations.

(b) Further, any payments that qualify as royalty under the ITA, payable to a non–resident by an Indian company would be taxable in India in the hands of such non–resident and the same would be taxed generally at the rate of twenty percent (20%) (plus applicable surcharge and cess) on a gross basis. Accordingly, the Indian company would be required to withhold taxes. This would be subject to benefits available, if any, under an applicable tax treaty.

(c) The Government allows Indian companies to issue equity shares against royalty due and payable and against external commercial borrowings received in convertible foreign currency, subject to meeting all tax liabilities and compliance with the procedures prescribed.

Consultancy Fees

(a) An Indian company may remit up to USD 1 million per project, toward consultancy services received from abroad, without any RBI approval. In the case of infrastructure projects[15], the limit is USD 10 million per project. Payments exceeding these amounts require prior RBI approval. However, where remittance is made from the funds held in Exchange Earners' Foreign Currency account of the Indian company, prior approval of the RBI is not required.

(b) Additionally, any payments which qualify as 'fee for technical services' ("**FTS**"), which include managerial, technical and consultancy services payable to a non–resident by an Indian company are taxable in India in the hands of such non–resident at a rate of twenty percent (20%) (plus applicable surcharge and cess) on a gross basis. Accordingly, the Indian company would be required to withhold taxes. This would be subject to benefits available, if any, under an applicable tax treaty. Additionally, FTS payments are also subject to transfer pricing regulations.

Dividends

(a) Once foreign equity participation is allowed, the foreign investor is normally allowed to freely repatriate the profits by way of dividends in respect of the equity participation subject to Indian taxes. Further, prior to payment of any dividends, the Indian company would have to make necessary statutory reserves.

Q34. Can Indian company issue employee stock options to persons resident outside India?

An Indian company may issue "employees' stock option" and/ or "sweat equity shares" to:

(a) its employees or

(b) its directors or

(c) employees or directors of its holding company or

(d) employees or directors of its joint venture or

(e) employees or directors of its wholly owned overseas subsidiary or subsidiaries, in each case such employees or directors being resident outside India.

Where the issue of "employee's stock option" or "sweat equity shares" in a company where investment by a person resident outside India is under the approval route shall require prior government approval and issue of "employee's stock option" or "sweat equity shares" to a citizen of a land bordering country shall require prior government approval.

Q35. Can foreign parent company fund its Indian subsidiary through debt and what are the laws that govern such debt?

[15] For this purpose, infrastructure sector is defined as (i) power; (ii) telecommunication; (iii) railways; (iv) road including bridges; (v) sea port and airport; (vi) industrial parks; (vii) urban infrastructure (water supply, sanitation and sewage projects) and (viii) exploration, mining and refinery.

Any debt or ECB from an entity abroad, including a debt by a subsidiary from its Indian parent company, will be governed by the Master Direction - External Commercial Borrowings, Trade Credits and Structured Obligations, Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 and Foreign Exchange Management (Guarantees) Regulations, 2000.

Funding an Indian subsidiary through debt is permitted under general permission without taking specific approvals, provided:

That the minimum average maturity period (MAMP) will be 3 (three) years. Call and put options, if any, shall not be exercisable prior to completion of MAMP. However, for the specific categories mentioned below, the MAMP will be as prescribed therein:

S.No.	Category	MAMP
(a)	ECB raised by manufacturing companies up to USD 50 million or its equivalent per financial year.	1 year
(b)	ECB raised from foreign equity holder for working capital purposes, general corporate purposes or for repayment of Rupee loans	5 years
[4](c)	ECB raised for (i) working capital purposes or general corporate purposes (ii) on-lending by NBFCs for working capital purposes or general corporate purposes	10 years
(d)	ECB raised for (i) repayment of Rupee loans availed domestically for capital expenditure (ii) on-lending by NBFCs for the same purpose	7 years
(e)	ECB raised for (i) repayment of Rupee loans availed domestically for purposes other than capital expenditure (ii) on-lending by NBFCs for the same purpose	10 years
for the categories mentioned at (b) to (e) – (i) ECB cannot be raised from foreign branches / subsidiaries of Indian banks (ii) the prescribed MAMP will have to be strictly complied with under all circumstances.		

The ECB will be subject to such all-in-cost ceilings as set out in the regulation.

There are certain prohibited end-uses of the ECB, such as:
(a) Real estate activities.
(b) Investment in capital market.
(c) Equity investment.
(d) Working capital purposes, except when the debt was taken for working capital purposes.
(e) General corporate purposes, except when the debt was taken for general corporate purposes.
(f) Repayment of Rupee loans, except when the debt was taken for repayment of rupee loans.
(g) On-lending to entities for the above activities, except in case of ECB raised by non-banking financial companies.

INTRODUCTION TO M&A ROUTES.

Q36. What is a court approved merger route?

This is a statutory process governed by the (Indian) Companies Act, 2013, requiring approval from the National Company Law Tribunal (NCLT). The process involves filing a scheme of arrangement, obtaining consent from seventy five percent (75%) of the shareholders present and voting and 75% of the creditors. The terms of the mergers or amalgamation or acquisition should be set out in a scheme of arrangement or amalgamation and the scheme shall be filed with the NCLT for approval. The shareholders of the company that is getting folded or merged into the resultant entity will be offered shares in the resultant entity. Where a scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has been approved by the holders of not less than ninety percent (90%) of the value of the transferring shares, other than shares already held by the transferee or its nominees or subsidiaries, the transferee company shall make an offer to any dissenting shareholder, to acquire their shares within a period of 2 (two) months from the date of the ninety percent (90%) approval, provided that the ninety percent (90%) approval was provided within 4 (four) months of the transferee making its offer to buy hundred percent (100%) of the transferor company. The offer shall be binding on the transferee company unless the dissenting shareholder disputes such offer.

The court or tribunal process ensures that all the relevant regulators provide their no-objections to the scheme and merger has no dissenting shareholders or creditors.

On completion of the merger, without any further act or approval the assets and liabilities of the merging entities will be deemed to have been transferred to the resultant entity and the order approving the scheme of merger or amalgamation will also the effect of dissolution of the transferor company without the process of winding up. The scheme will state an “appointed date” which is the date from which the scheme shall be effective once approved by the NCLT.

When the scheme involves the merger of two or more small companies[16] or between a holding company and its wholly-owned subsidiary company or two or more start-up companies[17] or one or more start-up company with one or more small company.

When the merger results in the movement of all the property and liabilities of the transferor company to the transferee company, and the holders of seventy five percent (75%) of the value of the shares in the transferor company (other than shares already held therein immediately before the merger by, or by a nominee for, the transferee company or its subsidiary) become shareholders of the resultant company, otherwise than as a result of the acquisition or distribution of property, the merger is considered as an ‘amalgamation’ for the purposes of the ITA. There are separate tax-neutrality conditions prescribed under the ITA, which are required to be satisfied for an amalgamation to qualify as a tax-neutral/ exempt amalgamation

Q37. Can an Indian company merge with a foreign company through the tribunal process explained in Q34?

The Foreign Exchange Management (Cross Border Merger) Regulations, 2018 read with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 provides general permission to the merger, amalgamation or arrangement between an Indian company and foreign company incorporated in a jurisdiction specified in Annexure B to Companies (Compromises, Arrangements and

[16] “*small company”* means a company, other than a public company having a (i) paid-up share capital of which does not exceed INR 4,00,00,000; and (ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed 40,00,00,000. Provided that nothing in this clause shall apply to - (A) a holding company or a subsidiary company; (B) a company registered under section 8; or (C) a company or body corporate governed by any special Act;

[17] “*start-up company*” means a private company incorporated under the Companies Act, 2013 or the Companies Act, 1956 and recognized as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry.

Amalgamation) Rules, 2016[18] whether having a place of business in India or not. The merger can either be an 'Inbound merger' where the resultant company is an Indian company or an 'Outbound merger' where the resultant company is a foreign company. The resultant company shall take over the assets and liabilities of the companies involved in the cross border merger.

When the resultant company is an Indian company, the issue or transfer of securities to persons resident outside India on account of the merger should be compliant with FEMA NDI Rules. Similarly, when the resultant company is a foreign company, the issue or transfer of securities to persons resident in India on account of the merger should be compliant with FEMA ODI Rules.

An office outside India of the foreign company, pursuant to the sanction of the Scheme of cross border merger shall be deemed to be the branch/office outside India of the resultant company.

The guarantees or outstanding borrowings of the foreign company from overseas sources which become the borrowing of the resultant company or any borrowing from overseas sources entering into the books of resultant company shall conform, within a period of two years, to the laws on external commercial borrowings in India. Provided that no remittance for repayment of such liability is made from India within such period of 2 (two) years.

Q38. What are the methods of acquiring a business or entity that do not require court approval?

Share purchase (SPA): When a company acquires the shares of another company, and the latter becomes the subsidiary of the former – the share purchase agreement or SPA route. The SPA route is used to buy-out companies or for investment purposes or for acquihires.

Asset purchase (APA): When a company buys the assets only (and not the liabilities) of another company. The buyer will selectively decide which assets contribute to its business and buy each of them for an individual consideration. In an asset purchase it is expressly agreed in the documentation that no liabilities whatsoever move to the buyer. Income arising from an itemized transfer of assets (other than depreciable assets) may be subject to income tax as capital gains in the hands of the seller, subject to the nature of the assets, and the period of holding of such assets in the hands of the seller. Long term capital gains are subject to income-tax at the rate of twelve and a half percent (12.5%) increased by applicable surcharge and cess, while short term capital gains are subject to income-tax at the effective corporate tax rates which typically is thirty percent (30%) as increased by applicable surcharge and cess. Income from the transfer of depreciable assets may be subject to income-tax as short-term capital gains at the applicable corporate tax rates. Income from the transfer of all items other than capital assets, such as stock in trade, may be subject to income tax either as 'business income' or 'other income' in the hands of the seller. The rate of tax applicable on income classified under the heads 'business income' or 'other income' generally is thirty percent (30%) (plus applicable surcharge and cess). The sale of each asset by the seller may be subject to Goods and Services Tax ("**GST**") (indicatively at the rate of 5%, 12%, 18% or 28%) depending on the value, nature and classification of such asset, and the seller may be liable to discharge such GST (which can contractually be recovered by the seller from the buyer). Further, the seller may also be under an obligation to undertake the prescribed GST compliances (such as depositing the GST with the authorities, issuing GST compliant invoices, filing GST returns, etc.). The GST paid by the buyer to the seller on the said transactions may be available as input GST credit to the buyer, subject to applicable conditions and restrictions.

Business purchase (BTA): When a company buys the entire enterprise from another company, leaving behind a shell entity (or if the entity has multiple enterprises, such other enterprises). This is distinct

[18] The jurisdiction should be one (i) whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with SEBI, or
(ii) whose central bank is a member of Bank for International Settlements (BIS), and
(iii) which is not identified in the public statement of Financial Action Task Force (FATF) as:
(a) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or
(b) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies

from an asset purchase – in the former, the whole business and every asset that operates the business moves as one consolidated asset; in the latter only the selected asset from an enterprise is transferred. The ITA defines it as a slump-sale - "slump sale" means the transfer of one or more undertaking, by any means, for a lump sum consideration without values being assigned to the individual assets and liabilities in such transfer. Since the entire "undertaking" is treated as a single asset, the consideration is not given in an itemized manner for every asset that constitutes the enterprise, it is a lump sum for the whole "undertaking". Gains arising from a slump sale are chargeable to capital gains tax under the ITA. If the undertaking is held for more than 36 (thirty six) months, the resulting capital gain or loss would be long-term and if it is held for less than 36 (thirty six) months, the resulting capital gain or loss would be short term. Long term capital gains on slump sale are taxed at the rate of 12.5% (plus applicable surcharge and education cess) while short term capital gains are subject to income-tax at the effective corporate tax rates which typically is thirty percent (30%) as increased by applicable surcharge and cess.

Unless like an APA in a BTA, the buyer must identify and quantify the liabilities in the agreement and contractually seek indemnity for any liabilities that are not within the agreed list of liabilities.

Q39. Structuring consideration in a contractual acquisition

A contractual acquisition (M&A) provides a lot more flexibility in terms of structuring the consideration. Typically, in an M&A, the buyer would base his final acquisition value on a true-up of the accounts of the acquired or target company. This refers to a financial adjustment process that reconciles estimated financial figures used to determine the purchase price with the actual financial results as on the transaction date available after the transaction is completed.

The true-up is most commonly done on the working capital and on the net debt or net cash of the target or acquired company. For the working capital, parties usually agree to a minimum working capital, and the purchase price will either go up or down based on the actual working capital available at closing. If actual working capital is higher than estimated, the purchase price increases; if lower, the purchase price decreases accordingly. The process typically involves the buyer preparing a post-closing calculation of the actual financial metric based on final accounting data, which is then reviewed by the seller. True-up calculations usually take up 60 (sixty) to 120 (one hundred and twenty) days after closing to allow for thorough data verification, with contractual provisions specifying deadlines and dispute resolution procedures.

In contrast is the locked box M&A, where the value of the target is frozen with permitted leakages. Any leakage outside of permitted leakages triggers a suit for indemnity. Locked-box is common when there is little to no time gap from diligence to closing and the buyer's priority is to close the deal as locked-box is a deal sweetener for the seller since the deal value is frozen.

A contractual M&A allows the buyer to also holdback consideration through escrow mechanisms contingent on any post-closing warranty or covenant, which are very common structures in Indian M&A. RWI or representation and warranty insurance is also becoming increasingly common in Indian M&A transactions. RWI can provide a reliable recourse for buyers with a low risk appetite for unknown losses and this is usually used in addition to holdback escrow.

In a deal where the buyer is a non-resident, there are certain limitations on the holdback escrow i.e. the escrow cannot be for a period longer than 18 (eighteen) months from the date of the purchase agreement, and cannot be for an amount in excess of twenty five percent 25% of the final consideration that the seller has received.

It is also common in Indian M&A for buyers to use earn outs (either through cash or share swap) to mitigate risk. Earn outs enable the buyers to allocate part of the purchase price that are based on financial or operational milestones such as revenue or EBITDA or profit targets, etc. In this structure, the buyer pays an upfront consideration, and the deferred consideration is contingent on achievement of the milestones. In a deal where the buyer is a non-resident, there are certain limitations on the amount and duration of the deferment i.e., the deferment cannot be for a period longer than 18 (eighteen) months from the date of the purchase agreement, and not more than twenty five percent (25%) of the final consideration that the seller has received, can be deferred. Further, the pricing of the deal has to

be compliant with the pricing norms assuming the deferred consideration or holdback has not been paid out. Therefore, even at the minimum end of the range of consideration, the deal has to be at and not below the fair market value.

The earn outs can also be paid out as part of the employment (retention bonus) although such payouts are taxed at the applicable tax slab.

EMPLOYMENT: LAW AND PRACTICE.

Q40. What are the key laws regulating employment in India?

Social Security Benefits

(a) **Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF)**:[19] Applicable to any entity that employs 20 (twenty) employees or more and if any of those employees receive wages of INR 15,000 per month or more. Under the EPF Act, the employer is required to make a contribution of 13.61% of the employee's basic salary (including all permanent allowances) and dearness allowance towards:

- 8.33% towards employees' pension
- 3.67% towards provident fund
- 0.5% towards deposit linked insurance
- 1.1% towards EPF administrative charges
- 0.01% towards deposit linked administrative charges

(b) **Employees' State Insurance Act, 1948 (ESI)**:[20] Applicable to any entity that employs 10 (ten) employees or more and if any of those employees receive wages of INR 21000 per month or more. Under the ESI Act, the employer is required to make a contribution of 3.25% and the employee is required to make a contribution of 0.75% of the employee's basic salary (including all permanent allowances) and dearness allowance towards ESI in case of sickness, maternity, and employment injury. The benefits are provided by the Employees' State Insurance Corporation (ESIC) constituted under the ESI.

Gratuity and Bonus

(a) **Payment of Bonus Act, 1965**[21] Applicable to every factory and any other entity that employs 20 (twenty) persons or more persons on any day during an accounting year. The law mandates employers to pay the statutory bonus to its employees who receive wages and dearness allowance, not more than INR 21,000 per month and who have worked for at least 30 (thirty) days in the accounting year. The bonus is calculated as 8.33% of the salary of INR 100 whichever is higher. The maximum bonus payable is 20% of the salary.

(b) **Payment of Gratuity Act, 1972:**[22] Applicable to all factories and to establishments employing at least 10 (ten) employees. Employees who have rendered continuous service of not less than 5 (five) years (interpreted to mean 4 (four) years and 190 (one hundred and ninety) days) on the cessation of their employment are entitled to gratuity calculated at the rate of 15 (fifteen) days wages based on the rate of wages last drawn by the employee. Daily wages are computed on the average of the total wages received by him for a period of 3 (three) months immediately preceding the termination of the employment.

Disputes

(a) **Industrial Disputes Act, 1947**:[23] Governs the settlement of employer-employee and inter-employee industrial disputes, retrenchment and layoffs, strikes and lockouts, unfair labor practices, etc. Applicable to all factories and industrial establishments as defined in the law. The benefit of the Act applies only to workmen as defined under the law which excludes persons who are primarily

[19] This law is proposed to be replaced by the Code on Social Security, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.
[20] This law is proposed to be replaced by the Code on Social Security, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.
[21] This law is proposed to be replaced by the Code on Wages, 2019, which has been notified (published in the official gazette) on August 8, 2019, although its effective date is yet to be separately notified.
[22] This law is proposed to be replaced by the Code on Social Security, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.
[23] This law is proposed to be replaced by the Industrial Relations Code, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.

employed in a managerial or administrative capacity or supervisors who draw a monthly salary exceeding INR 10,000.[24]

Policy on leave, safety, registration of factories, working conditions

(a) **Factories Act, 1948**:[25]Provides terms governing the registration of factories, working conditions, working hours and overtime, leave and holidays, etc.
(b) **Industrial Employment (Standing Orders) Act, 1946**:[26] Requires that every defined employer implement the terms and conditions of work and requires that the employers procure the terms and conditions be certified by the concerned labor department.
(c) **Relevant Shops and Establishments Act**: Every state in India has its state shops and commercial establishments act which provide for the registration, working conditions, working hours and overtime, leave and holidays of non-factory establishments.
(d) **Child Labour and Adolescent Labor (Prohibition and Regulation) Act, 1986**: Prohibits the employment of children of 14 (fourteen) years or less except in certain limited situations. It also prohibits the employment of children between the age of 14 (fourteen) and 18 (eighteen) years in hazardous occupations and processes.
(e) **Maternity Benefit Act, 1961**:[27] Provides for paid leave both before and after the pregnancy totaling 26 (twenty six) weeks and certain other benefits.
(f) **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013**: Prohibits the sexual harassment of women at workplace and provides for redressal of grievances pertaining to workplace sexual harassment.
(g) **Employees' Compensation Act, 1923:**[28] Provides for payment of compensation to employees or their family members in case of accidental death, occupational diseases, or disablement (partial or total disablement).

Equal wages, minimum wages, contract labour, trade unions

(a) **Equal Remuneration Act, 1976**[29] that requires equal pay for men and women.
(b) **Payment of Wages Act, 1936**[30] that requires that all employees be paid wages.
(c) **Minimum Wages Act, 1948**[31] that requires that all employees be paid wages no lower than the minimum wages. Each state government determines the minimum wage for each type of employment based on the type of industry, location, and nature of work done. These rates are periodically reviewed and revised.
(d) **Contract Labour (Regulation and Abolition) Act, 1970**[32] regulates the employment of contract labor, registration of the principal employer, onus of ensuring compliance with labour law either on the principal employer or the contractor.
(e) **Trade Unions Act, 1926**[33] provides for registration of trade unions and the rules of engagement of a trade union.
(f) **Rights of Persons with Disabilities Act, 2016** prevents discrimination of persons with disabilities.

[24] This threshold will be revised to INR 18,000 for the Industrial Relations Code, 2020; and INR 15,000 for the purpose of Code on Wages, 2019, on notification of their respective provisions.
[25] This law is proposed to be replaced by the Occupational Safety, Health and Working Conditions Code, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.
[26] This law is proposed to be replaced by the Industrial Relations Code, 2020, which has been notified (published in the official gazette) on September 29, 2020, although its effective date is yet to be separately notified.
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(g) **Transgender Persons (Protection of Rights) Act, 2019**: protects transgender persons from discrimination.
(h) **The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Protection and Control) Act, 2017** prohibits discrimination of persons who are HIV positive or who is living or has lived with an HIV-positive person in employment of occupation and prohibits HIV testing as a prerequisite for obtaining employment.

Q41. What are the new labour codes?

In order to increase the ease of doing business in India, the Central Government reformed the labour law framework by embarking on a massive consolidation of 29 (twenty nine) federal labor laws resulting in 4 (four) labour codes explained as follows:

- 4 (four) laws relating to wages and bonus were amalgamated into the **Code on Wages, 2019**,
- 9 (nine) laws relating to social security were amalgamated into the **Social Security Code, 2020**
- 13 (thirteen) laws relating to the occupational safety, health and working conditions of the employees in an establishment were amalgamated into **The Occupational Safety, Health and Working Conditions Code, 2020**
- 3 (three) laws relating to trade unions, conditions of employment in industrial establishment or undertaking, investigation and settlement of industrial disputes were amalgamated into the **Industrial Relations Code, 2020**

The 4 (four) codes are yet to come into force although approved by the Parliament.

Q42. Is the practice of building a workforce through an employer-on-record common in India?

Employers of record (EOR) or staffing companies are common in India for foreign employers who don't have an entity in India but seek to build a work force in India, especially in the software and technology sectors. While the law does not prohibit EOR structures, the foreign employer should ensure that the applicable laws and contractual arrangements with respect to the employees employed for the foreign company are complied with.

Q43. What are the guidelines for foreign enterprises outsourcing work to their employees in India?

The software industry in India continues to thrive on the outsourcing model sometimes called as the offshore delivery centre model. In this model, the foreign company is the sales entity, signing up the contracts with offshore customers (USA, UK) and the work is outsourced to the Indian subsidiary. The Indian subsidiary becomes the employer and is responsible for compliance with Indian laws. Where the Indian employer uses EORs, the supply of manpower falls within the remit of the Contract Labour (Regulation and Abolition) Act, 1970 as explained in Q40.

Direct employment of employees in India by foreign employers will be subject to the structural considerations set out in Q2 and Q3.

Q44. What are the primary mechanisms to resolve employment disputes?

Industrial disputes fall within the process set out in the Industrial Disputes Act, 1947 which is briefly explained below.

Each industrial establishment employing at least 20 (twenty) workmen is required to institute a grievance redressal committee. The decisions of the grievance redressal committee may be appealed against with the employer. The employer must provide its decision on the appeal within 1 (one) month from the date of receipt of the appeal and send a copy of the decision to the aggrieved workman.

Each industrial establishment employing at least 100 (hundred) workmen may be required to institute a works committee. The committee will be responsible to promote measures for maintaining the relations between the employer and workmen.

The state government may also appoint such number of persons as it thinks fit to be conciliation officers, charged with the duty of mediating in, and promoting the settlement of, industrial disputes. If the conciliation officer is not able to resolve the dispute, the parties to the dispute will send the report to the government. The government may then refer the dispute to the Board of Conciliation, Labor Court, or Industrial Tribunal.

The state government may create one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter. The Industrial Tribunal consists of one person who is appointed by the appropriate government.

The central government may create one or more National Tribunals for the adjudication of industrial disputes that, in the opinion of the central government, involve questions of national importance or are of such a nature that industrial establishments situated in more than one state are likely to be interested in, or affected by, such disputes.

In addition to the above, the employer and the workmen have the option to refer a dispute to arbitration by way of a written agreement before such dispute is referred to any of the above-mentioned authorities. A copy of the arbitration agreement has to be forwarded to the appropriate government and the conciliation officer, and the appropriate government must, within 1 (one) month from the date of the receipt of such copy, publish the same in the Official Gazette.

Considering the foregoing provisions, it should be possible for the employer to compel the employees to arbitrate claims of wrongful dismissal provided the parties have an arbitration agreement in place. It may not be possible to compel employees to refer the dispute to arbitration in the absence of any such agreement allowing for arbitration. In the Indian context, given the protection provided to employees under labor laws, and since labor courts and tribunals are set up under such laws, employees often prefer to make their complaints to the labor courts rather than referring the matter to arbitration.

Q45. Can an employee bring claims on behalf of other workers (i.e., class or collective action)?

Order 1 Rule 8 of the Civil Procedure Code provides that where there are numerous persons having the same interest in a particular suit, then one party can represent such other people in a common cause of action. Therefore, where the claim relates to a number of workmen, and there is a common cause of action, any one worker can file a suit on their own behalf and the other workers. The Payment of Wages Act, 1936 similarly allows for a single application with respect to claims from an unpaid group. There is also a similar provision under the Industrial Disputes Act, 1947 for workmen entitled to receive any money or benefit capable of being computed in terms of money, enabling filing of a single application for recovery of such amounts, on behalf of or in respect of any number of such workmen. Additionally, as per the Trade Unions Act, 1926, trade unions can prosecute any rights of the trade union and the rights arising out of the relations of any member with their employer or with a person whom the member employs.

Q46. Does Indian law permit employment-at-will?

Indian labor laws do not permit an at-will employment relationship. Employers can terminate employment only for reasonable cause or for misconduct. Further, due process needs to be followed based on the principles of natural justice in order to prove the act of misconduct prior to terminating employment. Foreign employers often overlook this basic requirement and ignore the employment termination provisions of law. This may lead to a potential litigation risk, and in a worst-case scenario, courts could order reinstatement with back wages by treating the termination as illegal or unlawful.

Q47. Can a global handbook extend to employees India?

Such extension could lead to the: (a) a potential violation of the local labor laws resulting in penalties; (b) employees receiving lesser benefits than those stipulated under Indian law, thereby increasing the

risk of potential litigation; and (c) giving more benefits than may be required under local labor law, which may have financial implications for the foreign employer.

LAWS ON DATA PRIVACY

Q48. What is the law governing the protection of personal data of Individuals in India?

As on date, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 ("**SPDI Rules**"), formulated under the Information Technology Act, 2000 ("**IT Act**"), form the legal framework governing the protection of personal data in India, outlining the safeguards that businesses must implement while handling the personal data or information of individuals.

The SPDI Rules are sector agnostic and apply to all entities, including companies, firms, proprietorships, and associations of individuals engaged in commercial or professional activities.

Note that India is in the process of overhauling its privacy regime. The framework contained under the SPDI Rules is set to be replaced by the one under the Digital Personal Data Protection Act, 2023 ("**DPDP Act**"). The text of the DPDP Act has been finalized and the DPDP Act has been published in the official gazette. It is however pending implementation.

Q49. What is the meaning of Personal Information and Sensitive Personal data or information under the SPDI Rules?

'Personal Information' refers to any information relating to an individual, which is capable of identifying such individual, either directly or indirectly. While personal information is provided a basic level of protection under the SPDI Rules, it becomes subject to stricter handling requirements if it qualifies as sensitive personal information.

'Sensitive Personal data or information' has been defined under SPDI Rules as password, financial information including the bank account information, physical and mental health condition, sexual orientation, medical history, biometric information. However, any information which is freely accessible in public domain has been excluded from the definition of sensitive personal data or information.

Q50. What are the obligations and restrictions imposed on a body corporate collecting sensitive personal data or information under the SPDI Rules?

Sensitive personal data is a subset of personal data. While all sensitive personal data is personal data, all personal data is not sensitive personal data. Accordingly, all provisions of the SPDI Rules apply to sensitive personal data and some of these have been identified below.

Under the SPDI Rules, a body corporate is prohibited from collecting sensitive personal data or information unless it is necessary for a lawful purpose. Where such collection is justified, the body corporate is required to comply with the obligations and restrictions, as outlined below:

(a) **Obligation to Obtain Consent***:* A body corporate must obtain the consent of the individual before collecting any sensitive personal data or information. In doing so, it is also required to inform the individual about the fact that the information is being collected, purpose of data collection, the intended recipients of the data, and the name and address of the entity collecting and retaining the information.

(b) **Obligation to implement Privacy Policy***:* The SPDI Rules mandate that every business entity that collects, receives, stores, processes, or handles personal or sensitive personal data must implement a clearly defined privacy policy. This policy must be made available on the entity's website and must be easily accessible to individuals providing their data. The policy should detail the entity's data handling practices and policies, the types of information collected, the purposes of collection and usage, how the information may be disclosed, and the reasonable security practices implemented to protect such data.

(c) **Restriction on retention of data***:* A body corporate or any person processing sensitive personal data is required to retain such information only for as long as it is required for the purpose for which

it was collected or required under applicable law. Sensitive personal data should not be held longer than is necessary for the purpose for which it was collected.

(d) **Restriction on usage of data***:* Sensitive personal data or information collected by a body corporate must be used strictly for the purpose for which it was collected.

Q51. Whether the sensitive personal data collected under the provisions of SPDI Rules can be disclosed to third parties?

Yes, the sensitive personal data collected under the SPDI Rules can be disclosed to third parties, provided that the consent of the individual providing such information has been obtained. However, such consent is not mandatory when the disclosure is made to government agencies that are legally authorized to obtain such information. This includes situations involving the verification of identity or the prevention, detection, investigation (including cyber incidents), prosecution, or punishment of offences.

Q52. Whether a body corporate is allowed to transfer the data?

Yes, a body corporate is allowed to transfer personal data or information, whether within India or to any other country. However, such transfer is subject to the following conditions:

(a) The body corporate must ensure that the transferee entity provides the same level of data protection as mandated under the SPDI Rules; and
(b) The transfer must be necessary for the performance of a lawful contract between the body corporate, or any person acting on its behalf, and the data subject; OR The individual whose data is being transferred must have given his consent to such transfer.

Q53. What are the security measures that a body corporate is required to adhere to under the SPDI Rules?

Under the SPDI Rules, a body corporate that handles personal data or information is required to implement reasonable security practices and procedures to safeguard such data.

Reasonable security measures refer to the implementation of security practices and standards and the implementation of a comprehensive, documented information security program. This program must include managerial, technical, operational, and physical security control measures that are appropriate to the nature of the information being protected and aligned with the scale and nature of the business operations.

The International Standard IS/ISO/IEC 27001 on "*Information Technology – Security Techniques – Information Security Management System - Requirements*" is one such standard.

Q54. Does India have any other specific data privacy or data protection law and what is the scope and applicability of the same?

Yes, as mentioned above, the DPDP Act is meant to be India's primary law on the protection of digital personal data. Once provisions of the DPDP Act are brought into force, the DPDP Act will replace Section 43A of the IT Act and the SPDI Rules.

The DPDP Act provides the framework on how organizations should collect, process, store, and transfer personal data of individuals for lawful purposes in a manner that protects the rights of the individuals to whom the personal data belongs. The DPDP Act focuses on digital personal data and does not apply to any anonymized data, any personal data that the person has made public themselves, data processed by an individual for personal purpose and non-personal data.

The DPDP Act defines ‘personal data’ as any data about an individual who is identifiable by or in relation to such data. The DPDP Act does not categorize personal data into different categories (such as personal data and sensitive personal data).

The DPDP Act introduces a fiduciary relationship between 'Data Principals', i.e. persons to whom the personal data relates and 'Data Fiduciaries' i.e. persons who determine the purpose and means of the processing of personal data.

The DPDP Act not only extends to the processing of digital personal data within the territory of India but also processing undertaken outside India if it is in connection with the offering of goods or services to Data Principals within the territory of India.

Q55. What are the obligations of a Data Fiduciary under the DPDP Act?

The obligations of a Data fiduciary include the following:

(a) **Obligation in relation to purpose*:*** Every Data Fiduciary should ensure that any processing of personal data of Data Principals is done so for a lawful purpose for which the Data Principal has given her consent or for a legitimate use as specifically identified under the DPDP Act.

(b) **Obligation of requesting consent**: A Data Fiduciary can process the personal data of a Data Principal after obtaining their consent for the same. The consent must be free, specific, informed, unconditional and unambiguous with a clear affirmative action, that signifies the Data Principal's agreement to process their personal data for the specified purpose and be limited to only such personal data as is necessary for the specified purpose.

(c) **Obligation to provide notice*:*** Prior to obtaining consent, the Data Fiduciary must provide a notice informing the Data Principals of the -

- categories of personal data processed;
- purpose of the processing of personal data;
- process for Data Principals to exercise the right to withdraw consent and right of grievance redressal; and
- process for Data Principals to file a complaint with the Data Protection Board of India.

This notice must be provided in English as well as be available in language specified in the 8th Schedule to the Constitution of India for the Data Principal's reference.

(d) **Obligation to provide option to withdraw consent**: The Data Fiduciary is also required to ensure that the Data Principal is provided the right to withdraw their consent for processing their personal data at any time. The ease in which consent can be withdrawn should be comparable to the ease through which the consent was obtained.

(e) **Obligation to provide a right to erase personal data**: The Data Fiduciary is also required to ensure that the Data Principal is provided the right to erasure of personal data for the processing of which the Data Principal had previously given consent.

(f) **Obligation to provide a right to access information about personal data*:*** The Data Fiduciary is also required to ensure that the Data Principal is provided the right to access information in relation to the personal data including, a summary of the personal data of the Data Principal which is being processed by the Data Fiduciary, identities of any other Data Fiduciaries and Data Processors with whom the personal data has been shared along with description of the personal data shared with such other Data Fiduciaries or Data Processors; and any other information related to the personal data as may be prescribed.

(g) **Obligation to provide a right to correct, complete and update personal data*:*** The Data Fiduciary is also required to ensure that the Data Principal is provided the right to correct, complete and update personal data. When requested, the Data Fiduciary is required to correct the inaccurate or misleading personal data, complete the incomplete personal data and update the personal data.

(h) **Obligation to provide a right to nominate*:*** The Data Fiduciary is also required to ensure that the Data Principal is provided the right to nominate another individual to exercise their rights under the DPDP Act in the event of their death or incapacity.

(i) **Obligations while processing personal data of children or persons with disabilities***:* In order to process the personal data of Data Principals who is below the age of 18 years or a person with a disability, the Data Fiduciary needs to obtain verifiable consent from the parent/legal guardian to process their personal data, and the manner of obtaining the same will be prescribed.

(j) **Grievance Redressal**: A Data Fiduciary is required to provide the Data Principals with a readily available means of grievance redressal in respect of any act or omission of such Data Fiduciary regarding the performance of its obligations in relation to the personal data of such Data Principal or the exercise of their rights.

(k) **Some Other obligations**:

- When the Data Fiduciary is processing personal data that is used to make a decision that affects the Data Principal or is disclosed to another Data Fiduciary, it must ensure that the personal data processed is complete, accurate and consistent.
- Obligation to protect personal data in its possession or under its control, including in respect of any processing undertaken by it or on its behalf by a Data Processor (i.e., a person who processes personal data on behalf of the Data Fiduciary), by taking reasonable security safeguards to prevent personal data breach.
- Obligation to implement appropriate technical and organizational measures to ensure effective observance of the provisions of the DPDP Act.

Non-compliance with the above stated obligations by the Data Fiduciary will attract penalties up to two hundred and fifty crore rupees, determined by the Data Protection Board of India based on factors listed out in the DPDP Act and the nature of contravention.

Q56. Are Data Fiduciaries classified, and do such classifications carry additional compliance requirements?

The Central Government may notify any Data Fiduciary or a class of Data Fiduciaries as significant data fiduciaries taking into account multiple factors (such as volume of personal data processed, risk of harm, security of state, etc.). Significant Data Fiduciaries need to comply with additional requirements such as conducting periodic data audits, undertaking data protection impact assessments, appointment of a Data Protection Officer, and implement other measures as prescribed.

Q57. Can personal data be processed without obtaining consent?

The DPDP Act provides certain grounds classified as “legitimate uses” where consent of the Data Principal is not required for processing of their personal data. These legitimate uses include the following scenarios: (a) where there is voluntary sharing of personal data by the Data Principal in respect of which the Data Principal has not indicated to the Data Fiduciary that they do not consent to the use of their personal data; (b) for compliance with any judgment or decree or order issued under any applicable law; (c) for responding to a medical emergency involving a threat to the life or immediate threat to the health of the Data Principal or any other individual; (d) for taking measures to ensure safety of or provide assistance or services to any individual during any disaster or any breakdown of public order; (e) for the purposes of employment or those related to safeguarding the employer from loss or liability or provision of any service or benefit sought by a Data Principal who is an employee.

Q58. Are there any exemptions under the DPDP Act?

The DPDP Act also recognizes certain exemptions that allow processing of personal data without strictly adhering to all provisions of the DPDP Act. Such exemptions include processing of personal data that is necessary for enforcing any legal right or claim, processing is necessary for research, archiving and statistical purposes and where personal data is processed in the interest of prevention, detection, investigation or prosecution of any offence or contravention of law.

Q59. Are there are restrictions imposed on data transfer by the Data Fiduciary under the DPDP Act?

No. DPDP Act enables free flow of personal data, subject to the following 2 (two) restrictions:

(a) the transfer should not be to a territory or a country that is notified / blacklisted by the Central Government; and
(b) cross-border transfer of personal data should not be restricted under applicable sectoral laws.

OVERVIEW OF INTELLECTUAL PROPERTY RIGHT PROTECTION IN INDIA.

With the rise of the knowledge and information technology era, intellectual capital has become a critical asset, making Intellectual Property and associated rights highly valuable and rigorously protected. The past decade has seen a surge in cross-border business transactions, with companies operating globally and offering goods and services across jurisdictions. Given that Intellectual Property Rights (IPRs) are territorial, understanding the scope of protection in each jurisdiction is essential. This paper explores India's IP regime and the legal protections it affords.

India has established a robust statutory, administrative, and judicial framework for the enforcement of IPRs and has aligned its laws with the TRIPS Agreement through comprehensive legislative reforms. Notable changes include the replacement of the Trade and Merchandise Marks Act, 1958 with the Trade Marks Act, 1999, and amendments to the Copyright Act, 1957 to recognize computer programs as literary works in 1994. The Patents Act, 1970 has undergone significant amendments (1999, 2002, 2005), and the Designs Act, 2000 has replaced the earlier 1911 legislation.

India has also introduced dedicated statutes to protect emerging forms of IP, including:

1. The Geographical Indications of Goods (Registration and Protection) Act, 1999; and
2. The Semiconductor Integrated Circuits Layout-Design Act, 2000.

Further, in 2024, the Law Commission of India in its report titled 'Trade Secrets and Economic Espionage' has proposed the 'Protection of Trade Secrets Bill, 2024' to offer and regulate the statutory protection to trade secrets in India.

TRADE MARKS

Trademarks in India are protected under the Trade Marks Act, 1999 ("**Trade Marks Act**") and under common law principles of passing off.

Trademark law in India has undergone major reforms. The Trade Marks Act 1999 came into force on September 15, 2003. It has widened the ambit of substantive and procedural protection.

Under the Trade Marks Act, registration and protection is accorded to service marks, combination of colours, shapes and packaging of goods, collective marks, certification marks, three-dimensional marks and sound marks. Smell marks have not been specifically included or excluded under the Trade Marks Act. However, the expanded definition of trademark to include 'capable of being represented graphically' would allow the Trade Mark Registry ("TMR") to consider registration of distinctive smell marks that can be precisely represented in words.

The requirements for registration of marks have been relaxed and the TMR now requires a mark to be distinctive either inherently or by secondary meaning. The Trade Marks Act, though has its classification of goods and services, is persuaded by the Nice International Classification of Goods and Services.

Q60. What is a Trademark?

"Trademark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.

A **"**mark**"** includes device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colors or any combination thereof.

Q61. Is registering a trademark mandatory in India?

No, registering a trademark is not mandatory in India. In the absence of registration, the proprietor will be unable to initiate infringement proceedings before a civil court for enforcing its rights in the same. However, the proprietor continue using the said trademarks (barring any court ordered injunction) and initiate passing off actions against third parties based on the goodwill and common law rights acquired

through use. Having said that, the standard of proof and onus on the plaintiff in such proceedings is typically higher than in infringement actions.

Q62. What is the process for registration of Trademark?

(a) Search

Prior to any trademark applications being filed at the TMR, it is recommended that an availability search be conducted to ascertain the availability of the trademarks at the TMR in India.

The search at the TMR do not reflect trademarks which are used in the public by third parties but for which no trademark applications have been filed at the TMR. In any event, they are helpful to ascertain what prior applications have been filed and the status of these prior applications or registrations. The results of a search often assist in the drafting of the trademark application.

(b) Filing

(i) A trademark owner can file an application for registration of a trade mark. Applications can be filed in respect of:
   A. Single application for each mark in each class
   B. Multi-class applications
   C. Conventional applications that claim foreign priority date. A conventional application is required to be filed within 6 months of the date of filing the application in the convention country.

(ii) An application is required to include details such as the name, address of the applicant, local presence of the applicant, if any, representation of the trademark, date of first use of the mark in India, priority date on the basis of an earlier conventional application filed and specification of gods/services. Marks claiming prior use in India are required to be accompanied with an affidavit testifying to such use along with supporting documentation.

(iii) An application can be filed for a plain word trademark, for a logo/ device or for a label. A registration for a plain word gives protection to the trademark used in any stylised manner. Applications can be in colour or in black and white. Where the application is filed in black and white, the registration for such a trademark will give protection to the trademark used in any colour combination.

(c) Examination

Each application once filed undergoes examination by the TMR for satisfaction of whether the trade/service mark meets the registration criteria. At the stage of examination, the TMR can raise objections calling for the applicant to file a written response and attend a personal hearing or even file an affidavit to show that the mark has acquired distinctiveness through use.

(d) Acceptance & advertisement

In the event that the TMR accepts the application as distinctive, the application proceeds for advertisement in the Trade Mark Journal. The TMR can allow the mark to be advertised either with absolute acceptance, with limitations or before acceptance.

(e) Opposition

Within 4 months of advertisement of the application in the Trade Mark Journal, any person can file opposition proceedings against the registration of such application. A mark can be opposed on grounds such as (i) descriptive nature of the mark (ii) deceptive similarity with a mark having prior rights in the same class of goods, (ii) similarity with a well-known mark in different class of goods or, (iii) by virtue of the law of copyright and passing off.

(f) Registration

If the application succeeds in the opposition proceedings or no opposition is filed within the prescribed period of opposition, the trademark proceeds to registration. The term of the trademark registration relates back to the date of filing. The registration of the trademark is valid for 10 (ten) years and can be renewed for successive periods of 10 (ten) years.

Q63. What are the grounds on which a proposed mark may be refused?

An application may be refused by the TMR on absolute and/or relative the grounds.

(a) The absolute grounds of refusal are:
   (i) the mark lacks distinctive character;
   (ii) is descriptive of the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service;
   (iii) the mark has become customary in the current language or in the bona fide and established practices of the trade;
   (iv) is deceptive or may cause confusion;
   (v) the mark is likely to hurt the religious susceptibilities of any class or section of the citizens of India; or
   (vi) the mark is or contains scandalous or obscene matter; (vii) the use of the mark is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950

(b) Additionally, registration to a mark would be absolutely refused if the mark exclusively contains of (i) shape of goods which results from the nature of the goods themselves; (ii) shape of goods which is necessary to obtain a technical result; or (iii) shape which gives substantial value to the goods, would not be granted registration.

(c) The relative grounds of refusal are:
   (i) the mark is similar /identical to an earlier trademark used in relation to similar/identical goods/services which may cause a likelihood of confusion;
   (ii) the mark is similar / identical to an earlier trademark which is a well-known trademark (though applied for different goods/services);
   (iii) the use of the mark is prevented by the law of passing off protecting an unregistered trademark used in the course of trade; or
   (iv) by virtue of law of copyright.

Q64. What is a well-known mark and the criteria for well-known mark?

A "well known trade mark" means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

The Registrar shall consider any relevant fact including:

(a) Knowledge or recognition in the relevant section of public including knowledge in India obtained as a result of promotion of the trade mark;
(b) Duration, Extent and Geographical area of any use or promotional activities of the trade mark activities including advertising or publicity and presentation, at fairs or exhibition;
(c) The duration and geographical area of any registration of or any application for registration of that trade mark under this Act to the extent that they reflect the use or recognition of the trade mark
(d) Record of successful enforcement including recognition as well-known by any court or Registrar under that record.

For the purposes of determining a ‘well-known mark’, the fulfilment of the below criteria is not mandatory:

(a) That the trade mark has been used in India

(b) That the trade mark has been registered
(c) That the application for registration has been filed in India
(d) That the trade mark is well-known in other jurisdictions
(e) That the trade mark is well-known to the public at large in India

By increasing the scope of protection to well-known marks, the Trade Marks Act seeks to accord protection to unregistered marks that have acquired trans-border reputation. Convention applications can also be made in India seeking filing priority date in respect of an application filed in any of the Paris convention countries.

Q65. What kind of activities are undertaken in the enforcement process?

The police authorities have under the Trade Marks Act have the power to take cognizance of trademark offences related to infringement, counterfeiting, false application of trademarks or trade description. The police can take cognizance in some cases on a complaint made by the Registrar of Trade Marks and in other cases on an opinion of the Registrar. The police have powers to search and seize the infringing goods and materials in respect of which the offence has been committed.

Q66. What are the remedies in case of infringement?

(a) Civil remedies

The Trade Marks Act provides remedies for statutory infringement of registered marks and common law protection of passing off for unregistered marks. Remedies in the form of damages, account of profits, injunction, search, seizure, forfeiture and destruction are available in respect of trademark infringement, passing off and dilution actions. The civil courts have express powers to issue ex parte injunctions and search and seizure orders. Civil actions under the Trade Marks Act can be filed in the jurisdiction where the plaintiff carries on its business in case of registered trademark.

Rectification application for change of name of a company: Section 16 of the Companies Act, 2013 provides a remedy for rectification of the corporate name which is identical with or too nearly resembles a registered trade mark. This application is required to be filed within 3 (three) years from the date of incorporation, or change of name of the company.

(b) Criminal remedies

Trademark infringement and counterfeiting are now classified as cognizable offences. Other offences punishable under offences punishable under the Trade Marks Act are false entries on the TMR, false trademarks and false trade descriptions. These offences attract stringent punishments such as imprisonment and fines.

COPYRIGHT

The Copyright law in India confers protection to creative works that are original and reproduced in some tangible form. In India, copyright protection is available irrespective of whether a copyright registration is obtained or not. However, the drawback in filing an application for the registration of the copyright in a work is that there is a public disclosure to the Copyright Office of the work.

Q67. What is the scope of protection?

Copyright protection in India is governed by the Copyright Act, 1957, as amended by the Copyright (Amendment) Act, 2012 ("**Copyright Act**"). The Copyright Act confers protection on creative works that are original and reproduced in some tangible form. Works entitled to protection under the Copyright Act include artistic works, musical works, literary works, dramatic works, sound recordings and cinematographic films. The Copyright Act also recognizes neighbouring rights in performances and broadcasts. A device or logo used as a trademark could also be protected if it is an original work.

Copyright comprises of a bundle of rights that include the right to copy, reproduce, perform, make a film or recording, make a translation, make an adaptation, rental rights, communicate to the public by way of broadcast or through other medium and to sell, offer to sell or import the work.

The Copyright Act also specifically recognises special rights of an author that confer on an author the right to claim damages and prevent the distortion, mutilation, modification of the work or any other act that would be prejudicial to the honour or reputation of the author (together, "**Moral Rights**"). Author's special rights subsist even after the copyright in the work has been assigned or transferred by the author. However, this right can be waived by the author by way of a contract.

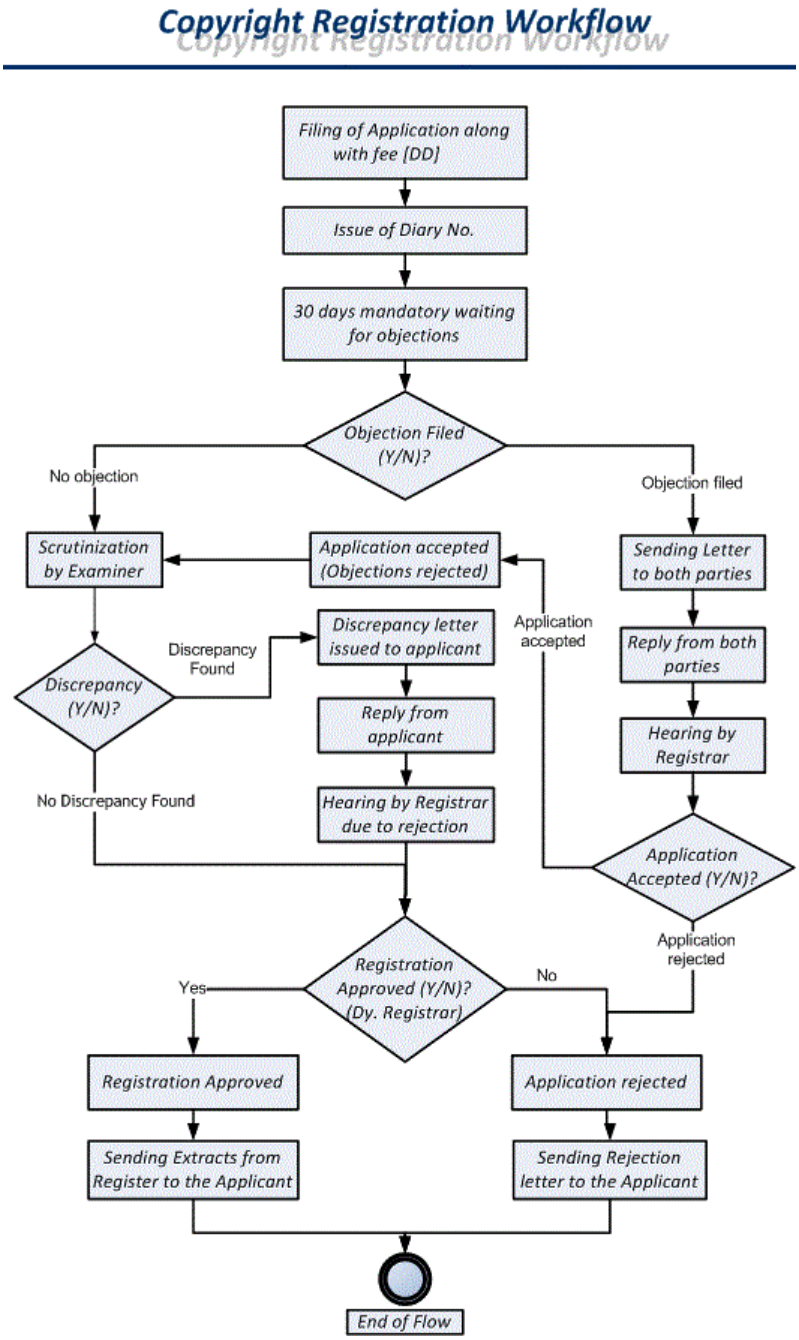
The Copyright Act prohibits circumvention of an effective technological measure and further prohibits the removal or alteration of any rights management information.

Q68. Is registration mandatory to register a copyright in India?

No, registration of copyright is not mandatory under Indian law. Copyright protection arises automatically upon the creation of an original work that qualifies under the Copyright Act. Having said that, it may serve as prima facie evidence of the particulars entered in the Register of Copyrights under the copyright Act and thus may facilitate evidentiary proceedings in litigation.

Q69. What is the process for registering a copyright?

Registration of copyright is not mandatory under the Copyright Act. Copyright protection is granted by virtue of the work being original, in some tangible form and being published. However, the Copyright Act provides a procedure by virtue of which an author/ owner of a copyrightable work can obtain registration. Below is a step-by-step guide to the copyright registration procedure in India:



Submission of supporting documents is a critical aspect of the copyright registration process. It is therefore essential to ensure that all necessary documents are prepared and available in advance for timely and successful filing.

Q70. Who owns a copyright?

The Copyright Act provides that ordinarily an author is the first owner of the copyright in a word, unless the circumstances under Section 17 of the Copyright Act get attracted. Section 17 of the Copyright Act specifies the circumstances under which a person other than an author is deemed to be the first owner of the copyright in a work. Such instances include works created during the course of employment or under a contract of services or apprenticeship. In such instance it is the employer who is the first owner, unless there is a contract to the contrary.

Similarly, for a certain work (such as a photograph, painting, portrait or engraving) which is made for valuable consideration at the instance of any person, in the absence of any agreement to the contrary, it is such person who is the first owner of the work and not the author of the work.

In the case of a literary, dramatic, musical or artistic work, incorporated into a cinematographic work, despite being a commissioned work or a work made for hire, the ownership of the copyright in the said work remains with the author and does not automatically vest in the producer of the cinematographic work, unless there is a specific contract to the contrary.

Q71. What is the duration of copyright protection for different works?

Copyright subsists in literary, dramatic, musical or artistic works for a period of 60 years from the date of the death of the author. For all other works, anonymous works, pseudonymous works, posthumous works and government works, the term of copyright is 60 years from the date of first publication. The term of copyright in photographs is 60 years from beginning of the year next following the year in which the photographer dies.

Performances and broadcasts are protected for a period of 50 years from the year in which the performance or broadcast was made.

Q72. What are the statutory requirements in relation to licenses and assignment of copyright?

(a) The Copyright Act recognizes the right of the owner to transfer the copyright by way of licenses or assignment. The transfers should be in writing and specify the nature, duration and territorial extent of the rights transferred. If duration or territorial scope is unspecified, then the copyright is presumed to be for a period of 5 (five) years and limited to the territory of India. In the event the assigned copyright is not utilized within a period of 1(one) year from the date of assignment, then the assigned copyright reverts to the assignor ("**Reversionary Rights**").

(b) In India, Moral Rights cannot be assigned. Consequently, it is common to seek a waiver of Moral Rights and Reversionary Rights.

(c) Under the Copyright Act, an assignment of copyright in respect of any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, is not permitted, unless the assignment specifically refers to such medium or mode of exploitation of the work.

(d) The Copyright Act prohibits authors of literary and musical works, included in a cinematographic film or being a private sound recording, and performers whose performance are included in a cinematographic film, from assigning or waiving the right to receive royalties, except in favour of their legal heirs or copyright societies.

(e) Further, the Copyright Act provides for statutory licenses and compulsory licenses of certain works.

(f) There is no mandatory requirement to register transfers with the Registrar of Copyrights.

Q73. What constitutes copyright infringement?

Copyright in an original work is considered to be infringed when:

(a) A person (without authorization) does anything in relation to an original work, the exclusive right of which is conferred on the owner of the copyright.

(b) A person engages in:
   (i) Making, selling, or renting infringing copies;
   (ii) Offering or displaying them for sale or hire;
   (iii) Distributing them in a way that harms the copyright owner;
   (iv) Exhibiting infringing copies publicly as part of trade;

(v) Importing infringing copies into India (except one copy for private and domestic use, which is allowed).

(c) A person permits for profit any place to be used for the communication of the work to the public, if such communication amounts to infringement, unless the person allowing such use was not aware or had no reasonable grounds to believe that a copyright was being infringed by such communication.

Q74. Does the Copyright Act identify any acts which are not considered as acts of infringement of copyrights?

The Copyright Act provides for an exhaustive list of acts which, when undertaken, shall not constitute an infringement. These include (i) use of copyright protected work for private or personal use, including research, critical analysis or review, reporting of current affairs; (ii) transient or incidental storage, (iii) reproduction for the purpose judicial proceedings; (iv) the making of a three-dimensional object from a two-dimensional artistic work, such as a technical drawing, for the purposes of industrial application of any purely functional part of a useful device; (v) the adaptation, reproduction, issue of copies or communication to the public of any work in a format accessible by persons of disability etc.

Q75. What remedies and enforcement actions exist in case of copyright infringement?

The Copyright Act provides for civil remedies, including injunctions, damages, accounts of profits, and other reliefs. If the infringer proves lack of knowledge of copyright subsistence, the court may limit relief to injunctions and reasonable profit sharing.

Additionally, the owner of a copyright may also request the Commissioner of Customs to treat the importation of any infringing copies of work as prohibited goods and detain it.

PATENTS

The Patent Act, 1970, governs patent registration and protection in India which has been substantially amended by the Patents (Amendment) Act, 2005 ("**Patent Act**") along with the Patents Rules, 2003 which has been amended by the Patents (Amendment) Rules, 2016 ("**Patent Rules"**). The amended Patents Act broadens the scope of patent protection available under the earlier Patents Act, 1970.

Q76. What inventions are patentable in India?

Patent protection (product, process & patent of addition) under the Patent Act is given to all inventions that meet the criteria of novelty, non-obviousness and utility (capable of industrial application), except those inventions that are specifically excluded by section 3 and inventions relating to atomic energy.

Inventions that are excluded under section 3 are:

(a) Frivolous or contrary to well-established natural laws
(b) Contrary to public order or morality or which causes serious prejudice to human, plant or animal life, health or environment
(c) Scientific principle, abstract theory or discovery of any living thing or non-living substance occurring in nature
(d) Discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the discovery of any new property or new use for a known substance or use of a known process, machine or apparatus unless it results in a new product
(e) Arrangement or re-arrangement or duplication of known devices
(f) Substance obtained by mere admixture
(g) Method of agriculture or horticulture
(h) Medicinal, surgical, curative, prophylactic process for treatment of animals or human beings
(i) Plants, animals and plant varieties in whole of part other than micro-organisms
(j) Business methods or computer programs *per se* or algorithms
(k) Literary, dramatic, musical or artistic works, cinematographic works and television productions
(l) Scheme, rule or method of playing games or performing mental acts

(m) Presentation of information
(n) Topography of integrated circuits
(o) Traditional knowledge, for example, known properties of turmeric, neem, etc.

Q77. Who can register a patent in India?

A patent application can be made by: (a) the person who claims to be the true and first inventor of the invention; (b) an assignee of such an inventor, i.e., someone to whom the inventor has transferred the right to apply for the patent; or (c) the legal representative of a deceased person who was entitled to apply. The application can be filed individually or jointly with others.

Q78. What is the process of patent registration?

a) Filing

(i) Any person who is the true inventor, its assignee or legal representative can file a patent application with the regional patent office, irrespective of whether such person is a citizen of India or not. The main office of the Patent Office is located in Kolkata, with regional branch offices in Mumbai, Delhi and Chennai.

(ii) The applicant has a choice of filing the application for a patent as an (a) International application under the Patent Co-operation Treaty ("**PCT"**) (hereinafter referred to as "**PCT application**") (b) Indian patent application under the provisions of the Patent Act for grant of a Patent in India or, (c) application filed in a Convention ("**Convention application"**) countryfor the purpose of priority filings. However, unless written permission from the Controller of Patents is obtained, resident Indians are required to first file for patent protection in India before seeking protection for the same invention outside India.

(iii) A PCT national phase application can be filed in India, within 31 (thirty-one) months from the priority date. This deadline is generally considered mandatory, and non-compliance renders the application deemed withdrawn.

(iv) An application for a patent has to be filed in the forms prescribed under the Patent Rules, which includes declaration, by the applicant where the application is not filed by the inventor. Further, the patent application is required to include a declaration by the inventor. While the inventor or the constituted Patent agent can sign the other forms relating to the patent application, the declaration by the inventor has to be signed by the inventor.

(v) The patent application, either in the form of a provisional[34] or complete specification, mainly comprises of the description of the invention accompanied by drawings/flowcharts, if any and the claims (in case of a complete specification). Where the applicant files only a provisional specification, a complete specification in respect of the invention is required to be filed within 12 months of the filing date along with the declaration as to the inventorship. If the complete specification is not filed within the stipulated time period, the application shall be deemed to be abandoned.

(vi) It may also be noted that in the event the applicant for a patent is prosecuting any other patents outside India for a similar or same invention, the applicant is required to disclose the particulars of such application along with the application for a patent in India. Further, the regional Patent Office, where the patent application is filed is required to be updated on the status of such foreign application from time to time as required by the provisions of the Patent Act.

[34] The provisional specification serves the purpose of enabling the applicant to stake his priority claim in respect of the invention.

(vii) Lastly, the authorisation of a patent agent has to be filed with the Patent Office in accordance with the Patent Rules.

b) Publication & Examination

(i) The Indian patent application is required to be published by the Patent Office, automatically, within one month of the expiry of 18 months from the date of application. In the alternative, a specific application for earlier publication may also be made. From the date of publication, the applicant will have all the privileges and rights (with the exception of the right to institute infringement proceedings) as if a patent has been granted.

(ii) For examination of the patent application, the applicant is required to file an application within 48 months from the date of filing the application. In the event no such written request is made within 48 months, the application is considered as withdrawn, by the Patent Office.

(iii) The Patent Rules require that an examination report relating to a patent application be received by the applicant within 6 months from the date of filing a request for examination.

c) Objections

On scrutiny of the application by the Patent office, objections may be raised if the invention does not meet the patentability criteria. The Applicant can, at this stage and within a period of six months, put in a response, request for hearing and/or amend the application/specification to overcome the objections. On satisfaction of the Patent Office, the application is deemed to be 'in order' for grant of patent.

d) Grant

Once the patent application is deemed to be 'in order' for grant of patent, the patent is granted by entering details of the same in the patent register, maintained by the Patent Office. The Patent Office is required to grant the patent certificate within 7 days from the date of grant. The grant of patent is also advertised in the patent journal. Upon advertisement of grant, the application, specification and other documents related to the patent will be open for public inspection. It may be noted that a patent will not be granted before the expiry of a period of six months from the date of publication of a patent application.

e) Opposition

On publication of the patent application and up to the time of patent grant, any person can file opposition proceedings. An application can be opposed on several grounds including that of prior publication, prior knowledge or use of the invention in India, prior foreign application, non-obviousness or that the invention does not meet other patentability criteria.

Q79. What is the term of a patent? What are the obligations to be fulfilled to keep the patent live?

The term of patent protection is 20 years from the date of filing of the patent application, subject to payment of renewal fee. On grant of the patent, the date of registration relates back to the date of filing However, this patent will automatically lapse if the required renewal fees are not paid on time or within the allowed extended period. Once a patent expires or ceases due to non-payment, the invention falls into the public domain and can no longer be protected under any law.

Q80. Can a patent be revoked?

The Patent Office can revoke a patent on grounds inter alia of non-working in India, unavailability of the invention to the public at a reasonably affordable price or that the requirements of the public have not been satisfied.

Q81. What are the grounds on which a compulsory license can issued?

Compulsory licenses can be issued by the Patent Office in respect of a patent, any time after the expiration of three years from the date of grant of the patent, on grounds such as (i) reasonable requirement of the public have not been satisfied, (ii) unavailability to the public of the invention at a reasonably affordable price, (iii) non-working of the patent in India. Compulsory licenses can be issued on terms and conditions such as reasonable remuneration, non-assignability, non-exclusivity and pre-dominant use being in India.

Q82. Can a patent be assigned or licensed?

(a) Any assignment, license, mortgage, or other interest in a patent is not legally valid unless there is a duly executed written agreement which documents all the terms and conditions governing their rights and obligation.

(b) All assignments, and licenses must be recorded with the Patent Office.

Q83. What are the remedies in case of infringement?

a) Civil
Civil remedies are available for infringement of a patent. Reliefs in the form of damages, account for profits, injunctions, search, seizures, forfeiture and destruction of infringing goods are available to the patentee. Parallel import is not considered to be a form of infringement.

b) Criminal
On the other hand, criminal remedies are available for limited offences in respect of false entires on the patent register, false claim on a patent and supply of false information to the Government/ Controller of Patents.

DESIGNS

Protection given to design viz. copyright in an industrial design is governed by the Designs Act, 2000. ("**Designs Act**"). The Designs Act and the Designs Rules, 2001 ("**Designs Rules**") came into force on May 11, 2001.

Q84. What constitutes a "design" under the Designs Act, 2000?

"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. The following shall not be considered as a 'design':

(a) Any mode or principle of construction
(b) Anything which is in substance a mere mechanical device
(c) Any trademark, property mark, or artistic work.

Q85. What kind of designs are not registrable?

A design shall not be registered if it:

(a) Is not new or original;
(b) Has been disclosed to the public anywhere in India or any other country by publication in tangible form or by use or in any other way prior to the filing date or priority date of the application for registration;

(c) Is not significantly distinguishable from known designs or combination of known designs; or
(d) comprises or contains scandalous or obscene matter

Q86. What is the registration process of a design?

(a) Filing:

A person claiming to be the proprietor of any new or original design can file an application for registration for the protection of the same in India. The Designs Office is located at Kolkata, State of West Bengal ("**Designs Office**").

(b) Examination:

Each application once filed undergoes examination by the Designs Office.

The Designs Office may raise objections to the registration of the application calling for the applicant to file his response or attend a personal hearing within 3 months. However, all the objections and hearings, if any, are required to be complied within 6 months from the date of application to enable registration.

(c) Registration and Publication

On compliance of the aforesaid objections a certificate of registration is granted to the proprietor of the design, which is thereafter published along with its representation in the Official Gazette. Registration confers upon the registered proprietor a "copyright" with respect to the design. Under the Designs Act, "copyright" refers to the exclusive right to apply the design to any article in any class in which the design has been registered.

Q87. How long does protection last, and how can it be renewed?

The initial term of registration of design is 10 years from the date of application, which may be extended by renewing the registration for a further term of 5 years.

Q88. Can a registered design be assigned or licensed?

The registered proprietor of the copyright in a registered design has power to transfer, absolutely assign, grant licenses to, or otherwise deal with the design and give effectual receipt for any consideration. Such transfer should be in writing and registered with the Designs Office.

Q89. Can the registration granted to design be revoked?

The registration can be revoked by any person aggrieved on grounds of (i) non-insertion or omission from the register of designs of any entry; (ii) or by any entry made in such register without sufficient cause; (iii) or by any entry wrongly remaining on the register or by an error or defect in any entry.

Q90. Can the registration granted to design be cancelled?

Any person interested can file cancellation proceedings at the Designs Office for the cancellation of the registered design on any of the following grounds:

a) design has been previously registered;
b) design has been published prior to the date of registration; or
c) design is prohibited under the Designs Act

Q91. What constitutes design infringement and what are the remedies?

During copyright existence, it's unlawful to:

(a) Apply design/fraudulent imitation to any article in registered class without license/consent
(b) Import for sale without consent any article with applied design/imitation

(c) Publish/expose for sale articles knowing design applied without consent

The remedy for a design infringement is a suit for recovery of damages for contravention and injunction against the repetition.

SEMICONDUCTOR INTEGRATED CIRCUITS LAYOUT-DESIGNS

Under India's Semiconductor Integrated Circuits Layout-Design Act, 2000, ("**Semiconductors Layout-Design Act**") the only subject matter eligible for protection is registered layout-designs of semiconductor integrated circuits.

Q92. What kinds of layout designs are prohibited from registration?

A layout-design refers to the arrangement or pattern of small electronic parts, like transistors and other circuit components inside a semiconductor chip (such as a microprocessor). It also includes the tiny wires that connect these parts. This design can be represented in any format, whether as a drawing, diagram, or digital file, as long as it shows how the components are placed and connected in the chip.

A layout-design will note be granted registration if it is (a) not original; (b) has been commercially exploited for more than two years before application in India or in any other country notified by the Government of India in its official gazette; (c) not inherently distinctive; or (d) not inherently capable of being distinguishable from any other registered layout-design.

A layout-design is considered to be original if it is the result of its creator's own intellectual efforts and is not commonly known to the creators of layout-designs and manufacturers of semiconductor integrated circuits at the time of its creation. However, if the layout-design is a combination of commonly known elements and interconnections, then such combination may be considered to be original if such combination as a whole is a result of the creator's intellectual efforts.

Once registered, the design confers on the proprietor exclusive right use the layout-design and obtain relief in case of infringement.

Q93. What is a semiconductor integrated circuit?

A semiconductor integrated circuit is a small electronic device made up of tiny parts like transistors and circuits, all built together in one piece on a semiconductor material (like silicon). These parts are inseparably connected, meaning they cannot be taken apart without damaging the whole thing. The circuit is designed to do specific electronic functions, like processing data or controlling signals, just like what happens inside a computer chip or a mobile phone processor.

Q94. Who has the right to secure registration of the layout-design?

The creator of the original layout-design has the right to secure a registration of the original layout-design. Having said that, if the original layout-design has been developed in the course of employment or has been specifically commissioned, then the employer or the person commissioning the preparation of the original layout-design has the right to register it provided there is no agreement to the contrary.

Q95. What is the process of registering a layout-design?

(a) <u>Application:</u>
An application is required to be filed with the office of the Semiconductor Integrated Circuits Layout-Design Registry within whose territorial limits the applicant has its principal place of business. If the applicant does not have a principal place of business in India, then the application must be filed in the office of the Semiconductor Integrated Circuits Layout-Design Registry within whose territorial limits the place mentioned in the address for service in India as disclosed in the application is situate.

(b) <u>Registrar's objections:</u>

The Registrar of Semiconductor Integrated Circuits Layout-Design ("**Registrar**") may refuse the application or may accept it absolutely or subject to such amendments or modifications, as he may think fit. If the applicant does not amend the application as required by the Registrar or provide its observation or apply for a hearing within a period of 3 (three) months from the date of such communication, then the application is deemed to be abandoned.

(c) Withdrawal of acceptance:

The Registrar has the ability to withdraw its acceptance at any time prior to registration if it is satisfied that the registration of the lay-out design is prohibited under the scheme of the Semiconductors Layout-Design Act (discussed in query 2 above) or if it had erred in accepting such application or if the application should not have been accepted in the circumstances of the case. However, if the applicant amends its application or applies for a hearing within 2 (two) months from the date of communication of withdrawal of acceptance from the Registry, then the Registrar may consider the submission or hear the applicant and pass orders as it may deem fit.

(d) Advertisement:
If the application for registration of the layout -design is accepted, then it is advertised in the journal and any person may oppose the registration within a period of 3 (three) months by filing a notice of opposition and paying the prescribed fee.

(e) Opposition:

(i) In the event the layout-design is opposed, then the applicant is required to file a counterstatement to the notice of opposition within a period of 2 (two) months from the receipt of counterstatement stating the grounds on which the application should proceed to registration. If a counterstatement is not filed, then the application is deemed to be abandoned.
(ii) If a counterstatement is submitted, then the Registrar will serve such counterstatement on the opponent. The opponent is required to submit its affidavit of evidence in support of opposition (or a letter indicating its reliance to the notice of opposition) to the Registrar and serve a copy on the applicant within 2(two) months from the date of receipt of the counterstatement.
(iii) If a copy affidavit of evidence in support of opposition (or a letter indicating its reliance to the notice of opposition) is served, then the applicant is required to submit its affidavit of evidence in support of application (or a letter indicating its reliance to the counterstatement) to the Registrar and serve a copy on the opponent within 2(two) months from the date of receipt of the affidavit of evidence in support of opposition/reliance letter.
(iv) If an affidavit of evidence in support of application (or a letter indicating its reliance to the counterstatement) is served on the opponent, then the opponent may submit and serve further evidence (limited to the contents of the affidavit of evidence in support of application) within 1 (one) month from the receipt of the affidavit of evidence in support of application/reliance letter.
(v) The Registrar shall thereafter give notice to the parties of a date when the arguments in the opposition proceedings would be heard. If the applicant/opponent is desirous of being heard, it must inform the Registrar within 14 (fourteen) days.
(vi) If the person giving notice of opposition or an applicant sending a counter-statement neither resides nor carries on business in India, the Registrar may require him to give security for the costs of proceedings before him and, in default of such security being duly given, may treat the opposition or application, as the case may be, as abandoned.
(vii) If the application is not opposed or the opposition is unsuccessful, then the Registrar shall grant registration to the layout-design.

Q96. How is the term of protection calculated?

The term of protection for a layout-design under the Semiconductor Integrated Circuits Layout-Design Act is 10 years, and this period is calculated from the earlier of the following two dates:

a) The date of filing of the application for registration; or

b) The date of first commercial use (exploitation) of the layout-design anywhere in India or in any other country.

Q97. What are the rights granted accorded to the registered proprietor of a layout-design?

Upon the grant of registration, the registered proprietor of the layout-design has the right to use the layout-design exclusively and obtain relief in case of infringement of the registered layout-design.

Q98. What are the benefits of registration of a layout-design?

In all legal proceedings relating to a layout-design, the original registration of the layout-design and all subsequent assignments and transmissions of layout-design are prima facie evidence of the validity thereof.

Q99. What are the requirements for assignment of a registered layout-design?

A registered proprietor has the right to assign (with or without goodwill) any/all of the rights associated with the registered layout-design. In case of assignment without goodwill, an application must be filed with the Registrar within 6 (six) months from the date of assignment requesting for the advertisement of the assignment. An application is also required to be filed with the Registrar for the change in the name of the registered proprietor consequent to the assignment of the registered layout-design.

Q100. What are the requirements for licensing a registered layout-design?

The Semiconductor Layout-Design Act does not prescribe any mandatory requirements for licensing a registered layout-design. Having said that, the Semiconductor Layout-Design Act provides an option to the registered proprietors and the licensee to jointly apply for registration of the licensees as a 'registered users.' A registered user has the right to initiate criminal proceedings in case of infringement of the registered layout-design by a third-party. However, a registered user cannot assign its rights to a third-party.

Q101. What constitutes infringement of a registered layout-design?

Infringement of a registered layout-design occurs when a person, without authorization, reproduces the layout-design (wholly or in part) or commercially imports, sells, or distributes a semiconductor integrated circuit or article incorporating the design. However, exceptions apply for acts done for scientific research, evaluation, or teaching, or where the design is independently created, or the person acted without knowledge of infringement. Further, use with the consent of the registered proprietor or lawful market placement also does not constitute infringement.

Q102. What is the penalty for infringement of a registered layout-design?

Any person who knowingly and wilfully infringes a registered layout-design may be punished with imprisonment of upto 3(three) years or fine of not less than ₹50,000, which can go up to ₹10,00,000 or both.

GEOGRAPHICAL INDICATIONS

The grant of a geographical indication to goods is governed by the Geographical Indications Of Goods (Registration And Protection) Act, 1999 ("**GI Act**") and Geographical Indications Of Goods (Registration and Protection) Rules, 2002 ("**GI Rules**")

Q103. What is a geographical indication?

A 'geographical indication' means an indication which identifies goods as agricultural goods, natural goods or manufactured goods as originating or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods

one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.

An 'indication' includes any name, geographical or figurative representation or any combination of them conveying or suggesting the geographical origin of goods to which it applies.

A geographical indication is typically applied to any agricultural, natural or manufactured goods or any goods of handicraft or of industry and includes food stuff.

Q104. What kind of geographical indicators are not permitted?

A geographical indicaton which
(a) by use, is likely to deceive or cause confusion;
(b) by use would be contrary to any law for the time being in force;
(c) comprises or contains scandalous or obscene matter;
(d) comprises or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India;
(e) would otherwise be disentitled to protection in a court;
(f) are determined to be generic names or indications of goods and are, therefore, not or ceased to be protected in their country of origin, or which have fallen into disuse in that country; or
(g) although literally true as to the territory, region or locality in which the goods originate, but falsely represent to the persons that the goods originate in another territory, region or locality, as the case may be,
shall not be registered as a geographical indication.

Q105. Who can apply for registration?

Any association of persons or producers or any organisation or authority established by or under any law representing the interest of the producers of the concerned goods can apply for registering a geographical indication in relation to the desired goods.

Q106. What is the registration process?

(a) Application:

An application is required to be filed with the Registrar of Geographical Indications ("**Registrar**") within whose territorial limits the territory of the country or the region or locality in the country to which the geographical indication relates is situated. If the territory, region or locality, is not situated in India, then the application should be filed in the office of the Geographical Indications Registry within whose territorial limits the address for services in India is situated. If an application for registration of a geographical indications is filed by an applicant from a convention country, then a certificate by the Registry or competent authority of the Geographical Indications Office of the convention country is required to be provided along with particulars of the geographical indication, the country and the date or dates of filing of the first application in the convention country and such other particulars as may be required by the Registrar.

(b) Examination:

Upon receipt of an application, the Registrar shall examine the application and the accompanying statement of case as to whether it meets the requirements of the GI Act and the GI Rules. To this end, consultative group (of not more than seven representatives chaired by him from organization or authority or persons well versed in the varied intricacies of this law or field) is assembled to ascertain the correctness of the particulars furnished in the statement of case which must be completed within a period of 3(three) months. Thereupon, the Registrar shall issue a examination report on the application to the applicant.

(c) Objection:

Registrar shall communicate its objection or proposal in writing to the applicant if, on consideration of the application on merits, the Registrar has any objection to the acceptance of the application or proposes to accept it subject to such conditions, amendments, modifications or limitations as he may think right to impose. Applicants have two months to either amend their application, submit observations, apply for a hearing, or attend a scheduled hearing, failing which the application is dismissed.

(d) Withdrawal of acceptance:

The Registrar has the ability to withdraw its acceptance at any time prior to registration if the Registrar has any objection to the acceptance of the application on the ground that (a) it was accepted in error, or that (b) the geographical indication ought not to have been accepted in the circumstances of the case, or (c) proposes that the geographical indication should be registered only subject to conditions or limitations, or to conditions additional to or different from the conditions or limitations subject to which the application has been accepted, However, if the applicant amends its application or applies for a hearing within 30 (thirty) days from the date of communication of withdrawal of acceptance from the Registry, then the Registrar may consider the submission or hear the applicant and pass orders as it may deem fit.

(e) Advertisement:

If the application for registration of the geographical indication is accepted, then it is advertised in the journal and any person may oppose the registration within a period of 3 (three) months by filing a notice of opposition and paying the prescribed fee.

(f) Opposition:

(i) In the event the registration of the geographical indication is opposed, then the applicant is required to file a counterstatement to the notice of opposition within a period of 2 (two) months from the receipt of counterstatement stating the grounds on which the application should proceed to registration.

(ii) If a counterstatement is submitted, then the Registrar will serve such counterstatement on the opponent. The opponent is required to submit its affidavit of evidence in support of opposition (or a letter indicating its reliance to the notice of opposition) to the Registrar and serve a copy on the applicant within 2(two) months from the date of receipt of the counterstatement.

(iii) If a copy affidavit of evidence in support of opposition (or a letter indicating its reliance to the notice of opposition) is served, then the applicant is required to submit its affidavit of evidence in support of application (or a letter indicating its reliance to the counterstatement) to the Registrar and serve a copy on the opponent within 2(two) months from the date of receipt of the affidavit of evidence in support of opposition/reliance letter.

(iv) If an affidavit of evidence in support of application (or a letter indicating its reliance to the counterstatement) is served on the opponent, then the opponent may submit and serve further evidence (limited to the contents of the affidavit of evidence in support of application) within 1 (one) month from the receipt of the affidavit of evidence in support of application/reliance letter.

(v) The Registrar shall thereafter give notice to the parties of a date when the arguments in the opposition proceedings would be heard. If the applicant/opponent is desirous of being heard, it must inform the Registrar within 14 (fourteen) days.

(vi) If the person giving notice of opposition or an applicant sending a counter-statement neither resides nor carries on business in India, the Registrar may require him to give security for the costs of proceedings before him and, in default of such security being duly given, may treat the opposition or application, as the case may be, as abandoned.

(vii) If the application is not opposed or the opposition is unsuccessful, then the Registrar shall grant registration to the geographical indication.

Q107. What is the term of registration of a geographical indication?

The term of protection for a geographical indication is 10 years and can be renewed for successive periods of 10 (ten) years.

Q108. Can a registration to a geographical indication be cancelled or varied?

A registration granted to a geographical indication may be cancelled or varied by an order of a High Court of the Registrar upon receipt of a compliance form an aggrieved person on the ground of any contravention, or failure to observe the condition entered on the register in relation thereto.

Q109. What are the rights granted accorded to the registered proprietor of a geographical indication?

Upon the grant of registration, the registered proprietor of the geographical indication has the right to use the geographical indication exclusively in relation to the goods in respect of which the geographical indication has been registed, and obtain relief in case of infringement of the geographical indication.

Q110. What are the benefits of registration of a geographical indication?

In all legal proceedings relating to a geographical indication, the certificate of registration granted by the Registrar shall be prima facie evidence of the validity thereof and be admissible in all courts.

Q111. Can a registered geographical indication be assigned?

Except in case of transmission, any right to a registered geographical indication shall not be the subject matter of assignment, transmission, licensing, pledge, mortgage or any such other agreement.

Q112. Can a geographical indication be registered as a trademark?

No, a geographical indication cannot be registered as a trademark.

Q113. What constitutes infringement of a registered geographical indication?

A registered geographical indication is infringed by a person who, without authorization:

(a) uses geographical indication in such a manner to indicates or suggests that the goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the public

(b) uses any geographical indication in such manner which constitutes an act of unfair competition including passing off in respect of registered geographical indication; or

(c) uses another geographical indication to the goods which, although literally true as to the territory, region or locality in which the goods originate, falsely represents that the goods originate in the territory, region or locality in respect of which such registered geographical indication relates.

INTRODUCTION TO ANTI-TRUST LAWS

Q114. Brief overview of merger control laws in India

An acquisition, merger, or amalgamation is notifiable to the Competition Commission of India ("**CCI**") if it satisfies any of the jurisdictional thresholds prescribed under Section 5 of the Competition Act, 2002 ("**Act**") ("**Jurisdictional Thresholds**") unless exempt pursuant to either: (a) the statutory exemptions under the Act and the Competition (Criteria for Exemption of Combinations) Rules, 2024 ("**Exemption Rules**"); and/or (b) exemptions prescribed by the Central Government through its gazette notifications. The Indian merger control regime is mandatory *(i.e., if the Jurisdictional Thresholds, which are detailed below, are met, notification to CCI is mandatory)* and suspensory in nature *(i.e., parties cannot implement any part of any notifiable acquisition, merger or amalgamation until approval is received from the CCI)*.

Q115. Who has the responsibility / obligation to make the filing with the CCI?

In case of acquisitions, the obligation to make a filing with the CCI lies with the acquirer. In case of a merger/amalgamation, the obligation lies on all parties to the scheme of merger/amalgamation.

Q116. At what stage can parties to a transaction file the application with the CCI? What is the "trigger document" that parties need to execute before filing?

A notification can be made to the CCI upon execution of the binding transaction documents in case of any acquisition or, in case of mergers, upon passing of a board resolution approving the same (by all merging parties), and prior to consummating the transaction. However, if a transaction triggers a notification requirement to the CCI, the same cannot be completed – in whole or in part, until the CCI approval is obtained.

Q117. What is the Target Based Exemption / *De Minimis* Exemption?

Under the current competition law regime in India, any transaction where the target enterprise (i.e. the enterprise whose shares, voting rights, assets or control are being acquired) has either: (a) assets not exceeding INR 450 crores (~52 million) in India; or (b) turnover not exceeding INR 1250 crores (~USD 144 million) in India, ("***De Minimis* Thresholds**"), is exempt from the mandatory pre-notification requirement ("***De Minimis* Exemption**"). The *De Minimis* thresholds are to be assessed on the basis of the audited financial statements of the target enterprise for the financial year immediately preceding the year in which the transaction is to take place.

Q118. What are the additional thresholds linked to the "deal value" of a transaction?

On 10 September 2024, "deal value thresholds" were introduced as one of the most significant changes to the merger control regime in India. Per the "deal value thresholds", any transaction (that is yet to fully close): (a) with a (global) deal value of INR 2,000 crores (~USD 230 million); and (b) where the target has "substantial business operations" ("**SBO**") in India – will require a notification to the CCI, regardless of the availability of the "De Minimis" exemption or the small target exemption to the said transaction ("**DVT**").

(a) "**Deal value**" is defined to include all consideration, regardless of whether its direct, indirect, immediate, deferred, cash or otherwise.
(b) "**SBO**" in India test is met if, the target has:*

Gross Merchandise Value (GMV)	OR	Turnover

(i) **10% or more** of its total global gross merchandise value in India in the past 1 (one) year from the trigger; **AND** (ii) **more than** INR 500 crores (~USD 57.7 million) GMV in India.		(i) **10% or more** of its total global turnover from all products and services in India, in the preceding year from the trigger; **AND** (ii) **more than** INR 500 crores (~USD 57.7 million) turnover in India.

In sum, despite meeting the **10%** threshold, if a target does not have INR 500 crore (~USD 57.7 million) of GMV or turnover in India, it would not meet the SBO test.

Additional SBO criteria for digital markets. *The regulations introducing DVT set an industry specific SBO in India threshold for entities providing internet services or digital content (**Digital Service Provider**). In addition to the GMV or turnover criteria, a Digital Service Provider is deemed to have SBO in India if **10% or more** of its annual average business users or end users are from India. However, this criterion is not relevant in the assessment of the Proposed Transaction since the Target (in our view) does not qualify it to be "Digital Service Provider".*

"**Deal value**" includes all consideration, regardless of whether its direct, indirect, immediate, deferred, cash or otherwise. For instance, the Combination Regulations specify that the deal value is to include consideration paid for, *inter alia*, (a) non-compete and other restrictions; (b) interconnected steps to a transaction; (c) arrangements entered into as part of the transaction or up to two years from the date of the transaction coming into effect (*such as technology assistance, licensing of IPR, usage rights to any product, service or facility, supply of raw materials or finished goods, branding and marketing*); (d) call options (assuming full exercise); (e) consideration paid by the acquirer or its group for any M&A involving the same target in the preceding 2 (two) years; and (f) occurrence or non-occurrence of any uncertain future event as per the acquirer's estimates. Deal value for open offers will assume the acquirer's full subscription to the open offer.

Note that if DVT is breached (including meeting of the SBO test), then the transaction will require a prior notification to and approval from the CCI regardless of whether it benefits from the *De Minimis* Exemption, unless it is exempt under any of the provisions under the Exemption Rules.

Q119. What are the various exemptions available under the "Exemption Rules"?

Schedule 1 to the Combination Regulations treats certain categories of transactions as being ordinarily not likely to cause an appreciable adverse effect on competition in India, and hence exempts such transactions from the requirement of prior notification to and approval of the CCI. These exemptions include (a) minority (<25%) investments made solely as an investment, not leading to acquisition of control; (b) acquisition of shares / voting rights pursuant to a bonus issue, stock split, consolidation, buy back or rights issue (not leading to change in control); (c) acquisition of shares / voting rights of up to twenty five percent (25%) by an underwriter or a stockbroker on behalf of a client in the ordinary course of its business and in the process of underwriting or stockbroking; (d) share acquisitions of up to 10% in the ordinary course of business by registered mutual funds; (e) certain intra-group transactions (except in cases where the transaction results in change in control), (f) mirrored demergers, etc.

Q120. What are the various types of merger filing under the Indian merger control regime?

The Act provides for a self-assessment regime to determine the form of notification to the CCI, which is to be made either in Form I (short-form) or Form II (long-form), as specified in the Combination Regulations. A Form II is typically required to be filed when either (a) the parties to the combination are engaged in similar/identical business and the combined market share exceeds 15% in the relevant market, or (b) the parties to the combination are engaged at different stages of the supply chain and their individual/combined market share is more than 25% in the relevant market. Typically, a Form I takes 2-3 weeks for preparation and 6-8 weeks for approval. A Form II is significantly more data intensive and may take longer to prepare. Depending on the extent of overlaps and the combined market share of the parties, the approval may take at least 3-4 months, assuming the transaction is cleared in Phase I.

Green Channel notification: A transaction can qualify for a green channel filing if the transacting parties do not share any business overlaps (i.e., horizontal, vertical or 'complementary') either: (i) directly (i.e., the activities of the transacting parties themselves do not overlap), or (ii) indirectly (i.e., the activities of the acquirer's affiliates that meet the Green Materiality Threshold with the activities of the target's affiliates that meet the Green Channel Materiality Threshold (*defined below*).

Green Channel Materiality Threshold would mean entities where the acquirer/acquirer group either has (i) direct or indirect shareholding of 10% or more; or (ii) a right or ability to access commercially sensitive information of the entity; or (iii) a right or ability to nominate a director or observer.

For Green Channel filings, CCI encourages parties to consult it by way of a pre-filing consultation (**PFC**) to informally seek CCI's views on availability of the Green Channel before formally filing the notification with the CCI. If the proposed transaction qualifies for "Green Channel", it would be deemed approved upon making a formal filing with the CCI. Typically, this process typically takes 4 -5 week, including both time for preparation and reaching out to the regulator to discuss the applicability of green channel.

Q121. What are penalties of non-compliance with the CCI?

Consequence of not filing with the CCI or implementing part of the transaction: Any implementation before CCI's approval can attract a penalty of up to one percent (1%) of the total turnover or assets of an enterprise or the value of the transaction (whichever is higher) for gun-jumping. Such penalty is imposed on the acquirer in case of acquisitions and on both parties in case of mergers or amalgamations.

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