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Global Practice Guides

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ANA Law Group is a full-service law firm based in Mumbai, with a team of experienced professionals who have broad industry knowledge and specialisation across a wide spectrum of business areas. The firm has significant experience in counselling international clients on data privacy and cybersecurity law issues in India, and regularly represents clients from various industries. The firm works with global clients to implement privacy programmes, create compliant processes, products, and services. It also assists international companies with carrying out transfer impact assessments, drafting and negotiating contracts with Indian counterparts, and preparing privacy policies for international companies operating in India and their Indian subsidiaries. The firm routinely advises clients on issues such as permitted data processing, consent requirements, data collection, retention and disclosure, regulatory requirement compliance, transfer of sensitive personal data, security breaches and drafting security breach policies, on international compliance projects, and on prosecutions and offences.

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1. Legal System

1.1 Legal System and Judicial Order

India is a common law jurisdiction, along with a combination of codified laws and judicial precedents. The laws relating to companies, contracts, and property are largely based on principles of common law.

India has an independent judiciary with an established hierarchy of courts, which follow an adversarial system and a higher court's precedent is binding on the lower courts. The lower court judgments are appealable to higher courts. India does not have a jury system, and all issues of fact and law are decided by the judges.

The judicial order followed in India is as follows:

- Supreme Court of India: The Supreme Court is the apex court of the country, comprising the Chief Justice of India and 25 other judges, and it is the highest court having appellate jurisdiction in the country. Additionally, the Constitution of India gives extensive original jurisdiction to the Supreme Court for enforcement of fundamental rights, and the court is empowered to issue directions, orders, or writs, to adjudicate challenges to the legality of actions of government authorities. Any party aggrieved by the actions of such authorities may petition the Supreme Court for relief, such as the issuance of a writ in the form of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, to enforce them.
- High Courts: India has a total of 25 High Courts having appellate jurisdiction from the lower courts. The Presidency High Courts in Delhi, Mumbai, Calcutta (Kolkata), and Madras (Chennai) enjoy original jurisdiction. Further, some of the High Courts have special divisions to exclusively deal with a certain type of cases, such as Delhi High Court's Intellectual Property Division, Commercial Division, etc.
- District Courts: The district courts are established for every district or a group of districts with civil and criminal jurisdictions. Additionally, there are special courts such as courts of metropolitan magistrates in metropolitan cities specifically to adjudicate a large number of matters to be heard in the cities.

- Lok Adalats: These are city/town-level subordinate courts that provide means of alternate dispute resolution.
- Tribunals: Tribunals are quasi-judicial authorities set up by the government of India with the power granted under the Constitution of India to adjudicate specific matters concerning intellectual property rights, company disputes, land, tax, consumer complaints, etc. Some of the tribunals include district and state consumer dispute forums, income tax appellate tribunals, company law tribunals, labour courts, etc.

Additionally, specialised regulatory authorities have the power to issue regulations in various fields. For instance, banking, financial, and foreign exchange dealings are regulated by the Reserve Bank of India (RBI), the public securities market is regulated by the Securities and Exchange Board of India (SEBI), and the insurance industry is regulated by the Insurance Regulatory and Development Authority (IRDAI).

2. Restrictions on Foreign Investments

2.1 Approval of Foreign Investments

India has a liberal foreign investment regime and foreign direct investment (FDI) is permitted through either the automatic or government route. In India, the Department for Promotion of Industry and Internal Trade (DPIIT), a department under the Ministry of Commerce and Industry, is the nodal department for the formulation of government policy on FDI. The foreign investment and foreign currency transactions are regulated by RBI by the foreign exchange laws.

FDI is allowed through the following routes:

- Automatic route: Under the automatic route, no investment requires prior approval of the government or RBI, so long as the investment is within the sectoral cap and meets the conditions prescribed for that sector.
- Government approval route: Under the government approval route, prior approval of RBI, the concerned government authority, or ministry is required.

The applicable route depends on the sector of the proposed investment and the extent of shareholding to be acquired.

Permitted Sectors

FDI is permitted up to 100% on the automatic route, subject to applicable laws/regulations and other prescribed conditions. While 100% FDI is allowed in many sectors, others may have a specified sectoral cap (ie, the maximum amount that can be invested by foreign investors in an entity). For instance, 100% FDI is permitted through the automatic route for sectors such as agriculture and animal husbandry, plantation, petroleum and natural gas, broadcasting carriage services, airports, construction development, trading, e-commerce activities, railway infrastructure, pharmaceuticals, other financial services, etc. Whereas public sector banking, satellites, print media, broadcasting content, multi-brand retail trading, etc, fall under the government approval route.

Prohibited Sectors

FDI is currently prohibited in the following sectors:

- lottery business;
- gambling and betting, including casinos;
- chit funds;

- National Initiative for Developing and Harnessing Innovations (Nidhi) company, a non-banking finance business;
- real estate business or construction of farmhouses;
- manufacture of cigars, cigarettes, etc, of tobacco or tobacco substitutes; and
- activities/sectors that are not open to private sector investment (eg, atomic energy).

Foreign technology collaborations in any form including licensing for franchise, trade mark, brand name and management contract are also prohibited for lottery business and gambling and betting activities.

Foreign Portfolio Investments

Foreign Portfolio Investors (FPI) may make investments in the manner and subject to the terms and conditions specified in Schedule II of Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

Foreign Venture Capital Investment

A Foreign Venture Capital Investor (FVCI) may make investments in the manner and subject to the terms and conditions specified in Schedule VII of Foreign Exchange Management (Non-Debt Instruments) Rules 2019.

2.2 Procedure and Sanctions in the Event of Non-compliance

Procedure and Timeline for Foreign Investors to Obtain Approval

The DPIIT has issued a standard operating procedure (SOP) for processing FDI proposals, which contains the following procedure:

- Proposals for foreign investment requiring government approval are to be filed online on the Foreign Investment Facilitation Portal.
- The DPIIT will identify and assign the proposal to the relevant competent sectoral authority within two days of the online filing. The Administrative Ministries/Departments would be the competent authorities for approval of foreign investment.
- The DPIIT will also circulate the proposal for comments to the RBI, the Ministry of External Affairs, and in case of proposals requiring security clearance, the Ministry of Home Affairs.
- Within 12 days, the competent authority shall scrutinise the proposal and documents attached and ask the applicant for relevant additional information/documents, if required.
- Once the processing of the proposal is complete, the competent authority shall decide within four weeks and convey the decision to the applicant.

In case of proposals involving a total foreign equity inflow of more than INR50 billion, the competent authority shall place the same for consideration by the Cabinet Committee on Economic Affairs (CCEA).

Criteria

Based on the SOP, a foreign investment approval application will have to be accompanied by the following key particulars and documents:

- summary of the proposed foreign investment;
- audited financial statements of the investor and investee entities for the preceding financial year;
- a signed copy of the joint-venture agreement, shareholders' agreement, etc.;
- particulars of the ownership and control of the parties;
- foreign inward remittance certificates in case of post-facto approvals; and

- valuation certificate issued by an approved chartered accountant and statutory auditor.

Penalties

Violations of the FDI policy are covered by the penal provisions of the Foreign Exchange Management Act 1999 (FEMA Act). If a person or a company contravenes any FDI regulations, or any conditions subject to which approvals are issued by the government/RBI from time to time, the contravener upon adjudication shall be liable to a penalty of up to three times the amount involved in the contravention. In cases where the amount involved is not quantifiable, the penalty may extend up to INR200,000. Further, for a contravention that continues beyond the first day, an additional penalty of up to INR5,000 for every day of delay is also payable by the contravener (Annexure 5, paragraph 3, FDI policy 2020).

2.3 Commitments Required From Foreign Investors

Apart from the entry routes and sectoral caps specified in the FDI policy, the provisions do not cover any specific commitments based on which authorities may approve. However, the investors are required to comply with all relevant sectoral laws, regulations, rules, security conditions, and state/local laws/regulations to be liable for approval. In some cases, the concerned ministry or government authority may exercise discretion in requiring additional clarifications or commitments from the investors, such as clarifications on future business plans. Similarly, the concerned authority may also require the investor and investee entities to comply with commitments such as non-compete arrangements, compliance with pricing norms, etc.

2.4 Right to Appeal

There is no specific provision for filing an appeal against decisions/rejections of the competent authorities. However, this will not prevent the parties from submitting a revised proposal for review.

Further, in case a proposal for foreign investment complies with the FDI policy and other applicable regulations and conditions and is arbitrarily rejected by the competent authority, the investor will have the option to avail constitutional remedies by seeking judicial review of the authority's actions.

3. Corporate Vehicles

3.1 Most Common Forms of Legal Entity

In India, the Companies Act 2013 (Companies Act) regulates the incorporation, management, and winding up of companies in India. Further, there are other specific legislations such as the Limited Liability Partnership Act 2008, the Partnership Act 1932, The Societies Registration Act 1860, etc. The most common types of corporate vehicles available in India and their characteristics are as follows:

- A one person company is a company with a single person as its member.
- A private company is a company with the minimum amount of paid-up share capital as may be prescribed, with a maximum of 200 members. Private companies do not give out their securities for subscription to the public. The minimum number of members needed to form a private company is two in general and one in the case of a one-person company.
- A public company is a company that lists out its securities for the public to subscribe to, with a minimum paid-up share capital as may be prescribed. The minimum number of members needed to form a public company is seven.

- A small company is a company except a public company, that has a maximum paid-up share capital of INR4 million, and a maximum turnover of INR400 million.
- A partnership firm is a partnership where two or more persons come together to establish a business and divide its profits amongst themselves in the agreed ratio.
- A limited liability partnership (LLP) is where the partners have limited liability. LLPs are separate legal entities having perpetual succession. The change in partners of an LLP will not affect its rights, liabilities or existence. The minimum number of members to form an LLP is two.

3.2 Incorporation Process

The company incorporation procedure is prescribed under the Companies Act and Companies (Incorporation) Rules 2014, and the process broadly involves the following steps:

- company name reservation;
- incorporation of the new company;
- allotment of Director Identification Numbers (DINs) for at least three directors;
- securing a Permanent Account Number (PAN);
- securing a Tax Deduction and Collection Account Number (TAN);
- securing a Goods and Services Tax Identification Number (GSTIN);
- registration with the Employees' State Insurance Corporation and Employees' Provident Fund Organisation (EPFO);
- opening a banking account for the company; and
- securing a professional tax registration for the new company.

The MCA has recently launched a streamlined portal that allows applicants to make a single application for all the foregoing services at the same time.

Company

An application for incorporation of a company will have to be submitted to the concerned Registrar of Companies (RoC) having the jurisdiction, along with the required documentation, such as details of the directors and subscribers, memorandum of association (MoA), and articles of association (AoA).

The RoC, if satisfied with the application, will issue a certificate of incorporation in the prescribed form along with the Corporate Identity Number.

Partnership Firm

To incorporate a partnership firm, a duly signed statement, along with the prescribed fee and a true copy of the partnership deed containing the firm's particulars, must be sent by post or delivered to the registrar of the area where the firm is currently or proposed to be situated. This must be done within one year from the date the firm was constituted.

The registrar will thereafter enter the firm's statement in the Register of Firms. Once the entry is made, the firm is deemed to be registered. The registered firm must use the suffix "(Registered)" immediately.

Limited Liability Partnership (LLP)

Once the incorporation document is submitted to the registrar, the registrar, if satisfied, will register the incorporation document and grant a certificate of registration to the LLP.

Normally, the incorporation process takes one to two weeks.

3.3 Ongoing Reporting and Disclosure Obligations

The Ministry of Corporate Affairs (MCA) has mandated detailed financial reporting by all companies, both public and private. Financial reporting has been made easier with online portals over recent years. Further, all such filings and disclosures are publicly available in the MCA database for a nominal fee.

Financial Disclosure

Each company must carry out the annual reporting of all audited financials within six months of the closing of the financial year, along with a Directors' Report and a Directors' Responsibility Statement. Further, the SEBI mandates that all publicly listed companies must report their shareholding pattern, corporate governance report, statement on investor complaints, and audited financial statements, to all the stock exchanges where their securities are traded.

The MCA also requires companies to provide the following additional information while reporting the financial statements:

- disclosure of shareholding of promoters;
- maturities of long-term borrowings;
- immovable property details;
- aging schedule of capital work in progress, intangible property and trade payables and receivables; and
- disclosure of financial ratios such as current ratio, debt-equity ratio, return of equity ratio, net capital turnover ratio and return on investment.

Corporate Governance Reporting/Disclosure

The reports must contain detailed particulars regarding the company, the number of board meetings held in the financial year, related-party transactions, the performance of subsidiaries and joint ventures, and the directors' appointment or resignation, among other things.

Companies must report any change in the directors, managing directors, secretary, or manager, within a stipulated time of thirty days from the date of change. The Companies Act allows for private companies to amend their AoA and AoAs to contain entrenchment provisions. For instance, the AoA can only be altered if certain requirements like that of special resolution (a resolution having a three-fourths majority) have been met. A private company may also amend its AoA by way of a special resolution to change itself to a public company. This alteration can only have effect once the appropriate tribunal passes an order approving it. Thereafter, such amended AoA along with a copy of the tribunal's order shall be filed before the RoC within 15 days.

The Directors' Responsibility Statement filed along with the annual reports must contain a declaration regarding the compliance of applicable accounting standards and maintenance of accounting records.

3.4 Management Structures

The management structure of a company under the Companies Act should consist of individual directors, collectively known as the board of directors. Further, a public company must have a minimum of three directors, a private company shall have a minimum of two directors, and both shall have a maximum of fifteen directors. In case a company wishes to have more than fifteen directors, the board of directors shall pass a special resolution of not less than a three-fourths majority of its members.

The board management structure is one-tier, and there is no distinction between a managerial or supervisory board. Further, at least one director of the company shall be an Indian resident. Additionally, in case of a public company that is listed on the stock exchange, one third of its total directors should be independent directors. The central government based on the class of the public company can prescribe a minimum number of independent directors. Furthermore, public listed companies with paid-up capital of INR1 billion or a turnover exceeding INR3 billion shall appoint at least one female director.

3.5 Directors', Officers' and Shareholders' Liability

The main duties of the directors as prescribed under the Companies Act are as follows:

- duty to act in accordance with the AoA;
- duty to act in good faith to promote the bona fide interests of a company, employees, shareholders, the community in general, and environment protection;
- exercise duties with reasonable care, skill and diligence;
- duty to exercise independent judgement; and
- duty not to be involved in conflicting interests with the company and the duty not to achieve any undue gain or advantage.

The director also has the following responsibilities:

- review the annual budgets, business plans, and oversee major capital expenditures, acquisitions and divestments;
- monitor the company's effectiveness and governance practices;
- monitor and manage potential conflicts of interest of management and board members;
- maintain high ethical standards and consider the interests of stakeholders; and
- facilitate the independent directors to perform their role effectively as board members.

Further, the independent directors' additional duties are also stipulated by the Companies Act.

Additionally, according to the provisions of the Companies Act and case law precedents, directors of a company are jointly liable for losses suffered by the company due to any breach of their duties and may also be personally liable to make good any loss suffered by the company. A director in breach of his/her fiduciary duty towards the company is liable to be removed or disqualified from the company by way of passing a general resolution.

The Companies Act states that a member of the company or officer committing a legal offence shall be liable for imprisonment or a fine as a penalty. The act does not carve out a section for piercing the corporate veil; however, it has provided the power to the courts and tribunals to disregard the privilege of the corporate personality of the company when a member defaults. The courts and tribunals have the power to pass orders in favour of regulating the company's management if the incorporation of the company has been done with misconceived facts and fraudulent tactics and means. The liability shall extend to the first directors, the promoters and the individual making a declaration under the Companies Act.

4. Employment Law

4.1 Nature of Applicable Regulations

Until recently, the labour and employment law framework was dealt with by a combination of central and state legislations focused on various aspects of wages, industrial relations, social security and welfare benefits, and working conditions, health and safety.

One of the recent developments in Indian labour and employment law has been the codification of over 29 central laws into four labour codes, which include the following:

- Code on Wages 2019, which replaces various wage-related laws, including those on equal remuneration, payment of bonuses and the minimum wage;
- Occupational Safety, Health and Working Conditions Code 2019, which merges thirteen laws regulating the health and safety conditions of workers in establishments;
- Industrial Relations Code 2019 (IR Code), replacing the Industrial Disputes Act 1947 (ID Act), the Trade Unions Act, 1926 (TU Act), and the Industrial Employment (Standing Orders) Act 1946 (IE Act); and
- Code on Social Security 2020, which will replace nine social security-related laws in India.

The codes are yet to be fully implemented by the central government and are aimed to address the following issues:

- to provide universal social security coverage to all workers, including those in the informal sector;
- to ensure minimum wages and the timely payment of wages;
- to promote industrial harmony and collective bargaining;
- to protect workers' health and safety; and
- to improve the ease of doing business and compliance.

It is anticipated that the new labour codes will be implemented and enforced after the general elections in May 2024. So far, the provisions of the Code on Social Security 2020 regarding identification of beneficiaries of the employees for receiving statutory benefits through Aadhar Card, and the provisions in the Code on Wages 2019 relating to the "central advisory board in relation to minimum wages" have been made effective by the central government by way of notification. However, the other codes and provisions are yet to be notified.

Collective Bargaining Agreements

In India, collective bargaining is regarded as an effective dispute resolution mechanism, particularly in industries where the employees are largely unionised, such as manufacturing, construction and mining sectors. The terms and conditions of employment, including welfare activities, banking and medical facilities for the employees, are negotiated and agreed through collective bargaining under the collective agreements. These collective agreements are also structured as memoranda of settlements, which specify various clauses governing the relationship between the employees represented by trade unions and employers. The IE Act requires the employer to consult the employees or their representatives to finalise the terms of employment contained in the organisation's standing orders. Collective bargaining agreements do not usually exist in the private sector, and the employees' collective grievances are dealt with through other means, including labour unions initiating online campaigns and resorting to social media to secure employees their statutory rights.

The IR Code proposes to prohibit and punish the commission of any unfair labour practices, including, interfering, restraining or coercing workers in their right to engage in concerted activities for collective bargaining, and refusing to bargain collectively in good faith with the trade unions/employers.

Employment Agreements

Private sector employees are governed by their employment contracts, which adhere to the general principles of contract law under the provisions of the Indian Contract Act 1872, if such a contract is signed, as Indian law does not mandate employer-employee contracts.

Certain state-specific shops and establishment legislations require an employer to issue an appointment letter in a prescribed form, containing basic information such as the employer's name and address and employee details, wages, allowances and joining date. Furthermore, the rules under the IE Act (to the extent applicable) require that the employer issue a written order on the employee's completion of the probation period.

It is prudent to execute comprehensive employment contracts to capture the key terms and conditions of employment. There are certain implied terms in an employment contract, such as confidentiality obligations, the protection of trade secrets, or good faith and duty of care.

4.2 Characteristics of Employment Contracts

Certain characteristics of an employment contract in India are as follows:

- A comprehensive employment contract must include all the important terms, such as the job description, rate of compensation, statutory entitlements, terms of employment, rights and obligations of both parties, termination conditions, confidentiality and non-disclosure provisions, intellectual property and technology assignment, compliance with company policies and the preferred dispute resolution mechanism.
- For senior designations, the agreement may also include post-termination obligations such as non-competition and non-solicitation (to the extent enforceable, or also for deterrent purposes), stock options, indemnity and gardening leave.

Formalities

The requirements to execute an employment contract are:

- The contract must be stamped before execution, or within three months of its receipt in India, if executed abroad. An unstamped contract is inadmissible as evidence in Indian courts.
- Furthermore, it may be time-consuming to stamp the agreement at the litigation stage and may delay the proceedings, which may be prejudicial to employers seeking urgent relief in cases of employee breach.

Verbal Conclusion of Employment Contracts

Verbal conclusions of employment contracts are permitted in India so long as the arrangement follows the basic principles of a valid contract, such as offer, acceptance, consideration and meeting of minds. In general, verbal agreements are considered valid contracts under the Indian Contract Act 1872 if the four conditions are met.

Duration and Regulation of Employment Contracts

The duration of the employment contract would be according to what has been agreed between the employees and the employers, and the types of contracts are as explained below:

- India's employment laws do not have any provisions prescribing the terms of an employment contract. Broadly, employment contracts can be for an indefinite term or a fixed term.

- Fixed-term contracts are commonly used for employees undertaking work of a temporary nature or project-based work. Consultants and contract employees also execute fixed-term contracts with employers.
- The government has extended fixed-term employment to all sectors to ensure statutory benefits for fixed-term workers as well as those employed on an indefinite basis.
- From a practical standpoint, it is advisable to execute short-term contracts with employees to ensure flexibility in termination, and for better enforcement, particularly of restrictive covenants such as non-compete and non-solicitation clauses.
- However, in many cases, including that of government employees, open-ended agreements are preferred to secure long-term employment and to make use of the statutory benefits available to employees based on the length of their service.
- In the private sector, short-term agreements present hiring challenges for employers because well-qualified employees at all levels seek job security and long-term commitment.

4.3 Working Time

The working hours of an employee are based on the following aspects:

- The Factories Act 1948 (FA Act), state-specific Shops and Establishment laws (the SE Acts), the Model Shops and Establishments (Regulation of Employment and Conditions of Service) Act 2016 (Model Shops Act) prescribe a maximum of nine working hours per day and 48 hours a week.
- A worker shall not be made to work for more than five hours without taking a break of at least half an hour.
- The Code on Wages 2019 allows the government to fix working hours to constitute a normal working day inclusive of one or more specified intervals.
- The total spread-over period (that is the total length of time from the start of a working day to its conclusion including breaks) shall not exceed ten and a half hours under the FA Act.
- However, the spread-over period is extendable up to twelve hours by a chief inspector for specific reasons under the FA Act.
- The SE Acts permit a spread-over period of 11 hours per day. Furthermore, the workers must be given at least one day off a week.
- The foregoing work hours, overtime and the spread over periods may be modified by the orders of chief inspectors under the respective statutes. The Model Shops Act does not prescribe the opening or closing hours, and the establishments can remain open throughout the week.

Overtime

- If workers are required to work more than the maximum daily and weekly working hours stipulated under various statutes, they will be entitled to receive wages for that overtime work, at twice their normal wages.
- The FA Act stipulates a maximum of 50 overtime hours in a quarter, which can be extended to a maximum of 75 hours in exceptional circumstances.
- The SE Acts also contain provisions relating to overtime and permit up to 40-50 overtime hours in three months. However, the Model Shops Act, and the respective SE Acts of Maharashtra and Gujarat, have increased the permitted overtime hours significantly, to 125 hours in a quarter.

4.4 Termination of Employment Contracts

The employment contract can be terminated based on what has been agreed between the parties in the contract, and the following rules generally apply:

- Employers must include clauses in their employment contracts that give them the flexibility to terminate the employment without incurring any liabilities or making potential claims by outgoing employees more likely.
- Indian law does not restrict employers from executing termination agreements with outgoing employees, which has become standard industry practice. Employers prefer to sign the agreement simultaneously with the severance payment.
- The law does not provide for “at-will” termination, other than the newly introduced Model Shops Act and the corresponding Maharashtra Shops and Establishment Act 1948 and the Gujarat Shops and Establishment Act 2019, which do not include any termination provisions, thus granting flexibility to both the employers and the employees to terminate the employment.
- A termination agreement normally incorporates provisions such as settlement and release of claims by the employee, the employee’s acknowledgment of receipt of the final severance consideration, the employee’s indemnity and representations not to defame the employer.
- As regards the statutory formalities, a nominal government levy known as stamp duty must be paid on the agreement for it to be admissible as evidence in Indian courts. Furthermore, it is a good practice to execute the agreement in a notary public’s presence to validate the parties’ signatures.
- There are no statutory requirements or restrictions on termination agreement terms. Reasonable releases, non-disclosure and non-disparagement provisions may be enforceable against the employees.
- There are no formal requirements for severance payments. However, from a practical standpoint, it is advisable to have the outgoing employees execute separation and release agreements with the employer, if required.

4.5 Employee Representations

Indian law does not grant management representation rights to employees.

Besides the trade unions, the ID Act requires that any establishment with more than 100 employees must appoint a Works Committee consisting of an equal number of representatives of the employer and the employees.

- The representatives of the workmen on the Works Committee must be elected in the statutorily prescribed manner and in consultation with the relevant trade union, to secure and preserve amicable relations between the employer and the employees, and to discuss and bring resolution to any issues of common interest or concern.
- Any establishment with 20 or more employees must appoint a Grievance Redressal Committee to resolve disputes arising out of individual grievances. The committee can have maximum of six members, with an equal number from the employer and the employees. The committee’s chairperson will be selected from the employer and the employees on a rotating basis.
- Any establishment with ten or more employees must constitute an Internal Complaints Committee under the Sexual Harassment of

Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, to handle instances of sexual harassment against women in the workplace.

At least half the members of the Internal Complaints Committee (ICC) should be women, and the presiding officer must be a woman of a senior designation. At least two members of the ICC should be employees, and there must be one independent member from a non-government organisation or someone familiar with the issues relating to sexual harassment.

5. Tax Law

5.1 Taxes Applicable to Employees/Employers

The taxes paid by the employee and the employer are governed by the Income Tax Act 1961 (IT Act), where tax rates are imposed on domestic and foreign companies in India. The tax rates depend on factors like the entity's residential status, business type, turnover, cess and surcharge rates applicable.

Under the existing legal framework, employers shall comply with a variety of tax laws and payroll contributions, including individual income tax (IIT), social security contributions, GST, value added tax (VAT), withholding tax, and business tax. Nonetheless, employers do not have to withhold any income taxes for their employees. The employers have to subtract a portion of the salary of their employees and pay tax deducted at source (TDS).

In India, the employer is expected to make a social security contribution, which equates to 12% of an employee's compensation. Further, depending on the employer company size, it will have to make a contribution of an additional 4.75% to the Employees State Insurance Cooperation (ESIC) scheme.

As regards the employees, individual tax rates will be applicable under two tax mechanisms, namely the traditional and new regimes, and it is the employee's prerogative to choose the tax regime.

A summary of individual tax rates for the financial year 2023-2024 is as follows:

Traditional Regime

- up to INR250,000 – nil;
- INR250,000-INR500,000 – 5%;
- INR500,000-INR1 million – 20%; and
- above INR1million – 30%.

New Regime

- up to INR300,000 – nil;
- INR301,000-INR600,000 – 5%;
- INR600,001-INR900,000 – 10%;
- INR901,000-INR1.2 million – 15%;
- INR1.2 million-INR1.5 million – 20%; and
- above INR1.5 million – 30%.

Under the traditional regime, individuals can claim deductions such as travel allowances, house rent allowances, etc. The new tax regime excludes deductions on tax such as home loan interest, allowance for rent and others.

5.2 Taxes Applicable to Businesses

A summary of tax rates applicable to companies in India is as follows:

- A domestic company with a gross turnover that does not exceed INR4 billion will be taxed at 25%.

- A domestic company with a gross turnover that exceeds INR4 billion will be taxed at 30%.
- A surcharge and education and health cess will be applicable in both of the above cases. The government notifies the surcharge and cess annually, which ranges between 11.28% and 16.48% of the foregoing base tax, depending on the company's taxable income.
- In case the basic tax liability is less than 15% of the company profits, the minimum alternate tax (MAT) of 15% of book profit will be applicable, in addition to surcharge and cess, in lieu of the normal tax liability.
- In case of foreign companies, a flat rate of 40% is applicable on business income accrued in India, and a surcharge which ranges from 6.08-9.2% of the base tax, which will vary based on the taxable income.
- All other special incomes in the form of dividends, interest, royalties, etc, are taxed at varied rates. For instance, 20% on dividends, 5-20% on interest, and 20% on royalties are applicable.
- A rate of 30% tax is applicable for a partnership firm (resident and foreign), along with surcharge and cess that ranges from 4-12.48% of base tax, which will vary based on the taxable income.

Other taxes payable by an incorporated business also include some of the following indirect taxes:

- the goods and services tax (GST), which consolidates multiple indirect taxes inclusive of VAT, excise duties, service tax, and central sales tax;
- integrated GST on goods and services imported into India, in addition to customs duty;
- GST for export of goods/services (which is nil subject to compliance with the prescribed conditions);
- stamp duty, which is a government levy payable on all transactions; and
- property tax.

Withholding Taxes on Dividends and Interest

The payments extended to residents, including technical and consultancy fees, dividends, rent, commission, royalties should be subject to the withholding tax according to the rates under the IT Act.

A summary of withholding taxes is below:

- The rate for withholding tax is between 2-10% and can be adjusted against the total tax liability against the one receiving.
- For non-resident recipients, the withholding tax is 20% (plus the cess surcharge).
- Fees for technical services (FTS) and royalties are subject to a 20% withholding tax for payments made to non-residents.
- Interest payments are subject to a 10% withholding tax rate, and 5% on the interest on a foreign currency loan paid by a resident to a non-resident.
- The tax rate for dividends is 20% on the payments to a non-resident.

Organisation for Economic Co-operation and Development (OECD) Outcome Statement on the Two-Pillar Solution

India has joined the OECD Outcome Statement on the Two-Pillar Solution; however, the Two Pillar model has not yet been introduced in India. However, it is anticipated that the model may be implemented in the July 2024 budget.

5.3 Available Tax Credits/Incentives

The IT Act provides for concessions, credits, and incentives on various incomes. Some of the incentives include:

- International Financial Service Centres (IFSC) can be set up by foreign banks, which allows for a tax exemption of 100% on profits for the initial five years and 50% on the next set of five years.
- Under the IT Act, start-up companies are provided a tax holiday of 100% for three consecutive taxable years out of ten.
- Income from royalties from patents developed and registered in India is eligible for concession, and such income will be subject to 10% plus surcharge and cess.
- Entities that are carrying out specific business such as warehousing, operating and building hotels, hospitals, and others can claim a 100% deduction on capital expenditure in the year the expense occurs.
- The government also offers certain incentives for businesses and companies that have been established within Special Economic Zones (SEZ).
- SEZ business units get a full tax exemption for the first five years, 50% exemption for the next five to ten years, and 50% for ploughed back export profit for 10 to 15 years.

In addition to the foregoing, the IT Act provides multiple weighted deductions and incentives on technological investments.

5.4 Tax Consolidation

Tax consolidation is not permitted in India.

5.5 Thin Capitalisation Rules and Other Limitations

Thin capitalisation rules are applicable in India and are part of the IT Act. The rules under the IT Act put a cap of 30% of earnings before interest, taxes, depreciation, and amortisation (EBITDA) for deduction on interest towards Indian companies.

5.6 Transfer Pricing

The transfer pricing regulations are governed under the IT Act and are notified by the central government. The rules are applicable to cross-border transactions, and the prices are adjusted by the tax authorities. India's transfer pricing rules generally follow the OECD Transfer Pricing Guidelines. The regulations have incorporated the arm's length principle, and targeted anti-avoidance rules are prescribed in the IT Act regarding transfer pricing.

5.7 Anti-evasion Rules

Both general and specific anti-avoidance rules are applicable in India.

Specific Anti-avoidance Rules

- When a transaction between sellers and buyers occurs at a discounted rate from its fair value, such discounted rates are considered ordinary income for the recipient.
- If shares are issued by a closely held company at a price above the fair price, such increase would be considered ordinary income for the entity that has issued the shares.
- Transfer pricing rules are explained in **5.6 Transfer Pricing**.
- Thin capitalisation rules are explained in **5.5 Thin Capitalisation Rules and Other Limitations**.
- If a foreign company is managed and controlled from India, it can be subject to Indian tax laws and can be taxed accordingly.

General Anti-avoidance Rules

- General Anti-Avoidance Rules (GAAR) have been active in India since 2016 to overcome aggressive tax avoidance and planning.
- GAAR discourage transactions that are entered into with the objective of tax benefits.
- GAAR will be applicable to situations where the impact of tax exceeds the INR30 million threshold.
- India has signed the Multilateral Instrument (MLI) in 2020 with many tax-paying jurisdictions and has modified its tax treaties in accordance with the MLI.

6. Competition Law

6.1 Merger Control Notification

Under the Competition Act 2002 (Competition Act), when acquisitions, mergers, or amalgamations exceed the prescribed threshold limits (based on the value of their assets and turnover), they are considered "combinations" for the purposes of the Competition Act and are subject to notification. The jurisdictional thresholds under the Competition Act are as follows:

- The parties/enterprises involved in the transaction jointly have:
  - (a) in India, assets valued at more than INR10 billion or turnover of more than INR30 billion; or
  - (b) in India or outside India, in aggregate, assets valued at more than USD500 million, including at least INR5 billion in India, or turnover of more than USD1,500 million, including at least INR15 billion in India.
- The group (to which the enterprise would belong after the acquisition/merger/amalgamation), jointly has or would jointly have:
  - (a) in India, assets valued at more than INR40 billion or turnover of more than INR120 billion; or
  - (b) in India or outside India, in aggregate, assets valued at more than USD2 billion, including at least INR5 billion in India, or turnover of more than USD6 billion, including at least INR15 billion in India.

In this context, "group" means two or more enterprises that, directly or indirectly, can: (i) exercise 26% or more of the voting rights in the other enterprise; or (ii) appoint more than 50% of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise.

According to the new Competition (Amendment) Act 2023 (Amendment Act), the Competition Commission of India (CCI) must also be notified regarding a combination where the value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds INR20 billion. However, this provision of the Amendment Act is pending notification by the central government.

Combinations that cause or are likely to cause an appreciable adverse effect on competition within the relevant market in India are prohibited in India.

Exempted Categories

Certain categories of transactions may be exempted from the requirement to be notified to the CCI, as they are ordinarily not likely to cause an appreciable adverse effect on competition in India. These include the acquisition of shares or voting rights made "solely as an investment" or "in the ordinary course of business", which does not entitle the acquirer to hold

25% or more of the total shares or voting rights of the targeted company, and does not lead to the acquirer gaining any controlling rights over the targeted company.

Provisions for joint ventures are not expressly included in the Competition Act. However, certain joint ventures that are formed through the trandsfer of assets by one or more enterprises may be notifiable if the jurisdictional thresholds in the Competition Act are met and they do not fall into the exempted categories. However, there is limited clarity regarding the notifications of joint ventures provided by the CCI.

6.2 Merger Control Procedure

Any person or enterprise that proposes to enter into a combination, must provide notice to the CCI, in the form specified and the fee determined by regulations, disclosing the details of the proposed combination, within 30 days of the approval of the merger/amalgamation's proposal, or the execution of any agreement or other document for acquisition.

The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Rules) specify the steps to file the notice before the CCI.

Forms

- The notice must be filed in Form I specified in Schedule II to the Combination Rules, along with the proof of payment of the fee by parties to the combination.
- The parties also have the option to give notice through Form II of Schedule II to the Combination Rules. Filing of Form II may be required if:
  - (a) the parties to the combination are competitors and the combined market share of the parties to the combination after such combination is more than 15% in the relevant market; or
  - (b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than 25% in the relevant market.

The Combination Rules provide that in case of acquisition or hostile takeover, the acquirer must file a notice and in case of a merger or an amalgamation, the parties have to jointly file the notice.

Timing

Combinations shall not come into effect until 210 days have passed from the day on which the notice has been given to the CCI, or the CCI has granted approval (whichever is earlier). The Amendment Act has reduced this time limit from 210 days to 150 days; however, this provision is yet to be notified.

Green Channel Route

There is also a provision for a "green channel" approval route under the Combination Regulations, which allows parties to file Form I along with a declaration and receive deemed approval of the transaction immediately upon filing the notice. However, the green channel can only be availed of by parties falling under Schedule III of the Combination Rules – ie, in cases where parties to the combination do not have any horizontal, vertical, or complementary arrangements or agreements, where another party to the combination is involved.

6.3 Cartels

Anti-competitive agreements are void in India. The Competition Act prohibits any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

The following types of agreements, including practices/agreements by cartels, are presumed to be anti-competitive (ie, have an appreciable adverse effect on competition) in India:

- which directly or indirectly determines purchase or sale prices;
- which limits or controls production, supply, markets, technical development, investment or provision of services;
- which shares the market or source of production or provision of services by way of allocation of the geographical area of the market, or type of goods or services, or number of customers in the market or any other similar way; or
- which directly or indirectly results in bid rigging or collusive bidding.

Agreements entered by way of joint ventures are exempt from the above provision.

Further, agreements such as tie-in arrangements, exclusive dealing agreements, exclusive distribution agreements, refusals to deal, and resale price maintenance agreements, are considered anti-competitive agreements if they cause, or are likely to cause, an appreciable adverse effect on competition within India. However, this provision does not apply to agreements between an enterprise and an end consumer.

Moreover, the Competition Act provides that the provisions prohibiting anti-competitive agreements shall not restrict any person's right to prevent infringement or impose reasonable conditions that may be necessary to protect their intellectual property rights.

The CCI is the primary authority that must eliminate practices having adverse effects on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in markets in India.

The CCI has the power to impose penalties on enterprises involved in anti-competitive agreements and direct them to discontinue and not re-enter such agreements. If an anti-competitive agreement has been entered into by a cartel, the CCI may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times the profit of the company for each year of continuance of the cartel, or 10% of the company's turnover for each year of continuance of the cartel, whichever is higher.

6.4 Abuse of Dominant Position

The Competition Act prohibits enterprises from abusing their dominant position. If an enterprise or group carries out any of the following acts, such acts/practices qualify as "abuse of dominant position" per Indian law:

- imposing unfair or discriminatory conditions or prices in the purchase or sale of goods or services (including predatory pricing);
- limiting or restricting the production of goods or provision of services or market;
- limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers;

- indulging in practices leading to denial of market access;
- concluding contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; and
- using a dominant position in one market to enter into, or protect another relevant market.

While determining whether an enterprise enjoys a dominant position, the CCI will consider the following factors:

- market share of the enterprise;
- size and resources of the enterprise;
- size and importance of the competitors;
- economic power of the enterprise, including commercial advantages over competitors;
- vertical integration of the enterprises or sale or service network of such enterprises;
- dependence of consumers on the enterprise;
- monopoly or dominant position, whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise;
- entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- countervailing buying power;
- market structure and size of market;
- social obligations and social costs; and
- relative advantage, by way of contribution to economic development, of the enterprise enjoying a dominant position that has or is likely to have an appreciable adverse effect on competition.

The CCI may also take into account any other factor which it may consider relevant for the determination of the dominant position. The CCI also has the power to impose penalties on enterprises involved in the abuse of their dominant position and direct parties to discontinue such abuse of their dominant position.

7. Intellectual Property

7.1 Patents

India is a party to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, the Paris Convention, and the Patent Cooperation Treaty (PCT), and the Indian patent regime is governed by the Patents Act 1970 (Patents Act) and the Patents Rules 2003. Patents are examined, granted and administered by the Patents Act, which complies with the foregoing international treaties.

An invention relating either to a product or process that is new, involving inventive steps and capable of industrial application can be patented. However, an invention is not patentable if it falls into the categories of inventions that are non-patentable as prescribed under Sections 3 and 4 of the Patents Act. For instance, mere discovery of a new form of a known substance is not patentable, unless there is enhancement of the known efficacy of that substance. The Patents Act excludes inventions relating to mathematical or business methods or a computer program, per se, or algorithms from patentability.

Term of Protection

The validity of a patent is 20 years from the filing date, or the priority date.

Registration Procedure

Three main types of patent applications can be filed: ordinary domestic patent application, convention application, and PCT national phase application. An ordinary application is usually filed when the applicant does not want to claim priority in a convention country. A convention application is filed to claim a priority date based on the same or substantially similar application filed in one or more of the convention countries. The convention application must be filed in the patent office within 12 months from the date of the first filing of a similar application in the convention country. Whereas, after filing an international application according to PCT designating India, an applicant must file the national phase application in India within 31 months from the international filing date or the priority date, whichever is earlier. Applications must include a specification (complete/provisional) containing claims set out in a prescribed format, and details of the inventor and applicant.

Applications are published in the Patent Journal after (i) 18 months of filing in India; or (ii) 18 months after the priority date, and are open to third-party opposition. The applications are examined only after publication and upon filing a request for examination. The request for examination can be filed along with the patent application or within 31 months from the filing date/priority date (for applications filed after 15 March 2024). The First Examination Report (FER) will be issued after examination and the applicant must file the response to the FER within six months of the date of FER, which is extendable by three months. If the patent office is satisfied with the response, and there is no pre-grant opposition filed against the patent, the office will grant the patent. However, if pre-grant opposition exists, the office will schedule a hearing to address the matter before deciding on whether to grant the patent.

Enforcement and Remedies

The Patents Act provides for enforcement through infringement actions. Such actions in India can be instituted before the district courts, and the four high courts having original jurisdiction, subject to their pecuniary jurisdiction. In case of a suit for infringement, the patent owner can claim damages from the date of publication of the patent application or the date of infringement, whichever is earlier. However, the suit for infringement can be filed only after a patent is granted.

The reliefs that a court may grant in any suit for infringement can include either damages or an account of profits. The court may also order that the infringing goods be seized, forfeited or destroyed, as the court deems fit without payment of any compensation.

7.2 Trade Marks

Trade mark law in India is administered by the Trade Marks Registry (Registry) under the Office of the Controller General of Patents, Designs and Trade Marks, and the Trade Marks Act 1999 (TMA) is the comprehensive legislation that governs all aspects of trade mark protection in India.

A device, design, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging and colour combination can be registered as a trade mark under the TMA, if it can be graphically represented and is capable of distinguishing the goods or services thereunder from those of others.

Term of Protection

The length of protection of a trade mark registration is ten years in India, which can be renewed perpetually. The trade mark's use is not mandatory for maintaining or renewing the trade mark. However, a registered trade mark will become vulnerable to cancellation action if it is not used for a continuous period of five years from the date of its entry into the Register of Trade Marks.

Trade Mark Prosecution Procedure

Once a trade mark application is filed, the Registry first carries out procedural examination and, thereafter, substantive examination of the trade mark application. If the Registry has no objections, it will accept it for registration, and in case of any objection or issues, it will issue an examination report. This examination/review process may take up to two to three months depending on the branch of the Registry in which the mark is filed.

In a straightforward case, where the Registry directly accepts a trade mark, it will be published in the Trade Marks Journal for public objection. If no one opposes the mark within the four-month publication period, the trade mark will proceed to registration. In case the Registry objects, the applicant will have to file a response, based on which the Registry may either accept the mark or schedule a pre-acceptance hearing.

In a straightforward case, if there are no objections, a trade mark application proceeds to registration within eight to ten months of filing. However, the following factors may increase the timeframe:

- nature of objections raised by the Registry;
- extension requests filed in the Registry;
- any hearings scheduled by the Registry and any subsequently filed written submissions and oppositions filed against the trade mark; and
- any amendment and assignment recordation applications filed by the applicant.

Enforcement and Remedies

The TMA provides for enforcement through infringement and passing-off actions. An infringement or passing-off action in India can be instituted before the district courts, and the four high courts having original jurisdiction. Trade mark infringements and falsifications are punishable offences under the TMA, with imprisonment for a term of six months to three years and/or a fine of INR50,000 to INR200,000, or both. Further, a trade mark owner may file a criminal complaint before a magistrate seeking investigation, search and seizure of infringing goods within the premises of the infringer, under the Code of Criminal Procedure 1973. A criminal complaint can also be filed with the police for the infringement and falsification of trade marks.

Administrative enforcement includes recordation of the registered trade mark with the Customs Department at different posts, to prevent the import of infringing goods.

The following civil remedies are available in infringement and passing-off actions:

- interlocutory injunctions, upon establishing a prima facie case of infringement, irreparable harm or injury caused to the aggrieved party, and balance of convenience in favour of the aggrieved party;
- permanent injunctions;
- damages;
- accounts of profit;
- delivery up of infringing materials for destruction;
- Anton Piller orders;
- Mareva injunctions;
- John Doe orders; and

- Quia timet actions.

Monetary reliefs may vary depending on various factors, such as the loss caused to the trade mark proprietor's business, goodwill and reputation, punitive damages (usually twice the amount of compensatory damage), exemplary costs, etc.

The TMA provides for criminal remedies in trade mark infringement and falsification of trade marks with imprisonment extending up to three years or a fine of up to INR200,000, or both. In certain cases, Indian courts have granted substantial damages to brand owners. For instance, an Indian court awarded costs of approximately USD700,000 in a trade mark infringement suit in 2020.

7.3 Industrial Design

Industrial designs are governed by the Designs Act 2000 (Designs Act), and Designs Rules 2001, and under the office of Controller General of Patents, Designs and Trade Marks (Controller).

A design refers to the features of shape, configuration, pattern, ornamentation or composition of lines or colours applied to any article, whether in two- or three-dimensional (or both) forms. This may be applied by any industrial process or means (manual, mechanical, or chemical) separately or by a combined process, which in the finished article appeals to and is judged solely by the eye.

Term of Protection

The registered proprietor of a design has copyright in the design for ten years from the date of registration.

Registration Procedure

An application for registration of a design may be accompanied by a statement of novelty if required by the Controller. Thereafter, the application is examined and once the examination report is issued to the applicant, the applicant must file a response to the examination report. If the Controller is not satisfied with the response, a hearing will be provided to the applicant. After the hearing, the Controller shall decide whether the application should be accepted or not. Once the objections are rectified, the controller may accept the application, and the application is published in the patent office journal. If the controller rejects the application, an appeal may be filed in the relevant high court within three months of the controller's decision.

Enforcement and Remedies

The Designs Act provides for enforcement through infringement actions. An infringement action in India can be instituted before the district courts, and the high courts having original jurisdiction.

According to the Designs Act, a design is infringed, if during the term of registration of the design, a person (without authorisation of the registered design owner):

- applies or causes to be applied to any article in any class of articles in which the design is registered, the design or any fraudulent or obvious imitation thereof, for the purpose of sale;
- imports for sale any article belonging to the class in which the design has been registered, and has applied to it the design or any fraudulent or obvious imitation of the design; and
- knowing that the design or its fraudulent or obvious imitation has been applied to any

article in any class of articles in which the design is registered without the consent of the registered proprietor, publishes or exposes or causes to be published or exposed for sale, that article.

Under the Designs Act, in cases of infringement/piracy of designs, the registered proprietor of the design is entitled to civil remedies by way of injunctions and damages. Further, the infringer is liable to pay a fine of up to INR25,000, to the registered proprietor of the design (recoverable as a contract debt).

7.4 Copyright

The Copyright Act 1957 (CRA) provides for copyright protection in India. The CRA provides that copyright subsists in the form of original literary, dramatic, musical, or artistic work, cinematograph films, and sound recordings.

Term of Protection

Although copyright registration is not mandatory for protection in India, a copyright registration will serve as evidence of the copyright in the work. A copyright registration is valid for the lifetime of the author, plus an additional 60 years after the author's death.

Copyright Registration Process

A copyright registration application must be filed in the Copyright Office, along with the relevant supporting documents. If no one objects to the copyright application within 30 days' mandatory waiting period, the Copyright Office will examine the application and approve it or raise its objections, if any. The application will proceed further based on the applicant's response in satisfying the Copyright Office's objections.

Upon completion of the notice period and examination, the Copyright Office normally issues the copyright certificate within two to three months. In case of no major objections from third parties or the Copyright Office, the overall registration process can be concluded within eight to ten months from the date of filing.

Enforcement and Remedies

The CRA provides for enforcement through infringement actions. An infringement action in India can be instituted before the district courts, and the high courts having original jurisdiction. A copyright owner can take legal action against any person who infringes the copyright in the work.

In India, "fair use" is an exception to infringement of copyright. Certain unauthorised uses of a copyrighted work without its owner's permission, for criticism, comment, news reporting, teaching, scholarship, or research, etc, may be considered fair use and may not qualify as infringement under the CRA. Indian courts often consider the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion of the copyrighted work used, and the effect of the use upon the potential market, among other factors, to determine fair use.

The remedies provided by the CRA against infringement of copyright are:

- Civil remedies: The copyright owner is entitled to civil remedies by way of injunctions, damages, and accounts.
- Criminal remedies: The CRA provides for search and seizure remedies by the police. If the complainant has a copyright registration certificate, it will be sufficient for the police to conduct the search and seizure in case of an infringing use on an urgent basis by invoking its powers under the Copyright Act.

Infringement is punishable under the CRA with imprisonment, for a term of six months to three years and/or a fine of INR50,000 to INR200,000, or both. If the court finds that the infringement was not made for gain in the course of trade or business, it may impose imprisonment of fewer than six months or a fine of less than INR50,000.

7.5 Others

Software

The CRA covers computer programs under the purview of literary work, and therefore, the literary portions of a computer program, including the source code, are protected under the CRA. Although the Patents Act excludes protection for standalone computer programs, a piece of software claimed in conjunction with a novel hardware element can be patentable in India (Guidelines for Examination of Computer Related Inventions 2017).

Databases

There is no specific legislation or statutory protection for databases in India, nor in respect of data and databases used in machine learning. However, the CRA protects a computer database under the purview of literary work. The CRA also protects databases by granting rights associated with the labour involved in compiling and presenting data in a particular form.

Trade Secrets

Currently, there is no legislation or statutory protection for trade secrets in India. However, different courts in India have extended protection to trade secrets and confidential information in India, if information's confidentiality is reflected in contractual documents, such as confidentiality agreements, non-disclosure agreements, and reasonable and legally enforceable non-compete clauses in the agreements.

8. Data Protection

8.1 Applicable Regulations

- The Constitution of India guarantees the right to privacy (which includes the right to data security) to all citizens as part of the right to life and personal liberty under Articles 19 and 21. This was also upheld by the Supreme Court of India landmark judgment of Justice K S Puttaswamy (Retd) and Another v. Union of India and Others (2017) 10 SCC 1.
- The current law governing data protection in India is the Information Technology Act 2000 (ITA) and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (SPDI Rules), which prescribe reasonable security practices and procedures to be implemented for collection and the processing of personal or sensitive personal data.
- The SPDI Rules prescribe the protection of personal information and Sensitive Personal Data (SPD).
- SPD includes passwords, medical records and history, biometrics, and such information received or provided to body corporates.
- The SPDI Rules mandate a body corporate that has sensitive personal data to employ reasonable security practices to protect the stored data by seeking consent from those to whom the SPD belongs for the use of the data.
- Collection of SPD is permitted by the body corporates in case of lawful purpose and where collection of SPD is necessary for such purpose.
- Usually, disclosures of SPD by a body corporate to a third party require consent from who provided the SPD unless disclosure is required for a legal obligation.

- In case of any information security breach, such corporations are required to show to the authorities that the prescribed security control measures have been implemented.
- Any lapse on the part of such bodies corporate shall attract charges under Section 43A of the ITA and they will be required to compensate all those affected as a result of such breach.

Recent Developments

- India enacted its first comprehensive law on data privacy in 2023, called the Digital Personal Data Protection Act 2023 (DPDPA), which will come into force once the central government notifies it.
- It is anticipated that the central government will notify the DPDPA in 2024.
- The DPDPA will replace Section 43A of the ITA and the entire SPDI Rules.
- The rules under the DPDPA have been drafted and pending to be notified by the central government.
- Pending notification, the DPDPA serves as a regulatory compliance for the organisations to follow.
- DPDPA has categorised data as "personal data" if it can be used to identify an individual.
- Processing of personal data can only happen by way of consent of the data principal. A notice must be given to the data principal before seeking consent. The notice should contain details about the personal data to be collected, the purpose of processing, as well as the way the data principal may withdraw its consent, avail the grievance redressal mechanism and make a complaint to the Data Protection Board (DPB).
- The DPDPA prescribes that the consent obtained from the data principal must be free, specific, informed, unconditional, and unambiguous, with a clear affirmative action, and shall signify an agreement to the processing of personal data for the specified purpose and be limited to such personal data as is necessary for such specified purpose.
- Consent need not be sought for legitimate uses which include processing for:
  (a) specified purposes for which the data principal has voluntarily shared personal information without objecting to such processing;
  (b) purposes of employment;
  (c) responding to medical emergencies;
  (d) performing any function under law or the State providing any service or benefit to the data principal;
  (e) compliance with any judgment or order issued under any law; and
  (f) taking measures to ensure safety during breakdown of public order, etc.

8.2 Geographical Scope

As regards the regulations in the international content, the ITA and the SPDI Rules apply to foreign companies operating outside India who target Indian customers. The ITA extends even to offences committed outside Indian territory by any person.

The body corporate can transfer sensitive personal data to any other body corporate or a person in India or located in another country, that ensures the same level of data protection that is adhered to by the body corporate. The transfer of sensitive personal data is allowed only if it is necessary for performance of the lawful contract between the body corporate and the information provider.

In a landmark case involving collection and transfer of citizens' personal data for COVID-19 tracking purposes by the government of Kerala (a southern Indian state) to a US-based data analysis company, the Kerala High Court restricted the government from sharing citizens' sensitive personal data, unless the data was anonymised. The court had also recognised the importance of the data subject's informed consent prior to collecting their personal data and the safeguards to ensure confidentiality of the data collected.

Upcoming Framework

- The DPDPA also applies to the processing of digital personal data outside the territory of India, if such processing is in connection with activities related to offering goods/services to data principals within the territory of India.
- Transfer of personal data to territories outside India for processing purposes is permitted, except to countries restricted by the central government through notification. Such list of prohibited countries is not yet framed by the government.

8.3 Role and Authority of the Data Protection Agency

- There is no standalone agency under the ITA and the SPDI Rules for enforcing data protection rules.
- However, the Data Protection Board (DPB) is the central data privacy authority per the provisions of the DPDPA. The DPB is currently being set up. The DPDPA specifies that before a matter reaches the Data Protection Officer (DPO), it should be heard by the data fiduciary or the consent manager. A consent manger is a person who is registered with the Board and serves as a point of contact with the data principal. If the individual is aggrieved by the decision of the DPO, then he/she can approach the Appellate Tribunal for appeal.
- Under the DPDPA, the Telecom Disputes Settlement and Appellate Tribunal established under Section 14 of the Telecom Regulatory Authority of India Act 1997 adjudicates on appeals from the orders of the DPB, and the SCI is the final appellate authority for all purposes under the DPDPA.
- As regards cybersecurity, the Indian government has established the CERT-In under the ITA as the national nodal agency for cybersecurity. CERT-In has also set up sectoral CERTs to implement cybersecurity measures at a sectoral level.

9. Looking Forward

9.1 Upcoming Legal Reforms

Data Protection

The Digital Personal Data Protection Act 2023 (DPDPA) is set to change the legal framework of data protection in India. The key features of the DPDPA are briefly covered in **8. Data Protection**. The DPDPA will come into force when it is notified by the central government.

Patents

The DPIIT, on 15 March 2024, notified the Patents (Amendment) Rules, 2024, which amend the Patents Rules 2003. Some of the key features of this amendment include:

- The deadline to file a request for examination is reduced from 48 months to 31 months, for applications filed after 15 March 2024.
- Before the amendment, a patentee was required to file a working statement for granted patents annually, starting from the financial year commencing immediately after the one in which the patent was granted. With the new amendment, the working statement will be required to be filed once every three years.

- The amendment clarifies the filing of divisional applications. The applicant can now file one or more divisional application(s) under Section 16 based on an invention disclosed in the provisional specification or complete specification or any previously filed divisional application.
- The amendment introduces a provision to apply for a grace period of twelve months in the event that a patent has been publicly displayed.
- Inventors can obtain a certificate of inventorship, based on the new amendment.

Competition Law

The Amendment Act amends the Competition Act. Some of the key amendments include the broadening of the scope of anti-competitive agreements, the introduction of the green channel into the Competition Act, the power granted to CCI to issue guidelines on the Competition Act, and rules made thereunder. Other relevant amendments are briefly covered in Section 6.

CHAMBERS GLOBAL PRACTICE GUIDES