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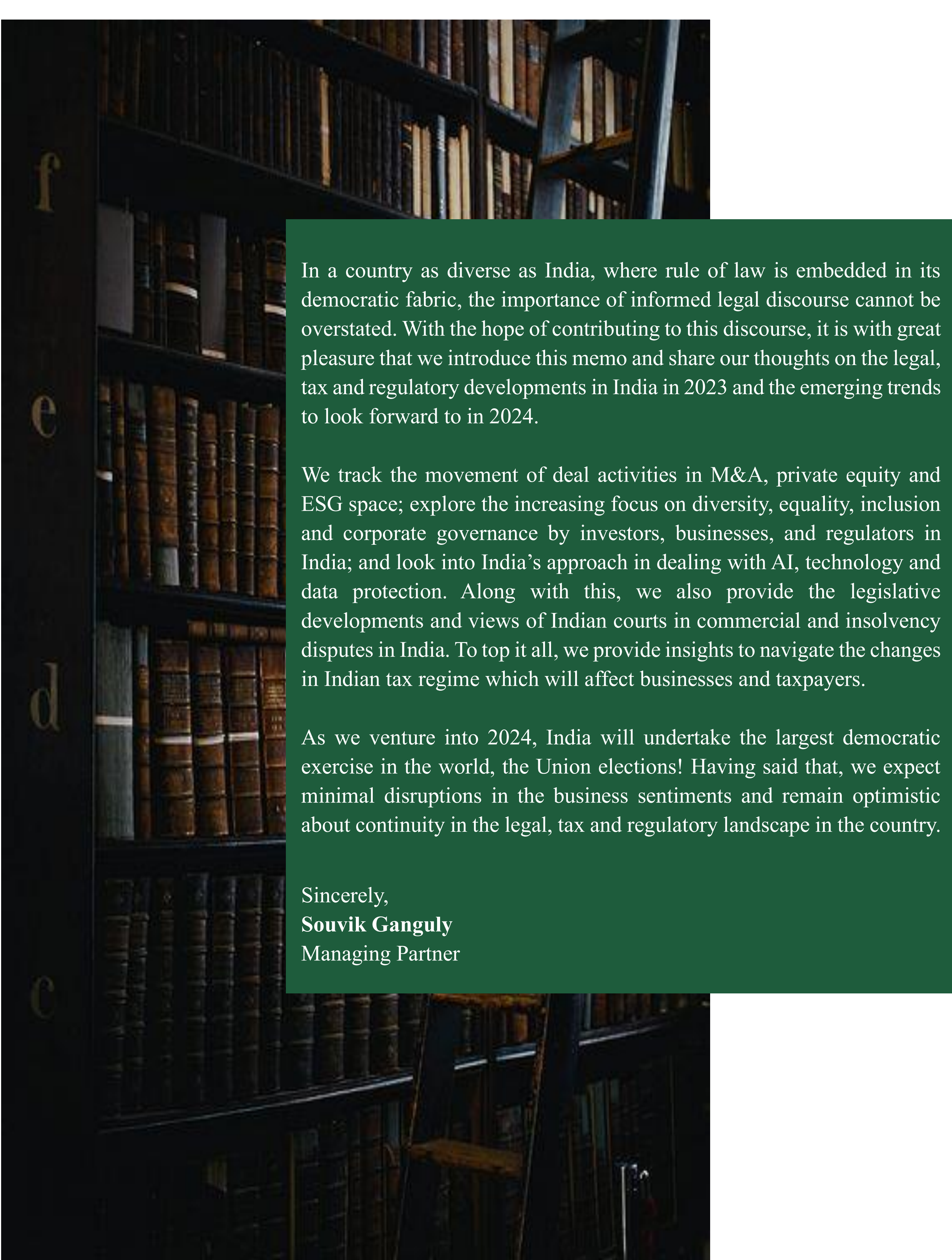
Yearly Rewind 2023

CORPORATE | DISPUTES | TAX

FOREWORD



In a country as diverse as India, where rule of law is embedded in its democratic fabric, the importance of informed legal discourse cannot be overstated. With the hope of contributing to this discourse, it is with great pleasure that we introduce this memo and share our thoughts on the legal, tax and regulatory developments in India in 2023 and the emerging trends to look forward to in 2024.

We track the movement of deal activities in M&A, private equity and ESG space; explore the increasing focus on diversity, equality, inclusion and corporate governance by investors, businesses, and regulators in India; and look into India's approach in dealing with AI, technology and data protection. Along with this, we also provide the legislative developments and views of Indian courts in commercial and insolvency disputes in India. To top it all, we provide insights to navigate the changes in Indian tax regime which will affect businesses and taxpayers.

As we venture into 2024, India will undertake the largest democratic exercise in the world, the Union elections! Having said that, we expect minimal disruptions in the business sentiments and remain optimistic about continuity in the legal, tax and regulatory landscape in the country.

Sincerely,
Souvik Ganguly
Managing Partner

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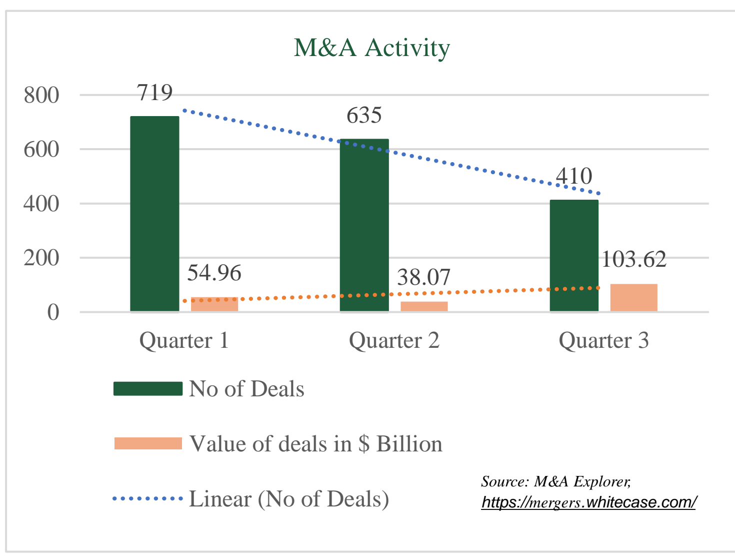
01

MERGERS & ACQUISITIONS AND PRIVATE EQUITY

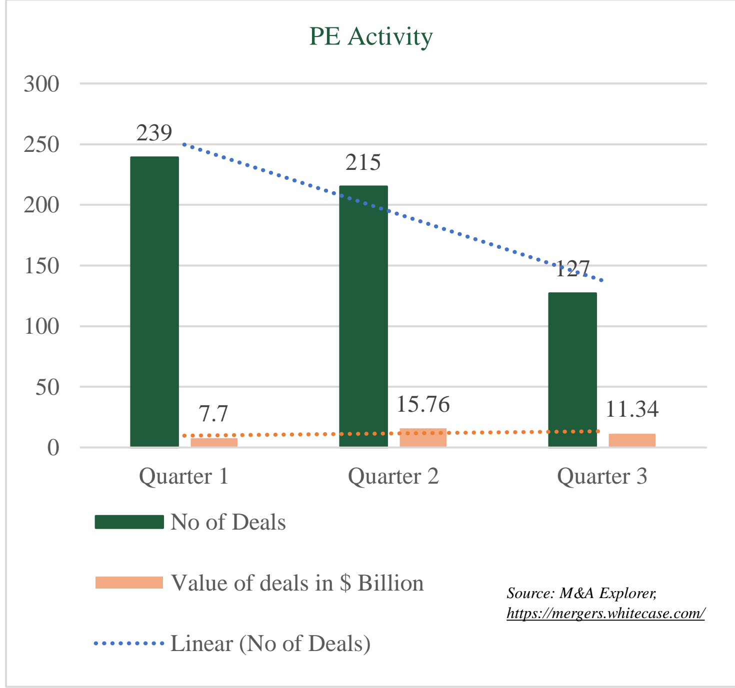
India is one of the world's rapidly growing economies, creating an increasingly attractive and flourishing landscape for investors.[1] Boasting the largest young population globally,[2] India presents prospective investors with a valuable asset – youth waiting to fulfil their aspirations! Against this backdrop, and further fuelled by the recent geo-political developments, the investment landscape shows compelling tailwinds in the M&A and private equity / venture capital space, which picked up in Q3 of 2023, and may see further upswing in the year 2024. In this report, we touch upon (a) deal activities in the M&A and PE space including, in brief, sectoral deal analysis, (b) certain observations in the corporate governance space, and (c) certain developments in the legal / regulatory space which may benefit M&A and PE transactions in the near future.

Deal activity in India



Mergers & Acquisitions

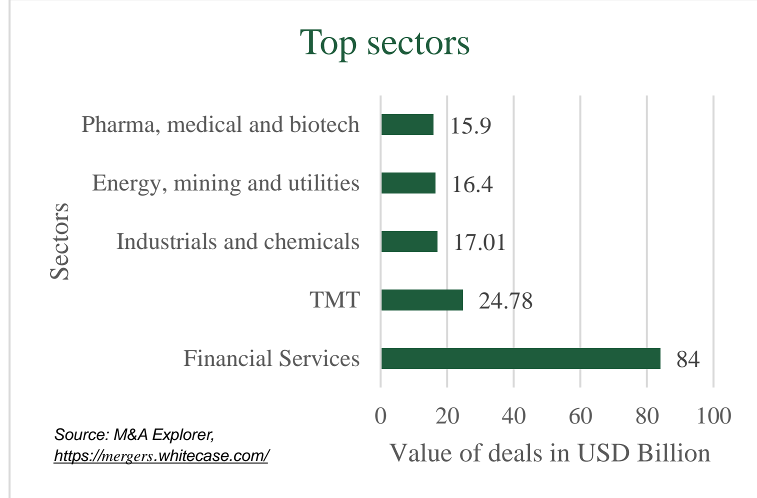
M&A suffered in India during 2023. M&A deal value at a global level saw a decrease, ranging from 41–45%.[3] In India, deal value plunged by 61% in comparison to its 2022 figures.[4] One possible reason behind such drop could be that in 2022 there was a mega merger between HDFC and HDFC Bank. It is expected that India's M&A activity will grow strong in the year 2024 due to global interest in Indian markets.



Private Equity

In Q3 of 2023, private equity activity remained moderate yet consistent, comprising of 127 deals totalling to USD 11.34 billion. Notably, there was an uptick in deal value from Q1 to Q2 of 2023, followed by a subsequent decline from Q2 to Q3 of the same year. This pattern is evident on a global scale, with the peak deal value occurring in Q2 of 2023 and a subsequent dip in Q3.[5] On an annual basis, there is a noteworthy 44% decrease in global PE deal value for the year 2023.[6] This global decline is mirrored in India, where the PE deal value experienced a 40% downfall compared to the figures recorded in year 2022.[7]

Key Sectors (by deal value)



1. **Financial services**: In Q1 of 2023, fintech dominated both M&A deal volumes and values. Additionally, fintech deals led PE in deal volume, while banking and non-banking finance companies took the lead in PE deal values. Notably, BPEA, EQT, and ChrysCapital's investments of ~USD 1.1 billion in HDFC Credila Financial Services played a substantial role in the overall PE deal values within the financial services sector.[8]

2. **Technology, Media, and Telecommunications (TMT)**: In year 2023, a visible trend emerged as global corporations such as Accenture, Truecaller, and Adobe acquired Indian AI-based startups, including Flutura, TrustCheckr, and Rephrase.ai.[9] Other key deals involved Saregama acquiring majority stake in Pocket Aces Pictures Pvt Ltd. for ~USD 23 million and the merger of PVR Pictures with Inox.

3. **Industrials and chemicals**: In the Indian chemical industry, alkali chemicals have the largest share with ~73.3% of the total production from April to March (2022-23). It is expected to contribute USD 383 billion to India's GDP by 2030. Further, India is the 6th largest producer of chemicals in the world and 3rd in Asia, contributing 7% to India's GDP.[10] The industrials and chemicals sector's notable deal value suggests investor's interest in manufacturing, industrial production, and chemical industries. In February 2023, Adani Group acquired controlling stakes in both Ambuja Cements and ACC from Holcim for a combined value of USD 10.5 billion. This single transaction catapulted them to become the second-largest cement producer in India.[11]

4. **Pharma, medical and biotech**: The pharma, medical, and biotech sector demonstrate a considerable deal value, indicating a continued focus on healthcare innovations, pharmaceutical advancements, and biotechnological developments. In the year 2023, the M&A space witnessed a remarkable 161% surge in deal values, primarily fuelled by Nirma's acquisition of a 75% stake in Glenmark Life Science for USD 689 million.[12] However, there was a decline in cross-border deals, with only one inbound deal – Gleneagles Development's acquisition of Ravindranath GE Medical Associates for USD 90 million. In the PE space, both values and volumes decreased from the previous quarter (Q2 of 2023). A noteworthy trend in health tech emerged with 12 deals recorded in the quarter. The standout deal involved significant investments from Temasek Holdings, and other investors, in Pharmeasy for value of USD 2 billion. This signals a strong demand for digital health solutions in India, indicating substantial investment interest in the health tech segment.[13] We note that this could be because of the potential for consolidation in the health sector, due to the fragmentation of the hospital provider base in India.

Key deals

1. **AMG Media Networks acquired majority stake in IANS**: AMG Media Networks Limited (AMNL), a wholly owned subsidiary of Adani Group, has acquired a 50.5% stake in news agency IANS India Private Limited.[14]
2. **Axis Bank - Citi Bank acquisition**: Axis Bank acquired Citibank's consumer banking business in India for USD 1.4 billion.[15]
3. **Temasek's investment in Manipal Hospitals**: Temasek, a Singapore-based investment company, invested USD 2 billion in Manipal Hospitals, a leading healthcare provider in India.[16]

4. **BPEA EQT and ChrysCapital's deal in HDFC Credila**: Baring Private Equity Asia (**BPEA**), EQT, and ChrysCapital invested USD 1.3 billion in HDFC Credila, a non-banking financial company that provides education loans in India.[17]
5. **ADIA and GIC's follow-on investment in Greenko Energy**: Abu Dhabi Investment Authority (**ADIA**) and GIC, a Singaporean sovereign wealth fund, invested USD 1.55 billion in Greenko Energy, a leading renewable energy company in India.[18]
6. **Carlyle's buyout of VLCC Wellness**: Carlyle, a global investment firm, acquired VLCC Wellness, a leading wellness and beauty services provider in India, for USD 1.1 billion.[19]

Foreign Direct Investment (FDI)

India is poised to claim the third spot in the global consumer market by 2027, with household spending projected to surpass USD 3 trillion *(read more here)* At the core of this economic engine is the country's vast middle class (i.e., income up to USD 36,000), estimated at ~USD 400 million *(read more here)* (in the year 2021) individuals, who serve as the primary drivers of consumption expenditure. The burgeoning middle class, coupled with rising disposable incomes, stands as the pivotal force propelling the upward trajectory of domestic consumption in India. The government's strategic emphasis on rural development and farmers *(read more here)* further taps into the growing market for diverse consumer goods, contributing to the expansion of India's economic landscape.

India's investment growth has also been bolstered by a suite of government initiatives *(read more here)*, encompassing the development of the financial system, enhancement of infrastructure, and relaxation of FDI norms. Under the current framework, most sectors are open for 100% FDI through the automatic route. Furthermore, India's FDI policy undergoes regular reviews, underscoring the nation's dedication to maintaining its status as an attractive and investor-friendly destination. This ongoing commitment ensures that the investment climate remains dynamic, adapting to the evolving needs of the global market.

Recent updates

1. As per the world investment report by United Nations Conference on Trade and Development (UNCTAD),[20] India received 8th highest FDI in the world in 2022.[21]

2. There were no major changes to India's FDI legislation, although there were minor amendments to the current laws and regulations governing FDI's in India such as introduction of a new standard operating procedure for processing FDI.[22]

3. Simplified processes such as single-window clearance and the goods & services tax implementation, have eased the bureaucratic burden on businesses and foreign investors in India, which enhanced the ease of doing business in India.

Notable FDI in India[23]

1. In July 2023, Walt Disney explored various strategies to help its Star India business grow and reduce expenses, which may involve a joint venture or sale.

2. In July 2023, Havas' Indian arm, a French advertising and public relations company, declared its acquisition of PivotRoots.

3. In June 2023, private equity investors, including Blackstone Inc., BPEA EQT, CVC Capital Partners, and General Atlantic Service Company, were competing to acquire Mumbai-based Indira IVF Hospital Pvt. Ltd.

4. In February 2023, Singapore Airlines purchased a 25.1% stake in the Air India group for USD 267 million.

5. In January 2023, the rural economy-focused technology startup VilCart secured USD 18 million in funding from Asia Impact SA, NABVENTURES Fund, and Texterity Pvt. Ltd. to expand its operations.

Corporate Governance

In 2023, investors in Indian start-ups made governance a top priority to avoid unwarranted situations.[24] The recent spate of layoffs at well-funded start-ups, such as Swiggy and ShareChat, coupled with the revelation of alleged financial improprieties at GoMechanic, BharatPe, Zilingo has prompted investors across the ecosystem to re-examine their approach on governance issues of portfolio companies.[25] Aggressive investors, wary of potential oversights during the frenzy of 2021, are now making governance a top priority along with the renewed focus on profits over growth.[26] Investors are establishing strict oversight mechanisms including regular mandatory reporting of financial disclosures, periodic internal control and audit testing to avoid unwarranted situations.

Byju's and Deloitte Resignation

Deloitte, the auditor of Byju's, tendered its resignation citing a "significant impact" on its ability to conduct the audit in accordance with necessary standards. The resignation underscored the absence of communication regarding the resolution of audit report modifications for the fiscal year 2021-22.

Adani Ports & SEZ and Deloitte Resignation

Adani Ports and SEZ disclosed Deloitte's resignation, its statutory auditor since 2017, which had been re-appointed in 2022. Deloitte raised concerns over specific transactions highlighted in the Hindenburg Research Report about the group. The resignation was compounded by Deloitte's limited audit remit concerning other listed group companies. The Adani Group firm, however, asserted that the board's audit committee found Deloitte's grounds for resigning to be "not convincing or sufficient".

Supreme Court Decision's Impact

A Supreme Court decision in May 2023 allowed the Serious Fraud Investigation Office to resume criminal proceedings against BSR & Associates LLP and Deloitte Haskins & Sells LLP, former auditors of IL&FS Financial Services. This decision has heightened auditors' caution, emphasizing the increased scrutiny and potential legal ramifications surrounding auditing practices.

The year 2023 witnessed the following key occurrences in change of auditors, which may be a first lead to issues brewing in a company:

These developments underscore the sensitive nature of auditing functions, where auditors navigate complex scenarios, raise pertinent concerns, and sometimes make the decision to resign due to perceived impediments to their ability to fulfil their responsibilities effectively. The landscape has been further influenced by legal decisions, reinforcing the need for auditors to exercise heightened diligence in fulfilling their roles.

Key changes in the legal landscape

1. **Dematerialization of shares**: To increase transparency and facilitate digital oversight on transactions of large private companies, the government has now mandated dematerialization (i.e., electronic form) of securities of private companies as well. Earlier, only public companies were required to maintain their securities in dematerialized form *(read more* ***here****)*.

2. **Amendment of money laundering laws**: The Ministry of Finance, by way of notification, has amended the Prevention of Money-laundering (Maintenance of Records) Rules, 2005 (PMLA). The key amendment has been made in Rule 9 of the PMLA, where for the purpose of determining the beneficial owner of a partnership firm, the threshold has been reduced to ownership of / entitlement to more than 10% (earlier it was 15%) of capital or profits of the partnership. Further, a person 'who exercises control through other means of the partnership has also been added to identify the beneficial owner. 'Control' has been defined

to include the right to control the management or policy decision *(read more **here**)*.

3. **Fast track mergers**: In a significant development concerning fast-track mergers, the process has been streamlined. Now, the timeframe for regional director to give approval to a fast-track merger has been specified, which was earlier not fixed, leading to delays. Other amendments included the introduction of deemed approval, wherein the failure of regulatory authorities to raise objections within specified time will result in automatic approval.

4. **Angel Tax**: In cases where an investor purchases shares of an unlisted company at a value higher than the fair value of such shares, the difference between the value paid and the fair value is taxable. Earlier, this was only applicable to Indian resident investors. However, the Finance Act, 2023 has extended the applicability of this to consideration received from non-residents for issue of shares. Currently 21 (twenty one) countries have been exempted from this, which includes Australia, Denmark, Finland, France, Germany, Japan, Sweden, United Kingdom and United States.[27]

5. **Enforceability of put option**: A put option in a transaction document grants the holder the right to sell a specified asset, such as shares or property, at a predetermined price within a defined timeframe. This contractual provision provides the holder with downside protection by allowing them to sell the asset regardless of its market value at the time of exercising the option. The enforceability of put option in agreements has been a contentious matter. Recently, the Bombay High Court in Percept Finserve Pvt. Ltd. v. Edelweiss Financial Services Ltd. held that a put option clause contained in a share purchase agreement is legally valid.

Looking ahead

The surge in both outbound and inbound investments ascertains a growing cross-border economic collaboration. Sustaining this momentum in 2024 requires that Indian authorities ensure the continuity of rules and regulations without any sudden changes, while the Indian judiciary must persist in safeguarding capital and intellectual property with utmost diligence.

For prospective investors, adopting a long-term perspective on the Indian opportunity is imperative. Allocating resources to individuals capable of comprehending the nation's diversity across various dimensions, such as, culture, religion, food, climatic conditions, education, geography, and more, is crucial. A recommendation for investors unfamiliar with India is to travel the country, experiencing firsthand the varied facets to gain a comprehensive understanding of the diverse opportunities India presents!

02

ARTIFICIAL INTELLIGENCE & DATA PROTECTION

The year of 2023 was characterized and defined by the introduction and growth of generative AI products, such as Google Bard and Chat GPT. These products work on large language models (**LLMs**) and are based on processing of substantial amount of data. Accordingly, though data was already important in various technologies being developed, LLMs made data the central theme for innovating the next generation of products. In this section, we highlight the key issues that emerged in the data and AI space in 2023 in India considering the global context. We touch upon India's stand on developing an AI specific regulation, the emerging issues of deepfakes and misuse of personality rights by using AI and technology, India's new data protection law and its position on cross-border movement of data.

India's view on AI specific regulatory regime

AI systems using LLM rely heavily on vast datasets to train and improve their performance.[28] With the rise of such systems, there is an increased risk of privacy violations, data breaches and unauthorized use of sensitive information.[29] To address such concerns, the European Union (**EU**) became the first jurisdiction to regulate AI with the enactment of the Artificial Intelligence Act.[30] On 09 December 2023, the EU entered into a provisional agreement to prohibit application of AI in instances which may have a potential adverse impact on the rights of its citizens. For instance, AI systems with the ability to manipulate human behaviour, to circumvent their free will or systems which can assign social scores to individuals based on social behaviours come under its purview.[31]

Currently, there is no specific regulatory regime on AI in India and the Indian government has clarified that India will not be considering enacting the same.[32] Although, the NITI Aayog, which is Indian Government's top strategy and policy think tank, published an approach document on the responsible use of AI, which outlines various systemic considerations including privacy and security concerns, and accountability of the decisions taken by such AI systems.[33]

Deception by deepfakes

In 2023, Indian policymakers faced multiple issues concerning use of AI leading to privacy infringements and unlawful use of personal data, particularly, in the form of a series of incidents involving deepfakes.[34] Deepfakes are commonly understood to mean any video recording, motion-picture film, sound recording, electronic image, or photograph, or any technological representation of speech which is deceptive in nature but appears to be authentic.[35] In India, while activities such as identity theft and cheating are generally governed under the Information Technology Act, 2000 (**IT Act**) and the Indian Penal Code, 1860, there is no specific law addressing deepfakes. The increased concerns on deepfakes prompted the Ministry of Information and Technology in India to issue an advisory to social media intermediaries to exercise necessary due diligence to identify misinformation and deepfakes.[36] Such intermediaries have been obligated to remove objectionable content from their platforms and on failing to do so, the intermediaries lose their protection under the safe harbour provision of the IT Act which provides them protection from liability for any third-party information, data or communication that is either made available or hosted by them.

In other jurisdictions such as the United States of America (**US**)[37], a specific legislation with respect to deepfakes has been in place since 2019 which defines deepfakes expansively and delineates the penalties in the form of both criminal or civil liabilities and private right to claim damages. Going ahead, India may also benefit from a directed legislative framework to protect against privacy and personal information infringements by deepfakes.

Reappearance of personality rights in context of AI

In 2022, the Delhi High Court recognized the personality right of a popular Indian actor and issued directions restraining the unauthorized use of his personality traits[38]. In India, personality rights are not expressly

recognized as a distinct category under intellectual property law. However, certain aspects of an individual's personality such as name, image and voice are protected through a combination of laws related to privacy, defamation, and the right to publicity.[39] In 2023, the conversation regarding misuse of personality rights resurfaced, only this time, with the use of AI. In a recent case before the Delhi High Court,[40] the personality rights of another Indian actor were protected when the court restrained the use of any technological tools such as AI to create content using a person's image, voice and personality. It can be noticed that even in the absence of a particular law on personality rights, Indian courts have been positively inclined towards protecting personal information and privacy rights of individuals.

Beginning of a new era of data protection laws in India

Speaking of privacy rights, individuals around the world have already started seeking legal measures against privacy breaches and improper use of personal data.[41] Amid such concerns, in 2018, the EU General Data Protection Regulation (**GDPR**) became one of the first legislations that regulated collection and movement of data. The GDPR ensures that all companies operating in the EU are required to maintain same levels of data protection irrespective of the place of incorporation of such entities.

In India, presently, the collection and use of personal data is governed under the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (**SPDI Rules**) notified under the IT Act. In the previous years, discussion on various shortcomings in the SPDI Rules to effectively regulate personal data gained considerable traction. Issues such as the definition of 'sensitive personal data' being too narrow and excluding several vital categories of personal data were identified.[42] In 2023, to address such concerns, India enacted the Digital Personal Data Protection Act, 2023 (**DPDA**). The DPDA has not come into effect till date, but upon being effective, it will replace the SPDI Rules to regulate the processing which includes collection, storage, transfer, sharing or use of digital personal data of an individual.

With the DPDA, India joins the league of jurisdictions having a strict stance on protection of personal data. However, the DPDA is not without its challenges, one of the most important being the extent of powers given to government bodies for processing of personal information if it is necessary for the performance of their functions. In this aspect, the DPDA stands in contrast with the GDPR which specifically prohibits public authorities from using 'legitimate interest' as a ground to process personal data in the performance of their task as a public authority. While the DPDA fortifies consent requirements and privacy rights of individuals, it still needs to be more detailed for actual implementation. Going into 2024, it is expected that the Indian government will publish rules under the DPDA which should provide a better understanding of working of the new data protection law in India.

Data Localisation vs. Data Free Flow

Data localization and free flow of data are two contrasting approaches for movement of data. Data localization refers to the practice of storing and processing data within the borders of a specific country, rather than allowing it to flow freely across international borders.[43] This concept has gained prominence due to the increasing digitization of information and concerns about national security and sovereignty. On the other hand, some international organizations such as the World Economic Forum subscribe to the view that free flow of data across borders may be essential to enable innovation and establish global trade.[44] Certain countries such as Japan have encouraged free flow of data under a global cooperative regime of 'Data Free Flow with Trust'.[45] EU also provides for an enabling provision allowing transfer of data to countries that ensure adequate level of data protection.

India's approach under the DPDA is inclined towards free flow of data across jurisdictions which maintain a higher degree of protection than that imposed in India.[46] The DPDA does not require companies operating in India to mandatorily store the relevant data within the country. In fact, the DPDA allows data to flow freely across jurisdictions unless prohibited by a statutory authority. For instance, the RBI prohibits payment system providers operating in India to transfer any data related to payment systems outside India.[47] Additionally, the Indian government has been given the power to restrict the transfer of data to identified territories outside India.

Roadmap ahead

Globally, the EU is leading the way in regulating AI and data protection with comprehensive legislations on both subject matters. The US stands at the far end of the spectrum in terms of specifically regulating AI and data. India has taken a similar course of action as the EU in regulating data but does not intend to regulate AI as a whole. It is unlikely that a dedicated legislation to regulate all applications of AI will be introduced in India. It appears that specific instances of AI application will be regulated by sector specific laws. It is possible that the Digital India Act,[48] the enactment of which is under consideration to govern new age technologies, will lay out the general principles which can be considered by sectoral regulators before introducing relevant regulations.

03

GREEN INVESTMENTS: THE 2023 INDIA STORY

GREEN INVESTMENTS: THE 2023 INDIA STORY 03

The year 2023 started with an outburst of green initiatives by the Indian government with the allocation of INR 3,500 billion (~USD 4.2 million) for investment towards energy transition and net zero objectives. In this section, we discuss the sectors that attracted investor interest in the ESG space in India and focus on the issues of greenwashing and reporting challenges faced by stakeholders. We also discuss, in brief, the developments with respect to credit rating entities, supply chain models and the establishment of carbon market in India.

Renewable energy and clean technology take the centre stage

In 2023, the most attractive sectors for green investments in India were renewable energy and clean technology. In January, India successfully issued its first sovereign green bond amounting to INR 80 billion (~USD 1 billion) for financing of public sector projects aimed at reducing the carbon emissions intensity and supporting renewable energy. In the private sector, start-ups in the clean technology space witnessed promising interest from venture capital investors despite the reported decline in venture funding in tech start-ups in 2023.[49] This can be attributed to India's raised commitments towards sustainability and achieving reduction of 33-35% in emissions intensity by 2030.[50] Resultantly, there is an increased demand for investments to meet such commitments.

In this sector, green hydrogen received considerable attention with the Indian Government deploying INR 197 billion (~USD 2.3 billion) on green hydrogen projects to facilitate transition from fossil fuels to clean energy. Many global financial institutions like the World Bank[51] and European Investment Bank[52], and institutional investors including Peak XV Partners (formerly known as Sequoia India)[53], Gruhas and Rainmatter Climate[54] have also invested towards production and use of green hydrogen. Electric mobility was another preferred sector for private equity investments both from domestic and foreign investors.[55] The sector has benefitted from government schemes such as exemption from customs duty on import of goods and machinery for manufacture of batteries used in electric vehicles up to 31 March 2024.[56] The Indian Government has also pushed towards achieving electric mobility by allocating USD 7 billion towards deployment of electric vehicles in India. In light of the favourable schemes and India's commitment towards electric mobility, large domestic corporations[57] as well as global giants like Foxconn[58] are already looking at investing in the Indian electric mobility market.

Greenwashing

Greenwashing continues to be a challenge for investors and regulators across jurisdictions. In 2023, there was a 70% increase in the greenwashing incidents globally.[59] India also witnessed a series of greenwashing incidents, some involving, as reported in the Economic Times, against large conglomerates like the Adani Group which were allegedly found to be contributing finance towards fossil fuels despite making carbon neutral commitments.[60] In a report by the Advertising Standards Council of India (**ASCI**), it was found that 79% of the environment related claims made by advertisements are exaggerating or misleading.[61] To increase transparency and accountability, ASCI proposed draft guidelines which include suggestions for a high level of substantiation for products marketing themselves as 'ecofriendly' or 'sustainable'.[62]

In April 2023, the Reserve Bank of India (**RBI**) also came up with a framework to address greenwashing concerns in deposits issued by regulated entities.[63] Within the framework, the RBI identifies greenwashing as the practice of marketing products as 'green' when they fail to meet the necessary requirements. One of the primary identifiers to qualify a product or service as 'green' is to determine the use of the finance proceeds i.e. determining the use of the finance to ensure that the funds are used for an activity that is categorized as 'green'. The use of proceeds test is consistently being recommended by global organizations and has been previously adopted in the Indian regulatory framework to mitigate the risk of misuse of funds.[64]

The next big steps for India in curbing greenwashing may be using artificial intelligence (**AI**) and technology to enable a robust system of verifiable and accurate data. AI and data analytics are already being used to assess real time performance of green projects in other parts of the world.[65]

Enhanced reporting obligations

On 12 July 2023, the Indian securities market regulator, Securities and Exchange Board of India (**SEBI**) introduced the 'BRSR Core' which seems to be an enhanced version of the existing reporting obligations under the Business Responsibility and Sustainability Report (**BRSR**). The BRSR Core outlines 9 key performance indicators which include water, energy and greenhouse footprint, embracing circularity, enhancing employee wellbeing and safety, and enabling gender diversity and inclusive development. Certain new indicators such as openness of business and gross wages paid to women are also included in the BRSR Core. Under the framework, the top 1000 listed entities are required to make disclosures of specified data points with respect to the key performance indicators, in their annual reports.

Amid global concerns on greenwashing and to bring credibility into the disclosures, SEBI has also required that the companies must obtain 'reasonable assurance' from an independent third party for the disclosures under the BRSR Core. This requirement is a higher threshold than other global regulators which only require 'limited assurance' which can be less costly and may better correspond to the current technical ability for assurance providers to undertake such assessment.[66]

With the increase in regulatory oversight, businesses will need to establish internal policies for collection and efficient reporting of information. One of the solutions to ensure accuracy and maintain standards is integrating technology enabled platforms into ESG reporting. In 2023, using technology to solve reporting issues has created investment opportunities for start-ups providing sustainability management software services to organizations for managing and reporting their ESG performance.[67] Going into 2024, we expect this trend to continue in India in line with the approach taken by companies across Europe and North America who are turning to AI and technology to simplify their reporting obligations.[68]

Supply chains at the frontier

A supply chain is the entire process which a product or service undertakes from its inception to the end user which includes the supply of raw materials, manufacturing and distribution. Globally, businesses are recognizing the importance of a sustainable end-to-end supply chain on parameters such as employee wellbeing and carbon emissions.[69]

India has also recognized the need for transformations in the supply chain and its impact on the overall ESG assessment of a company. SEBI through the BRSR Core has mandated disclosures for value chain, which encompasses the top upstream and downstream partners of the company, comprising of 75% sales or purchases by value. Indian start-ups have tapped this opportunity and have garnered investments for innovations in supply chains. For instance, Minfiti, a supply-chain financing platform aimed at digitizing the supply chain of corporations attracted investments worth USD 110 million in 2023.[70] Indian start-ups aimed at reducing carbon footprints in supply chains have also attracted funds from institutional investors like Omnivore.[71]

Regulatory framework for ESG Credit Rating Providers

The rising ESG landscape has led to the emergence of various service-related offerings, particularly the services provided by ESG rating providers which seek to objectively assess a company's performance on ESG metrics. The ESG assessments provided by such third-party agencies assume significance as they influence investor interests and opportunities. A recent study by Kroll surveyed over 13000 listed companies worldwide and observed that companies with higher ESG ratings generally experience better investment returns than companies with lower ratings.[72] In 2022, stakeholders raised concerns around the role and credibility of entities providing ESG ratings to companies. Issues such as lack of a common understanding of what constitutes ESG rating and use of different methodologies leading to varying results were identified.[73]

In 2023, India took steps to address such concerns in the securities market by bringing ESG rating providers (**ERPs**) within the ambit of the Securities and Exchange Board of India (Credit Rating Agencies) Regulations, 1999. It defines ESG ratings as products that are marketed as opinions about an entity regarding its ESG profile or exposure to ESG risk that are issued using a defined ranking system. On 12 July, SEBI issued a master circular requiring ERPs to obtain prior registration with SEBI. To ensure greater transparency, ERPs are required to provide ESG rating to companies on a scale of 0 (minimum) to 100 (maximum) and provide a detailed rational for the rating. As the demand for ESG related information is increasing, it is expected that the demand and use of ESG data related services and ERPs into business investment decisions will also increase. In view of this, the safeguards put forward by SEBI will prove to be consequential in ensuring investor protection.

Setting up the carbon market

The importance of international carbon markets to mitigate greenhouse gas emissions has already been realized by the international community under the Paris Agreement. India has also accepted the need for carbon markets but instead of participating in the international markets, it seeks to establish its own domestic carbon trading mechanism. To that effect, India introduced the Energy Conservation Amendment Act, 2022 (**Energy Conservation Act**) enabling the creation of a domestic carbon trading market. Under the aegis of the Energy Conservation Act, India launched its carbon credit trading scheme (**CCTS**) on 28 June 2023. The CCTS provides for a compliance mechanism under which industries in certain identified sectors will be required to maintain prescribed emissions targets and upon failing to do so, they can purchase credits to offset their increased emissions. The sectors have not been notified yet, but it is expected that fossil fuel intensive industries, iron, steel and cement may come under its purview.

However, achieving reduction in carbon emissions in such sectors can be challenging. These sectors are also hit by the European Union's Carbon Border Adjustment Mechanism (**CBAM**) which contemplates levy of higher import taxes on products whose production is carbon intensive. India is considering allowing overseas trading of carbon credits to facilitate such sectors in maintaining their emissions rates.[74] For instance, a framework for export of carbon credits to Japan is under deliberation.[75] Going forward in 2024, it is likely that India will collaborate with more countries for overseas trading of carbon credits.

India' s way forward

Globally, there is an increased awareness on the impact of human actions on the planet. Businesses and investors across sectors have been considering non-financial factors in their investment and business actions. Regulators around the world have also become increasingly stringent on regulating corporate behaviour and fixing accountability. Green finance investments in India have seen a significant increase in the previous two financial years, both from domestic and foreign investors.[76] However, in terms of contribution from the private sector, India still needs more participation to bridge the gap between the existing and required green finance. The conversation around 'blended finance' i.e. using concessional funding from public institutions and philanthropic sources to mobilize private commercial capital has already started in India.[77] To gather concessional funding, India needs to develop a predictable and transparent investment climate. The G20 Sustainable Finance Report emphasizes on combining public and private enterprises and improving the data and reporting infrastructure.[78] In 2024, we expect that the discussion on green investments in India will be inclined towards blended finance for shaping India's green economy.

04

DIVERSITY, EQUITY, AND INCLUSION

Diversity, Equity, and Inclusion 04

India is presently the fifth-largest economy in the world and is predicted to become the third largest economy in 2027 (Financial Year 2028 for India). The growth of the Indian economy is attributable to various factors such as untapped markets, geo-political situation and favorable policies and initiatives of the Indian Government. However, it is India's young and aspirational population, which makes 'human resources' an integral building block of India's economic growth. With the increasing importance of human resources, we see the emergence of new types of employment and the relationship between employers and employees (permanent and temporary). Another important aspect that fuels growth for businesses and the economy is 'sustainability'. In this section, we look at the intersection of sustainability and human resources through the lens of DEI - diversity, equity, and inclusion, and India's efforts towards promoting and achieving DEI goals and the impact of technology in achieving DEI. We have also covered some legal and practical issues faced by employees and employers while implementing DEI at their workplaces.

What is 'Sustainability'?

Sustainability reflects how an organization manages its environmental, social and governance (**ESG**) impact to create long-term value for its stakeholders, i.e., customers, investors, regulators, suppliers, etc. According to PWC's Global Investor Survey 2023, sustainability considerations in strategic decision-making and risk management by a company has emerged as an important investment decision-making factor. Investors are also keen to understand a company's sustainability plans vis-à-vis their business model, and the capital allocation to achieve these goals. Evidently, sustainability has transformed from a mere ESG compliance exercise to a strategic priority for businesses.

What does 'S' in ESG stand for?

The 'S' in ESG stands for 'social aspects', which includes how a company treats and manages social factors, i.e., people within and outside the organization. The fundamental social metrics include DEI, employee benefits, labour policies, etc.

Introduction to DEI

Simply put, DEI refers to the core value of an organization to include and fairly treat individuals from all walks of life, including people of different genders, races, ethnicities, religions, ages, physical abilities, and sexual orientations. Companies around the globe have been progressively implementing DEI strategies within their organization, pursuant to various factors such as: (a) global activism movements and campaigns for gender equality, racial justice, LGBTQIA+ rights; (b) stakeholder expectation; (c) investor focus on ESG metrics; (d) competitive advantage; etc. Data has shown a correlative relationship between business performance and diversity, which can be attributed to greater access to talent and increased employee engagement.

While the estimate for closing the global gender gap prior to the Covid-19 pandemic was 99.5 years, the World Economic Forum's Global Gender Gap report 2023 estimates it will take a whopping 131 years to achieve full gender parity at the current pace.[1] On the other hand, it is challenging to systematically estimate global gaps for LGBTQIA+ and disability inclusion with the limited data available.

What DEI looks like in India?

According to the World Economic Forum's Future of Jobs 2023 report, approximately 61% of the surveyed organizations in India expect the global trend of application of ESG standards to transform business and employment. Also, with respect to business practices, 28% organizations opted for more DEI programs and policies, and 24% organizations sided with offering more remote and hybrid work opportunities within countries.[79]

According to EY's Humans at the Centre of Sustainability Transformation 2023 report, Business Responsibility and Sustainability Reporting (**BRSR**) in India by 1,040 listed companies evidence the strategic focus on DEI, robust training initiatives, and comprehensive employee support programs.[80] Yet, the data on gender diversity and inclusion of differently abled is grim.[81] Women only constitute 23% of the permanent employees, with highest gender diversity in the IT and consumer services sectors at 34% each. India has been ranked 127th of 146 countries on the World Economic Forum's Global Gender Gap Index (**WEF Index**) in 2023[82]. The WEF Index gives such a dismal ranking mainly due to the significant gap in economic participation and opportunity for women and decline in the share of women in senior positions and technical roles.

DEI efforts in India by Indian companies

Companies in India have been proactively implementing inclusive benefits for employees to attract and retain a diverse workforce. These benefits beyond the tried-and-traditional include pet adoption leave, menstrual leave, medical assistance directed towards mental health, fertility / adoption assistance, assistance in setting up remote offices, etc. Companies have started including programmes for their employees who require focused benefits. For instance, Accenture introduced medical benefits covering gender reassignment surgery for LGBTQIA+ employees and their partners; Procter & Gamble (*P&G*) introduced a programme for early preventive care and treatment for employees' children who have specific disabilities or special needs.[83]

Indian companies are also increasingly focussing on creating employment opportunities and actively promoting inclusivity for LGBTQIA+. With a focus on attracting and hiring more transgender individuals, companies are conducting targeted recruitment drives, implementing gender-neutral policies and providing gender-neutral facilities such as accessibility of washrooms to all employees regardless of their gender identity and ensuring non-disclosure of gender identity under application forms and other onboarding documents.[84]

Tata Steel launched its initiative aiming at transforming its workforce with 25% diverse employees by 2025, covering a wide variety of diversity dimensions including gender, LGBTQIA+, disability, caste, much before 2023. In 2022, Tata Steel launched LGBTQIA+ focused recruitment model called 'Queerious', and aimed to hire more through this model in the year 2023.[85] Axis Bank has set a goal of having 30% women in its workforce by 2027.[86] To further its DEI initiatives, the bank has put in place an inclusive hiring policy, imbibed inclusivity training in its induction programs, introduced policies and programmes to ensure gender inclusivity, as well as ensured accessibility for differently abled person in its infrastructure.[87]

Regulatory efforts promoting DEI in India

Not only the Indian private sector is setting trends in DEI-focused hiring and practices, but the government is also introducing measures focused on gender diversity and welfare of differently abled persons. The Tamil Nadu government, for instance, entered into a memorandum of understanding with the fast-moving consumer goods company Godrej Consumer Products Ltd., under which Godrej will hire 50% women and 5% LGBTQIA+ individuals and differently abled persons in its newly set up manufacturing unit in Tamil Nadu. The Tamil Nadu government also notified the Transgender Persons (Protection of Rights) Rules, 2022 for furthering the welfare and protection of rights of transgender persons.

The central government picked up the DEI baton and amended the Rights of Persons with Disabilities Rules 2017, to incorporate the standard for public buildings as specified in the Harmonised Guidelines and Standards for Universal Accessibility in India, 2021, in the existing rules of accessibility, wherein every establishment is required to comply with certain standards relating to physical environment, transport and communication technology.

Next in line, the Haryana government revised conditions for women to work at night under the Punjab Shop and Commercial Establishments Act, 1958. It imposed conditions for the employer to ensure the safety of such women employees. For instance, detailed conditions relating to security of female employees have been extended for night shifts from 8 PM to 6 AM.

Speaking of women safety, the government and the courts in India have been emphasising on the implementation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (**POSH**

Act), the legislation aimed at protecting women at the workplace. On 12 May 2023, the Supreme Court issued directions for better enforcement of POSH Act in the case of *Aureliano Fernandes v. State of Goa and Others*. The Supreme Court expressed concern on the serious lapses in the enforcement of the POSH Act, where various establishments have still not constituted the internal committee (**IC**) as required under the POSH Act, and if constituted, many a time the unprepared IC conducts an ill-considered inquiry. The Supreme Court issued directions such as taking immediate and effective steps by management / employers to orient the IC on their duties and the manner of conducting an inquiry; educating women employees about the provisions of the POSH Act.

Technology advances the DEI movement

Remote work has now become mainstream and integral to the manner in which many organizations operate globally. To a large extent, this can be credited to technology –better internet connectivity, the advent of powerful digital tools that enable collaboration, cloud computing, and a shift in workplace culture.

In the 1990's Hollywood hit 'Jerry Maguire', we see Rod Tidwell tell his agent "*Show me the money*". It appears that this is no longer the sole mantra for all to get employed. According to Randstad Employer Brand Research report 2023, 'work-life balance' ranks second in the top priorities for employees globally, and has emerged as the top priority for employees in India, at par with the monetary benefits of the job. Buffer's 2023 State of Remote Work report[88] states that 91% of the respondents preferred remote work. In the Randstad Employer Brand Research report, work-life balance has been identified as the main reason for employees leaving their current jobs and looking for employers offering better non-monetary benefits. Remote-work or hybrid-work models are likely to promote DEI by allowing access to employment for persons with disabilities, women who are involved in the role of a caregiver, persons situated in tier-II or tier-III cities, or even urban areas, with lower employment opportunities.

However, employers have been facing certain challenges, especially in the IT and ITeS establishments in India. Owing to concerns over security of the information and data shared by the clients, and potential moonlighting by the employees, the IT companies in India have been attempting to impose the work-from-office model.[89]

Big shift towards gig hiring

Technology has also fuelled the growth of the gig economy, and increased opportunities for gig workers. In the 2023 report of the World Bank Group on 'Working Without Borders: The Promise and Peril of Online Gig Work', it is estimated that the number of global online gig workers ranges from 154 million to 435 million, and the 'gig economy' accounts for up to 12% of the global labour market. Companies in India have showcased an upward trend in hiring of gig-workers rather than full-time employees. This increase has been dramatic in several industries, including manufacturing, FMCG, professional services, healthcare.[90] This can be attributed to the various advantages that gig hiring provides to the employers, such as low costs, as employers are not required to provide social security benefits to gig workers, and ease of termination of services.

The gig economy is not only creating job opportunities, but also promoting diversity and inclusivity. The virtual and often temporary nature of gig work benefits groups such as women, youth, and differently abled people. It is supporting inclusion of such people who face mobility constraints in the offline labour market.

India has recognised the rapid growth of the gig economy as well as the challenges that may be faced by the gig-workers and the employers. The central government had introduced the Code on Social Security, 2020, which recognised gig-workers and platform-workers and allowed social security benefits such as putting in place social security schemes relating to life and disability cover, accident insurance, health and maternity benefits, old age protection, etc., and mandatory contribution by the employer to the social security fund for gig-workers. The Code on Social Security, 2020, however, has not been notified yet. Apart from the issues faced by the gig-workers for recognition and adequate social protection, the gig-economy also poses challenges for the employers, such as ambiguity in treatment of gig-workers and potential increase in labour costs, which in turn may adversely affect the prospects of the concerned business *(read more **here**)*.

On 12 September 2023, the Rajasthan state government introduced a legislation aimed at the recognition and protection of gig-workers, called the Rajasthan Platform-Based Gig Workers (Registration and Welfare) Act, 2023. The legislation covers provisions in relation to registration of all gig workers, aggregators and primary employers; contributions to the social security fund for the workers; provision of social security benefits to workers such as accident and health insurance, maternity benefits, gratuity, pension, EPF, ESIC; grievance redressal mechanism for the workers, and heavy penalties for aggregators and employers for non-compliance. The Rajasthan Government has also promised an allocation of INR 2 billion (~USD 24 million) to the Gig Workers Security & Welfare Fund.

Moonlighting concerns of employers

While on one hand, remote or online nature of jobs facilitate 'gig-work' and enable temporary workers to undertake multiple jobs at the same time, the remote nature of jobs poses concerns for employers in case of full-time or permanent employees. Employers are facing the issue of 'moonlighting' by employees working remotely. Moonlighting may also be referred to as 'dual employment', which is the practice of engaging in a second employment alongside the primary employment. IT companies have frowned upon such practice, leading to mass termination of employees, for instance, Wipro had fired over 300 employees for working for companies in the same niche, while being employed with Wipro.[91]

The Indian law does not define or explain moonlighting or dual employment. However, a few legislations do regulate this to a certain extent. The Factories Act, 1948, and certain state shops and establishments legislations (such as those applicable to Haryana and Delhi) impose restrictions on working hours in the context of dual employment. The Factories Act, 1948, restricts an employer from requiring or allowing a worker to work in the factory on any day on which they have already been working in another factory. The state shops and establishments legislations as mentioned above provide that an employer may not engage an employee to work beyond the prescribed working hour limits across their employment with different establishments.[92] In India, the position is that dual employment is permitted, if such dual employment is contractually permitted, or is being undertaken with the prior consent of the employer.[93]

Moonlighting raises serious concerns for employers by exposing them to business risks such as a conflict of interest, breach of confidentiality or proprietary information, competition, solicitation of co-employees or vendors, compromise of intellectual properties, as well as attrition. On these concerns, the regulators and courts in India have taken a pro-employer stance to some extent by recognising reasonable non-compete restrictions during the employment period, and contractual protection of confidentiality of information and intellectual property of an employer.[94]

However, to prevent moonlighting, companies may specifically prohibit the practice of dual employment in the employment contracts. Companies may draft the exclusivity clauses in the employment agreements in a manner where it expressly prohibits the employee from engaging in any employment / consultancy / advisory arrangement with any other company, irrespective of the working hours. It should further state that the breach of the exclusivity provision would amount to misconduct, and the employer would have the right to take appropriate action against such an employee.

DEI: Legal Landscape

While companies and governments are taking the efforts to promote and bolster DEI in the country to benefit both employees and employers, presently statistics on DEI implementation in India is at a nascent stage.

Anti-discrimination and inclusivity in employment lies at the very heart of the Indian constitution. Article 15 of the Constitution of India prohibits unfair treatment and discrimination of any person of the grounds of their religion, race, sex, caste, place of birth or any of them. Article 16 extends equality of opportunity and prevents discrimination in any public employment or office. There are several legislations in India which have been enacted keeping in mind the global momentum in the DEI movement. These laws include: (a) the Transgender Persons (Protection of Rights) Act, 2019 which prohibits discrimination against transgender persons in employment, and require all establishments put in place an equal opportunity policy for transgender individuals; (b) Rights of Persons with Disabilities Act, 2016 requires all establishments to have an equal opportunity policy

in place and also employers should provide reasonable accommodation to employees with disabilities, if possible; (c) Code on Wages, 2019 (yet to come into force) prescribes equal remuneration for same work for all employees irrespective of their 'gender'; (d) Employees' State Insurance Act,1948 prohibits employers from terminating or impose disciplinary actions on employees receiving sickness, maternity, or disablement benefits under the Employees' State Insurance Act,1948.

There are specific legislations for the protection of the rights of women, and their safety, such as: (a) POSH Act for preventing sexual harassment against women at workplace; (b) Equal Remuneration Act, 1976, providing equality in remuneration, recruitment, promotions, training; (c) Maternity Benefit Act, 1961, extending maternity benefits and facilities to women; and (d) various state legislations enacted for the protection of women during night-shifts.

While companies and the government authorities are taking active efforts to promote DEI, there are still workplace laws that are women centric. For instance, the POSH Act is applicable to all organizations. As mentioned previously, there is particular focus on the proper implementation of the POSH Act, with the Supreme Court issuing directions in this regard. The POSH Act, however, excludes other genders from the sexual harassment at workplace. Unfortunately, not much attention is being paid by the legislators for extending such protection to the LGBTQIA+ individuals. In November 2023, in the case of *Binu Tamta and Anr. V. High Court of Delhi*[95], the Supreme Court declined the plea to include LGBTQIA+ persons within the ambit of 'aggrieved woman' under the Gender Sensitization and Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition, and Redressal) Regulations, 2013, formulated under the POSH Act. The Supreme Court declined the gender neutralization of the law, by stating that the POSH Act is intended to protect 'women' from sexual harassment at workplace, and such inclusion will dilute the purpose of the law.

Similarly, while companies are adopting more gender neutral and inclusive policies for maternity benefit, the Maternity Benefit Act, 1961 still excludes trans-men that may be giving birth.

Road ahead for DEI

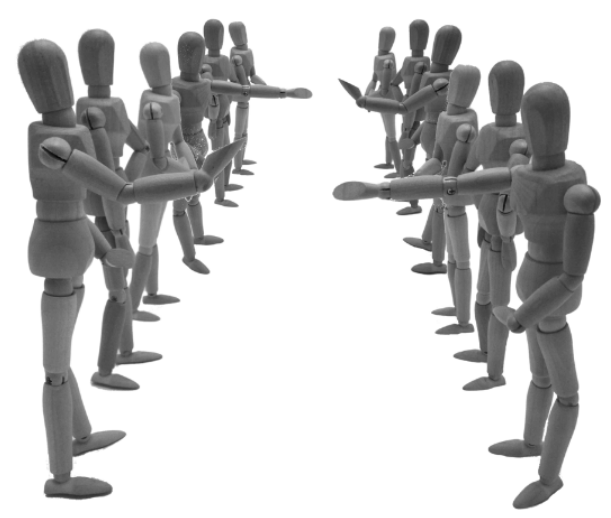
Globally, businesses have recognized the importance of sustainability, especially on the parameter of diversity and inclusion in employment. The extensive efforts by Indian companies in furthering the DEI movement is noteworthy. Promoting DEI is not merely a compliance exercise, but it is strategically advantageous to the organizations by allowing them access to larger and diverse talent pools. The year 2024 may witness more companies formulating their recruitment strategy around DEI.

DEI remains a work in progress and does not come without its challenges. Companies are faced with legal issues of compliances and uncertainty in extending statutory benefits for such employees, practical issues of lack of proactive policies and catering to diverse needs of diverse individuals, and business risks such as moonlighting, confidentiality breach, etc. As of today, the legal landscape around DEI is focused on large and mid-sized companies. While it may be relatively easier for large and mid-sized companies to implement DEI initiatives, small companies are still focused on growth and profit-making, rather than DEI. For instance, the mass lays-offs in India amid the funding winter has focused on expenses / costs, rather than considerations around DEI. According to reports, the lay-offs disproportionately impact women, and 46% of the people laid-off were women.[96] However, data suggests that startups in India have the potential to create 2 million new jobs for women by 2030.[97] Smaller companies and start-ups can capitalize on the benefits of including DEI in its corporate strategy and gaining competitive advantage, by implementing practical measures such as reforming recruitment strategies, setting DEI targets, increasing safety at workplace and providing equal opportunity for all.

While the labour markets are going through a volatile period especially in the start-up space,[98] it is recommended that long term view is taken to build sustainability in the workplace especially with respect to human resources, as AI and technology will only supplement the performance of human resources and not make redundant human interventions in the near future. Further, sustainable practices will ensure that companies are able to capitalize on new opportunities and scale up businesses which will benefit the interest of all stakeholders.

05

COMMERCIAL DISPUTES



The preceding year witnessed a transformative shift in the legal landscape both in terms of the substantial and the procedural aspects of commercial dispute resolution. The Indian judiciary has adopted a proactive stance and has been striving to resolve areas of legal ambiguity where the legislature has either been silent or has failed to clarify the uncertainties linked to a statutory provision.

The long-standing conundrum of arbitration clauses in unstamped agreements

On 13 December 2023, the Supreme Court of India (**Supreme Court**), in a landmark seven-judge bench decision titled *In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act, 1996, and the Indian Stamp Act, 1899 (**In Re: The Interplay**),* resolved a longstanding legal debate. This judgment addressed the enforceability of arbitration clauses in agreements that are inadequately stamped /unstamped.

The Court ruled that while arbitration clauses in agreements lacking proper stamping are enforceable, they are inadmissible in evidence until the deficiency in stamping is corrected, as per the Indian Stamp Act, 1899. Importantly, the Court clarified that issues related to stamping do not fall under the purview of the courts at a pre-referral stage. Instead, the referral court's role is confined to examining the existence of the arbitration agreement. Objections concerning the stamping of the agreement are to be decided by the arbitral tribunal, establishing a clear division of jurisdiction between judicial and arbitral tribunals in such cases.

The triumph of 'group of companies' doctrine

The group of companies doctrine has been a subject of debate in India. This doctrine was first acknowledged by the Supreme Court in the case of *Chloro Controls (India) Pvt. Ltd. v. Severn Trent Water Purification Inc & Ors.* Subsequently, Indian courts have relied upon the said doctrine to compel non-signatory group companies, especially parent companies, to participate in arbitrations and fulfill arbitral awards, despite having abstained from signing the underlying arbitration agreement.

In 2022, the Supreme Court issued two notable judgments with diverging views on the doctrine. The first, in *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd. & Anr.* (**ONGC Decision**), saw the Court uphold the doctrine's relevance in Indian law and set aside an arbitral award for not considering the doctrine's applicability. However, in *Cox & Kings Ltd. v. SAP India Pvt. Ltd. & Anr.*, the Court scrutinized the doctrine, doubting its validity in light of well-settled principles such as party autonomy and distinct corporate personality. These conflicting stands led to the referral of the doctrine's foundational aspects, scope, and application to a larger constitutional bench of the Supreme Court.

The constitutional bench of the Supreme Court in its judgment in December 2023, has resolved these ambiguities, stipulating that factors outlined in the ONGC Decision should be collectively considered when applying the doctrine. The key factors include the mutual intent of the parties, the relationship of the non-signatory with a signatory party, the commonality of the subject matter, the composite nature of the transactions, and the contract's performance.

The Supreme Court emphasized the need for a fact-specific approach, acknowledging the intricacies of modern commercial transactions. Furthermore, the Supreme Court affirmed the retention of the group of companies doctrine in Indian arbitration jurisprudence, recognizing its importance in discerning parties' intentions in complex transactions involving multiple entities and agreements. Additionally, it ruled that at the referral stage, courts should allow arbitral tribunals to determine whether non-signatories are bound by the arbitration agreement, thereby maintaining the balance between judicial intervention and autonomy of arbitral tribunals.

Unilateral appointment of arbitrators – Calcutta High Court's deviation

Under the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) the Seventh Schedule specifies relationships that may compromise an arbitrator's eligibility due to potential conflict of interest. Previously, any such relationship would render the arbitrator or their nomination ineligible, based on the legislative rationale that certain relationships could unfairly advantage one party over another, contradicting principles of arbitrator independence.

The Delhi High Court, in *Taleda Square Pvt. Ltd. v. Rail Land Development Authority*, emphasized the crucial role of an arbitral tribunal's independence and impartiality in upholding the integrity of arbitral proceedings. The Court ruled that parties should not be forced to choose their nominee arbitrators from a list maintained by the opposing party. This was further reinforced in *Margo Networks Pvt. Ltd. & Anr. v. Railtel Corporation of India Ltd.,* where the Delhi High Court deemed it impermissible for one party to have the right to appoint a majority of the arbitrators.

However, in *Mcleod Russel India Ltd. v. Aditya Birla Finance Ltd. & Ors.,* (**Mcleod decision**) the Calcutta High Court diverged from this trend. It ruled that unilateral arbitrator appointments are not inherently invalid if the parties have consented in writing and participated in the proceedings despite knowing about the unilateral appointment *(read our article **here**).*

Subsequently, in the case of *J.S.R. Constructions v. National Highway Authority of India and Anr.,* the Delhi High Court ruled that a party is not permitted to unilaterally appoint the presiding arbitrator when the nominee arbitrators fail to agree on a candidate. The Court found that the practice of allowing the Director General of one of the parties to appoint the presiding arbitrator in such circumstances to be bad in law. The judgment emphasized that individuals who are themselves ineligible to be arbitrators should not participate in the appointment process. This procedure was criticized for lacking a balanced approach, inherently skewing the formation of the arbitral tribunal in favor of one party.

Currently, the McLeod decision stands out as a departure from the settled position of law with regards to unilateral appointment of arbitrators. Subsequent High Court rulings have generally aligned with the law laid down on unilateral appointments and suggesting that the McLeod decision may remain an exception in this legal area.

Extension of mandate of an arbitral tribunal - divergent views of High Courts

The interpretation of Section 29A(4) of the Arbitration Act concerning whether courts can extend the mandate of an arbitral tribunal after its termination, has resulted in varied opinions from different High Courts, creating a legal quandary.

The Arbitration Act provides for a 12-month deadline for domestic arbitral proceedings from the completion of pleadings. This period can be extended by mutual consent for an additional six months. Section 29A(4) allows for the court to extend this 18-month period, either before or after its expiry, but does not specify the landmark for seeking such an extension.

The Calcutta High Court in *Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Ltd.*, and the Patna High Court in *South Bihar Power Distribution Company Ltd. v. Bhagalpur Electricity Distribution Company Pvt. Ltd.*, have interpreted this to mean that extension applications must be filed before the tribunal's mandate expires. On the other hand, the Delhi High Court in *ATC Telecom Infrastructure Pvt. Ltd. v. Bharat Sanchar Nigam Ltd.,* ruled that barring applications post-expiration defeats the Arbitration Act's purpose, advocating for flexibility.

The Bombay High Court, in the case of *Nikhil H. Malkan & Ors. v. Standard Chartered Investment and Loans (India) Bank*, aligned with Delhi High Court's view, differing from the Calcutta and Patna High Court's view. This inconsistency among High Courts on the legal interpretation necessitates a clarifying intervention from the Supreme Court.

Uncertainty on interim reliefs when arbitration initiated under MSME Act

Section 18 of the Micro Small and Medium Enterprises Development Act, 2006 (**MSME Act**) provides that whenever any amount due to a micro or small enterprise is in dispute, reference for adjudication of such dispute may be made to the Micro and Small Enterprises Facilitation Council (**Council**). The Council shall conduct conciliation of such disputes. Where the conciliation does not lead to any settlement, the Council itself shall either conduct arbitration proceedings in relation to the dispute or refer the dispute to any institution providing alternate dispute resolution services. The Arbitration Act shall apply to such proceedings. However, in case of inconsistency between the two Acts, the Supreme Court in 2022 in *Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods (P) Ltd.* held that given MSME Act is a special legislation, it shall have an overriding effect on the application of the Arbitration Act.

The issue of seeking interim reliefs before, during and after the arbitration proceedings before the Council presents a legal quandary, especially since the MSME Act lacks explicit provisions for such a remedy. This gap in the legislation leaves parties without a clear course of action under the MSME Act. In 2022, the Madhya Pradesh High Court in *M/s Ujas Associates v. M/s KJS Cement (India) Ltd*. ruled that interim reliefs under the Arbitration Act are only accessible after the conclusion of conciliation proceedings under the MSME Act. Conversely, in 2023, the Calcutta High Court in the case of *Indian Oil Corporation Ltd. & Anr. v. Union of India & Ors.* took a broader view. It ruled that the option for interim reliefs is always available when an arbitration agreement exists, regardless of whether the proceedings are under the MSME Act or the Arbitration Act.

While the Calcutta High Court has sought to reconcile the provisions of both Acts in a specific context, the broader legal question remains unanswered. This uncertainty highlights the need for further legal clarity on the interplay between these two significant legislations.

Arbitrability of oppression and mismanagement disputes under Indian law

The Bombay High Court's decision in *Anupam Mittal v. People Interactive (India) Pvt. Ltd. & Ors*. has brought to the forefront the complex interplay between international commercial arbitration and national legal framework. The Bombay High Court issued an anti-enforcement injunction, preventing the defendants from enforcing a permanent anti-suit injunction granted by the Singapore High Court, which had restrained Anupam Mittal from pursuing claims of oppression and mismanagement before the National Company Law Tribunal, Mumbai (**NCLT**), citing an existing arbitration agreement *(read our views **here**)*.

Subsequently, the NCLT issued an anti-arbitration injunction to halt ongoing Singapore-seated arbitration proceedings before the International Chamber of Commerce (**ICC**), highlighting the non-arbitrability of such disputes under Indian law. This decision is starkly in contrast with the Singapore Court's findings that arbitrability of disputes must be determined as per the law of the arbitration agreement, which was Singaporean law in this case.

India's stance on the non-arbitrability of oppression and mismanagement disputes, diverging from majority of countries, leads to the unpredictability for commercial parties engaged in cross-border transactions. The judgment has necessitated a need for parties to clearly define the law governing their arbitration agreements to mitigate such uncertainties.

Strengthening the enforceability of consent awards in arbitration

Arbitral proceedings do not always lead to a formal adjudication of disputes. Often, parties opt for a settlement during the arbitration process leading to a consent award. Section 30 of the Arbitration Act acknowledges such consent awards in India-seated arbitrations. However, the enforceability of consent awards from foreign jurisdictions have been a subject of debate.

The Delhi High Court's ruling in *Nuovopignone International SRL v. Cargo Motors Pvt. Ltd. & Anr.* is a landmark decision in this context. Adopting a pro-arbitration stance, the Delhi High Court dismissed the argument that foreign consent awards are unenforceable under the Arbitration Act treating them at par with

domestic consent awards. This judgement reinforces the Indian courts' commitment to enforcing consent awards and discouraging parties from undermining the validity of arbitral awards based on settlement / agreed terms.

Bombay High Court upholds substantive rights over procedural formalities in arbitration

In the case of *Palmview Investments Overseas Ltd. v. Ravi Arya and Ors.*, the Bombay High Court emphasized the primacy of substantive rights over procedural formalities in arbitration proceedings. The Court ruled that the requirement for a company to pass a board resolution authorizing an individual to initiate legal action is a procedural formality. Consequently, any shortcomings in such a resolution are deemed procedural irregularities, which should not impede the substantive rights of a party. The tribunal is empowered to allow a party to rectify these defects, and thus, a mere deficiency or defect in authorization cannot be a basis for dismissing a party's claims.

This judgment marks a significant step towards fostering a more equitable and pragmatic arbitration environment. By distinguishing between procedural irregularities and substantive rights and permitting the correction of the former, the Court has reinforced the fundamental principles of justice within the arbitration process *(read our article **here**)*.

Delhi High Court broadens the doctrine of 'piercing the corporate veil'

In *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation*, the Delhi High Court significantly broadened the application of the doctrine of piercing the corporate veil. The Court ruled that this doctrine extends beyond instances of fraud or evasion of legal obligations, and also encompasses cases where equity demands it to achieve justice. This ruling is particularly relevant in today's complex corporate landscape, characterized by multi-layered holdings and structures *(read our views **here**)*.

The Delhi High Court's decision equips parties with a powerful tool to enforce their claims. This decision by the Delhi High Court is currently under review before the Supreme Court and it will be interesting to see if the Supreme Court will endorse this expansion of the doctrine or revert to the traditional and relatively stringent criteria for its application. The outcome could significantly influence how corporate structures are navigated and scrutinized in legal proceedings.

'Writ' jurisdiction not bound by 'seat'

In arbitration agreements, the 'seat' is defined as the legal jurisdiction that governs the arbitration proceedings. 'Jurisdiction' refers to a court's authority to hear and decide cases based on the subject matter and applicable laws. Specifically, in the context of a writ court, 'jurisdiction' determines the court's legal capacity to adjudicate certain types of cases, such as constitutional or administrative matters *(read more **here**)*.

Complexities emerge when an arbitration agreement specifies a 'seat' and, simultaneously, another court holds 'jurisdiction' under constitutional law. In *Durgapur Freight Terminal Pvt. Ltd. & Anr. v. Union of India Ministry of Railways & Ors.*, the Delhi High Court ruled that a writ petition's maintainability is exclusively determined by constitutional law norms, independent of the designated seat under the arbitration agreement. A writ is maintainable if the cause of action arises, wholly or partly, within the territorial jurisdiction of the writ court, thus negating the influence of arbitration agreements on the jurisdictional authority of writ courts *(read our views **here**)*.

Delhi High Court on arbitration in Intellectual Property Rights (IPR) disputes

The Delhi High Court in *M/s. Liberty Footwear Company v. M/s. Liberty International* clarified that certain IPR disputes can be resolved through arbitration. In this case, the Delhi High Court ruled that the dispute was about enforcing a right to use the trademark within the scope of a partnership deed between the parties, rather than about the trademark's registration or grant. As a result, it fell under the category of arbitrable disputes and the Court allowed the matter to be resolved through arbitration as per the arbitration clause in the partnership deed.

This ruling is significant as it shows that not all IPR disputes need to go to court; some can be settled through arbitration, depending on the nature of the dispute *(read our views **here**)*.

Mediation Act 2023: Codifying the future of dispute resolution

Traditionally, Indians have leaned heavily on court-driven litigation and, to a lesser extent, arbitration for settling commercial disputes. The role and effectiveness of mediation in facilitating amicable resolutions, however, has been significantly underutilized and undervalued, with its application largely confined to family disputes and matters involving nominal amounts.

Mediation serves as an alternate dispute resolution method that avoids adversarial proceedings. It involves a structured, voluntary, and interactive negotiation facilitated by an impartial mediator who employs specialized communication and negotiation skills to assist parties in settling their disputes. This process is tailored to the specific interests, needs, and rights of the disputing parties. On 15 September 2023, the Government of India brought into force The Mediation Act, 2023, to formalize the framework for mediation as a distinct alternate dispute resolution mechanism *(read more **here**)*.

According to the National Judicial Data Grid, approximately 11 million civil disputes remain unresolved in Indian courts as of December 2023 *(read over **here**)*. In the fiscal year from April 2022 to March 2023, a record 412,990 cases were directed to mediation, resulting in the resolution of 92,446 cases *(read more **here** and **here**)*. This marks a success rate of 22.38%. The trend towards mediation has continued to rise, with 49,618 cases successfully mediated between April and September 2023, highlighting an increasing reliance by parties on mediation in India *(read more **here**)*.

Shift from ad hoc to institutional arbitration

In India, there's a marked preference for *ad hoc* arbitrations, with parties frequently seeking court intervention for appointment of arbitral tribunals as per the Arbitration Act. However, recent initiatives have been focused on enhancing institutional arbitration in the country, recognized for its numerous benefits over *ad hoc* approaches. Institutional arbitrations offer established procedural rules, aids in arbitrator appointments, and provides administrative support.

India hosts several arbitral institutions, including the International Centre for Alternative Dispute Resolution (**ICADR**) with its main office in Delhi and branches in Hyderabad and Bangalore, and the Nani Palkhiwala Arbitration Centre in Chennai. The Indian Council for Arbitration (**ICA**), established in 1965, also operates nationally. The Mumbai Centre for International Arbitration (**MCIA**) is a recent addition, established by the Government of Maharashtra alongside domestic and international stakeholders. Global entities like the Singapore International Arbitration Centre (**SIAC**), the ICC, and the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**) have a presence in India, with SIAC and ICC maintaining liaison offices in Mumbai and Delhi, respectively.

While we anticipate the release of statistics regarding institutional arbitrations held in the year 2023 by institutional arbitration centers, the data on *ad-hoc* arbitrations remains undisclosed due to confidentiality reasons. The MCIA has published its 2022 annual report, showcasing promising statistics *(read more **here**)*. The report reveals a significant 20% increase in caseload compared to the previous year and a total dispute value exceeding 1 billion USD. Other notable achievements include 24 new filings, swift resolution of two emergency arbitrations within 14 days, completion of 92% of arbitrations within 18 months. Additionally, the MCIA has made strides in gender diversity, appointing women as 38% of its arbitrators. These developments are indicative of India's evolving status as a pro-arbitration jurisdiction, reflecting the growing sophistication and efficiency of its arbitration landscape.

Wishlist for 2024

2023 is a pivotal year in determining India's reputation as a pro-arbitration jurisdiction. Should this year mirror the successes of 2022 *(read our views **here**)*, it would affirm that India has indeed passed a critical test, reflecting the collective efforts of courts, the government, and arbitral institutions over the past decade to establish the

country as a mature arbitration jurisdiction. Nonetheless, as with each passing year, there remains a set of aspirations and goals for 2024 to refine and strengthen India's arbitration framework.

Extension of mandate of arbitral tribunals

The Indian legal landscape is currently facing a significant point of contention regarding the timing for applications to extend the mandate of arbitral tribunals. As mentioned above, different High Courts across the country have diverged in their interpretations of when such applications should be made under the Arbitration Act. However, this issue is now under the scrutiny of the Supreme Court in the case of *Vridavan Advisory Services LLP v. Deep Shambhulal Bhanusali*. Notably, the Supreme Court has stayed the order of the Calcutta High Court. The outcome of this case is expected to have substantial implications for the functioning and mandate of arbitral tribunals.

As the Supreme Court is yet to establish a definitive ruling on this matter, it is currently prudent for parties to err on the side of caution. To avoid potential legal complications, it is advisable for parties to seek an extension of the arbitral tribunal's mandate before it expires, rather than after the statutory period has lapsed.

Success of mediation in India

According to a 2020 report of Vidhi Centre for Legal Policy *(read more **here**)*, in Italy, out of 1,748,384 new civil and commercial cases in 2015, 139,870 were subject to mandatory mediation with a 44% success rate, and 16,288 were voluntarily mediated with a 60% success rate. As per the report, the United States of America has increasingly adopted mandatory mediation to reduce court caseloads, with many courts and federal agencies implementing mandatory programs. Australia's federal system uses mandatory mediation in various civil disputes, with high settlement rates in cases like retail tenancy disputes, achieving over 80% settlement. These examples highlight how mandatory mediation can effectively reduce court workloads and expedite dispute resolution.

Mediation offers considerable promise, and there is optimism that it will thrive in India. However, it is important to recognize that mediation is not a one-size-fits-all solution for the challenges faced by an overburdened court system. It should be viewed as one component in a broader strategy of legal reforms aimed at enhancing the health of our judicial system. Experience from various jurisdictions has shown that mediation can significantly alleviate the workload of courts while offering an efficient avenue for dispute resolution.

Resolving third-party funder liability: A Supreme Court decision awaited

The Supreme Court is set to address the contentious issue of third-party funder's (**TPF**) liability in the case of *SBS Holdings, Inc. v. Tomorrow Sales Agency Private Ltd. & Ors*[*]. This follows a significant ruling by the Division Bench of the Delhi High Court, which recognized the role of TPF in enhancing access to justice for claimants in arbitration cases. The Delhi High Court had ruled that a TPF, not being a party to the arbitration agreement, proceedings, or award, should not bear liability for an arbitral award and, consequently, is not obligated to provide security for its enforcement. The Supreme Court is set to decide the issue regarding liability of a TPF where a funded party is obligated to pay adverse costs in a foreign seated arbitration.

[*]Disclaimer: Acuity Law is representing the Petitioner in the said case before the Supreme Court.

Lack of enforceability of foreign-seated emergency arbitration in India

Parties are increasingly relying upon emergency arbitration procedures for seeking interim awards prior to constitution of the arbitral tribunal. Given the short time period within which an emergency arbitrator is required to provide the findings, a number of parties prefer to approach an emergency arbitrator instead of approaching domestic courts.

The Supreme Court, in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. and Ors.*, held that an emergency arbitrator's order in an Indian-seated arbitration is enforceable in the country, akin to any interim award passed by an arbitral tribunal *(read our views **here**)*. However, the enforceability of such an award in foreign-seated arbitrations is subject to debate. Under Part II of the Arbitration Act, which governs foreign-

seated arbitrations, there is no mechanism for enforcing an interim award such as an emergency arbitrator's order.

Indian parties in foreign seated arbitrations have been relying upon the emergency arbitrator's order to seek interim relief from domestic courts under Part I of the Act. This was explored in the Delhi High Court's 2016 *Raffles Design International India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd. & Ors.* case, involving a Singapore-seated arbitration. The Court concluded that it could not enforce the foreign-seated emergency arbitrator's order directly but could grant interim relief independently, provided the parties had not excluded Part I's applicability to their foreign-seated arbitration.

The Calcutta High Court adopted a similar approach in its 2023 judgment of *Uphealth Holdings Inc. v. Glocal Healthcare Systems Pvt. Ltd. & Ors.* where a party in a Chicago-seated arbitration sought for interim relief under Part I of the Arbitration Act before the Calcutta High Court. The Court acknowledged the lack of a specific provision for enforcing emergency arbitrator's orders in foreign-seated arbitrations. Nevertheless, it noted that if both parties participated in the emergency arbitration, consented to be bound by the emergency arbitrator's order, and if the order was legal and unchallenged, it should not be disregarded. The Court thus granted interim reliefs, treating the emergency arbitrator's order as an additional factor in its decision-making process.

Since a number of Indian parties are engaged in foreign-seated arbitrations, there is an urgent need for the legislature to consider amending the law to allow enforcement of interim awards / orders passed by foreign seated arbitral tribunals. Until then, parties may have to rely on this indirect approach, using the emergency arbitrator's award as a supplementary factor for Indian courts to consider while granting interim reliefs or approach Indian courts directly for obtaining interim reliefs.

Making India Online Dispute Resolution (ODR) ready

ODR is emerging as a transformative solution for India's dispute resolution challenges. Traditionally, resolving disputes in India has been confined to courtrooms, but the COVID-19 pandemic has accelerated the shift towards technology-driven alternatives. With artificial intelligence advancements, ODR can offer automated resolutions and cater to specific disputes, making it cost-effective, efficient, and less biased.

India's journey towards ODR readiness is promising, with judiciary support and legislative backing. In 2021, the Supreme Court launched India's first AI-driven research portal 'SUPACE/ - Supreme Court Portal for Assistance in Court's Efficiency. Through this portal, the Supreme Court intends to leverage machine learning to deal with the amount of data received in the filing of cases. in 2023, the Securities and Exchange Board of India (**SEBI**) amended various regulations *vide* the SEBI (Alternative Dispute Resolution Mechanism) (Amendment) Regulations, 2023 (**Amendment**) to introduce ODR mechanism for redressal of grievances *(read our views **here**)*. However, to fully realize ODR's potential, India needs to enhance digital literacy and infrastructure, train more ODR professionals, and encourage private sector innovation. By integrating ODR, India can significantly improve its legal ecosystem, making dispute resolution more efficient and accessible for all.

06

INSOLVENCY & RESTRUCTURING

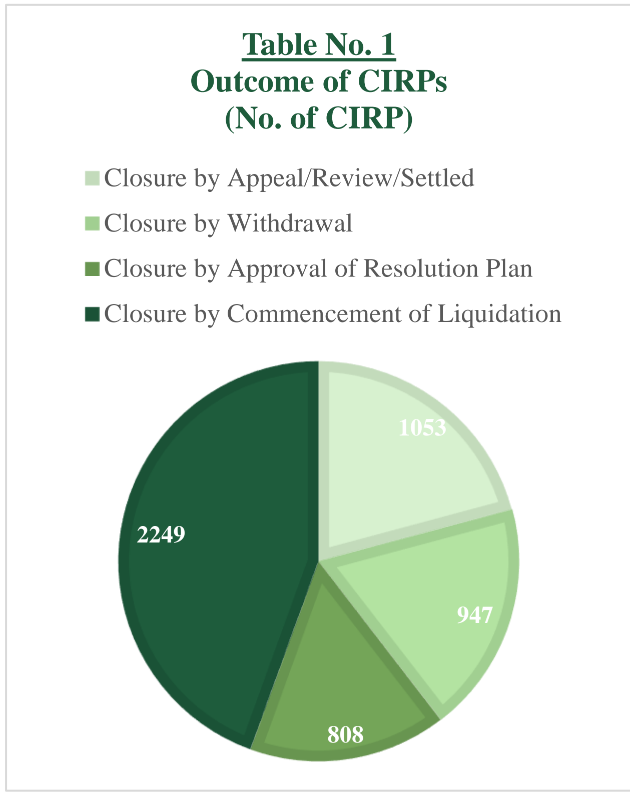
In this section, we detail the path that the Code has taken in terms of its evolution and emerging jurisprudence; the continual improvements during the past one-year, key judgments and amendments, the impact that the law has had on stakeholders, and lastly, what lies ahead (hopefully).

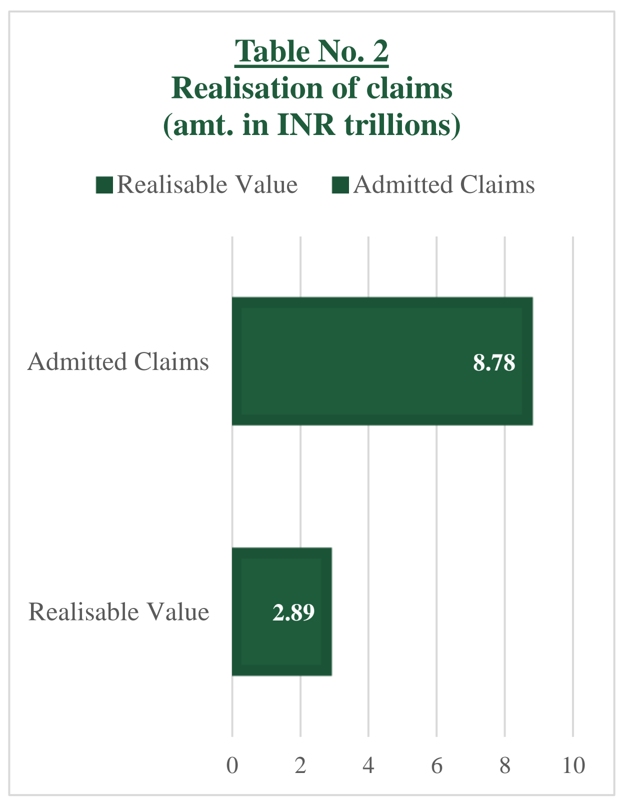
The number game – how the Code fared in 2023

While the overarching objective of the Code, as articulated in its preamble, is the timely reorganization and resolution of corporate insolvency, aiming to maximize asset value, the quarterly newsletters from the Insolvency and Bankruptcy Board of India (**IBBI**) for July-September 2023 *(read the report here)* paints an interesting picture.

Insolvency Proceedings – better recovery, but delayed timelines

As of September 2023, a whopping 7,058 Corporate Insolvency Resolution Processes (**CIRPs**) have kicked off, and 2,001 are still ongoing. However, 808 of these 7,058 CIRPs have culminated in successful resolution plans for the corporate debtors (**CD** / **CDs**) while 2,249 have been pushed into liquidation. Further, the successful CIRPs have yielded the creditors INR 2.92 trillion (~USD 35.19bn) against their claims of INR 9.23 trillion (~USD 111.23bn), resulting in a realization of 31.62%. Financial creditors secured 33.8% of their claims, while operational creditors recovered 18.3%.





The average duration for the resolution of successful CIRPs was 653 days, posing a challenge in meeting the mandatory 330-day timeline stipulated in the Code. Another issue in this regard is the extended duration for admitting insolvency cases, typically taking upwards of 12 months. For example, the application for CIRP of

Reliance Naval & Engineering Ltd. took about 16 months for admission highlighting the gap between the letter of law and ground realities.

Media reports claim that the Central Government is planning to establish dedicated benches within the National Company Law Tribunal (**NCLT**) which will focus solely on the admission or rejection of insolvency petitions. This initiative aims to streamline the process, ensuring decisions are made within the 14-day timeframe stipulated in the Code. The data shows that the present infrastructure is inadequate for completing CIRP within the prescribed 330 days. Accordingly, it is expected that these specialized benches will facilitate timely adjudication of applications for admission of the CDs into CIRP.

Liquidation process – liquidation is the norm

As of September 2023 (*see Table Nos. 1 and 2)*, out of the 7,058 admitted CIRPs, 2,249 cases have been admitted to liquidation, constituting 31.8% of all admitted CIRPs. Interestingly, only 808 CIRPs have been successful, representing merely 11% of the total admitted cases. The recent ruling in *Gayatri Polyrub Pvt. Ltd. v. Anil Kohli & Anr.* by the National Company Law Appellate Tribunal (**NCLAT**) reiterated the Code's primary objective of reviving the CD, emphasizing that liquidation should be the last resort.

However, despite this intent of the Code, the trend seems to be moving more towards liquidation than resolution. It is possible that banks and financial institutions, facing delays in the resolution process and asset value depreciation, may prefer timely liquidation over prolonged resolution, with concerns about inadequate recovery and extended timelines.

Illustrative cases include the insolvency of Lavasa Corporation Limited, lasting almost 5 years and concluding in July 2023, where the recovery amounted to 24% of the total claim of INR 66.42 billion (~USD 800.4mn). Similarly, Indu Projects Limited, admitted to insolvency in February 2019, saw a resolution plan approved in July 2023, offering INR 3.9 billion (~USD 47mn) against an admitted debt of INR 39 billion (~USD 470mn), reflecting a significant haircut of almost 90%!

Fate of pre-packs

The introduction of the Pre-packaged Insolvency Resolution Process (**PPIRP**) during the pandemic aimed to safeguard Micro, Small, and Medium Enterprises (**MSMEs**), vital to the Indian economy, from insolvency. Unlike regular CIRPs, PPIRP follows a debtor-in-possession model, preserving the board of directors without transferring management to the resolution professional. Despite its distinct structure, as of September 2023, only 6 applications have been admitted, with 1 withdrawal and 3 approved resolution plans for Amrit India Limited (18.79% recovery), Sudal Industries Limited (33.2% recovery), and Shree Rajasthan Syntex Limited (37.55% recovery). 2 PPIRP cases are still pending.

The Institute of Cost Accountants of India's Insolvency Professional Agency suggests that the limited response may stem from the hesitancy shown by financial institutions to invoke PPIRP *(read more **here**)*. Notably, in PPIRP, creditors have early insight into the potential haircut, whereas in CIRP, the extent of the haircut becomes clear at a later stage, and possibly, the creditors anticipate a relatively favourable resolution plan.

Use of technology in insolvency space

To address the issue of delays in admission of insolvency applications, the Code now recognizes the Record of Default (**RoD**) from an Information Utility (**IU**) as evidence of debt and default, aiding the NCLT in deciding on insolvency proceedings. The Code mandates the submission of RoD as evidence of default in CIRP initiation applications. The National E-Governance Services Ltd. (**NeSL**), the sole IU, has issued approximately 112,017 RoDs to support the insolvency ecosystem by the end of September 2023.

Effectiveness of the Code vis-à-vis earlier legislations

According to a November 2023 report by CRISIL *(read more **here**),* the recovery rates under the Code surpass those of other mechanisms, averaging between 5-20%. This highlights the Code as the most effective avenue for lenders to recuperate their dues. 720 CIRPs have been withdrawn due to settlement between CD and the

creditors. Further, 26,000 applications having underlying default of INR 9.33 trillion (~USD 112.42bn) have been withdrawn before their admission.

Major judgments and amendments

Improving outcomes in real estate cases

As of September 2023, the real estate sector accounted for 21% of all admitted CIRPs, totalling 1,482 cases. However, only 121 of these cases have seen successful resolution plans, while 404 have been admitted into liquidation. Despite the significant presence of the real estate sector in the Code, it is observed that insolvency resolution of CDs in this sector have posed a major challenge due to the peculiarities of this sector.

Though the Code has clarified the status of the allottees in a real estate project as financial creditors and made them a core part of the Committee of Creditors (**CoC**), at times, their divergent interests do not align with the scheme of the CIRP. Unlike banks and financial institutions, these real estate allottees typically favour obtaining possession of the property over partial refunds through the insolvency process. To protect the interests of allottees, several judicial experiments have been conducted to adapt CIRPs to the nature of the real estate sector, such as 'reverse CIRP' *(read our article **here**)* and 'conjoined CIRP' *(read our article **here**)*.

In a significant decision in *Mist Avenue Pvt. Ltd. v. Nitin Batra & Ors.*, the NCLAT has ruled on the maintainability of a joint petition under the Code to seek conjoined CIRP of three corporate entities linked to a common real estate project. The NCLAT upheld the joint petition, emphasizing the interconnectedness of the three entities and the necessity for their inclusion in the CIRP to ensure project resolution and prevent losses to allottees. This decision showcases the commitment of the insolvency courts to find pragmatic solutions for complex issues arising out of real estate projects.

The Supreme Court of India, in the case of *Vishal Chelani & Ors. v. Debashis Nanda*, has clarified the status of home buyers in insolvency proceedings under the Code. The Supreme Court ruled that all home buyers, irrespective of their recovery decree under the Real Estate (Regulation and Development) Act, 2016 (**RERA**), should be treated as financial creditors in insolvency proceedings and they cannot be treated differently. This landmark judgment ensures fairness and equity in dealing with the financial claims of home buyers and sets a significant precedent for the treatment of such cases in India.

Supreme Court clears the path for personal guarantor insolvency

Following the enactment of the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, and subsequent notification No. S.O. 4126 dated 15 November 2019, insolvency proceedings may be initiated by creditors against personal guarantors even where no proceedings are initiated against the CD *(read our article **here**)*.

As of September 2023, a total of 2,289 applications have been submitted to initiate the Personal Guarantors Insolvency Resolution Process (**PGIRP**), with 282 admissions. Out of these admitted PGIRPs, 90 cases have been successfully concluded, 21 with approved repayment plans. In these resolved cases, creditors have recovered INR 912.7 million (~USD 11mn), constituting 5.22% of their admitted claims.

A landmark ruling by the Supreme Court in *Surendra B. Jiwrajika v. Omkara Assets Reconstruction Pvt. Ltd.* has upheld the constitutionality of the Code's provisions related to PGIRP (sections 95 to 100). This decision dismissed 384 petitions challenging the legal validity of these provisions, where the petitioners argued that personal guarantors were not afforded an opportunity to present their case prior to the initiation of the insolvency resolution process. The Supreme Court, however, ruled that these provisions cannot be deemed unconstitutional for not providing a hearing opportunity to personal guarantors before the insolvency petition is admitted.

Effect of breach of settlement agreement under the Code

The issue of reviving a CIRP after withdrawal due to a breach of settlement terms has sparked conflicting judgments in various NCLTs. The question at hand is whether the CIRP is automatically revived in case of breach of a settlement agreement or whether the creditor must file a fresh application under the Code. The recent

NCLAT judgment in *IDBI Trusteeship Services Ltd. v. Nirmal Lifestyle Ltd.* settles the controversy, ruling that an insolvency petition may be revived upon a breach of settlement terms if the terms allow for such revival *(read our article **here**)*.

Leased oil assets outside moratorium

On 14 June 2023, the Ministry of Corporate Affairs (**MCA**) issued a notification which will impact CDs involved in transactions, arrangements, or agreements governed by the Oilfields (Regulation and Development) Act, 1948. In essence, petroleum assets leased by a company undergoing CIRP will no longer enjoy the protective shield of the moratorium provided by the Code. The rationale behind this move seems to ensure that crucial national assets in the petroleum sector do not remain inactive during CIRP. This move highlights the economic importance of the oil sector and aims to facilitate the seamless continuation of projects critical for various economic activities *(read our update **here**)*.

Big relief to aircraft lessors in airline insolvencies

On 03 October 2023, the MCA issued a notification exempting arrangements involving aircraft, aircraft engines, airframes, and helicopters from the moratorium imposed by the Code. This decision was likely prompted by the global aviation community's strong critique of Go Airlines (India) Ltd. (**Go First**) CIRP *(read our update **here**)*.

In the Go First CIRP, aircraft lessors raised concerns about the Code's moratorium conflicting with their rights under the Cape Town Convention on International Interests in Mobile Equipment. The disparity lies in the rights of creditors/lessors to reclaim leased aircraft during the lessee/debtor's insolvency. While the Code's moratorium prohibits asset repossession during the CIRP, the Cape Town Convention requires the debtor to return the aircraft to the lessor within 60 days of an insolvency-related event. This discrepancy posed challenges for foreign lessors of Go First, hindering their ability to reclaim aircraft. The MCA notification signals India's commitment to align with the Cape Town Convention obligations.

Avoidance Application – major ambiguities resolved

Under the Code, the resolution professional/liquidator is mandated to identify and reverse avoidable transactions (preferential, undervalued, defrauding creditors, and extortionate transactions) by filing avoidance applications before the NCLT. Previously, a Delhi High Court single bench ruled that NCLT lacks jurisdiction post-approval of a resolution plan to decide such applications. However, the Division Bench, in *TATA Steel BSL Ltd. v. Venus Recruiter Pvt. Ltd.,* has now ruled that avoidance applications can continue even after CIRP approval, emphasizing the need to uncover dubious transactions and prevent wrongful benefits to promoters and other parties *(read our article **here**)*.

In the case of *Arvind Garg, Liquidator of Carnation Auto India Pvt. Ltd. v. Jagdish Khattar & Ors.,* an interesting issue arose on whether the legal representatives of a deceased director of the CD can be impleaded in the proceedings concerning avoidable transactions. The NCLAT allowed the impleadment of the director's widow as his legal representative, considering her possession of the late director's estate and her status as a legal heir. This decision sets an important precedent, aiding insolvency professionals in recovering misappropriated assets and returning funds to the CD *(read our article **here**)*.

The Code provides a 'look back period' for investigating avoidance transactions by a CD. This period is two years for transactions with related parties and one year for others. However, fraudulent transactions don't have a specified look back period in the Code. Typically, if a limitation period isn't defined, the action can be taken within three years under the Limitation Act, 1963. In *Mr. Thomas George v. K. Easwara Pillai and Others*, the NCLAT ruled that the three-year limitation doesn't apply to fraudulent transactions under the Code. This means insolvency professionals can investigate beyond the period of three years from the initiation of CIRP for fraudulent transactions *(read our article **here**)*.

Speaking of fraudulent transactions, Section 65 of the Code addresses potential misuse of insolvency applications by imposing penalties of up to INR 10 million on those fraudulently initiating CIRP. The key issue was whether Section 65 applied when an application for initiation of CIRP was pending admission before the

NCLT. In *Ashmeet Singh Bhatia v. Sundrm Consultants Pvt. Ltd. and Anr.*, the NCLAT clarified that Section 65 is applicable even when the CIRP application is pending admission before the NCLT and fraudulent initiation of CIRP can be challenged even before 'admission' *(read our article **here**)*.

Supreme Courts emphasis on time bound processes under the Code

In the recent case of *RPS Infrastructure Ltd. v. Mukul Kumar & Anr.,* the Supreme Court emphasized that claims filed after the approval of a resolution plan by the CoC cannot be entertained, as allowing such claims could potentially jeopardise the resolution plan that had already received the CoC's approval and this will disrupt the time bound insolvency resolution process. This ruling reinforces the Code's objectives of a creditor-driven, time-bound resolution process.

The Supreme Court decision in *Eva Agro Feeds Pvt. Ltd. v. Punjab National Bank* has significant implications for the powers and responsibilities of Liquidators under the Code. This case involved the cancellation of an auction during the liquidation process of the CD, raising questions about the discretion of the liquidator and the rights of the highest bidder. The Court ruled that the liquidator cannot cancel auctions without providing reasons, emphasizing the importance of a thoughtful decision-making process. It highlighted that mere expectation of a higher price is an insufficient ground for cancelling a valid auction, as such actions could incur unnecessary expenses and undermine the credibility of the auction process. The judgment reinforces the idea that the liquidator must operate within a legal framework, performing duties for the benefit of all stakeholders while upholding the law.

Power to "recall" judgments

In *Union Bank of India v. T. Venkatasubramanian and Others,* a five-member bench of the NCLAT clarified the authority of insolvency tribunals i.e., NCLT and NCLAT to recall their earlier orders. The ruling establishes that insolvency tribunals, similar to judicial bodies, possess inherent power to recall orders based on the violation of principles of natural justice. This decision brings clarity to the ongoing confusion and conflicting opinions on whether insolvency tribunals have the jurisdiction to recall their previous rulings *(read our article **here**)*. The Supreme Court in *Union Bank of India v, Financial Creditors of M/s Amtek Auto Limited & Ors.* upheld the view taken by NCLAT.

Amendment to the CIRP process

The IBBI introduced the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2023 on 18 September 2023. The amendments include:

1. Detailed information required from creditors in CIRP initiation applications.
2. Procedures for the resolution professional's control of assets and records.
3. Extended timelines for claim filing by creditors.
4. Enhanced roles and fees for authorized representatives.
5. Committee-approved audits of the CD.
6. Synchronized procedural timelines.
7. Changes in the invitation for expression of interest.
8. Inclusion of CoC minutes in compliance certificates to be filed by the resolution professional.
9. Prompt disclosure of debt assignment details by creditors.

*(read our update **here**)*

Supreme Court clarifies law on MSME registration during CIRP

MSMEs have played an indispensable role in the Indian economy for decades, particularly fostering entrepreneurship in semi-urban and rural regions. The insertion of Section 29A into the Code in 2017 outlined the criteria for individuals who are ineligible to submit resolution plans for CDs, including promoters of the CD. Subsequently, Section 240A was introduced in the Code in 2018, exempting MSME CDs from certain restrictions imposed by Section 29A. Consequently, the promoter of a MSME CD is eligible to submit a resolution plan for the same.

However, a 2021 ruling by the NCLAT in *Digamber Anand Rao Pingle v. Shrikant Madanlal Zawar & Ors.* had established that former promoters/directors of CDs cannot bypass their ineligibility under Section 29A by obtaining MSME registration during CIRP.

This position has now been reversed by the Supreme Court of India by its 2023 judgment in *Hari Babu Thota*, affirming that promoters of MSME CDs are eligible to submit resolution plans, even when the MSME registration was obtained during CIRP *(read our update **here**)*.

Wish list for 2024

Insolvency petition – To Admit or not to Admit

The Code allows financial creditors to initiate insolvency against a debtor for non-repayment of debt. In 2022, the Supreme Court, in *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*, introduced discretion for NCLT to reject a creditor's application based on a CD's financial health *(read our article **here**)*.

However, in the 2023 judgment of *M. Suresh Kumar Reddy v. Canara Bank and Others*, the Supreme Court has distinguished the *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.* judgment and held that the non-payment of the debt when it becomes due and payable, will amount to default on the part of the CD and initiation of insolvency proceedings under the Code must follow. These judgments of coordinate two-judge benches raise uncertainties, and a conclusive resolution by a larger Supreme Court bench is recommended to clarify and settle the controversy on the criteria for admitting insolvency applications *(read our article **here**)*.

Statutory claims on par with secured creditors?

The Supreme Court in *State Tax Officer v. Rainbow Papers Ltd.* (**Rainbow Papers**) ruled that by virtue of a 'security interest' created in favour of the Government for tax claims arising under Gujarat Value Added Tax Act, 2003 (**GVAT Act**), the tax authorities i.e., the Government is a 'secured creditor' under the Code. The Court held that if a resolution plan excludes statutory dues payable to the Government, it cannot be said to be in conformity to the provisions of the Code and, as such, will be non-binding on the Government *(read our article **here**)*. Recently, the Supreme Court in *Sanjay Agarwal v. State Tax Officer* dismissed the review petition against Rainbow Papers.

However, in *Paschimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat Pvt. Ltd.*, the Supreme Court ruled that the Code overrides the provisions of the Electricity Act, 2003. The provisions of the Code treat the dues payable to secured creditors at a footing higher than the dues payable to the Government. The Court also noted that decision in *State Tax Officer v. Rainbow Papers Ltd.* is limited to the facts of that particular case. This has created uncertainty and without legislative intervention, ongoing and completed liquidations face disruption, highlighting the urgent need for lawmakers to address this issue.

Group Insolvency – need for adoption

Numerous corporations operate with subsidiaries and associates, leading to intricate economic ties. Resolving these complexities under the current legal framework causes delays. While in January 2023, the MCA had issued a discussion paper proposing amendments to the Code for a group insolvency procedure, no further action has been taken. Recently, the necessity for a group insolvency framework became evident during the resolution processes of CDs such as the Videocon Group. Therefore, there is a need of implementing a group insolvency structure under the Code.

Cross border insolvency – the wait game continues

In today's global economy, businesses operate across borders with assets and creditors located in many countries, posing challenges for insolvency proceedings. India's current cross-border insolvency framework governed by Sections 234 and 235 of the Code, relies on bilateral agreements. Despite proposals to incorporate the UNCITRAL Model Law into the Code as Part Z *(read more **here**)* and the publication of draft rules and regulations in 2020 *(read more **here**)*, adoption is still pending as of the end of 2023.

In the case of Jet Airways (India) Limited, which faced simultaneous insolvency proceedings in India and the Netherlands, the existing framework's constraints became apparent, particularly in scenarios where the CD possesses assets across international borders. Initially, NCLT, Mumbai rejected the Dutch court's jurisdiction due to the lack of a bilateral agreement with Netherland. However, NCLAT later overturned this by permitting a protocol between Indian and Dutch counterparts, defining their roles in the insolvency proceedings, highlighting the potential of cross-border cooperation. A cross-border insolvency framework will make it possible for India to deal with issues arising for the Indian companies with foreign assets and vice-versa. Introduction of cross-border insolvency will mark an epochal change in the Code by bringing it at par with mature regimes globally.

07

TAXATION

TAXATION 07

The year 2023 has been noteworthy from an Indian direct tax perspective as significant rulings have been pronounced on certain controversial issues. The rulings will have a far-reaching impact on the taxpayers, with some outcomes being beneficial and others having adverse effects. The Union Budget 2023-24 also amended certain provisions under the Income-tax Act, 1961 (**IT Act**), which will impact taxpayers, especially non-resident taxpayers. On the indirect tax front, the Goods and Services Tax (**GST**) Council has paved the way for formation of the much-awaited GST Tribunal. GST on online gaming and secondment of personnel continues to be a burning issue with a flurry of show cause notices, tax demands and circulars/ clarifications from the tax authorities. The Foreign Trade Policy (**FTP**) 2023 was announced on 01 April 2023, which was long due since the FTP 2015-20 was extended year on year due to the Covid-19 pandemic. In this memo, we have captured the relevant updates on topical issues having a continuing impact on taxpayers.

Direct tax

Protocol allowing benefits under the MFN clause is not automatic, issuance of a notification is a pre-condition

The Supreme Court (**Apex Court**) ruling on treaty interpretation with a specific reference to the most favored nation (**MFN**) clause contained in various Double Taxation Avoidance Agreements (**DTAA**) entered by India with Organization for Economic Cooperation and Development (**OECD**) member countries[99] will have far reaching impact on taxpayers.

The Apex Court ruled that a notification under section 90(1) of the IT Act is a necessary condition to give effect to a DTAA or any protocol issued under the relevant DTAA (such as the MFN clause), to seek benefit of any beneficial clause extended to a third country. Also, the MFN clause can be invoked only if the third country was an OECD member country while entering into the DTAA with India. This ruling redefines the interpretation of MFN clause, applicability of treaty benefits and will certainly result in increased scrutiny from the Indian tax authorities.

This ruling will certainly impact the manner in which each DTAA is interpreted. It will affect entities/ individuals who would have either not paid taxes or paid taxes at a lower rate by seeking benefit under the MFN clause. This will also have an impact on the pending assessments, and may trigger initiation of re-assessment proceedings, wherever the limitation period permits.

Determination of Arms-Length Price (ALP) can be the subject matter of scrutiny by the High Court

The Apex Court has ruled on the manner in which transfer pricing related adjudication will be undertaken.[100] The question before the Apex Court was whether in every case where the Tribunal determines the ALP, the same shall attain finality and whether the High Courts are precluded from re-determining the ALP. It was contended by the taxpayers that determination of ALP is a factual exercise and the same cannot give rise to a substantial question of law unless perversity is demonstrated. Additionally, it was contended that a factual finding may give rise to a substantial question of law, *inter alia,* only in the event the findings are based on (i) no evidence; (ii) while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration; (iii) legal principles have not been applied in appreciating the evidence; or (iv) when the evidence has been misread.

The Apex Court ruled that determination of ALP outside the relevant provisions or the guidelines, can be considered as perverse, and perversity itself can be said to be a substantial question of law. When the determination of ALP is challenged before the High Court, it is always open for the High Court to consider and examine whether the ALP has been determined taking into consideration the relevant guidelines or not. Thus,

there cannot be any absolute proposition of law that in all cases where the Tribunal has determined ALP, the same is final and cannot be the subject matter of scrutiny by the High Court.

Determination of ALP is a fact-finding exercise which involves a significant amount of data. This exercise, when undertaken by the High Court, will only increase the existing pendency of matters and will certainly extend the timelines of the entire litigation, which will adversely affect the taxpayer.

Tax Residency Certificate (TRC) conclusive to claim treaty benefits

The year 2023 was the year of re-affirming the settled position with respect to the finality of TRC when dealing with gains on exit of investments that were claimed as not taxable in India due to the DTAA benefit. Under the IT Act, a non-resident investor can claim non-taxability of capital gains in India on the basis of DTAA provisions, if any, if such non-resident furnishes a TRC. In early 2023, the Hon'ble High Court of Delhi[101] in the context of India-Singapore DTAA held that the Income-tax department cannot question the TRC issued by other jurisdictions, as the same is sufficient evidence to claim treaty eligibility and to prove the residential status of the non-resident. While arriving at this position, the High Court relied upon the rulings of the Apex Court[102] and the circulars[103] issued by the Central Board of Direct Taxes (**CBDT**). Similarly, the Bombay High Court[104] in the context of Indi- Mauritius DTAA has taken the same position that TRC is conclusive evidence to claim the treaty benefits, unless illegality or fraud has been alleged and demonstrated (which was not done in the present case).

This ruling of the Delhi High Court has been followed by the Delhi Tribunal in various cases during the year 2023. A re-affirmation on the conclusiveness of the TRC will certainly repose the faith of foreign investors in the tax system of India. Recently, the Apex Court has stayed the order of the Delhi High Court in the case of Blackstone. It would be interesting to see the manner in which this issue gets settled, as the Apex Court itself had upheld the validity of TRC for claiming treaty benefits in the past.

Dividends subject to dividend distribution tax (DDT) cannot claim benefit of tax treaty rate

There was uncertainty on whether the tax rate applicable to dividends declared to a non-resident shareholder, should be at the rate provided under section 115-O (provision applicable to DDT) of the IT Act or at the reduced rates under the tax treaty. This issue was ruled in favor of the taxpayer by the Delhi Tribunal[105] and the Kolkata Tribunal[106], which decisions were subsequently doubted for being incorrect by the Mumbai Tribunal. Hence, this issue was referred to the special bench of the Mumbai Tribunal.

The first issue before the special bench[107] was whether the DDT is a tax on the domestic company or on the shareholder, or is it a tax which is paid on behalf of the shareholder. Having placed reliance on the ruling of the Bombay High Court[108] and section 115-O (it was stated that this provision is a complete code in itself and does not have any features of withholding provisions, wherein tax is deducted on behalf of the payee), the special bench held that DDT is a tax on the profits of the company and not a charge in the hands of the shareholder or a tax paid on behalf of the shareholder by the domestic company.

The second issue was whether there is any double taxation in the context of DDT to give effect to tax treaty provisions. On this issue, the special bench held that a tax treaty is seen from a recipient's perspective and thus, in order to claim benefit under a tax treaty, the non-resident should be taxed in India. However, in the present scenario, DDT is levied on the income of the company which is a resident of India, and is not tax which is paid on behalf of the shareholder. In such circumstances, the domestic company paying DDT does not enter the domain of the tax treaty at all, unless a specific provision has been agreed between the two contracting states, similar to the one provided under the India-Hungary tax treaty.

Though DDT has been abolished from 2020, then this ruling will impact those taxpayers, who have claimed refund of the excess DDT by seeking a benefit under the tax treaty.

Increase in tax rate on royalty and Fees for Technical Services ('FTS') leads to unwarranted consequences on non-residents

One of the key amendments in the Finance Act, 2023 impacting non-residents was increasing the rate applicable to taxation of royalty and FTS. As per the amendment, the tax rates have been increased from 10% to 20%. The general tax rates applicable to royalty and FTS under most of the DTAA's is 10% and thus, non-residents were not required to claim the benefit of the DTAA on these sources of income. If the DTAA benefit was not claimed, non-residents were not required to undertake various compliances under the IT Act such as filing return of income (if royalty and FTS were the only source of income and appropriate taxes were withheld) or obtaining of permanent account number (**PAN**) or furnishing of relevant documents to claim DTAA benefit.

However, with this amendment in place, non-residents/ foreign companies will now be required to claim the benefit of the reduced rate prescribed under the DTAA. However, such a claim will result in additional compliance burden (like furnishing of TRC, Form 10F, no permanent establishment certificate, obtaining PAN and filing return of income) and the risk of scrutiny, if any, by the Income Tax Department (**ITD**). Moreover, now the non-residents should also be cognizant of various anti-avoidance provisions, which may be invoked by the ITD. This amendment not only burdens non-residents/ foreign companies, but it is equally harsh on the resident payers, if grossing up of tax has been agreed between the partes.

Share premium exceeding fair market value (FMV) in unlisted companies taxable even if received from non-residents (Angel tax)

Taxation of share premium (section 56(2)(viib)), popularly known as Angel Tax, is a tax levied on an unlisted Indian company if it receives consideration for issue of shares in excess of FMV. This provision was introduced in 2012 and was made applicable to share premium received from resident shareholders only. However, with the Finance Act, 2023, this provision has been extended to share consideration received from non-resident shareholders as well. Thus, if an unlisted Indian company is receiving consideration for issuance of shares in excess of its FMV, such excess amount is deemed to be the income of the Indian company and taxable as "Income from Other Sources" at the applicable corporate tax rates.

Applicability of share premium provisions to non-residents may pose valuation concerns for Indian domestic companies. As per the current exchange control regulations, shares can be issued to any non-resident at a price which is at FMV or above FMV. Thus, issuance of shares below FMV is not permissible under the exchange control regulations. Whereas, under the IT Act, if shares are issued above FMV, domestic companies will be liable to tax. Accordingly, for the purposes of IT Act, shares need to be issued at FMV or below FMV. Thus, valuation under the IT Act and exchange control regulations needs to align to ensure compliance under both the legislations.

To restrict the rigors of this provision, CBDT has issued two notifications[109], whereby the provisions will not be applicable to (i) start-ups duly registered with Department for Promotion of Industry and Internal Trade ('**DPIIT**') (which fulfills the required conditions); and (ii) classes of persons such as Government related investors, certain banks and certain non-resident investors coming from specified jurisdictions. Additionally, rules have also been issued providing for additional valuation methodologies.

Taxation of online gaming income

Online gaming has witnessed a huge surge in terms of participation on account of its recent popularity. To ensure that the winnings are taxed appropriately, legislators felt the need to introduce a separate income-tax regime to cover online gaming transactions. Section 115BBJ and section 194BA were introduced under the IT Act by the Finance Act, 2023. As per section 115BBJ, if the total income of a taxpayer includes any income by way of winnings from any online game, the same shall be taxed at 30%. The term 'online game' "*means a game that is offered on the internet and is accessible by a user through a computer resource including any telecommunication device*". Thus, the definition has a wide coverage and any game played on the internet will fall within the ambit of online game.

Corresponding to the charging provision, a tax withholding provision has also been introduced in the IT Act i.e., section 194BA, whereby any person responsible for paying to any person income by way of winnings will be required to withhold taxes on the net winnings at the applicable rates. Provisions have also been included for winnings in kind, and responsibility has been cast upon the payer to ensure that taxes have been paid. Clarity is

required to ensure that non-residents do not face unwarranted consequences as it is unclear whether 'person' includes non-residents as well.

CBDT has also notified rules for computation of 'net winnings' for the purposes of taxation and withholding provisions.

Tax Collected at Source (TCS) on Liberalized Remittance Scheme (LRS)

In the recent past, applicability of TCS[110] under the IT Act has been consistently expanded. Various transactions have been included within the ambit of TCS and one such transaction is TCS on LRS payments. TCS on LRS remittance was introduced in 2020, with the TCS rate at 5% (if the amount remitted is in excess of INR 0.7 million (~USD 84 thousand)). Exceptions were made for remittance from loan obtained for educational purposes (TCS rate at 0.5%). Finance Act, 2023 increased the TCS rate from 5% to 20% and removed the threshold of INR 0.7 million, unless the remittance is for the purposes of education or medical treatment.

Considering that the removal of threshold would lead to unwarranted consequences, a circular was issued by the CBDT restoring back the monetary threshold of INR 7 lakhs. Thus, the revised TCS rates on LRS are as follows:

Nature of payment	Applicable rate
LRS for education financed by loan obtained from a financial institution	Nil up to INR 7 lakh 0.5% above INR 7 lakh
LRS for education (other than financed by a loan) or medical treatment	Nil up to INR 7 lakh 5% above INR 7 lakh
LRS for any other purpose (other than purchase of overseas tour package)	Nil up to INR 7 lakh 20% above INR 7 lakh

There has also been an amendment to the rules concerning current account transactions i.e., Foreign Exchange Management (Current Account Transactions) Rules, 2000, wherein international credit card spending abroad has been brought under the ambit of LRS. On account of this amendment, TCS provisions will be applicable on such usage. However, implementation of the amendment has been postponed.

Indirect tax

GST on online gaming

In a significant development for the online gaming industry, the GST Council in its 50th and 51st meeting held on 11 July 2023 and 02 August 2023, respectively, confirmed a GST levy of 28% on the face value of initial bets placed by users (excluding bets placed from the winning amounts). Vide this amendment, the GST laws have done away with the distinction between 'game of chance' and 'game of skill' and have applied a uniform rate for all online games. This marks a departure from the previous tax structure wherein an 18% GST was applied on the platform fee associated with skill-based games, whereas a 28% GST was applied for other online games, including betting and gambling. This change has led to a significant increase in the GST outgo for online gaming companies requiring a relook at the pricing/ fee structure and the overall operating model.

Even before the aforementioned changes were proposed and implemented, GST authorities had started to issue show cause notices to a few online gaming companies alleging that the predominant character of the games offered was 'game of chance' and hence attracted a higher GST rate of 28%. Post the amendments, issuance of show cause notices gained momentum with the initial view of GST authorities that the amendments are only clarificatory and hence the amended provisions applied even to periods prior to 01 October 2023. In a welcome

move, the India Finance Minister clarified that these amendments are prospective and will be applicable only effective 01 October 2023. However, taxation for past periods will be determined by the Apex Court in the petition filed in the matter of Gameskraft. It is estimated that show cause notices aggregating to an approximate demand of over INR 1 trillion (~USD 12 bn) have been issued which have been challenged before various High Courts across India.

GST on secondment of employees

Applicability of GST on secondment/ deputation/ loaning of employees/ expats is a burning issue in India, resulting in issuance of show cause notices to several multinational companies operating in India. The heightened investigation by GST authorities is pursuant to an Apex Court judgment of May 2022 (Judgment) which held that service tax is payable (under the reverse charge mechanism) on transactions involving secondment of employees where salaries of seconded employees were reimbursed to the overseas parent.111 Although this judgment pertains to the service tax regime (pre-GST), implications squarely apply to the existing GST regime. It is basis this judgment that the tax authorities have been issuing show cause notices to various Indian subsidiaries of foreign companies having secondment arrangements.

Given the widespread impact, implication and involvement of large multinational organizations, multiple representations were filed before the Ministry of Finance to seek clarification and also to highlight the fact that show cause notices were being issued and the 'extended period of limitation' is being invoked by the GST authorities without appreciating the facts and similarity to the Apex Court judgment.

Taking note of these representations, the GST policy wing of CBDT has issued Instruction No. 05/2023-GST dated 13 December 2023 (Instructions).112 The Instructions provide the following observations/ guidance/ instructions for the GST authorities for investigating/ adjudicating the matter on taxability of secondment transactions:

1. The Apex Court has emphasized a nuanced examination based on the unique characteristics of each specific arrangement, rather than relying on any singular test.
2. There can be multiple types of secondment arrangement and in each such arrangement, the tax implications may be different depending on the specific nature of the contract and the terms/ conditions attached to such contract.
3. The Judgment should not be mechanically applied in all cases.
4. Investigation in each case requires careful consideration of its distinct factual matrix, including the terms of contract between overseas company and the Indian entity.
5. 'Extended period of limitation' cannot be involved merely on account of non-payment of GST.
6. Only if the investigation indicates a material element of fraud, willful misstatement or suppression of facts, the 'extended period of limitation' can be invoked.
7. Evidence of such fraud, willful misstatement or suppression of facts should be made a part of the show cause notice.

The Instructions are a welcome and positive step. If the Instructions are indeed followed judiciously, it could help closure of various show cause notices and avoid any protracted litigation.

Clarification on levy of GST on personal and corporate guarantee

The GST Council in its 52nd meeting on 07 October 2023, recommended valuation rules and certain other clarifications relating to levy of GST on personal and corporate guarantees.

On personal guarantee by a director, the Reserve Bank of India (**RBI**) prohibits any direct and indirect payment to directors for providing personal guarantees. Therefore, in such a transaction, there is no consideration

involved. However, even supply with no consideration can be deemed to be a supply if it is between related parties. The Central Board of Indirect Tax and Customs issued a clarification on 27 October 2023 stating that when no consideration is paid by a company to the director in any form, directly or indirectly, for providing a personal guarantee to the bank/ financial institution on their behalf, open market value of the said transaction/ supply may be treated as zero and hence no GST is payable.[113] However, if such director is no longer connected to the management after giving a personal guarantee, any remuneration subsequently paid to such director shall be liable to GST.

GST on the corporate guarantee provided by a holding company to its subsidiary was also a burning issue, especially regarding taxability and valuation aspects. Post recommendation of the GST Council, a recent amendment (effective 26 October 2023) has been made to rule 28 of Central Goods and Services Tax Rules 2017 to prescribe the valuation principles for such supply of service.[114] Vide the amendment, provision of corporate guarantee will be valued at 1% of the guarantee offered or the actual consideration, whichever is higher for levy of GST. This valuation principle will apply whether the service recipient is eligible for full input tax credit or not. This amendment will certainly increase the costs in certain industries where input credit of such tax cannot be availed.

Formation of Goods and Services Tax Appellate Tribunal (GSTAT)

In September 2023, the Finance Ministry announced the setting up of 31 benches of the much-awaited GSTAT across 28 Indian states and 8 Union Territories. GSTAT is the forum for second appeal in GST laws and the first common forum for dispute resolution on GST issues between the Centre and states. GSTAT will ensure that there is uniformity in redressal of disputes arising under GST, and thereby reducing multiple (contradictory) judgments on similar issues. Currently, the only mechanism available with taxpayers is to approach the High Court (writ mechanism) for any adverse order by the 1st appellate authority, with a request to either quash the order or to grant a stay on recovery. It is estimated that the number of appeals (under Central GST laws) pending adjudication is approximately 14,000 (and increasing) in absence of a functioning GSTAT.[115] It is expected that once GSTAT starts functioning (sometime in 2024), it will expedite adjudication process, provide tax certainty in recurring litigative issues, reduce the burden on higher courts and assist in resolving disputes between the Centre and States.

Classification of LCD panels

The Apex Court in *CCE Aurangabad v Videocon Industries Limited*[116] pronounced an important ruling on classification of liquid crystal display (**LCD**) panels under the Indian customs legislation. As per this ruling, LCDs should be classified under chapter 90 and not chapter 85 of the Customs Tariff Act, 1975.

The key question revolved around whether these panels should be categorized as ‘parts of television sets’ or should be considered independently. The tax authorities sought to classify LCD panels as ‘parts of television sets’, subjecting them to higher customs duties. However, the assessee argued for an independent classification under 9013.8010 of the Customs Tariff Act, 1975. In the judgment, the court mentioned that LCDs have diverse applications beyond television or audio sets. Importantly, chapter 85, as contended by the tax authorities explicitly excluded chapter 90, which specifically mentioned LCDs. Finally, the Apex Court held that classification of LCD must be in consonance with the headings in the chapter note. It determined that chapter 90 which mentions ‘LCD panels’ was more specific compared to the generic heading under HSN 8529 as suggested by the tax authorities. The court applied the general rules of interpretation which mention that headings that are specifically provided should prevail over the general headings.

This is a welcome ruling and puts to rest a significant controversy on classification of LCD which is an important import product for the IT and electronics industry in India.

Foreign Trade Policy 2023

The Ministry of Commerce & Industry announced the much-awaited FTP 2023.[117] The previous FTP was for the period 2015-20 and was extended until March 2023 due to the Covid-19 pandemic. Unlike the previous FTPs which have a set tenure of 5 years, FTP 2023 is open-ended with no sunset clause. This will allow making

revisions and changes on a need basis and to adapt to changing economic and trade conditions. FTP 2023 rests on the following four objectives:

1. Shifting from the traditional incentive based to a tax remission-based regime. FTP 2023 will focus on reducing the tax burden on exporters and not just provide financial incentives, which is also an area of concern under the World Trade Organization (**WTO**) norms.

2. Enhancing collaboration between States, Districts and Exporters to boost exports and increase competitiveness of Indian goods and services in global trade.

3. Reducing transaction costs, introducing e-initiatives and enhancing ease of doing business quotient.

4. Focusing on emerging areas such as e-commerce exports, developing districts as export hubs and streamlining the SCOMET policy.

FTP 2023 introduced several initiatives such as the one-time amnesty scheme for closure of pending authorizations, 'Towns of Export Excellence' scheme, enabling merchant trading from India, streamlining the Advance Authorization and EPCG schemes. It also emphasizes the use of IT systems with risk management systems for various approvals and encourages paperless and online processes.

WTO ruling on increased import duties on ICT Products

On 02 April 2019, the European Union (**EU**) challenged India's imposition of import duties on various Information and Communication Technology (**ICT**) products, ranging from mobile phones, integrated circuits to optical instruments. The challenge arose from the inconsistencies with certain WTO provisions. Subsequently, Chinese Taipei and Japan joined the dispute.

The complainants argued that India, as per its commitments in the General Agreement on Tariffs and Trade, 1994 (**GATT**), initially adhered to duty-free treatment for ICT imports. However, since 2014, India significantly raised import duties to as high as 20 percent, violating obligations under GATT. The WTO Panel held that this breach resulted in less favorable treatment, imposition of excess duties, and unfavorable conditions. In September 2023, both regions requested the WTO's dispute settlement body to defer adopting a ruling against India's import duties until December 2023, as bilateral talks were ongoing.

Despite efforts, the EU filed for the adoption of the panel report on 07 December 2023. India, in turn, appealed against the order on 08 December 2023 at the WTO. The appeal came after 7 months of unsuccessful negotiations for a mutually agreeable solution (**MAS**) between India and the EU. The EU, as part of the MAS, sought customs duty concessions on specific goods, which India found unacceptable.

India had increased import duties on ICT products to promote domestic manufacturing and limit cheaper imports. The potential adoption of WTO Panel's ruling could markedly affect the domestic ICT industry, potentially increasing the influx of international ICT products. Yet, the report's implementation is on hold until the conclusion of India's appeal as the WTO Appellate Body is not operational due to disagreements among member countries over member appointments. Despite the potential negative impact of the WTO ruling, there will be no immediate consequences for Indian industry, although it is necessary to keep watching this space.

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