THE BUSINESS GUIDE

NOVEMBER 2020 • INDIA • VIETNAM

business environment • outlook • statutory framework • policies

INCHAM INTRODUCTION

Indian Business Chamber in Vietnam (INCHAM) is a Non-Profit organization, licensed and established in January 1999 with the objective to strengthen ties of Indian Businesses with the Vietnamese authorities for promoting 'Economic and Business' relations between Vietnam and India and also to be the focal point of the Indian Community in Vietnam. In its existence, the Chamber has moved decisively on each of these fronts. Incham was established in Ho Chi Minh City (formerly known as Saigon) which is the commercial capital of Vietnam. Incham established its Chapter in the capital city of Hanoi in October 1999 to further widen and strengthen its presence in Vietnam. The chamber primarily endeavors to play an active role in promoting the bilateral trade between the two countries. It aims to create a forum that allows members to assist and complement each other to establishing a smooth framework for the development of Indian business in Vietnam. Incham offers a platform to its members to promote their business interest and represent them to local authorities in time of need on a case to case basis.

INCHAM is an active and dynamic foreign business association, with over 400 members in various fields to help you get involved, stay informed and connected. Moreover, this is also a perfect platform for networking, information-sharing, advocacy and problems solving to improve the business environment and expand business.

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CHAPTER 01

The Introduction

As the world's largest democracy, with a population of over 1.3 billion people occupying the world's seventh-largest country (by land area and in terms of its economy), India continues to be one of the world's most attractive investment destinations.

A former British colony, India followed a protectionist/mixed economy path from its independence in 1947 until 1991, when it opened up the economy for foreign investment. The focus on liberalisation, privatisation and globalisation after 1991 has dramatically transformed the country and integrated it with the global economy. Close to 30 years after liberalisation, there is a significant increase in the contribution of FDI to India's GDP thanks to a liberal foreign investment policy.

The key factors contributing to the 'India buzz' are:

- a young demographic profile of the country (over 50 per cent of the population are in the working age group of 15–59 years) forming a large pool of skilled manpower conversant in English;

- a stable political environment and responsive administrative set up supported by a well-established judiciary and a legal system based on common law;

- a labour force of nearly 530 million and low labour costs; and

- robust banking and financial institutions.

India's top five trading partners in 2019–2020 continue to be the US, China, the United Arab Emirates (UAE), Saudi Arabia and Hong Kong. China is the largest exporter to India followed by the US, UAE and Saudi Arabia. In recent times, Hong Kong, South Korea and Singapore have also emerged as significant exporters to India. India's largest export destination country continued to be the US in 2019–2020, followed by the UAE, China and Hong Kong. Major imports include crude petroleum, gold, petroleum products and coal, in addition to electronics, which recorded one of the fastest growth rates in 2019–2020.

In the World Bank's Ease of Doing Business rankings, India ranked 63rd in 2019, jumping up approximately 14 places from the previous year.

Despite global trade slowing down and protectionist winds blowing across countries, India, one of the Group of Twenty (G20) major economies, continues to remain an attractive market.

CHAPTER 02

The Business Environment

GOVERNMENT STRUCTURE

India is a federal union with 28 states and eight union territories. At the union level there is a bicameral legislature comprising the Lok Sabha (House of the People) and the Rajya Sabha (Council of States), jointly comprising the Parliament. At the state level certain states have a bicameral legislature, that is, a legislative assembly and a legislative council, while others have a unicameral legislature, that is, only a legislative assembly.

Schedule VII of the Constitution of India comprises three lists: the union list, state list and concurrent list. The union list comprises all the matters that the Parliament has exclusive power to legislate, including, inter alia, items such as defence, regulating corporations, banking, foreign exchange and corporation tax. The state list comprises the matters that the state legislatures have exclusive power to legislate on, including, inter alia, trade and commerce, agricultural taxes, land and building taxes, stamp duty and local governmental issues. The concurrent list comprises matters that can be legislated by Parliament or the state legislatures (Parliament has primacy), including, inter alia, contracts, bankruptcy and insolvency, arbitration, employment and labour, factories and electricity. Moreover, Parliament has the residuary power to legislate on any matter that has not been covered by the state list or concurrent list. This includes foreign investment and residuary taxing power.

LEGAL SYSTEM

In India the primary sources of law are the Constitution of India, codified laws and customary law. In addition, concerned government departments make rules for various laws and also pass notifications, circulars and orders. The state legislatures and the state government bodies fulfill these roles for those items under the Constitution wherein the residuary law-making power is with the states.

Further, international treaties and judicial decisions interpreting the law are important secondary sources of law. The courts in India rely on the doctrine of *stare decisis* (adherence to judicial precedents), and a judgment by a higher court has binding value on a lower court. India follows a common law system of adjudication and judicial decisions in India rely on common law doctrines, especially in contract law. The Supreme Court in New Delhi is the apex court in India, followed by the State High Courts. The lowest level of the judiciary comprises various district courts and small causes courts located throughout the country. Additionally, specialised tribunals, like the Income Tax Appellate Tribunal (tax cases) and the National Company Law Tribunal (NCLT) (which replaced the Company Law Board for company law disputes with effect from 1 June 2016), have been set up to decide

matters on particular subjects. Depending on the applicable legal provision, appeals from such tribunals may lie either with an appellate body, the High Court or the Supreme Court.

Most foreign judgments are not enforceable in India unless a fresh suit is filed upon the judgment in an Indian court. However, India recognises decrees passed by superior courts of certain countries, and decrees passed by superior courts in those countries are enforceable, provided that such decrees are not against India's public policy.

CHAPTER 03

Business and Corporate Structure

COMMON FORMS OF LEGAL ENTITIES

A company continues to be the most common form of legal entity for business in India due to the ease of obtaining third-party capital and the general security provided by elaborate laws governing companies. Limited liability partnerships have also evolved as a preferred form for partnerships due to their flexibility in governance and certain tax advantages.

A private company enjoys a certain degree of flexibility, particularly concerning capital structure, governance and related party transactions, and the norms are stricter for a public or public listed company. Further, the government has created relaxed norms for one-person companies, small companies and startup companies, as compared to rules applicable to private companies or public companies, to promote new or smaller businesses.

INCORPORATION PROCESS

Incorporation timelines and processes have become more efficient in the last few years. Presently, it takes about two to three weeks after the submission of an incorporation form and related documents to incorporate a company. The process is relatively inexpensive and has no minimum capitalisation requirement. Very recently, the incorporation form (SPICe+ form) was revised. Now, in addition to incorporating the company, opening a bank account and obtaining certain regular registrations has been made possible as part of one form.

The SPICe+ form now acts as a single window application for:

- reservation and registration of the name of the new company;

- allotment of the Director Identification Number (DIN) for the first directors (for a maximum of three directors); if the proposed directors do not have a DIN, an application for obtaining a DIN will be included in the SPICe+ form;

- incorporation of the company;

- obtaining mandatory registrations with the Employees' Provident Fund Organisation and the Employees State Insurance Corporation;

- obtaining a mandatory Permanent Account Number and Tax Deduction and Collection Account Number;

- obtaining a mandatory bank account number; and

- obtaining a Goods and Service Tax Identification Number (if applied for).

This is expected not just to reduce timelines but also avoid coordination with various authorities and duplication of documentation.

For foreign shareholders incorporating a company in India, one thing to watch out for is the requirement that at least one director is resident in India at all times, and in particular, at the time of incorporation, at least one director, who is the authorised representative executing documents for company incorporation, should be an Indian citizen and resident.

ONGOING REPORTING AND DISCLOSURE OBLIGATIONS

In the current business environment, the government is faced with twin objectives, which at times are divergent and therefore require the two to be balanced. These are: (1) to make it easy to do business in India; and (2) to increase vigilance and disclosure to prevent dubious or questionable operators. This has resulted in some instances of increased compliance requirements, particularly from a disclosure and liability perspective. Further, most disclosures have been shifted to online submissions, the latest being foreign investment filings. The key corporate compliance relates mainly to the below requirements.

Requirements under the Companies Act

Under the Companies Act, the reporting/disclosure requirements can be broadly categorised as:

periodic/mandatory filings, which include the filing of annual returns and other financial statements, disclosure of interest by directors and appointment of auditors; and (2) event-based filings, which include an intimation of the alteration of share capital, issuance of securities, creation and satisfaction of charges, and change in directors and key managerial personnel (KMP). The relevant filings are required to be made with the Registrar of Companies (ROC) within the prescribed timelines, and non-compliance may lead to fines or other penal implications.

Requirements under Securities and Exchange Board of India regulations

For listed companies, the Securities and Exchange Board of India (SEBI) has prescribed:

disclosures for a limited audit of quarterly financial statements and annual audit of financial statements; (2) time-bound disclosures for material information; and (3) any other material information that may have an impact on stock prices. The disclosures also differ based on the kind of debt or equity securities listed. The standards of disclosures are, in a way, subject to regular review by SEBI and often result in amendments in disclosure requirements.

Requirements under foreign exchange regulations

Any foreign investment in an Indian company (whether such an investment is made by a subscription of shares or transfer/acquisition of shares) is required to be reported to the Reserve Bank of India (RBI) in the prescribed form. The onus of such a filing is on the Indian entity receiving the foreign investment (in the case of an issue of shares) and on the resident transferee/transferor, as the case may be (in the case of a transfer of shares). In addition to these one-time filing requirements, any company that has received foreign investment is required to make mandatory annual filings on foreign investment it has received.

Other developments

Disclosure of significant beneficial ownership

With the intention of identifying the ultimate beneficiary shareholders, the Ministry of Corporate Affairs (MCA) in 2018 notified the Companies (Significant Beneficial Owners) Rules 2018 (the 'SBO Rules') to identify individuals/entities that have significant control over the affairs of a company. As per the SBO Rules, every individual who is acting alone or together, or through one or more persons or trust, holds directly or indirectly not less than ten per cent of the shares/voting rights in an Indian company or has the right to receive or participate in at least ten per cent of the total distributable dividend or any other distribution or has the right to exercise significant influence or control (directly or indirectly) over an Indian company is deemed a 'significant beneficial owner'. Such persons are required to make a declaration to the concerned investee company, specifying the nature of their interest and other particulars in the prescribed form within 30 days of acquiring significant beneficial ownership. The onus is also on the investee companies to take all necessary steps to identify if there is any individual who is a significant beneficial owner and cause such an individual to make the relevant declarations. The investee company is also required to notify such significant

beneficial ownership to the ROC on the prescribed form. However, there are concerns raised by both domestic and foreign holders on the level of disclosures required under the SBO Rules.

Recent disclosure requirements for listed companies

With a view to enhancing the accountability of listed companies from an environmental, social and governance perspective, which has been SEBI's focus in recent years, SEBI has made it mandatory for the top 1,000 listed entities based on market capitalisation (the earlier requirement was limited only to the top 500 companies) to include a business responsibility report in their annual report describing the initiatives taken by them in these sectors. There has also been a tightening of disclosure norms around financial defaults involving listed companies. SEBI now requires:

disclosure of any default in payment of interest/installment obligations on loans by such a company, where such a default continues beyond 30 days; and (2) disclosure by the promoter of the listed company of detailed reasons for creating an encumbrance on its shareholding, if the combined encumbrance by the promoter along with persons acting in concert with it equals or exceeds 50 per cent of their shareholding in the company or 20 per cent of the total share capital of the company.

MANAGEMENT STRUCTURES

With the focus on having a robust corporate governance framework and ensuring transparency and accountability, the law provides for having independent directors, and the role of board committees and KMP, with an emphasis on board-managed companies.

Unlisted public companies with significant capital, turnover or outstanding loans are required to have at least two independent directors and one women director on the board of directors. For listed companies, the requirement is even higher, with up to half of the board required to be independent directors if it has an executive officer as the chair of the board. To further scrutinise the decisions, there are requirements for having mandatory committees of the board of directors, with the audit committee and nomination and remuneration committee being the key ones, with a defined scope of reference and requirement of independent directors on such committees. In addition, the Companies Act provides for designations of KMP for a company, which include chief executive officer (CEO), managing director, chief financial officer, company secretary, whole time directors and other officers not more than one level below the directors who are in the employment of the company the entire time and designated as a KMP by the board (typically other CEOs and CFOs). Such KMPs performs important designated management roles, and typically head respective teams in a company and answer directly to the board of directors. All listed companies and certain classes of public unlisted companies with a prescribed capital threshold are required to mandatorily appoint certain KMPs. Private companies and public companies falling below the stated financial thresholds are not subject to these governance requirements and enjoy flexibility.

Other than legal requirements, one can observe a host of business and aspirational considerations in determining management structures. Investors or joint venture parties rely on a combination of having board representation and affirmative voting rights at shareholder level. Investors who are seeking these rights as investor protection tend to rely more on affirmative voting rights than a board seat. With the scaling of a business, particularly when raising substantial amounts of private capital and for companies going for listing, it is preferable to have professional senior management functioning under the board of directors. Founder’s relevance, business continuity principles and succession planning are other relevant considerations.

DIRECTOR, OFFICER AND SHAREHOLDER LIABILITY

Indian law, based on common law principles, places a fiduciary duty on directors of a company to maintain the interests of the company and its stakeholders. In particular, the Companies Act codifies certain key duties of directors, including a duty to exercise their responsibilities with due and reasonable care, skill and diligence, and exercise independent judgement, as well as a duty not to become involved in a situation in which they may have a direct or indirect interest that conflicts with the interests of the company.

Where the Companies Act provides for offences by a company or an officer of the company who is in default, the executive directors, KMP or any other officer of the company who is charged with the concerned responsibility, or any other director who is aware of the contraventions or participated in the proceedings without objecting to the same, can be held liable. However, the Companies Act specifically provides for a safe harbour for independent directors or non-executive directors for any contravention by the company if it has occurred without their knowledge, consent or connivance, or where they have acted diligently. Similar principles are incorporated in other legislation, where the person in charge of and responsible to the company for the conduct of its business at the time of the commission of the offence, as well as other officers who are responsible for or aware of contraventions, may be held liable.

Indian companies generally do not ascribe liability on shareholders for the actions of a company, except in very limited circumstances where the piercing of the corporate veil is permitted. These are typically in cases involving fraud, evasion of tax or any other welfare benefits; setting up of a shell company as a subsidiary that has no independent existence; or if it is required in the public interest or to uphold public policy.

Recent developments

Amendments to the Companies Act

The MCA recently introduced amendments to the Companies Act whereby certain offences (e.g. non-compliance with the filing requirement of annual returns/financials of a company and non-compliance with the requirements of the appointment of directors/number of directorships), which were earlier punishable with a fine and/or imprisonment, are now liable for a fine only. This implies that, where the fine amount was previously determined pursuant to adjudication by relevant company courts, the authorities (MCA/ROC) can now directly impose a fine, while imprisonment has been dropped. There are other proposed amendments pending before the Indian Parliament to decriminalise certain offences (e.g., of provisions

under the Companies Act relating to the transfer of securities, registration of charges/encumbrances created on assets and significant beneficial ownership) and reduce the amounts of penalties that may be imposed. These steps are being brought in to reduce the disproportionate exposure of directors/management and increase business confidence.

Penal proceedings

In view of recent insolvencies or financial distress, particularly in the financial sector, the government and law enforcement agencies (enforcement directorate and serious fraud investigation office) have, on several occasions, initiated penal proceedings against delinquent senior management. This has resulted in some clarity, streamlining and capacity building in the enforcement process, and has had an impact on overall enforcement risk analysis.

Insolvency and Bankruptcy Code, 2016

With the advent of the Insolvency and Bankruptcy Code, 2016 (IBC), investigations concerning financing irregularities are initiated as a matter of process, and are thereafter dealt with under relevant provisions of criminal law. To assist in the acquisition of insolvent companies, the IBC provides for a favourable concession that upon the change of control of the insolvent company, the liability of such a company for events prior to commencement of the corporate insolvency process ceases. However, any person who has been designated as ‘officer-in-default’ or was in any manner in charge of or responsible to the company for the conduct of its business shall continue to be liable.

CHAPTER 04

Takeovers (friendly M&A)

Any investment in a listed company, including a transaction involving acquisition of control, is governed and regulated by the SEBI. The SEBI seeks to protect the interests of investors in securities and to regulate the securities market in India.

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the 'Takeover Regulations') regulate, inter alia, takeovers of listed Indian companies and open offer obligations. The Takeover Regulations seek to protect the interests of public shareholders and provide a transparent and equitable framework for the acquirer to acquire shares and public shareholders to exit the target company. The Takeover Regulations apply to any direct or indirect acquisition of shares, voting rights or control in a listed company. The Takeover Regulations provide for mandatory open offers, voluntary open offers and competing offers.

A mandatory open offer for 26 per cent of the shares of the target company is triggered in any acquisition resulting in the acquirer: (1) becoming entitled to 25 per cent of the voting rights in the target company; (2) already having acquired 25 per cent of the voting rights, acquiring a further five per cent of the shares or voting rights (creeping acquisition limit); (3) acquiring control of the target company; or (4) indirectly acquiring control over a holding company that effectively satisfies the foregoing thresholds. The creeping acquisition limit has been increased to ten per cent for the financial year 2020-21, in case of subscriptions by promoters.

Further, the Takeover Regulations lay down the parameters for determining the offer price and the process of understanding the open offer. The floor price of the open offer for an acquirer who has not bought any shares of the company previously, is higher than the negotiated price of volume weighted average market price for the previous 60 days from the trigger date (in case of frequently traded shares). To undertake an open offer, the acquirer is required to appoint a merchant banker, open an escrow account, prepare a draft letter of offer and seek in-principle approval from the SEBI, and advertise the schedule of activities in the open offer process through newspapers. The process starts with issuance of a public announcement in a prescribed format, followed by publication of a detailed public statement in the newspapers, and filing of the draft letter of offer with the SEBI. The tendering is initiated after dispatch of the letter of offer to the shareholders post-receipt of comments from the SEBI. In addition, the Takeover Regulations also provide for certain acquisitions that are exempt from the open offer obligation. These include, transfer between promoters, acquisitions through schemes of arrangement and the SEBI has recently issued an exemption for acquisition (through preferential allotment) of companies having stressed assets. The SEBI also has the power to give case-by-case exemptions. Further, there are certain reporting requirements under the Takeover Regulations, including, inter alia:

- for every acquirer, who by itself and through persons acting in concert acquires five per cent shares of the target listed company, to disclose the acquisition within two working days

to the target listed company and all stock exchanges at which shares of the target listed company are listed;

- for every acquirer, who by itself and through persons acting in consent has already acquired five per cent shares of the target listed company, to disclose the acquisition of any further acquisitions amounting to two per cent of the shares of the target listed company; this disclosure must be made within two working days to the target listed company and all stock exchanges at which shares of the target listed company are listed;

- for every acquirer, who by itself and through persons acting in consent holds at least 25 per cent of the voting rights of the target listed company, to disclose its aggregate shareholding at the end of every financial year; and

- for the promoters of every listed company to disclose the details of shares of the listed company that have been encumbered, within seven days from the creation, invocation or release of

- the encumbrance to the listed company and all stock exchanges at which shares of the listed company are listed.

The SEBI has powers, inter alia, to investigate non-compliance; search and seize books, records, documents and registers; levy monetary penalties in specific instances; and direct the target company not to give effect to any transfer of shares acquired in violation of the Takeover Regulations.

In case of a primary investment into a listed company by preferential issuance of shares, in addition to the compliance for preferential allotment prescribed under the Companies Act, 2013, every listed company must comply with the requirements under Chapter V of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018, inter alia, with respect to the eligibility criteria for the allottee, the pricing requirements and the lock-in period requirements.

In respect of mergers and acquisitions through stock transactions, the Companies Act, inter alia, provides for schemes of mergers or amalgamations ('Schemes') which require approval of the NCLT. The Companies Act also prescribes the steps to be taken by the NCLT for approving the Scheme. Once the NCLT passes an order approving the Scheme, the company must submit that order to the jurisdictional ROC. For regulating mergers and amalgamations of listed companies through Schemes in India, the SEBI has issued a circular dated 10 March 2017 on Schemes of Arrangement by Listed Entities (the 'SEBI Circular') to be read with provisions of the Companies Act. The SEBI Circular require inter alia (1) obtaining a no-objection certificate(s) of the relevant stock exchanges to the draft Scheme prior to submitting

the Scheme to the NCLT; (2) a valuation report, if required; and (3) additional shareholders' approval for the certain Scheme.

CHAPTER 05

Foreign Investment

FOREIGN INVESTMENT CONTROL/RESTRICTION

Foreign equity investment into an Indian company is regulated by the FDI policy issued by the government and exchange regulations issued by the RBI. The FDI Policy places limits for each sector, which is further categorised on the basis of the permissibility under the automatic route or the approval route. Investments falling under the automatic route can be made without the government's prior approval, whereas for investments under the approval route, prior approval of the relevant governmental/regulatory authority is required.

In India investments up to 100 per cent can be made under the automatic route in a majority of sectors, such as airports, assets reconstructions, cash and carry wholesale trading/wholesale trading, chemicals, coal and ignite, e-commerce (business-to-business), petroleum and natural gas, renewable energy, single brand product retail trading, power generation and hospitality.

In brownfield industries engaged in pharmaceuticals, healthcare or biotechnology, investments up to 74 per cent are permitted under the automatic route, while such investments are limited to up to 49 per cent in telecoms, defence and private sector banking. For investments beyond these limits, and in sectors such as multi-brand retail or print media, prior approval from the government is required. It is in such sectors that entering the Indian market by way of collaborations and joint ventures becomes a legal necessity.

While the government's approval is required only in limited cases, the process of seeking such approval has been significantly simplified by the setting-up of the foreign investment facilitation portal, which is a single point interface with the government that facilitates FDI approvals based on standard operating procedures.

Foreign investment is entirely prohibited in certain sectors. These include atomic energy, manufacturing of tobacco/tobacco products, chit funds, gambling, lottery, real estate business

(except development of townships, construction of residential/commercial premises, roads or bridges, educational institutions, recreational facilities, city and regional level infrastructure, and real estate broking services).

The sector-wise categorisation is, in some cases, also supplemented with investment or performance-linked conditions. For example, foreign investments made for development of townships or real estate broking services are subject to a lock-in period of three years. Similarly, one of the conditions for investment in the cash and carry wholesale trading sector is that wholesale trading to companies that belong to the same group should be limited to 25 per cent of the total turnover of the wholesale venture with the group of companies taken together. Despite such conditions, India is an attractive destination for investors.

Tapping into the Indian market

Foreign investors can invest in equity or hybrid instruments that are compulsorily convertible into equity, such as preference shares, debentures and share warrants.

Investors looking to invest largely in listed Indian securities, government bonds, corporate bonds and units issued by investment vehicles can be registered with SEBI as foreign portfolio investors (FPIs). SEBI has put in place a consolidated framework setting out investment conditions and restrictions, general ongoing obligations, responsibilities and governance rules for FPIs.

There are individual and aggregate shareholding limits applicable to investments by FPIs in an Indian company. Investment by an FPI or its investor group is subject to a cap of ten per cent of the share capital or the value of any series of other instruments issued by the Indian company, as the case may be. Any investment above this threshold would result in the entire investment made by the FPI or the investor group being reclassified as FDI.

In addition to investing under the FDI and FPI regime, foreign investors can be registered with SEBI as a foreign venture capital investor (FVCI). However, FVCI's may only invest in securities issued by entities engaged in certain sectors, which include infrastructure (power generation and transmission), biotechnology, information technology-related hardware and software development, nanotechnology, seed R&D, R&D for new chemicals in the pharmaceuticals sector, dairy industry, poultry industry, production of bio-fuels and certain categories of hotel-cum-convention centres. In such permissible sectors, FVCI can invest by way of optionally convertible instruments.

In the recent past, the insolvency framework of India has created a stressed assets market. As lenders are looking to resolve non-performing assets, there is huge potential for foreign investors to acquire assets that have scope for revival at an attractive value. For this, collaborations, joint ventures and even investments through asset reconstruction companies or alternate investment funds (AIFs) have become relevant.

Recent developments

With the aim to making it easy to do business in the country, the government has removed several restrictions that inhibited growth and development of various sectors. Some important amendments recently made to the FDI Policy are discussed below.

Civil aviation

FDI up to 100 per cent is now allowed under an automatic route in the civil aviation sector.

Insurance intermediaries

To enable foreign brokerage firms to venture into the Indian insurance space, 100 per cent FDI in insurance intermediaries has been allowed. These intermediaries include insurance brokers, reinsurance brokers, insurance consultants, corporate agents, third-party administrators, surveyors and loss assessors.

As per the new policy, an insurance intermediary with a majority shareholding of foreign investors should have an Indian resident as its chair, CEO, principal officer or managing director. Such intermediaries are also required to acquire the prior permission of the authority concerned before repatriating dividends.

Single-brand retail trading

Previously, 30 per cent of the value of goods had to be procured from India if the single-brand retail trading entity had more than 51 per cent FDI. Further, as regards local sourcing requirement, the same could be met as an average during the first five years, and thereafter annually towards its India operations.

The new policy eases local sourcing norms and allows all procurements made from India by the single-brand retail trading entity for that single brand to be counted towards local sourcing, irrespective of whether the goods procured are sold in India or exported. Further, the cap of considering exports for five years has been removed to give an impetus to exports.

Until now, single-brand retail trading entities had to operate through bricks-and-mortar stores before retail trading their brand through e-commerce. To remove this artificial restriction, retail trading through online trade prior to opening physical stores has been allowed subject to the condition that such stores are opened within two years.

Mining

The government had permitted 100 per cent FDI under the automatic route for entities engaged in the sale of coal and coal mining activities. However, the relevant Indian laws imposed certain end-use restrictions on minerals extracted from a significant number of coal mines. In order to remedy this policy mismatch and provide operational flexibility, these domestic laws have been amended recently.

In the wake of the economic and financial crisis caused by the Covid-19 pandemic, India has revised its FDI policy, imposing stricter norms on foreign investments in Indian companies from an investor based out of bordering countries. Under the new rules, any foreign investment by a non-resident based out of a country that shares a land border with India will require the prior approval of the government irrespective of the sector into which the investment is being made. India shares a land border with Afghanistan (Restricted Country), Bangladesh, Bhutan, China, Myanmar, Nepal and Pakistan. This investment approval requirement also extends to: (1) those investments, where the beneficial owner (corporate or individual) is situated in the jurisdiction of a Restricted Country; or a direct or indirect transfer of ownership of any existing or future investment, which results in the beneficial owner being from a Restricted Country.

FOREIGN EXCHANGE CONTROL

Pricing guidelines

One of the primary foreign exchange control norms governing foreign investments is the pricing guideline. Irrespective of the route or form of investment, pricing guidelines have to be abided by at the time of investment, as well as at the time of repatriation. Any investment coming into India must not be at a price lower than the fair market value. Similarly, any exit by a foreign investor should not be at a price higher than the fair market value. However, this pricing rule does not apply in the case of the transfer of investment between two foreign entities.

In the case of convertible instruments, the price or the formula pursuant to which the conversion would occur needs to be determined upfront; that is, at the time of issuing such instruments. This price/conversion formula cannot be lower than the prevailing fair market value.

Repatriation

All foreign investments are repatriable; although, in some cases, this may be subject to a certain lock-in period. For example, in construction-development projects that include the development of townships or construction of residential/commercial premises, a foreign investor's exit and repatriation of funds is subject to the completion of a lock-in period of three years. In any event, such lock-ins does not prevent a buy-back or dividend payout to the foreign investor, as long as applicable taxes are paid.

Reporting requirements

Reporting requirements in the case of foreign investments are fairly straightforward. In the case of an acquisition, the Indian company receiving foreign investment is required to report the same to the RBI in e-Form FC-TRS within 30 days. Similarly, in the case of the issuance of securities, a report in e-Form FC-GPR is required to be filed with the RBI within 30 days from the date of issue of shares. In addition to the above, the Indian company is required to report its foreign assets and liabilities in e-Form FLA on an annual basis.

The authorised dealer bank of the Indian company is authorised to process these forms, which further simplifies this process and prevents a bottleneck at the RBI.

KEY TAX INCENTIVES

Key tax incentives that are available to foreign investors under the tax regime are summarised below.

Exemption for the specified income of sovereign wealth funds

The Finance Act, 2020 provides for a 100 per cent tax exemption in respect of interest, dividend and capital gains income earned by sovereign wealth funds from any investment made in infrastructure and other notified sectors in India. In order to avail the exemption, the investment must be made on or before 31 March 2024 and held for at least three years. The sovereign wealth fund is required to comply with certain specified conditions.

Abolition of dividend distribution tax

Under Indian tax laws domestic companies were required to pay dividend distribution tax (DDT) at an effective rate of 20.56 per cent on dividend payments. Such a dividend was then exempt in the hands of shareholders. The Finance Act, 2020 has abolished DDT and instead taxes dividends in the hands of shareholders. Under the DDT regime foreign investors faced difficulty in claiming credit for DDT in their home jurisdictions. Further, they could not avail concessional tax rates on dividend income as provided in India's tax treaties (which typically vary between five and 15 per cent). Accordingly, this amendment is expected to benefit foreign investors as the return on equity in Indian companies should improve.

Favourable tax regime for FPIs

Indian tax laws provide for a favourable tax regime for FPIs:

- interest income earned by FPIs from investments in government securities and rupee-denominated bonds issued by Indian companies is taxed at a concessional rate of five per cent, subject to the fulfillment of certain conditions;

- dividend income earned by FPIs is taxable at the rate of 20 per cent; post the abolition of DDT, FPIs would be eligible to avail concessional tax rates on dividend income as provided in India's tax treaty with their home jurisdiction;

- long-term capital gains income earned by FPIs is taxable at the rate of ten per cent; and

- capital gains income arising from the transfer of interest in specified categories of FPIs is exempt from tax in India.

Concessional tax rate of five per cent on interest income of non-FPI foreign investors

Foreign investors (other than FPIs) are also entitled to avail of a concessional tax rate of five per cent in respect of interest income, subject to the fulfillment of certain conditions. On a general basis, the interest income should relate to a foreign currency loan extended to an Indian company or specified foreign currency/rupee denominated bonds issued by an Indian company. The rate of interest should not exceed the all-in-cost ceilings specified by the RBI under external commercial borrowings (ECB) regulations.

Comprehensive treaty network

India has a wide network of tax treaties. These treaties protect the income of foreign investors from double taxation and generally provide for concessional tax rates in respect of interest income and dividend income. Certain tax treaties also exempt capital gains income of foreign investors from Indian tax, subject to the fulfillment of certain conditions. Additionally, these treaties protect foreign investors from discriminatory taxation in India and contain measures for the initiation of a mutual agreement procedure between India and the home jurisdiction of the foreign investor in certain circumstances (eg, for the elimination of double taxation or for issues relating to the interpretation of the tax treaty).

Availability of concessional tax rates

Entities set up by foreign investors to undertake business activities in India may be entitled to avail of concessional tax rates/tax holidays provided under Indian tax laws. The tax laws were recently amended to allow new domestic manufacturing companies (set up and registered on or after 1 October 2019 and commencing manufacturing on or before 31 March 2023) to opt for a concessional tax rate of 15 per cent. Similarly, existing domestic companies have been allowed to opt for a concessional tax rate of 22 per cent. To avail the concessional tax rates, such companies are required to give up specified deductions, such as additional depreciation of 20 per cent on new plants and machinery available to manufacturing companies/companies engaged in the generation/ distribution of power.

Companies not opting for concessional rates are entitled to avail of certain deductions/exemptions, for instance, additional depreciation as referred to above; deduction for investment in new plants and machinery in notified states; certain kinds of scientific

research-related expenditure; expenditure on specified business; and expenditure on agricultural extension and skill development projects.

CHAPTER 06

Restructuring and Insolvency

INSOLVENCY AND BANKRUPTCY CODE

In late 2016, the Indian corporate insolvency regime was repealed and replaced by the IBC, which provided for certain novel features such as a creditor-in-possession model, time-bound insolvency and mandatory reference to liquidation upon failure of insolvency resolution. The enactment of the new insolvency law was primarily driven by rising 'non-performing assets' in the Indian banking system, which had turned into a crisis.

A stressed company (the 'corporate debtor') may be placed under the corporate insolvency process prescribed under the IBC through an application filed by any creditor or by the corporate debtor itself in case of a default of INR 100,000 (approximately $1,300) or more. Once the insolvency application is admitted, an 'interim resolution professional' (akin to an administrator) is appointed and takes over the management of the corporate debtor; its board of directors is immediately suspended. The interim resolution professional issue a public notice and invites claims from the creditors of the corporate debtor. Once the claims are received, the interim resolution professional verifies and admits the claims, and constitutes the 'committee of creditors' of the corporate debtor. The committee of creditors, usually comprising the financial creditors (discussed below), oversees the key decisions of the interim resolution professional/resolution professional, including the process to invite bidders (known as resolution applicants) to place their bids (resolution plans) for the corporate debtor.

The IBC has divided creditors into two broad categories: (1) financial creditors, which include traditional lenders lending for time value of money; and (2) operational creditors, which include trade creditors, workers and government. While drafting the IBC, law-makers were of the view that the committee of creditors must consist of members with the capability to assess the viability and modify existing liabilities in negotiations. Typically, operational creditors are not in a position to do this. Hence, the law-makers felt that the committee of creditors should be restricted to financial creditors[1]. In view of this rationale, the Supreme Court has upheld the differential treatment accorded to financial creditors and operational creditors under the IBC[2].

The differential treatment led to the National Company Law Appellate Tribunal, the appellate authority under IBC, to hold that operational creditors should be provided equitable treatment; that is, they should be required to take the same percentage haircut as the financial creditors under a resolution plan providing for the settlement of all creditor claims[3]. However, this principle was overturned by the Supreme Court, which allowed for differential treatment for

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[1] The *Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design*, p 84.

[2] *Swiss Ribbons Private Limited v Union of India* (MANU/SC/0079/2019).

[3] *Standard Chartered Bank v Satish Kumar Gupta, RP of Essar Steel Ltd & Ors* (Company Appeal (AT) (Ins) No 242 of 2019; Order dated 4 July 2019).

different creditor classes and held that, ultimately, the wisdom of the committee of creditors must prevail[4].

As aforementioned, the purpose of the corporate insolvency process is insolvency resolution of the corporate debtor through a resolution plan provided by a resolution applicant. The resolution plan must provide for the corporate debtor as a going concern. This 'going concern' condition has restricted transaction structures that may be employed by bidders and compels them to take on the corporate debtor's liabilities. This has naturally raised the question of the treatment of contingent liability under the resolution plan. The IBC requires creditors to file their claims with the interim resolution professional, but does not stipulate what happens to claims that are not filed with the interim resolution professional. The IBC further requires that claims be filed as of the 'insolvency commencement date'. Accordingly, it is (or was) not clear what should be done in respect of claims that may not be crystallised as of the insolvency commencement date. The resolution applicant requires a 'fresh slate' or a complete settlement of all such claims so as to be sure that the asset bought by it will be able to be revived and will not be subject to antecedent claims, even after coming out of insolvency. This issue was analysed by the Supreme Court in the case of the *Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta*[5], where the Supreme Court agreed that the resolution applicant requires a fresh slate and therefore must know what payment is required. Accordingly, the resolution applicant must ascribe a value to contingent claims as well and admit the same so that they may be dealt with under the resolution plan.

Another unique requirement is section 29A, which prescribes certain eligibility criteria for prospective resolution applicants. These eligibility criteria are required to be met by the resolution applicant, persons acting jointly or in concert with the resolution applicant, 'connected persons' of the resolution applicant (which includes its promoters, management and their holding company, subsidiaries and related parties). Certain limited carve-outs are available for financial entities, the acquirer of a company under insolvency and so on. The eligibility criteria include not being an undischarged insolvency, not having or controlling a company that has an account declared a non-performing asset for more than one year, not being convicted of certain specified offences, not being prohibited from accessing the securities market and not being disqualified to act as a director. Section 29A has been a leading cause for litigation in IBC cases, and in many instances has led to protracted litigation leading to delay in insolvency resolution. The Supreme Court has attempted to rationalise the use of section 29A by: (1) streamlining its usage by bidders to maintain the time-bound nature of IBC

[4] *Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta* (Civil Appeal No 8766-77 of 2019; Order dated 15 November 2019).

[5] Order dated 15 November 2019 in Civil Appeal No 8766-77 of 2019.

transactions[6]; and (2) restricting the scope of 'related party' and 'relative' to parties connected with the business activity of the resolution applicant[7]. However, there is still ambiguity regarding the scope of section 29A due to its broad language.

The IBC was amended in August 2018 to provide for the withdrawal of corporate insolvency proceedings with the consent of 90 per cent of the financial creditors. The regulator stipulated that such a withdrawal may only occur prior to the issuance of an invitation to prospective bidders. However, subsequently, this timeline has also been held to be directory, and the withdrawal of IBC proceedings was recently allowed when a resolution plan approved by the committee of creditors was pending the approval of the adjudicating authority[8].

There are numerous other aspects of the IBC from the perspective of various stakeholders (e.g., the financial creditors, operational creditors, resolution applicants and erstwhile directors), which present their own intricacies.

[6] *Arcelor Mittal India Private Limited v Satish Kumar Gupta and Ors*; Supreme Court Order dated 4 October 2018.

[7] *Swiss Ribbons Private Limited v Union of India* (MANU/SC/0079/2019).

[8] *Satyanarayan Malu v SBM Paper Mills Ltd* (MA 1396/2018,827/2018, 1142/2018 and 828/2018 in CP (IB)-1362(MB)/2017; Order dated 20 December 2018).

PRUDENTIAL FRAMEWORK FOR RESOLUTION OF STRESSED ASSETS

The regime for pre-IBC debt restructuring and resolution has also undergone a material change in recent times. Under the power granted to the RBI at the same time as the enactment of the IBC, the RBI issued a circular dated 12 February 2018 (the '12 Feb Circular') laying down a radically new framework for stressed assets resolution, and repealing all previously issued debt restructuring mechanisms, such as corporate debt restructuring, strategic debt restructuring and scheme for the sustainable structuring of stressed assets. However, the 12 Feb Circular was challenged by several industries, and, due to its features, such as mandatory reference to the IBC in the case of failure to resolve stress, ultimately to be *ultra vires* the powers granted to RBI by the legislature[9].

The RBI has now replaced the 12 Feb Circular with a new Prudential Framework for the Resolution of Stressed Assets issued pursuant to its circular dated 7 June 2019 (the '7 June Framework'). The 7 June Framework applies to banks and certain categories of financial institutions and non-banking financial institutions. Certain provisions also apply to asset reconstruction companies.

The 7 June Framework has attempted to rectify a number of pitfalls of the 12 Feb Circular, such as a lower consent threshold for approving a resolution plan and no mandatory reference to the IBC. The framework also provides for the mandatory execution of an inter-creditor agreement between all creditors of a debtor upon default in order to review the situation and arrive at a future course of action (whether it is resolution or recovery).

The framework provides for various means of implementing a resolution plan involving a change in ownership, restructuring, one-time settlement and so on. In this regard, it is pertinent to note that provisional norms may make it unattractive for lenders to approve a resolution plan that involves the continuation of the same promoter. However, in case of a resolution plan to qualify for 'change in ownership', the new acquirer must not be disqualified under section 29A of IBC nor be a person from the existing promoter group.

The framework also provides for measures such as increased provisioning in the case of failure to resolve stress within the stipulated timeline, the prudential norms or the pricing norms for the issuance of securities as part of the resolution plan.

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[9] *Dharani Sugars and Chemicals Limited v Union of India & Others* (Transferred Case (Civil) No 66 of 2018 in Transfer Petition (Civil) No 1399 of 2018; Order dated 2 April 2019).

All in all, the 7 June Framework provides a holistic paradigm for resolving stressed debt without resorting to IBC proceedings and a last resort to promoters to turn their companies around. Although resolutions under the 7 June Framework do not benefit from the numerous exemptions available to IBC resolutions, significant interest has been seen in pre-IBC resolutions under the 7 June Framework due to the flexibility it affords.

CHAPTER 07

Employment, Industrial Relations, Work Health and Safety

LABOUR LAWS IN INDIA

Liberalisation has helped India to establish its identity on the world map in terms of business operations. While focusing on economic development and increasing job opportunities, it is essential to also consider the aspect of conditions of work. The increased production capacity of a nation is attributable to numerous factors, including investor-friendly policies, reduction of procedural hurdles, incentives and availability of labour. The industrial and other valuable output generated are the fruits of the efforts contributed by employees exercising their skills.

Coming from a socialist/mixed economy background, the Indian legislature has laid down a framework of labour regulations in order to ensure the social security of blue-collar employees in particular. The entities interested in doing business in India are required to abide by all the necessary compliance and directions issued under the provisions of the applicable labour laws, non-compliance with which may result in penal consequences.

Applicable labour and employment laws

Laws related to wages

Workers work to earn a livelihood for themselves in the form of salaries or wages, which are the amounts, in the form of emoluments, paid periodically to employees to compensate for their labour for the duration served. Indian legislature aims at ensuring the payment of wages to those who have expended their labour, energy and effort to contribute towards the business of their employers.

With a view to ensuring that wages are paid to workers, laws such as the Payment of Wages Act, 1936 append the responsibility of an employer to fix wage period, the time period for payment of wages, and deductions thereto in respect of their workers. In addition, laws such as the Minimum Wages Act, 1948 have been enforced to standardise minimum wages, which must be paid to skilled and unskilled workers. The law also mandates the payment of a bonus, which is 8.33 per cent of the salary or wage earned by the employee during a financial year, to the employee on the basis of production or productivity in every factory and to every other establishment where 20 or more workers are employed under the provisions of the Payment of Bonus Act, 1965.

Recently, the federal government has enacted a Code on Wages 2019, proposed to replace and consolidate the above laws. The code is expected to be notified once the minimum wages' calculations are arrived at, and the delegated legislation put in place.

Laws related to social security/statutory contributions

Owing to financial issues, workers are often faced with numerous challenges on account of the subsistence, health, education and wellbeing of themselves and their dependents.

In order to address such concerns Indian law has various provisions for social security cover to workers, such as workmen's compensation covered under the Workmen's Compensation Act, 1923 to help workers and/or their dependents in the case of accidents arising out of and in the course of employment; benefits to employees in the case of sickness, maternity and employment injury by establishments employing more than ten persons in the form of employees' state insurance covered under the Employees' State Insurance Act, 1948; provision of provident fund pension funds and a deposit linked insurance fund for employees in factories and other establishments employing 20 or more persons under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952; and gratuity, which is a reward for long service, as a statutory retiral/exit benefit to workers who have rendered continuous service of five years or more.

Working conditions, women employees and industrial relations

Several laws, such as the provisions of the Factories Act, 1948, and state-specific shops and establishment acts, lay down guidelines for adequate safety measures, working hours, leave, holidays, hygienic work environment, permissible working hours for women and so on. The Contract Labour (Regulation and Abolition) Act, 1970 was promulgated to regulate the employment of workers by contractors in establishments, while the Building and Other Constructions Workers (Regulation of Employment and Conditions of Service) Act, 1996 controls the employment and conditions of service for workers engaged in the construction of buildings and other construction workers, focusing on their safety and health. The Child Labour (Prohibition and Regulation) Act, 1986 was enacted to prohibit the engagement of children below the age of 14 in factories, mines and hazardous employment, and to regulate their conditions of work.

With the objective of promoting the equality of women in all spheres of life, including employment, and to avoid discrimination against women, there are various laws to ensure equal pay to men and women for the same work (Equal Remuneration Act, 1976); to regulate the employment of women for a certain period before and after childbirth (Maternity Benefit Act, 1961); and to protect against sexual harassment of women at the workplace (Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013).

In order to secure industrial peace and harmony, the legislature has enforced laws such as the Industrial Disputes Act, 1947, with the objective of providing a procedure for the resolution and settlement of industrial disputes by negotiation; and the Industrial Employment Standing

Order Act, 1946, with the aim of imposing a duty on employers to lay down the conditions of employment and communicate the same to workers in their employ.

Work permits

India has a complicated visa regime, which is approval-orientated.

The government issues an ‘E’ visa for foreigners seeking employment in the country. It is important to note that the individual applicant must have an employment contract directly with the Indian entity.

Categories of workers eligible for an ‘E’ visa include:

- consultants who are paid a fixed sum versus a monthly salary;

- independent consultants in highly skilled fields, such as engineering, accounting and medicine;

- individuals who provide training or knowledge transfer to an Indian company for which the company pays a fee or royalty to the employer of the individual; and

- senior management or specialists who are transferred to India for a specific project or management assignment.

Just because someone is able to work in one of these areas does not guarantee acceptance. Each applicant should also be able to prove:

- the worker is a highly skilled professional working under a contract in a technical job, managerial position or senior executive;

- the job offered to the foreign worker cannot be filled by a local worker; and

- the worker will make more than the threshold pay.

CHAPTER 08

Tax Law

TAXES APPLICABLE TO INDIVIDUALS (EMPLOYEES)

Tax rates are applicable for the financial year 2020–2021 pertaining to the period 1 April 2020 to 31 March 2021:

Total income (INR)	Tax rates (%)
Up to 250,000**	Nil
250,001 to 500,000	5
500,001 to 1,000,000	20
1,000,001 and above	30

Alternatively, on the satisfaction of certain prescribed conditions, an individual may opt to compute tax in respect of total income (without considering prescribed exemptions/deductions), as per the following rates:

Total income (INR)	Tax rates (%)
Up to 250,000**	Nil
250,001 to 500,000	5
500,001 to 750,000	10
750,001 to 1,000,000	15
1,000,001 to 1,250,000	20
1,250,001 to 1,500,000	25
1,500,001 and above	30

**For a resident individual aged 60 or above, but less than 80, the basic exemption limit is INR 300,000.

A surcharge will be applicable at the following rates:

Sl No	Total income (INR)	Surcharge (%)
1	More than 5,000,000, but less than 10,000,000	10
2	More than 10,000,000, but less than 20,000,000	15
3	More than 20,000,000, but less than 50,000,000	25
4	More than 50,000,000	37

Health and education Cess at 4% will be applicable

TAXES APPLICABLE TO BUSINESSES

Resident Indian companies (RIC) that: (1) were set up after 1 October 2019; (2) are engaged only in the business of manufacture or production of articles or things (including generation of electricity); and (3) commenced manufacturing/production before 31 March 2023 have the option to be taxed at the rate of 15 per cent, provided they do not claim specified benefits or deductions. A surcharge of ten per cent and Cess at four per cent will be applicable.

RICs that were set up after 1 March 2016 and are engaged only in the business of manufacture or production have the option to be taxed at the rate of 25 per cent, provided they do not claim any specified benefits or deductions. A surcharge will be applicable at the following rates:

Sl No	Total income (INR)	Surcharge (%)
1	More than 10,000,000, but less than 100,000,000	7
2	More than 100,000,000	12

Cess at 4% will be applicable

RICs not engaged in manufacturing or production has the option to be taxed at the rate of 22 per cent, provided they do not claim any specified benefits or deductions. A surcharge will be applicable at the rate of ten per cent on income tax. Cess will be applicable at the rate of four per cent.

RICs whose total turnover or gross receipts in the financial year 2018–2019 does not exceed INR 4,000m will be taxable at the rate of 25 per cent. A surcharge will be applicable at the rate of ten per cent. Cess will be applicable at the rate of four per cent.

RICs which are not covered under the previous paragraphs will be taxed at the rate of 30 per cent.

Surcharge and cess will be applicable as above.

Foreign companies are taxable in India at the rate of 40 per cent. A surcharge is applicable at the following rates:

Sl No	Total income (INR)	Surcharge (%)
1	More than 10,000,000 but less than 100,000,000	2
2	More than 100,000,000	5
Cess at 4% will be applicable on income tax, inclusive of the surcharge		

Firms (including limited liability partnerships) will be taxable at a rate of 30 per cent. A surcharge is applicable at the rate of 12 per cent where the total income exceeds INR 10m. Cess at four per cent will be applicable on income tax, inclusive of the surcharge.

OTHER TAXES

Royalties and fees for technical services

Under the IT Act, payments made by RICs to a non-resident that are in the nature of royalties and fees for technical services will be taxable in India at the rate of ten per cent (excluding the surcharge and education CESS) and the RIC is liable to withhold tax on such payments.

Dividends

With effect from 1 April 2020, RICs are not required to withhold dividend distribution tax prior to distributing profits. Such dividends will be taxed in the hands of shareholders at the applicable tax rates.

Income from capital gains

Income earned from the transfer of capital assets will be taxed under the head 'capital gains'. The tax rates depend on whether the gains are short-term and/or long-term capital gains. 'Short-term capital asset' means a capital asset held by a taxpayer for not more than 24 months immediately prior to its date of transfer. An asset other than a short-term capital asset is regarded as a long-term capital asset. The rate of long-term CGT is between 10 and 20 per cent (excluding the surcharge and education CESS), and the rate of short-term CGT is between 15 and 30 per cent (for residents, excluding the surcharge and education CESS) and 40 per cent (for non-residents, excluding the surcharge and education CESS).

Minimum alternate tax

Minimum alternate tax (or an alternate minimum tax) will be applicable at the rate of 18.5 per cent (plus the applicable surcharge and CESS) on the adjusted book profits of RICs only when the tax payable under the normal income tax provisions is less than 18.5 per cent of their adjusted book profits.

Buy-back of shares

An additional tax of 20 per cent is payable by an RIC that is buying back shares from its shareholders. This tax is payable by the RIC on the difference between the amount paid for the buy-back and the issue price of the shares. The buy-back amount received is exempt from tax in the hands of the recipient.

Indirect transfer provisions

Under the IT Act, the income of a non-resident will be deemed to accrue or arise in India if it arises, directly or indirectly, through or from any business connection, property, asset or source of income or from a transfer of a capital asset (shares or other interest) situated in India. The indirect transfer provisions are triggered if the value of the assets located in India exceeds INR 100m and the assets in India represent at least 50 per cent of the value of all the assets owned by the offshore transferor company.

Income from other sources

Any income that is not covered under any of the specific heads of income will be liable to tax under the head income from other sources. Expenditure that is incurred wholly and exclusively for earning such income will be allowed as a deduction.

Thin capitalisation rules

Interest expenses paid to an associated enterprise shall be restricted to 30 per cent of its earnings before interest, taxes, depreciation and amortisation or to the actual amount of interest paid to an associated enterprise, whichever is less.

Equalisation levy

An equalisation levy of six per cent will be applicable on the total consideration received or receivable by a non-resident not having a permanent establishment in India for providing online advertising, digital advertising, or any other facility or service for online advertisements as may be specified by the government.

Permanent Account Number

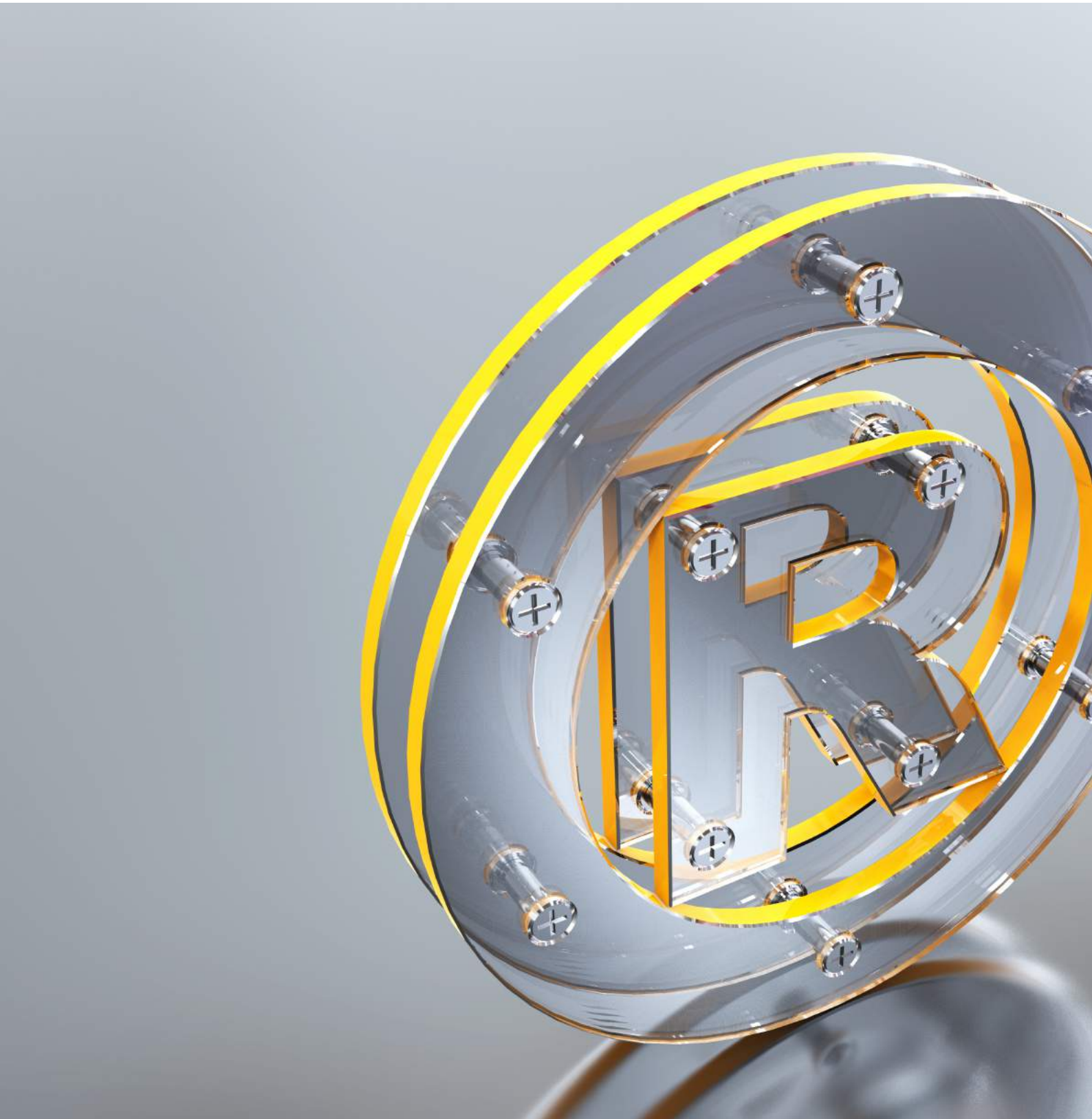
Any person who makes a payment to a non-resident or a resident that is chargeable to tax in India will be liable to withhold taxes at source from such payments in accordance with the relevant provision of the IT Act. If the Permanent Account Number is not available, a higher tax withholding rate of 20 per cent will be applicable. However, this provision is relaxed if certain conditions are fulfilled.

Goods and services tax

The GST is a VAT ranging between 05 per cent and 28 per cent (on both goods and services) which is levied at all points in the supply chain, with an input tax credit allowed subject to the satisfaction of conditions.

CHAPTER 09

Intellectual Property



Innovation, manufacturing and the services industry are key drivers of the Indian economy and business ethos. International outbound investment from India has also increased, which has led to a significant amount of technology transfer through industrial acquisitions.

It is advisable for foreign companies doing business in India, as well as contemplating to do business in India, to register their intellectual property rights at the outset so as to enjoy unhindered protection and avoid any infringement issues at a later date. Indian law allows foreign companies to register all forms of intellectual property, including patents, trademarks, designs, copyrights, geographical indications, semiconductors and plant varieties. All forms of copyright, trademark, design and patent applications can be filed online. Applicants that do not have a registered place of business in India are required to file applications through an Indian attorney or agent.

India is a member of the following International Treaties and Conventions:

Sl no	**Treaty**	**Signature**	**Signing of Indian Instrument of Accession**	**In force in India**
1.	Paris Convention	20 March 1883	Accession: 7 September 1998	7 December 1998
2.	Berne Convention	9 September 1886	Declaration of Continued Application: 23 April 1928	1 April 1928
3.	Patent Cooperation Treaty	19 June 1970	Accession: 7 September 1998	7 December 1998
4.	Madrid Protocol	1 April 1996	Accession: 8 April 2013	8 July 2013
5.	Locarno Agreement	8 October 1968	Accession: 7 June 2019	7 September 2019
6.	Nice Agreement	17 June 1957	Accession: 7 June 2019	7 September 2019

PATENTS

In India the law relating to patents is governed by the Patents Act, 1970 as amended by the Patents (Amendment) Act, 2005 and the Patents Rules, 2003 (as amended in 2016). The term of every patent granted in India is 20 years from the date of filing the application. For the National Phase application under the Patent Cooperation Treaty (PCT), the term of a patent will be 20 years from the date of international filing.

A patent application can be filed by any person, either a citizen of India or not, either alone or jointly with any other person at the earliest possible date to register the priority of invention. For foreign companies or foreign nationals, the applicant must appoint a registered agent or representatives in order to be able to furnish an address for service in India.

The types of patent applications that can be filed under Indian patent law are the Provisional Application, Ordinary Application, Convention Application, PCT National Phase Application, PCT International Application, Application for Patent of Addition and Divisional Application. The priority of the filed application can be claimed within 12 months from the earliest corresponding application in the convention country/PCT. The minimum filing requirements for an applicant include names, addresses and nationalities (for PCT applicants) of all the inventors and applicants, and also of the applicants in the convention country.

After the grant of patent, every patentee must maintain the patent by paying annual renewal fees. For the first two years there are no renewal fees; renewal fees are payable only from the third year onwards. If not paid, the patent will cease. One exception is in the case of a patent of addition, where no annuities are payable. To provide an update on the working of patents, every patentee every licensee is required to furnish, at the end of the financial year, a statement as to the extent to which the invention has been worked on in India on a commercial basis. If the applicant/inventor is residing in India, and decides to directly file a patent application in a foreign country without first filing in India, then it is compulsory for the inventor to obtain a foreign filing licence from the Indian Patent Office (IPO).

TRADE MARKS

The law governing trademarks in India is the Trade Marks Act, 1999 (as amended by the Trade Marks (Amendment) Act, 2010) and the Trade Marks Rules, 2017. The term of protection for a trademark application is ten years, which can be renewed for additional ten-year periods. Any person claiming to be a proprietor of a mark can file a trademark application with the Trade Marks Registry, and Foreign companies/nationals not living in India must appoint a registered agent or representative to furnish an address for service in India.

The kinds of trademarks that can be filed in India are the word mark, device mark, service mark, collective mark, certification mark, shape mark and sound mark. The international classification of goods is used, and separate applications must be filed for goods falling in different classes. Currently, the 11th edition of the Nice Classification passed by the WIPO is in force in India. Ownership of a trademark in India is determined on a first-to-use basis. Unlike the law on patents or designs, trademark law mandates the first-to-use rule over the first-to-file rule.

Once the application is filed and where all formalities are in order, the application will be examined. Once examined, the Trade Mark Office will either accept the application and publish it in the journal or issue an examination report citing the following:

- procedural objection, where power of attorney (POA) has not been filed; goods/service do not fall under the applied class and so on; and

- substantive objections, which are objections put forth in the light of absolute (section 9) and relative grounds (section 11) of refusal.

Applications that have been accepted are advertised in the Trade Marks Journal, and opposition may be filed within four months of the date of advertisement.

The exclusive rights obtained by registration cannot operate against the rights of the prior user of the same or similar trademarks in respect of goods in relation to which the impugned mark has continuously been used for dates prior to the use of registered mark or date of the registration of the registered mark. However, section 12 of the act provides for the registration of a trademark in the case of its honest concurrent use by providing that

‘in the case of honest concurrent use or of other special circumstances which in the opinion of the Registrar, make it proper so to do, he may permit the registration by more than one proprietor of the trade marks which are identical or similar (whether any such trade mark is

already registered or not) in respect of the same or similar goods or services, subject to such conditions and limitations, if any, as the Registrar may think fit to impose'.

Thus, the Registrar is not obliged to register such an honest concurrent user; it depends upon his/ her discretion.

A registered trade mark can be assigned with or without the goodwill of the business concerned, and the registered trade mark may be rectified (removal of mark) from the register on the ground of wrongly remaining on the register, or non-use of a mark for a continuous period exceeding five years and three months before the filing of the rectification application from the date of registration unless there are special circumstances excusing non-use.

COPYRIGHT

In India the law governing copyright is the Copyright Act, 1957 and the Copyright Rules, 2013. The term of protection for a copyright is the life of the author plus 60 years from the beginning of the calendar year following the year in which the author dies. Any individual who is an author, rights owner, assignee or legal heir may file a copyright application and foreign companies/nationals not living in India must appoint a resident agent or representative in order to be able to furnish an address for service in India.

However, it should be noted that copyright protects expressions, not ideas. There is no copyright protection for ideas, procedures and methods of operation or mathematical concepts as such, and the registration of a copyright is not mandatory in India. The acquisition of copyright is automatic; it does not require any formality. Copyright comes into existence as soon as a work is created, and no formality is required to be completed for acquiring copyright. However, a certificate of registration of copyright and the entries made therein serve as *prima facie* evidence in a court of law with reference to a dispute relating to the ownership of copyright. However, in 2012, in the case of *Dhiraj Dharamdas Dewani v Sonal Info Systems Pvt Ltd and Ors*, the Bombay High Court held that

'in the absence of registration under section 44 of the Act by the owner of the copyright it would be impossible to enforce the remedies under the provisions of the Act against the infringer for any infringement under section 51 of the Act. Hence registration of copyright was compulsory or mandatory for taking recourse to the provisions of the Act'.

The author of a work has the moral right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other acts in relation to the said work that is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to his/her honour or reputation. Moral rights are available to the authors even after the economic rights are assigned.

The author of a work is usually the 'first owner' of the work. In certain circumstances, section 17 of the Copyright Act determines who may be regarded as the 'first owner' of a copyrighted work.

The provisions of section 52 of the Copyright Act provide for certain acts that would not constitute an infringement of copyright, namely fair dealing with a literary, dramatic, musical or artistic work not being a computer program for the purposes of:

- private use, including research;

- criticism or review;

- reporting current events in any print media or by broadcast or in a cinematographic film or by means of photographs;

- a judicial proceeding or report of a judicial proceeding;

- reproduction or publication of a literary, dramatic, musical or artistic work in any work prepared by the Secretariat of a legislature or, where the legislature consists of two Houses, by the Secretariat of either House of the Legislature, exclusively for the use of the members of that legislature;

- reproduction of any literary, dramatic or musical work in a certified copy made or supplied in accordance with any law for the time being in force;

- the reading or recitation in public of any reasonable extract from a published literary or dramatic work;

- the publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions; and

- the making of sound if made by or with the licence or consent of the owner of the right in the work.

DESIGNS

In India the Designs Act, 2000 and the Designs Rules, 2001 govern the law relating to industrial designs. The term of protection is ten years from the priority date, which can be renewed (once) for a period of five years. Any person claiming to be the proprietor of a design, whether Indian or a foreign national, can file a design application in India. Foreign companies/nationals not living in India must appoint a resident agent or representative to furnish an address for service in India. It is mandatory to provide an address for service, or else the IPO shall not proceed with the application.

Prior publication, registration or public use anywhere in the world destroys the novelty of a design. This affects the registrability and is a ground for rectification of the registered design. A design is capable of being registered only if it is new or original and the proprietor of a new design should not make the design public/publicise by any means anywhere in the world, or monetise the design/ article, before having design protection granted for any particular product. However, the proprietor may sell his/her design after filing a design application with the IPO.

Articles sought for design registration are categorised according to an International Classification System (known as the Locarno Classification) mentioned in the Third Schedule of Designs Rules, 2001, and only one class number is to be mentioned in one particular application, which is mandatory under the rules. This classification is for articles upon which the design is applied. Examination is conducted with a view to determine whether the application is anticipated by designs already registered in India or worldwide. An examination report issued by the IPO contains both technical objections (related to the novelty of the design), as well as formal requirements. A reply to the objections raised in the examination report has to be filed with the IPO within six months from the date of filing the design application with the IPO.

It is pertinent to note that before delivery on the sale of any article(s) to which a registered design is applied, the proprietor shall cause each such article to be marked with the prescribed mark; prescribed words REGISTERED/REGD/RD; or figures denoting that the design is registered and the corresponding registration number. If the proprietor fails to do so, then he/she shall not be entitled to recover any penalty or damages in respect of any infringement of his/her copyright in the design, unless he/she shows that he/she took all proper steps to ensure the marking of the article, or unless he/she shows that the infringement took place after the person guilty thereof knew or had received notice of the existence of the copyright in the design.

It is mandatory to record, by means of an entry in the Designs Register, the assignment of any registered design, and if any assignment has been made for a foreign design application prior to filing its reciprocity application with IPO, the applicant must furnish the certified copy of the assignment from the patent office (of the country where the first application has been filed) to claim priority and proprietorship in India.

The registration of a design may be cancelled at any time after the registration of design on a petition for cancellation, along with the prescribed fee, to the Controller of Designs (at the IPO) on the following grounds:

- the design has been previously registered in India;
- the design has been published in India or elsewhere prior to the date of registration;
- the design is not new or original;
- the design is not registrable; or
- the design is not a design under the definition of ‘design’ in the Designs Act, 2000.

CHAPTER 10

Financing

MARKET PANORAMA

The Indian loan market is a milieu of a diverse range of credit providers, ranging from traditional banks, non-banking finance companies (NBFCs), debt funds, portfolio investors, small finance banks (SFBs) and startup lending platforms. These creditors cater to a variety of customers, ranging from deeply leveraged heavy industries, infrastructure projects, medium and small enterprises to the retail segments covering personal and business loans.

Lending in India operates largely in a regulated environment, primarily governed by the Banking Regulation Act, 1949 and supervised by the RBI. Where it involves retail investors or debt capital markets, SEBI in collaboration with the RBI provides additional regulation.

Traditionally, the main source of credit in India has been commercial banks, but over the last decade NBFCs have been increasingly active and have occupied lending spaces where regulated banks cannot operate or find it too risky to operate. This has resulted in the 'shadow' banking infrastructure mushrooming rapidly.

Banks in India operate under a heavily regulated regime. In order to start banking operations, companies are required to obtain a banking licence from the RBI under the provisions of the Banking Regulation Act, 1949. Banks are also subject to heavy regulation in the form of requirements on maintaining capital adequacy ratios, exposure norms, provisioning norms and end-use restrictions on loan proceeds.

NBFCs, while regulated by the RBI and operating under a licence regime prescribed by it, are subject to lighter regulations. In particular, NBFCs are exempt from lending restrictions on pricing and end use, providing greater flexibility to reach some of the underserved sectors and offering more innovative products. Also, depending on the sector and nature of facilities offered by NBFCs, different regulations apply. For instance, NBFCs allowed to accept deposits from the public under their licensing terms are subject to bank-type regulations, while non-deposit taking NBFCs operate under a fairly relaxed regime. Another prominent type of NBFCs are microfinance institutions, which have done tremendously well in boosting access to credit for medium, small and micro enterprises in India.

Other sources of traditional credit include international financial institutions, such as the World Bank Group and other multilateral development finance institutions, but their lending range is limited in light of their specific lending criteria.

Outside traditional credit providers, FPIs, venture debt providers, AIFs, retail lending platforms and SFBs have emerged as alternate sources of credit in the Indian markets. Considering the temporary liquidity stress in the NBFC market and conservative approach of

banks, these sources have been progressively increasing their market share in the Indian lending landscape.

Lending by FPIs, venture debt providers and AIFs generally occurs by way of listed and unlisted debt instruments. Given that they operate in debt capital markets, they are regulated by SEBI. These regulations primarily relate to registration with SEBI, minimum eligibility requirements, and restrictions on entry and exit.

SFBs, on the other hand, are more akin to a traditional bank, but set up with the objective of financial inclusion for under-served sections of society. SFBs are also regulated by the RBI and require an SFB licence for providing the basic banking service of the acceptance of deposits and lending.

More recent additions in the retail lending space are platform lending entities and specialised Fintech companies. These entities provide technology-driven platform services for institutional and retail lenders. Platform entities providing services to institutional lenders are vicariously regulated through the regulation of institutional lenders by the RBI and/or SEBI. Platform entities providing services to retail lenders require a NBFC peer-to-peer licence from the RBI and are subject to certain other restrictions, including prohibition on lending on the platform.

BORROWING BY INDIAN COMPANIES

Domestic borrowings from local sources such as banks, NBFCs and SFBs can be in any form depending on the requirement of the borrowers; that is, term loans, non-convertible debentures (NCDs), demand loans, discounting facilities and so on. For availing any of these financings, Indian companies typically need to comply with the requirements of the Companies Act, 2013, primarily comprising various approvals from their shareholders and board of directors, along with general authorisation under their constitutional documents for borrowing.

The RBI regulates loans extended by foreign entities to Indian entities, and such lending is classified as an ECB. Eligible borrowers may raise ECBs for up to $750m in a single financial year from eligible lenders, which must have a maturity period of at least three years. Eligible borrowers include all entities eligible to receive FDI, which excludes individuals. Recognised classes of foreign lenders include international banks and financial institutions, international capital markets, export credit agencies, suppliers of equipment, foreign collaborators and foreign equity holders. Money raised through ECBs cannot be used for on-lending for investment in equity or real estate purposes, acquisition financing or the borrower's general corporate or working capital purposes (unless an ECB for such a general or working capital purpose has a maturity of more than ten years). All eligible ECBs can be availed through an automatic route and, in some cases, require confirmation from the borrower's local AD bank. It is possible to get around some of these restrictions at times by going under the approval route by applying for the upfront permission of the RBI for the transaction after making a full disclosure, but the exercise of this authority by the RBI is entirely discretionary and all such requests are evaluated on a case-by-case basis.

Another route for availing foreign debt by Indian companies is from FPIs by way of the issuance of rupee denominated NCDs. FPIs can invest in NCDs under the following routes: (1) the voluntary retention route with on-tap limits, voluntary maturity thresholds for NCDs and exemption from concentration norms; and (2) the regular FPI route with the minimum short-term maturity of one year for NCDs subject to the monitoring of caps on total annual redemption at a portfolio level. Investment in listed NCDs by FPIs does not have any end-use restrictions. However, proceeds of unlisted NCDs cannot be utilised by the borrower for investment in capital markets, dealing in real estate business or purchase of immovable properties.

Indian companies can also borrow from AIFs and venture debt funds in the form of the issuance of listed or unlisted NCDs. This route is virtually without any material restrictions on maturity and end use, and can be structured as 'short-term' or 'long-term' investment subject to compliance with general requirements for such investments prescribed by the RBI and SEBI from time to time. Venture debt funds usually provide short-term debt funding because their

objective is to provide bridge financing for the interim requirement of startups without the founders diluting their ownership and control in their companies. AIFs, on the other hand, have been capturing the void created due to the liquidity crunch faced by NBFCs and are active in infrastructure, real estate and the distressed assets space.

SECURITY AND GUARANTEE

Typically, the most common forms of security are in the form of a mortgage over immovable properties, hypothecation of movable properties (including fixed and current assets) or a pledge over shares.

All types of security creation over the assets of any company require the registration of the charge to be made with the ROC within 30 days of the creation of the charge. If this does not occur, the charge will not be taken into consideration if the company goes into liquidation. A mortgage of immovable properties must be registered with the concerned local Sub-Registrar of Assurances for the area where the mortgaged property is situated within four months of security creation. The mortgage is not enforceable until the registration has been made. However, this is not compulsory in some states if the mortgage is in the form of an equitable mortgage effected through the deposit of title deeds.
In respect of a pledge of shares, if the shares are in dematerialised form, a pledge creation form must be filed with the depository before the pledge will be effective. If the shares are in physical form, the pledge is created with the delivery of share certificates along with signed blank transfer forms.

There are no significant costs involved in relation to form filings with the ROC; a very small amount is charged as a nominal fee. However, there is stamp duty payable to the government at the time of the execution of any instrument and as registration fees post-execution in respect of mortgages. The rates of payment differ from state to state. In some states these duties are capped, while in others they are charged as an *ad valorem* percentage on the amount of debt secured without an upper limit, thereby pushing up transaction costs significantly.

It is possible for Indian companies to give downstream, upstream and cross-stream guarantees, provided they relate to the obligations of domestic entities and the passing of some corporate benefit can be demonstrated.

From a foreign debt perspective, the creation of security over the assets of the borrower or pledge over shares of the borrower and guarantees by third parties for securing and guaranteeing ECBs and NCDs subscribed by FPIs is generally permitted. However, obtaining a no-objection certificate from the AD bank of the borrower is a procedural requirement in certain cases.

Security over assets of third parties (promoters, shareholders and group companies of the borrower other than financial securities of the promoter) for securing ECBs may require approval from the RBI, although the RBI occasionally issues directions permitting/restricting

such security creations. While structuring a security package for foreign debt, the prevailing foreign exchange directions issued by the RBI should be thoroughly reviewed.

Additionally, pursuant to the Companies Act, 2013, an Indian company cannot issue guarantees or provide any security on behalf of any other company if: (1) the respective boards of the two companies have any directors in common; (2) the directors of the guarantor company can jointly exercise at least 25 per cent of the total voting power available to the shareholders of the borrower company; or (3) the borrower company, its board or managing director is accustomed to acting according to the instructions of the guarantor company or any of its directors (individually or collectively). However, the above three restrictions will not apply if: (1) the borrower company is the wholly owned subsidiary of the guarantor company; or (2) the guarantor company is acting in the ordinary course of its business in giving such a guarantee or providing security; and (3) the shareholders of the guarantor company have approved the provision of such a guarantee or security by 75 per cent majority and the loan for which such a guarantee or security is being provided will be utilised for the principal business of the borrower company.

In India it is only possible contractually to determine the order of priority in conflicting security interests among secured creditors. While there is a statutory order of priority to be followed in the event of liquidation of the company that cannot be contractually overturned, the terms of the contract determine what will ordinarily be the order of priority in which secured creditors are repaid. All creditors of the same rank receive payment on a basis proportionate to their exposure only after the dues of all higher-ranked creditors have been completely discharged.

CHAPTER 11

Privacy Law & Data Protection

The present regulatory framework governing data protection is archaic, with information technology laws primarily outlining basic data protection requirements. A comprehensive law dealing with data protection and privacy modeled on the lines of the European Union's General Data Protection Regulation (GDPR) is presently in the works and expected to pass later this year.

A FUNDAMENTAL RIGHT TO PRIVACY

In a landmark judgment (*Justice K S Puttaswamy (Retd) and Another v Union of India and Others*) rendered in August 2017, the Supreme Court of India ruled that the right to privacy is a fundamental right and can only be subject to reasonable restrictions under the law. The Supreme Court further recognised that informational privacy in the digital era is a facet of the right to privacy and highlighted the need for a robust data protection law to control the actions of the state as well as non-state actors.

PRESENT REGULATORY FRAMEWORK

The Information Technology Act, 2000 as amended by the Information Technology Amendment Act, 2008 (the 'IT Act') is the principal legislation governing electronic transactions and data protection in India. The IT Act has extraterritorial jurisdiction and covers contraventions committed outside India if such a contravention involves an Indian computer, computer system or network. While there is no data protection regulator, the Department of Information Technology under the Ministry of Electronics and Information Technology (MeitY) is the nodal agency for all information technology matters.

INTERMEDIARY REGULATIONS

The Information Technology (Intermediary Guidelines) Rules, 2011 framed under the IT Act (the 'Intermediary Rules') specifies the duties of intermediaries in India.

An intermediary is an entity that provides storage, transmission and any other service related to third-party electronic data. It includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online marketplaces and cyber cafes. An intermediary must comply with the Intermediary Rules, which mandate the intermediary to: (1) publish a 'User Agreement' or 'Terms and Conditions' and a 'Privacy Policy' on the intermediary's website accessible in India; (2) prohibit its users from hosting, publishing, transmitting or sharing any information that belongs to someone else, obtained without his/her authorisation or is misleading, defamatory, obscene, pornographic, paedophilic, libellous, hateful, harms minors or violates

any applicable law in India; (3) appoint a ‘Grievance Officer’ and have a grievance redressal mechanism in place; and (4) report cybersecurity incidents to the Computer Emergency Response Team under the MeitY as soon as possible.

An intermediary is exempt from liability for any third-party information hosted on its website, as long as the intermediary observes due diligence while discharging its duties and does not initiate the transmission of such information or modify the information being transmitted through the intermediary. This safe harbour provision will not apply if the intermediary is involved in the commission of an unlawful act or fails to take down unlawful content upon receiving actual knowledge or on being notified by the appropriate government or its agency.

REGULATIONS RELATING TO PERSONAL AND SENSITIVE PERSONAL DATA

The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (the 'SPDI Rules') set out the safeguards to be implemented by an entity for the collection, storage, use and transfer of personal information and sensitive personal data or information. Under the SPDI Rules, personal information is broadly defined to include any information regarding a natural person that is directly or indirectly capable of identifying such a person, such as an individual's name, telephone number or address. A subset of personal information, sensitive personal data, consists of, inter alia, passwords, biometric information, sexual orientation, physical, physiological and mental health condition and so on, and excludes information that is freely available in the public domain.

An entity dealing with sensitive personal data is considered to be a data controller and must have a privacy policy disclosing its data handling and disclosure practices, type of information collected, purpose of such a collection, intended usage of the information collected and reasonable security practice followed by the data controller. Sensitive personal data must be collected/processed only for a lawful purpose and not be retained for longer than necessary. Specific written consent of the information provider who 'opts-in' (or 'opts-out') to share his/her sensitive personal data is mandatory and third-party disclosure is permissible provided prior consent is obtained from the information provider. Similarly, an entity may freely transfer sensitive personal data outside India, as long as the same level of data protection is adhered to in the recipient country. Barring specific sectoral regulations (e.g., data storage on local servers for Fintech firms mandated by India's central bank), there are no explicit requirements on the data hosting location or jurisdiction under the SPDI Rules. These rules are applicable only to corporate entities and leave government bodies outside their ambit.

PENALTY FOR BREACH OF DATA PROTECTION OBLIGATIONS

Under the IT Act, it is a criminal offence punishable with a monetary fine as well as imprisonment for a person to fraudulently or dishonestly carry out any act that result in the failure to protect data, or for an intermediary to disclose personal information in breach of a lawful contract.

SECTORAL REGULATIONS

Apart from the IT Act, multiple sectoral regulations address various aspects of data privacy and data protection in India. For instance, medical regulations in India mandate patient–physician confidentiality. Similarly, the RBI and the Telecom Regulatory Authority of India provide for privacy and confidentiality obligations that must be adhered to by business entities in the financial and telecom sectors, respectively.

CHAPTER 12

Competition Law

INTRODUCTION

Ever since the merger control-related provisions under the Competition Act, 2002 were enforced eight years ago, the Competition Commission of India (the 'Commission') has been tasked with balancing the growth of a robust competition regime in India while safeguarding the interests of the industry to enable ease of doing business in India.

Recent noteworthy developments under the Indian merger control regime include the introduction of a green channel clearance regime, acceptance of purely behavioural remedies in horizontal mergers and increased scrutiny of vertical mergers.

Indian competition law, including merger control provisions, is proposed to be amended to bring it in line with global best practice. In 2018 the central government constituted a Competition Law Review Committee (CLRC)[10] to recommend changes to the existing law (i.e., the Competition Act) and the CLRC submitted its report in August 2019. Following the CLRC recommendations, in February 2020 the central government invited public comments on the Competition (Amendment) Bill, 2020 (the 'Bill').[11]

[10] By way of full disclosure, Uberoi was part of the working group of the CLRC.

[11] See http://feedapp.mca.gov.in//pdf/Draft-Competition-Amendment-Bill-2020.pdf accessed 13 May 2020.

RECENT DEVELOPMENTS IN THE INDIAN SCENARIO

Introduction of the 'green channel' route

The automatic approval route, or the 'green channel', was introduced by the Commission with effect from 15 August 2019. Under the 'green channel' route, notifiable transactions wherein the parties do not have any horizontal and/or vertical overlaps in any of the plausible markets nor have any presence in complementary markets can obtain 'near simultaneous' or same-day clearance from the Commission. This makes India the only jurisdiction with a mandatory notification regime to enable the notifying party/parties to obtain same-day approval from the Commission, in certain specified scenarios.

As of February 2020, nine transactions had been approved under the 'green channel' route.

Increase of behavioural remedies

Over the last eight years of merger control, in the assessment of complex horizontal mergers the Commission has shown a preference for structural divestments in seven out of its eight Phase II reviews, with behavioural remedies being more commonly accepted in Phase I reviews.

However, in the past year, while assessing the transaction involving Schneider Electric India Private Limited and Temasek Holdings (Private) Limited's proposed acquisition of the electrical and automation business of Larsen & Toubro Limited[12], the Commission for the first time approved a notifiable transaction subject to purely novel behavioural remedies in a Phase II review.

In doing so, the Commission has acknowledged that: (1) the 'one-size-fits-all' approach is not effective in addressing concerns on the appreciable adverse effect on competition; and (2) behavioural remedies are capable of addressing appreciable adverse effect on competition concerns just as effectively as structural ones.

[12] C-2018/07/586; by way of full disclosure, Uberoi advised Schneider Electric India Private Limited and Temasek Holdings (Private) Limited.

Increased scrutiny of vertical mergers

In 2019 the Commission increased its scrutiny of vertical mergers, requiring Form II notifications in at least two vertical mergers involving: (1) acquisition of equity stake in a cab aggregator by a car manufacturer (i.e., acquisition of equity stake in ANI Technologies Pvt. Ltd, which runs the online ride sharing platform 'Ola', by Hyundai Motor Company and Kia Motor Company)[13]; and (2) acquisition of equity stake in an airport operator by a corporate group with a majority stake in two airlines (i.e., the acquisition of shares of GMR Airports Limited by TRIL Urban Transport Private Limited, Valkyrie Investment Pte. Limited and Solis Capital (Singapore) Pte Limited)[14].

However, it is pertinent to note that in both these vertical mergers the Commission accepted the behavioral remedies offered by the parties, given that such remedies effectively addressed the vertical foreclosure harms.

This trend of increased scrutiny of vertical mergers by the Commission is in line with the practices of other mature jurisdictions such as the US[15], and is expected to increase given that vertical integration will be commonplace for digital platforms.

[13] C-2019/09/682.

[14] C-2019/07/676.

[15] Jenner & Block, Increased Scrutiny for Vertical Mergers on the Horizon, https://jenner.com/system/assets/publications/18871/original/Increased%20Scrutiny%20for%20Vertical%20Mergers%20on%20the%20Horizon%20-%20ATTORNEY%20ADVERTISING.pdf?1557244521 accessed 13 May 2020.

KEY CHANGES PROPOSED: COMPETITION AMENDMENT BILL

Reduced timelines

In a bid to 'fast-track' merger clearances, the Bill seeks to reduce the timeline for Phase I reviews from 30 working days to 20 calendar days, and to reduce the outer limit timelines from 210 days to 150 (+30) calendar days[16]. This time limit is subject to clock-stops, such as when the Commission requests more information.

Size of transaction test

The Bill suggests an amendment to the Competition Act that enables the government to prescribe any criteria that shall cause an acquisition, merger or amalgamation deemed to be a combination, and require the prior approval of the Commission[17]. This amendment, although quite open-ended, is expected to bring in a 'size of transaction' or 'deal value' threshold in addition to the asset and turnover thresholds currently in place under the Indian competition regime.

Material influence standard

The standard for control used by the Commission has an important impact on the nature of transactions that are required to be notified with and assessed by the Commission. To date, the Commission has predominantly used the 'decisive influence' test to determine control,

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[16] '7. In section 6 of the principal Act, —

…

in sub-section (2A), for the words "two hundred and ten", the words "one hundred and fifty calendar" shall be substituted.

after sub-section (2A), the following proviso shall be inserted, namely: —

"Provided that the Commission may by order extend the period under sub-section (2A) beyond one hundred and fifty calendar days by such further period as it thinks fit, but not exceeding thirty calendar days in case parties to the combination request for additional time to furnish relevant information or remove defects to the notice filed under sub- section (2) of section 6 as may be requested by the Commission."'
http://feedapp.mca.gov.in//pdf/Draft-Competition-Amendment-Bill-2020.pdf accessed 13 May 2020.

[17] '6. In section 5 of the principal Act,

after clause (c), the following provisos shall be inserted, namely: —

"Provided that the Central Government may in public interest and in consultation with the Commission prescribe any criteria other than those prescribed in clauses (a), (b) and (c), the fulfillment of which shall cause any acquisition of control, shares, voting rights or assets, merger or amalgamation to be deemed to be a combination under this section and a notice for any acquisition of control, shares, voting rights or assets, merger or amalgamation fulfilling such criteria shall be given to the Commission under section 6."'
http://feedapp.mca.gov.in//pdf/Draft-Competition-Amendment-Bill-2020.pdf accessed 13 May 2020.

and has used the 'material influence' in only two cases[18]. However, the Bill has now sought to bring in a 'material influence' threshold under the act[19].

[18] (1) C-2015/02/246, which involved the transfer of business, assets and operations of two cement plants owned by Jaiprakash Associates Limited to UltraTech Cement Limited; and (2) C-2016/10/443, which involved the amalgamation of Agrium Inc and Potash Corporation of Saskatchewan, Inc.

[19] '6. In section 5 of the principal Act, —

…

for clause (a) of the Explanation, the following clause shall be substituted, namely: —

"(a) "control" means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—

one or more enterprises, either jointly or singly, over another enterprise or group; or

one or more groups, either jointly or singly, over another group or enterprise;"'

http://feedapp.mca.gov.in//pdf/Draft-Competition-Amendment-Bill-2020.pdf accessed 13 May 2020.

CHAPTER 13

Dispute Resolution

STRUCTURE OF THE COURTS

The ease of doing business is largely dependent on the legal and regulatory framework of a country. An effective judiciary enabling timely adjudication of disputes, coupled with recognition of the importance of enforcement of contractual obligations is a key factor contributing towards building investor confidence in a country.

A key factor that contributes to boosting investor confidence, as recognised by the World Bank is the enforcement of contracts supported by timely adjudication of commercial disputes. The judiciary in India, like most countries, has a hierarchical structure, comprising the Supreme Court as the apex court of the country, High Courts as the highest courts in states and subordinate courts in various districts supervised by the High Courts.

Further, to ensure the timely, efficient and effective resolution of commercial disputes, the Commercial Courts Act, 2015, as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (the '2018 Amendment'), was enacted. The Commercial Courts Act is primarily aimed at expediting commercial disputes at the original and appellate levels, by way of, inter alia, specialised fora, Commercial Courts at the district level and Commercial Divisions in all High Courts, ordinary original civil jurisdiction, and Commercial Appellate Divisions in the High Court so as to bring about a time-bound adjudication of commercial disputes. The specialised Commercial Courts have jurisdiction to try all suits and applications relating to a commercial dispute of a specified value[20]. The pecuniary jurisdiction of Commercial Courts has been brought down to INR 300,000 from the earlier specified value of INR 10m by way of the 2018 Amendment.

The Commercial Courts Act provides that any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of 60 days from the date of judgment or order. Further, any person aggrieved by the judgment or order of a Commercial Court at the level of a District Judge exercising original civil jurisdiction or, as the case may be, the Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of 60 days from the date of the judgment or order[21].

[20] The Commercial Courts Act 2015, s 6.

[21] *Ibid*, s 13.

USE OF ARBITRATION

Arbitration has emerged as a popular and effective means of dispute resolution in India, governed by the Arbitration and Conciliation Act, 1996 (the '1996 Act'). The government has made concerted efforts to introduce global best practice into the arbitration regime with the intention to make India a global arbitration hub. For instance, key amendments have been brought about by the Arbitration and Conciliation (Amendment) Act, 2015 (the '2015 Amendment') and the Arbitration and Conciliation (Amendment) Act, 2019 (the '2019 Amendment'). These amendments are designed to improve the perception of India as an international arbitration jurisdiction by attempting to strengthen institutional arbitration, reduce judicial interference and empower arbitral tribunals, so as to build confidence in arbitration as an effective mechanism of adjudication of commercial disputes. As far as adjudication of challenges to arbitral awards are concerned, the Indian judiciary is increasingly taking a non-interventionist approach. Arbitrations are now characterised by limited interference of courts from the stage of referral of disputes to arbitration until proceedings to set aside/challenge an arbitral award. Some of the key changes to the 1996 Act in this regard are:

Interim relief

Prior to the 2015 Amendment parties could seek interim relief from courts prior to the commencement of arbitration, but were under no compulsion to commence arbitral proceedings in a timely manner. Therefore, parties enjoyed the benefit of interim orders from courts for extended periods of time. To address this anomaly, the 2015 Amendment mandated that arbitration must commence within 90 days from the date of the interim order. Moreover, the courts are not to entertain any application under section 9 of the 1996 Act, unless they find that circumstances exist that may not render the remedy under section 17 (i.e., seeking interim relief from the arbitral tribunal) efficacious.

Under section 17 of the 1996 Act, which is applicable to India-seated arbitrations, interim measures of protection may be passed by the arbitral tribunal during the arbitral proceedings. Now, by virtue of the 2015 Amendment, the arbitral tribunal has same power for making orders under section 17 of the 1996 Act as the court has for the purpose of, and in relation to, any proceedings before it under section 9, and any such order passed by the arbitral tribunal is enforceable under the Code of Civil Procedure 1908 (CPC) in the same manner as if it were an order of the court.

Proceedings to set aside or challenge the enforcement of an award

The 2015 Amendment brought much needed clarity to the ambit of the term 'public policy' in section 34(2)(b) of the 1996 Act, which is applicable for proceedings to set aside an arbitral award rendered in an India-seated arbitration. By way of this amendment, two explanations were added to section 34(2) specifying that an award may be set aside on this ground only if the award: (1) is vitiated by fraud or corruption; (2) is in contravention with the fundamental policy of Indian law; or (3) is in conflict with the most basic notions of morality or justice. The additional ground of 'patent illegality appearing on the face of the award' remains available as an independent ground for setting aside an arbitral award only for India-seated arbitrations other than international commercial arbitrations. The 2015 Amendment has, however, clarified that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

Further, the 2019 Amendment clarified that the scope of challenge to an arbitral award under section 34 is limited to a challenge based upon the record of the arbitral tribunal. Therefore, wide-ranging challenges based on evidence not led before the arbitral tribunal – which create uncertainty and increase time and cost related to the ultimate enforcement of the arbitral award – has been restricted, providing an impetus for the swift enforcement of awards. As regards the enforcement of foreign awards under section 48, all grounds for challenge except 'patent illegality' are available.

Indian courts have increasingly adopted a pro-arbitration approach and even staved off challenges to awards on the ground of breach of public policy for alleged violation of foreign exchange regulations. One of the key decisions in this regard was that of the Delhi High Court in *NTT Docomo Inc v Tata Sons Ltd, 2017 SCC OnLine Del 8078,* wherein the Delhi High Court noted that:

'The issue of an Indian entity honouring its commitment under a contract with a foreign entity which was not entered into under any duress or coercion will have a bearing on its goodwill and reputation in the international arena. It will indubitably have an impact on the foreign direct investment inflows and the strategic relationship between the countries where the parties to a contract are located. These too are factors that have to be kept in view when examining whether the enforcement of the Award would be consistent with the public policy of India.'

Prior to the 2015 Amendment a mere admission of a challenge to an India-seated award meant that the award could not be enforced. Such a grant of an automatic stay on the mere admission of a challenge to an award led to a lot of frivolous challenges to arbitral awards. Thus, to

encourage a pro-enforcement environment, the 2015 Amendment introduced changes to section 36 of the 1996 Act mandating that:

- a separate application be made by an award debtor seeking stay over enforcement of the award; and
- while considering the application for grant of stay in the case of an arbitral award for payment of money, the court should have due regard to the provisions for grant of stay of a financial decree under the provisions of the CPC, that is, typically for the deposit of security for costs. Practically, commercial courts in India have directed the party challenging the award to deposit security in the range of 50–100 per cent of the award amount.

Thrust towards institutional arbitration

The government is proactively investing in building infrastructure for arbitral institutions, such as the setting up of the New Delhi International Arbitration Centre and Mumbai Centre for International Arbitration, to bring India on a par with jurisdictions such as Singapore and London, which boast of pre-eminent arbitral institutions such as the Singapore International Arbitration Centre (SIAC) and London Court of International Arbitration, respectively.

There is a thrust towards the development of an arbitration bar and expertise. The 2019 Amendment is clear in its intention to encourage institutional arbitration in India and regulate the development of an arbitration bar, including by way of proposing setting up the Arbitration Council of India (ACI), specifying qualifications for arbitrators and tasking the arbitral institutions rather than courts with the functions of the appointment of arbitrators under the amended section 11. However, these provisions are yet to be notified for enforcement.

Other important reforms to the 1996 Act

Apart from the above amendments, there are other noteworthy amendments brought about by the 2015 and 2019 Amendments.

Mandatory disclosure of impartiality

Under section 12, the 2015 Amendment has made it mandatory for an arbitrator to make a declaration of independence and impartiality. The Fifth Schedule lists the grounds that would give rise to justifiable doubts as to the independence or impartiality of the arbitrator. The Seventh Schedule sets out the conditionalities under which an arbitrator is ineligible to act as such unless, subsequent to disputes having arisen, parties have waived this disqualification by way of an express agreement in writing. Further, section 14 provides for the substitution

of an arbitrator in the event of the termination of his/her mandate. This is intended to encourage greater transparency and accountability in the process.

Extension of the time by consent of parties

The 2015 Amendment introduced section 29A into the 1996 Act with the aim of effective and time-bound disposal of India-seated arbitrations. This section provided that an arbitral award must be rendered within 12 months from the date on which the arbitral tribunal enters reference, and such a time period may be extended by a period of six months by the mutual consent of parties. A further extension of this period could only be made by judicial order and would invite scrutiny into the conduct of the arbitral proceeding and potential cost consequences to the parties or tribunal. However, this provision has been further amended by the 2019 Amendment to provide that in the case of non-international commercial arbitrations, the award must be passed within 12 months from the date of completion of pleadings. Further, pleadings are to be completed within six months from the date upon which the arbitrator receives notice of his/her appointment in writing, whereas there is no mandated timeline for India-seated international commercial arbitrations, which are expected to meet these timelines on a best endeavours basis.

Fast-track procedure

Section 29B was introduced in the 2015 Amendment for the purpose of the completion of arbitrations involving small claims through a fast-track procedure. Such arbitrations are to be conducted through documentary evidence and must be completed within six months.

Costs

Section 31A was introduced in the 2015 Amendment to bring the concept of the 'costs follow events' regime to India and discourage frivolous claims.

Confidentiality

The 2019 Amendment introduced section 42A, which obligates the arbitrator, arbitral institution and parties to the arbitration to maintain confidentiality of arbitral proceedings, except where the disclosure of an award is necessary for its implementation and enforcement.

All the above amendments to the 1996 Act have opened up a gamut of options for parties seeking to resolve disputes through arbitration to find timely, efficient and cost-effective dispute resolution through arbitration.

OTHER FORMS OF DISPUTE RESOLUTION

Apart from litigation and arbitration, other ADR mechanisms in India include mediation and conciliation. While they are effective mechanisms to resolve the pendency of litigation in India, they are less popular in India as a matter of practice. In fact, the CPC encourages ADR. Section 89 of the CPC stipulates that where it appears to the court that there exist elements of settlement that may be acceptable to the parties, the court may formulate the terms of the settlement, subject to input from the parties, and refer them for resolution by means of arbitration, conciliation, mediation or judicial settlement through the Lok Adalat. However, this provision is severely underutilised in India.

Further, the 2018 Amendment has added section 12A to the Commercial Courts Act 2015, which introduced the concept of pre-institution mediation. Essentially, this contemplates mediation of commercial disputes prior to the institution of a suit in the case of suits that do not contain a plea for urgent interim relief. It also provides for the enforcement of settlement terms arrived at between parties. In this regard, the amendment provides that the written settlement between the parties would have the same status as that of an arbitral award under section 30 of the 1996 Act. However, pre-institution mediation is still at a nascent stage in India and has not yet emerged as an effective means of resolution of disputes between parties.

Further, under the Commercial Courts (Pre-institution Mediation and Settlement) Rules 2018, it is only where both parties to the commercial dispute appear before the concerned authority and give consent to participate in the mediation process that the authority may refer the matter to a mediator. However, the reality is that the average commercial litigant in India, does not, to date, view mediation as an effective means for binding dispute resolution. This is further augmented by the lack of adequate infrastructure for training mediators and the consequent non-availability of a skilled pool of mediators who can effectively resolve disputes through a non-adversarial process, such as mediation.

Interestingly, the 2019 Amendment mandates the ACI to take all such measures as may be necessary to promote and encourage arbitration, mediation, conciliation or other ADR mechanisms and, for that purpose, to frame policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration. However, the relevant provision has not yet been notified for enforcement, and given the existing lack of infrastructure; the functions of the ACI pertaining to the promotion of mediation remain unclear. Therefore, cultivating a skilled pool of mediators through concerted efforts at training and developing adequate infrastructure to support and promote mediation and conciliation as an effective dispute resolution mechanism is critical for the growth of these ADR mechanisms as effective tools for commercial dispute resolution in India.

CHAPTER 14

Others

Depending upon the specific industry/requirement, foreign entities may be required to comply with the following illustrative laws.

FOOD LAWS

Food safety laws in India fall under the purview of the Food Safety and Standards Act, 2006 and subsequent rules framed thereunder. The standard body regulating food safety in India is the Food Safety and Standards Authority of India (FSSAI). Any person carrying out food business in India has to ensure compliance with the aforementioned laws. The main objective of the Food Safety and Standards Act, 2006 is to ensure that the consumable items available in the market are healthy, safe to eat and not adulterated. To ensure that these consumable products are safe, the FSSAI has introduced regulations wherein it restricts certain products and ingredients from being sold.

Every food business operator, whether a manufacturer, retailer or any person dealing in the sale of food products, must mandatorily obtain an FSSAI licence/registration from the FSSAI department. The application for a FSSAI licence can be made on the FSSAI website by submitting the required documents along with the prescribed fees. A FSSAI licence is valid from one to five years, depending on the nature of the fee paid.

There are two kinds of FSSAI licence in India: the state licence and central licence. For a state licence the food business should have an annual turnover of up to INR 200m, and for a central licence the annual turnover should be more than INR 200m. Small business owners with an annual turnover of less than INR 200m do not require a licence; however, they need an FSSAI registration for operating their food business.

Food packaging and labelling laws are regulated under the Food Safety and Standards (Packaging and Labelling) Regulations, 2011. The above rules list the precautions to be taken by every food business operator while packaging products. They further mention the mandatory declarations that must be affixed on the food packaging, along with the manner in which the declarations are required to be mentioned.

Wrongful branding, sale of substandard food, operating without a licence/registration and misleading advertisements are some of the recognised offences under the food safety laws in India. These offences can either be punishable with imprisonment or a fine, or both.

COSMETICS

The cosmetics market in India is growing at a significant rate, with an increased percentage of users every year. As cosmetics have properties that can directly or indirectly influence human health, their manufacture/sale/distribution is regulated under the Drugs and Cosmetics Act, 1940 and subsequent Drugs and Cosmetics Rules, 1945. The said laws have been enforced to protect the interests of consumers, who can be deceived by substandard products, fake products or products having less net weight than fixed by the authorities.

The aforementioned laws provide for mandatory registrations and compliance required by enterprises or proprietors engaged in the business of drugs and cosmetics. The government continues to modify the enactments by issuing notifications or orders when required. India also allows the import of cosmetics, which are regulated under the guidelines provided for the registration of imported cosmetics.

The labeling of cosmetics is regulated under the Drugs and Cosmetics Rules, along with the Legal Metrology (Packaged Commodities) Rules, 2011. Some of the mandatory labeling requirements include the name of the product, manufacturing site address, directions for use, net contents, ingredients and any caution, if necessary.
Additionally, the Bureau of Indian Standards (BIS), which is the statutory body for standards in India, sets the standards for cosmetics for the products listed under Schedule ‘S’ of the Drugs and Cosmetics Rules, 1945. Schedule ‘S’ comprises products such as skin powders, and creams, hair oils and shampoos. The standards published by BIS must be adhered to for manufacturing cosmetics in India.

The Drugs and Cosmetics Rules, 1945 restrict the use of cosmetics containing dyes, colours and pigments, other than those specified by the BIS. Further, the above rules prohibit the use/import of lead and arsenic compounds in cosmetics for the purpose of colouring. The rules also prohibit the manufacture and import of cosmetics containing mercury compounds.

The application has to be made under the method mentioned in the Drugs and Cosmetics Rules, 1945. The rules classify cosmetics into different categories; that is, powders, creams, lipsticks, hair dyes and so on, according to which their application can be made. To manufacture any of the products as specified in these categories, a licence has to be obtained from a Licensing Authority appointed by the federal government.

Before granting or refusing the licence, the Licensing Authority must order an inspection of the whole premises where the operations of manufacturing are being carried out. A detailed

report must be submitted to the Licensing Authority, which then decides whether to grant the licence.

After the government notification introduced in 2011, all cosmetic products imported for sale in India need to be registered with the Central Drugs Standard Control Organization (CDSCO). CDSCO is the licensing authority for the purpose of import according to the 1945 Rules. This new 'registration' requirement is primarily to regulate the import of beauty and personal care products by traders with no accountability for contents and no mechanism to fix responsibility in case a consumer is not satisfied with the quality. The new regulation is an attempt to check the sale of substandard cosmetic products and harmonise import requirements with products manufactured in India.

A trademark owner without a manufacturing unit in India to sell cosmetics is now required to obtain a registration certificate to continue marketing activities in India. An application for the registration of import must be made along with the requisite documents and submitted to the Drug Controller General at the CDSCO office in New Delhi.

The Drugs and Cosmetics Act, 1940 is a punitive act. If any of the provisions or rules under the act with respect to cosmetics is not complied with, it can attract a fine or imprisonment, or both, depending on the gravity of non-compliance.

LEGAL METROLOGY LAWS

The Legal Metrology Act, 2009 deals with the units and methods of weighment and measurement in relation to mandatory technical and legal compliance in order to ensure public guarantee of security and accuracy. The act was introduced to replace the Standard of Weights and Measures Act, 1976 and the Standards of Weights and Measures (Enforcement) Act, 1985. The provisions of the act came into force on 1 April 2011.

The aim of the act is to set and enforce the standards of weight and measures; to regulate the trade and commerce in weights, measures and other goods sold or distributed by weight, measure or number; and to regulate other connected matters. The Legal Metrology (Packaged Commodities) Rules, 2011 pertain to goods that are packaged and provide the manner in which declarations are to be made and what declarations a packaged commodity meant for sale must contain.

The major stakeholders under the Legal Metrology Act are listed below:

Packers

A packer is defined under Regulation 2(g) as a person who pre-packs any commodity in any bottle, tin, wrapper or otherwise in units suitable for sale, whether wholesale or retail.

Manufacturers

Under section 2(i) of the act, ‘manufacturer’, in relation to any weight or measure, means a person who: (1) manufactures a weight or measure; (2) manufactures one or more parts, and acquires other parts, of such a weight or measure and, after assembling those parts, claims the end product to be a weight or measure manufactured by itself; (3) does not manufacture any part of such a weight or measure, but assembles parts thereof manufactured by others and claims the end product to be a weight or measure manufactured by itself; and (4) puts, or causes to be put, its own mark on any complete weight or measure made or manufactured by any other person and claims such a product to be a weight or measure made or manufactured by itself.

Dealer

Under section 2(b) of the act, ‘dealer’, in relation to any weight or measure, means a person who carries on, directly or otherwise, the business of buying, selling, supplying or distributing any such weight or measure, whether for cash or deferred payment, or for commission,

remuneration or other valuable consideration, and includes a commission agent, importer and manufacturer, who sells, supplies, distributes or otherwise delivers any weight or measure manufactured by it to any person other than a dealer.

Importer

An ‘importer’ is the individual, firm or legal entity that brings goods or causes goods to be brought from a foreign country into a customs territory.

Repairer

Under section 2(p) of the Act, ‘repairer’ means a person who repairs a weight or measure, and includes a person who adjusts, cleans, lubricates or paints any weight or measure, or renders any other service to such a weight or measure to ensure that such a weight or measure conforms to the standards established by or under this act.

Every manufacturer, packer or importer of commodities is required to obtain a registration by filing an application with the Director or Controller, along with submission of its particulars, including, but not limited to, its name, complete address of the premises and name of the commodity, along with the payment of the requisite fees (Regulation 27).

Mandatory Declarations need to be made under the provisions of the act.

The rules mandate for the making of declarations on every package intended to be commercialised in the Indian market (Regulation 6 of the rules), namely:

- name and address of the manufacturer, packer, importer;
- common or generic names of the commodity;
- net quantity in terms of the standard unit of weight or measure of the commodity;
- month and year in which the commodity was manufactured, pre-packed or imported;
- retail sale price of the package; and
- size/dimensions of the commodity wherever relevant.

Offences and penalties under the act are specified in chapter V:

Section 27 of the act provides a penalty for the manufacture or sale of a non-standard weight or measure that shall be punishable with a fine, which may be extended to INR 20,000, and for the second or subsequent offence with a fine or imprisonment for a term that may extend to three years, or both.

Section 36(1) of the act provides a penalty for the manufacturing, packaging, selling, distributing, importing and so on of non-standard packages that shall be punished with a fine, which may extend to INR 25,000; for the second offence, with a fine, which may extend to INR 50,000; and for the subsequent offence, with a fine that shall not be less than INR 50,000, but which may extend to INR 100,000, or imprisonment for a term that may extend to one year, or both.

Section 36(2) of the act provides punishment for manufacturing, packing or importing any pre-packaged commodity with an error in the net quantity as may be prescribed. The punishment may be a fine of not less than INR 10,000, but may extend to INR 100,000, or imprisonment for a term that may extend to one year, or both.

Section 38 of the act provides a penalty for the non-registration by the importer of the weight or measure. The offence is punishable with a fine, which may extend to INR 25,000; and for the second subsequent offence with a fine or imprisonment for a term that may be extended to six months, or both.

Regulation 32 of the rules imposes a penalty on the manufacturer, packer or importer of the commodities for non-registration under the provisions of the rules or contravention of any other rules.

Section 48 of the act provides that some offences may be compounded either before or after a prosecution upon payment of a prescribed sum. However, no offence can be compounded if the person has committed the same offence or a similar offence earlier within three years of date of the first offence, which was compounded. Companies must nominate a person who will be held responsible for the conduct of the company, and communicate the same to the Director of Legal Metrology or the concerned controller. When no person is nominated, then the person in charge or responsible for the operations of the company is held responsible. The company may be directed by the court to publish its name along with the offence committed in a newspaper at its own cost.
Appeals can be filed to the next highest authority against all decisions or orders of an officer in charge of legal metrology within 60 days from the day of the passing of the order or decision.

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NOTE

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CHAPTER 01

Business and Corporates Structure

In Vietnam, there are four forms of enterprises: limited liability company (LLC), joint stock company (JSC), partnership company (PC) and private enterprise (PE). Of these four forms, the LLC and JSC are the most preferred and common forms of enterprise for foreign investors due to their significant advantages compared with the PC and the PE.

Below is a brief comparison of the basic characteristics of each enterprise:

Criteria	LLC	JSC	PC	PE
Ownership	Quantity: 1–50 Qualification: a member can be either an individual or an organisation	Quantity: ≥ 3 Qualification: a shareholder can be either an individual or an organisation	Quantity: ≥ 2 general partners; and ≥ 0 limited partners Qualification: general partner must be an individual; a limited member can be either an individual or an organisation	Quantity: 0 Qualification: the sole owner must be an individual
Liability of owners	Members of an LLC generally bear liability for the debts and obligations of the LLC only to the extent of their contributed capital	Shareholders of a JSC generally bear liability for the debts and obligations of the JSC only to the extent of their contributed capital	General partners bear liability for the debts and obligations of the PC to the extent of all their assets Limited partners bear liability for the debts and obligations of the PC to their extent of their contributed capital	Sole owners bear liability for the debts and obligations of the PE to the extent of all their assets
Securities issuance	LLCs cannot issue shares LLCs may issue only straight corporate bonds to raise capital	JSCs may issue all kind of shares and corporate bonds to raise capital	PCs cannot issue securities of any kind	PEs cannot issue securities of any kind

INCORPORATION PROCESS

Upon completion of investment procedures specifically designated to investment projects by foreign investors, that is, obtaining an in-principle approval and an investment registration certificate (IRC), a foreign investor must complete an enterprise registration certificate (ERC) application in order to set up his/her business. The content of the ERC includes material corporate information, such as corporate name, tax code, charter capital, registered address, legal representative(s), information on general partners in the case of a PC and information on the owner or members in the case of an LLC. Upon issuance, information contained in the ERC is published on the National Portal of Business Registration (NPBR).

ONGOING REPORTING AND DISCLOSURE OBLIGATIONS

Vietnamese law sets forth various obligations on the disclosure and reporting of information related to Vietnamese enterprises and their investors.

For instance, enterprises must have the content of their ERC and other corporate information made available on the NPBR. Vietnamese enterprises also have an obligation to report to licensing authorities any changes to the ownership of foreign shareholders, board of management (BOM) members, controllers and directors/general directors.

Moreover, in the case of a JSC with an operational website, information on the charter; resumes of all the JSC's BOM members, controllers, directors and general directors; the JSC's annual financial statements approved by its General Meeting of Shareholders (GMSs), as well as operation outcome assessment reports of the JSC's BOM and control committees must be publicised on the JSC's website.

In addition, public JSCs are subject to more onerous disclosure obligations, including, but not limited to, the disclosure of any information that might affect their securities' prices, information on stock offerings and capital utilisation reports.

MANAGEMENT STRUCTURES

In practice, PEs are not a common enterprise form used for foreign investment in Vietnam, therefore this section concentrates on the three other forms: LLCs, JSCs and PCs.

LLC (multi-member LLC and single-member LLC)

Multi-member LLC

The management structure of a multi-member LLC comprises the Members' Council (MC), the Director/General Director and the Control Committee.

MC

The MC is composed of all members of the multi-member LLC and is the highest decision-making body of the multi-member LLC.

Meetings of the MC can be held periodically as prescribed in the charter of the multi-member LLC, but not less than once per year. Extraordinary meetings of the MC can be held upon the request of the Chair of the MC, or one or more members of the MC representing no less than ten per cent of the charter capital of the multi-member LLC.

The quorum for an MC meeting of a multi-member LLC is constituted when no less than 65 per cent of the charter capital of the multi-member LLC is represented at the meeting.

Resolutions of the MC in a physical meeting are passed by the affirmative votes of no less than 65 per cent of the total capital contribution of the members in attendance. The affirmative votes of no less than 75 per cent of the total capital contribution of the attending members are required for resolutions approving: (1) disposals of assets worth 50 per cent or more of the total asset value of the multi-member LLC stated in its latest financial statements; (2) any amendments and/or supplements to its charter; and (3) restructuring and/or dissolution of the multi-member LLC.

Where the resolutions are passed in writing in the form of opinion polls, the resolutions are passed upon the affirmative votes of MC members representing no less than 65 per cent of the charter capital of the multi-member LLC.

Director/General Director

A Director/General Director is the person in charge of managing day-to-day business affairs of the multi-member LLC and bears responsibility before the MC for the exercise and the performance of his/her rights and duties. The Chair of the MC can also hold the position of a Director/General Director.

Control Committee

The management structure of any multi-member LLC with 11 members or more must include a Control Committee. In cases of multi-member LLCs with fewer than 11 members, a Control Committee may be established if requested by the multi-member LLCs.

The rights, obligations, appointment criteria, conditions and working regulations of the Control Committee (including the head of the Control Committee) are set out in the charter of the multi-member LLC.

Single-member LLC

The management structure of a single-member LLC comprises the MC or President, the Director/General Director and the Controller. Generally, the management structure of a single-member LLC is of similar features to that of a multi-member LLC, except for those stated below.

MC

The MC is not part of the management structure of a Single Member LLC owned by an individual.

Unlike the MC in a multi-member LLC, the MC in a single-member LLC is composed of three to seven authorised representatives appointed by the owner of the single-member LLC.

The quorum for a meeting of a single-member LLC is constituted when no less than two-thirds of MC members are present.

Resolutions of the MC in a physical meeting are passed by the affirmative votes of a simple majority of MC members in attendance. The affirmative votes of three-quarters of MC members in attendance are required for resolutions approving: (1) assignment of all or part of the charter capital of the single-member LLC; (2) any amendments and supplements to the charter; and (3) restructuring of the single-member LLC.

President

Unlike a multi-member LLC, the owner of a single-member LLC may opt to appoint only one authorised representative as the President in lieu of an MC. In the case of a single-member LLC owned by an individual, the owner holds the position of President.

Controller

In the case of a single-member LLC owned by an organisation, the owner decides and appoints one or Controllers. However, a single-member LLC owned by an individual is not required to have a Controller.

JSC

The management structure of a JSC comprises the GMS, BOM, Control Committee and Director/General Director.

GMS

The GMS is the highest decision-making body of a JSC and is composed of all shareholders owning shares in the JSC with voting rights.

The GMS is convened periodically once per annum. Extraordinary Meetings of Shareholders can be convened where: (1) the BOM deems it necessary; (2) the minimum number of members of the BOM and/or Control Committee are not satisfied; (3) upon the request of the Control Committee or a shareholder/a group of shareholders holding ten per cent or more of the total ordinary shares for a consecutive period of six months; and (4) other circumstances prescribed in the charter of the JSC.

The quorum for the GMS is constituted when no less than 51 per cent of the total number of voting interests in the JSC are in attendance.

Resolutions of the GMS are passed by the affirmative votes of no less than 51 per cent of the voting interests in attendance. The affirmative votes of no less than 65 per cent of the voting interests in attendance are required for resolutions approving: (1) amendments to the classes of shares and number of each class of shares; (2) changes to the scope of business or management structure;

1. investment projects or disposals of assets worth 35 per cent or more of the total asset value of the JSC stated in its latest financial statements; (4) restructuring and dissolution of the JSC; and
2. other matters so prescribed in the charter of the JSC.

Where the voting is conducted in the form of opinion polls, resolutions shall be passed upon agreeing votes of shareholders representing no less than 51 per cent of the total number of votes in the JSC.

BOM

The BOM is the managing body of a JSC and has the power to exercise rights and perform the obligations of the JSC on behalf of the JSC, save for those rights and powers reserved for the GMS. The BOM is composed of three to 11 members elected by the GMS by means of cumulative voting.

Meetings of the BOM can be convened periodically or extraordinarily, but no less than once per quarter, by the Chair of the BOM.

The quorum for meetings of the BOM is constituted when no less than three quarters of the BOM members are present.

Resolutions of the BOM are passed by the affirmative votes of a simple majority of members in attendance. The Chair of the BOM shall have the casting vote in the case of even votes.

Control Committee

The Control Committee is the body responsible for, among other things, supervising the BOM and the Director/General Director in their management and administration of the JSC. The Control Committee is composed of three to five members elected by the GMS.

The management structure of the JSC can be organised without a Control Committee, so long as at least 20 per cent of the BOM members are independent members and an internal Auditing Committee is organised subordinate to the BOM.

Director/General Director

The Director/General Director is the person in charge of managing the day-to-day business affairs of the JSC, and is subject to the supervision of and bears responsibility before the BOM for the exercise and the performance of his/her rights and duties. The Director/General Director is elected among the BOM members or hired by the BOM.

PC

The management structure of a PC is outlined below:

Partners' Council

The Partners' Council is the highest decision-making body of the PC and is composed of all general partners of the PC. Any general partner may convene meetings of the Partners' Council to discuss and decide business matters of the PC. The Law on Enterprises, 2014 sets forth no quorum for meetings of the Partners' Council.

Resolutions of the Partners' Council shall be passed by the affirmative votes of no less than two-thirds of the general partners. The affirmative votes of least three-quarters of the general partners is required for resolutions approving: (1) business plan development; (2) amendments or supplements to the charter; (3) acceptance of new partners, or withdrawal or removal of existing partners; (4) investment projects, lending or other forms of capitalisation and borrowing to the value of 50 per cent or more of the PC's charter capital; (5) acquisition and disposal of assets to the value of the PC's charter capital or higher; (6) approval of annual financial statements, total profits, profit distributions and shares of profits to each partner; and (7) dissolution of the PC.

Director/General Director

The Chair of the Partners' Council holds the position of Director/General Director unless otherwise provided for in the charter of the PC.

LIABILITY OF DIRECTORS, OFFICERS AND SHAREHOLDERS

Like many other jurisdictions, under Vietnamese law directors and those holding other managerial posts (e.g., Chair of the MC, Controllers and BOM members) generally bear a duty of care and fiduciary duty towards and a duty to act in the best interest of the enterprise and the members/shareholders of the enterprise.

Members/shareholders of enterprises have the right to bring civil lawsuits against directors and other managerial personnel to seek indemnification in any case of violation or omission of any delegated rights and obligations.

CHAPTER 02

Takeovers (friendly M&A)

OVERVIEW OF A TENDER OFFER

In Vietnam a friendly takeover can be conducted by the submission of a tender offer, by either entities or individuals, for a part of or all the voting shares of a public company with the intention to obtain the controlling right of such a listed company.

TRANSACTIONS OF WHICH A TENDER OFFER IS REQUIRED

According to the Law on Securities, 2006, as amended in 2010, a tender offer should be submitted by a party in one of the scenarios:

1. it intends to purchase voting shares leading to the ownership of 25 per cent or more of the number of currently circulating shares in any one public company;

2. it and its related persons holding 25 per cent or more of the voting shares in any one public company wish to purchase a further ten per cent or more of the currently circulating voting shares in the public company – this requirement is supplemented by Circular 194/2009/TT-BTC, which requires a tender offer to be submitted in instances where purchase of shares results 'in ownership of 51 per cent, 65 per cent or 75 per cent' of a public company; or

3. it and its related persons holding 25 per cent or more of the voting shares wish to purchase a further interest of between five and ten per cent of the voting shares in the public company within one year from the date of completion of the acquisition of a previous tender offer tranche.

Furthermore, after conducting a public offer, an acquirer holding 80 per cent or more of the number of shares of a public company must continue to purchase the remaining number of shares within 30 days on the same conditions on price and method of payments offered in the public offer.

The Law on Securities was made in 2006, and has been amended and supplemented during the implementation process. Many provisions of the Law on Securities are not amended and supplemented directly into the law, but are amended, supplemented and clarified through the provisions of guiding decrees and circulars. In order to provide a clear and consistent legal ground for the securities sector, on 26 November 2019 the National Assembly of Vietnam adopted the Law on Securities, 2019, which will replace the current Law on Securities and take effect from 1 January 2021. The Law on Securities, 2019 essentially maintains the spirit of the current Law on Securities, brings critical contents currently prescribed in guiding decrees and circulars directly into the provisions of law, and at the same time, clarifies some of the content.

In particular, the Law on Securities, 2019 supplements the applicability of the scenario set out in scenario (1) above from just the acquirer to the acquirer and its related persons. For the scenario set out in scenario (2), instead of specifying the number of shares to be offered for purchase being '10% or more of the voting shares in in the public company' and the thresholds of '51%, 65% or 75%', the Law on Securities, 2019 supplements and specifies ownership thresholds that require a tender offer to be 'leading to direct or indirect ownership of or in excess of 35%, 45%, 55%, 65% or 75% of the number of voting shares of the public company'. The Law on Securities, 2019 also removes scenario (3) above and replaces it with the requirement for an acquirer holding 80 per cent or more of the number of shares of a listed company to continue purchasing the remaining number of shares held by the other shareholders.

PROCEDURE FOR CONDUCTING A TENDER OFFER

The process for conducting a tender offer includes the following steps:

- the offeror sends the tender offer dossier to the State Securities Commission (SSC) for approval and, at the same time, sends the tender offer to the target company;
- the target company makes a public announcement on receiving the tender offer dossier within three days from its receipt of the tender documents;
- the board of directors of the target company sends its opinion regarding the tender offer to the SSC and the shareholders of the target company within ten days from receipt of the tender documents;
- the SSC sends its reply to the tender offer dossier to the offeror (either an approval or request for further information) within 15 days from receipt of the tender documents;
- the offeror makes three consecutive public announcements regarding the tender offer on one electronic newspaper or written newspaper and on the relevant stock exchange within seven days from receipt of the SSC's approval;
- the term of a tender offer must be no fewer than 30 days and no longer than 60 days from the date of the tender offer application submitted to the SSC; and
- the offeror reports the results of the tender offer to the SSC within five days of completion, and at the same time, makes a media announcement regarding the results of the tender offer.

The tender offer may only be implemented after the SSC has provided its opinion and after the public announcement about the tender offer. In addition, the acquirer must appoint a securities company to act as an agent for conducting the procedures implementing the tender offer. Furthermore, a foreign investor cannot submit any tender offer that would result in a breach of any foreign ownership limitation applicable to the target company prescribed by Vietnamese law.

CASES WHERE THE TENDER OFFER REQUIREMENT CAN BE WAIVED

Under the Law on Securities, the purchase of shares of a public company newly issued under an issuance plan passed by the public company's GMS will not require a tender offer even if the envisaged share acquisition results in the ownership of 25 per cent or more of the voting shares in the company. A tender offer is also not required in relation to a share transfer of a shareholder in a public company to another organisation or individual, resulting in changing ownership in excess of 25 per cent, where such transfer has been approved by the GMS of the public company.

The new Law on Securities, 2019 maintains the stance that the acquisition of shares with voting rights will not be subject to a tender offer if such a waiver is approved by the GMS.

CHAPTER 03

Foreign Investment

In general, the current Law on Investment No 67/2014/QH13, passed by the National Assembly of Vietnam on 26 November 2014 as amended and supplemented with the latest amendment by Laws No 90/2015/QH13, No. 03/2016/QH14, No. 04/2017/QH14, No. 28/2018/QH14 and No 42/2019/ QH14 regulates almost all business investment activities of both foreign and local investors in Vietnam. The Law on Investment sets out prohibited business investments, conditional business investments, and the relevant procedures for making investments and so on. In addition to the Law on Investment, the business investment activities of foreign investors in Vietnam are regulated by: various Vietnamese laws and international treaties to which Vietnam is a signatory. In particular, with the exception of provisions regulating business investment prescribed in the Law on Securities, the Law on Credit Institutions, the Law on Insurance Business and the Law on Petroleum, in the event there is any discrepancy between provisions of the Law on Investment and the provisions of any other Vietnamese laws relating to prohibited business investments, conditional business investments, and procedures for making investments, the provisions of the Law on Investment shall prevail (pursuant to Article 4.2 of Law on Investment). If an international treaty to which Vietnam is a signatory contains provisions that differ from or conflict with the provisions of the Law on Investment or other provisions of Vietnamese law, then the provisions of the relevant international treaty shall prevail (pursuant to Article 4.3 of the Law on Investment and Article 6.1 of the Law on International Treaty).

FORMS OF INVESTMENT

Foreign investors are able to invest in Vietnam through the following forms of investment as prescribed by the Law on Investment: (1) establishment of an economic organisation; investment in the form of capital contribution, or purchase of shares or portion of capital in an existing Vietnamese economic organisation; (3) investment in the form of business cooperation contract (BCC); or (4) investment in the form of public–private partnership (PPP).

For the establishment of an economic organisation, foreign investors must prepare an investment project and register it in Vietnam to obtain an IRC (Article 22.1 of the Law on Investment). After obtaining the IRC, foreign investors must register the establishment of an economic organisation and receive the ERC for such economic organisation.

In order to make a capital contribution or purchase shares or a portion of capital in an existing Vietnamese economic organisation, foreign investors must obtain a notification on satisfaction of investment conditions from the provincial department of planning and investment (the

'DPI') if either: (1) the contribution or purchase results in 51 per cent or more of charter capital of the Vietnamese economic organisation being held by foreign investors; or (2) the Vietnamese economic organisation operates in a business sector with conditions to foreign investment (Article 26.1 of the Law on Investment). In theory, other than these two scenarios, foreign investors investing in Vietnam in this form are not required to go through the above procedure with the provincial DPI. However, in practice, many provincial DPIs request all foreign investors investing in their provinces in this form to perform such procedures.

In order to make investments into Vietnam through a BCC, foreign investors must obtain an IRC, but the parties to the BCC are not required to establish a new economic organisation to implement the investment project (Article 28.2 of the Law on Investment).

To make an investment in Vietnam in the form of a PPP, foreign investors must sign the PPP contract with the authorised state agency in accordance with the Vietnamese regulations governing PPPs (the primary legislation governing the PPP is Decree No 63/2018/ND-CP ('Decree 63'), dated 4 May 2018 on investment in the form of a PPP) in 2020. It is noted that the new Law on Public-Private Partnership (the **PPP Law**) of Vietnam will take effect from 1 January 2021 and at present Decree 63 is applicable to PPP projects in Vietnam. Foreign investors are not required to obtain an IRC when investing in the form of a PPP.

In the cases where foreign investors are required to go through the aforementioned procedure to obtain an IRC (in relation to the establishment of an economic organisation or investment through a BCC), if the sector, scope and impact of foreign investors' investment projects require an in-principle approval from the National Assembly, the Prime Minister or provincial People's Committee, then the in-principle approval for such investment project must be obtained before the issuance of the IRC (Article 37.1 of the Law on Investment).

RESTRICTION ON FOREIGN INVESTMENT

The Law on Investment specifies six sectors in which foreign investment is prohibited: (1) trading of narcotics; (2) trading of hazardous chemicals and minerals; (3) trading of endangered flora and fauna; (4) business dealing with prostitution; (5) human trafficking, trading of human tissue and body parts; and (6) human cloning (Article 6, Appendices 1 and 2 of the Law on Investment).

Furthermore, the Law on Investment also lists 243 conditional investment sectors applicable to both foreign investors and local investors in Vietnam (Article 7 and Appendix 4 of the Law on Investment), such as financial and professional services; certain types of education; trading

and exploration for energy and minerals; operation of ports, railroads and airports; and trading in medical services. In general, if operating in one of the conditional investment sectors, the economic organisation in Vietnam may be required to obtain specific licenses (Article 9 of Decree 118/2015/ND-CP). The specific conditions applicable to these conditional investment sectors are detailed in specialised laws regulating the particular sector or in international treaties to which Vietnam is a signatory.

Apart from the conditional business applicable to all investors, foreign investors are also required to satisfy further investment conditions when investing in certain sectors that have conditions regarding foreign investment set out in laws, ordinances, decrees and international treaties on investment (Article 2.6 of Decree 118/2015/ND-CP). Examples of such conditions include: (1) limitation on foreign ownership; (2) form of investment; (3) conditions on the scope of investment activities; (4) conditions on qualification of Vietnamese partners; and (5) other conditions prescribed in laws, ordinances, decrees and international treaties on investment (Article 10.1 of Decree 118/2015/ ND-CP).

FOREIGN EXCHANGE CONTROL RELATING TO THE FOREIGN INVESTMENT

The main legislation regulating foreign exchange in Vietnam is the Ordinance on Foreign Exchange Control, 2005 as amended in 2013 (the 'FX Ordinance'). The Vietnamese government and State Bank of Vietnam have issued numerous guiding decrees and circulars to supplement the FX Ordinance.

Vietnamese laws (and, in particular, the FX Ordinance) generally regulate foreign exchange issues relating the foreign investment (e.g., capital injection into Vietnam or remittance of profits abroad) via a system of investment capital accounts. Because the FX Ordinance is drafted based on the Law on Investment, 2005, which classifies investment as direct investment and indirect investment, the FX Ordinance and its guiding supplements are not completely compatible with the Law on Investment, 2014, which does not make a distinction between direct and indirect investment. Pursuant to the FX Ordinance and its guiding supplements, foreign exchange issues relating to foreign investment are settled via either: (1) a direct investment capital account (which is mainly regulated by Circular 06/2019/TT-NHNN); or (2) an indirect investment capital account (which is mainly regulated by Circular 05/2014/TT-NHNN). In other words, depending on the investment forms identified under the FX Ordinance

and its guiding legal documents, foreign investors are allowed to inject capital into Vietnam or repatriate profits via direct or indirect investment capital accounts.

INVESTMENT INCENTIVES AVAILABLE TO FOREIGN INVESTORS

Under Vietnamese law, investment incentives are given to investment projects of both foreign investors and local investors when such investment projects are performed in certain geographic areas and business sectors (Article 15.2 of the Law on Investment). In addition, investment incentives are given to enterprises or organisations in the high-tech and scientific/technology sector, investment projects where the investment capital is VND 6tn or more (of which at least VND 6tn will be disbursed within a period of three years or less from the date investment approval), and for investment projects located in rural areas and employing 500 employees or more.

According to Article 15.1 of the Law on Investment, investment incentives offered under Vietnamese laws are:

- application of a lower rate of corporate income tax (CIT) for a definite period or for the whole duration of implementation of the investment project, or exemption from or reduction of CIT;
- exemption from import duty in respect of goods imported to form fixed assets, raw materials, supplies and components for implementation of an investment project; and
- exemption from and reduction of land rent, land use fees and land use tax.

The current standard CIT rate is 20 per cent (Article 1.6 of Law No 32/2013/QH13). There are also preferential tax rates set at ten per cent, 15 per cent or 17 per cent and applied for a period of either 15 years or ten years (Article 1.7 of Law No 32/2013/QH13 and Article 1.7 of Law No 71/2014/QH13). It is also possible to receive CIT exemption for a period of either two or four years, and 50 per cent CIT reductions for a period of either four or nine years (Article 1.8 of Law No 32/2013/QH13). For example, except for projects relating to the production of goods subject to special consumption tax and exploitation of mineral resources, manufacturing projects are eligible for a ten per cent tax rate for 15 years, a four-year tax exemption and a nine-year 50 per cent tax reduction, if one of the following conditions are met (Articles 1.7–8 of Law No 32/2013/QH13):

- investment capital of at least VND 6tn to be disbursed within three years from the issuance date of the IRC, and total annual revenue of at least VND 10tn three years after the year the enterprise begins earning revenue; and

- investment capital of at least VND 6tn to be disbursed within three years from the issuance date of the IRC and employing more than 3,000 employees.

No tax incentives are applicable to income arising from the transfer of capital; transfer of real estate; transfer of investment projects; income from business activities outside Vietnam; or income from precious mineral resources, oil and gas exploration and exploitation and so on (Article 1.12 of Law No 32/2013/QH13).

CHAPTER 04

Restructuring and Insolvency

PETITION FOR BANKRUPTCY

The primary of legislation governing the insolvency of companies incorporated in Vietnam is the Law on Bankruptcy of Vietnam No 51/2014/QH13, dated 19 June 2014. The Bankruptcy Law applies to enterprises, cooperatives and units of cooperatives. The scope of the Bankruptcy Law does not extend to natural persons.

Pursuant to the Bankruptcy Law, an enterprise is deemed insolvent when it fails to meet its financial obligations and pay its debts within three months following the date that such debts become due. An enterprise is bankrupt only when it is declared so by the People's Court.

Upon the insolvency of the enterprise, the following persons have the right to file a bankruptcy petition to the court:

- unsecured creditors or partially secured creditors;
- labourers or trade union representatives; and
- shareholders of the insolvent enterprise.

On the other hand, the owner of a sole proprietary, the chairman of the board of directors of a JSC, the chairman of the MC of an LLC, a partner of a partnership and the legal representative of the insolvent enterprise are obliged to file a bankruptcy petition upon an enterprise becoming insolvent. Failure to comply with this obligation will bring the above persons subject to liability under the Bankruptcy Law and also give rise to the obligation to pay compensation if there is any damage caused due to such non-compliance.

ASSET PROTECTION

With the intention to preserve assets in the event of insolvency, the following transactions conducted by the insolvent enterprises during a six-month period prior to the decision on the commencement of bankruptcy proceedings will be deemed invalid and declared so by the People's Court:

- asset transfer or assignment not at the market price;
- conversion of unsecured debt(s) into debt(s) secured or partly secured by the assets of the enterprise;
- payments or setoffs that benefit a creditor in respect of a debt that has not yet become due or with a sum that is larger than a debt that has become due;
- donation of movable or immovable assets to another person; and

- other transactions for the purpose of dispersing assets of the debtor.

Furthermore, transactions between insolvent entities and their related persons within 18 months before the People's Court issues the Commencement Decision will also be deemed invalid.

STEPS OF THE BANKRUPTCY PROCEDURE

In general, the bankruptcy procedure may last over a year. A summary of the bankruptcy procedure is as follows:

1. The petitioner files the application with the court to commence bankruptcy proceedings.

2. The petitioner and the insolvent enterprise negotiate on withdrawal of the petition.

3. The court accepts the bankruptcy petition after the payment of required court fees by the petitioner and notifies such acceptance to various relevant entities, including the petitioner, the insolvent enterprise, the relevant procuration authority and other authorities dealing with cases relating to the insolvent enterprise. Upon acceptance of the bankruptcy petition, all ongoing judicial proceedings and enforcement against the insolvent enterprise's assets must be suspended.

4. The court decides on the commencement of bankruptcy proceedings and circulates its decision to the petitioner; the insolvent enterprise; (other) creditors; the relevant procuration authority, judicial enforcement authority, tax authority and local licensing authority; and makes a public announcement on the national enterprise registration information portal, the court's official website and two consecutive volumes of a local newspaper.

5. The judge in charge appoints an asset administrator or an asset management liquidation firm.

6. The insolvent enterprise conducts an inventory and evaluation of its assets.

7. The judge in charge calls for the creditors' meeting, which decides whether to suspend the bankruptcy proceeding, conduct a restoration plan or declare bankruptcy.

8. The insolvent enterprise conducts the restoration plan if it is resolved by the creditors' meeting or the court declares bankruptcy, if the restoration is not resolved or is unsuccessful, such a declaration shall be circulated to relevant entities.

9. The judicial enforcement authority conducts the liquidation procedure under the supervision of the asset administrator or asset management liquidation firm.

Upon the decision on the commencement of bankruptcy proceedings (Step 4) and the appointment of an asset management liquidation firm (Step 5), all operations of the insolvent enterprise are put under supervision of the judge in charge and the asset administrator or the asset management liquidation firm.

CHAPTER 05

Employment, Industrial Relations, Work Health and Safety

EMPLOYEES RIGHTS AND STATUTORY PROTECTION METHOD

The main law regulating the employment relationship is the currently prevailing Labor Code, 2012, which will be replaced by Labor Code, 2019 from 1 January 2021. The employment relationship is also further governed by the Law on Social Insurance, Law on Labor Hygiene and Security, and other governmental regulations, decrees and circulars.

An employee shall have the following rights, among others:

- to participate in vocational training, and to improve occupational skills and suffer no discrimination; furthermore, employers are prohibited from discriminating on the basis of gender, race, skin colour, social strata, marital status, belief, religion, HIV infection, disabilities and for the reason of establishing or joining trade unions and participating in trade union activities;

- to receive a wage commensurate with his/her occupational knowledge and skills on the basis of an agreement reached with the employer; skilled labourers can receive a salary at least seven per cent higher than the minimum wage;

- to receive protection and be able to work in conditions that ensure labour safety and labour hygiene; employers are required to provide appropriate tools, equipment and a safety plan for employees to prevent labour accidents and occupational diseases;

- to work normal working hours and be paid additional wages for overtime work, where eight hours per day and 48 hours per week is considered normal working hours; for overtime work, employees can receive additional pay, but the maximum overtime hours shall not exceed four hours per day, 30 hours per month (from 1 January 2021, the maximum overtime hour will be increased to 40 hours per month) and 200 hours per year; and a gross maximum annual overtime of 300 hours is permitted in some special scenarios;

- to take at least 12 days of paid annual leave and to enjoy collective welfare benefits;

- to take leave on the ten public holidays, including: (1) Calendar New Year Holiday: one day;
- (2) Lunar New Year Holidays: five days; (3) Victory Day: one day; (4) International Labour
- Day: one day; (5) National Day: one day; and (6) Commemorative Celebration of Vietnam's
- Forefather – Hùng King: one day; under the Labour Code 2019, an additional one day will be added to the National Day holiday; and if employees are required to work on public holidays, they will be paid 300 per cent of their normal salary;

- to form and join and participate in activities of trade unions, occupational associations and other organisations in accordance with Vietnamese law; employers are prohibited from obstructing or causing difficulties to employees in the establishment, joining and operation of trade unions;

- to request and participate in dialogue with employers, implement democratic regulations and be consulted at the workplace to protect his/her rights and legitimate interests;

- unilaterally to terminate the labour contract in accordance with Vietnamese law, although employees are required to provide prior notice to employers; and

- to go on strike in certain circumstances provided by Vietnamese law; an employees' collective is permitted to carry out the strike in order to achieve its demands in the process of a labour dispute settlement.

Recognising that an employer holds a stronger position than its employees, in order to protect the legitimate rights and benefits of employees, Vietnamese law provides certain statutory protection for employees. Firstly, the laws provide the legal basis to protect the job of the employee, according to which any termination by employers must be based on statutory grounds, and are subject to strict formal requirements and procedures. Employers are also required to provide severance payment to employees with more than 12 months' service and who choose to terminate their labour contracts as allowed by law. Secondly, Vietnamese law ensures suitable labour conditions for the employee by providing for minimum wages applicable for various regions, working hours, annual leave and equipment for employees for dangerous and/or hazardous work. Such labour conditions must be explicitly set out in the labour contract, internal regulations, collective labour agreements and other documents required under law. Moreover, Vietnamese law prescribes some specialised regulations applicable to female employees (e.g., six-month maternity leave), juvenile labour or elder labour, and disabled labour. Last but not least, Vietnamese law grants labour unions 'the role of representing and protecting the rights and legitimate interests of trade union members and employees' and, in certain disciplinary processes, the participation of the trade union is mandatory to ensure the legitimacy of the disciplinary decision of the employer.

STATUTORY CONTRIBUTIONS AND MINIMUM WAGE

By law, both the employee and employer are required to make payments towards mandatory insurance (including social insurance, healthcare insurance and unemployment insurance) at the following rates:

Contribution subject	**Percentage for mandatory insurance (based on the monthly salary of the employee)**			
	Social insurance	Healthcare insurance	Unemployment insurance	Total
Contribution of the employer (percent)	17.5	3	1	21.5
Contribution of the employee (percent)	1.5	1.5	1	10.5
Total (percent)	**25.5**	**4.5**	**2**	**32**

Social insurance contributions apply to foreign employees working in Vietnam who satisfy the following requirements: (1) they obtain work permits, practising certificates and practising licences issued in Vietnam; (2) they enter into indefinite-term or definite-term labour contracts valid for at least one year with employers in Vietnam; (3) they have not reached the age of 60 for males and 55 for females; and (4) they are not intra-company transferees, including employees who have been managers, chief executive officers, experts or technicians of a foreign enterprise for at least 12 months, and have been transferred to work in the commercial presence of such an enterprise within the territory of Vietnam.

Minimum wages differ depending on the location of employment. In comparison with 2019, the minimum wage of employees has increased by an average of approximately five per cent due to the proposals and opinions from the General Trade Union and National Salary Council, as follows:

Region	Minimum wage in 2019 (under Decree 157/2018/ND-CP) (VND)	Minimum wage in 2020 (under Decree 90/2019/ND-CP) (VND)
Region I	4,180,000	4,420,000
Region II	3,710,000	3,920,000
Region III	3,250,000	3,430,000
Region IV	2,920,000	3,070,000

The above regional minimum wages are only applicable for unskilled employees, whereas the minimum wage applied for skilled/educated employees is higher by at least seven percent.

WORK PERMITS AND RESIDENCE CARD

At least 15 working days before the day on which a foreign employee begins work, the employer must submit an application for a work permit to the provincial Department of Labour, Invalids and Social Affairs ('DOLISA'). The maximum term of a work permit is currently two years. Upon expiry of the two-year term, it is possible for an employer to renew the work permit for a foreign employee for another two-year term.

For certain foreigners working in Vietnam who would not normally receive exemption from the requirements for a work permit, at least seven working days before beginning work, the employer may request the DOLISA to certify that such foreign employees are eligible for exemption from work permits. A foreign worker who receives a work permit exemption can be: (1) a capital contributing member or owner of an LLC; (2) a member of the BOM of a shareholding company; (3) the head of a representative office or of a project of an international organisation or non-governmental organisation in Vietnam;
(4) entering Vietnam for a period of less than three months in order to offer services; (5) a foreign lawyer issued with a certificate to practise law in Vietnam in accordance with the Law on Lawyers; (6) an employee who is internally reassigned in a company that engages in one of the 11 service industries for which Vietnam's World Trade Organization (WTO) commitments on services apply.

A foreign employee who holds a valid work permit or is legally exempt from obtaining a work permit will receive a temporary residence card issued by the police authorities, which is valid throughout the term of his/her work permit or work permit exemption notice. A foreign employee who has received a temporary residence card can enter and exit Vietnam without a visa throughout the term of his/her temporary residence card.

CHAPTER 06

Tax Law

OVERVIEW OF TAXATION

Knowledge of tax regulations is a must for enterprises doing business in Vietnam. Vietnam only has national taxes centrally managed by the Ministry of Finance (MOF), which is also responsible for releasing implementation guidance for tax laws and regulations. The General Department of Taxes (the 'GDT') and the General Department of Customs administer almost all the taxes that companies need to be aware of when doing business in Vietnam. Tax agencies and customs offices are established at the provincial and district levels.

Enterprises operating in Vietnam are required to pay: (1) VAT; (2) CIT; (3) personal income tax (PIT); (4) foreign contractor; (5) special sale tax import/export tax; and (6) certain other specific taxes.

On 26 November 2019 the National Assembly of Vietnam adopted the Law on Securities, 2019, which will replace the current Law on Securities and take effect from 1 January 2021. The promulgation of the Law on Securities, 2019 focused on reviewing tax risk management, promotion of electronic transactions and administrative procedure, and enhancement of international cooperation on tax management. The Law on Securities, 2019 has the following new provisions:

- tax authorities will be granted more competence to collect tax;
- taxpayers and tax authorities will be required to conduct electronic transactions for tax purposes if they fully satisfy certain requirements;
- providing guidance on electronic invoicing;
- enhancing the cooperation between Vietnamese tax authorities and their overseas counterparts in various areas;
- changing various regulations on tax filing and payment procedures;
- reaffirming general principles of the existing transfer pricing regulations, such as the arm's length principle or the principle that adjustment of prices shall not reduce taxable profits; and
- providing more guidance in relation to tax audit, admin penalties and late payment interest.

TAXES IMPOSED ON ENTERPRISES

VAT

VAT is levied on supplies of goods and services made in Vietnam by a taxable person, including the import of goods and services into the country during the course of business. VAT payers include organisations and businesspersons that purchase services from foreign organisations (or individuals) that do not have a permanent establishment in Vietnam and are not registered for VAT in Vietnam.

There are two VAT calculation methods: tax deduction and direct calculation. Under the former, the VAT payable is determined by deducting the input VAT from the output VAT charged. Under the latter, VAT is applied on the added value of the goods or services. Taxpayers must file VAT returns on a monthly basis by the 20th of the following month, or on a quarterly basis by the 30th day of the subsequent quarter.
There are three categories of VAT rates:

- zero per cent, which mainly applies to exported goods and services;
- five per cent, which mainly applies to essential goods; and
- ten per cent, which is the standard VAT rate applicable to most types of goods and services.

There are, however, areas where VAT is exempt, the most important being:

- certain agricultural products and transfer of land use rights;
- financial derivatives and credit services;
- medical services;
- teaching and training;
- transfer of technology and software services; equipment, machinery and spare parts; and specialised means of transport;
- necessary materials used for the prospecting, exploration and development of oil and gas fields that cannot be produced in Vietnam; and
- goods and services imported under official development assistance (ODA) programmes.

Corporate income tax (CIT)

Foreign enterprises doing business under the Law on Investment, 2014, the Law on Petroleum and the Law on Credit Institutions, 2010 are subject to taxation imposed under CIT laws. The standard rate is 20 per cent.

CIT-taxable income is the difference between an enterprise's total revenue, whether domestic or foreign-sourced, and its deductible expenses, plus other assessable income. CIT taxpayers are required to prepare an annual CIT return, which must include a section setting out the adjustments between accounting profits and taxable income. CIT taxpayers may carry forward their tax losses for five years. The carrying-back of losses is not permitted. There is no provision for any form of consolidated filing or group loss relief.

Expenses are tax deductible if they relate to the generation of income and are properly supported by suitable documentation, such as a contract, invoice or bank transfer voucher.

The following is a non-exhaustive list of non-deductible expenses under current laws:

- depreciation of fixed assets that are not in accordance with the prevailing regulations;
- employee remuneration expenses that are not stated in a labour contract or collective labour agreement; and
- provisions for stock devaluation, bad debts, financial investment losses, product warranties or construction work that are not in accordance with prevailing regulations.

There are three preferential tax rates available: (1) ten per cent, either for 15 years or the lifetime of the project; (2) 17 per cent for the lifetime of the project; and (3) 17 per cent for ten years. Preferential tax rates start from the commencement of operating activities. When the preferential rate expires, the CIT rate reverts to the standard rate of 20 per cent.

Foreign contractor tax (FCT) – withholding tax

FCT applies to certain payments to foreign parties, such as interest, royalties, service fees, leases, insurance, transport, transfers of securities and goods supplied within Vietnam or associated with services rendered in Vietnam. FCT comprises a CIT and VAT element at varying rates and can also include PIT for payments to foreign individuals.

There are three methods for tax payment: direct method, deduction method and hybrid method. Under the direct method, the foreign contractor does not have to register for VAT purposes, nor file CIT and VAT returns. Instead, CIT and VAT will be withheld by the Vietnamese customer at prescribed rates from the payments made to the foreign contractor, whereas the deduction method requires the foreign contractor to register for VAT and file CIT and VAT returns in the same way as a local entity. The foreign contractor needs to issue VAT invoices and charge VAT similar to a local company. CIT is paid at 20 per cent on net profits.

Foreign contractors can apply the deduction method if they meet the following requirements:

- they have a permanent establishment or are tax resident in Vietnam;
- the duration of the project in Vietnam is more than 182 days; and
- they adopt the full Vietnam Accounting System, complete a tax registration and are granted a tax code. The Vietnamese customer is required to notify the tax office that the foreign contractor will pay tax under the deduction method within 20 working days of the date of signing the contract.

If the foreign contractor carries out several projects in Vietnam and qualifies for the application of the deduction method for one project, the contractor is then required by law to apply the deduction method to all its other projects as well.

Under the hybrid method, the foreign contractor registers for VAT and accordingly pays VAT based on the deduction method (i.e., output VAT less input VAT), but with CIT being paid under the direct method rates on gross turnover. Foreign contractors wishing to adopt the hybrid method must:

- have a permanent establishment in Vietnam;
- operate in Vietnam under a contract with a term of more than 182 days; and
- maintain accounting records in accordance with the accounting regulations and guidance set out by the MOF.

Double taxation avoidance agreements (DTTA)

Vietnam has entered into Double Taxation Avoidance Agreements with over 75 countries and regions in the world, which helps to reduce an enterprise's tax liability in Vietnam. For example, capital gains are normally subject to 25 per cent CIT, but for residents of some contracting countries, capital gains are only taxed in the resident's home country and exempt from CIT in Vietnam. Accordingly, if these capital gains are not taxed in the home country, the taxpayer will be exempt from any CIT against capital gains in Vietnam.

Special Excise Duty (Special Sales Tax or SST)

SST applies to the production or import of certain goods, the domestic sales by the importers of these goods and the provision of certain services. The Law on SST classifies SST objects into the following two groups:

- commodities, which include cigarettes, liquor, beer, automobiles that have less than 24 seats, motorcycles, aeroplanes, boats, petrol, air-conditioners up to 90,000 British thermal units, playing cards and votive papers; and
- services, which include discotheques, massage, karaoke bars, casinos, gambling, lotteries, golf clubs and entertainment with betting.

SST rates depend on the object and currently range between five and 150 per cent. Taxpayers must file SST returns on a monthly basis by the 20th of the following month.

Import and export duties

Import duty at various rates is imposed on goods imported into Vietnam. Import duty exemptions are provided for projects classified as encouraged sectors and goods imported in certain circumstances.

There are three import duty rates in Vietnam:

- ordinary rates;
- preferential rates; and
- special preferential rates, which apply to imported goods from countries that have free trade agreements (FTA) with Vietnam. Vietnam has signed many FTAs with nations and areas, such as the Association of Southeast Asian Nations (ASEAN), Australia and New Zealand, Japan, South Korea and the EU-Vietnam FTA.

Vietnam also has an anti-dumping tax, anti-subsidy tax and self-defence tax.

Export duties are levied on a few items comprising natural resources, such as sand, chalk, marble, granite, ore, crude oil, forest products and scrap metal.

The General Department of Customs and its agencies are central to imported/exported goods and services issues in Vietnam, particularly in determining the value of goods and services for tax calculations.

Personal Income Tax (PIT)

A personal income taxpayer is any resident individual with taxable income arising either within or outside the territory of Vietnam, or any non-resident individual with taxable income arising within the territory of Vietnam.

Residents are those residing in Vietnam for 183 days or more in a calendar year, or for 12 consecutive months from the first date of arrival; or those having a permanent residence in Vietnam.

Tax residents are subject to Vietnamese PIT on their worldwide taxable income, wherever it is paid or received. Employment income is taxed on a graduated tax rates basis, while non-employment income is taxed at a variety of different rates.

Individuals who do not meet the definition of a tax resident are considered to be taxed non-residents. Taxed non-residents are subject to PIT at a flat tax rate of 20 per cent on the income received as a result of working in Vietnam in the given tax year. Non-employment income is taxed at various other rates subject to any applicable DTAA.

For residents with regular income, depending on their monthly income, the rate shall be five per cent to 35 per cent. For residents with irregular income, the capital gains tax (CGT) as PIT is due and payable when the transaction is completed, with the following range: 0.1 per cent for a security transfer; five per cent for interest/dividends, income from copyright and franchising/royalties; ten per cent for income from winning prizes and inheritance/gifts; and 20 per cent for capital transfer.

In addition, there is a list of taxable income and non-taxable income. This list is complex and changes depending on the policy of the government. Therefore, advice from a qualified tax consultant should be sought.

TAX COMPLIANCE, AUDITS AND PENALTIES

To reform the tax administration, as well as to modernise tax administration systems and procedures, taxpayers are now required to self-assess their taxes, and there is a shift towards declaring and paying taxes online.

There are detailed regulations setting out penalties for various tax offences. For discrepancies identified by the tax authorities upon audit/inspection, a 20 per cent penalty is imposed on the amount of tax that is under-declared. Late payment of tax is subject to interest of 0.03 per cent of the tax liability for each day that the tax is late instead of 0.05 per cent previously.

CHAPTER 07

Intellectual Property

PATENTS

Vietnam distinguishes between invention patents and utility solution patents.

An invention patent is a technical solution in the form of a product or process intended to solve a problem by the application of natural laws. An invention shall be eligible for protection in the form of the grant of an invention patent when it satisfies the following conditions: it is novel, it is of an inventive nature and it is susceptible to industrial application. Rules for utility solution patents are similar to those for invention patents, but the item is not required to demonstrate an inventive nature.

The following objects are ineligible for protection as inventions: (1) scientific discoveries or theories and mathematical methods; (2) schemes, plans, rules and methods for performing mental acts, training domestic animals, playing games and doing business; (3) computer programs;
3. presentations of information and solutions of aesthetic characteristics; (5) plant varieties and animal breeds; (6) processes of plant or animal production that are principally of a biological nature, other than microbiological processes; and (7) human and animal disease prevention methods, diagnostic and treatment methods.
Invention patents are protected for a maximum of 20 years, while utility solution patents are valid for ten years.

TRADEMARKS

A trademark is any sign in the form of letters, words, drawings or images, including holograms, or a combination thereof, represented in one or more colours, used to distinguish goods or services of different organisations or individuals. Vietnam laws provide another nearly similar definition of ‘trade name’, which can be interpreted as the designation of an organisation or individual used in business activities in order to distinguish the business entity bearing such a trade name from other business entities in the same business sector and area.

However, the following signs are ineligible for protection as marks: indistinctive (e.g., simple shapes and geometric figures, numerals, letters or scripts of uncommon languages or signs indicating time, place and method of production, category, quantity, quality, properties, ingredients, use, value or other characteristics descriptive of goods or services); identical with or confusingly similar to national flags or national emblems; causing misunderstanding or confusion or deceiving consumers as to the origin, properties, use, quality, value or other characteristics of goods or services.

Trademarks are generally protected by registration. Unregistered trademarks may still be protected in Vietnam if such trademarks are deemed to be ‘well-known’ based on the number of customers, territories for sales, sales turnover and so on.

A trademark is valid for ten years; after which it may be renewed indefinitely for additional ten-year periods.

COPYRIGHT

Copyright means rights of an organisation or individual to works (any creation in the literary, artistic or scientific sector) that such an organisation or individual created or owns, whereas copyright-related rights mean rights of an organisation or individual to performances, audio and visual fixation, and broadcasts and satellite signals carrying coded programs.

Copyright in works shall comprise moral rights (e.g., to give titles to their works, to publish their works, to authorise other persons to publish their works or to forbid other persons from modifying, editing or distorting their works in whatever form) and economic rights (e.g., to display their works to the public, to reproduce their works, or to communicate their works to the public by wireless or landline means, and electronic information networks or other technical means).

Copyright shall arise at the moment a work is created and fixed in a certain material form, irrespective of its content, quality, form, mode and language, and irrespective of whether or not such work has been published or registered. Furthermore, the copyright-related rights shall arise at the moment a performance, audio and visual fixation, broadcast or satellite signal carrying coded programs is fixed or displayed without causing loss or damage to copyright.

To be protected as copyrights in Vietnam, works that are created in another country and exist in a definite form, or that are first published or disseminated in another country, must be published in Vietnam within 30 days from the first publication. Provided, however, that if such a foreign country is a member of the international treaties to which Vietnam is also a signatory (e.g., the Bern Convention for the Protection of Literary and Artistic Works or any other bilateral convention regarding national treatment), Vietnam extends its national treatment in copyright protection to such a member country.

DESIGN

Design (literally referred to as ‘industrial design’ under Vietnamese law) is defined as the outward appearance of a product embodied in three-dimensional configurations, lines, colours or a combination of such elements. Similar to a patent, a design shall be protected if it satisfies

the following conditions: (1) it is novel; (2) it is of an inventive nature; and (3) it is susceptible to industrial application. There are three types of designs deemed as ineligible for protection:

1. outward appearance of a product that is necessary due to the technical features of the product;
2. outward appearance of civil or industrial construction works; or (3) shape of a product that is invisible during the use of the product.

An industrial design patent shall be valid from the grant date until the end of five years after the filing date and may be renewed for two consecutive terms, each of five years.

OTHER REMARKS

To enjoy most types of intellectual property rights in Vietnam, the intellectual property should be registered. The application for registration may be lodged in Vietnam or overseas if so allowed under the law of Vietnam and the treaty regarding intellectual property to which Vietnam is a party. Vietnam laws apply the ‘first to file’ principle, under which if two or more applications for registration are filed by different parties, a protection title may only be granted to the valid application with the earliest priority or filing date among applications that satisfy all conditions for the grant of a protection title.

Any organisation or individual who commits an act of infringement of the intellectual property right of another organisation or individual may be dealt with by the application of civil, administrative or criminal remedies.

Preliminary injunctions and compensation for damages are available through the civil courts. Administrative remedies can include caution or monetary fines and additional penalties (e.g., confiscation of intellectual property counterfeit goods, raw materials, and materials and facilities used mainly for the production or trading of such intellectual property counterfeit goods; or the suspension of business activities for a fixed period in the sector in which the infringement was committed). In certain cases, criminal proceedings may be launched against persons who violate trademarks, geographical indications, copyrights and other related rights.

CHAPTER 08

Financing

TYPES OF BANKS

A foreign bank is permitted to provide banking operations and other related business operations in Vietnam through one or more of the following forms after it has obtained an establishment and operation licence (the 'Licence') issued from the State Bank of Vietnam (the 'SBV'):

1. a wholly foreign-owned bank;

2. a joint venture bank (between a foreign bank and a Vietnamese bank); and/or

3. a branch of a foreign bank in Vietnam.

Under Vietnamese law, banks operating in form (1) and/or (2) are independent legal entities, while entities operating in form (3) do not have legal entity status. In addition, a foreign bank may also set up a representative office in Vietnam for the purpose of acting as a liaison office (without providing any banking services in Vietnam). A representative office is also not an independent legal entity and may not conduct revenue-generating activities.

The scope of operation of a wholly foreign bank, joint venture bank and branch of a foreign bank will be specified in the Licence issued by the SBV, which may include some or all of the below activities as stipulated under Article 98 of Laws on Credit Institutions, 2010 (as amended in 2017):

- taking demand deposits, time deposits, saving deposits or other deposit types;
- issuing deposit certificates, promissory notes, treasury bills and bonds to raise capital within and outside Vietnamese territory;
- extending credits in forms as approved by the SBV;
- opening current accounts for clients;
- providing payment instruments; and
- providing payment services as approved by the SBV.

LICENSING REQUIREMENT FOR BANKS

The specific licensing conditions may vary depending on whether the bank is a wholly foreign-owned bank, joint venture bank or branch of a foreign bank. Generally, an application for a Licence may be granted upon satisfaction of the following conditions:

- having funded capital at least equal to the minimum legal capital as required by laws; for instance, VND 3,000bn for wholly foreign-owned and joint venture banks, and $15m for a branch of a foreign bank;
- the foreign bank/foreign credit institution (CI) must be a legal entity currently operating lawfully and must have sufficient financial capacity to participate in capital contribution. In the case of a branch of a foreign bank, the total asset value of the foreign parent bank must be at least $20bn in the preceding year. In the case of a wholly foreign-owned bank or joint venture bank, the requirement on total asset value is at least $10bn in the preceding year;
- managers, executives and members of the board of controllers must satisfy all the criteria and conditions in accordance with Vietnamese law;
- having a charter with provisions in accordance with Vietnamese law;
- having a proposal for establishment and a feasible business plan that do not adversely affect the safety and stability of the Vietnamese CIs system and do not create a monopoly or restrict competition, or create unfair competition within the Vietnamese CI system;
- the foreign bank/foreign CI is permitted to conduct banking operations in accordance with the law of the country where its head office is located;
- the proposed operations for which the Licence is applied to conduct in Vietnam must be the operations that the foreign bank/foreign CI is permitted to conduct in the country where its head office is located;
- the foreign bank/foreign CI must have a healthy operation and satisfy all conditions on total assets, financial status and prudential ratios in accordance with the SBV's regulations;
- the competent authority of the foreign country has agreed in writing with the SBV on the inspection and supervision of the banking operation, and on the exchange of information about the supervision of banking safety, and has given a written commitment on the unified supervision of the operation of the foreign bank/foreign CI in accordance with international practice; and
- the foreign bank must give a written commitment that it accepts liability for all obligations and commitment of its branch in Vietnam; ensures that the actual value of the funded capital of its branch will be maintained at no less than the minimum capital as required by law; and that it will comply with Vietnamese banking regulations on safety requirements. On the other hand, the foreign CI must give a written supporting commitment on the finance, technology, administration and operation of the joint venture bank or the wholly foreign-owned bank, and

ensure that those entities shall maintain funded capital at least equal to the minimum legal capital and comply with provisions on the prudential ratios as required by laws.

The procedure for issuing a Licence for a wholly foreign-owned bank, joint venture bank or branch of a foreign bank in Vietnam is as follows:

- The applicant submits to the SBV the applications dossier as required by Vietnamese laws. Within 60 days from the receipt of the complete application documents, the SBV will issue a letter of acknowledgment of such receipt.
- Within 90 days from the letter of acknowledgment, the SBV will issue an in-principle approval for the establishment of the applicant. In the case that the SBV refuses to issue an in-principle approval, the SBV will explain the reasons for such a refusal in writing.

- Within 60 days from the receipt of the in-principle approval from the SBV, the applicant will submit to the SBV additional documents as required by Vietnamese laws. Failure to supplement the additional documents as required by Vietnamese laws within the aforesaid period shall result in the in-principle approval no longer being in effect.

- Within two days from the receipt of the complete additional documents, the SBV will issue a letter of acknowledgment of such receipt.

- Within 30 days from the receipt of the complete additional documents, the SBV will issue the Licence. In the case that the SBV refuses to issue the Licence, the SBV will explain the reasons for the refusal in writing.

With respect to the issuance of a Licence for representative offices, within 60 days from the receipt of a complete application dossier, the SBV must either issue the Licence or explain the grounds for its refusal of such an application.

CHAPTER 09

Privacy Law & Data Protection

Despite rights to privacy and confidentiality of information being stated as one of the fundamental rights under the 2013 Constitution, there is no single unified legislative document regulating this matter in Vietnam.

REGULATIONS ON PRIVACY AND DATA PROTECTION

Although the National Assembly has repeatedly proposed to issue a single law on privacy and data protection, in practice there has been no movement to introduce such a law. For the time being, several regulations on privacy and data protection are found across various legislative documents, such as the Civil Code, 2015, Law on Telecommunication, 2009, Law on Post, 2010, Consumers' Rights Protection Law, 2010, Cyber-Information Safety Law, 2015, Cybersecurity Law, 2018, Criminal Code, 2015, Law on Children, 2016, Law on Medicine, 2016, Law on Statistics, 2015, Law on Press, 2016 and Law on Citizen Identification, 2014. However, these regulations merely provide general regulations, and most of them are overlapping in content. Due to the current situation, the application of privacy and data protection regulations is rather difficult in Vietnam.

Because privacy and data protection are regulated in different pieces of legislation and without cross reference, it is difficult to achieve a consistent understanding of privacy and data protection. Nevertheless, privacy and data protection are recognised principles in Vietnam. In practice, unless otherwise permitted by Vietnamese law, no collection, processing or usage of personal data can be conducted without consent being sought from the data subjects by target entities. Data subjects also have the right to request that any target entities furnish them with their personal data so that the data subjects are able to check, correct, remove and prevent the disclosure or transmission of their personal data to other parties.

REMEDIES AGAINST VIOLATIONS RELATED TO PRIVACY AND DATA PROTECTION

Infringements of privacy and data protection will result in the imposition of administrative sanctions or even criminal penalties depending on the severity of the violations. An individual may also pursue civil procedures to protect his/her privacy and personal information, such as requesting the relevant authority or the court recognise his/her right or terminate the infringement, or requesting compensation for any damages or loss.

The three different remedies mentioned above are provided for under law, but in practice, such remedies are ineffective. This is due to a lack of detailed implementing regulations. Moreover,

the sanctions and penalties are not strong enough to prevent the violation of the relevant regulations. Ultimately, the unclear and troublesome nature of such remedies discourages entities from pursuing them.

CHAPTER 10

Competition Law

The recently passed Competition Law, 2018 No 23/2018/QH14 introduces significant changes to the competition landscape in Vietnam, most notably the shift to an effects-based regulatory approach that focuses on the significant competition-restraining impact of a conduct rather than the form in which it is carried out. The Law also applies to offshore transactions that have an impact on domestic market competition. Decree 35/2020/ND-CP, which guides a number of provisions of the Competition Law, and provides for, among other matters, detailed merger filing thresholds and pertinent factors for substantive assessment, took effect on 15 May 2020.

This chapter outlines three key areas regulated by the Competition Law: (1) abuse of monopolisation and dominance; (2) cartels; and (3) merger control.

ABUSE OF MONOPOLISATION AND DOMINANCE

Under the Competition Law, an undertaking is deemed to be in a dominant market position if it possesses:

(1) a market share of at least 30 per cent in the relevant market, or (2) significant market power. Significant market power is determined based on, inter alia, financial capacity, market barriers and market share ratio, among undertakings in the relevant market. A group of two, three, four or five undertakings is deemed to have a collective dominant market position if the group has a combined market share of at least 50 per cent, 65 per cent, 75 per cent or 85 per cent in the relevant market, respectively.

An undertaking is monopolistic if it has no competitors in the same relevant market.

An undertaking or (where applicable), a group of undertakings, having monopolistic or dominant market power, is not in and of itself unlawful. Legal concerns are only raised if such an undertaking or group of undertakings abuses the monopolisation or dominance that it enjoys. As such, the Competition Law prohibits the following abusive conduct:

Prohibited conduct	Dominance	Monopolisation
Predatory pricing	✓	
Resale price maintenance (RPM) practice	✓	✓
Restraining production or distribution of goods or services, limiting the market, or impeding technical or technological development	✓	✓
Applying different commercial conditions to the same transaction	✓	✓
Imposing unrelated conditions	✓	✓
Hindering the participation in, or expansion of, the market by other undertakings	✓	✓
Imposing disadvantageous conditions on customers		✓
Unilaterally changing or terminating signed contracts without justification		✓
Conducting acts prohibited by other laws		✓

Of note, not all of the aforementioned conduct is prohibited per se. Except for those for which the prohibition is exclusive to monopolistic undertakings, abusive conduct is only illegal if it is actually or potentially harms competitors or causes loss to customers.

CARTELS/RESTRICTIVE AGREEMENTS

Article 3.3 of the Competition Law defines a ‘restrictive agreement’ as an agreement in any form that has an actual or potential competition-restraining effect.

Under the Competition Law, cartels are no longer prohibited solely on the basis of the undertakings’ combined market share as outlined under the former regime. The law instead adopts a new approach, according to which a given cartel is assessed on the basis of its restrictive impact on the domestic market. Accordingly, certain types of restrictive agreements, such as price fixing or market allocation between undertakings having a combined market share lower than 30 per cent in the relevant market than were permitted under the former competition law, are now prohibited.

Furthermore, certain cartels are now criminally prosecutable. Prohibited and criminalised cartels include the following:

Cartels	Illegal per se[1]		Conditionally prohibited[2]		Criminally prosecutable	
	Horizontal	**Vertical**	**Horizontal**	**Vertical**	**Horizontal[3]**	**Vertical**
Bid rigging[4]	✓				✓	✓
Removal of non-members from the market	✓	✓			✓	✓
Restriction of non-members' market access or business development	✓	✓			✓	✓
Price-fixing	✓			✓	✓	
Allocation of market and/or customer	✓			✓	✓	
Quota fixing	✓			✓	✓	
R&D restriction			✓	✓	✓	
Agreements on the refusal to deal			✓	✓		
Agreements to limit the upstream/downstream market			✓	✓		

[1] Illegal cartels are considered hard-core cartels, in that their mere existence is in and of itself detrimental to market competition, and thus strictly prohibited.

[2] Conditional prohibited cartels are only prohibited if they actually or potentially restrict competition significantly.

[3] Except for bid rigging and agreements on the removal of non-members from the market or restriction of non-members' market access or business development, horizontal cartels are only considered criminally prosecutable if the co-conspirators' combined market share is at least 30 per cent.

[4] For bid rigging, only individuals are criminally prosecuted.

Agreements to impose businesses conditions not directly related to the subject matter of the contract			✓	✓	✓	
Other restrictive agreements			✓	✓		

The Competition Law provides for a leniency programme, under which co-conspirators participating in a cartel may turn themselves in and assist with the competition authority's investigation in exchange for either full immunity from, or a reduction of, fines for breach of competition law that the authority would have otherwise imposed on them. This is the first time a leniency programme has been formally introduced in Vietnam. Nevertheless, it is designed to create a so-called 'race to court' effect with conditions and levels of immunity similar to those of the conventional leniency programme recommended by the Organisation for Economic Co-operation and Development (OECD).

MERGER CONTROL

Under the Competition Law, a contemplated economic concentration that crosses any of the filing thresholds must be notified to the competition authority prior to its completion. An economic concentration encompasses a merger, consolidation, acquisition, joint venture or other type of concentration provided by law.

The Competition Law no longer relies on market share as the sole jurisdictional threshold, but adds a new set of criteria to its filing test, namely total assets, total turnover and transaction value. This means there will be no merger prohibited per se as under the former competition law regime. Two sets of thresholds are set out in Decree No 35/2020/ND-CP, one applicable to transactions in virtually all sectors, the other reserved for transactions involving CIs, insurers and/or securities companies.

General thresholds

A contemplated concentration, except for one involving any of the above listed undertakings, must be notified to the competition authority if any of the following thresholds is met:

Criteria	Threshold
Total sales or purchase turnover or total assets on the Vietnamese market of either undertaking to the transaction or group of affiliated undertakings	VND 3tn
Transaction value of the merger[5]	VND 1tn
Combined market share of the parties to the transaction in the fiscal year prior to the year of merger filing	20 per cent

Specific thresholds

A contemplated transaction involving CIs, insurers and/or securities companies must submit a notification if it crosses any of the following thresholds:

Threshold	CIs	Insurers	Securities companies
Total assets of either transaction undertaking or the respective group of related undertakings	20 per cent of total assets of all Cis on the Vietnamese market	VND 15tn	
Total sales/purchase turnover of either transaction undertaking or the respective group of related undertakings	20 per cent of total revenue of all CIs on the Vietnamese market	VND 10tn	VND 3tn
Transaction value	20 per cent of total charter capital of all CIs on the Vietnamese market	VND 3tn	
Combined market share	20 per cent		

Of note, the total assets/turnover and combined market share values refer to those as of the fiscal year prior to the year of the anticipated transaction. The transaction value thresholds in both cases do not apply to offshore deals.

The substantive assessment of a notified transaction comprises two phases. At the preliminary appraisal stage, the authority will assess the parties' combined market share and/or post-merger Herfindahl–Hirschman Index (HHI) to decide whether the contemplated transaction falls within any of the safe harbours and should consequently be cleared. It is noteworthy that if the authority does not issue a decision within the statutory timeframe, the transaction will be automatically cleared.

[5] This threshold does not apply to offshore transactions.

If the transaction fails the preliminary appraisal, the review moves to the second phase, where the authority employs a substantial lessening of the competition test to decide whether to issue an approval and on what conditions (if any). Accordingly, a concentration, even a foreign-to-foreign one, which causes or is capable of causing significant anti-competitive impact on the Vietnamese market, is prohibited.

CHAPTER 11

Dispute Resolution

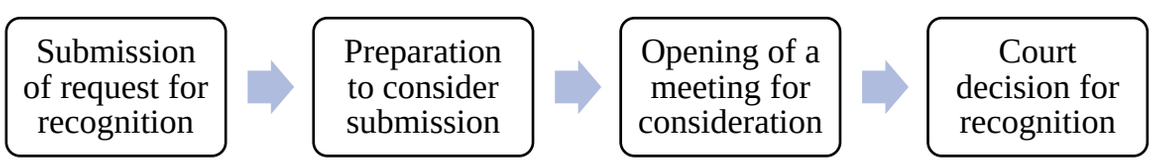
There are three potential means of dispute resolution under the Vietnamese legal system: mediation, arbitration and litigation.

MEDIATION

Due to certain drawbacks in the Vietnamese court system, it is essential that the parties to any dispute attempt to reach an amicable settlement outside of the court system. Vietnamese law acknowledges this by requiring the parties to certain disputes (including civil, labour and family disputes) at least to attempt mediation before commencing litigation. Decree No 22/2017/NDCP on commercial mediation was established on 24 February 2017, making commercial mediation an independent and effective form of dispute resolution, as well as making the result of mediation legally binding on the involved parties.

If the parties reach a settlement during mediation, that arrangement is enforceable as a normal contractual agreement. One or both parties to the mediation settlement agreement can apply to the court for the recognition of their settlement agreement. After being recognised, the mediated settlement agreement is enforceable as a full and final court judgment in compliance with the law of Vietnam on civil enforcement, which means it shall take effect immediately upon issue and can neither be appealed nor protested against through appellate procedures.

The process for recognising the successful result of mediation is as follows:



ARBITRATION

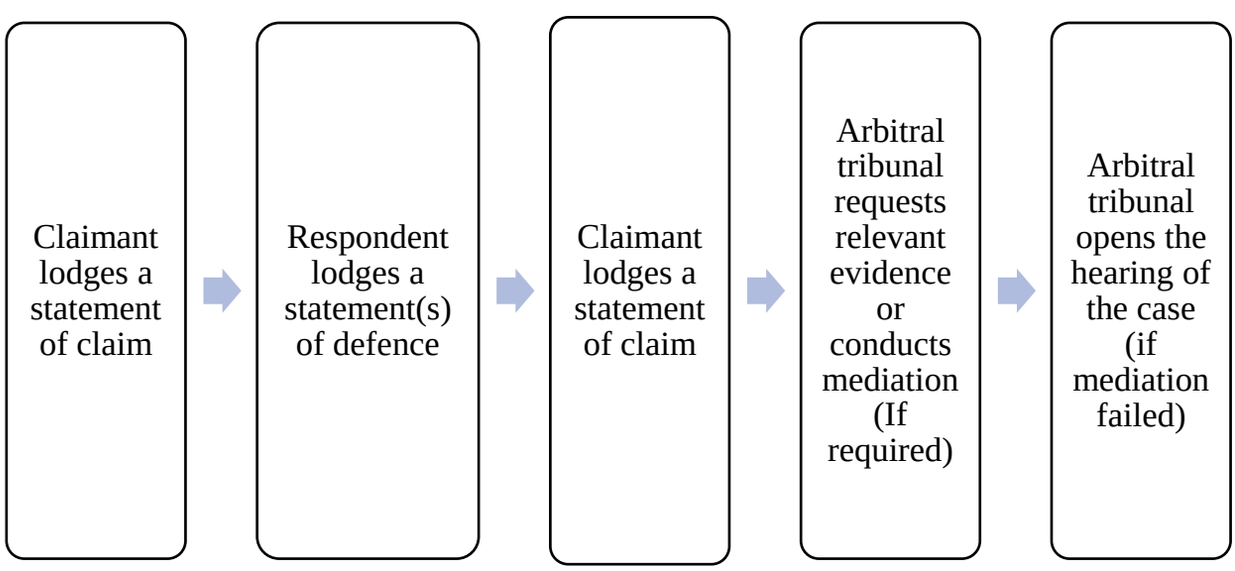
Legal framework of arbitration

The Law on Commercial Arbitration No 54/2010/QH12 (the 'LCA') is the main legal instrument governing Vietnamese law on arbitration. According to the LCA, arbitration in Vietnam covers:

- disputes arising from commercial activities;
- disputes between the disputants, with at least one carrying out commercial activities;
- disputes between goods or services provider and consumer by consent of the consumer; and
- other disputes to be settled by arbitration as provided by law.

Disputes between the involved parties can be settled by an arbitral tribunal organised by an arbitration centre, such as the Financial and Commercial Centre for Arbitration (the 'FCCA') or the Vietnam International Arbitration Centre (VIAC), in accordance with its procedural rules ('Institutional Arbitration'), or through ad hoc arbitration set up by the parties involved in accordance with the procedures as agreed by the parties ('Ad hoc Arbitration'). Unless otherwise agreed, if the parties cannot agree on the number of arbitrators, the tribunal will be composed of three arbitrators.

Commercial disputes shall be settled by arbitration through the following basic procedural st



Decisions from Vietnam's arbitration centres are final and binding on the parties, and may be enforced by the Enforcement Department in the same manner as an enforceable court decision.

Foreign arbitration

Under the Civil Procedure Code (CPC), foreign arbitral awards are arbitral awards rendered outside Vietnam or those rendered by non-Vietnamese arbitrators within Vietnam. As the law currently stands, Vietnamese courts will only consider an application for recognition and enforcement of a foreign arbitral award if the award has been made in or by arbitrators of a member state of the New York Convention or to the extent that the country in question grants reciprocal treatment to Vietnam. Vietnam ratified the New York Convention in 1995. There have been many instances where Vietnamese courts have enforced foreign arbitral awards.

An award recognised by a Vietnamese court will have the same legal effect as a judgment given by a Vietnamese court and can be enforced in Vietnam.

On the other hand, a Vietnamese court may reject an application for recognition and enforcement of a foreign arbitral award if the respondent can provide evidence. Interestingly, the procedures prescribed by law in relation to the recognition and enforcement of foreign arbitral awards appear to grant only the respondent (the party who is subject to enforcement of the arbitral award) the right to participate in the court hearing. The applicant (the party seeking recognition and enforcement of the arbitral award) does not appear to enjoy a similar right.

Although the law states that the courts should ratify awards that meet the aforementioned requirements without assessing their merits, the Vietnamese courts have historically gone beyond this legal rule. However, since Vietnam's accession to the WTO in 2007, the Vietnamese government has made considerable efforts to strengthen the enforcement regime by introducing new legislation and detailed guideline regulations. The current Law on Enforcement of Civil Judgment, which was amended and supplemented in 2014, has helped to improve the recognition and enforcement of foreign arbitral awards in Vietnam.

LITIGATION

Foreign court

Vietnamese law generally allows foreign investors to refer their disputes to courts in a foreign jurisdiction if parties have a choice of law clause, unless statutorily exempt under the Civil code 2015. These include:

- cases where the consequences of referring such a foreign court are inconsistent with the fundamental principles of Vietnamese law;
- the disputes over immovable property located in Vietnam, particularly disputes over the ownership rights, other rights with respect to such immovable property, and lease or use of such immovable property as security property; and
- the applicable law in a labour contract or a consumer contract adversely affects the minimum interests of employees or consumers as prescribed by Vietnamese law.

There are two points that investors should take note of when choosing to litigate in foreign courts under the Vietnamese system. Firstly, Vietnamese courts might not uphold choice of law contract provisions. Therefore, an investor should either include a clause referring disputes to arbitration or be prepared to enforce their rights in Vietnamese courts under Vietnamese law. Secondly, a judgment issued by a foreign court is only enforceable in Vietnam if Vietnam has signed a bilateral treaty with the country in question. The CPC does offer some hope in this regard, as it provides that Vietnamese courts will recognise and enforce foreign court judgments on a reciprocal basis.

Domestic court

Under the Law on Organisation of the People's Courts and the CPC, there are four main People's Courts in Vietnam, excluding military tribunals, other tribunals provided by law and special tribunals set up by the National Assembly under special circumstances, namely the Supreme People's Court, Superior People's Court, Provincial People's Court and District People's Court. Excluding the District People's Court, these courts have separate specialised courts, namely the criminal court, civil court, economic court, labour court and administrative court.

The court process in Vietnam can be lengthy. Parties begin proceedings at the first instance, where parties are required to disclose evidence and attend mediation meetings. If the parties still maintain their claims afterwards, then a council of adjudicators consisting of one judge and two jurors (usually) will commence the hearing. Afterwards, the council will render a judgment. If a party disagrees with such holding, an appeal must be heard in the court that held the trial at first instance within 15 days.
Parties may also petition for a second review on grounds of legal error or newly discovered evidence, subject to a decision by the Chief Judge or the Chief Procurator of a competent court or procuracy. The grant of a review can also be accompanied by an order for stay of enforcement. The review will take place in closed courtrooms and can be lengthy.

Vietnam is a civil law jurisdiction, so judges in Vietnam base their decisions mostly upon the applicable law and principles of interpretation. However, under the new CPC, from 6 April 2016 the Council of Supreme Court has officially issued nine precedents for lower-level courts to consider and apply. As of the end of 2017, there have been 16 precedents enacted by the Council of the Supreme Court.

In an attempt to streamline what was a very complex system of enforcement, the Law on Judgment Enforcement, 2008, amended and supplanted in 2014, was introduced to replace the Ordinance on Judgment Enforcement, 2004. The new system provides for two steps:

- Firstly, the court will serve judgment to litigants and the judgment enforcement authority (JEA), and the successful claimant may request the enforcement of the judgment. The person who is responsible for satisfying the judgment has the right to lodge an application to the JEA for enforcement within the time limit of five years from the effective date of the judgment.

- Secondly, the JEA will issue a decision to enforce the judgment and serve it on the obligatory party within three days from issue. Subsequently, the obligatory party will have 15 days voluntarily satisfy the judgment. If the obligatory party fails to do so, the JEA will enforce the judgment in accordance with the law.

Foreign investors should be aware of the statute of limitations and the time-consuming nature of court proceedings. In general, the new CPC does not provide a statute of limitations for initiating court proceedings as stipulated in the Civil Proceedings Code 2004. The statute of limitations is subject to specific laws. Although Vietnamese law sets strict time limits for courts to dispose of cases (e.g., two to four months for first instance proceedings), each party

involved in a dispute must bear in mind that court procedures are time-consuming and sometimes unpredictable. In practice, some disputes have been heard and reviewed in various court proceedings over a period of several years.

CHAPTER 12

Infrastructure

OVERVIEW OF INFRASTRUCTURE IN VIETNAM

As the backbone of urbanisation and key to smooth economic operation, infrastructure is one of the most important sectors in Vietnam. A blooming infrastructure sector needs legislative coherence and consistency, yet in Vietnam the sector is subject to a plethora of regulations, from construction and planning to land and environment.

In an attempt to tackle this issue, the National Assembly passed a new Planning Law on 24 November 2017 and a Law amending 37 laws related to planning on 20 November 2018, both of which came into force on 1 January 2019. These legislative measures are long-awaited and designed to enhance consistency in the infrastructure regulatory regime. One point to note in particular is that the new Planning Law has abolished the planning permission requirement, thereby removing the gray area in the application for a construction permit under the previous legislation.

One of the recent areas of great interest in Vietnam is PPPs. The first legislative measure concerning PPPs surfaced in 1992, when for the first time the amended Foreign Investment Law defined build–operate–transfer contracts (BOTs). In recent years, given the intense demand for new and improved infrastructure fuelled by rapid industrialisation and urbanisation, the development strategy of Vietnam is to prioritise investment in the form of PPPs. As a result of these developments, the government is now in the process of developing an improved legal framework for PPP projects, the most recent being Decree 63.

CONSTRUCTION PROJECTS CHARACTERISTICS

General construction projects

Foreign investors wishing to conduct construction business in Vietnam are allowed to do so by setting up a foreign-invested company incorporated under Vietnamese laws. Alternatively, they can directly partake in a construction project as a foreign bidder then either enter into a joint-venture agreement with a Vietnamese party or use local contractors to carry out the project. If there is no local contractor capable of performing the entire construction process as required, the project may be conducted solely by foreign contractors, provided that they satisfy all local requirements.

Subject to capacity, experience and education, individuals and organisations, including foreign-invested companies, in the construction sector must obtain a capacity license in order to do business in Vietnam. The construction works performed by the individual or organisation shall be based on the license granted. As of 15 September 2018, a foreign bidder may lose its construction license if it fails to resolve an infringement of administrative regulations after a second notice from the authority, or if it has incurred a penalty in relation to construction works covered by the second operation license.

The procedure of a construction project is the same as that of a real estate project. The investors must prepare and obtain approvals for the pre-feasibility study report, feasibility study report and construction economic-technical report for the construction project prior to the process in relation to the land use right and construction.

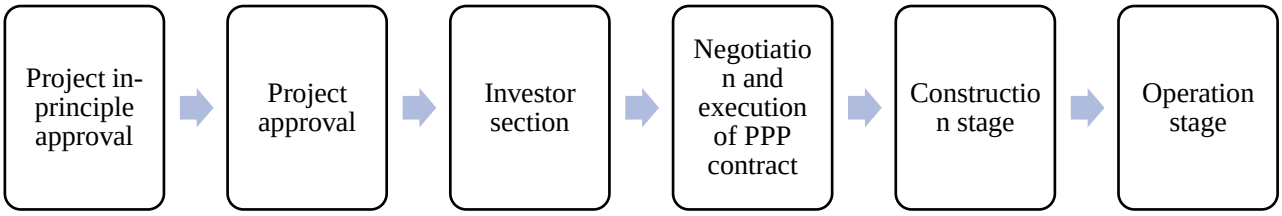
Public–private partnership (PPP) projects

A PPP refers to a contractual cooperation between the state (public sector) and investors (private sector) (the ‘PPP Contract’) jointly to build, innovate, operate and manage infrastructure and public services projects.

A PPP Contract can be a BOT, build–transfer–operate contract (BTO), build–transfer contract (BT), build–own–operate contract (BOO), build–lease–transfer contract (BLT) and operate–manage contract (O&M), or a combination of any of the above.

Depending on the scale, a project may be classified into grade A, B or C, and a certain ministry or provincial level People's Committee shall be authorised to execute the project contracts within the scope of its functions, duties and powers and to perform the rights and obligations and comply with the commitments under the project contract. For example, a development project with investment capital of more than VND 2,300bn (equivalent to $100m) is regarded as a Grade A project subject to the approval of the Prime Minister.

The procedures required for a PPP are outlined in the below flow chart:



Project in-principle approval

The authority shall consider and approve the PPP project in principle based on the project's preliminary proposal, which is known as the 'pre-feasibility study report', and is prepared by either the public investment authority or the investor to present results of the preliminary research into and assessment of the necessity, feasibility and efficiency of the project. After granting an approval at this stage, the authority shall publicise general information on the PPP project in question for bidding purposes.

Project approval

The authority shall consider and officially approve the PPP project based on a 'feasibility study report' prepared by either the public investment authority or the investor. If the investor is to prepare the feasibility study report, it shall sign an agreement with the authority, which usually requires it to waive any claim for the costs of preparing the feasibility study report should the report be subsequently rejected by the authority. However, investors who prepare a feasibility study report often enjoy advantages at a later stage when the authority conducts the public tender to select the investor of the PPP project.

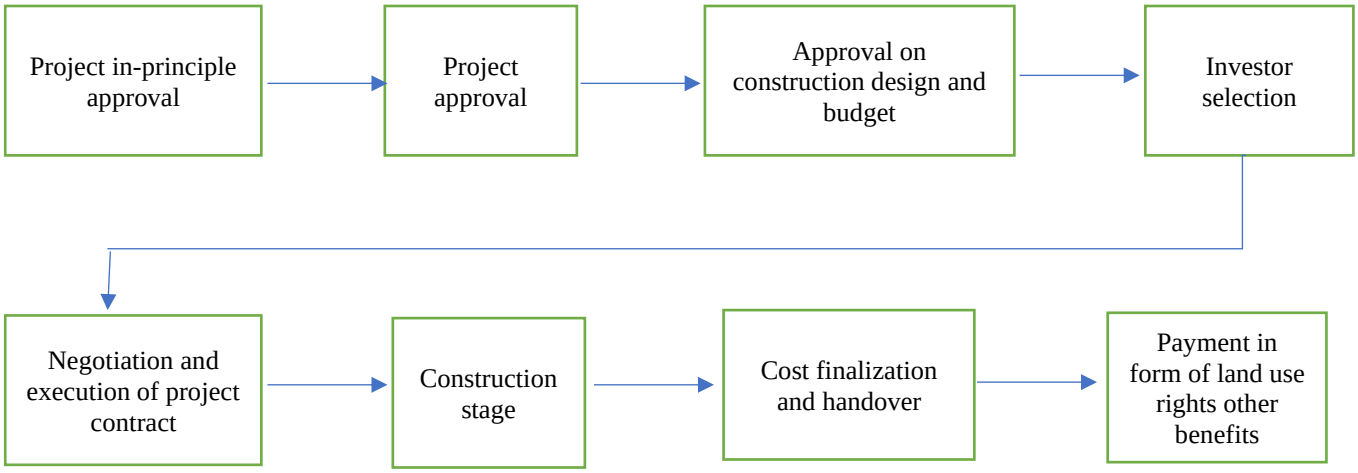
Selection of investor

The authority shall select the investor for the PPP project either by: (1) holding a public tender; or (2) directly appointing an investor. Option (2) shall only apply in cases where (i) there is only one registered bidder; or (ii) only one investor is able to perform the project due to matters concerning intellectual property, commercial secrets, technologies or capital arrangements; or (iii) the investor proposing the PPP project is able to implement it at the highest efficiency under the Prime Minister's approval.

Negotiation and execution of PPP contract

The investors and the authority will negotiate and execute the PPP contract, which will last for two rounds: (1) preliminary negotiation; and (2) official negotiation and execution of PPP contract.

For BT projects in which the authority grants land to the investor, the procedures are as follows:



REQUIREMENTS FOR A CONSTRUCTION PROJECT

In general, a PPP project must fall within one of the statutory sectors. It should be economically and financially feasible to the investor and affordable to the state in respect of finance, the environment and other matters required by laws.

Investment capital

The investor shall be responsible for contributing the equity and mobilising other capital (i.e., obtaining loan from banks/other third partners) to implement the PPP project. For example, for projects with investment capital of up to VND 1,500bn (US$64m), the investor's contributed capital shall account for at least 20 per cent of the project's total investment capital.

Assignment of project

Decree 63 sets out more stringent requirements for private investors that wish to assign rights and obligations under the project contracts to lender(s) or other investors. In particular, the investor is now restricted from assigning part or all rights and obligations in a PPP contract prior to completion of construction works or commencement of the project's operation. To receive the assignment, the proposed assignee must satisfy the financial and managerial capability and other requirements to implement the PPP project.

Lender's step-in right

The lender may assume or designate another qualified investor to assume any or all the rights, interests and obligations of the investor under the PPP contract if the investor fails to perform its obligation under the PPP contract or the loan agreement. In doing so, the lender must request a tripartite agreement between the investor, lender and authority concerning the lender's step-in right.

Construction permit

As a fundamental part of any real estate development project or any other infrastructure investment project, a construction permit must be obtained before the commencement of construction and must suit the project's timeline and plan. As mentioned above, obtaining a construction permit is one of the last steps in registering a real estate project. It is granted subject to the land use right recognised by a legitimate certificate and the suitability of the construction project to the local plan at province and district levels.

Depending on the type and characteristics of the project, the construction permit may or may not have to be obtained from the Ministry of Construction or the People's Committee at the respective level (in practice, from the respective Department of Constructions, who is authorised by the People's Committee) prior to the construction process. Normally, infrastructure projects that have been approved by the President of the People's Committee at the provincial level or higher competent authorities shall not require a construction permit. Specifically, any seven-story residential housing project that has a 1/500 master plan approval and an area of less than 500m2 shall be exempt from the construction permit requirement.