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THE HOSPITALITY INDUSTRY IN INDIA

A GUIDE TO LEGAL ISSUES

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Preface

'If the laws could speak for themselves, they would complain of the lawyers' - George Savile

The rapid and unprecedented changes witnessed by hospitality industry over last few years have helped shape this sector in its present form. Disruptions to the 'standard' industry model – in the form of alternative franchising models, online booking platforms, real-time review by users, emergence of aggregators, and many others – have forced the industry to adapt, evolve and respond, leading to the emergence of a new normal. Going forward will the likes of Amazon, Google and Facebook expand their services to the hospitality industry? Will the current disruptors become the disrupted? Perhaps.

2019 is expected to be a landmark year for India's hospitality industry which is expected to post a robust growth of 7%-9% in FY18-19. While overall sentiment is quite bullish, maintaining a fine balance between reinforcing the old and incorporating the new will be critical.

While traditional challenges pertaining to stringent government regulations, constantly changing policy related issues, rising infrastructure costs, and paucity of talent remain a perennial concern, the industry has to also contend with a new set of challenges around data privacy, electronic contracts, workplace security, etc. Going forward we expect the focus to move from physical hotels to customers' needs – the same customer who can afford to stay both in a five-star hotel as well as Airbnb. What then can the operator do to engage the customer? Will Performance Tests continue to remain unchallenged as the only way to judge an operator? Will we see F&B being outsourced in five-stars given the competencies in India's restaurant capabilities?

In this context, the gap in understanding between managers and owners – as regards industry standards of practice and the terms underlying the all-encompassing Hospitality Management Agreements – will likely emerge as a critical factor determining success of hospitality ventures. Further, with the advent of REITS, it's only a matter of time when hotels will be housed in such structures, permitting owners to spread their risks.

Set against the backdrop of this ever-evolving operating environment for the industry, ELP's guide –**The Hospitality Industry in India: A Guide to Legal Issues** – is an attempt to create a collective repository of industry best practices and market trends in the hospitality sector. Drawing upon our experience of over 17 years in this sector, this guide specifically addresses the pressing legal issues which are being faced by various stakeholders in the industry. Our team of specialists has endeavored to simplify and cut through the complex legal language to put forth these issues in a commercially attuned, reader friendly format.

The subjects covered in this guide include the very real and practical problems faced by the industry presently, which, if addressed and handled correctly, could be game changers for the sector. From a legal standpoint, potential pitfalls in the everyday operations in a hotel, HMA's, franchising agreements, competition law, taxation and IBC have been included. Equally, the guide also focuses on the pressing issues of data privacy and the prospective business models which seem likely to play out in the sector.

We hope this makes for some interesting reading. We value every reader's opinion and welcome your feedback.

Warm regards

ELP's Hospitality Team

Disruptors in the Hospitality Industry

‘Innovation is the ability to see change as an opportunity- not a threat’
– Steve Jobs

The story lies in the numbers. The travel industry now accounts for over 10% worth of the Global GDP with the hospitality industry accounting for half of that if clubbed with food and beverage industry and alternate lodging. In India, the total contribution of the travel and tourism sector to India’s GDP is expected to reach US\$ 492.21¹ billion by 2028. The industry which generates 12.38 per cent of total employment in the country is now the third largest foreign exchange earner.

The world is changing at an unprecedented pace. Businesses are harder pressed than ever to keep up with this altering landscape. Whether it’s balancing current business with digital transformation, competing with room renting apps, smaller chains or completely new ways of doing business- the hospitality sector has witnessed some of the most significant transformations in the past few years.

This section will address, with illustrations and case studies, disruptions, inflection points and what potentially lies ahead in the hospitality sector curve in India.

Digital Disruptors: Technology Trends

Mobiles and apps

Smart Room Keys: The humble metal key transformed to an electronic card and now the new morphed version of the key already lies with the customer. It’s his mobile. The hotel industry is increasingly embracing mobile access to electronic locks to enhance customer experience and increase efficiency. Starwood, Hilton, Hyatt, Marriott and IHG, for example, have already launched various levels of mobile-enabled room key technology².

Another innovative way to offer a keyless experience is through fingerprint-activated room entry systems and retina scanning devices. Hotels like the Nine Zero Hotel in Boston have installed an iris scan system in place of key cards to control access to the hotel’s presidential suite.

Apps: A report by Criteo indicates that up to 80% of last-minute bookings are made by mobile devices. Underpinning the importance of booking apps on the mobile, the report also states that the conversion rate on the app is up to 5 times higher than on mobile web. In addition to enabling direct personal connect, in house apps improve brand loyalty and stickiness with the customer. Self-service is also another core advantage.

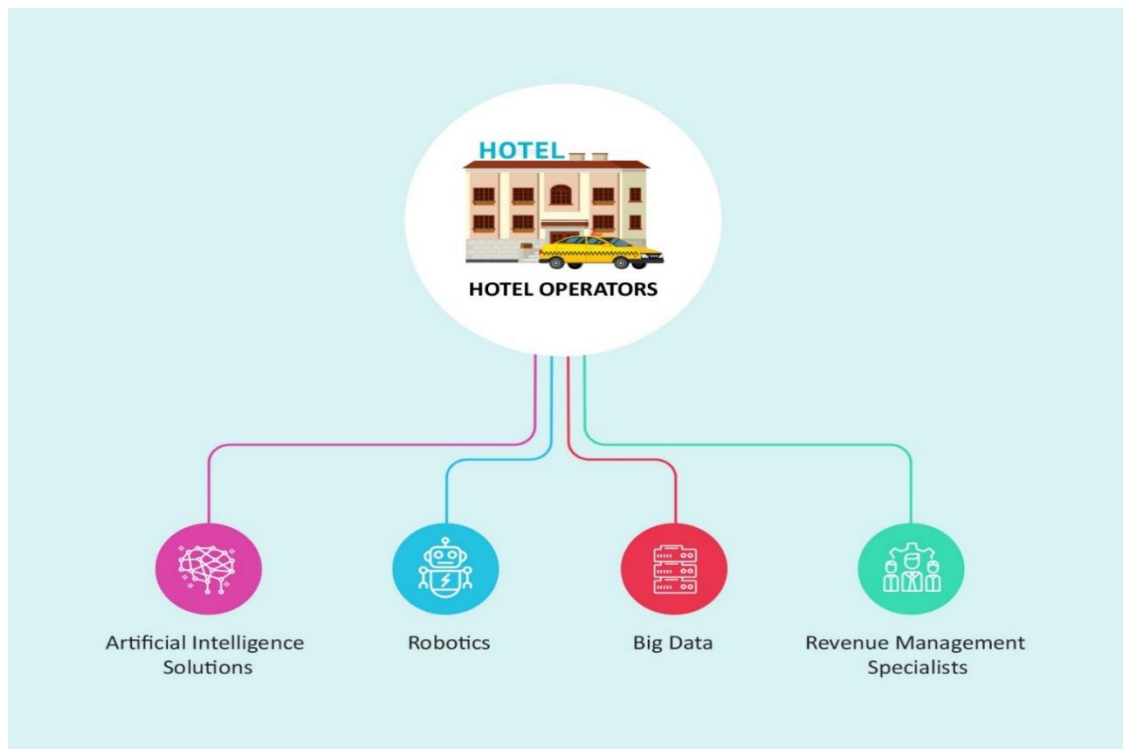
¹ ibef.org

² themedium.com

Case study



In 2015 Virgin Hotels, introduced Lucy, a mobile app that allows guests to integrate their device into their hotel experience. Lucy gives users a seamless and customised stay by transforming their digital ecosystem into a personal hotel assistant by fulfilling requests for services and amenities, functioning as the room thermostat, streaming personal content and more. Further Lucy allows guests to check in and check out and transforms the guests' smartphone into a TV remote.



The hospitality industry: Leveraging technology

Artificial Intelligence (AI)

Artificial intelligence is playing an increasingly important role in the hospitality industry, primarily because of its ability to carry out traditionally human functions at any time of the day.

Electronic guest check in (without any need for human interaction where guests head straight to the room) , making sure housekeeping is done before check in, hotel room systems like air conditioning and lighting (all functioning just before the guest is due to check in), guest orders, payments for services debited to the guest account - AI ensures that these software systems work seamlessly to ensure higher customer satisfaction and streamline hotel operations. Apart from basic customer service, AI mines data, continuously evolves segmentation to facilitate hyper personalisation. In a hotel, Artificial intelligence engines not only unlocks the future with past data but creates feedback loops so those improvements always build on themselves. Marketing is now targeted at touchpoints into the guest's life, both on and off property.

Robots

The use of robots within the hospitality industry is becoming more commonplace, with uses ranging from artificially intelligent chatbots, designed to assist with the customer service process, through to robot assistants, deployed to improve guests' experience in a hotel.

Case study



Named after Conrad Hilton, Connie is a pint-sized robot – the result of a collaboration between Hilton Worldwide and IBM. Connie, can call upon various Watson APIs -- Dialog, Speech to Text, Text to Speech, and Natural Language Classifier -- and WayBlazer's travel-specific knowledge to answer questions from Hilton guests about nearby attractions, dining options, and hotel services.

In Henn na Hotel, near Nagasaki, Japan, robot technology has replaced humans, at the front desk with a velociraptor greeting guests. It then asks you to check-in using the provided touchscreen. On entering your room, by face recognition, there's another robot with the name Churi San. It/she can control the heating, lighting, provide a weather forecast, and sing all at the guests' request.

Virtual Reality & Augmented Reality

The uses of virtual reality within the hospitality industry are almost endless, due to its capacity to place customers in virtual settings. This can be used everywhere from the booking stage of the customer journey, through to the hotel stay itself.

More and more, hotel websites are using 360 degrees imaging technology to allow virtual reality users to experience rooms in their hotel before they book.

Augmented reality goes one step beyond virtual reality. While virtual reality is able to transpose the user (blocks out the room) and puts the user someplace else, augmented reality however, takes the user's current reality and adds something to it. It does not move the user elsewhere. As an illustration, while with virtual reality, you can swim with sharks, with augmented reality, you can watch a shark pop out of your business card.

When taken in a hotel scenario, one way in which hotel owners can use augmented reality to boost their offering is through the use of interactive elements within hotel rooms. Further, integrating augmented reality features, be it communicating information or marketing content in the hotels' inhouse mobile applications can help promote the app itself and increase its usage. This increases the hotel's opportunity to deliver marketing content to a greater number of individuals and makes guests more likely to share their experiences through their own social media, constituting an additional way of promoting the hotel and its concept and branding. During their stay, AR can be leveraged to keep guests logged on and use the app on a regular base, building a more detailed guest profile and enhancing the guest's experience and satisfaction.

Another interesting use of augmented reality is gamification – the most well-known example of which is Pokemon Go. Hotels are increasingly providing AR games to inhouse to appeal to the younger customers. In many instances these gaming features are integrated into the hotel apps.

Case study



Source: augment.com

The Hub Hotel from Premier Inn in the United Kingdom, which has started using AR in conjunction with wall maps placed in its hotel rooms.

By pointing a smartphone at the map, guests are able to see additional information about local places of interest, enhancing the use of the map itself and potentially making their stay more convenient and enjoyable.

Disruptive Ideas: Capitalising on New Opportunities

OYO

Founded six years ago, OYO began with twenty rooms and a single hotel chain. Today, OYO is the largest Indian hotel brand by number of rooms and aims to emerge as the world's largest hotel brand by adding over a million rooms globally in four to five years. Massively increasing its geographic reach, today OYO has a presence in China, United Kingdom, U.A.E., Malaysia and Nepal.

Oyo found and capitalised on the opportunity in the market for middle class travellers, who were looking for other options apart from major hotel chains or small independent lodges/hotels where quality could vary. With over 10,000 branded hotels, OYO is largely built on a franchise model where local hotel owners (who are required to have their properties refurbished to OYO's specifications) pay a commission on each booking. The brand focuses on quality living spaces at an affordable cost while ensuring an end-to-end control over the experience of guests. The vast majority of these hotels have no more than twenty rooms. OYO has managed to capitalise on these small assets to create the largest hotel brand in India today.

Constantly reinvention is one of the key hallmarks of OYO. OYO homes for instance, found a significant market opportunity in second homes by owners, especially those in top holiday destinations. It partners with home owners to upscale the current home with functional aesthetics and use existing stay fulfillment processes and technologies to ensure that the entire guest journey (from booking to check-in to stay to check-out) is a completely predictable and hassle-free experience. This means testing and scaling never-seen-before features when booking alternate accommodation such as reception-less check-ins, pay-on-arrival at the home, immediate booking confirmation and on-demand services³. OYO Homes currently operates over 3,000 fully-managed residential accommodations in India spread across 25 cities.

Co living spaces

India is set to have the youngest population in the world by 2020. India has 400 million millennials –up a third of the population and 46 per cent of the country's workforce⁴. These millennials have changed the way brands look at and reach out to customers. A study by Nielsen found that single person households in urban areas have increased by 35% between 2007 and 2017, primarily due to millennials migrating to urban centres for job opportunities. Frequent changes in jobs and locations are not unusual, with urban millennials making the switch in approximately 20 months.

Co-living spaces to have the potential to become a \$93 billion industry

Prop Tiger report

Catering to this need in the market, one of the new concepts which is fast catching on is the concept of co living spaces. Typically, a co-living space involves people having access to common areas (kitchen, living room) while still having some privacy—usually a personal bedroom. Given that the rental cost of the bedroom works to merely around 40 per cent of the total, it is prudent to have the less utilised spaces used by multiple people so as to share the rentals, utilities and maintenance bills.

This space is attracting interests from various stakeholders - investors, real estate companies and hospitality firms.

- Startups like Stanza Living, ZiffyHomes, CoLive, ZoloStays have raised over \$40 million altogether⁵
- NestAway has already raised \$100 million
- Earlier this year, Bengaluru-based co-living startup Grexter raised \$1.5 million in pre-Series A round led by integrated incubator and angel network Venture Catalysts
- Housing Development Finance Corporation agreed to pick up a 25% stake in Good Host Spaces Pvt. Ltd, which offers student housing facilities under the brand name NewDoor
- Noida-based Placio, which operates an eponymous student housing solutions platform, secured \$2 million in a pre-Series A round from Singapore-based private equity fund Prestellar Ventures

³ OYO Rooms website: Official blogs

⁴ Morgan Stanley report

⁵ entrackr.com

Case study

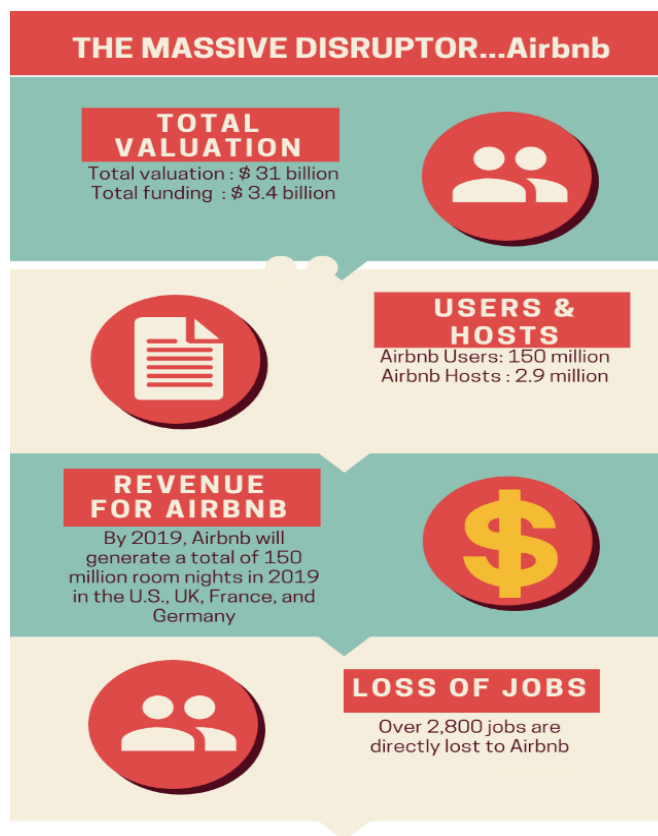


Source: vccircle.com

The hospitality sector is not far behind. US-based private equity giant Warburg Pincus had formed a joint venture with mid-price hotel chain Lemon Tree Hotels named Hamstede Living. OYO has ventured into the co living rental spaces with OYO Living.

“Communal living is blurring the distinction between residential and hotels” - Ian Schrager, Hotelier

Airbnb: Your Neighbour Could be Your Competition



Airbnb is now active in 81,000 cities in 191 countries and has over 4.5 million listings on its site — including 3,000 castles and 1,400 treehouses. It recently rolled out tiers for higher-end customers, called Airbnb Plus and Beyond by Airbnb.

HVS estimated that hotels lose approximately \$450 million in direct revenues per year to Airbnb. Between September 2014 and August 2015, 480,000 hotel room nights were reserved while over 2.8 million room nights were booked on Airbnb. By 2019, Airbnb will generate a total of 150 million room nights in 2019 in the U.S., UK, France, and Germany.

Clearly, the vacation rental site has diminished the demand for traditional hotel rooms. Furthermore, many hotel employees are losing their jobs because of these decreasing demands. Airbnbs are less labor intensive than hotels because they do not require the same level of service. Over 2,800 jobs are directly lost to Airbnb, a loss of over \$200 million in income for hotel employees.

Conclusion

To conclude by a quote from Arne Sorenson, president and CEO of Marriott International⁶ *“We are in an absolute war for who owns the customer. This is a long-term war. We have been in competition for decades, and we will continue to compete on products, service and the human experience. But we have disruptors that are without a doubt trying to take ownership of our customers. For us it is loyalty, what we do with the data we have on folks and how we deliver value to our customers. This is a battle we are going to be fighting for some time, a war of fundamentals.”*

⁶ Quoting from a panel discussion at the NYU Hospitality Conference (June 2018)

Legal Issues in Hospitality Operations

‘The customer is never wrong’ - César Ritz

Introduction

ELP has advised on hotel management contracts and contractual sharing of risks between the owner and the operator for many years. The discussion often seems esoteric to non-legal folk. The contract itself is a starting point and merely a skeleton supporting the flesh and blood of the arrangement between the manager and the owner and the operations of the hotel. People within the hotel industry, often state though, that the contract is just one element, and what happens practically and in real time could be quite different.

This section is useful nonetheless as it clearly sets out the primary role of the owner. The owner is ultimately responsible for all that happens at the hotel. The 'ownus' (pardon the pun) lies on the owner for everything that happens at the hotel. All the employees are his employees, notwithstanding that they don't follow his instructions. *For his (the owner's) investment and risk, he is entitled to the revenues of the hotel after deducting the manager's fee. The manager will of course manage the hotel but will always look to the owner to step in, when a risk cannot be managed.*

Some of these risks have a legal complexion. They fit within the four corners of a statute. There is an increasingly complex framework of laws that apply to business operations in India and this is especially true of a business such as hospitality. Licensing requirements, real estate and zoning issues, food and safety norms, intellectual property rights, security and taxes are just some of the laws a hotel owner has to grapple with.

It then becomes imperative for an owner to apprise himself of all kinds of operational issues. The buck ultimately stops at the owner.

Infra hospitium – The Car Valet Case

The Concept

Traditionally, an innkeeper was liable for all things within his inn but nothing outside of his inn. This concept of infra hospitium has been recognized the world over and fixes a strict liability on an innkeeper or a hotel owner for the care of goods within the premises of the hotel.

When a guest enters the hotel, he places his belongings in the care of the hotel. This principle also extends to a guest's car when parked in the hotel premises, even with the disclaimer of risk by the hotel, as held in the National Consumer Disputes Redressal Commission (**NCDRC**).

Scenario 1



A typical hotel, where our guest drives into the hotel and gives his keys to the valet. He receives a tag which states that the car will still be at his risk. He walks into the hotel and never sees his car again.

A case study based on this scenario is given below:

Case Study

In a case decided by the NCDRC in February 2018, where a car was stolen from the hotel premises, it was held that the hotel was liable for making good the loss. The hotel owed a duty of care to the guest and the disclaimer that the car was being parked at the risk of the owner was not entertained. The disclaimer on the ticket which said that the car was at the risk of the owner was not enforceable as the guest did not have notice of the terms of the slip. Merely accepting such slip did not mean that the guest was aware of the terms printed on the overleaf.

This leads to the establishment of 2 principles:

- *A hotel owner is responsible for the goods of a guest within the hotel premises.*
- *If the hotel wishes to disclaim liability, it would have to make the guest aware of the terms under which it disclaims liability.*

An appeal against the order passed by the NCDRC is presently pending before the Supreme Court

The Brand

Scenario 2



Before entering the hotel, the guest takes in the name of the hotel, which includes the brand, which has an international reputation. In the adjoining area, there is a small Italian restaurant with the same name as the international brand. There is an ongoing dispute between the brand and the restaurant owner. The restaurant owner claims that he registered the trademark in 1982. The brand entered India only in 2005 although it is well known worldwide.

Trade Mark

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

A trademark is infringed by a person who, not being a registered proprietor or a person:

- Using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.
- Uses in the course of trade a mark because of its identity with the registered trademark in conjunction with similar goods or its similarity to a registered trademark and identity of goods or the identity of trademark and the goods is likely to cause confusion with the public or which is likely to have an association with the registered trademark.



INFRINGEMENT



Even where the goods and services are not similar but the registered trademark is a well-known mark, usage may amount to infringement if such usage takes unfair advantage of the repute of the registered trade mark.

REGISTRATION



Registration of a trademark in India is crucial for trademark protection. Even though a suit may lie for passing off where the trademark is not limited, there is a greater burden of proof that the mark belongs to the plaintiff.

OUTSIDE INDIA



There is no automatic trademark protection available for marks registered outside of India and an application would need to be made to the Indian authorities for protection under the Indian Trademarks Act, 1999.

TRADEMARKS ACT



Apart from civil remedies, trademark infringement is also an offence under the Trademarks Act with imprisonment up to 3 years and fine up to INR 2,00,000

Even where the goods and services are not similar, but the registered trademark is a well-known mark, usage may amount to infringement if such usage takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

Registration of a trademark in India is crucial for trademark protection. Even though a suit may lie for passing off where the trademark is not limited, there is a greater burden of proof that the mark belongs to the plaintiff. Further, there are no criminal remedies for passing off.

There is no automatic trademark protection available for marks registered outside of India and an application would need to be made to the Indian authorities for protection under the Indian Trademarks Act, 1999.

Where an application for registration of trademarks is made in another country (with which India has a treaty for this purpose) and then an application is made within 6 months in India, then the date of registration shall be deemed to be the date of application in the other country.

Apart from civil remedies, trademark infringement is also an offence under the Trademarks Act, 1999. Section 103 and 104 of the Trademarks Act, 1999 provides for penalty in case of a criminal action for infringement. The offence is punishable with imprisonment for a term which shall not be less than 6 months, but which may extend to 3 years and fine which shall not be less than INR 50,000 but may extend to INR 2,00,000.

It is interesting to note that the Taj Mahal Hotel in Mumbai has applied for and received a trademark for the building itself, probably a first in India. This would mean that if an image of the hotel is used for commercial purpose – there could be a claim for infringement.

Elevator Music

Scenario 3



Once checked in, our guest heads to the room using the elevator. He listens to canned music, which seems somewhat familiar. It sounds like a popular song from the yesteryears. Several hotels play music in elevators and common areas such as the lobby and in restaurants. Whether they have the license to play such music is something they would need to contend with.

Several hotels have received notices from licensors of music claiming copyright infringement. Copyright societies, such as Indian Performing Rights Society, Phonographic Performance Limited (PPL) and Novex Communications (Novex), issue notices and/or proceed against hotels for playing copyrighted music without their approval. PPL has, based on directions from the Bombay High Court, published a list of titles owned by it on its website such that notice of its copyright on certain music is made available to all.

Hotels should therefore ensure that they are not infringing the copyright of any third party. Even performances of songs by artists for which copyright is owned by another person could be construed as an infringement.

Copyright in the context of musical works has been defined to mean the exclusive right to:

- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means
- (ii) to issue copies of the work to the public not being copies already in circulation
- (iii) to perform the work in public, or communicate it to the public
- (iv) to make any cinematograph film or sound recording in respect of the work
- (v) to make any translation of the work
- (vi) to make any adaptation of the work
- (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi)

Dinner Time

Scenario 4



He scopes out the room and he keeps his belongings there. He heads down to dinner, looking forward to a sumptuous meal. He looks at the menu and orders a nice Thai meal. He also orders a fine French white wine. Dinner is unfortunately a disaster. The Pad Thai has peanuts to which our guest is mildly allergic. The white wine is a knock off that our guest's fine palate has picked up on. This could mean serious trouble for the hotel.

Did the menu mention the ingredients? Did the server point out that there were peanuts in the food, a common trigger for dangerous allergies?

The Food Safety and Standards Act, 2006 (**FSS Act**) prescribes penalties for *inter alia* (a) sale of sub-standard food, misbranded food, food containing extraneous matter, (b) failure to comply with Food Safety Officer's directions, (c) unhygienic or unsanitary processing of food, (d) possessing adulterants.

As per the FSS Act, while determining whether any food is unsafe or injurious to health, the following are to be *inter alia* regarded:

- The information provided to the consumer, including information on the label, or other information generally available to the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods not only to the probable, immediate or short-term or long-term effects of that food on the health of a person consuming it, but also on subsequent generations;
- The particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers.

Further, there is a penalty for publication of an advertisement which: (a) falsely describes food; or (b) is likely to mislead as to the nature or substance or quality of any food or gives false guarantee. The fact that a label or advertisement relating to any food in respect of which the contravention is alleged to have been committed contained an accurate statement of the composition of the food shall not preclude the court from finding that the contravention was committed.

Therefore, the menu should clearly specify the main ingredients of a dish along with information in relation to common allergens. Servers should be trained to ask the guests about their allergies.

Section 59 of the FSS Act: Punishment for unsafe food

Any person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is unsafe, is punishable:

- Where such failure or contravention does not result in injury, with imprisonment for a term which may extend to 6 months and also with fine which may extend to INR 1,00,000
- Where such failure or contravention results in a non-grievous injury, with imprisonment for a term which may extend to 1 year and also with fine which may extend to INR 3,00,000
- Where such failure or contravention results in a grievous injury, with imprisonment for a term which may extend to 6 years and also with fine which may extend to INR 5,00,000
- Where such failure or contravention results in death, with imprisonment for a term which shall not be less than 7 years, but which may extend to imprisonment for life and also with fine which shall not be less than INR 10,00,000

Persons responsible for the conduct of the business are primarily liable. Any person designated for food safety would be liable. Such a person could defend himself on the basis that he did not know of such contravention and that he has acted with due diligence. In the case of companies, the directors and other officers would be liable unless they prove that they acted diligently and that the contravention took place without their consent or connivance.

Liability under the Consumer Protection Act, 1986 (CPA) may also be attracted for defects in goods or deficient services or unfair trade practices. Falsely representing a product to be of a particular standard, quality, quantity, grade, composition, style or model is an unfair trade practice as defined under the CPA.

Scenario 5



At the end of the meal, our guest asks for the cheque. He notices the following:

- He has been charged INR 300 for a 1 litre of mineral water.
- He has been charged a 10% service charge.

Controversy on charges for mineral water

There has long been a controversy around the ability of five star hotels to charge more than the maximum retail price for mineral water. The Legal Metrology Act, 2009 (LMA) prohibited the sale of any goods beyond the MRP.

The Supreme Court has held in *Federation of Hotel and Restaurant Associations of India vs. Union of India* that the LMA does not prohibit the sale of mineral water in hotels and restaurants at prices which are above the MRP. The sale of mineral water at a five star hotel is a composite indivisible agreement for supply of services and food and drinks and hence does not fall within the purview of the LMA.

Tips & Service Charges

There is a great deal of public outcry about the payment of mandatory service charges on restaurant bills. The Guidelines on Fair Trade Practices related to Charging of Service Charge from Consumers by Hotels/Restaurants dated April 21, 2017, issued by Ministry of Consumer Affairs, Food and Public Distribution clarified that charging of service charge could constitute an unfair trade practice under the CPA. Consumers are entitled to seek redressal for unfair trade practices under the CPA. Therefore, a practice commonly followed is alerting guests on the menu itself that a separate service charge would be applicable.

Scenario 6



Our guest has enjoyed the service rendered by the waiting staff and decides to leave a good tip. The tip is collected by the management. The question which now arises is: By law is it mandatory for the owner to distribute tip?

There are two interesting Supreme Court cases which can be highlighted here. In the case of *Rambagh Palace Hotel v. Rajasthan Hotel Workers' Union*⁷ the court observed:

"It is well known that in important five-stars in the country -- the Appellant is now a five-star hotel -- the customers are of the affluent variety and pay tips either to the waiters directly or in the shape of service charges or otherwise to the management along with the bill for the items consumed. In short, the true character of tips cannot be treated as any payment made by the management out of its pocket but a transfer of what is collected to the staff as it is intended by the payer to be so distributed."

The Supreme Court in the case of *ITC Limited Gurgaon v. Commissioner of I.T. (TDS) Delhi*⁸ quoted with approval the above extract and further went on to observe that:

"Tips are received by the employer in a fiduciary capacity as trustee for payments that are received from customers which they disburse to their employees for service rendered to the customer. There is, therefore, no reference to the contract of employment when these amounts are paid by the employer to the employee."

⁷ ((1976) 4 SCC 817)

⁸ (AIR 2016 SC 2127)

“We agree with the statement of law that there is no ground for saying that these tips ever became the property of the employers. Even if the box were kept in the actual custody of the employer, he would have no title to the money as he would hold such money in a fiduciary capacity for and on behalf of his employees.”

It can be inferred from the above-mentioned judgments that the employees are entitled to the tips received from customers and the employer only holds them in a fiduciary capacity which ultimately needs to be disbursed to the employees.

Service Charges

The Central Board of Direct Taxes (CBDT)⁹ has issued directions with respect to treatment of service charge taken from customers by hotels/restaurants under the Income - tax Act, 1961.

The directions were issued in response to the submissions made by the Ministry of Consumer Affairs (Ministry) wherein the Ministry submitted that there is every likelihood that amount collected as service charge from customers does not actually reach the workers and is instead kept by the hotel/restaurant owners.

Pursuant to this the CBDT directed that while framing assessments or carrying out verification under various provisions of the Income-tax Act, 1961 in the case of hotels/restaurants, it is necessary to examine whether there is any under-reporting or non-reporting of additional income collected in the name of service charge. In the event the service charge is not passed on to the workers or there is some under-reporting or non-reporting, such amount would be liable to income tax.

Thus, the hotels/restaurants are not mandatorily required to distribute 100% of the service charge to their workers and can retain the service charge but the undistributed portion of the service charge would be liable to income tax with respect to the hotel/restaurant owner.

At the Spa

Scenario 7



The next day, the guest decides to visit the spa. He changes his mind when he hears that a female guest was assaulted by one of the male masseuses.

⁹ vide letter dated November 19, 2018

Prevention of Sexual Harassment in the Hospitality Industry: Whose cross is it to bear?

It is against this backdrop of the previous section that one needs to examine the issue of sexual harassment and the hospitality industry. The past two years have witnessed an increased awareness regarding sexual harassment of women at the workplace throughout the world. The #MeToo movement has compelled organisations to reconsider their HR practices to ensure the establishment of adequate safeguards for prevention of any form of sexual harassment at the workplace and effective redressal mechanisms.

Given the nature of the contractual relationship of a hotel owner and a hotel operator, a common point of contention on hotel management contract negotiations is the responsibility for compliance with laws. Considering that the hotel employees are hired and trained by the operator, the owner usually expects the operator to undertake the obligation of complying with the law. Interestingly however, although policies are often set by the operators, contractually the onus is placed on the owner and the purported position of the operator as a mere service provider does not admit to a clear legal obligation for compliance with various employment legislations.

Who is responsible?

Under a HMA, more often than not, hotel employees are designated as employees of the owner. This is despite the fact that the owner has little or no control in matters relating to employees. Customarily, it is usually the operator who selects and hires, exercises day-to-day supervision and control over the employees and formulates the HR policies and guidelines. The owner often has no say in disciplinary actions or dismissal of employees. Given this typical arrangement, the question that needs to be addressed then is who is responsible under the law for prevention of sexual harassment- the owner or the operator?

A few years ago, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (**POSH Act**) was formulated by the Indian Government. The POSH Act requires an 'employer' to take certain prescribed actions for prevention of sexual harassment at the workplace and is inter alia applicable to a private unit or undertaking carrying on any commercial activities, including provision of any services.

An employer has been, defined under the POSH Act to mean, any person responsible for the management, supervision and control of the workplace. Persons discharging contractual obligations with respect to his or her employees could also be considered within the ambit of an 'employer'.

Taking into consideration, the definition of an 'employer' under the POSH Act it may be contended that both the operator and the owner can be considered as an 'employer' for the purposes of the POSH Act. Whilst the operator is responsible for the management, supervision and control of the workplace, the owner is liable under the HMA to discharge obligations towards its employees.

Actions to be taken

- Most operators have anti-sexual harassment policies in place across the brand which they usually extend to the employees of hotels in which they provide their services.
- Operators also typically undertake the onus of constituting the Internal Complaints Committee (**ICC Committee**) as required under the Act for addressing complaints of sexual harassment. However, they are wary of undertaking any liability for non-compliance of statutory provisions.
- Given that the operator is in-charge of the hotel employees and formulates policies in respect of such employees, it may be deduced that the operator is responsible for compliance of the Act by inter alia undertaking the following actions:
 - Organising workshops and awareness programs at frequent intervals for sensitising the employees
 - Organising orientation programs for members of the ICC Committee
 - Assisting aggrieved women in filing complaints
 - Monitoring timely submission of reports by the ICC Committee
 - Ensure that the order constituting the ICC Committee and the consequences of sexual harassment are displayed at a conspicuous place in the workplace
- *The operator may additionally have to undertake investigation of the complaints and the witness statements to examine the accuracy of the claims and information provided. At times this could entail forensic examination of electronic data, footprints and records available through mobile devices and laptops to gather and preserve electronic evidence.*

Considering that the owner may also be construed as an employer, the owner should ensure that all of the aforesaid actions are undertaken by itself or the operator. Usually owners expect the operator to only formulate a policy for prevention of sexual harassment, constitute the ICC and inform them regarding any complaints received by or against any employees. However, it is time, that this obligation be extended beyond that. Owners may consider monitoring compliance of the POSH Act by seeking the requisite details in the MIS reports provided by the Operator.

Safety to be of prime importance

Regardless of who takes on the responsibility over the hotel employees or of complying with the POSH Act, it is important to not overlook the main objective. The hospitality industry is an industry with a high level of human interaction. Harassment in such an industry is not just limited to that inter se the employees but may also extend to cases amongst guests and employees. It may be noted that the POSH Act covers acts of sexual harassment not only of employees but any persons at the workplace.

Operators may need to be mindful of the fact that even though they may disclaim liability for any non-compliance or violation of the POSH Act by the hotel employees, a reported case of sexual harassment can be catastrophic for the brand image.

Deficiency of Services and Disclaimers

Scenario 8



It is time for our guest to leave the hotel. He claims that the hotel ruined his jacket that he asked to be laundered. Additionally, while he was at the spa, his watch was missing. The hotel is quick to point of various disclaimers in relation to the services to be provided.

We go back to the example of the valet. There appears to be a general principle that the hotel owner is responsible for the goods within the hotel. If he seeks to disclaim liability, then he should do so clearly in a contract with the guest and the guest should have due notice of the disclaimer.

In the case of laundry, where the guest hands over possession over goods to the hotel, the hotel becomes responsible to take care of the goods as a man of ordinary prudence would, under similar circumstances take of his own goods.

A bailment is created when there is a delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

The hotel would not be responsible for loss where there is a special contract to the contrary. However, in an old case¹⁰, where a laundry receipt stated that “Clothing cannot be claimed in case of any accident by fire or if things get torn”, the court held that such language should be construed to only apply when there is accidental tearing as might easily happen even if all reasonable care were taken and that on such a construction, the clause would not safeguard the laundry against any tearing due to negligence or deliberate improper treatment.

Besides, it would be open to a guest to start proceedings under the CPA for deficient services.

¹⁰ *Hollandia Pinmen v. H. Oppenheimer AIR 124 Rang 356*

Risk sharing under the Hotel Management Agreement (HMA)

As stated at the beginning – *the Owner is primarily liable under an HMA for all matters related to the hotel. The rationale for this is that the owner, being absolutely entitled to the property and taking a large part of the proceeds of the operation of the hotel should bear the responsibility for the hotel.*

However, the Owner has limited control over the hotel under an HMA. Often HMAs contain specific language authorizing the Manager to do all and sundry in relation to a hotel without interference from the Owner. All policies for the hotel are set by the Manager.

Even where hiring and firing is concerned, although the employees are on the books of the Owner, it is the Manager who makes the decisions. The rights of the Owner are limited to approval over certain key employees.

To top it off, many HMAs also include indemnities from the Owner in favour of the Manager saving them from all losses occurring at the hotel or in relation to the operations thereof, including losses consequent to the acts or omissions of the Manager. The exceptions usually are willful misconduct and gross negligence, which the Owner would have to prove.

Is the Manager an agent of the Owner?

- An agent is a person employed to act for another or represent another in dealings with a third person. A principal is responsible for the wrongs of his agent and is bound by his actions. This is certainly similar to the way things work in an HMA.
- Even where a contract does not name the relationship as an agency, it may still be construed as such based on the facts of the case in hand. Often HMAs specifically provided that the contract does not create an agency relationship and the Manager and the Owner are both acting as principals and independent contractors.
- An agent owes a fiduciary duty towards the principal i.e. the relationship is that of trust and confidence. As such, an agent is required to always act in the interest of the principal, even to the detriment of his own interest.

In this backdrop, questions could always be raised that if the Manager is an agent of the Owner, whether it can disclaim all liabilities associated with its actions?

Further, Owners often are required to obtain insurance covering all acts or omissions occurring at the Hotel. Although this would go a long way to mitigate the risks – it may be noted that insurance for criminal acts or omissions by the insured may not be enforceable.

Extra-Territorial Claims

It is increasingly common for guests from all over the world to file claims in their home countries after staying at an Indian hotel. The motivation could be the comfort with proceeding in the home jurisdiction of that person or the measure of damages that they could recover.

Usually, courts cannot claim extra-territorial jurisdiction for criminal acts or omissions. That is the reason claims are often made in civil courts for breach of contract or tort.

Whether a foreign court can claim jurisdiction over wrongs in India territory is a subject of debate. Indian courts do not usually exercise jurisdictions over matters beyond their territory. Even where a foreign court provides a judgment, if enforcement is sought in an Indian court, the Indian court may refuse enforcement.

An Indian court may hold that a foreign judgment is not conclusive where:

- Where it has not been pronounced by a Court of competent jurisdiction
- Where it has not been given on the merits of the case
- Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable
- Where the proceedings in which the judgment was obtained are opposed to natural justice
- Where it has been obtained by fraud
- Where it sustains a claim founded on a breach of any law in force in India

However, if the defendant has property in that foreign country, then the foreign judgment may be enforced on its assets in that country. This creates a risk for international managers, who may have assets in various jurisdictions across the world. Given the construct of the HMA, a manager may then choose to recover the damages payable by them from the owner or the insurance specific to the hotel.

Insolvency and Bankruptcy

I often say to entrepreneurs, 'If Lehman Brothers were Lehman Brothers & Sisters, it wouldn't have gone into bankruptcy' -Shinzo Abe

India ranked 77th among 190 countries by leapfrogging 23 ranks in World Bank's Ease of Doing Business (EODB) 2018 rankings. This significant shift in a period of 1 year has been attributed to various legal reforms in the country, including the Insolvency and Bankruptcy Code, 2016 (Code), with a vision for resolving the rampant insolvency situation.

Whereas, over a course of two year, the Code has proved instrumental in achieving the purpose for which it was implemented, it has also created a conducive environment for asset reconstruction companies, private equity firms as well as distressed asset funds. As per the news sources, private equity players have raised distressed assets funds totalling over USD four billion in the past 2 years, sensing an opportunity in the increasing number of bad assets in the banking system. Given the nature of the Code and the evolving jurisprudence, it will be interesting to know how the aggrieved holders of quasi-debt instruments such as Foreign Currency Convertible Bonds (FCCBs), Global Depository Receipts (GDR) or American Depository Receipts (ADR) approach for recourses under the Code.

Interestingly, prior to the commencement of the Code, the bankruptcy and insolvency framework was knit together from debt recovery laws as well as collective action laws to resolve insolvency and bankruptcy. However, these laws were highly fragmented and were covered under various legislations as follows:

- **Debt recovery**

A civil court of relevant jurisdiction is an avenue available to any creditor for debt recovery. Further, banks and certain financial institutions could invoke their rights under the Recovery of Debt Due to Banks and Financial Institutions Act, 1993 and in case of certain specified conditions, the secured creditors could take possession of collateral without requiring the involvement of a court or tribunal under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act).

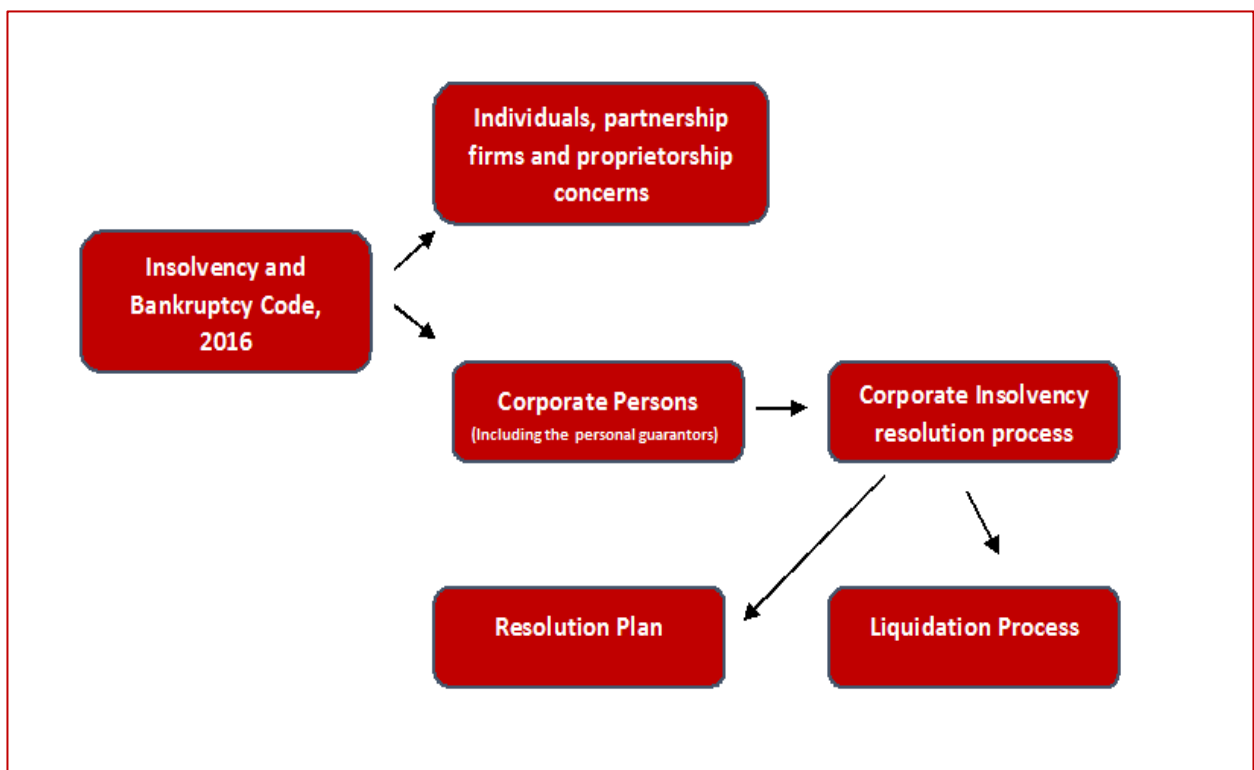
- **Collective resolution of bankruptcy and insolvency**

The Sick Industrial Companies (Special Provisions) Act, 1985 enabled rehabilitation of the industrial companies. Further, various out-of-court mechanisms under the regime of Reserve Bank of India were available for banks to restructure loan contracts with debtors, such as corporate debt restructuring, strategic debt restructuring, scheme for change of ownership of stressed assets outside the notified debt restructuring processes, and scheme for sustainable structuring of stressed assets (popularly known as S4A scheme).

▪ Winding-up and liquidation

Certain creditors seeking recovery of their debts from companies could also resort to winding-up and liquidation of such companies as contemplated in the Companies Act, 2013 based on limited ground available therein.

Owing to the multiple laws governing the subject matter, it was a huge impediment that the different laws were implemented in different judicial fora. Subsequently, the Code was enacted with an objective to consolidate and amend the laws relating to reorganisation and insolvency resolution of inter alia corporate persons in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and for matters connected therewith or incidental thereto. The Code is structured as follows:



In this section, we have attempted to elucidate the CIRP in a simple and diluted manner. We have also discussed certain developments pursuant to the Code and illuminate issues stemming out of the jurisprudence in the recent past in relation to the CIRP. We believe that a reader of this guide would be benefitted with the uncomplicated yet holistic analysis of the CIRP.

Steps Involved in the Corporate Insolvency Resolution Process

In this part of the section, we have explained the process of CIRP under the Code (as per Part II-Chapter II of the Code)¹¹.

Following are the key steps involved in CIRP, and the latter part of the guide diagrammatically elaborates these steps and also provides bird's eye view of the CIRP that can be initiated by various applicants:

- (i) Upon occurrence of a default, CIRP could be initiated by: (a) financial creditor, or (b) operational creditor, or (c) the corporate debtor itself
- (ii) Depending upon who initiates CIRP, an application is then required to be filed before the adjudicating authority under the Code, that is, the National Company Law Tribunal having jurisdiction (**NCLT**) as per the process and/or timelines mentioned under the Code
- (iii) The application is then either admitted or rejected by the NCLT
- (iv) The admission of the application by the NCLT results into various consequences inter-alia declaration of moratorium, appointment of an Interim Resolution Professional (**IRP**) (immediately or within the prescribed time depending upon who initiated CIRP), and causing a public announcement for CIRP
- (v) Upon admission of the application to initiate CIRP by the NCLT, CIRP is required to be completed within one hundred and eighty (180) days, and an extension of not more than ninety (90) days may be granted by the NCLT (CIRP Period)¹²
- (vi) The powers of the board of director of the corporate debtor stand suspended upon the appointment of IRP and management of the affairs of the corporate debtor vests with the IRP
- (vii) The IRP so appointed is required to carry out various duties and functions as per the provisions of the Code, including, issuing a public announcement for inviting claims of creditors and to constitute a Committee of Creditors (COC), running the business of the corporate debtor as a going concern, monitoring the assets of the corporate debtor and managing its operations until a resolution professional (RP) is appointed by the COC, etc.
- (viii) Once the COC is constituted, the RP is appointed by the COC which could be the IRP as appointed earlier or could be some other RP
- (ix) The RP so appointed has to perform certain actions as per the provisions of the Code, including, conducting meeting of creditors for the purposes of taking certain decisions as are required to be taken by the COC or which cannot be taken without the prior consent of the COC, inviting prospective resolution applicants, to prepare the information memorandum for the purposes of formulation of

¹¹ Please note that the term 'corporate insolvency resolution process' has not been defined under the Code, but the process provided under Part II-Chapter II of the Code is referred to as the 'corporate insolvency resolution process'.

¹² As per Section 12 of the Code and Regulation 40 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

resolution plan, appointment of registered valuers and transaction auditors to verify whether the resolution plans received by it meet the requirements as provided by the Code, submission of such complied resolution plans before the COC, etc.

- (x) The COC is then required to either approve or reject the resolution plan(s) submitted before it by the RP
- (xi) If a resolution plan is approved by the COC as per the votes required under the Code (which is 66% in value of the total financial debt of the corporate debtor), such resolution plan is required to be submitted before the NCLT
- (xii) The NCLT then decides whether the resolution plan submitted before it meets the requirements as provided by the Code, and then either approves or rejects the resolution plan
- (xiii) Where the NCLT has rejected the resolution plan or has not received any resolution plan within the CIRP Period, it is required to pass an order for the liquidation of the corporate debtor as per the provisions of the Code

Initiation of Proceedings for CIRP

Who can initiate the proceedings for CIRP?

The Code recognises three categories of applicants who can initiate the proceedings for CIRP against a corporate debtor.¹⁴ They are as follows:

A financial creditor. A person who disbursed money to the corporate debtor against the ‘*consideration for the time value of money*’ and includes a person to whom such debt has been legally assigned or transferred;¹⁵

An operational creditor. A person who has a claim in respect of the provision of goods or services, including employment or a debt in respect of the repayment of dues payable to any governmental authority;¹⁶ and

A corporate applicant. This includes the corporate debtor itself and other persons in control or management of the corporate debtor.¹⁷

¹³ As per Section 11 of the Code following persons are not entitled to make application to initiate CIRP under the Code: (a) a corporate debtor undergoing a CIRP; (b) a corporate debtor having completed CIRP 12 months preceding the date of making an application under the Code; (c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved 12 months before the date of making an application under the Code; or (d) a corporate debtor in respect of whom a liquidation order has been made.

¹⁴ Refer Section 6 of the Code, read with Section 7, 8, 9 and 10 of the Code.

¹⁵ The term ‘financial creditor’ is defined under Section 5(7) of the Code, and has been specifically set out in **Schedule 1** attached hereto.

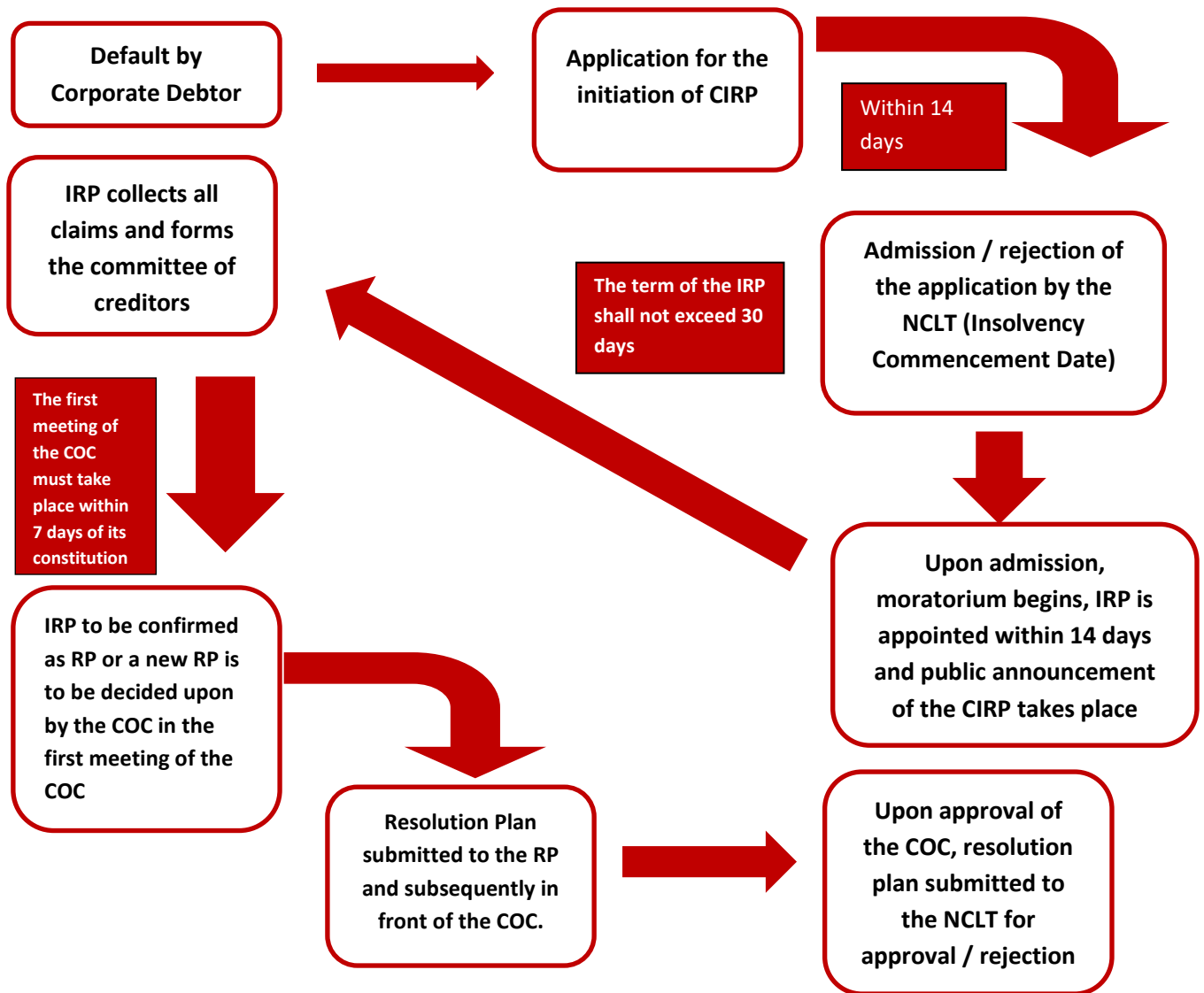
¹⁶ The term ‘operational creditor’ is defined under Section 5(20) of the Code, and has been specifically set out in **Schedule 1** attached hereto.

¹⁷ The term ‘corporate applicant’ is defined under Section 5(5) of the Code, and has been specifically set out in **Schedule 1** attached hereto.

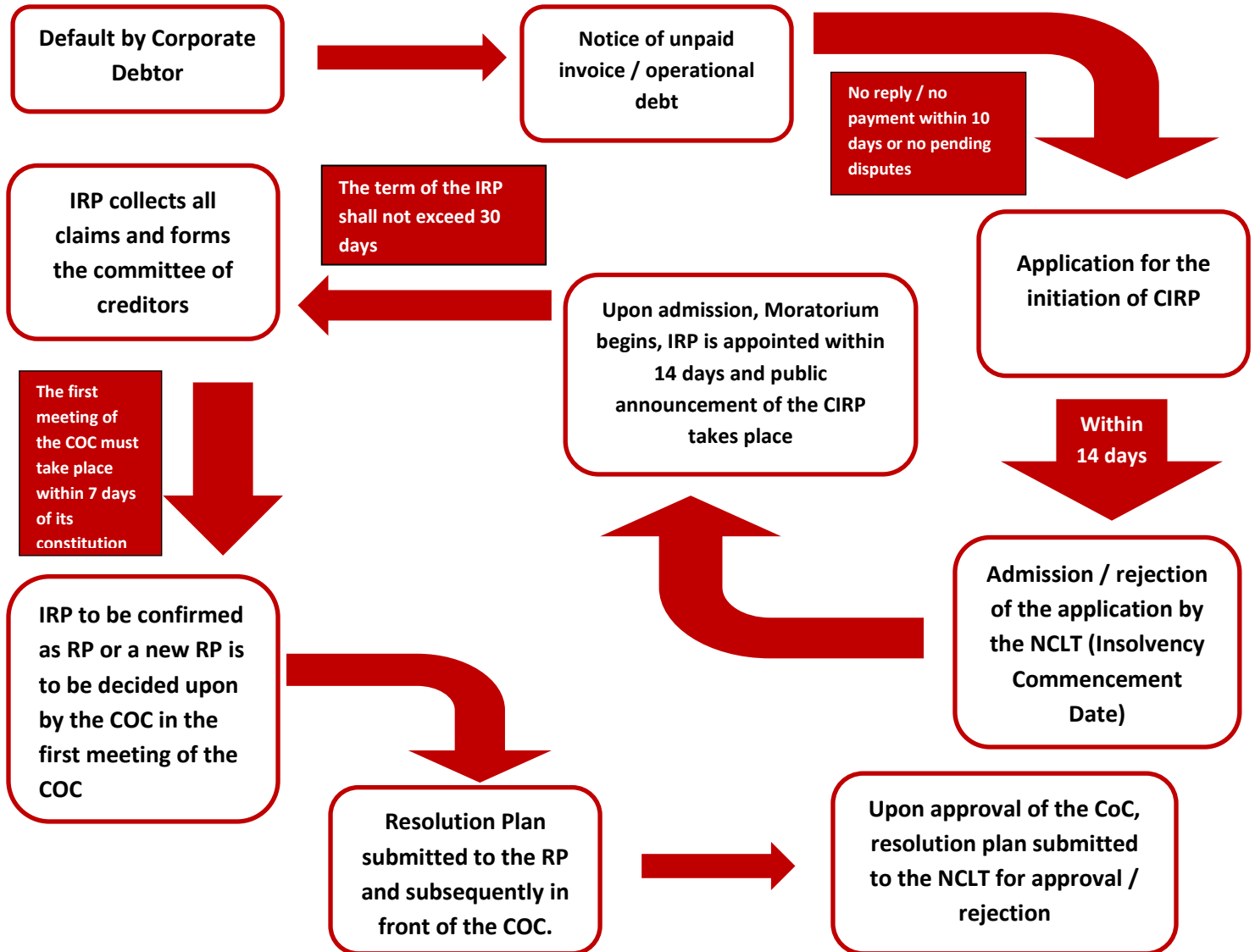
The categorisation of the 'financial creditor' and 'operational creditor' has been made based on the nature of the debt owed to them by the corporate debtor. The scope of the 'financial debt' and 'operational debt' has been set out below.

Provided below is the diagrammatic representation for the process in each of the aforementioned applicants:

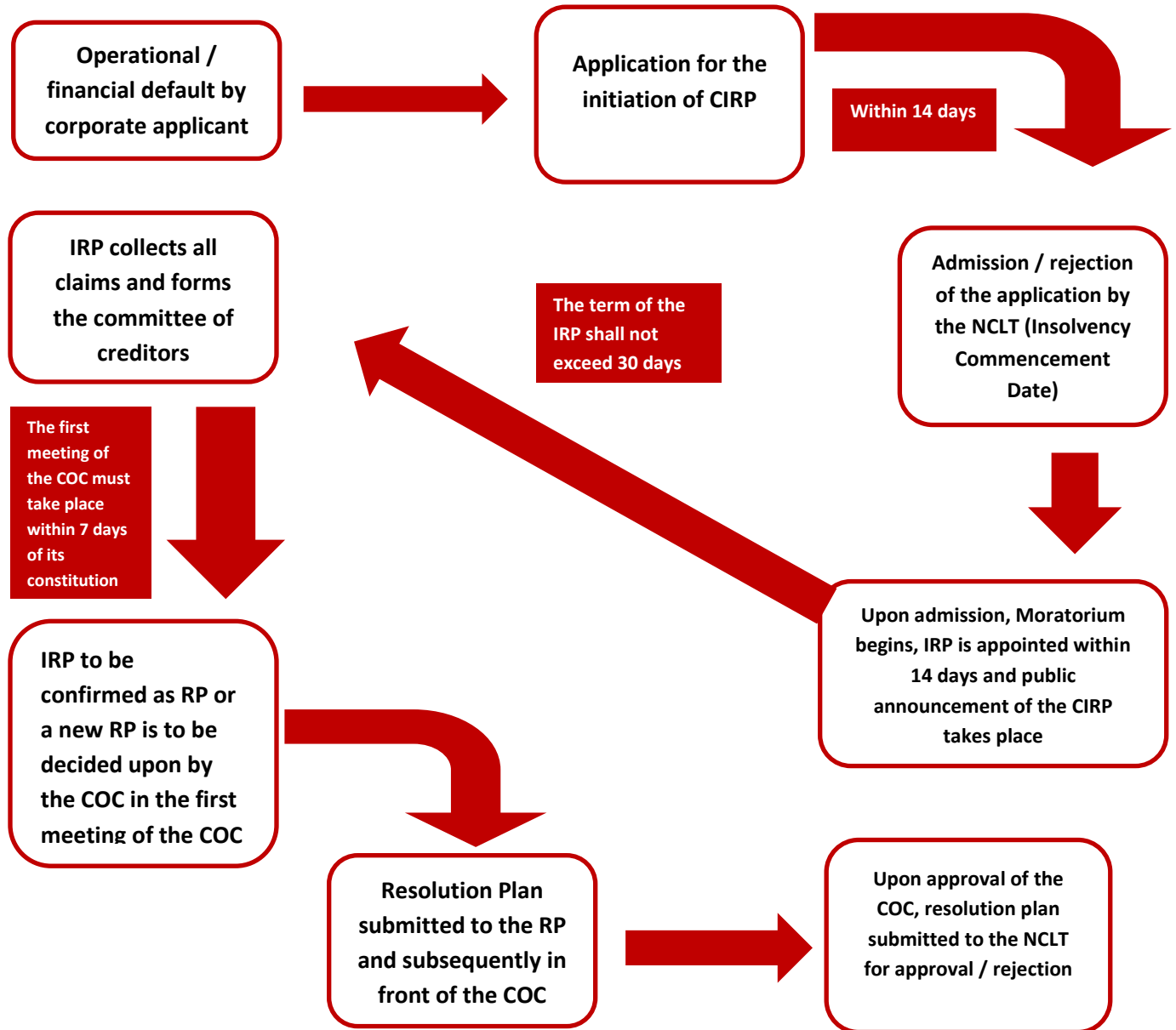
CIRP VIS-À-VIS FINANCIAL CREDITOR - Flow of events of the CIRP if initiated by a financial creditor



CIRP VIS-À-VIS OPERATIONAL CREDITOR - Flow of events of the CIRP if initiated by an operational creditor



CIRP VIS-À-VIS CORPORATE APPLICANT - Flow of events of the CIRP if initiated by a corporate applicant



1. Trigger event for initiation of proceedings for CIRP

CIRP can be initiated under the Code when a corporate debtor commits a 'default' of a minimum amount of INR 1, 00,000/-.

The term 'default' means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the corporate debtor, as the case may be. Further, the term 'debt' means a liability or obligation in respect of a claim¹⁸ which is due from any person and includes a financial debt and operational debt.

2. What is the process for initiation of CIRP under the Code?

An eligible applicant can make an application to the NCLT for initiation of CIRP, as follows:

- Financial creditor. Under Section 7 of the Code, upon occurrence of default¹⁹;
- Operational Creditor. Under Section 9 of the Code, upon occurrence of default, preceded by a ten (10) days' demand notice for payment of the unpaid operational debt²⁰;
- Corporate Applicant. Under Section 10 of the Code, where a corporate debtor has committed a default²¹.

Subject to the conditions as specifically set out under Section 7, 9 and 10, respectively, the NCLT may either admit or reject the application, within fourteen (14) days of the said application. Once the NCLT admits the application made by the respective applicants, the CIRP is said to have been initiated.

Consequences of an Admission of an Application by the NCLT to Initiate the CIRP

3. Moratorium

Upon the admission of an application, the NCLT declares a moratorium till the date of completion of CIRP²² for prohibiting all of the following, namely:²³

- (a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority
- (b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any

¹⁸ The term 'claim' is defined under Section 3(6) of the Code, and has been specifically set out in Schedule 1 attached hereto.

¹⁹ Read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 ("AAA Rules"), in Form 1.

²⁰ Read with Rule 5 and 6 of the AAA Rules, in Form 3, Form 4 and/or Form 5, as the case may be.

²¹ Read with Rule 7 of the AAA Rules, in Form 6.

²² Please note that where at any time during the CIRP period, if the NCLT approves the resolution plan or passes an order for liquidation of Corporate Debtor, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

²³ As per Section 14 of the Code.

legal right or beneficial interest therein

- (c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act
- (d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor

4. Non-applicability of moratorium

To ensure that the business of the corporate debtor is not affected as a going concern, the supply of following essential goods or services to the corporate debtor are not terminated or suspended or interrupted during moratorium period:²⁴

- (a) Electricity
- (b) Water
- (c) Telecommunication services
- (d) Information technology services

To the extent these are not a direct input to the output produced or supplied by the corporate debtor.²⁵

5. Appointment of the IRP

The Code contemplates the appointment of a ‘resolution professional’²⁶ within fourteen days of the insolvency commencement date (*that is, the date of admission of an application for initiating CIRP by the NCLT*) who is an insolvency professional²⁷ appointed to conduct the CIRP and includes an interim resolution professional (**IRP**). One of the most important functions of such an IRP is to take over the management of the corporate debtor and operate its business as a going concern. The powers of the board of directors of the corporate debtor stand suspended from the date of the appointment of the IRP.

Because of the initiation of CIRP, NCLT appoints an IRP, subject to fulfilment of certain conditions under the Code, e.g. the eligibility requirements are met for such appointment, etc., as per the following:

- (i) It is mandatory for a financial creditor and corporate applicant to suggest the name of an IRP in its application made before the NCLT for initiation of CIRP

²⁴ As per Section 14(2) of the Code read with Regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations**”).

²⁵ For example, water supplied to a Corporate Debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

²⁶ The term ‘resolution professional’ is defined under Section 5(27) of the Code, and has been specifically set out in **Schedule 1** attached hereto.

²⁷ The term ‘insolvency professional’ is defined under Section 3(19) of the Code, and has been specifically set out in **Schedule 1** attached hereto.

- (ii) It is optional for an operational creditor to suggest the name of an IRP in its application made before the NCLT and may request the NCLT to appoint such an IRP vide reference being made to the Insolvency and Bankruptcy Board of India (IBBI)²⁸

6. Tenure of the IRP and various duties to be performed during such tenure

- (i) The term of the IRP shall not exceed thirty (30) days from date of his appointment.
- (ii) The IRP has various crucial duties and responsibilities for the operation of CIRP, such as taking over the management of the corporate debtor, inviting and consolidating claims against the corporate debtor and constitution of a COC.²⁹ The duties and responsibilities of the IRP as provided under Section 17, 18, 20 and 21 are specifically set out under Schedule 2.

7. Status of the personnel of the corporate debtor

- (i) The personnel of a corporate debtor, its promoters or any other person associated with the management of the corporate debtor are required to extend all assistance and cooperation to the IRP as may be required by him in managing the affairs of the corporate debtor.
- (ii) Where any such person who is required to assist or cooperate with the IRP does not assist or cooperate, the IRP may make an application to the NCLT for necessary directions. The NCLT, on receiving such application, shall by an order, direct such person to comply with the instructions of the RP and to cooperate with him in collection of information and management of the corporate debtor.

8. Invitation and consolidation of claims from the creditors

- (i) Once the CIRP is initiated against a corporate debtor, the Code contemplates the consolidation of all the claims against it.
- (i) The same is achieved by a public announcement³⁰ to be made by the IRP immediately but not later than three (3) days of his appointment, to call for submission of claims by all the creditors of the corporate debtor. Pursuant to such public announcement, the creditors are required to submit their proof of claims to the IRP within a stipulated time, that is, which shall be fourteen (14) days from the date of appointment of the IRP.³¹
- (ii) However, a creditor who has failed to submit proof of claim within the time stipulated in the public announcement may submit such proof to the IRP or the RP, as the case may be, on or before the

²⁸ Established under Section 188(1) of the Code. The Insolvency and Bankruptcy Board of India is then required to recommend the name of an IRP within 10 days of receipt of reference from the NCLT.

²⁹ COC shall mean the committee of creditors constituted by the IRP as per the provisions of Section 21 of the Code read with Chapter V of the CIRP Regulations.

³⁰ Public announcement is required to be made in the form and manner as per Section 15 of the Code read with Regulation 6 of the CIRP Regulations.

³¹ The claims by creditors are required to be submitted in the form and manner as provided under Chapter IV of the CIRP Regulations.

ninetieth day of the insolvency commencement date.

- (iii) The IRP or the RP, as the case may be, is thereafter required to verify every claim as on the insolvency commencement date within seven (7) days from the last date of receipt of claims and maintain a list of creditors.

9. Appointment of registered valuers for determination of liquidation value

- (i) Within seven (7) days of his appointment, but not later than forty-seventh day from the insolvency commencement date, the RP is required to appoint 2 registered valuers to determine the liquidation value of the corporate debtor in accordance with Regulation 35 of the CIRP Regulations.
- (ii) Following persons cannot be appointed as registered valuer: (a) a relative of the RP; (b) a related party of the corporate debtor; (c) an auditor of the corporate debtor in the 5 years preceding the insolvency commencement date; or (d) a partner or director of the insolvency professional entity.

Constitution of the COC and the Interim Management

1. Who constitutes the COC and who forms part of the COC?

Pursuant to the collection, consolidation and verification of claims, the IRP is required to constitute the COC within thirty (30) days of his appointment,³³ comprising of following:

- (i) All the financial creditors of the corporate debtor, provided that a financial creditor who is a related party³⁴ to the corporate debtor is to be excluded from the COC; and
- (ii) In cases where the corporate debtor has no financial debt or where all financial creditors are related parties of the corporate debtor, the COC shall consist of following:³⁵
 - (a) 18 largest operational creditors by value and where number is less than 18, COC shall comprise of all such operational creditors;
 - (b) 1 representative elected by all workmen other than those workmen included under sub-clause (a) above; and
 - (c) 1 representative elected by all employees other than those employees included under sub-clause (a) above.

³² The term 'liquidation value' means the estimated value of the assets of the Corporate Debtor if the Corporate Debtor were to be liquidated on the insolvency commencement date.

³³ IRP is required to file a report certifying constitution of the COC to the NCLT on or before the expiry of 30 days from the date of his appointment.

³⁴ The term 'related party' has been defined under Section 5(24) of the Code, as specifically set out under **Schedule 1** attached hereto.

³⁵ As per Regulation 16 of the CIRP Regulations.

2. Submission of information memorandum

The RP is required to submit an information memorandum³⁶ in electronic form to each member of the COC within two weeks of his appointment but not later than fifty-fourth day from the insolvency commencement date, whichever is earlier containing at least such information as are required under Regulation 36(2)(a)-(i)³⁷ of the CIRP Regulations.

3. First meeting of the COC and appointment of RP therein

- (i) The first meeting of the COC shall be held within seven (7) days of the constitution of the COC.
- (ii) The COC may at its first meeting appoint either the appointed IRP, or any other eligible person as the RP (replacement of the IRP with any other RP can be done after an application in this regard is made to the NCLT, wherein the NCLT is required to forward such reference to the IBBI for its confirmation. If the IBBI does not confirm such reference within ten (10) days of receipt thereof, the NCLT will require the existing IRP to play the role of RP until such time the IBBI confirms the appointment), to further conduct the CIRP.
- (iii) The RP plays a pivotal role in conducting the CIRP, which included various duties such as preserving and protecting the assets of the corporate debtor, inviting prospective resolution applicants and presenting such resolution plans submitted to it by such investors. The RP needs to exercise powers and perform duties as are vested or conferred on the IRP under Part II-Chapter II of the Code.

4. Decision making by the COC

- (i) All decisions of the COC shall be taken by a vote of not less than as per the voting share³⁸ of the financial creditors (or operational creditors, as the case may be) as more particularly laid down under the Code and CIRP Regulations.
- (ii) Decision at a COC's meeting will not be taken unless all the members of the COC are present at such meeting. However, if all members are not present at a meeting, a vote shall not be taken at such meeting and the RP shall :
 - (a) circulate the minutes of the meeting by electronic means to all members of the committee within

³⁶ The term "information memorandum" means a memorandum prepared by RP under section 29(1) of the Code.

³⁷ Such matters include information in relation to the assets and liabilities as on the insolvency commencement date, latest annual financial statements, list of creditors, details of guarantees given in relation to debts of the Corporate Debtor by other persons, etc.

³⁸ As per Section 5(28) of the Code, "voting share" in the context of a COC comprising financial creditors, means the share of the voting rights of a single financial creditor in the COC which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the Corporate Debtor.

Further, as per Regulation 16(3) of the CIRP Regulations, in case the COC comprises of operational creditors, a member of the COC shall have voting rights in proportion of the debt due to such creditor or debt represented by such representative, as the case may be, to the total debt. The term 'total debt' is the sum of- (a) the amount of debt due to the creditors listed in Regulation 16(2)(a) of the CIRP Regulations; (b) the amount of the aggregate debt due to workmen under Regulation 16(2)(b) of the CIRP Regulations; and (c) the amount of the aggregate debt due to employees under Regulation 16(2)(c) of the CIRP Regulations.

48 hours of the conclusion of the meeting; and

- (b) seek a vote on the matters listed for voting in the meeting, by electronic voting system where the voting shall be kept open for 24 hours from the circulation of the minutes.

5. Process for meetings of the COC

Detailed provisions dealing with convening the COC meetings is provided in Chapter VI of the CIRP Regulations. We have provided below certain key elements for such meetings, e.g. who can call meeting, notice for meeting, quorum for meeting, and how meetings to be held, etc.

- (i) RP may convene the COC meeting as and when he considers necessary and shall convene a meeting of a request to that effect is made by members of the COC representing 33% of the voting rights.
- (ii) A meeting is required to be called by giving not less than five (5) days' notice in writing to every participant. Such notice can be given by electronic means. The notice period can be reduced by the COC but not less than twenty four (24) hours.
- (iii) Attendance at meetings is permissible either in person or through an authorised representative.
- (iv) Quorum for holding a valid COC meeting is members of the COC representing 33% of the voting rights, either present in person or by video conferencing or other audio and visual means. The COC may modify the percentage of voting rights required for quorum for its future meetings. The quorum is required to be present throughout the meeting.
- (v) The meeting of the COC can happen through video conferencing or by other audio and visual means;
- (vi) The scheduled venue for any meeting of the COC shall be in India.
- (vii) RP will act as the chairperson of the meeting of the COC, and he is required to circulate the minutes of the meeting to all the participants by electronic means within 48 hours of the meeting of the COC.

6. Matters requiring prior COC approval

Whereas the RP conducts the CIRP and takes over the management and operations of the corporate debtor, a RP cannot take certain actions without prior approval of the COC, such as raising interim finance, change in capital structure, change in ownership interest or change in management of the corporate debtor or its subsidiaries. Failure to obtain such approval will render any such action as void.

Resolution Plan and its Approval by the COC

1. What is a resolution plan and its contents?

- (i) A resolution plan means a plan proposed by a resolution applicant for the insolvency resolution of the corporate debtor as a going concern in accordance with Part II of the Code.
- (i) A resolution plan must mandatorily consist of provisions for, inter alia, a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor, statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the Adjudicating Authority at any time in the past, payment of CIRP costs, amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors, the term of the plan and its implementation schedule, management of the affairs of the corporate debtor during its term and adequate means for supervising its implementation.
- (ii) A resolution plan shall also contain details of the resolution applicant and other connected persons to enable the COC to assess the credibility of such applicant and other connected persons to take a prudent decision while considering the resolution plan for its approval.
- (iii) The provisions which are mandatorily and optionally required to be incorporated in a resolution plan are specifically set out under CIRP Regulations.

2. Who can prepare/submit resolution plan?

RP is responsible for inviting prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of COC, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by IBBI, to submit resolution plan(s), based on the information provided by the RP in the information memorandum.

3. Who is a 'resolution applicant'?

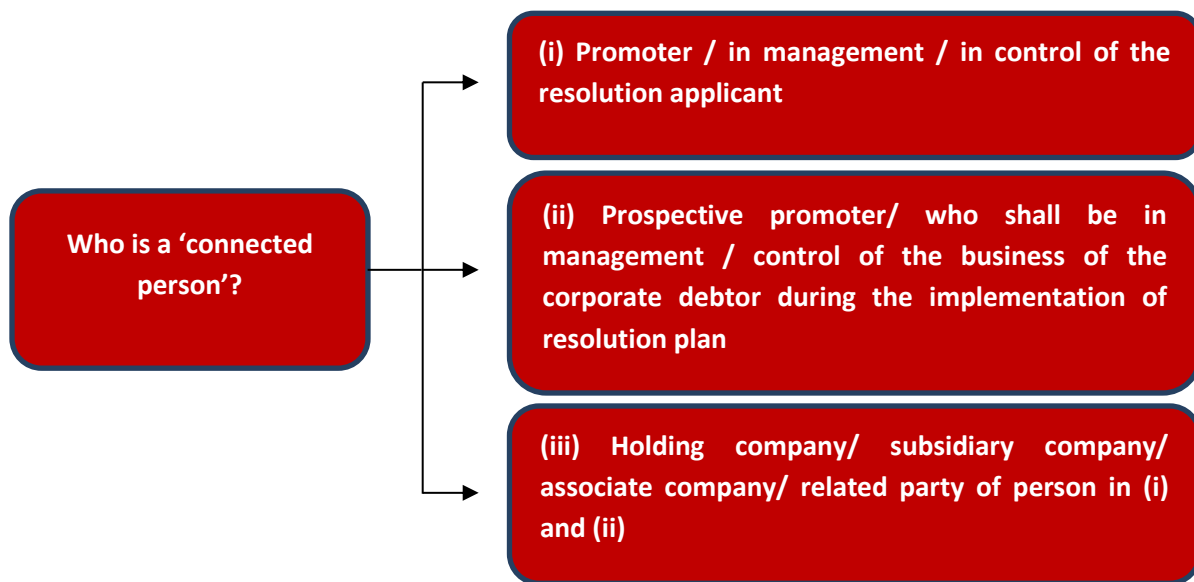
At this juncture, it is important to understand who is eligible to submit a resolution plan. As per Section 5(25) of the Code, a resolution applicant shall mean:

'Any person who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25.'

On the other hand, by way of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017, Section 29A has been inserted to the Code which disqualifies certain persons from becoming a resolution applicant. It states that a person shall not be eligible to submit a resolution plan, if such a person or any other person acting jointly with such person, or any person who is a promoter or in the management or control of such person is:

- (i) An undischarged insolvent
- (ii) A willful defaulter
- (iii) One whose account is classified as non-performing assets for over 1 year;
- (iv) Convicted for any offence punishable with imprisonment for 2 years or more;
- (v) Disqualified to act as a director;
- (vi) Prohibited from trading in securities or accessing the securities market;
- (vii) Executed an enforceable guarantee in favour of a creditor, in respect of a corporate debtor;
- (viii) 'Connected person' meeting the aforementioned criteria of disqualification;
- (ix) Subject to any of the abovementioned disabilities, under any law in a jurisdiction outside India.

4. Who is a 'connected person'?



5. Timeline for submission of resolution plan to the RP

A resolution applicant shall endeavour to submit a resolution plan prepared in accordance with the Code to the RP.

6. Submission of resolution plan to the COC for its approval

- (i) Once the resolution plan is submitted by a resolution applicant to the RP, the RP examines each resolution plan received, and presents such resolution plans which consist of all the mandatory ingredients and which comply with the requirements of Section 30(2) of the Code and Regulation 38

of the CIRP Regulations,³⁹ before the COC to seek their approval.

- (ii) The COC may approve a resolution plan submitted to it with such modifications as it may deem fit.
- (iii) Once the COC has approved a resolution plan in accordance with the Code, the RP is then required to submit such resolution plan to the NCLT for its approval.

Approval of the Resolution Plan by the NCLT

- **Submission of the resolution plan to the NCLT**

If the NCLT is satisfied that the resolution plan meets the mandatory requirements of a resolution plan as set out in CIRP Regulations and requirements of Section 30(2) of the Code, the NCLT shall by order approve such resolution plan. However, such a resolution plan may be rejected by the NCLT, if it does not conform to such requirements.

- **Consequences of the approval of a resolution plan by the NCLT**

A resolution plan approved by the NCLT is binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. Pursuant to the approval of such resolution plan, the moratorium ceases to have effect.

- **What happens if NCLT receives no resolution plan or if a resolution plan is not approved by the NCLT?**

In case, the NCLT does not receive a resolution plan or if the NCLT rejects a resolution plan as approved by the COC, it shall pass an order to initiate liquidation of such corporate debtor.

³⁹ Requirements under Section 30(2) of the Code include compliance with factors viz., the resolution plan does not contravene any of the provisions of the law for the time being in force, etc.

Emerging Trends in Acquisition of Hotels

‘Only buy something that you’d be perfectly happy to hold if the market shut down for 10 years’ – Warren Buffet

Investment in the hospitality sector in India has attracted sustained interest from domestic and foreign investors over last few years. Of late, institutional investors have also committed significant capital to this sector and created a large portfolio of hotels, often through acquisitions of operating hotels. Similarly, many of the global hotel management companies now own or have invested in hotels in India. Acquirers typically rely on both equity and debt funding for such transactions. This article highlights investment options/avenues and associated risks for the hospitality sector investment transactions in India.

Foreign Equity

While FDI is permissible up to 100% of equity in a hotel-owning company or a limited liability partnership, hotel investments are considered as ‘investments in construction development projects’ under the FDI policy issued by the

Government of India and, as such, are subject to the conditions applicable to all construction development projects. However, hotel projects are entitled to certain relaxations as compared to other construction development projects.

Point to note: Foreign investors would need to bear in mind the pricing guidelines which restrict them from acquiring equity securities in Indian companies at a price lower than the fair value. Additionally, exit by way of transfer of equity securities to a resident would need to be at a value not more than the fair value of such securities. These restrictions also apply to what is known as downstream investments, that is, investments by an Indian entity owned or controlled by non-residents into another Indian entity.

Domestic Equity

There are no specific provisions applicable to investments through equity by domestic investors in hotel assets. The provisions of the Companies Act, 2013 (“Companies Act”) relating to subscription of purchase of equity securities are however to be complied with.

Point to note: Equity transactions involving acquisition of listed Indian entities may trigger open offer provisions under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 issued by the Securities and Exchange Board of India (“SEBI”). Even if the open offer provisions are not triggered, certain disclosure requirements may apply for acquisitions. Compliance of the aforesaid laws would also have to be ensured in cases of infusion of foreign equity.

Debt Financing

RBI’s recent inclusion of hotels under the definition of “infrastructure sector” has provided a significant boost, considering a liberalized approach for financing is applicable to infrastructure sector. This allows the hotel industry to access longer tenure debt and cheaper facilities and also provides lenders with a less stringent approach qua provisioning of the facilities to this sector.

Hotels also have access to foreign debt through external commercial borrowings (“ECB”), under the automatic route, as regulated by the RBI. In certain situations, ECBs along with relevant hedging facilities may allow for access to funds cheaper than rupee debt for borrowers. Corporates are also increasingly analysing structures around bond issuances as a means of raising debt – rupee bonds, also known as “masala bonds” are becoming popular, given their ability to rest the currency risk with the lender and/or investor, instead of passing this on to the issuer.

Point to note: Financial institutions are undertaking specific scrutiny to better understand and create specific structures for the hotel industry. It usually makes better commercial sense to approach a financial institution that has a clear understanding of the hotel industry, rather than only availing of a simple corporate credit facility.

Real Estate Investment Trusts (REITS) and Infrastructure Investment Trusts (INVITS)

To encourage investments in the real estate and infrastructure sectors, SEBI introduced REITs and InvITs as alternate investment structures to be set up as registered trusts under the regulations framed by SEBI.

Point to note: Whilst REITs and InvITs offer an alternate method of accessing the market and pooling together funding from retail investors, there has been no real progress in the actual establishment or listing of REITs and InvITs. SEBI has brought in several amendments in order to address the concerns that have kept developers away from this method. However, issues such as tax treatment, stamp duty and high thresholds for investment in already developed projects are still unresolved.

Understanding Typical Risks in Hotel Acquisitions

Although no transaction is exactly like the other, investors should be aware of the following risks that are typical of hotel acquisitions and investment transactions in India:

Leveraged Assets: Given the high costs of acquisition of real estate and ballooning construction costs, hotel properties are often heavily leveraged. More often than not, there are long-standing payment defaults leading to institutional lenders designating their debt as 'non-performing assets'. This, then restricts the promoters from transferring securities or ceding control by way of further investments in the owner.

Land Title: Given the multiplicity of land laws, the historical nature of land holdings, and devolution of small scattered holdings in the name of individuals without adequate paper trails, the acquirer of, or investor in, any business that relies on any real estate asset, should employ adequate time and resources to ascertaining the quality of the title of land.

Third Party Consents: Third party consents from lenders and lessors may be required in case of acquisition of substantial shareholding or control over an owning entity. Additionally, consents from various authorities for hotel operations may need to be examined to verify whether there are any operations may need to be examined to verify whether there are any requirements to obtain consents or intimations to the relevant authorities.

Diligence Issues: As under any other acquisition, the acquirer undertakes diligence of the target. Such diligence may throw up issues for the acquirer to consider while making its decision to purchase or invest. These issues could lead to a reduction in the asking price or obligations on the target and promoters to 'clean house' or mitigate their effects. However, communication of information by persons associated with the company to acquirers and their advisors would need to be seen through the lens of insider trading regulations in India. The scope of due diligence of listed entities is usually more limited than as may be desired by the acquirer.

Competition: Certain large transactions would trigger the combination provisions of the Competition Act, 2002. Any acquisition of control, shares, voting rights or assets and any mergers and amalgamations which cross the specified jurisdictional thresholds are to be reported to the Competition Commission of India (CCI). The jurisdictional thresholds in India adopt the 'size of parties' test and transactions which meet any one of the specified thresholds are to be notified to the CCI as the Competition Act, 2002 adopts a suspensory regime.

Conclusion

The last three years have witnessed the hospitality sector seeing consistent growth. To be sure, increase in occupancies, the increase in average room rates and the fact that demand has outpaced supply in many markets in India, has been a welcome relief for the industry. However, the flip side is that India is still not viewed as a very favorable investment destination on account of several risks (mentioned above) – developmental risk being key. In order to promote more greenfield ventures vis-à-vis investments in operational assets, it is important to bring down interest rates and increase debt tenure for the hospitality sector. State governments will also need to work cohesively with industry on the labyrinth of licensing requirements. A single window approval would perhaps

Debt Funding in the Hotel Industry

'Debt is one person's liability, but another person's asset'
-Paul Krugman

The success of a hotel depends on multiple factors, such as its location, occupancy levels, category, competency of the hotel operator, amenities, growth of tourism, economic growth of the jurisdiction, global economic situation and also a sound financing plan.

The approach of financial institutions for financing the hotel industry is highly dependent on:

Debt funding to the hotel industry has increasingly created a niche, with financial institutions undertaking specific scrutiny, to better understand and create specific structures/covenant/processes for the industry. It has been noticed that it makes more commercial sense to approach a financial institution that has a clear understanding of the hotel industry, rather than only availing of a simple corporate credit facility.

1. **The purpose of financing**
2. **The stage that the hotel and/or project is in**

Some of the requirements and stages are elaborated below:

Stage 1: Land Acquisition and/or Hotel Acquisition

In both the cases mentioned above, the financial institutions treat the debt funding as a case of acquisition finance. Some of the interesting issues are noted below:

- Banks refrain from doing direct financing of land acquisition and promoter contribution for the acquisition, considering that the RBI has restricted the same;
- It is usual practice that the acquirer of the hotel is a newly-formed company and/or special purpose vehicle. In such a scenario, the lenders seek comfort by way guarantees and security from the promoters, group and/or the parent entities;
- As stipulated by RBI, the financial institutions do not lend against the primary security of shares, and therefore, the immovable and/or movable property forms the main comfort; and
- Owing to the increase in real estate costs, the stamp duty, other indirect tax levy and registration costs in most locations in India, the acquisition of land has become a costly affair. The stamp duties and registration costs alone may increase the acquisition cost by up to 10% depending on the location. However, the higher

Floor Space Index (**FSI**) (that is, the quotient obtained by dividing the total covered area (plinth area) on all floors, excluding exempted areas as given in relevant development regulations by the area of the plot.) available for hotels in most states in India provides some shade in the sunlit path. Most of the states provide for exclusion of certain areas from being considered for calculation of the FSI in starred hotels. Prior to acquisition, it should be ensured that the legal due diligence in respect of the permits, consents, licenses, and so on, are also done in addition to the title of the property. This due diligence is also helpful for the future and helps in ensuring that the due diligence of future financiers is smoother.

Stage 2: Construction of the Hotel

Generally, lenders tend to approach financing at this stage, but face similar issues as faced for construction finance. *One of the differences though, is that there is no separate mortgage of units and release of mortgage required (like for residential and/or commercial projects) for hotels under construction.* The structures are highly dependent on who the borrower is, whether the owner of the land, the parents in the joint venture entity, a developer having the right to develop the hotel, the construction contractor, and so on. At this stage, it is very important for the lenders to ascertain that all the required approvals are in place and that the project has achieved financial closing (in the form of clear commitments) before disbursing any money. The lenders insist on receipt of equity contribution before the debt is disbursed. Lenders also look to provide the non-fund-based funding requirements of the borrowers at this stage.

Stage 3: Renovation/Refurbishment/Expansion

At this stage, the borrowers look for a certain amount of top-up funding or look to refinance the existing debt exposure with an increased limit. In such situations, it would be important for the borrower to analyse the prepayment conditions under its existing facilities. Sometimes, prepayment premiums charged by existing lenders completely change the costing of a refinancing structure. In such a stage, lenders also analyse whether the refinancing and the re-jigging proposed would lead to “restructuring” and therefore, an increase in provisioning for the lenders.

Stage 4: Working Capital

Similar to all businesses, financiers provide the regular working capital limits to this industry.

Infrastructure Sector: *The primary boost that has been provided to the hotels is that the RBI regulations have included this sector under the definition of “infrastructure sector”.* In its efforts to boost the infrastructure sector, the regulations provide a liberalized approach for financing the infrastructure sector. Accordingly, this allows the hotel industry to access longer tenure debt and cheaper debt facilities. It also provides the lenders with a less stringent approach qua provisioning of the facilities to this sector. Hotels also have access to foreign debt through external commercial borrowing (**ECB**), under the automatic route, as regulated by the Master Directions of ECB issued by the RBI (**ECB Regulations**). In certain situations, ECB along with relevant hedging facilities still allow for access to funds cheaper than rupee debt for borrowers.

Bond Financing: Corporates are now increasingly analysing structures around bond issuances as a means of raising debt. Some of the key factors that are attracting corporates for bond issuances are as follows: (i) push given by the government in trying to uplift India's corporate bond market, (ii) relaxation in norms around foreign investment into the corporate bond market, thereby allowing access to a larger market of lenders, (iii) secured, rated bonds having an interest coupon, which is cheaper than rupee term loans and (iv) availability of flexible coupon structures or hybrid security structures to suit varied commercial requirements.

Within the domestic market, bond financing has mostly been in the form of secured non-convertible debentures, issued under the private placement route. Private listed companies no longer need to have the non-convertible debentures listed, as was required earlier. Additionally, the companies are also evaluating issuing rupee bonds under the ECB Regulations, also known as “masala bonds”. The primary feature of such bonds is that the currency risk is to rest with the lender and/or investor and should not be passed on to the issuer.

Terms and Covenants of Financing

In addition to the standard terms and covenants including creation of security over all hotel assets (and additional collateral, guarantee and comfort letter from the parent entity or promoters in certain cases), the following terms are considered in a hotel industry:

- **Hotel Management Contracts**

For all cases where there are hotel operators in the project, the analysis over the HMA forms an extremely important stage to finalise the structure and the covenants applicable. The arrangement with hotel operators provides for one of the few situations in the financing space wherein market practice suggests that the operator will continue with its right to receive the cash flows even though the lender is not receiving its repayment. In fact, in certain situations, hotel operators also negotiate for agreements like non-disturbance agreements (**NDA**) wherein the operators' right is not disturbed, even in case of an event of default or in case of an enforcement and transfer of ownership. The lenders have tried to push back on NDA. However, they have agreed that operators have a priority in the waterfall of payments. In some situations, lenders have also agreed with the hotel operators that they will not initiate any action to freeze accounts in case of enforcement of security.

- **Escrow Mechanism**

Unlike other projects, it is important to ensure that the waterfall mechanism of the escrow or the collection accounts should be tailored to ensure that the lenders have interest only on the owner's share of collection and that the operators' shares are paid out to them as a priority, since any dispute with the operator would directly impact the overall business of the hotel. In order to effectuate operational ease, lenders have agreed on complex

sub account operations within the escrow account, which allows for automated releases and automated transfers.

- **Debt Equity Ratio:** This is one of the most important covenants, as most hotels generate revenues in the long term and high interest burdens can make the project unviable. Most banks would insist that at least a sum equivalent to soft costs including consultant fees, interest during construction, land cost, and so on, is brought in by promoters as their equity and/or contribution to the project, and that the promoters should not withdraw their contribution prior to complete repayment;
- **Date of Commencement of Commercial Operations:** This is an important covenant in the financing of any project, including hotels. As per the guidelines issued by the RBI on asset classifications, loan for infrastructure projects (which include hotels) is to be classified as an NPA if it fails to commence commercial operations within two years from the original Date of Commencement of Commercial Operations (**DCCO**), despite no financial default. There is only a one-time relaxation to requalify the same as standard assets by restructuring as per the RBI guidelines;
- **Average Occupancy and Room Rents:** Given the nature of the business, this is a financial covenant laid down by most bankers to ensure that the long-term feasibility and growth of the hotel is achieved;
- **Prepayment Terms:** Given the fact that the financing of hotels are generally long term in nature, one should always consider negotiating favourable terms for prepayment, which is helpful in ensuring that refinancing may be done without huge pre-payment penalty in the event that the financing market turns more favourable during the loan tenor.

In addition to the aforementioned points, it becomes important to structure the transaction documents to ensure that they are most cost-effective in terms of stamp duty, registration, and so on. This would include determining and negotiating the type of mortgage, merging the security documents of movable and immovable assets in a single document, choosing the place of execution and the jurisdiction of the documents. Given the fact that stamp duty in India is a state subject, merely the location may make a huge difference in the cost involved in financing. **One of the most important concepts which govern financing structures for this industry is the concept of “maintaining business continuity”.**

Competition Law & The Hospitality Industry in India

'Antitrust is the way that the government promotes markets when there are market failures. It has nothing to do with the idea of free information' -Bill Gates

At this stage, the perspective of India's market regulators towards the hospitality industry becomes significant. Entrusted with the regulatory task of promoting and sustaining competition in markets, the Competition Commission of India (CCI) has had a few, but limited opportunities to deal with the hospitality sector. A few important aspects of India's antitrust enforcement in the hospitality sector are discussed below.

Behavioural Issues – Potential of Inquiry into Anti-Competitive Conduct in the Hospitality Sector

With the increasing proliferation of e-commerce and emergence of online booking platforms and aggregators like MakeMyTrip, Goibibo and Oyo, the hospitality industry also faces the increased potential of inquiries into allegedly anti-competitive conduct. In the recent past, globally, there has been increased attention towards practices adopted by online aggregators and booking platforms, including various "price parity" and "MFN" clauses. While in India there is no publicly reported inquiry that has been initiated by the CCI, press reports suggest that industry associations like the Federation of Hotels and Restaurant Association of India, may have approached the CCI alleging contravention of the Act by Oyo, Goibibo and other aggregators.

The CCI's powers in this regard cover two broad areas viz., (a) anti-competitive agreements and (b) abuse of dominant position.

- **Anti-competitive Agreements:** Section 3 of the Competition Act regulates agreements between enterprises and prohibits those agreements which have an appreciable adverse effect on competition (AAEC). The Act presumes, that agreements entered into between competing enterprises which have an effect on price, supply, markets or result in bid rigging, have an AAEC. Unless the absence of AAEC is proved, such agreements are prohibited. However, even for agreements between enterprises at different level in a production chain (such as, agreements between manufacturer and distributor) are prohibited only if AAEC is proved to exist.
- **Abuse of dominant position:** Section 4 of the Competition Act prohibits a dominant entity from abusing such position in the market. A dominant position is described as a position of strength in the market which enables a enterprise to operate independently of market forces. Market share is one of the factors that is used to determine dominant position. A dominant enterprise is saddled with a greater responsibility under the Competition Act. Any actions of such an enterprise which are discriminatory, unfair, or restrict market access, development, supply in the market etc., are prohibited under the Competition Act.

Given the broad parameters of CCI's powers a few practices that can raise a concern under the Competition Act are:

Issues that can raise a concern before the CCI



MFN or price parity clauses: Clauses requiring a hotel to provide its best prices on a particular booking platform may be scrutinized by the CCI and pose a concern for the aggregator.



Deep Discounting: the practice of deep discounting followed by some aggregators has been highlighted as being anti-competitive. While the CCI is yet to make any determination on this issue, discounting practices followed by an aggregator/booking platform need to be accessed from the perspective of the Act.



Boycotts: threats of boycott of, or by, an aggregator can raise concerns under the Act. The CCI has in the past found such practice, followed widely in the pharmaceutical sector, to be anti-competitive.

Notification to the CCI – Jurisdictional Thresholds

Any acquisition of control, shares, voting rights or assets and any mergers and amalgamations which cross the jurisdictional thresholds specified in the Competition Act (read with GoI notifications) must be reported to the CCI. ***The Act adopts a suspensory regime, and as such notification is compulsory. The jurisdictional thresholds in India adopt the 'size of parties' test; and transactions which meet any one of the following thresholds must be notified to the CCI:***

Companies party to M&A or Acquisition			Groups (2 or more enterprises) party to M&A or Acquisition		
In India			In India		
Assets	OR	Turnover	Assets	OR	Turnover
					> INR 240 billion (INR 24,000 crores)
In India & Outside India (aggregate)			In India & Outside India (aggregate)		
Assets	OR	Turnover	Assets	OR	Turnover
> USD 1 billion (Including minimum INR 1000 crores in India)		> USD 3 billion (Including minimum INR 3000 crores in India)	> USD 4 billion (Including minimum INR 1000 crores in India)		> USD 12 billion (Including minimum INR 3000 crores in India)

The GoI has also extended the *de minimis* exemption (or the “Target Exemption”) till March 2022. According to the Target Exemption, any acquisitions of shares, voting rights, control, or assets need not be notified to the CCI if the enterprise which is being acquired has:

- Assets not more than INR 3.5 billion in India; and/or
- A turnover of not more than INR 10 billion in India.

Target Exemption, however, does not apply to transactions structured as mergers or amalgamations.

CCI’s Merger Control Record in the Hospitality Sector

While assessing the impact of transactions on competition in India, the CCI has pragmatically acknowledged the competitive nature of the industry and the presence of large players in the four and five star segment. The competitive landscape in this sector will be further strengthened with consumers having the advantage of information symmetry from emerging travel aggregators and hotel comparison platforms such as ixigo.com, trivago.com TripAdvisor, and so on. As such, the CCI is likely to continue with a liberal outlook in examining the hospitality industry in future transactional and behavioural enquiries that it undertakes. Although the CCI refused to define a relevant market in the Starwood/ Marriott acquisition, the CCI may examine future transactions in segment-based product markets at city-level geographies. This, however, must be assessed on the basis of the facts of each case.

Case Study 1	Case Study 2
<ul style="list-style-type: none"> ▪ In early 2016, the CCI cleared the acquisition of Starwood Hotels & Resorts Worldwide, Inc. by Marriott International, Inc. In India, Marriott manages hotels under several of its brands including the Ritz-Carlton, Bulgari, Edition, JW Marriott and Marriott Hotels. Starwood, on the other hand, is engaged in operating, franchising and licensing hotels such as Le Meridian, Sheraton, St. Regis and Westin. ▪ Starwood and Marriott, in their notice, proposed the relevant market to be market for hotels in different cities in India; and alternatively suggested a narrower market definition of four and five star category hotels. ▪ The CCI, in its assessment, did not feel the need to define a relevant market, since the combination did not raise competition concerns regardless of a market definition. ▪ The CCI noted the presence of competing large players in the four and five star hotel segment such as The Indian Hotels Company Limited (Taj Group), The East India Hotels Company (The Oberoi Group), The Leela Group of Hotels, Lemon Tree Hotels, Park Hotels, The Radisson Hotels, Hilton, Hyatt, the Intercontinental Hotel Group to name a few and was of the view that the combination did not have an appreciable adverse effect on competition in India. 	<ul style="list-style-type: none"> ▪ In 2015, the CCI also cleared acquisition of the Leela Goa, by Ceres Hotels Private Limited, by way of a slump sale. Due to an absence of any horizontal or vertical overlap between the parties, the CCI decided that the combination did not cause an appreciable adverse effect on competition in India.

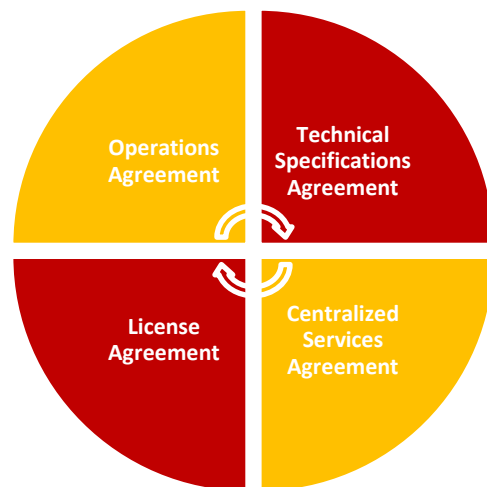
Taming the Beast- Issues in HMAs

'Hospitality exists when you believe the other person is on your side' – Danny Meyer

HMAs are a peculiar form of contract involving a complex array of documentation – the operations agreement, the license agreement, the technical specifications agreement and the centralized services agreements.

The Balancing Act: Manager and Owner

Managers, often running multiple hotels in multiple jurisdictions, and often, even within the same jurisdiction, come to the table with their standard form on contract containing little room for variance. This leaves the person with the most skin in the game, that is, the owner, with very little say in how his asset is to be managed. This may be attributed to the fact that a manager, in its vast experience of management, has figured out an optimal model agreement that works for what the manager is seeking to cover. Owners on the other hand, and in particular first-time owners, have limited knowledge with respect to running and operating a hotel and all that it entails. And thus, from the outset, there is a gap of understanding between the manager and the owner as regards industry standards of practice and the terms underlying the all-encompassing HMA.



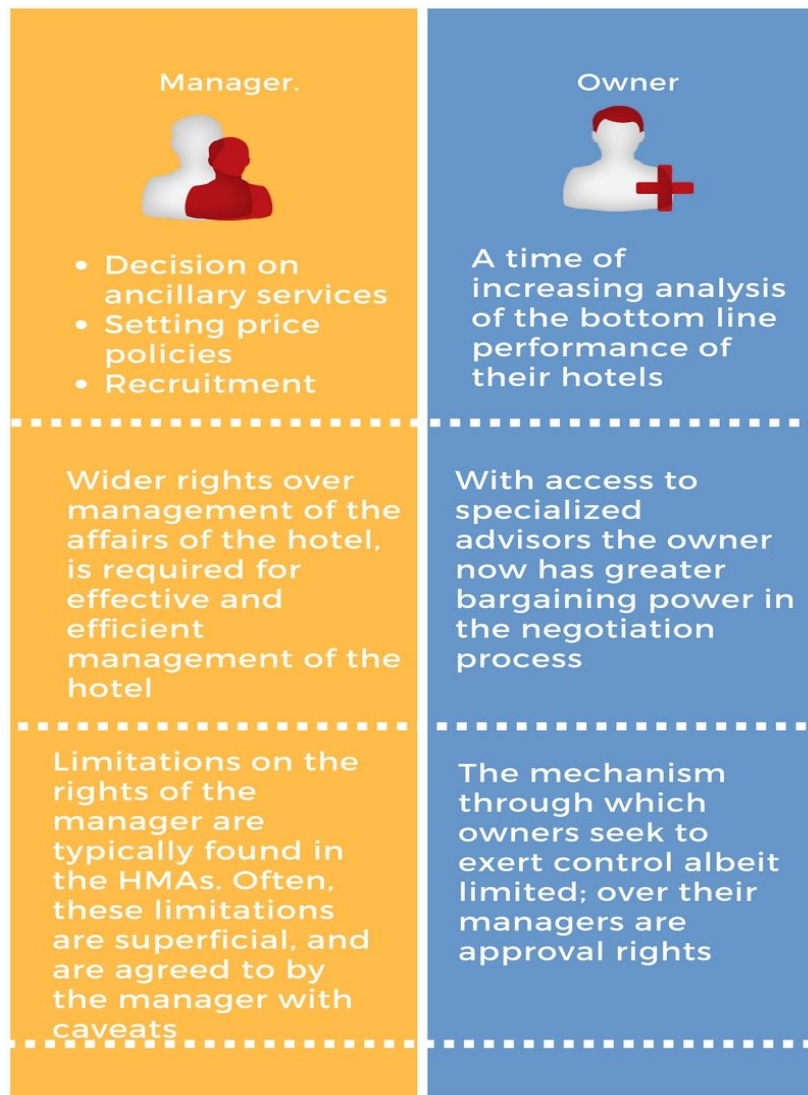
Managing hotels and leisure facilities inevitably lead to a complex range of commercial and legal issues. These issues should be carefully managed at the outset to ensure a smooth partnership between the owner and manager.

A few of the issues that invariably come up are listed below:

Limitation on the Rights of the Manager

The manager under the HMA, typically enjoys unfettered rights to manage and operate the hotel in such manner as the manager deems fit. His argument usually is – I am the pilot of your plane, so let me fly it. From setting price

GETTING IT RIGHT : THE OWNER : MANAGER CONFLICT



policies and ancillary services for the hotel, to appointment and recruitment of hotel employees, everything is to be spearheaded by the manager. The owner has little control over human resource policies, vendors, from whom supplies are sourced, managing publicity and media for the hotel, management of bank accounts, and so on. From the manager's point of view, wider rights over management of the affairs of the hotel, is required for effective and efficient management of the hotel. However, from the point of view of an owner, being the chief financier of the hotel and its operations, a prudent owner wants to be assured of a return on his investment, and in turn, actively seeks certain restrictions to be placed on the rights of the manager under the HMA.

Limitations on the rights of the manager are typically found in the HMAs. These limitations take the form of restrictions on the manager in terms of financial expenditure beyond a certain threshold, entering into agreements with third parties beyond a certain term, and so on.

Often, these limitations are superficial, and are agreed to by the manager with large caveats. Also, whether these limitations are effective in restricting the

manager in real terms, is a question often posed. We believe that there may be better mechanisms for permitting the owner to have more say in the HMAs other than merely placing these limitations on the manager. However, it must be balanced such that the manager is not unduly restricted from doing what he is best at – operating hotels.

Control Rights to Owners

On the side of owners, it seems we have entered a time of increasing analysis of the bottom line performance of their hotels. HMAs that were often signed based on the implicit trust in the managers, as well as the lack of availability of advisors to the owners, have had to undergo significant changes.

Owners have gained valuable experience, as well as access to specialized advisors, and this combined with the increase in the number of managers in the market have given the owner greater bargaining power in the negotiation process.

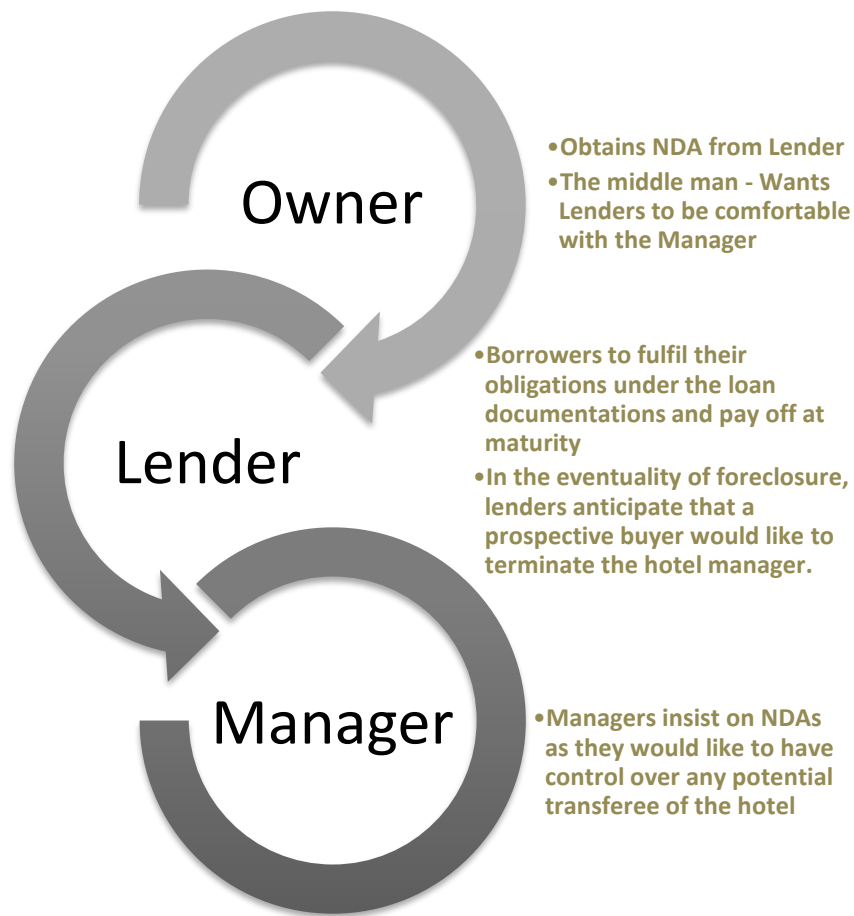
We have observed that hotel asset owners seek greater inclusion in the management of the hotel, as they are generally financing the construction, management and maintenance of the hotel. Owners like to ensure that their money is being spent well and with purpose. Focus on performance unsatisfactory to the owner often results in an enhanced sensitivity toward the management practices and conflicts of motivation that may contribute to such unsatisfactory results. This often finds expression in HMAs through approval rights to the experienced owner. Further, even today's first-time owner wants a seat at the table when it comes to major decisions, for example, preparing and approving the annual budget, major capital expenditure, implementing a change in brand standards, and so on.

The mechanism through which owners seek to exert control albeit limited; over their managers are approval rights. This finds a form under the HMA through approval rights over certain line items in the annual plan, thresholds for owner approval in respect of capital expenditure, monthly meetings with the general manager to review the performance of the hotel, and lock-in with respect to brand standards for a certain period of time post opening of the hotel.

It is a principle of contract law that all provisions of an agreement must be read together in order to understand the true meaning and essence of the contract, and the same holds true with the HMA. While a number of approval rights are granted to the owner, the managers also ensure that enough is held back to permit them to operate the hotel with as little interference from owners as possible. In fact, it has been our experience that managers do not shy away from the inclusion of a 'non-interference' provision in the HMAs, whereby what is to be construed as owners' interference in the managers operation of the hotel is defined in detail.

In order to balance these often seemingly opposed interests, it is important that both parties have meaningful rights under the HMA that are exercised with the interest of the hotel in mind.

Non-Disturbance Agreements



An increasing number of HMAs require the owner to obtain an NDA from the lenders of the owner in respect of the finance availed of for the acquisition of the underlying land or for the construction of the hotel. This tri-partite agreement between the owner, manager and lender operates to bind the lender in the event of default by the manager or owner and the lender then takes over the hotel in accordance with the terms of the HMAs.

Managers insist on NDAs as they would like to have control over any potential transferee of the hotel – to ensure they have the financial wherewithal, is not a competitor; while the goal of the lender is simple – for borrowers to fulfil their obligations under the loan documentations and pay off at

maturity. However, in the eventuality of foreclosure, lenders anticipate that a prospective buyer would like to terminate the hotel manager.

The middleman in this scenario, the owner, wants for nothing more than to be able to construct, build, equip and operate the hotel. They do not want their lenders to be uncomfortable with their managers, or for the terms of financing to be adversely affected.

Therefore, as an advisor, balancing the interests of all the parties is essential, and requires to be addressed in an effective manner as part of the overall relationship between the owner and manager under the HMA.

Exit Rights

There are limited exit rights available to the owner under any HMA. One rarely comes across an HMA where the owner may terminate for convenience or on sale of the hotel. In the event any manager agrees to the inclusion of the aforesaid, the same is coupled with a sizeable pay-out to the manager.

In case of sale of the hotel, the pre-condition is generally that the proposed transferee meets certain criteria and is agreeable to continue under the HMA as the owner of the hotel, and inherit all rights and obligations of the erstwhile owner. The combination of all these restrictions could lead to a real cost in the sale process for the owner, and could include a reduction in the price that the hotel could attract had it not been for such restrictions. The industry calls it 'vacant possession'.

Other exit rights available to the owner include a failure of the performance test by the manager. The provision of the performance test itself is riddled with so many terms and conditions that we are yet to see a termination on this basis. The conditions often include provisions whereby the performance test does not kick in until the fourth or fifth operating year, half years are not included, no year whereby the competitive set is incomplete can be included, and even then, if the manager fails the performance test, it may cure the same by making a payment to the owner. This greatly reduces the ability of an owner to terminate an under-performing manager. If the manager has wide cure rights, it may choose to simply buy its way out of trouble each time it fails the performance test.

With ownership of hotels changing hands during these unstable economic times, many HMAs are being renegotiated or new agreements are being entered into. It is during this time that owners and managers should take a hard look at the performance test and negotiate language that is meaningful on a going-forward basis to ensure the optimum performance of the hotel and maximum accountability of the parties involved.

On a practical note, however, the owner should remember that managers don't want their flag to stay on an underperforming hotel and it is very unlikely given a choice, a hotel manager would insist on buying his way out of a performance test.

We have provided, as an annexure to this write up, a tabular representation of termination rights available to an owner via-a-vis brand operated as well as independently operated hotels⁴⁰.

⁴⁰ Source: *Hotel Management Contracts – Past and Present*, Jan A. deRoos (2010)

Owners Termination under HMAs

	Brand	Independent
Without Cause		
▪ Frequency in Contracts		
- At any time	0%	42%
- After pre-determined period	15%	2%
▪ Required Notice Period (Days)	90 – 365	30
▪ Termination fee multiple	3-5	1-5
On sale		
▪ No operator option to purchase	35%	67%
▪ Operator option to purchase	56%	22%
▪ Operator option to continue	72%	38%
▪ Termination fee multiple	2-5	0.5-2.5
On Foreclosure		
▪ Frequency in contracts	80%	80%
▪ Termination fee multiple	0-2	0-1

Employee Relationships under HMAs

'By putting the employee first, the customer effectively comes first by default, and in the end, the shareholder comes first by default as well' - Richard Branson

Under the hospitality management arrangement, one of the functions of the manager is to recruit and train all employees of the hotel. Further, the manager is also responsible for setting the human resource policy in all respects, including the hours of work, remuneration package, days of leave, and so on. The manager directs and controls the employees in the performance of their duties in relation to the hotel. **Barring a few key personnel, the owner typically has little to no say in the recruitment, retention and human resource policy adopted and implemented by the manager.**

The wide role of the manager in relation to the hotel employees would cause one to believe that employees of the hotel are employees of the manager. But, in reality, the hotel employees are engaged by the owner of the hotel. And therefore, the owner becomes responsible for the employees in the performance of their functions and duties in course of their employment. In light of this background, it becomes important for owners to understand their responsibilities to the employees under law.

Master- Servant Relationship

We examine the relationship between the employee, the owner and the manager (if any) in terms of a master – servant relationship. This is necessary to understand the liability of the employer for acts committed by his/her employees. The terms “master” and “servant” are used to describe the legal relationship between the employer viz. the master and the employee viz. the servant and is based on the control exercised by the employer over the services provided by the employee. Generally,⁴¹

- The master can tell the servant what to do;
- A servant is a person who not only receives instructions from his master but is subject to his master's right to control the manner in which he carries out those instructions;
- Generally, a servant, qua servant, has no authority to make contracts on behalf of his master; and
- A servant is paid by wages or salary.

From the above, we observe that a master and servant relationship is determined based upon the amount of control the employer exercises over the service provided by the employee. Looking back on the relationship between the owner and employees, vis-à-vis the relationship between the manager and employee, it may be said that a master – servant relationship does not exist between the former but does exist between the latter.

⁴¹ *Lakshminarayan Ram Gopal and Son Ltd. v Govt of Hyderabad*, [AIR1954SC364] relying on Powell's Law of Agency

Vicarious Liability

As regards liability, a master will be liable for acts of an employee committed while within the scope of employment. Such liability attaching to an employer due to acts of an employee is called vicarious liability.

As a general principle, a person is liable for the wrongful act committed by him/her. However, there may arise certain circumstance in which a person becomes liable for the wrongful act committed by others, even though he had no part or was not in fault in such wrongful act. The principle of 'vicarious liability' is determined by the legal maxim "*Qui Facit per Alium Facit Per Se*" meaning - the act done by me on behalf of you is not my act.

Vicarious liability in the law of tort⁴² may be defined as a liability imposed by the law upon a person as a result of (1) a tortious act or omission by another, (2) some relation between the wrongdoer and the defendant whom it is sought to make liable, and (3) some connection between the tortious act or omission and that relationship⁴³. To prove vicarious liability under the law of tort, it is important to establish the relationship between the wrongdoer and the person who is sought to be made liable, that is, the master and servant. Generally, a servant is a person who not only receives instructions from his master but is subject to his master's right to control the manner in which he carries out those instructions, and has no authority to make contract on behalf of his master.⁴⁴ There are various factors which are taken into consideration while establishing the master- servant relationship. For example, the extent of control of the master upon the servant, the kind of occupation, the place of works, the method of payment, and so on.⁴⁵

Further, to determine whether a wrongful act committed is a vicarious one, it is also important to establish that the act committed was during the course of employment. This general principle is well settled in law.

Case Study: In case of *Sitaram Motilal Kalal Vs Santanuprasad Jaishankar Bhatt*, the Supreme Court of India while referring to the law laid down in *Storey v. Ashton* I.L.R stated

"The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant."

⁴² Law imposes a duty on every individual to respect the legal rights bestowed on others and any person interfering with someone else's enjoyment of their legal right is said to have committed a tort. Generally, tort is a breach of duty. In India, the law of torts is uncodified and is still in the process of development

⁴³ Vicarious Responsibility in law of Torts, P.S Atiyah (London Butterworths, 1967)

⁴⁴ Powell's Law of Agency, Page 20.

⁴⁵ American re-statement of law Vol. IP 483

Who is the Employer: Owner or Operator?

Considering the foregoing, it remains to be tested under Indian law, whether, a manager could be held liable for the wrongful acts committed by hotel employees (who are not directly engaged by the manager, but by the owner). And in such a scenario, it becomes vital for the owner to seek appropriate indemnities from the operator, to protect against any liability to employees or third parties arising through mismanagement by the operator.

In the context it would be prudent to reference a Supreme Court judgement in the case of *Balwant Rai Saluja & Anr vs. Air India (Ltd) & Ors.*⁴⁶ The immediate case dealt with the issue as to whether ‘workmen engaged in statutory canteens, through a contractor, could be treated as employees of the principal establishment’. The case was presented before a division bench of three judges of the Supreme Court as an appeal from a division bench of two judges of the same court. In the current case, Hotel Corporations of India Ltd. (HCI), which was a wholly owned subsidiary of Air India Ltd. (“Air India”), through one of its units provided canteen services at the establishment of Air India. *The question before the court was whether the workmen employed by HCI could be treated as deemed employees of Air India.*

The Court after having examined the various submissions and various judgements of the Indian and English Courts, concluded that workers, who have been engaged through contractors, would need to satisfy the test of employer-employee relationship in order for them to be called the employees of the principal employer for all purposes.

The relevant factors while considering an employer-employee relationship would include, inter alia,

- Who appoints the workers
- Who pays the salary/remuneration
- Who has the authority to dismiss
- Who can take disciplinary action
- Whether there is continuity of service
- Extent of control and supervision, i.e. whether there exists complete control and supervision

The employer must not only have the right of directing what work the employee is to do but also the manner in which he would do his work. Any kind of remote control over the employees would not be sufficient, it must be shown that the employer exercises absolute and effective control over the said workers.

In light of the aforesaid judgement, it may be contended that whilst the hotel employees are the employees of the owner as per the terms of the management agreement, they may be actually held to be employees of the manager under law. This would however vary from case to case and depend largely on the nature of the control exercised by the manager over the hotel employees.

⁴⁶ (2014 (9) SCC 407)

HMA: Negligence & Gross Negligence

'In persons grafted in a serious trust, Negligence is a crime' - William Shakespeare

Introduction

Undoubtedly, a large part of the negotiation when it comes to an HMA pertains to whether "misconduct" should instead be "willful misconduct" or "negligence" should be "gross negligence". The governing law of the HMA as well as current case law would help the parties determine the meaning that should be ascribed to the aforesaid words. Usually, an operator attempts to apportion the majority of the responsibility on the owner in an HMA.

While negotiating an HMA, operators generally want to avoid paying any costs incurred in operating a hotel. They want to protect their base and incentive fees from any offsets or reductions and want to be protected from any claims incurred in the course of their operating the hotel for the owner. The limited exception that operators are generally willing to make to their complete indemnification by owners, is for a loss that is caused by the hotel operator's own gross negligence or willful misconduct. In the ideal situation for the operator, it has no liability for the negligence of its employees, including the acts of a general manager, barring the situation where the owner can show that the negligence was the result of corporate gross negligence or willful misconduct of the operator.

Owners want operators to manage their property professionally and maintaining high standards. They do not expect to pay for damages or losses caused by someone else's negligence, breach of contract or violation of law, much less for the gross negligence or willful misconduct of the operator. Owners would ideally want to be indemnified by the operator if it causes losses for any of the aforementioned reasons.

Negligence

Negligence is the failure to use the level of care and caution that an ordinary person would use in similar circumstances. It often involves a careless mistake or inattention that causes an injury.

Case Study

The Supreme Court in *M.S. Grewal and Another vs. Deep Chand Sood and Others*, (2001) 8 SCC 151, held as follows:

"Negligence in common parlance mean and imply failure to exercise due care, expected of a reasonable prudent person. It is a breach of duty and negligence in law ranging from inadvertence to shameful disregard of safety of others. In most instances, it is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his act. Negligence is thus a breach of duty or lack of proper care in doing something, in short, it is want of attention and doing of something which a prudent and a reasonable man would not do (vide Blacks Law Dictionary). Though sometimes, the word inadvertence

stands and used as a synonym to negligence, but in effect negligence represents a state of the mind which however is much serious in nature than mere inadvertence. There is thus existing a differentiation between the two expressions whereas inadvertence is a milder form of negligence, negligence by itself mean and imply a state of mind where there is no regard for duty or the supposed care and attention which one ought to bestow."

The Supreme Court laid down that in a case of negligence, the following must exist:

- (i) The existence in law of a duty of care situation.
- (ii) Breach of the duty of care by the defendant.
- (iii) A causal connection between the defendant's careless conduct and the damage.
- (iv) That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

Gross Negligence

Gross negligence is the deliberate and reckless disregard for the safety and reasonable treatment of others.

The Black's Law Dictionary defines "gross negligence" as follows:

"A lack of slight diligence or care. A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages."

- In Green vs. Ingram, (2005) 269 Va. 281, 608 S.E.2d 917, it was held as follows:

"Gross negligence is that degree of negligence that shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of another. It must be such a degree of negligence as would shock fair minded people, although something less than willful recklessness."

- In Chapman vs. City of Virginia Beach, (1996) 252 Va. 186, 475, it was stated that:

"Gross negligence is utter disregard of prudence amounting to complete neglect of safety of another. It is absence of slight diligence with a want of even scant care. Several acts of negligence alone may not amount to gross negligence but when combined may show a form of reckless or total disregard for another's safety."

Difference between Negligence and Gross Negligence

In both negligence and gross negligence, the fundamental disregard for responsibility must directly cause harm to another person, another person's property, or both. The distinction, however, would appear to lie in the degree of the disregard shown.

- In *Spread Trustee vs. Sarah Ann Hutcheson*, [2011] UKPC 13, Sir Robin Auld observed as follows:

"On the plain meaning of the words and as a matter of logic and common sense, the terms "negligence" and "gross negligence" differ only in the degree or seriousness of the want of due care they describe. It is a degree of difference, not of kind, as stated by Millett LJ in Armitage v Nurse."

- In *Armitage vs. Nurse*, [1997] EWCA Civ 1279, Millett LJ observed as follows:

"But while we regard the difference between fraud on the one hand and mere negligence, however gross on the other as a difference in kind, we regard the difference between negligence and gross negligence as merely one of degree."

As a result, the terms are often used inter-changeably, and there is often no distinct difference attributed to them both in common parlance as well as case law.

Examples of Negligence and Gross Negligence

Negligence

- Slip-and-fall injuries coupled with the non-usage of precaution such as a "wet floor" sign.
- Injuries caused due to broken or faulty furniture.
- Theft on the premises caused as a result of improper security measures or faulty security technology.
- Illness caused due to faulty or improper food and beverage preparation.
- Assault, theft, inappropriate sexual advances or other misconduct by hotel staff.
- Drownings and other pool accidents.
- Inadequate fire safety and other disaster management planning such as designated exits, trained staff, and so on.
- General negligent behaviour by the staff/management not in keeping with the standards and skill expected to be met by a person engaged in a similar business.



Gross Negligence

- A hotel does not follow adequate fire hazard safeguards and safety protocol. Due to a fire, some of the patrons suffer injuries to their person. Despite this, the hotel does not remedy the same, and in a similar subsequent incident, more patrons are injured by another fire. Here, the hotel management is well aware of the shortcomings in their fire safety measures, and yet does nothing to remedy the same. This shows complete disregard and neglect for the safety of others, and hence would constitute gross negligence.
- A hotel serves food or beverages to its patrons, knowing that the quality of the aforementioned refreshments/meals is far below the requisite standards. This shows utter disregard for the health and safety of the patrons, despite the knowledge that consumption of the refreshments/meals is likely to affect their health.
- The diving board of a swimming pool in the hotel has been the cause of multiple minor accidents. The hotel management has not hired a lifeguard for the same, and as a result a patron injures himself and has to be saved by fellow guests. Not hiring a lifeguard in itself may constitute gross negligence, as the dangers associated with a swimming pool, not to mention a diving board, are common knowledge and must be accounted for if such facility is being offered to the guests of the hotel.



Case Laws

In the case of *Vinay Rajkumar Rajpal vs. Parkhyatt Goa Resort & Spa*, before the Goa State Consumer Disputes Redressal Commission, Vinay Rajpal and his wife had checked into Park Hyatt Goa Resort & Spa. Vinay slipped while entering the bathroom, and the fall resulted in several injuries and fractures to his person. The Goa State Consumer Disputes Redressal Commission vide its order dated January 25, 2012 held as follows:

“The photographs produced and the evidence on record proves that the bath room of room no.321 was indeed peculiar, and, though the complainant has not explained the said expression, in our view, it was peculiar because it was a sunken bathroom which could be used for a shower as well as a bathtub and to go there were three slanting steps to be climbed down without proper support. The floor of the bath room or the bath tub was made of unpolished natural stone known as Tumble Rock while the steps leading to the bathroom were made of polished egyptian marble with a slant towards the bathroom to ensure that excess water does not accumulate on the steps, when in fact the arrangement of steps ought to have been at one

level if not in reverse direction. *It is admitted that there was another incident on 15/09/2007 similar to the present one involving one Mr. Neeraj Goenkar and only thereafter that the anti-skid precautionary measures were taken by the opposite party as regards the said steps. A late realization indeed of duty to care! As regards the hand railing, as already noticed, it was short and was not available for support to be taken while taking the second or third step apart from the fact that it was inconveniently placed at a lower level and even a person of average height had to bend to hold it. In other words, it was no support to get down slanting polished marble steps. In other words the bathroom was defective and negligently maintained. It was waiting for an accident to happen. This was not expected of a Five Star hotel. It would hardly be relevant to find out whether the complainant fell with his face down or on the back or on the bath tub or on the steps but the fact remain that the complainant suffered injuries on his right mandible and left ramus."*

In Klaus Mittelbachert (deceased) vs. The East India Hotels Limited and Others, AIR 1997 Delhi 201, the High Court of Delhi was dealing with a case regarding injuries caused to a diver in the swimming pool of Hotel Oberoi Intercontinental and it observed as follows:

"degree of care is not a phrase with static connotation. Its meaning would depend on given fact situation-the person who owes a duty to take care, the person whose care is to be taken and the subject-matter by reference to which degree of care is to be determined. A person who enters or walks into any premises, if the premises be open to accept entry, and there be nothing warning against his entry, has a right to assume that he is walking into a safe premises."

The Delhi High Court held that:

"the injuries caused to the plaintiff in the accident are attributable to the negligence of defendants No.1 and 3; the swimming pool was a trap on account of its having a latent hazard in structure and designing- providing not a safe depth of water at the plummet point; there was no negligence, contributory negligence or inaction on the part of the plaintiff, and the defendant No.1 and 3 are bound to indemnify the plaintiff for the injuries suffered by him."

In Taj Mahal Hotel vs. United India Insurance Company, I (2018) CPJ 546 (NC) the National Consumer Disputes Redressal Commission held as follows:

Having regard to the fact that the Hotel admitted to the car owner having dinner at their restaurant; the doctrine of 'infra hospitium' which provides that the Hotel's 'duty of care' towards guests' vehicle does not stop with mere parking of the vehicles; by providing free car parking and valet service for the convenience of its guests, the Hotel extended an invitation to park the car which is sufficient to constitute the valet parking as within the hospitium; mere printing of 'owner's risk' on the parking tag does not absolve the Hotel of its liability when the loss of vehicle from its parking space is construed as 'negligence'; it is held that the hotel indirectly benefits from providing such facilities and when the Parking Tag is issued in the name of the Hotel, it can be reasonably inferred by the 'car owner' that the car would be in the 'duty of care' and custody of the Hotel, which in the instant case, it failed to exercise and is held liable to pay damages."

Conclusion

Usually, an HMA contains indemnities from the owner to the operator for all loss, damage and liability which the operator may sustain or incur in the operation of the hotel. The typical exceptions to such releases and indemnities are willful misconduct and gross negligence by the operator. However, there are questions as to whether such broad indemnities are effective. For example, under Indian law, agents are generally expected to exercise reasonable care in and diligence in the performance of their duties.

Judicially, the difference between negligence and gross negligence has always been held to be a matter of degree. The ability of an owner to obtain relief against an operator for its negligence is therefore limited to circumstances where such negligence is of a severely reckless nature, something that would depend on the facts of the case and that the owner would be bound to establish.

Dispute Resolution Clauses in HMAs

‘At a round table there is no dispute about place’ - Proverb

Whilst lawyers and advisors must try and anticipate the risks in an HMA and find means to mitigate them, there will come a time when a third party will need to adjudicate. As someone once said, *“We as lawyers need to act as the fence on the edge of a cliff, but sometimes we have to be the ambulance below it.”*

The standard approach in HMA’s across various hotel operators is to have a two -pronged approach – (a) have disputes resolved either by arbitration; or (b) by determination by an expert in the hospitality sector. However, certain operator’s do opt for resolution of all disputes by arbitration.

Arbitration being one of the preferred dispute resolution mechanisms, certain factors must be considered while drafting an arbitration clause in an HMA.

Institutional or Ad hoc Arbitration

An institutional arbitration is one which is conducted with the assistance of an arbitral institution, e.g., the Singapore International Arbitration Centre (**SIAC**) or the International Chamber of Commerce (**ICC**). The arbitral institution usually sets the arbitrators' fees (this may be scaled according to the total amounts in dispute), facilitates the exchange and dissemination of pleadings, enforces procedural deadlines, and reviews the arbitral award.

An ad hoc arbitration is one which is administered by the arbitral tribunal itself. A three-member tribunal and/or sole arbitrator as the case may be, will be appointed directly by the parties. In case the parties do not mutually agree to the appointment of an arbitrator, the parties will have to seek the Court’s assistance. Fees of the arbitrators and the procedure to be followed in the arbitration proceedings will both be determined by the arbitrators themselves.

In case of an HMA, designating an institution in the dispute resolution clause would probably be the most ideal scenario. Further, while designating the institution, it may be prudent to review the institutional rules. For instance, if there are multiple contracts out of the same subject matter, designating an institution which provides for consolidation of proceedings would be advisable in order to avoid multiple arbitration proceedings.

Dispute Resolution Clauses in HMAs

1

INSTITUTIONAL ARBITRATION

An institutional arbitration is one which is conducted with the assistance of an arbitral institution.

2

ADHOC ARBITRATION

An ad hoc arbitration is one which is administered by the arbitral tribunal itself.

3

METHOD OF SELECTION OF ARBITRATORS

Parties usually specify if there should be one or three arbitrators.

4

METHOD OF SELECTION OF ARBITRATORS

The institutional rules may also provide for a default appointing authority if the parties cannot agree on the appointment of the sole or third arbitrator.

5

ARBITRATION RULES

The parties should determine the arbitration rules.

6

PLACE OF ARBITRATION

It is the 'seat' of arbitration that has important legal implications.

7

EXPERT DETERMINATION IN HMAs

Given the technical nature of an HMA, it may be fruitful to have the disputes presented before an expert who knows more about the industry as opposed to a practicing lawyer and/or former judge.

Method of Selection and Number of Arbitrators

Parties usually specify in the arbitration clause or arbitration agreement as the case may be, that there should be either one or three arbitrators (specifying an even number will only risk deadlock). If parties fail to specify the number of arbitrators, then the applicable arbitration law will usually determine the number of arbitrators and the default appointing authority.

The institutional rules (if agreed between the parties) may also provide for a default appointing authority (for example, the institution's Chairman) if the parties cannot agree on the appointment of the sole or third arbitrator. If the parties wish to have a say in the appointment of arbitrators, the dispute resolution clause may be framed accordingly.

The advantages of appointing a sole arbitrator are costs and speed. However, a sole arbitrator may not have the legal and/or technical expertise to address all the issues in dispute. A three-member tribunal is most common in international arbitrations, particularly if the amounts in dispute are significant or the issues are diverse or complex. A three-member Tribunal allows the parties to appoint arbitrators of various legal and technical skills to hear the dispute. There is also a lower risk that a three-member Tribunal will arrive at a wrong decision. However, the cost of three arbitrators can be high and should be weighed against the amounts in dispute.

In an HMA, if the dispute resolution clause provides for institutional arbitration, generally an institute itself will provide for the number of arbitrators as per the quantum of the monetary claims.

Arbitration Rules

The parties should determine the arbitration rules which, in addition to the arbitration law of the seat of the arbitration, will govern the arbitration procedure. Parties that choose to have their arbitrations administered will usually adopt the arbitration rules of that institution. Some of the more common arbitration rules used by parties include the SIAC Rules, the ICC Rules and the UNCITRAL Rules.

Parties are also at liberty to have the disputes administered by an institute while applying a different set of rules.

Language of the Arbitration

Parties should specify the language of the arbitration, particularly if the parties and their respective witnesses speak different languages, or if the law of the country governing the arbitration specifies that in the absence of any agreement between the parties, the arbitration should be conducted in the national language of that country. Failure to specify the language of the arbitration may ultimately result in parties having to incur expensive and unnecessary costs for translating documents and witness evidence.

If the parties do designate an institution, that is, the ICC or the SIAC, in the dispute resolution clause, the institutional rules provide that the arbitral tribunal may determine the language of the arbitration proceedings in the absence of agreement between the parties.

Place of the Arbitration

The 'place' or 'seat' of the arbitration determines the arbitration law governing the arbitration procedure. The 'place' or 'seat' should not be confused with 'venue'. The venue can be anywhere; it does not have legal significance. It is the 'seat' of arbitration that has important legal implications.

Parties should select a neutral place, and also one where the local courts will enforce the arbitration agreement and support the arbitral process. For example, Singapore is a popular choice for parties doing business in Asia because Singapore is neutral and has a well established legal system that observes the rule of law. Singapore courts also offer a high level of support for arbitration.

However, while it is always better to have the 'seat' in an arbitration-friendly jurisdiction, the subject matter of the HMA must also be taken into consideration.

For instance, if the hotel property is located in India with parties to the HMA situated in the USA and Singapore, it may be advisable to have the 'seat' in India. This is for the simple reason that it will be the courts of the 'seat' where the parties will go to seek interim measures until the time a tribunal is composed. Now if the 'seat' would be in a jurisdiction other than India and if the courts over there pass an interim measure protecting the hotel property, that order will have to be brought to India and then appropriate proceedings may have to be filed for

the order to be enforced. Therefore, parties may also factor in the above while providing for the seat of arbitration.

Also, if the parties fail to determine the ‘seat’ of arbitration in the dispute resolution clause, the arbitral tribunal may determine the same in case of an institutional arbitration.

Enforcement and Annulment/Setting aside of Awards

An award in an international arbitration once delivered may be enforced in any of the countries which are parties to the New York Convention, 1958 (NYC). The award must also have been delivered in a country which is a party to the NYC⁴⁷.

The ‘seat’ of arbitration is most important when it comes to annulment and/or setting aside of awards as the award has to be compliant with the law of ‘seat’ and it is this ‘seat’ where the annulment and/or setting aside proceedings will be filed. It is therefore advisable to have the ‘seat’ in an arbitration friendly jurisdiction.

By way of a comparison, an award delivered in an international commercial arbitration seated in Switzerland, can be challenged only once before the Swiss Federal Tribunal. If the same award is delivered in India seated arbitration, the challenge proceedings will have to be filed before the relevant High Court, after which the parties may further choose to test the decision of the High Court before the Supreme Court of India which perhaps would be a more time-consuming process.

Expert Determination in HMAs

It is not uncommon in an HMA to provide for expert determination in a dispute resolution clause. Given the technical nature of an HMA, it may be fruitful to have the disputes presented before an expert who knows more about the industry as opposed to a practicing lawyer and/or former judge.

However, much depends on how a dispute resolution clause is drafted and how the clause treats the issue of expert determination. While in some instances, an expert determination clause may precede the clause providing for arbitration, in certain others an expert determination may be the only mechanism to resolve disputes.

⁴⁷For enforcing an international award in India, the country in which the award was delivered/made, must not only be a party to the NYC but must have also been notified as a territory to which NYC applies, in the official gazette of India

Case Study

Tiered arbitration clauses, in which one set of arbitration proceedings may practically be appellate arbitration proceedings against the decisions of another arbitral tribunal, have been recognized in India in a recent judgment.

- The facts are in relation to a contract for sale of copper to be delivered to a certain port.
- The arbitration provisions were invoked, and accordingly, the dispute was referred to the Indian Council of Arbitration (the **ICA**). The arbitrator appointed by the ICA passed a nil award. Aggrieved with this award, the party invoking arbitration also invoked the second tier.
- The arbitral tribunal constituted as per the ICC Rules, allowed the claims.
- An application was filed for execution of the award before the District Judge at Alipore, which was then transferred to the Calcutta High Court.
- The Single Judge of the Calcutta High Court allowed the execution application which was challenged by way of an appeal.
- The division bench of the Calcutta High Court held that ‘successive arbitrations’ are not impermissible in India and further held that the ICC award is not a foreign award within the meaning of Section 44 of the Arbitration and Conciliation Act, 1996 and therefore Section 34 would apply in the facts and circumstances of the case.
- Being dissatisfied with the judgment, the parties approached the Supreme Court. The apex court had held that since arbitration is essentially a party-driven mechanism, with parties having agreed upon the mechanism of dispute resolution, the courts or an arbitral tribunal must respect the same.

However, if the parties provide for an expert determination as the only mechanism to resolve disputes, parties must ensure that the procedure prescribed to have the disputes adjudicated before such expert must follow the due process under the law. This is because if the due process is not followed, the award and/or decision rendered by the expert may be susceptible to setting aside and/or annulment proceedings. It may therefore be prudent to provide for a mechanism where an expert may render the decision and/or award while presiding over the disputes with a lawyer so as to ensure compliance.

It would be ideal if arbitration is proposed after an expert determination because in that situation parties may have a preliminary idea about the maintainability of a claim. Parties could perhaps also work out a settlement before invoking arbitration proceedings on the basis of such expert determination. Having stated the same, the draftsman of a dispute resolution clause must ensure that this exercise is conducted in a definite timeline in order to avoid delays in adjudicating a dispute. Also, the parties could name the expert in the dispute resolution clause so as to avoid delays.

An HMA may or may not provide for an expert determination. However, greater importance must be given to drafting the dispute resolution which may or may not provide for an expert determination and/or arbitration. Appointing the best expert in an industry will certainly not aid in effective dispute resolution if the basic factors, as discussed above, have not been taken into consideration. Likewise, if an arbitration clause is worded without

understanding the nature of the agreement and the intention of the parties, the procedure for dispute resolution may indeed cause more harm to a party than the very dispute itself.

HMAs, like most commercial agreements executed in India, has been inclined towards ad hoc arbitration for resolving disputes. This trend, however, has seen a change, may be for the better, in the recent past possibly because corporations and individuals realize that while an institutional arbitration could be a more expensive procedure, it is in most instances, less time-consuming, while allowing parties to have a say in the procedure too.

While there cannot be a perfect model clause for dispute resolution as the same may differ depending on the parties' intentions and the nature of the agreement, the following are the basic dispute resolution clauses under different arbitration rules which can certainly be developed upon:

	Standard Clause
ICC	<p><i>"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."</i></p> <p>The parties may also wish to stipulate in the arbitration clause:</p> <ul style="list-style-type: none"> the law governing the contract; the number of arbitrators; the place of arbitration; and/or the language of the arbitration.
LCIA	<p><i>"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause".</i></p> <p>The number of arbitrators shall be [one/three].</p> <ul style="list-style-type: none"> The seat, or legal place, of arbitration shall be [City and/or Country] The language to be used in the arbitral proceedings shall be [] The governing law of the contract shall be the substantive law of []
	<p><i>Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (SIAC) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) for the time being in force, which rules are deemed to be incorporated by reference in this clause.</i></p> <ul style="list-style-type: none"> The seat of the arbitration shall be []. The Tribunal shall consist of [] arbitrator(s).

SIAC Rules	<ul style="list-style-type: none"> ▪ The language of the arbitration shall be [] ▪ APPLICABLE LAW ▪ Parties should also include an applicable law clause. The following is recommended: ▪ This contract is governed by the laws of []
MCIA	<p><i>Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration (MCIA Rules), which rules are deemed to be incorporated by reference in this clause.</i></p> <ul style="list-style-type: none"> ▪ The seat of the arbitration shall be [] ▪ The Tribunal shall consist of [one/three] arbitrator(s). ▪ The language of the arbitration shall be [] ▪ The law governing this arbitration agreement shall be [] ▪ The law governing the contract shall be []
HKIAC	<p><i>"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted."</i></p> <ul style="list-style-type: none"> ▪ The law of this arbitration clause shall be []. ▪ The seat of arbitration shall be [] ▪ The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in []
UNCITRAL	<p><i>Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force."</i></p> <ul style="list-style-type: none"> ▪ The appointing authority shall be [] ▪ The number of arbitrators shall be [] ▪ The place of arbitration shall be [] ▪ The language to be used in the arbitration proceedings [] ▪ The law governing the proceedings will be []

An Alternate Arrangement- Hotel Franchising

'Micromanage the Process, Not the People' –
Joe Apfelbaum

HMAs are typical arrangements between international hotel brands and managers and Indian owners. However, they are by no means the only kind of relationship between hotel brands and owners. Hotel franchising arrangements have made an inroad into the Indian market in the last few years as a natural consequence of its maturation. As brands have gained experience in managing Indian hotels and dealing with Indian owners and assets, there appears to be greater willingness to explore the hotel franchising model by both.

The word franchise comes from the French word 'franchise' meaning to liberate or set free, and it is particularly for this reason that Owners generally prefer the franchise model - they enjoy greater autonomy and control over finances.

There also exists the potential of a lower cost. Hotel brands tend to be leery at times as their ceding control may impact standards. However, the advantages of reduced operational and regulatory risks are not lost upon them either.

A few of the issues that commonly arise in negotiating franchises are set out below:

Brand Standards

The cornerstone of a hotel franchise system is its brand, while one of the hallmarks of a franchisee agreement is that the owner typically has control over the management and operations of the franchise hotel. Managers are seldom involved in the day-to-day activities of the hotel, and often only play a 'big brother' role. Therefore, this leads to the inevitable discomfort among managers as to the maintenance of their brand standards. In order to safeguard the brand, managers have designed methods to monitor the brand and its representation by the owner. This finds expression in the franchise agreement through various provisions, including damages for failure to comply.

From the owner's point of view, it is important for the owner to provide utmost importance to the maintenance of the franchisor's brand standards as customers expect that a brand will offer a consistent experience. An owner

Hotel Franchising



Brand Standards : In order to safeguard the brand, managers have designed methods to monitor the brand and its representation by the owner.

Liquidated Damages: In a liquidated damages clause, the owner and franchisor to a contract agree to pre-determined damages payable to the non-defaulting party in case of an early termination.

Restrictions on Transfer of Interest: The franchisor places considerable transfer restriction on the owner. Frequently, franchise agreements also require the owner to seek franchisor approval in case of any invitations of private placement.

Protected Areas: In any HMA, the provisions dealing with the restricted area almost always exclude any franchise operated hotel under the same brand.

that does not comply with the brand standards will dilute the value of the brand, and ultimately the interest of both parties to the franchise agreement will be adversely affected.

Liquidated Damages

An increasing number of franchisors are including liquidated damages (LDs) provisions in their franchise agreements. Managers use the LD provision as a means to exercise control over, and compliance by owners.

In a liquidated damages clause, the owner and franchisor to a contract agree to pre-determined damages payable to the non-defaulting party in case of an early termination. In the context of a hotel management franchise agreement, the “non-defaulting party” is always the manager. There is never a reciprocal provision that entitles the owner to liquidated damages. There is sometimes a concern amongst owners that franchisors may terminate the franchise agreement on subjective grounds and claim LDs.

Therefore, it is important for owners to carefully consider what events would allow LDs to managers. Owners should consider negotiating a *de minimis* and a *de maximus* amount of LDs as part of their LD provision. Further, consideration is to be given to factors causing the termination – whether the same was due to an act of the owner or the manager, or whether the same was a force majeure, whether the owner complied with its mitigation obligations, and so on.

Restrictions on Transfer of Interest

Hotel Franchise agreements are personal contracts for the benefit of the named owner only and are further limited by the owner’s ownership structure as of the effective date of the agreement. Therefore, it would logically proceed that the franchisor places considerable transfer restriction on the owner.

Often, the franchise agreement terminates with the change in ownership. But for those managers that permit transfer, franchise agreements are rigged with a complicated transfer provision coupled with tedious conditions for the prospective transferee, much like the HMAs. In some cases, the owner is required to pay a buy-out fee to the franchisor which increases the cost of acquisition for a third party, thereby limiting potential purchasers.

Frequently, franchise agreements also require the owner to seek franchisor approval in case of any invitations of private placement. The franchise agreement spells out considerable control by the franchisor over the process of private placement – the franchisor reserves the right to approve, amend or delete any provision describing the franchise agreement or of the relationship between owner and manager, or any use of the brand, contained in any offering memorandum or other communications or materials the owner proposes to use in the sale or offer of any securities.

Negotiation of this provision requires thoughtful deliberation between the parties so that the franchisor can identify issues perceived, and the owner can provide meaningful comfort to the franchisor.

Protected Areas

In any HMA, the provisions dealing with the restricted area almost always exclude any franchise operated hotel under the same brand. So also, the hotel brand seldom provides the franchisee with an area of exclusivity, that is to say, a geographic area within which he will not own, run, operate or franchise a hotel under the same brand. A very real possibility the owner could face, is another hotel of the same brand being run in its backyard with the potential consequence of reservations and other business being diverted.

Owners may however, consider that it would be imprudent for an operator to have more than one hotel under the same brand within a relatively small geographic area, but nonetheless actively seek an area of protection within which another hotel of the same brand will not be owned, run, managed, operated or franchised by the franchisor or its affiliate companies.

The franchisor and franchisee relationship is a complex one, and with the evolution of the model in India, we are sure to see some of the above issues cleared up, while possibly making room for new ones. Like any other agreement, both parties should weigh their options and determine which rights are meaningful for them to be able to maximize their performance under the contractual arrangement.

Data Privacy Legislation in India and Ownership of Guest Data

‘In God we trust. All others must bring data’ - William Edwards Denning

In the highly competitive hospitality industry, every brand is trying to distinguish itself from the other. Even within a single hotel brand system, hotels are trying to carve out their own niche. A prime example is the W hotels, which operate a chain-run ‘boutique’ hotel, and each W resort places great importance on distinguishing itself from other hotels of the same brand. One of their tools to achieve this is to provide guests with personalised experiences. Details of guest preferences allow greater focus on personalised experiences for the guest. Needless to add, they are also key to more precise and targeted marketing and promotion programs. Each hotel management company collects information about its guests, often through its own loyalty program. Typically, this includes their name, age, residential address, birth date, contact information – telephone number and email address -- and in some cases, even includes their marital status, anniversary date, and income group. In addition to this, information such as room preferences, food and beverage tastes, and credit card information is also sometimes captured. Brands attempt to gather as much information as possible about their guests to enable them to provide tailor-made guest and hospitality experiences in an increasingly competitive hotel industry. This allows the particular brand to anticipate the needs of its guests, and also to develop concentrated marketing programs. Hotel owners are also interested in such data given that it is generated at their properties.

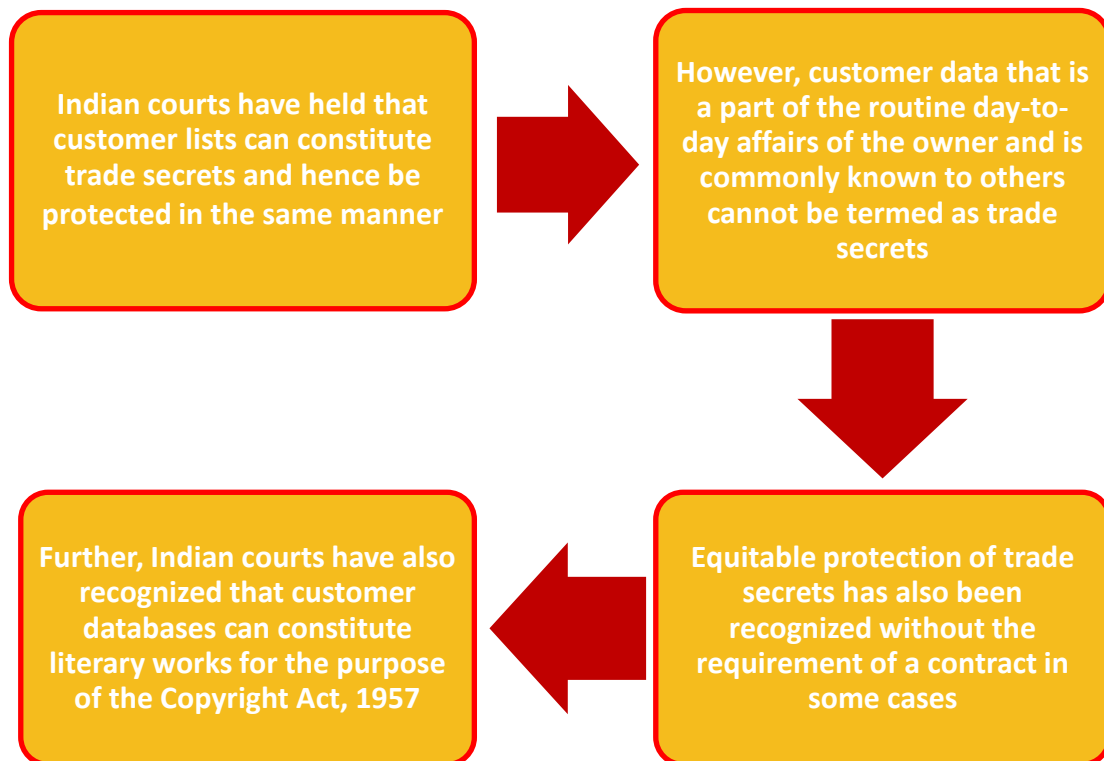
Guest data therefore assumes great significance, and owners and managers are acutely aware of the value attached to this information. *Managers prefer to keep guest data to themselves, even to the exclusion of the owner. During the operating term, there may be a possibility of data being shared between the manager and owner, however on termination; it is typical for the HMA to stipulate that the operator retains ownership of guest data.* Other than ownership of data, the legal issues around data privacy are also gaining prominence. In several jurisdictions across the world, as well as in India, laws relating to privacy have been evolving. These could have some bearing upon the practices of managers and owners regarding collection of guest data and the protection thereof.

Right and Nature of Guest Data

As discussed above, the HMA’s clearly specify that the right to guest data ultimately lies with the manager. This has led to clashes between owners and managers during HMA negotiations as the value of guest data has gained prominence through the years. These clashes are compounded by the fact that the data is collected by hotel employees who are typically employees of the owners, and such data is collected from guests at the hotel premises.

Other than this, the nature of the right to guest data may itself be a subject for debate. This is because the protection of such a right would be dependent on its nature. secrets.⁴⁸ Trade secrets do not have any statutory recognition of protection in India but have been recognized judicially as a common law right and is, as such, governed by the terms of the contract. However, equitable protection of trade secrets has also been recognized without the requirement of a contract in some cases.⁴⁹

Further, Indian courts have also recognized that customer databases can constitute literary works for the purpose of the Copyright Act, 1957⁵⁰ (**Copyright Act**) and accordingly be protected there under. Copyright would constitute a right *in rem* and would not be dependent on the terms of a contract.



If guest data is to be considered as works subject to copyright, the right to use such guest data would be subject to the Copyright Act, which prescribes requirements for assignment and licensing of works.

The manner of collection and compilation of the database, that is, whether manually or electronically, would also have a bearing as to who would be considered the author of the guest data. Questions also arise, as to whether moral rights, that is, the right to claim authorship and the right to restrain modification, are assignable under Indian law.

⁴⁸ *American Express Bank Limited v. Priya Puri* 2006 Indlaw DEL 362

⁴⁹ *John Richard Brady and Others v Chemical Process Equipments P. Limited and Another*, 1987 Indlaw DEL 10356

⁵⁰ *Vogueserv International Private Limited v Rajesh Gosain and others*, 2013 Indlaw DEL 3125

Data Privacy Laws

In India, there is no specific data privacy law in existence. The right to privacy has been recognized as a facet to the right to life under Article 21 of the Constitution. *However, unlike in other countries there is no specific legislation dealing with data privacy.* The existing legislations and policies are essentially sectoral in nature. With the intent to formulate a comprehensive data protection legislature, the expert committee set-up under the chairmanship of Justice Srikrishna for formulation of data protection regime in India has released the Personal Data Protection Bill, 2018. The bill is expected to be tabled before the Parliament post Lok Sabha elections. The bill aims at regulating the processing of personal data as a recognition of an individual's right to privacy. The essence of what is considered as personal data entitled to protection under the bill is data relating to individuals, which can lead to identification of such individual.

Data Privacy Laws: A snapshot



The provisions of the IT Act and the IT Rules (collectively the **Indian IT Legislation**) would be applicable to the guest data collected.



The IT Rules require that any person who on behalf of a corporate who collects, and handles information shall provide a privacy policy for handling of or dealing in personal information and ensure that the same is readily available for view by the providers of information.



Where managers share guest data which is categorised as 'sensitive personal data or information' with their service providers and affiliates, specific consent from the guests for the onward sharing of data would be required.



The collectors of personal information are also required to establish a mechanism for redressal of grievances in compliance with the provisions of the IT Rules.



Any unauthorised access to guest data is required to be reported to Indian Computer Emergency Response Team at Department of Electronics and Information Technology.



The IT Act clearly provides that any contravention of the IT Act outside India would constitute an offence under the IT Act. This becomes particularly important under a hotel management set up since the employees collecting the data are typically owner employees, and therefore the obligation of compliance with Indian legislative requirements, would fall on the owner, even where the guest data may be collected purely for the manager.

Where personal data is collected, processed or stored electronically, the provisions of the Information Technology Act, 2000 (the **IT Act**) and the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (the **IT Rules**) would need to be referred to. Considering that

all guest data is usually stored in the electronic form, the provisions of the IT Act and the IT Rules (collectively the **Indian IT Legislation**) would be applicable to the guest data collected.

The IT Rules deal with the conversion into, storage of, and passage of information or data in electronic form and reasonable security practices and procedures. The IT Rules seek to protect both 'personal data' i.e. *"any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person"* and 'sensitive personal data' that is, certain specific information, which includes passwords, financial information such as Bank account or credit card or debit card or other payment instrument details, physical, physiological, and mental health condition, and medical information. Given that guest data would be capable of identifying individual guests and could include financial information, compliance with the IT Rules is a must.

The IT Rules require that any person who on behalf of body corporate collects, receives, possesses, stores, deals with or otherwise handles information of provider of information, shall provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information and ensure that the same are readily available for view by such providers of information who has provided such information under lawful contract. The privacy policy is required to contain certain information and be published on the websites of both the manager and the owner (as the owner's employees collect such information on behalf of the manager.) Further, the providers of such information are entitled to review the information provided, to enable them to correct or amend erroneous or deficient data as feasible. The practicality of this appears to be questionable. However, management and the owner are not responsible for the authenticity of the information.

Consent is required for the collection, storage, and disclosure of sensitive personal data, e.g. financial information, medical history biometric information etc. Where managers share guest data which is sensitive personal data with their service providers and affiliates, specific consent from the guests for the onward sharing of data would be required.

The IT Rules require certain safeguards in case of transfer or transmission of the information as well as adoption and implementation of policies with respect to security practices and procedures by the collection agency. The collectors of personal information are also required to establish a mechanism for redressal of grievances in compliance with the provisions of the IT Rules.

Non-compliance with Indian IT Legislation would lead to penalties.

Given the international nature of the hotel management business, where several international chains manage hotels in India, it would be remiss not to mention that the Indian IT Legislation seeks to have extraterritorial reach. The IT Act clearly provides that any contravention of the IT Act outside India would constitute an offence under the IT Act. Therefore, even persons outside India to whom the personal data is disclosed could be made liable under the IT Act.

Therefore, collection, sharing and processing of guest data is not an issue that ends with the determination of who has the right to the data, but consideration is also to be given to who is required to meet the legislative requirements in terms of collection, storage, sharing, and handling of such data. This becomes particularly important under a hotel management set up since the employees collecting the data are typically owner employees, and therefore the obligation of compliance with Indian legislative requirements, would fall on the owner, even where the guest data may be collected purely for the manager. It is then for owners to consider whether bearing risks associated with the collection, storage, maintenance, and protection of data is acceptable even though they may have no access to, or use of, such guest data.

Data Breaches

Another important matter to consider is the liability in relation to data breaches. Given the increased reliance on information technology and various high profile hacks and data breaches spanning industries and even governments and political parties worldwide, guest data could, or may even possibly already have been, a target for a data breach.

HMA's do not provide for liability in relation to data breaches. Given that all the IT systems that are used at hotels are part of the worldwide systems of hotel management companies, owners may look askance at having to bear liability for claims made by guests on breach of guest data. At the same time, hotel management companies would resist having to bear liability due to malevolent third party actors over which they may have no control.

Whether insurance can be an answer to this liability, pending resolution of contractual liabilities, could be explored.

General Data Protection Regulation

General Data Protection Regulation (**GDPR**) was approved and adopted by European Parliament in April 2016 and has come into force on May 25, 2018. GDPR not only applies to organisations located within the EU but also to those organisations located outside the EU if they use the personal data of EU data subject for offering goods or services. The Indian managers/ owners collecting personal data of European guests need to comply with the provisions of GDPR, if such personal data is retained in the system even after the guests have checked out for sharing promotional and information material with such guests.

Once GDPR becomes applicable, the managers/ owners need to obtain an express consent of the guests to retain the personal data. GDPR also provides the guests a greater ability to ascertain the manner in which the data can be processed. Each manager/ owner is required to maintain a record of processing activities under its responsibility and there are stringent conditions prescribed for notification of the personal data breaches. GDPR also imposes substantial penalties for non-compliances. The penalty can be as high as 4% of annual worldwide turnover. Those hotels which are managed by international chains are easily covered by the global privacy policies and procedures of such chains. However, the domestic players which do not have a global footprint also need to be mindful of the applicability of GDPR and the compliance requirements.

Will GST Show some Hospitality to the Sector?

‘This is too difficult for a mathematician. It takes a philosopher’
– Albert Einstein, on filing tax returns

With effect from 1st July, 2017, the indirect tax landscape of the country was completely overhauled, with multifarious indirect taxes such as Central Excise, Service tax, Value Added Tax (**VAT**), Central Sales Tax (**CST**), Countervailing Duty (**CVD**) and several cesses, being replaced and subsumed into a singular levy in the form of the Goods and Services Tax (**GST**).

The initial law as legislated at the time of introduction of GST was highly unsuitable for the hospitality industry and created more ambiguity rather than difficulty from the perspective of implementation by the hotels. However, full marks to the government for recognising these issues and pro-actively issuing amendments to not just eliminate ambiguity but also facilitate ease of implementation for the hospitality industry.

The amendments/ announcements carried out have facilitated in clarifying GST treatment in relation to:

- The determination of rate of GST (declared tariff vs. transaction value);
- Treatment of amounts forfeited on cancellation or no-show;
- Complimentary upgrades etc.

Nevertheless, considering the varied structures, promotion schemes, etc. operated in the hotel industry there still continue to exist various issues and concerns which need appropriate compliance by individual hotels.

This section proceeds to deal with some of such issues in the later part thereof before which some of the basic concepts of GST and its applicability to the hotel industry have been set out. This section also before concluding dwells upon GST on restaurant which has also seen some significant change.

The following are the key aspects of the new tax regime:

Concept of Supply

GST is to be levied on a ‘supply’, which is defined under Section 7 of the CGST Act as *“all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business”*. Intra-State Supplies are leviable to Central Goods and Services Tax (**CGST**) and State Goods and Services Tax (**SGST**) [in equal part], whereas inter-State supplies are leviable to Integrated Goods and Services Tax (**IGST**). What qualifies as inter-State supply and intra-State supply depends on two factors – the location of the supplier and the place of supply (determined in

terms of the place of supply rules). If both these factors occur in the same State, then CGST and SGST would be leviable, and if in different States, then IGST becomes applicable.

Certain supplies when made even without consideration are liable to GST. Relevantly, this includes a supply made between “distinct persons” and “related persons”. “Distinct persons” is defined as units of the same entity located in different States and having separate registrations. “Related persons” is defined to *inter alia* include entities having common parent or where one entity has direct/ indirect control over the other entity and thus includes group companies. “Related persons” also includes an employer and his/her employee.

Place of Supply

For goods, the place of supply, where such supply involves movement of goods is location of the goods at the time at which the movement of goods terminates for delivery to the recipient. The place of supply in a case where there is no movement of goods, is the location of such goods at the time of delivery to the recipient.

For services, the default rule is the location of the recipient. Further, separate rules are prescribed for specified instances. For services *“by way of lodging accommodation by a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel”*, the place of supply shall be the location at which the immovable property or the boat or the vessel is located. The place of supply of restaurant and catering services shall be the location where the services are actually performed.

Input Tax Credits

A critical aspect of the GST system is the fungibility of credit which exists between the GST levied by the Centre and that by the States. However certain credits remain restricted. Credit of goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business is not available. The term ‘construction’ includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property. Credit in relation to works contract services when supplied for construction of an immovable property (other than plant and machinery) is also restricted, except where it is an input service for further supply of works contract service. Credit in relation to supply of food and beverages is restricted, except when these are used for providing output supply of goods and services in the same category. Further, there is also a restriction of credits in relation to *“goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples”* – this has been interpreted to include instances of free supplies.

Classification of Goods and Services

Goods have been classified in terms of the Harmonized System of Nomenclature (**HSN**) – which is aligned to the system of classification adopted under Customs law. Services have been classified in terms of Service Codes (**SAC**). Categorisation of goods and services in terms of the HSN or SAC becomes relevant, since different rates are prescribed to different headings of HSN and SAC. For instance, accommodation services are classifiable under the SAC 9963 and are liable to GST at the rates of 12%, 18% and 28% depending upon the price paid. Food and

beverage services are also classifiable under SAC 9963 and are liable to GST at the rate of 5% or 18% depending upon whether the services are provided by an independent establishment or an establishment which is located within a hotel with specified tariff.

Valuation

GST is ordinarily payable on the transaction value i.e. the price that is actually paid or payable for the supply. Certain elements are specifically included in the price for computing GST. These include: taxes separately charged in invoice other than taxes levied under the GST enactments, any amount paid by the recipient on behalf of supplier in relation to supply of goods/ services not included in price, interest or late fee or penalty for delay in payment of consideration, subsidies directly linked to price excluding subsidy granted by State or Central Government, and, incidental expenses such as packing, commission incurred by supplier before or at the time of delivery of goods or supply of services.

The transaction value test becomes inapplicable in cases where price is not the sole consideration for the supply or where the parties are related; in these cases, value is to be determined in terms of the specified valuation rules. Further, the carve-out for pure agent as existing under Service tax law is continued even under GST.

Composite Supply and Mixed Supply

The GST law has introduced the concepts of ‘composite supply’ and ‘mixed supply’, which is comparable to the concepts of naturally ‘bundled services’ and not naturally ‘bundled services’, respectively, existing in the Service tax era. A “composite supply” is defined to mean a supply consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply. A “mixed supply” is defined to mean two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply. A composite supply shall be treated (and taxed accordingly) as the supply of the principal supply, whereas a mixed supply shall be treated as a supply of that particular supply which attracts the highest rate of tax. These concepts are of grave significance to the hospitality sector considering the package of supplies which are typically offered to the customers.

Anti Profiteering

The GST law specifically provides that any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices. Failure to do so would attract penalties and consequences which even includes cancellation of registration. Authorities to effectuate these aspects have been formed.

Matching Concept

GST law functions on the concept of matching of records. Hence the taxes reflected to have been paid by the supplier will qualify as credits for the recipient of the supply. The Goods and Service Tax Network (**GSTIN**) would

enable such a matching of details. It therefore becomes crucial for recipients to make sure that the suppliers have entered correct details in the GST returns, enabling the recipient to avail the credit. At present, the return which enables this matching of details has not been made effective. Presently the details in relation to output liability, and summary of output liability and credits availed are required to be disclosed in GSTR-1 and GSTR-3B respectively.

Documentation

GST law prescribes the particulars that are to be disclosed in the tax invoice, debit note, credit note etc. It is also pertinent that the dealer of the previous leg of the transaction discloses such details accurately so that dealer at the next leg is enabled to avail credits. It thus becomes relevant that the agreement casts such obligations on the parties to ensure smooth flow of credits. The tax clause in the contract should obligate that each party takes GST registration, remit GST, upload necessary returns and undertake necessary steps, within the prescribed timeline, to enable the other party to avail input tax credits.

Issues specific for Hotel and Lodging sector

- From July 2018, the GST rates applicable for accommodation in hotels or other commercial places meant for residential or lodging purposes depends upon the per-day transaction value charged for such unit of accommodation by the respective accommodation establishment.
- Prior to this amendment, the GST rates applicable for accommodation in hotels or other commercial places meant for residential or lodging purposes was determined on the basis of the tariff of a unit of accommodation which is 'declared' by the respective accommodation establishment.

The slabs of GST rates which continue to be the same are given in the table below:

Room Tariff Per Day	GST Rate
Less than Rs 1000	Nil
Rs 1000 – 2499	12%
Rs 2500 – 7499	18%
More than Rs 7500	28%

GST : Key Issues : Hotel and Lodging Sector	
Tariffs	Earlier, the rate of GST payable by unit of accommodation was determined as per the “declared tariff” of such unit of accommodation however, scope of the term “declared tariff” was unclear. Realising this issue, the Government replaced the concept of “declared tariff” with the concept of “value of supply” pursuant to which the rate at which GST is payable is determined as per the transaction value of the unit of accommodation.
Classification of Good and Services	Another important issue faced by this industry is classification of services provided and the application of the concept of ‘composite supply’ and ‘mixed supply’ to the various combinations of services/ packages offered. One needs to minutely apply these concepts in relation to each such package offered such as in room dining, mini bar sales, laundry services along with accommodation services, sale of liquor along with food, pick up and drop services, etc.
Strike - out deals	Hotels occasionally provide discount (in the form of strikeout deals) on the charges collected from customers for accommodation service. Prior to the amendment, even though a customer enjoyed discount on the value of supply, rate of GST was determined as per the “declared tariff” of the unit of accommodation (i.e. without factoring the discount). Post the amendment, GST rate is determined as per the transaction value which is determined after reducing discount given to customers.
Free upgrade	Hotels extend complimentary upgrade to its customer for which no charge and thereby no GST is collected by the Resort. This is frequently followed in case of weddings and MICE contracts. Prior to the amendment, rate of GST was to be determined as per the declared tariff of the room to which the customer is upgraded even though no charge is collected from the customer for such free upgrades. Post the amendment, GST rate is now determined on the basis of the actual tariff charged from the customer i.e. ‘value of supply’ or the ‘transaction value’ regardless of the category of room such customers are upgraded to.
Cancellation/ No Show Charges	Cancellation/ no show charges may attract GST at the rate of 18% for service of ‘tolerating an act’ or residuary rate of 18% in the absence of a specific entry.
Complimentary Stay	Complimentary stay (without charging any consideration) if provided to the hotel’s own employees may be susceptible to the levy of GST, considering that employers and employees are understood as ‘related parties’ and supply between such ‘related parties’ is understood as supply for GST purposes, even though made without consideration.
Alcohol Consumption	Supply of alcohol for human consumption is outside the purview of GST. However input tax credit in proportion to such supply of alcohol will be required to be reversed.
Cigarettes & Aerated Beverages	Certain luxury items such as supply of cigarettes and aerated beverages attract GST @ 28% as well as compensation cess at applicable rates. If these are supplied as a

	part of the stay package, these will be liable to GST rates applicable determined in terms of the tariff. However, in such cases, the input tax credit of compensation cess paid at the time of procuring such items becomes a cost in the chain.
Online Platforms	For online platforms (such as makemytrip.com, hotels.com, Airbnb.com) which act as a conduit between the customer and the service provider i.e. hotels or accommodation providers, these will be recognised as electronic commerce operators (ECOs) who will have an obligation to collect tax from source (TCS obligations) and remit to the government. Further, such entities may also qualify as Online Information Database Access and Retrieval (OIDAR) service providers, and accordingly will have to take registration and remit tax.
Credit for Major Expenses	Credits in relation to major expenses for this industry i.e. works contract service and construction services are restricted and remain a cost in the system.
Travel Agents	While the concept of pure agent as existing under Service tax, have continued even under GST, there has been a divergence in the practice being adopted by travel agents while charging their customers and claiming this exclusion. In some cases, the travel agent only raises invoice for its agency fees and the service provider (e.g. hotels/ airlines) directly raise their invoices on the ultimate customer. In other cases, travel agents raise invoice for both their agency fee and for the main service (e.g. accommodation service/ transportation by air service), and the service provider (hotels/ airline) raises its invoice on the agent. There is ambiguity as regards which model is the correct legal position to be adopted.

For F &B Sector (Restaurants)

GST: Key Issues: F & B Sector	
Supply of Service	For restaurant sales, by way of legal fiction, supply of food and drinks by way of or as part of any service or in any other manner whatsoever, is deemed to be a supply of service. The rates and the place of supply are to be determined accordingly.
Take away Sales	There arises ambiguity as regards take-away sales or drive-in sales and whether these will be seen as “by way of or as part of any service or in any other manner whatsoever”, to qualify as a deemed service. However, the service tariff code prescribed for restaurant services, specifically SAC 996331 is wide in scope and specifically covers “takeaway services, room services and door delivery of food” and it may be said that even take- away sales or drive-in sales would come within its ambit.
Input Tax Credit	<ul style="list-style-type: none"> In the pre-GST era, supplies at restaurants were subject to both Service tax and VAT. Restaurants typically availed the compensation schemes under VAT and for Service tax, determined value in terms of the specific valuation rule prescribed for restaurant services. Along with these concessional schemes under VAT and Service tax,

	<p>there was a concomitant restriction of input tax credits. Under GST regime, they are liable to pay GST at the concessional rate of 5%, but with the condition that input tax credits are restricted. Hence the position in terms of the tax cost is comparable to the pre-GST era.</p> <ul style="list-style-type: none"> Input tax credits in relation to supply of food and beverages and outdoor catering is restricted unless output supply is also of same category of goods/ services. Hence, except for the hospitality sector itself, for other businesses, credits in relation to such supplies is restricted.
Anti- Profiteering	<p>Certain restaurant companies have received anti- profiteering notice requiring them to showcase how they have passed on the benefits under GST to the customers. Considering that this sector services the end customer [B2C], it is expected that this sector will face greater scrutiny from the anti-profitteering authorities.</p>
Free Items	<p>If there are free items (e.g. toys) provided along with meal, the GST treatment of such free item becomes an issue to be addressed. If GST becomes separately applicable to such free supplies, then it requires determination as to on what value should GST be levied.</p>

Future Tense – Evolving Business Models in Hospitality

‘The secret of change is to focus all of your energy, not on fighting the old, but on Building the New’ - Socrates

With the rapid development of information technology, where disruption is seen as the key *mantra*, many traditional business models have either grown dimmer or have been rendered almost obsolete. Online retailers and marketplaces have taken the place of brick and mortar stores, which are now trying to work in tandem with technology or trying to evolve new strategies to stay relevant. The likes of Uber have introduced asset-light models for businesses dependent on actual physical assets being available for service. In the hospitality space, a similar asset-light platform approach has been embraced by Airbnb and its imitators. Hotel room aggregation is another model which is increasingly common in India. Traditional hotel businesses are watching these new developments closely. The impact of these changes is as yet not completely known. Their influence is growing with the growing sophistication of technology and its reach, as well as demographic changes. However, as with any new innovations in technology and business, issues arise by reason of the regulatory framework. Often these models are evolved abroad and implemented in various countries, including India. Sometimes what works in one country from a regulatory standpoint may not work in another.

Understanding the Model

Platform Model

In this, property owners list their properties online on a platform accessible to travellers. The travellers are able to select properties based on pictures and information posted on the platform. Payments are made by the travellers to the property owners through the platform while the platform owning company is entitled to a commission. The platform owning company owns none of the properties. Instead its investments are in maintaining the platform online and through apps. The platform owning company also insures some of the properties. Both the property owners and the travellers write reviews of the guests, hosts and premises, thereby creating useful data relating to the credibility of both the hosts and the travellers.

Hotel Aggregators and/or Consolidators

Hotels aggregators and/or consolidators bundle together hotel rooms in unbranded hotels, provide training and customer service, and then provide a platform for reservation of hotel rooms by travellers. This model differs from the earlier model in some respects. Hotel aggregators only provide access to hotel rooms and not home stays. Further, additional services such as training and customer service are provided by hotel aggregators. There is a consolidation of hotel rooms that aims towards making distribution easier as well as the standardisation of pricing. This model also works on commissions. The actual hotel owners are permitted to separately sell their rooms as well.

Issues Arising in New Models

Zoning Laws	<ul style="list-style-type: none"> Several cities have zoning laws that do not permit the use of premises in certain localities for anything other than residential use. Short-term renting of residential properties in lieu of hotel rooms, could, depending on local regulations be considered as commercial use and hence be violative of local zoning laws.
Property Taxes	<ul style="list-style-type: none"> The tax payable on residential properties is usually fairly lower than those payable in relation to commercial premises. In the platform model, where residential properties are listed for commercial use, the issue of payment of tax is murky. Further, in India, State Governments impose luxury taxes on hotels, lodging houses and resorts. Whether luxury taxes are payable on these kinds of arrangement may also be a question that could come up, pending the actual implementation of GST.
Licensing requirements	<ul style="list-style-type: none"> Residential hotels are required to comply with licensing requirements specific to each State, including under the local shops and establishments legislation. Typically, the term residential hotel is quite widely defined and may end up including residential premises that are let out through the platform model.⁵¹ Further, residential hotels are required to comply with certain norms under the local shops and establishment legislation in India. The laws do not currently recognize such an arrangement and more stringent norms may be applicable to such arrangements even though they maybe unwarranted. Serving food and alcohol within the premises, which could be considered as a commercial establishment, could also lead to the requirement of separate licenses.
Standards of Service	<ul style="list-style-type: none"> In both of the models discussed above, there is difficulty in maintaining standards of service at the hotels. Given that the business acts as an intermediary but has no control over the premises or the services, quality control becomes an issue. Even where standards are imposed contractually, given the nature of the business – where there are innumerable owners in innumerable locations, often far-flung – monitoring or enforcing such standards may be nigh impossible.

⁵¹ Under the Bombay Shops and Establishments Act, 1948, the term 'residential hotel' has been defined to mean "any premises used for the reception of guests and travellers desirous of dwelling or sleeping therein and includes residential club".

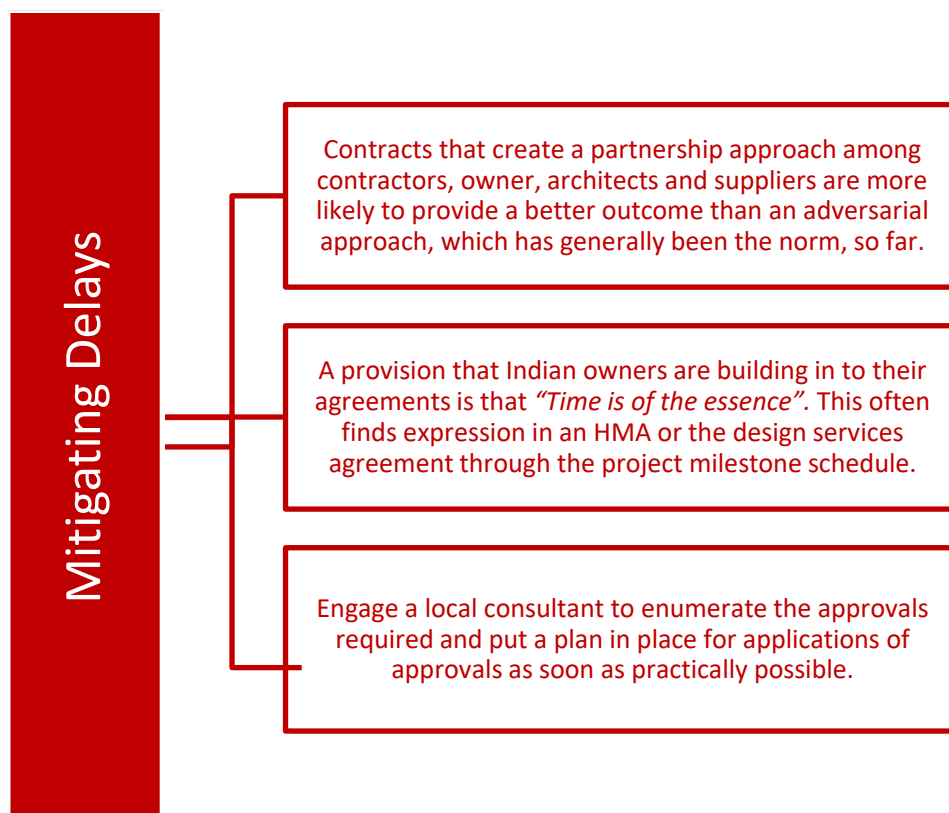
	<ul style="list-style-type: none"> Given the demanding nature of customers, quality issues create serious credibility issues that are difficult to address effectively.
Investment Restrictions	<ul style="list-style-type: none"> Press Note 2 of 2018 (PN 2 of 2018) issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, GoI, governs FDI in e-commerce retail and online marketplaces. There is lack of clarity on whether PN2 of 2018 also applies to aggregators of services. PN 2 of 2018 prohibits FDI in the inventory-based model of e-commerce which it defines as “an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly”. Further, a marketplace cannot exercise “control” over the inventory. However, whether a hotel aggregator could be said to have “control” over an inventory of services (even though it may not actually own the premises) by reason of its arrangement with hotel owners is debatable.

Delays in Hotel Construction Projects

‘Short cuts ...make Long delays’ - JRR Tolkien

Hospitality in India is steadily growing, and with a burgeoning tourism industry, the direct contribution of travel and tourism to GDP is expected to grow at 7.2 per cent per annum, during 2015–25, with the contribution expected to reach USD 160.2 billion by 2026. While these figures may pale in comparison to figures for the US or China, this growth is a small step in the right direction. Hospitality growth that was earlier focused only on a few key cities and sites of importance from a historical and tourism perspective is undergoing a shift with many major operators actively looking to expand into tier II and tier III cities, depending on the population and market demand.

With a shift in focus to newer markets, newer projects are required to be developed. It is during this phase of construction that owners become acutely aware of delays that invariably plague a project. **Certain delays or events that could lead to a delay may be mitigated or adequately dealt with under the HMA, but those that cannot be specifically dealt with, lead to a time and cost overrun.**



Given that the construction of a hotel project often has many players involved, a focused effort towards co-ordination between the various consultants, engineers, designers and the operation is the need of the hour. Therefore, as soon as the technical or the design agreement has been inked, the owner's focus should shift to employing qualified and reputed consultants and designers. It is essential for the owner's design team to act quickly, so that plans and specifications can be readied and referred to the operator for approval. It is for them to use their skills and tools to ensure that hotels are built within the time schedule and budget. For this, a move away from pure penalties and liquidated damages is perhaps the need of the hour. A disciplined policy often yields better results. Designs done without extensive investigation of the site could contain potential errors, and such designs could lead to additional work, revision of scope of work, and contract revision as the actual site conditions begin to be seen during the construction phase of the project. How, then, is the owner to ensure that all the different players perform their functions effectively and efficiently? Contracts that create a partnership approach among contractors, owner, architects and suppliers are more likely to provide a better outcome than an adversarial approach, which has generally been the norm, so far.

Like any EPC contract, the owner must build in time lines within which the consultants are to provide their drawings, reports, findings, plans, and specifications. Joint efforts and coordination among the participants, and proper training of skilled manpower together with careful timing and scheduling of the project are a few solutions that can help to reduce such delays. With respect to the operator, definitive language is required to be built in to the HMA. This ensures that the operator is required to give its comments on the plans and specification provided within a certain period of time of receipt, failing which, the same should be deemed to be approved.

Another provision that Indian owners are building in to their agreements is that "Time is of the essence". This often finds expression in an HMA or the design services agreement through the project milestone schedule. The failure to adhere to the agreed timeline milestones are seen as a material breach of contract.

Another delay plaguing projects, especially in India, relates to obtaining governmental approvals. Further, the sheer number of approvals, permits, licenses, registrations, and so on, required from various authorities for a hotel project in India could in itself be a reason for delay – one is never sure of the exact number of approvals required to be obtained as state laws differ. Lack of valid approvals could lead to deferred opening of the hotel. Mitigating the cause of this delay is a bit more difficult when compared to delays relating to construction. One way could be to engage a local consultant to enumerate the approvals required and put a plan in place for application of the approvals as soon as practically possible.

Delays in construction and obtaining approval leads to a cost increase, which is ultimately borne by the owner. Hospitality projects typically have administrators, office workers, supervisors and other overhead costs such as insurance and equipment rental that keep accumulating as long as the construction phase continues. Therefore, delays lead to an invariable increase in overhead costs. From another perspective, any hospitality project involves some amount of debt financing and delays as mentioned earlier, (relating to approvals and construction milestones) and these also lead to an increased cost of financing the project on the whole.

Most HMAs provide an option the operators to walk away from the contract if the hotel is not open for business by a specified date. This is critical for the owner as he stands to lose. Even from the operator's perspective, it is a loss, because invariably the operator has agreed to forgo other opportunities in the vicinity once the HMA is signed. To get a hotel up and running by the agreed date is therefore in the interest of both parties. It is also in the interest of the lenders, as, if the funding is on a project finance basis, then the sooner the hotel starts to earn revenues, the more certain is the repayment of principal and interest.

A Broad Outline of the Process of a Hotel Construction Project

- Design
 - Architecture
 - Structure
 - MEP
 - Interior Design
 - Landscape
 - Facility
- Tenders & Procurements
- Work Execution
 - Structure Works
 - Masonry & Plaster Works
 - Water Proofing Works
 - External Plaster Works
 - Façade Glazing Works
 - External Painting Works
 - External Development Works
 - Facility
 - Finishing works- BOH Area Ground Floor
 - Finishing works- Public Area
 - Finishing works- Guest Rooms
 - MEP Equipment Delivery
 - MEP Equipment Installation, Connection & Termination
 - MEP Testing & System Commissioning
 - Fire NOC Inspection Readiness
- Operator Snagging and Handover

Each of the above areas is where delays can, and often do occur. It would seem that coordinating time and activity management are the core skills required for such hotel projects, once the financing is up. With the family of players in the hospitality industries, it is the project managers who are the guardians of the trust that is reposed by hotel owners, operators and lenders. Delays in construction projects can be prevented with adequate planning and preparation by all participants involved. A comprehensive solution to deal with the delays that plague construction contracts may be possible sometime in the future, and owners should carefully consider their options and seek appropriate advice from consultants to stem any issues that may arise as best as possible.

Setting up a Restaurant in India: Key Regulatory Issues

‘There is no sincere love than the love of food’ – George Bernard Shaw

An Overview

The Indian Food Services market in India (organised and unorganised) was estimated at Rs 3,37,500 crore in 2017 and is projected to grow at a CAGR of 10% over the next 5 years to reach INR 5,52,000 crore by 2022. The unorganised segment’s share in the Food Services market reduced from 70% in 2013 to 66% in 2016 and is projected to fall to 57% by 2022, while the organised market (chain and organized standalone outlets) was estimated at Rs 1, 15,000 crore in 2017 and is projected to grow, at a CAGR of 16%, to reach INR 2, 37,000 crore by 2022.

The organised segment can be broadly divided into 5 categories which include:

- Quick Service Restaurants
- Casual Dining
- Cafes
- Fining Dining Restaurants
- Pubs, Bars, Lounges
- Frozen Desert Ice Cream

In the above segments, the Casual Dining Restaurants (**CDR**) at Rs 50,000 crore formulates around 61% of the organised standalone market and is growing at a CAGR of 16% to reach INR 1,05,500 crore (66%) in 2022 followed by Quick Service Restaurants (**QSR**) growing at 15% to reach INR 21,500 crore in 2022. For the International brands, the QSR segment is the maximum revenue contributor with around 70-75% share followed by CDR, whereas in the domestic segment, the market is dominated by CDRs with around 50-55% revenue share.

For private equity firms and global restaurant brands, India therefore represents huge upside potential, especially as major Middle East markets, which are undergoing rapid growth now, approach saturation levels in the years to come.

The regulatory requirements for setting up restaurants are much more complex vis-à-vis other Asian countries. This chapter therefore, seeks to give the reader a synopsis of key regulatory issues involved in setting up a restaurant in India.

Regulations & Policies

The following description is a summary of the relevant regulations and policies which are applicable to the restaurant industry in India. The regulations set out below may not be exhaustive, and are only intended to provide general information.

Regulations governing Food Services Industry in India

The Food Safety and Standards Act, 2006

The Food Safety and Standards Act, 2006 (the **FSS Act**) was enacted on August 23, 2006 with a view to consolidate the laws relating to food and to establish the Food Safety and Standards Authority of India (the **Food Authority**) for setting out scientific standards for articles of food and to regulate their manufacture, storage, distribution, sale and import to ensure availability of safe and wholesome food for human consumption. The FSS Act also sets out requirements for licensing and registering food businesses, general principles for food safety, and responsibilities of the food business operator and liability of manufacturers and sellers, and adjudication by 'Food Safety Appellate Tribunal'.

The FSSR provides the procedure for registration and licensing process for food business and lays down detailed standards for various food products. The FSSR also sets out the enforcement structure of 'commissioner of food safety', 'food safety officer' and 'food analyst' and procedures of taking extracts, seizure, sampling and analysis.

The Food Authority has also framed the following food safety and standards regulations in relation to various food products and additives:

- Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011
- Food Safety and Standards (Packaging and Labelling) Regulations, 2011
- Food Safety and Standards (Food Product Standards and Food Additives) Regulations, 2011
- Food Safety and Standards (Prohibition and Restriction on Sales) Regulations, 2011
- Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011
- Food Safety and Standards (Laboratory and Sampling Analysis) Regulations, 2011

The key provisions of the FSSA are:

- Establishment of the Food Authority to regulate the food sector
- The Food Authority will be aided by several scientific panels and a central advisory committee to lay down standards for food safety. The standards will include specifications for ingredients, contaminants, pesticide residue, biological hazards and labels
- Enforcement through 'state commissioners of food safety' and other local level officials
- Registration or licensing requirement for every entity in the food sector. Such licence or a registration would be issued by local authorities
- Every distributor is required to be able to identify any food article by its manufacturer, and every seller by its distributor

- Any entity in the sector is bound to initiate recall procedures if it finds that the food sold has violated specified standards

Other regulations

The Legal Metrology Act, 2009

The Legal Metrology Act, 2009 (**LMA**) has come into effect after its publication in the Official Gazette on January 14, 2010 and has been operative since March 1, 2011. The LMA replaces The Standards of Weights and Measures Act, 1976 and the Standards of Weights and Measures (Enforcement) Act, 1985. The LMA seeks to establish and enforce standards of weights and measures, regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number and for matters connected therewith or incidental thereto. The key features of the LMA are:

- Appointment of Government approved test centres for verification of weights and measures
- Allowing the companies to nominate a person who will be held responsible for breach of provisions of the Act
- Simplified definition of packaged commodity and more stringent punishment for violation of provisions

Environmental Regulations

The major statutes in India which seek to regulate and protect the environment against pollution related activities in India include the Water (Prevention and Control of Pollution) Act 1974, the Air (Prevention and Control of Pollution) Act, 1981 and the Environment Protection Act, 1986 (the **Environment Protection Act**). The basic purpose of these statutes is to control, abate and prevent pollution. In order to achieve these objectives, Pollution Control Boards (the **PCBs**), which are vested with diverse powers to deal with water and air pollution, have been set up in each state. The PCBs are responsible for setting the standards for maintenance of clean air and water, directing the installation of pollution control devices in industries and undertaking inspection to ensure that industries are functioning in compliance with the standards prescribed. These authorities also have the power of search, seizure and investigation if the authorities are aware of or suspect pollution that is not in accordance with such regulations. All industries and factories are required to obtain consent orders from the PCBs, which are indicative of the fact that the factory or industry in question is functioning in compliance with the pollution control norms. These consent orders are required to be renewed annually.

Municipality Laws

Pursuant to the Constitution (Seventy-Fourth Amendment) Act, 1992, the respective State Legislatures in India have the power to endow the Municipalities with the power to implement schemes and perform functions in relation to matters listed in the Twelfth Schedule to the Constitution of India which includes regulation of public health. The respective States of India have enacted laws empowering the Municipalities to regulate public health including the issuance of a health trade license for operating eating outlets and implementation of regulations relating to such license along with prescribing penalties for non-compliance.

Police Laws

The State Legislatures in India are empowered to enact laws in relation to public order and police under Entries 1 and 2 of the State List (List II) to the Constitution of India. Pursuant to the same the respective States of India have enacted laws regulating the same including registering eating houses and obtaining a 'no objection certificate' for operating such eating houses with the police station located in that particular area, along with prescribing penalties for non compliance.

Shops and Establishments Legislations

Under the provisions of local shops and establishments legislations applicable in the states in which establishments are set up, establishments are required to be registered. Such legislations regulate the working and employment conditions of the workers employed in shops and establishments including commercial establishments and provide for fixation of working hours, rest intervals, overtime, holidays, leave, termination of service, maintenance of shops and establishments and other rights and obligations of the employers and employees. The company's restaurants and confectionaries have to be registered under the Shops and Establishments legislations of the state where they are located.

Intellectual Property Laws

The Copyright Act, 1957 protects literary and dramatic works, musical works, artistic works including maps and technical drawings, photographs and audiovisual works (cinematograph films and video). The Copyright Act, 1957 specifies that for the purposes of public performance of Indian or international music a public performance license must be obtained else it will invite criminal action. All those who play pre-recorded music in the form of gramophone records, music cassettes or compact discs in public places have to obtain permission for sound recordings.

The Trademarks Act, 1999 provides for the application and registration of trademarks in India. The purpose of the Trademarks Act, 1999 is to grant exclusive rights to marks such as a brand, label, heading and to obtain relief in case of infringement for commercial purposes as a trade description. The Trademarks Act, 1999 prohibits registration of deceptively similar trademarks and provides for penalties for infringement, falsifying and falsely applying trademarks.

Motor Vehicles Act, 1988

The Motor Vehicles Act, 1988 (the **MV Act**) aims at ensuring road transport safety. The MV Act, among other things, provides for compulsory driving license, compulsory insurance, registration of vehicle, compensation in case of no fault liability and compensation by the insurer to the extent of actual liability to the victims of motor accidents irrespective of the class of vehicles. Under the MV Act it is the responsibility of the owner of the vehicle to ensure that the driver of the vehicle has a valid driving license and is not below the prescribed age limit. Acts such as driving the vehicle without a valid license, allowing such person to use the vehicle, and driving vehicle of unsafe condition, are criminal offences under the MV Act. The Central Motor Vehicles Rules, 1989 formulated under the MV Act provide for, among other things, procedures to register the motor vehicle and obtain licenses.

Labour Laws

The employment of workers for our Company's business is regulated by various labour laws, rules and regulations including the Factories Act, 1948, The Payment of Gratuity Act, 1972, The Contract Labour (Regulation and Abolition Act, 1970), The Payment of Bonus Act, 1965, The Maternity Benefit Act, 1961, The Employees' Provident funds and Miscellaneous Act, 1952, The Employees State Insurance Act, 1948, The Minimum Wages Act, 1948, The Payment of Wages Act, 1936 and The Workmen's Compensation Act, 1923.

Licenses for setting up a restaurant

It is important to note, that the restaurant industry in India is currently not recognised as a separate industry and is grouped as part of the hotel industry by the Ministry of Tourism in India. As a result, the industry lacks centralised and standardised controls across India.

License requirements in the Indian food services industry are burdensome. License requirements vary among states and there are over 10 basic licenses that need to be renewed every one to three years (Technopak Report 2009).

An indicative list of licenses required for setting up a restaurant in the state of Maharashtra is given below.

S No.	Licence	Granting Authority
1.	Food Licence (outlet wise)	Food Safety and Standards Authority of India
2.	Premises registration (outlet wise)	Maharashtra State Excise Department, Government of Maharashtra
3.	Licence for sale at a hotel of imported foreign liquors (potable) and Indian made foreign liquors on which excise duty has been paid at special rates	Maharashtra State Excise Department, Government of Maharashtra
4.	Licence for sale of wine in the premises of licensee	Maharashtra State Excise Department, Government of Maharashtra
5.	Licence for sale of mild liquor or wines or both (beer or wine) on and off the premises of a hotel/restaurant/canteen/club	Maharashtra State Excise Department, Government of Maharashtra
6.	Permit for consumption of liquor by an individual	Maharashtra State Excise Department, Government of Maharashtra
7.	Seller of liquor to equip himself and keep measures, weights and such instruments as prescribed for testing strength/quality of liquor.	Maharashtra State Excise Department, Government of Maharashtra
8.	Health/Trade License	License Department of the Municipal Corporation of Greater Mumbai

S No.	Licence	Granting Authority
9.	Eating House License	Licensing Police Commissioner
10.	Shops and Establishment License	The Municipal Corporation of Greater Mumbai
11.	GST Registration	Relevant state and central GST authority
12.	Fire Department NOC	State Fire Department
13.	Lift License	Electrical Inspector (Lifts)
14.	Music License	Phonographic Performance Limited
15.	Signage License	The Municipal Corporation of Greater Mumbai

Additionally, in the cases of certain licenses one may need to apply for renewal of approvals which expire, from time to time, as and when required in the ordinary course. Failure to comply with existing or increased regulations, or the introduction of changes to existing regulations, could result in approvals, licences, registrations and permits being suspended or revoked in the event of non-compliance or alleged non-compliance.

Risks: Health, safety and environmental regulation in India may become more stringent, and the scope and extent of new regulations, including their effect on a restaurant's operations, cannot be predicted with any certainty. In case of any change in health, safety or environmental regulations, the owner may be required to incur significant amounts on, among other things, health, safety and environmental audits and monitoring, pollution control equipment and emissions management. The promoters could also be subject to substantial civil and criminal liability and other regulatory consequences in the event that a health or environmental hazard is found. If any of the operations results in contamination of the environment, including the spread of any infection or disease, the owner may be the subject of public interest litigation in India relating to allegations of such contamination, as well as in cases having potential criminal and civil liability filed by regulatory authorities.

A few important sections under IPC in reference to food adulteration include:

- **Section 272: Adulteration of food or drink intended for sale-** Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing in to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Classification of Offence

Punishment- Imprisonment for 6 months, or fine of 1,000 rupees, or both None-Cognizable- Bailable- Triable by any Magistrate- None-compoundable.

Section 273: Sale of noxious food or drink- Whoever sells, or offers or exposes for sale, as food or drink, and article which has been rendered of has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may

extend to one thousand rupees, or with both.

Classification of Offence

Punishment- Imprisonment for 6 months, or fine of 1,000 rupees, or both None-

Cognizable- Bailable- Triable by any Magistrate- None-compoundable.

Property Licenses

Property could be owned / leased by the owner of the restaurant

- In the case of restaurant owner buying a property it is necessary to do a title verification
- In the case of a leased property, it is important to do a title verification of the lessor- Copies of title deeds and other relevant documents in relation to all immoveable properties on which the restaurant will be operated
- In the case of outlets All MOU's, leases or tenancies (including drafts, where applicable) for all the proposed outlets including details such as date of the lease, lessor, address, description including details as to the approximate area, term, rent and rent review provisions.

Sourcing Norms

Sourcing Domestic:

- A standardised supply contract for supplies and food products for a set term of at a mutually agreed price containing customary payment periods.
- Contracts should allow for regular inspection of vendors to ensure that the products purchased conform to a certain quality standards
- Comprehensive supplier audits frequently based on the potential food safety risk of each product.
- Under the terms of our supply agreements, it is important to clarify if the supplier/ restaurant is responsible for the transportation of raw materials from the suppliers' premises.

Sourcing ingredients internationally:

Some restaurants choose to buy imported ingredients from suppliers within India while others choose to import material directly from the overseas supplier.

Importers need to largely undertake the following activities for importing ingredients into India:

- Obtaining an Importer-Exporter Code (IEC) Number;
- Determining the tariff classification, rate of duty applicable, and providing the details as regards the assessable value, for the purposes of discharging the applicable Customs duty;
- Submitting the necessary documents at the time of import such as Bill of Lading / Airway Bill, Commercial Invoice cum Packing List, Bill of Entry

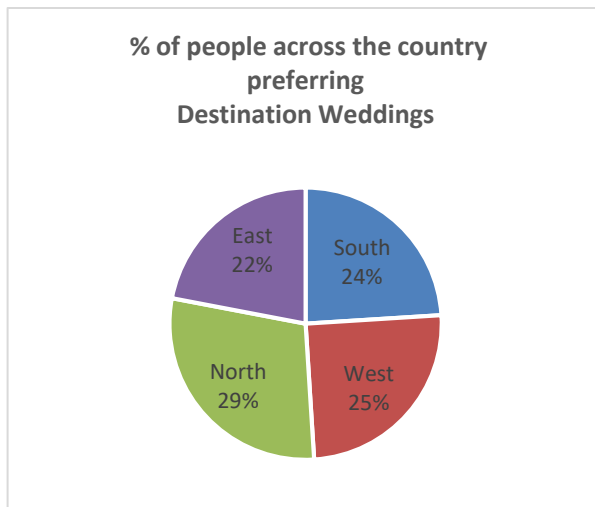
- In case any exemptions / concessions are being sought, ensuring that any supporting documentation / information for availing such exemption / concession is provided to the Customs authorities (e.g. a certificate of origin where concessions under Preferential Trading Agreements are being applied);
- Ascertaining whether an import licence from the DGFT (Director General of Foreign Trade) is required, and obtaining such licence in advance of the import;
- Providing any other additional documents that the Customs authorities seek in relation to the imported goods;
- Maintaining all records of the aforesaid mandatory documents and any other documents sought by the Customs authorities in connection with the imported goods.

The Great Indian Wedding: Leveraging the Opportunity

'By all means, marry. If you get a good wife, you'll become happy; if you get a bad one, you'll become a philosopher'

- Socrates

Marriages may be made in heaven but are celebrated on earth. Look no further than the great Indian wedding to emphasise this fact. One of the few recession proof industries, the Indian wedding market, which is growing at an annual rate of 20-30 %, currently stands at USD 40 billion. It is estimated that an average Indian spends one



Source: Business Insider

fifth of the wealth accumulated during his/ her lifetime on wedding ceremony. Typified by grandiose and lavishness, a marked trend which the wedding industry is witnessing is the increase in destination weddings. The concept of destination weddings, which were earlier thought to be affordable only to the elite, has now caught the fancy of India's aspirational middle and upper middle classes. As indicated by the figure below this trend is not confined to the North / West India (as one would presume) but is spreading across the country, including the Tier II & Tier III markets.

The preferred destinations in India



Indian weddings are increasingly moving towards exotic destinations and have become more intimate. Now, instead of 600-700 guests, the wedding size has reduced to 150-300 invitees and it is expected of the venue to offer an experiential element to the once-in-a lifetime event. Whilst Goa, Kerala, Alibaug and now The Andaman Islands are preferred choices for beach weddings, the palaces and grandeur of Rajasthan, Hyderabad, Agra & Mysore are equally popular. There is no doubting the levels of hospitality, world-renowned service, food and beautiful locations across India offers to make it an

attractive destination wedding option, yet then an ever-increasing number of travellers scouting for new and exotic overseas.

India's loss is a gain for overseas hotels



India enjoys considerable advantage when placed head to head with the prime global destinations of wedding tourism. Unfortunately, however, with limited traction amongst foreign nationals for destination weddings in the country and a rising outbound movement amongst Indians to locales including Southeast Asia, the Middle East, Europe, and Africa, India seems to be increasingly on a back foot in the burgeoning destination wedding market. Illustratively, Thailand saw a rise from a handful of Indian weddings to over 300 in a given year⁵². The average size of Indian wedding celebrations in Thailand, ranges from 250-800 and length of stay is around 3 -5 nights. Thailand has many advantages compared to other destinations including easy accessibility in terms of visas, world class hotels, beautiful beaches, proximity, availability of Indian/ vegetarian food, Thai hospitality, excellent spas, shopping and most importantly value for money.

There are several factors due to which the Indian hospitality industry is slowly losing out on the destination wedding cash cow.

⁵² Tourism Authority of Thailand

Competitively priced destinations



For a discerning Indian spender, value for money takes top priority in decision making. For example the cost of a 60 to 70 lakh wedding in Thailand, a reasonably grand affair with a 2 nights/3 days package for 100 people at a beautiful world-class resort would approximately be Rs 60 to 70 lakh. A similar wedding in India would cost between Rs.70 lakh and 90 Lakhs for a group of 100 without the enviable tag of a 'wedding abroad'⁵³.

The high tax burden has come up as a big blow to the wedding business where from hotels to wedding planners every vendor will levy taxes on customer, thus making the event expense costlier. This makes the destination wedding business more expensive but also less attractive in the country.

Lack of Promotion and Marketing



India is not marketing itself enough as an exotic wedding destination. The millennials are increasingly looking towards experiential and meaningful experiences. Merely having an online presence is not nearly enough today. It is important to reach this target market through focussed offline and online marketing campaigns and collaborations with event and wedding planners and portals. The need of the hour is to provide a comprehensive package of not only hospitality services, but equally as a place where a special memorable life event is celebrated in unforgettable way. It creates potential for destinations to recognise their unique selling feature and to market it to innovative wedding tourists who are willing to pay. Targeted marketing is key to this. In Oman, for example, the Ministry of Tourism has taken up this initiative and conducts an Indian wedding planner's

⁵³ https://www.weddingsutra.com/Thailand/wedding_in_thailand.htm

familiarisation trip to Oman every year. Similarly, the Tourism Authority of Thailand (TAT) participates in wedding fairs and exhibitions in India. Apart from this a wedding FAM and symposium is organised twice a year for wedding planners to visit new destinations and locations in Thailand.

Some Indian hotel chains too have already started addressing this. Hyatt launched a creative global campaign “Anything is Possible” – a web video series based in France, the Middle East and now India – that takes the viewer through the journey of a young couple, who meet, unite and celebrate their wedding day at the chain’s hotels. Another example is ITC Hotels, which has a dedicated webpage for weddings on its website showcasing 7 hotels across 7 destinations, promising to coordinate and perfectly execute a memorable event. The recently launched ‘Shaadi by Marriott’ was initiated with the intent of personalising a complete wedding experience, right from the perfect venue and décor to great food and hospitality. In 2016, Taj Hotels launched their “Timeless Wedding Concierge Service”. The marketing paradigm for weddings seems to be transforming.

Connectivity issues

In the case of foreign travellers, the dearth of scheduled connectivity to remote locations in India proves an impediment. Foreign charters operate at one fourth the price of their Indian counterparts, but are not allowed to fly to India unless the Indian carriers aren’t able to give quote. This challenge of connectivity is a big deterrent in attracting big volumes of wedding business. It may be prudent for the hospitality industry to present their case to the Government of India on this issue.

Conclusion

With increasing aspirational value complemented by the need to ‘be different’ the destination weddings have become a veritable force in the industry. To grow in this sector the Indian hospitality industry needs to have a two pronged effort. The first is to liaise with the Government on policy issues which are currently hindering the industry including high taxation, costs and connectivity, whilst the other is to focus more on hyper personalisation while marketing its services. Innovative thinking is key to this. To conclude, marriages may be made in heaven but are marketed on earth.

Abbreviations

Term	Meaning
AAA Rules	Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
AAEC	Appreciable Adverse Effect on Competition
ADR	American Depository Receipts
CBDT	Central Board of Direct
CCI	Competition Commission of India
CDR	Casual Dining Restaurants
CGST	Central Goods and Services Tax
CIRP	Corporate Insolvency Resolution Process
CIRP Period	One hundred and eighty (180) days, along with an extension of not more than ninety (90) days granted by the NCLT from the date of admission of application to initiate CIRP
CIRP Regulations	Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
COC	Committee of Creditors
Code	Insolvency and Bankruptcy Code, 2016
Copyright Act	Copyright Act, 1957
Companies Act	Companies Act, 2013 (to the extent certain sections have not yet been notified and gazetted by the relevant Government Authority) and/ or the Companies Act, 1956, as amended from time to time
Competition Act	Competition Act, 2002
CPA	Consumer Protection Act, 1986
CST	Central State Tax
CVD	Countervailing Duty
DCCO	Date of Commencement of Commercial Operations
ECB	External Commercial Borrowings (Foreign Currency Loans)
ECB Regulations	Master Directions of ECB issued by RBI
Environment Protection Act	Environment Protection Act, 1986
EU	European Union
FCCB	Foreign Currency Convertible Bonds
FDI	Foreign Direct Investment
Food Authority	Food Safety and Standards Authority of India
FPIs	Foreign Portfolio Investors
FSI	Floor Space Index
FSS Act	Food Safety and Standards Act, 2006
GDPR	General Data Protection Regulation
GDR	Global Depository Receipts
GoI	Government of India
GST	Goods and Services Tax
GSTIN	Goods and Service Tax Network
HKIAAC	Hong Kong International Arbitration Centre

HMA s	Hotel Management Agreements
HSN	Harmonized System of Nomenclature
IBBI	Insolvency and Bankruptcy Board of India
ICA	Indian Council of Arbitration
ICC	International Chamber of Commerce
IEC	Importer Exporter Code
IC Committee	Internal Complaints Committee
ICC Rules	International Chamber of Commerce Rules
IGST	Integrated Goods and Services Tax
Indian IT Legislation	IT Act and IT Rules
InvITs	Infrastructure Investment Trusts
InvITs Regulation	Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014
IRP	Interim Resolution Professional
IT Act	Information Technology Act, 2000
IT Rules	Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011
LCIA Rules	London Court of International Arbitration Rules
LD	Liquidated Damages
LMA	Legal Metrology Act, 2009
Ministry	Ministry of Consumer Affairs
MCIA Rules	Mumbai Centre of International Arbitration Rules
MV Act	Motor Vehicles Act, 1988
NCDRC	National Consumer Disputes Redressal Commission
NCLT	National Company Law Tribunal
NDA	Non-Disturbance Agreement (Non – Disturbance Deed)
NPAs	Non- Performing Assets (Bad Debts)
NYC	New York Convention, 1958
PCBs	Pollution Control Boards
POSH Act	Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
QSR	Quick Service Restaurants
RBI	Reserve Bank of India
REITs	Real Estate Investment Trust
RP	Resolution Professional
SAC	Service Codes
SARFAESI Act	Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
SEBI	Securities and Exchange Board of India
SIAC	Singapore International Arbitration Centre
SIAC Rules	Singapore International Arbitration Centre Rules
SGST	State Goods and Services Tax
UNCITRAL	United Nations Commission on International Trade Law
VAT	Value Added Tax



Notes



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