ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

ELP Knowledge Series

India Update – Part 2 of 2018

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FOREWORD

Dear Reader,

We welcome you to the latest edition of 'ELP Knowledge Series'.

Over the last quarter, there have been a spate of regulatory and legal developments that have significant implications for domestic and foreign businesses alike – 'India Update - Part 2 of 2018' endeavours to examine these developments and present a succinct summary to our readers.

Government of India's intent of promoting ease of doing business and creating parity with international regulatory standards is clearly manifest in the latest round of legislative reforms. In this document, we examine the improvements made to the country's dispute resolution process by strengthening provisions relating to specific enforcement of contracts and reducing the scope of local courts to grant interim relief during ongoing arbitration proceedings. We also delve into the implementation guidelines recently notified for enabling outbound cross-border mergers and the new reporting structure for disclosing information on foreign investment in Indian companies.

Steps taken to boost investor confidence, such as placing foreign lenders' at par with domestic entities under India's insolvency framework and revising the country's antiquated anti-corruption framework, are all tangible steps in the right direction. We have presented detailed analysis of these topics, as well as a discussion on impact of GST on India's e-commerce sector and the latest developments in defence sector. We conclude by discussing potential competition law risks faced by technology businesses in India and examining cost ramifications arising from domestic and bilateral or international data privacy compliance requirements.

We hope you will find this information helpful. For any clarification or further information, please connect with your point of contact at ELP or reach out to us at insights@elp-in.com.

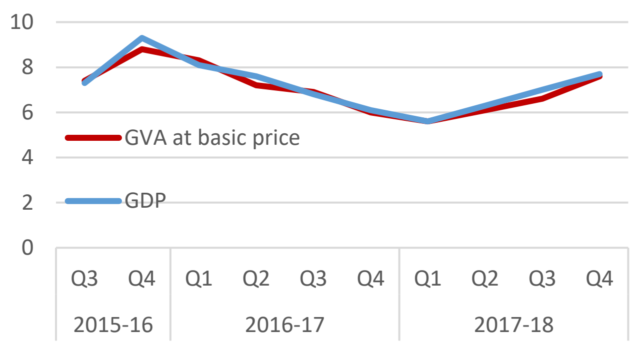
Regards,

Team ELP

INDIAN ECONOMY: A SNAPSHOT

ECONOMIC GROWTH

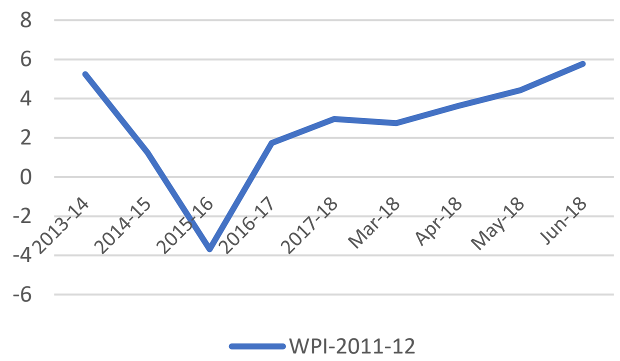
Quarterly Growth of GDP and GVA (%) at constant prices



Source: Central Statistical Organisation (CSO)

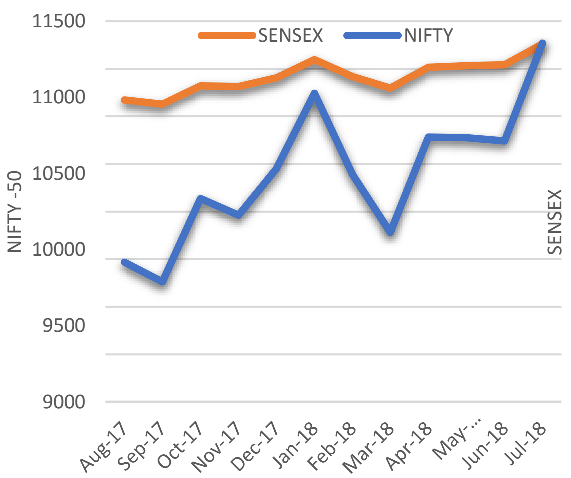
INFLATION

WPI (YOY %)



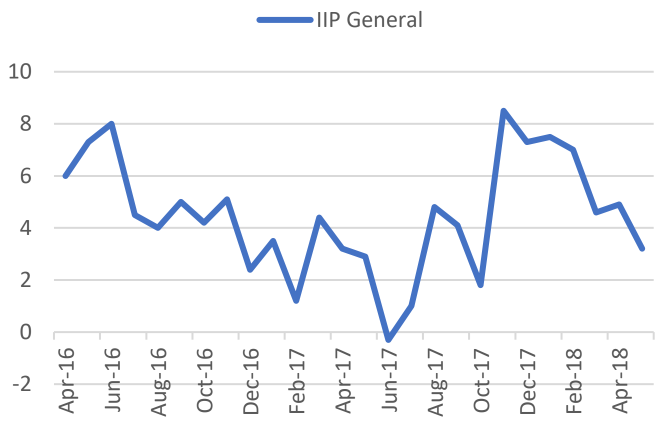
Source: Office of Economic Adviser- DIPP and CSO

SHARE MARKET



PRODUCTION GROWTH

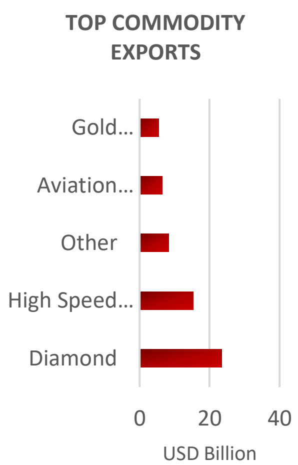
Index of Industrial Production (IIP) growth in %

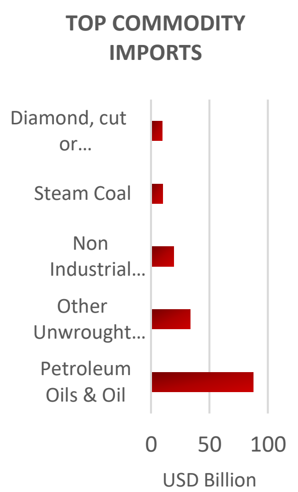


Source: CSO

EXTERNAL TRADE

MAJOR COMMODITIES TRADED (APR 17-MAR 18)





STRENGTHENING INDIA'S CONTRACT ENFORCEMENT FRAMEWORK: SPECIFIC RELIEF (AMENDMENT) ACT, 2018

According to World Bank's Doing Business ranking, 'enforcing contracts' indicator measures the 'time and cost for resolving a commercial dispute through a local first-instance court, and the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficiency in the court system'[1]. India has traditionally fared poorly on this indicator, and the general consensus amongst legal practitioners and business community has been that the existing legal framework for seeking specific relief under contracts in India was ineffective, if not an impediment, in the current scenario of rapid economic and infrastructural growth.

As part of sustained efforts over the past few years to overhaul commercial laws and improve ease of doing business in India, the government recently overhauled the law relating to specific relief by enacting the Specific Relief (Amendment) Act, 2018 ("**Amendment Act**"), which made several radical changes to the existing Specific Relief Act, 1963 (the Specific Relief Act, 1963 prior to the Amendment Act is hereinafter referred to as "**Act**").

Key aspects of the Amendment Act

- **Specific relief no longer a discretionary remedy:** Since decree of specific performance was a discretionary remedy in the earlier Act, there was a lot of uncertainty over whether courts would grant specific performance in any particular case. Coupled with the fact that the grounds for the court to exercise its discretion to deny relief under the Act were broad, specific performance was generally granted only in limited cases. The Amendment Act has now taken away this discretion from the courts by amending section 10 of the Act, which now provides that specific performance of a contract *shall* be enforced subject to the limited grounds of refusal set out in section 11(2), 14 and 16. With the Amendment Act making it much easier for an aggrieved party to obtain relief, it may serve as a deterrent for parties contemplating breach of contract by non-performance.

- **No bar to grant of specific relief even if party can be compensated by way of damages:** Specific performance was earlier available as a remedy only where (a) there was no standard for ascertaining damages caused by non-performance of the contract; or (b) monetary compensation would not be adequate relief.[2] The general rule therefore was to award damages, while specific performance was an exception. The Amendment Act now provides that specific performance of a contract *shall* be enforced subject to the limited grounds of refusal set out in section 11(2), 14 and 16 (which does not include the criteria that damages should not be an adequate relief). Therefore, a party aggrieved by breach of contract can now opt to file a suit for specific performance even if monetary compensation is an adequate relief. By giving the power to the plaintiff to choose his / her own remedy, the Amendment Act has made it easier for the party suffering the breach to obtain relief to the fullest extent.

- **No requirement to specifically aver readiness and willingness to perform:** Prior to this amendment, defendants would often raise the technical objection that the plaintiff ought not to be entitled to specific relief if she has not specifically averred that she was ready and willing to perform the contract (under Section 16 of the earlier Act), even if, plaintiff's readiness and willingness to perform could be inferred from the pleadings. This objection was raised by the defendant in *Moti Lal Jain v. Ramdasi Devi*[3] where the Supreme Court held that readiness and willingness to comply has to be in spirit and substance and not in letter and form. Therefore, in order to ensure that defendants do not use such technicalities to extricate themselves from liability, the legislature has decided to do away with the requirement by the plaintiff to specifically aver readiness and willingness to perform the contract.

- **Contracts which cannot be specifically enforced are now more limited:** The Act, under section 14, earlier contained a list of contracts that could not be specifically enforced. Additionally, section 20 of the Act provided for certain cases where the court may exercise its discretion not to decree specific performance. Under the Amendment Act, the grounds for refusal of specific performance have been narrowed, and the grounds for not granting specific performance where compensation is an adequate relief, have been deleted altogether. Further, the court's discretion in granting specific relief is completely removed. While this will lead to greater certainty for a party praying

[1] http://www.doingbusiness.org/data/exploretopics/enforcing-contracts

[2] Section 10, section 14(1)(a)

[3] AIR 2000 SC 2408

for specific performance, and may strengthen the sanctity of contracts, it needs to be highlighted that the Amendment Act is correct in removing all discretion from the courts in refusing specific performance.

- **Provision for substituted performance of contracts introduced:** The Amendment Act has substituted the old section 20 (which dealt with the discretion of courts) with a provision whereunder the party aggrieved by breach of contract due to non-performance can opt for substituted performance of contract through a third-party or its own agency, and claim the expenses and other costs incurred from the party committing the breach. The party suffering the breach must issue 30 days' notice to the defaulting party calling upon him / her to rectify the breach within the time specified in the notice, failing which the aggrieved party can opt for substituted performance. The requirement to give 30 days' notice to the defaulting party may prove effective in securing performance of the contract, since the defaulting party would now be aware that she would be held liable to cover the losses if the other party seeks substituted performance. However, it is pertinent to note that this section is a derogable provision – parties can contractually opt out of it.

- **Courts vested with power to engage experts:** With the massive strides being made each day in science and technology, contracts today, and the disputes arising under them, are becoming increasingly complex and technical. In order to assist the court in deciding such matters, the Amendment Act has introduced a new provision under Section 14A whereunder the court, where it considers it necessary, may appoint an expert to assist it on any specific issue involved in the suit. The expert may be directed to submit a report and/or provide evidence. Parties may also examine the expert with respect to the matters mentioned in his report, with the prior permission of the court.

- **Timeline for disposal of suit:** The Amendment Act has introduced section 20C whereunder the court is required to dispose of a suit filed under the provisions of the Act within 12 months from date of service of summons to the defendant, extendable by a further 6 months after recording reasons for the extension in writing. Given the over-burdened courts in India, adherence to these timelines seems unlikely; however, it may serve as a guideline to courts to attempt to dispose of such suits as expeditiously as possible, especially since the Amendment Act has removed much of the uncertainty surrounding the grant of specific relief by taking away the discretionary power of the court.

- **Special provisions introduced with respect to specified infrastructure projects:** The Amendment Act has added a sub-section (ha) to section 41 whereby an injunction cannot be granted if it would impede or delay the progress or completion of any infrastructure project, or any service or facility related to it. The Amendment Act has also introduced section 20A which states that no injunction shall be granted if it would impede or delay the progress or completion of any infrastructure project specified in the Schedule. These provisions have been introduced to address the concerns pertaining to injunctions granted by courts in favour of aggrieved parties, which have emerged as the biggest roadblocks to domestic infrastructure projects. Such suits thereafter take years to be disposed of, thereby leaving the injunction to operate indefinitely. On this note, the Amendment Act now provides that the State Government, in consultation with the Chief Justice of the High Court, shall designate certain civil courts as Special Courts to try suits relating to infrastructure projects.

Conclusion

As part of the Government's efforts to make India a business-friendly destination, commercial laws in Indian law have seen some radical changes over the past few years. These include the amendments to the Arbitration and Conciliation Act, 1996, and the introduction of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015, and the Real Estate (Regulation and Development) Act, 2016.

The Amendment Act is yet another step in this direction. The provisions introduced with respect to infrastructure projects seeks to create a climate of fostering economic growth in the country. Further, by making specific relief the rule and not the exception, the Amendment Act seeks to create a paradigm shift in attitude of contractual parties towards honouring contractual relationships.

TECHNOLOGY & DATA-INTENSIVE BUSINESS: THE COMPETITION LAW VIEWPOINT

The global perspective

The last few years have seen many of the world's leading technology companies come under increasing scrutiny of competition regulators across the globe, with historic fines levied on them for a variety of business practices and other transgressions. The core concerns pertain to accumulation of large data sets by companies and their ability to process it through computer algorithms and artificial intelligence in a manner that may negatively impact competition, as well as the end consumer. Control over this large pool of data is increasingly becoming synonymous with 'market power', even as an increasing number of industries – ranging from agriculture to airlines – become reliant on 'big data'.

Technology and data-intensive business in cross-hairs of US and EU regulators: The regulation of technology and big data presents its unique challenges, evident from the divide even between the major global regulators. While the European Union has adopted a rather aggressive approach towards technology and data intensive companies, the United States anti-trust authorities are seen acting with significant caution.

- As far back as 2008, the Department of Justice (**"DOJ"**) of the United States required Thomson to sell financial data and related assets in order to acquire Reuters
- The DOJ unsuccessfully opposed the merger between entertainment major Time Warner and the largest telecom provider AT&T, arguing that the merger would allow merged entity to have exclusive access to Time Warner's 'must have' television content to either raise its rivals' video programming costs or drive those same rivals' customers to AT&T's subsidiary DirecTV
- In Europe, in the Microsoft/LinkedIn merger, the European Commission (**"EC"**) had noted that although privacy concerns are covered under data protection laws, the same could be considered as a non-price competition factor in merger control assessments to the extent that consumers consider it as significant factor in the quality of the services offered
- The EC imposed a fine of USD 122 million on Facebook for failing to disclose that post its acquisition of WhatsApp, it would combine the data of the users of the two platforms
- The EU's Competition Commissioner Margrethe Vestager has recently promised to 'keep a close eye on how companies use data' and a number of European antitrust authorities have conducted full-blown studies on big data issues
- Anticompetitive effects of Apple's acquisition of music recognition app, Shazam is being investigated by the EC

The EC has imposed fines of USD 2.7 billion and USD 3.8 billion on Google with respect to certain conduct relating to its Shopping page and Android OS, respectively.

Technology companies in India: Understanding the ramifications under India's competition laws framework

Competition law in India is enforced primarily by the Competition Commission of India ("CCI"), established under the Competition Act, 2002 ("Act"). The CCI has the responsibility to "prevent practices having an adverse effect on competition and sustain competition in the market" and has been quite actively enforcing the Act since its inception in 2009.

Under the Act, the CCI can look into three aspects:

- Anti-competitive agreements, including collusive agreements between competitors under Section 3 of the Act
- Abuse of dominant position by an enterprise under Section 4 of the Act
- Regulation of mergers and acquisitions under Section 5 and 6 of the Act.

While there has been limited scrutiny by the CCI on issues relating to data, it has, in 2017-2018, passed three orders dealing with the impact and significance of data in the competition landscape which included complaints filed against WhatsApp and Google and approving the merger of Bayer and Monsanto.

It is noteworthy – and perhaps an indicator of the things to come – that in 2018, while approving the merger between Bayer and Monsanto, the CCI directed the merged entity to provide agricultural information/data on fair, reasonable and non-discriminatory terms.

Key concerns

Broadly speaking, the primary concerns that arise due to the interplay of data collection, processing and transfer, and competition law in the Indian context are identified here:

Collusive behaviour	Any technological platform enabling 'real-time' access to price and quantity data is viewed with suspicion by competition regulators Possibility of collusion between competitors using a 3rd party developed algorithm or AI, which relies on data sets or 'real-time data' This poses new & legal compliance challenges for the enterprises, diminishing the lines between permitted and prohibited conduct
Possibility of abuse	Any abuse of market power arising out of control over data may raise concerns such as: ▪ Access to data can be used to implement entry barriers against other participants in the market ▪ Discriminatory access to such data may also raise potential red flags ▪ Concerns may also arise from exclusive agreements if they prevent other entities from accessing data or foreclosing rivals' opportunities to procure similar data, by making it harder for consumers to adopt rival technologies or platforms
Big Data in Mergers	Competition authorities are likely to examine potential lessening of competition that may result from the acquisition of important data. A few reasons for this may be: ▪ The transaction combines substitutable datasets ▪ The transaction transfers control of critical data which impacts the existence of the acquiring firm's competitors and other players If in the assessment of the competition authority, the acquisition is likely to substantially lessen competition in the market, it may direct divestiture of the data or direct compulsory licensing/access to the data on predetermined terms and conditions

CCI has the power to impose significant penalties, up to 10% of the average of the turnover for the last three years or in case of a cartel, 3 times of the profit for each year in continuation of a cartel. In case of an abuse of dominant position, the CCI can also direct division of an enterprise. Similarly, while assessing a merger, CCI can direct divestment of certain assets or pass detailed guidelines on carrying of certain business activities, where the merger is found to have or is likely to have adverse effect on competition in India.

Conclusion

Although, 'big data' has been the center of attention from competition regulators globally, the authorities are still in the process of gaining a better understanding of inherent issues and ascertaining the manner in which the traditional tools can be applied to a technology driven landscape. The vulnerability to competition law scrutiny as a result of data accumulation and processing, extends across sectors ranging from the obviously vulnerable businesses (such as, aggregators, social networks, search companies) to businesses in traditional sectors (hospitality, insurance, life sciences, etc.). It would be prudent for companies to follow basic hygiene measures, including a regular review of existing policies, practices and agreements pertaining to data collection /processing/access in order to identify possible competition compliance gaps and risks involved; seeking specialist advice on issues pertaining to M&A activity; ongoing negotiations with parties in relation to data collection; streamlining policies, practices and contracts with applicable legal requirements; etc.

Even though limited information and jurisprudence is available in India, given the nascent nature of competition laws framework in the country, it is quite possible to assess potential competition issues that can arise for technology and data-intensive companies in India, and recommend suitable measures to limit such potential regulatory risks. Pre-emptive risk assessment and proactive mitigation steps are indeed the need of the hour.

ENFORCEMENT OF RIGHTS OF FOREIGN LENDERS UNDER IBC, 2016

Prior to the enactment of the Insolvency and Bankruptcy Code, 2016 ("**Code**"), recourse for insolvency and debt recovery matters under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("**SARFAESI Act**") and the Recovery of Debts due to Banks and Financial Institutions Act, 1993 was available only to domestic financial creditors. As things stood back then, foreign creditors could not seek recourse under these statutes.

As a significant step toward creating a level playing field and extinguishing the undue advantage accorded to domestic financial creditors, the Code has now brought within its purview foreign creditors as well, encompassing both operational as well as financial creditors.

Indian judiciary has played an active role in bringing about this change and ensuring recourse is provided to foreign creditors under the Code. While Ahmadabad and Mumbai benches of NCLT had admitted applications by foreign financial creditors against Essar Steel India Limited[4] and Ruchi Soya Industries Limited[5] respectively, the Hon'ble Supreme Court, in the case of *Macquarie Bank Limited v. Shilpi Cable Technologies Limited*[6], while deciding on the matter of whether a foreign operational creditor needs to bank with an Indian bank to file a claim, held that, "The Code cannot be construed in a discriminatory fashion so as to include only those operational creditors who are residents outside India who happen to bank with financial institutions which may be included under Section 3(14) of the Code. It is no answer to state that such person can approach the Central Government to include its foreign banker under Section 3(14) of the Code, for the Central Government may never do so. Such persons ought to be left out of the triggering of the Code against their corporate debtor, despite being operational creditors as defined, would not sound well with Article 14 of the Constitution, which applies to all persons including foreigners. Therefore, as the facts of these cases show, a so called condition precedent impossible of compliance cannot be put as a threshold bar to the processing of an application under Section 9 of the Code."

Key considerations

The following points are important for foreign creditors to take note of, as they seek to enforce their rights under IBC, 2016:

- Foreign creditors will individually be able to initiate the insolvency process and thereby bring the corporate debtor and all other creditors to the table to finalise a resolution process.
- A foreign creditor, being an applicant, will have a right to choose the interim resolution professional who will accept claims from all, form the committee of creditors and also organize for determination of 'liquidation value' for the Corporate Debtor.
- All financial creditors (including foreign financial creditors) will form part of the committee of creditors and can participate either physically or through video conferencing and vote on all matters during the resolution process. The voting share shall be proportionate to the extent of the debt owed to such creditor vis-à-vis the cumulative financial debt.
- As a creditor and a claimant, the foreign creditor will be provided with the information memorandum, the resolution process details, resolution plans and will therefore be privy to all information in relation to the corporate debtor, as available with the members of the committee. The resolution professionals are prohibited from sharing information separately with any other individual entity.
- For creditors who have provided external commercial borrowing or for any other transaction where terms have been reported to the RBI, any alteration of terms may require permission or additional filings. However, the resolution plan can seek waivers and the National Company Law Tribunal can direct authorities to consider providing the necessary approvals in the interest of reviving the business of the corporate debtor.

[4] [C.P. No. (I.B) 39/7/NCLT/AHM/2017]
[5] CP No. 1371 & 1372/IBP/NCLT/MAH/2017
[6] [AIR 2018 SC 498]

- The resolution plan, once approved and sanctioned by the adjudicating authority, becomes binding on all the shareholder, creditor and stakeholders of the company including dissenting financial creditors and operational creditors. Additionally, the provisions of the Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.
- Associated regulations have also been considerably relaxed to facilitate the insolvency process. For example, shareholders' approval if required for a certain act under the Companies Act, 2013, will not be required in order to implement the resolution plan. Similarly, there have been exemptions provided under the Income Tax Act, 1961 and by regulators such as the Securities and Exchange Board of India.
- In case the group companies have provided support (either as guarantor or security provider), it may be adequate indication to make demands on them directly or initiate action against them. The moratorium under the Code is only applicable qua the corporate debtor and its assets.
- For Indian companies that have assets outside India, the regulations for cross border insolvency have been notified by the Indian government. However, the government is required to finalise agreements with reciprocal territories to make it effective.
- Moratorium, once declared under the Code, is applicable to the assets of the corporate debtor along with institution or continuation of any proceedings. Foreign creditors must be aware of this fact for all cases where the insolvency process is initiated in order to protect their own interest.
- It is imperative that the creditors file their claims with the resolution professional. Until the creditor lodges its claim, it cannot be part of the committee of creditors. The Code does not require the notice to be provided to a creditors.
- As a result of the Code, transaction documents may be required to be modified to add information covenants, alter certain representations and some of the events of default. Also, it would be important for creditors to ensure that all relevant information qua the transactions are updated with the relevant repositories.

Conclusion

Foreign investors exploring distressed assets investment opportunity in India will certainly find these developments reassuring. The Code has now created a level playing field to ensure that lenders of all stripes are on the same footing and equal opportunity is created for all creditors in case of a default by a corporate debtor. In light of several companies entering the revival phase, there is heightened search for entities that are willing to provide cash injection, whether through debt, equity or mezzanine structures. The foreign party, as a resolution applicant, can also submit a resolution plan for the corporate debtor's resolution (promoters of defaulted companies have been made ineligible for bidding under the resolution process for companies under the Code).

The clear intent of the judiciary to adhere to timelines suggested in the Code, being duly implemented, will provide a huge boost to investor sentiment and provide clarity *qua* enforcement timelines. This new regime has created a functional and effective way for foreign creditors to recover from their Indian borrowers and is a significant step forward for India, bringing the prevailing practice in line with global standards.

SINGLE MASTER FORM FOR REPORTING FOREIGN INVESTMENT TRANSACTIONS IN INDIA

Keeping true to its stated intent of improving ease of doing business in India, Reserve Bank of India ("**RBI**"), pursuant to its circular dated June 7, 2018, has introduced an online application (FIRMS) by which it aims to provide a Single Master Form ("**SMF**") for reporting of foreign investment transactions in India. This is expected to streamline the existing process wherein multiple forms in different formats need to be filed for primary infusion of foreign capital; transfer of shares from non-resident to resident shareholder (or vice-versa); downstream investment via foreign owned or controlled entity into a subsidiary; etc. Additional complications crept in, given the lack of clarity regarding the supplementary documents that would often be required by Authorised Dealers during outward remittance.

FIRMS has been introduced in two modules. The first module was made available on the RBI portal from June 28, 2018 till July 12, 2018, by which Indian entities were required to upload data in relation to their existing foreign investments (including indirect foreign investments). This data could be edited by the Indian entities prior to August 15, 2018. The second module was to be made available from August 1, 2018, but this has not been made available by RBI so far. The second module will implement the SMF, by which reporting of foreign direct investment through various forms such as Form FC-TRS, Advance Reporting Form (ARF), Form FC-GPR, LLP 1, LLP 2, ESOP. DRR and CN will be subsumed into one form. The two step procedure for primary foreign capital infusion in the company, i.e. filing of ARF and Form FC-GPR would also get subsumed into one step. The finalised structure of SMF and operational instructions would be made available by RBI in the Master Direction on Reporting under Foreign Exchange Management Act, 1999.

We have set-out below the broad steps required to be undertaken by the entity to create Entity Master:

Action Required		
Step 1:	**Registration of the Entity User**	**Observation**
i.	Entity to authorize one individual as Entity User	Only one person can be authorized as Entity User to add/update the data in the Entity Master.
ii.	Entity to issue an authority letter to the Entity User (the "**Authority Letter**")	
iii.	The Entity User can be registered on the following link: https://firms.rbi.org.in/firms/faces/pages/login.xhtml	
iv.	To click on registration form for a new Entity User.	A pop-up box for the entity user registration form will open.
v.	To fill in the mandatory fields in the Entity User registration form.	
vi.	To attach the scanned copy of the Authority Letter.	
vii.	Click on submit button once the details have been filled.	The Entity User would be entirely responsible for the data entered in the Entity Master.
viii.	Message 'Record Saved Successfully' will pop up indicating that the user ID has been created	
Action Required		
Step 2:	**RBI Approval** **Observation**	
i.	Upon submission of the entity user registration form, RBI will verify the authority letter.	
ii.	After RBI's approval, the Entity User will receive a password on his/her registered email ID from RBI's email ID "autoreply-fid@rbi.org.in", within 48 hours of submission.	
Step 3:	**Login and Password**	
i.	To change password, the Entity User needs to access https://firms.rbi.org.in/firms/faces/pages/login.xhtml	

ii.	After entering user name and password provided by RBI in the email, the Entity User should click login.	
iii.	'Change Password' window will open and the Entity User will be asked to changer his/her password upon first login.	
iv.	Entity User should enter the old password (provided by the RBI) in the Old Password Field and new password in the New Password Field.	
v.	The new password needs to be re-entered to confirm it.	
vi.	After that, the Entity User should click on 'continue'.	
Step 4:	**Logging on to Entity Master**	
i.	Entity User to enter the username and new password to gain access to Entity Master.	
Step 5:	**Entry in Entity Master**	**Observation**
i.	Upon successful login, the home page/dashboard will be displayed.	
ii.	Click on top-left option button to open Menu.	
iii.	Click on Master Set Up option in the Menu.	
iv.	Then click on Entity Master option.	
v.	Click on Add button so that the entity details page is displayed.	
vi.	Click on Entity Details tab and add the requisite details.	
vii.	Then click on Particulars tab and add the requisite details.	
viii.	Click on Foreign Investment in Company / LLP tab to add the required details.	
ix.	Click on Foreign Investment Info to enter details of all foreign investments received by the entity since the date of incorporation.	
x.	Once all issuances/transfers have been entered, the entity user must click the declaration check box to enable submission of the Entity Master.	All details must be provided in one go. Only after all mandatory fields have been filled and the declaration check box is ticked, the submit button will be enabled.
Step 6:	**Completion**	**Observation**
i.	Once the details of the entity have been submitted, it will be available on the Entity Master page.	

Conclusion

The SMF is expected to simplify and rationalise the reporting process under exchange control regulations and will be required to be filed as and when the entity enters into a foreign investment transaction. The proposed form also provides greater clarity as to the nature of transactions in relation to which the reporting requirements apply, and the documents that are required to be submitted at the time of reporting.

This is a positive step taken by RBI to boost foreign investor confidence. With introduction of entity master form, Indian companies will be compelled to maintain data in relation to foreign direct investment in a more organised manner. Indian entities not complying with the above requirements will not be able to receive foreign investment (including indirect foreign investment).

INTERIM RELIEF IN INDIAN ARBITRATION LANDSCAPE

With the intent of establishing arbitration as the preferred mode of dispute resolution, the Arbitration and Conciliation (Amendment) Act, 2015 (**"Amendment Act"**) was passed by Indian parliament to amend the Arbitration and Conciliation Act, 1996 (**"the Act"**; the Act, as amended by the Amendment Act, has been referred to as the **"Amended Act"**). The Amendment Act is widely regarded as a positive step by the legislature to remedy the blemishes prevalent in the domestic law of arbitration. Amongst several remarkable changes introduced through the new regime, the legislature has taken steps to streamline the process of seeking interim measures from the courts (under section 9 of the Amended Act) and the arbitral tribunal (under section 17 of the Amended Act).

- **Policy of minimal intervention of courts:** The Amendment Act has sought to rule out unnecessary intervention of courts during arbitral proceedings. In its effort to ensure that interim measures can only be granted if parties really intend to pursue arbitration, the legislature has inserted Section 9(2) in the Amended Act, which provides that in the event a petition is filed in courts to obtain interim relief prior to initiation of arbitration, the party filing such petition shall commence the arbitration within a period of 90 days from the date it has obtained an order of interim relief.

  The courts are now consciously referring applications filed under section 9 of the Amended Act to an arbitral tribunal under section 17 of the Amended Act, and as time is of essence, even appointing the arbitral tribunal with the consent of the parties at the stage of disposal of the application under section 9 of the Amended Act. Furthermore, as per the newly inserted Section 9(3) of the Amended Act, once an arbitral tribunal has been constituted, the court shall not entertain an application for interim relief unless it finds that the interim relief sought from the arbitral tribunal under Section 17 of the Amended Act would not be efficacious. This is a positive step and will enable the courts to intervene in a selective manner based on the particular facts and circumstances of a matter.

- **Applicability of Section 9 to international commercial arbitrations:** The well-known *Bharat Aluminium* judgment[7] had specifically disallowed the availability of provisions of Part I of the Act to foreign seated arbitrations. Since provisions pertaining to interim relief contained in Part I of the Act, this judgment adversely impacted the ability of a foreign party to get interim relief against an Indian party or assets located in India, in support of a foreign seated arbitration. In a significant move, Section 2(2) of the Amended Act has now extended the applicability of Section 9 (interim measures by court) to international commercial arbitrations seated outside India, unless expressly excluded by parties through an agreement.

- **Interim measures pending enforcement of foreign awards:** Through various recent judgments, courts in India have sought to embrace the pro-arbitration spirit of the Amended Act. The Bombay High Court in the case of *Aircon Beibars*[8], sought to ensure that the interests of foreign award holders are protected pending enforcement and has, by way of an order under Section 9 of the Amended Act, secured the amounts due from a judgment debtor under a foreign award pending enforcement of the award in India. Similarly, in *TRAMMO DMCC*[9] , the Bombay High Court allowed the holder of a foreign award to apply for interim relief in the court which enjoyed jurisdiction over the assets of the judgment debtor. The decision saves the award holder from the unnecessary hassle of deciding which court to approach, i.e. the court which enjoys jurisdiction over subject matter of arbitration or the court which enjoys jurisdiction over the location of the assets to be used for enforcement.

- **Powers of the arbitral tribunal to secure interim measures:** Prior to the Amendment Act, in the absence of any procedure to enforce an order passed under Section 17 of the un-amended Act, parties often sought intervention of the courts under Section 9 to effectively secure interim relief. The Amendment Act has now extended the powers of the court to grant interim measures (on matters set out under Section 9 of the Amended Act) to the arbitral tribunal. To fortify the powers of the tribunal, Section 17 has also been amended to provide that an order of interim relief from an arbitral tribunal shall be deemed to be an order of a court and shall be enforceable under the Code of Civil Procedure, 1908 (**"CPC"**), in the same manner as if it were an order of a court.

Reflecting upon the judicial landscape since the Amendment Act, we find that various High Courts have been forthcoming in upholding the interim reliefs granted by arbitral tribunals in view of Section 17(1) of the Amended Act.

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[7] *Bharat Aluminum Company Limited v. Kaiser Aluminum,* (2012) 9 SCC 552

[8] *Aircon Beibars FZE* v. *Heligo Charters Pvt. Ltd.*, 2017 SCC Online Bom 631

[9] *Trammo DMCC (formerly Known as Transammonia DMCC)* v. *Nagarjuna Fertilizers & Chemicals Ltd.*, 2017 SCC OnLine Bom 8676

In *NTPC Limited*[10] and *Delhi State,*[11] the Delhi High Court upheld the mandatory injunction granted by the tribunal. In *Lanco Infrastructure,*[12] the Delhi High Court took note of the tribunal's powers under the amended Section 17 to grant reliefs to secure amounts in disputes. In *Enercon GmbH,*[13] the Bombay High Court reiterated that an arbitral tribunal's power to grant interim relief is akin to that of courts. In its effort to adopt a pro-enforcement approach towards interim measures granted by arbitral tribunals, the Supreme Court in *Alka Chandewar*,[14] enforced an interim order granted by an arbitral tribunal under the pre-amendment Act. The court observed that a party's failure to comply with tribunal's interim order amounted to a contempt of its orders. Hence, courts in India are making significant efforts to embrace the spirit of the Amended Act.

On 7 March 2018, the Union Cabinet approved the proposed Arbitration and Conciliation (Amendment) Bill, 2018 (**"Bill"**). The Bill aims to amend the Act to improve institutional arbitrations in India by establishing an independent body to lay down standards, make the arbitration process more party friendly, cost effective, and ensure timely disposal of arbitration cases. Notably, the Bill has also proposed to amend Section 17(1) of the Amended Act to omit the words "or at any time after the making of the arbitral award but before it is enforced in accordance with section 36". If the proposed change is implemented, applications under section 17 of the Act will only be maintainable during the arbitral proceedings and not once the arbitration proceedings have been terminated in terms of sections 32 and 33 of the Act.

Emergency Arbitrations

While the legislature has made significant efforts to reduce the scope of the court's role in granting interim relief in relation to arbitrations, the Amendment Act has not codified a globally recognized concept of emergency arbitrations, which, under various institutional arbitration rules, can be approached for interim relief before the arbitral tribunal is appointed. This omission in recognizing emergency arbitrators and the awards granted by them is surprising, given that institutional arbitration rules in India provide for emergency arbitrations (for e.g. Mumbai Center for International Arbitration ("**MCIA**") Rules, 2016 and Indian Council for Arbitration Rules, 2005)

While Indian courts have granted interim reliefs in relation to foreign seated arbitrations under Section 9 of the Act, in cases of enforcement of interim reliefs awarded by the tribunal in a foreign seated emergency arbitration, for example in *Raffles Design*[15] and *Avitel*[16], the courts till date have ruled that eventually a suit may have to be filed in Indian courts for seeking enforcement of such awards, or the courts may consider granting similar interim relief as the emergency arbitrator, after scrutinizing the merits of the interim relief sought, under a separate Section 9 application filed in Indian courts.

Conclusion

The amendments introduced to the Act, coupled with the efforts of the Indian courts to follow the policy of minimal intervention in arbitral matters, is bolstering India's image as an arbitration friendly jurisdiction. While it remains to be seen whether the legislature will introduce emergency arbitrations in India, the legislative trend and judicial prudence are encouraging signs towards a healthier and expeditious arbitration environment in the country.

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[10] *NTPC Ltd.* v. *Jindal ITF Ltd. & Ors.*, 2017 SCC OnLine Del 11219

[11] *Delhi State Industrial & Infrastructure* v. *PNC Delhi Industrial Infra Private Ltd.*, ARB. A. (COMM.) 17/2017, Delhi High Court

[12] *Lanco Infrastructure Ltd.* v. *Hindustan Construction Co. Ltd.*, 2016 SCC OnLine Del 5365

[13] *Enercon GmbH* & Ors. v. *Yogesh Mehra & Ors.*, 2017 SCC OnLine Bom 1744

[14] *Alka Chandewar* v. *Shamshul Ishrar Khan*, 2017 SCC OnLine SC 758

[15] *Raffles Design International India Pvt. Ltd.* v. *Educomp Professional Education Ltd. & Ors.*, 2016 SCC OnLine Del 5521

[16] *HSBC PI Holdings (Mauritius) Ltd.* v. *Avitel Post Studioz Ltd. & Ors*, 2014 SCC OnLine Bom 102

DATA PRIVACY & PROTECTION: ANALYSING SRIKRISHNA COMMITTEE REPORT AGAINST INDIA'S WTO OBLIGATIONS

Coinciding with the widespread global debate on data protection laws and citizens' privacy rights, a report titled "*A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians*" **("Report")** authored by a Committee of Experts under the chairmanship of Justice B.N. Srikrishna, and the Personal Data Protection Bill of 2018 **("Draft Bill")** were submitted to the Government of India **("GOI")** on 27 July 2018. The Draft Bill is quite comprehensive in its scope and places stringent obligations on businesses. In particular, it provides for measures relating to protecting the personal information of Indian citizens, the role and duties of data fiduciaries and data processors, rights of individuals, and penalties for violation of these data protection measures.

This note does not touch upon the general impact of the data protection under the Draft Bill on cross-border data flow and thereby impact on international trade and e-commerce. Rather, the note aims to test the provisions of the Draft Bill against India's obligations under the World Trade Organisation ("WTO"). Specifically, the Draft Bill places certain restrictions on the cross-border flow of personal data:

- Section 40(1) introduces requirements for storing a copy of all personal data generated through servers and data centres in India within India
- Section 40(2) prohibits the cross-border flow of certain types of personal data which are to be categories as "critical personal data" by the Central Government per its discretion

Possible inconsistencies with WTO Rules

Generally speaking, the data localization requirements and prohibition on cross-border flow of critical personal data may be argued to be inconsistent with India's obligations under the WTO. Measures that regulate cross-border flows of personal data attract the provisions of the General Agreement on Trade in Services **("GATS")**, which governs international trade in services. Obstructions to the flow of personal data across borders may have direct implications on Mode 1 (cross-border services) and Mode 2 (consumption abroad). These restrictions and/or prohibitions in the cross-border flow of data: (i) *may* run afoul India's market access commitments, and (ii) *could* violate the national treatment requirements set out under the GATS since foreign service suppliers *may* be provided less favourable treatment compared to domestic service providers.

- **Market access:** Article XVI of the GATS provides that, *inter alia*, where a country has made market access commitments in its GATS schedule, then that country is prohibited from imposing limitations, through any means, on the number of service suppliers, unless the country has included such limitation in its GATS schedule. Section 40 (1) and Section 40 (2) of the Draft Bill could violate the market access commitments made by India in its GATS schedule. This is because these "measures" in the context of any supply of services provided in India could, in effect, limit the number of suppliers of that service in the Indian market. In other words, these provisions of the Draft Bill could limit access of foreign firms to India's market by conditioning market access upon the local storage and processing of data. Such measures have the effect of restricting or prohibiting flow of cross-border services supply since they would require foreign firms to, *inter alia*, replicate data storage infrastructure which adds costs for additional data management and compliance requirements. However, this analysis has to be made on a case-wise basis after assessing the commitments made by India under the relevant service sector.

- **National treatment:** The national treatment rule under the GATS applies to all sectors where specific commitments have been undertaken. These commitments prohibit WTO members such as India from discriminating in favour of their domestic companies. Specifically, Article XVII of the GATS makes an obligation on countries to accord services and service suppliers of other countries "treatment no less favourable than that it accords to its own like services and services suppliers." Article XVII:2 of the GATS specifies that a country may accord foreign services or service suppliers different treatment to achieve this objective. Article XVII:3 of the GATS defines treatment as "less favourable" if it "modifies the conditions of competition in favour of services or service suppliers of the Member."

  The national treatment obligation may come in the way of the data localization requirements under the Draft Bill. For instance, data localization requires foreign suppliers to duplicate infrastructure and support-service in local markets. As a result, it could be argued that the foreign service suppliers are accorded less favourable treatment than the domestic service suppliers. Notably, even if the same conditions of localization apply to national suppliers of *like* services or are "formally identical", it may be argued that they are still designed in a manner to alter the conditions in favour of *like* domestic service suppliers since they may not have to incur additional costs in replicating the infrastructure and support-service costs. Therefore, the possibility that such measures are viewed as "less favourable" under Article XVII of the GATS exists.

Again, this analysis has to be made on a case-wise basis after assessing the commitments made by India under the relevant service sector. For example, data localization requirements imposed by the Reserve Bank of India dated 6 April 2018 to Indian banks and authorized e-payment systems may not violate India's commitments at under the GATS. This is because India has made its commitments in financial services sectors subject to the requirements under its domestic laws through a horizontal exception. However, India has not provided for such a blanket exception in context of its commitments for other service sectors.

Possible arguments India may take

Should Indian formally adopt the data localization requirements, India could argue as follows in its defense:

- First, the prohibition on cross-border flow of critical personal data and more specifically the data localization requirement does not limit the number of service suppliers. In other words, any number of service supplier who complies with the above requirements may provide services in India;
- Second, the data localization requirement in itself do not accord less favourable treatment to a foreign service supplier as the requirement applies to even Indian service suppliers. If an Indian service supplier hitherto did not store data locally, it would need to do so as well and therefore, the measures as such do not accord less favourable treatment.
- Third, India could also take recourse to the "privacy" exception under Article XIV(c) of the GATS arguing that the measures are necessary to secure the protection of the privacy of individuals and are not arbitrary or unjustifiable discrimination. The privacy exception is untested by the Dispute Settlement Body of the WTO, and it remains to be seen how wide, or narrow this exception is interpreted.
- Fourth, India could also argue that the measures were required to protect its "essential security interests" in accordance with Article XIV bis. Based on this provision, WTO members may take actions in derogation of their obligations if such actions are taken for reasons specified for national security reasons. The recent instances of invoking the national security exception by certain WTO Members coupled with the fact that misuse of certain type of data may indeed represent a threat to national security could give India ground to justify its action, even if they may be in derogation to its commitments under the GATS.

Conclusion: What happens next?

The Draft Bill has generated huge interest and debate among various stakeholders including businesses, academia, citizen interest groups and think tanks. At one hand, the proponents of privacy rights are pushing for stringent data protection measures and on the other, the business argue that the increased costs of data protection compliance may make businesses unviable. Undoubtedly, the Bill is likely to undergo significant churning through debates and reviews and it remains to be seen how India draws a balance between these two competing interests.

INDIA UPDATES IT'S PRIMARY ANTI-CORRUPTION FRAMEWORK: KEY TAKEAWAYS

The Prevention of Corruption Act, 1988 (**"PC Act"**), which is the principal law in India that criminalizes corruption, has been in force for almost three decades. Of late, there has been a felt need for upgrading this law in order to stem the criticism regarding weak enforcement levels under PCA and bring legal provisions dealing with corruption in line with international standards. An additional impetus was provided by India's ratification of the United Nations Convention against Corruption (**"UNCAC"**) in May 2011, wherein the country had committed *inter alia* to strengthen its anti-corruption laws.

Given the above context, the Prevention of Corruption (Amendment) Bill, 2013 (**"the Bill"**) was first introduced in August 2013. The Bill was passed by both houses of the Parliament and the Prevention of Corruption (Amendment) Act, 2018 (**"Amendment Act"**) received presidential assent on 26th July 2018.

The Amendment Act brings about significant changes in the PC Act, which will come into force from such date as may be appointed by Central Government vide a notification. The PC Act was considered restrictive in its scope in comparison to the Foreign Corrupt Practice Act, 1977 (**"FCPA"**) of the United States of America and the UK Bribery Act, 2010 (**"UK Bribery Act"**) of United Kingdom, which are considered to be stringent anti-corruption laws. Vide the Amendment Act, the scope of the PC Act has been widened and the law has been brought on par with several aspects of these international anti-graft laws.

This note analyses many of the key provisions and examines their potential impact.

Key changes in PC Act

Giving of a bribe to a public servant to be an offence

- Giving of bribe by any person to a public servant for improper performance of public duty or to improperly perform a public duty, has specifically been made an offence. This also covers giving bribe to a 3rd person (intermediary) for inducing/rewarding a public servant for such purpose.
- While there was no specific provision earlier making 'giving of a bribe' an offence, and the bribe giver was only charged for abetment of the offence by the public servant. The amendments specifically address the supply side of corruption, thereby bringing this legislation in line with other international standards.
- The amendment further distinguishes between a collusive bribe giver and a coerced bribe giver. In the latter case, the person is not guilty of the offence, provided he reports the same to the enforcement agency/investigating authority within seven days of giving the bribe.
- Further, where a person gives a bribe to a public servant after informing the law enforcement agency/investigating agency to assist them in such investigation, it will not be an offence.

Offences by commercial organisations

- It will be an offence by the commercial organisation, where any person associated with such commercial organisation gives a bribe to a public servant with an intention to obtain/retain business/advantage in conduct of business for such commercial organisation. Such an offence will be punishable with a fine.
- A person said to be associated with a commercial organisation includes an employee, an agent or subsidiary of such organisation.
- A 'commercial organisation' has also been defined in a very broad manner to include all incorporated bodies, partnerships or association of persons, whether incorporated/formed in India, or, whether incorporated/formed outside India but carrying on business or part of business in India.
- Where the offence is committed with consent or connivance of any director, manager, secretary or any other officer of the organisation, such person shall be punishable with imprisonment for a term of not less than three years, which may extend to seven years and a fine.

- It shall be a defence for the commercial organisation to prove that it had in place adequate procedures in compliance with prescribed guidelines to prevent persons associated with it from undertaking any corrupt conduct.
- This is a positive development and places the onus on the organisations to set up a comprehensive, clear, practical and accessible anti-corruption compliance program in line with adequate procedures and guidelines to be prescribed by Central Government. Generally, such programs involve having anti-corruption compliance and ethics codes, training of employees, conducting third party audits, whistle-blower mechanism, monitoring mechanism, etc.

Condition of *Mens Rea* inserted for prosecution of public servant for criminal misconduct

- The definition of criminal misconduct has been replaced. A public servant will be said to have committed an offence of criminal misconduct only where the intention to enrich himself illicitly is proven.
- Earlier, there was no element of *mens rea,* or 'criminal intent' required as a threshold to initiate prosecution. Resultantly, bona fide decisions made by public servants were considered the same as mala fide ones. This protective provision will encourage honest public servants to take bona fide decisions without the fear of being prosecuted.

Pre-investigation approval and sanction for prosecution of public servant

- The police cannot conduct any inquiry or investigation in relation to an offence alleged to have been committed by a public servant without the prior approval of the relevant authority or Government. However, such prior approval is not required where the public servant is caught red-handed.
- This provision has attracted adverse scrutiny, given its potential for delaying investigation by the regulatory authorities against public servants.

Other key amendments

- Specific powers have been given to the Special Judge conducting a trial under the PCA to pass orders in relation to the attachment/confiscation of money or property procured by means of an offence under PCA.
- Trials under PCA are to be concluded within two years which can be extended by the Special Judge after recording reasons for such extension, provided that the trial should not extend beyond a period of four years.

Concluding remarks

The amendments to the PCA have brought far-reaching changes especially in order to contain the supply side of the corruption. There is clearly an onus on commercial organisations to have comprehensive internal anti-corruption compliance programmes in place, bringing the law in line with comparable international legislations.

WHAT GST HAS MEANT FOR INDIA'S E-COMMERCE SECTOR

Introduction

After more than a year of living with the Goods and Services Tax ("**GST**"), it is an opportune time to introspect the impact of this watershed reform one of the most significant and upcoming sectors of the economy. The e-commerce sector has witnessed significant growth spurts in recent times. It is reported that by 2022, the size of the digital economy in India will be approximately $ 1 trillion and, by 2030, it will constitute almost 50% of the entire Indian economy. Given the significance of this sector, its regulation, including through tax measures, deserves closer scrutiny and analysis.

The taxation of e-commerce sector poses peculiar challenges given the unique features and idiosyncrasies of this sector. The biggest of such challenges is the absence of any physical presence in the country, even though the commercial intercourse is routed through e-commerce platforms. Motivated by a desire to tax players of the digital economy, whether or not they have a physical presence in the local jurisdiction, many countries have been forced to devise distinct and unconventional regulations to attend to the unique features of the digital economy, such as the 3% Digital Tax introduced by European Union, the new GST rule to tax foreign Electronic Distribution Platforms introduced by Australia, or the overturning of the 25 year position by the United States Supreme Court in *South Dakota v. Wayfair, Inc., ET AL* to hold that there is no need for a business to have physical presence in the State to collect its sales tax.

GST on e-commerce

Following the emerging global trend, Government of India too has also recognized the need for a separate framework to tax e-commerce sector. Under GST, two concepts have been recognized relevant for the e-commerce sector: "Electronic Commerce Operator" ("**ECO**") and Online Information Data Access or Retrieval ("**OIDAR**") service providers. Separate scheme of taxation has been prescribed for these two concepts as under:

1	ECOs have been defined to cover "any person who owns, operates or manages digital or electronic facility or platform for electronic commerce." 'Electronic commerce' is defined as "the supply of goods or services or both, including digital products over digital or electronic network".
2	OIDAR services are defined to have three essentials: ▪ the services are mediated over the internet or electronic network; ▪ these involves minimal human intervention; and ▪ the services are impossible to be rendered in the absence of information technology.
3	The place of supply for both, i.e. services provided by ECOs and OIDAR services, is the location of the recipient. The taxation of these transactions is thus driven on the basis of where the recipient is located and is indifferent to where the supplier is placed.
4	Incrementally, ECOs also have the additional obligation in relation to Tax Collection at Source ("TCS") i.e. to collect tax at 1% of the net amount of taxable supplies made by the supplier (supplying through the ECO) and remit the same to the Indian government. As of now, the TCS provisions have been deferred till the end of September 2018.
5	In relation to the OIDAR services provided by persons located outside India, to government or individuals in relation to any non-business purposes ("B2C supplies"), the foreign OIDAR service provider becomes liable to discharge GST on such transactions under forward charge. In case of supplies made to a business entity ("B2B supplies"), the business entity in India is required to discharge GST on reverse charge basis.

The above scheme of taxation for the e-commerce sector is reflective of the clear disposition of the government to levy GST on digital economy transactions, irrespective of whether or not such suppliers have a physical presence in the country.

Challenges under GST for the E-commerce sector

The unique GST framework for e-commerce sector results in certain ambiguities and challenges, some of which are listed below:

- While ECO and OIDAR services ostensibly cover different players of the digital economy, as regards certain entities, including those providing platform services to suppliers of services, there seems to be an overlap in both the definitions. This presents ambiguity as regards requirement of registration as both an ECO and OIDAR service provider or only as one of the two.
- There is at present a compulsory requirement to obtain registration for ECOs and non-resident OIDAR service providers making B2C supplies. The requirement for compulsory registration proves to be onerous, especially for smaller ECOs. Fortunately, this difficultly for ECOs seems to be have been noted by the Government, and in terms of the proposed amendments to the GST legislations, small ECOs who are not required to collect tax at source can avail exemption from registration if they are below the *de minimis* threshold of INR 2 million.
- For ECOs, the requirement to obtain multiple registrations and multiple return filings in all States of operation in the country has proved to be onerous, requiring significant investment in terms of time and man hours. On the other hand, a facilitative regime exists for non-resident OIDAR service providers, who can obtain a single registration (in the State of Karnataka) for their pan-India operations.
- As and when TDS obligations are effectuated, the time when such tax is to be remitted by the ECOs to the government becomes relevant to be determined. It can either when the consideration is paid by the recipient to the ECO or when such consideration is remitted by the ECO to the supplier or when the actual supply is made by the supplier. On this issue, there are seemingly conflicting clarifications, which need to be streamlined.
- For certain notified services, (such as radio taxi services and accommodation services), the ECO is deemed to be the tax supplier and obligated to discharge 100% of the tax liability of the supplier (i.e. the radio cab driver or the accommodation supplier). For such services, there arises ambiguity as to how the ECO is required to fulfil certain procedural obligations attached to such deemed tax liability, including as regards issuance of tax invoice.
- The Indian GST legislation embodies an anti-profiteering provision, in terms of which entities are obligated to pass on benefit arising out of reduction in rate of tax or increase in tax credits to the ultimate customers. Recently, the e-commerce sector has also faced scrutiny from the National Anti-Profiteering Authority ("**NAA**"), which has in June, 2018 ordered for audit of major e-platforms to ascertain whether the e-platforms have collected excess GST from the buyers and not refunded the same after tax rate cut. It is thus imperative for e-commerce players to put in place a robust system to identify and refund excess tax collected from customers.

Draft E-commerce Policy: It has been recently reported that the Government has circulated a Draft E-commerce Policy for consultation purposes, which makes the below recommendations as regards GST on e-commerce sector:

- Simplification of the GST procedures for e-commerce by allowing a centralized registration instead of local registration and displaying requirement for each place of business
- The relevant GST provisions would be modified in order to create a level playing field between online and offline delivery of goods and services for the purpose of GST
- TCS provisions in GST which impose additional burden on small and medium enterprises would be re-examined
- Providing refund of GST for goods exported by courier would be considered
- The non-inclusion of certain services in the definition of OIDAR services would be reviewed

Concerns were raised on certain aspects of the draft policy, and at present, a fresh draft of the policy is being developed."

Conclusion

E-commerce players have to accept the reality of coverage under the distinct GST framework specified for them, (irrespective of their physical presence in the country), and, at the same time, deal with the ambiguities and challenges that emanate from this framework. Given its significance for the Indian economy, the e-commerce sector should be pro-active to make representations to the government to eliminate ambiguities and issues as regards their coverage under GST, given the unique nature of their operations.

TAX AND REGULATORY ISSUES DURING CROSS-BORDER MERGERS

As part of its reforms push, the Government of India has opened the doors for outbound, cross-border mergers and notified specific provisions in this regard. By way of background, only inbound mergers were permitted under the erstwhile corporate law framework[17] of the country; while the revised framework enabled outbound mergers, there remained a lot of uncertainty in terms of implementation steps. Recently the Reserve Bank of India (**"RBI"**) has notified the regulations pertaining to cross-border mergers thereby making such mergers a reality.

Regulatory developments in relation to cross border mergers

Companies Act, 2013: Section 234 of the Companies Act 2013, read with Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules 2016[18], lays down the provisions pertaining to cross border merger of Indian and foreign companies[19], subject to RBI approval.

Foreign Exchange Management Act, 1999: The RBI has recently issued the Foreign Exchange Management (Cross-border Merger) Regulations, 2018[20] (**"RBI Regulation"**) which grant a deemed approval from RBI if the outbound and inbound mergers fulfil the prescribed conditions. In all the other cases, the merger transactions would require prior RBI approval.

Regulatory considerations

- **Entity set up post-merger:** As per the Regulation 5(3) of the RBI Regulation, the office in India of the Indian company, pursuant to the sanction of scheme of cross-border merger, may be deemed to be a 'branch office' (**"BO"**) in India of the resulting company. Accordingly, the Indian operations of the foreign company would be considered a BO of the foreign company as per the prescribed regulations.

- **Permitted activities:** The FEMA regulations governing a BO[21] permit only restricted activities to be undertaken in India by a BO of a foreign company. The permitted activities for a BO are as under:

  - Export/import of goods
  - Rendering professional or consultancy services
  - Carrying out research work in which the parent company is engaged
  - Promoting technical or financial collaborations between Indian companies and parent or overseas group company
  - Representing the parent company in India and acting as buying/ selling agent in India
  - Rendering services in Information Technology and development of software in India
  - Rendering technical support to the products supplied by parent/group companies
  - Representing a foreign airline/shipping company

  Due to this restriction, it is important for foreign companies to first factor the extent of operations which are being undertaken in India, as some of the operations/businesses activities may not be permitted post-merger (for instance, manufacturing activities).

[17] The Companies Act, 1956
[18] Notified with effect from 13 April, 2017
[19] Incorporated in specified jurisdictions
[20] Foreign FEMA 389/2018-RB dated 20 March, 2018
[21] Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016

Tax considerations

- **Capital Gains tax:** Under the Income Tax Act, 1961 (**"IT Act"**), in the case of inbound mergers where the resulting company is an Indian company, the provisions under Section 47(vi) and Section 47(vii) of the IT Act specifically exempt the transfer of a capital asset in a scheme of amalgamation from the ambit of levy of capital gains tax, subject to fulfilment of stipulated conditions. As far as outbound mergers are concerned, where the resulting company is a foreign company, no such tax exemption has been provided for. Hence, any transfer of capital assets from an Indian company to a foreign company in a scheme of outbound merger may attract capital gains tax both in the hands of the foreign company and the hands of the shareholders on the consideration received by them.

  Even the implications of Section 56(2)(x) of the IT Act, which prescribes taxation in the hands of the recipient if the transaction is undertaken at less than fair market value, will play a key role in the analysis of taxability of outbound mergers. This is because these provisions only exclude transactions which are squarely exempted from transfer under Section 47(vi) and Section 47(vii) of the IT Act, as outbound mergers are not covered under these provisions as of now. Having said this, in certain specific scenarios (for instance, bilateral tax treaties), it may be arguable that outbound merger also does not attract income tax.

- **Permanent Establishment ("PE") of foreign company in India:** A PE is a fixed place of business through which the foreign enterprise wholly or partly carries out its business in India. A PE includes, amongst others, a branch, office, a place of management, etc. Thus, if the resulting foreign company post-merger continues its operations through its BO in India, then the resulting foreign company could be construed to have a taxable presence in India and the profits attributable to the PE could be taxed at a higher rate of 40%[22] as against the rate of 25%/30%[23] pre-merger.

- **General Anti-Avoidance Rule ("GAAR"):** GAAR provisions under the IT Act provide for treating an arrangement as an impermissible avoidance arrangement if the main purpose of such arrangement is to obtain a tax benefit. A scheme which is approved by a judicial authority (such as the National Company Law Tribunal) may less likely be challenged by the tax authorities.

  This has even been clarified by Central Board of Direct Taxes through the clarification[24] issued for implementation of GAAR provisions that these provisions may not apply where the tax implications have been adequately considered while sanctioning the approval to the scheme. However, a certain element of risk remains and the transaction may not be completely free from challenge from tax authorities.

Conclusion

In light of the specific regulations governing cross-border mergers, foreign companies should objectively evaluate and consider all available options for consolidation of operations or internal restructuring. Even from a profit repatriation perspective, cross-border merger could be a mechanism in addition to issuance of dividend, buy-back of shares, winding up, etc.

While the notification of relevant guidelines by RBI is indeed a positive step, we believe that the Government will bring in more clarity on the treatment of outbound mergers in the tax law, which will bring much needed certainty and mitigate future litigation on this front.

[22] Excluding surcharge and cess

[23] Supra 7

[24] Circular 7 of 2017 dated 27 January, 2017

DEFENCE & AEROSPACE: LATEST STEPS TO PROMOTE DOMESTIC MANUFACTURING

Achieving a modicum of self-reliance in defence production and creating a sustainable domestic capacity have been long-standing objectives of the Government of India. Ever since the first iteration of Defence Procurement Procedure (**"DPP"**) was introduced in 2008, the government has been fine-tuning the policy contours to accommodate views of different stakeholders even while attempting to balance national security considerations with commercial interests of private sector companies.

Since the beginning of 2018, a spate of new policies and notifications have been issued with the aim of facilitating indigenous product development and streamlining private sector participation in the country's defence & aerospace sector. Few of the recent developments are discussed below.

Trusted STA-1 Trade Partner status from USA for sensitive products

In a significant boost to the country's defence sector aspirations, India recently entered the Wassenaar Group and also received STA-1 status from USA (by way of relaxing a key condition set by the Obama Administration that India would be eligible only after it had secured the membership of all four technology control regimes — the Nuclear Suppliers Group, the Missile Technology Control Regime, the Wassenaar Arrangement and the Australia Group). Subject to certain changes to US export regulations, these developments will enable India to acquire single comprehensive project licenses from various relevant licensing authorities for any dual-use or sensitive product imports, instead of stage-wise authorisation for different project stages.

The STA-1 status reaffirms that there is mutual trust between India and the USA regarding trade in sensitive products. This categorisation benefits both private and public entities and sets a presumption of in-principle approval for any projects underwritten by governments of both sides. From the industry's perspective, these developments will help reduce the red tape significantly. As an illustration, any license sought by India in this category will move through the applicable process and any authority/agency will now have to actively intervene to stop the approval process, as against the earlier requirement of seeking specific approvals at every point. This also provides an opportunity for India to focus on dual-use technologies, including sensitive products meant for defence - a promising growth area.

Strategic Partnership Model approved by Defence Acquisition Council (DAC)

The DAC recently approved implementation guidelines for the Strategic Partnership Model, which seeks to progressively build indigenous capabilities in the private sector to design, develop and manufacture complex weapon systems. This model has four segments – submarines, single engine fighter aircraft, helicopters and armoured carriers/main battle tanks – which will be specifically opened up for the private sector. One Indian private company will be selected in each segment for tying up with shortlisted global equipment manufacturers to produce equipment in India through technology transfer under the aegis of 'Make in India'.

While the announcement of this model was greeted with guarded enthusiasm by the industry, questions arose regarding certain specific aspects. The implementation guidelines seek to alleviate such concerns and streamline the entire process by reducing timelines, emphasising on incentivisation of transfer of niche technology and higher indigenous content, etc. The first program to be issued under Strategic Partnership is likely to be procurement of Naval Utility Helicopters for which the platform-specific guidelines have already been approved by the DAC.

Products notified under purchase preference from DPSUs

In order to give a push to domestic products, Government of India had issued an Order in June 2017 to give preference to 'Make in India' for all public procurements. The order stipulates that a purchase preference is to be given to a domestic vendor if there are competing bids from a foreign vendor (margin of purchase preference has been prescribed as 20%). Accordingly, all ministries, including defence, had to come up with the list of products in which the preference to domestic products will be given, after which Department of Defence Production and Department of Industrial Policy and Promotion have notified the products that would get purchase preference in Government procurements. These include:

Shipyards such as HSL, MDL, GRSE & GSL	➡	Procurement of items for submarines and the surface ship
Bharat Dynamics Limited	➡	Procurement of items related to Project Akash, Konkurs-M & Invars
Bharat Earth Movers Limited	➡	Procurement of 41 items such as Gear Shift Booster, Clutch Shaft, Injection Valve, Air Heater etc.
Hindustan Aeronautics Limited	➡	Procurement of Avionics, Aerospace Standard Electrical Systems & Parts, Aerospace Standard Mechanical Systems etc.
MIDHANI	➡	Design, Manufacturing, Supply, Erection and Commissioning of Furnaces & Capital equipment such as Rolling Mills, Press, Hammers etc.
Bharat Electronics Limited	➡	Procurement of items such as Interference Filter, Damper Vibration, Feeder Units etc.
OFB's	➡	HEF at Khadki, GCF at Jabalpur, CFA, Aruvankadu and HVF, Avadi
Other items for public procurement	➡	Sea Water Pumps, Torpedo Handling Trolley, Main Diesel Engine, Avionics, Integrated bridge systems (IBS), Ceiling Panels, Wiper System, Wind Screen Glass for Metro Cars, Electric Motors

It is expected that the Government will augment this list in the coming months. As more products get added to the list, the opportunity for Indian private industry will be immense and Foreign OEMs will also need to factor this change in policy in their strategy (esp. in cases of technology transfer and offsets) to sell to DPSUs and MoD.

Defence India start-up challenge

The Defence Minister, Nirmala Sitharaman, launched the Defence India Start up Challenge on 4th August 2018 in Bengaluru, in partnership with Atal Innovation Mission, aimed at supporting Start-ups/MSMEs/Innovators to create prototypes and/or commercialize products/solutions in the area of National Defence and Security.

Who can apply:

- Start-ups, as defined and recognized by Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India
- Any Indian company incorporated under the Companies Act 1956/2013, primarily a Micro, Small and Medium Enterprises (MSME) as defined in the MSME Act, 2006
- Individual innovators are also encouraged to apply (research & academic institutions are also included)

Key incentives: The selected applications will be funded up to Rs. 1.5 crores in the form of equity/other relevant structures. The funds will be disbursed in tranches based on the milestones decided by a high-powered selection committee. Apart from the fund, selected applicants may also be given entry to accelerator programs, where they will be supported in technology and business development through mentorship under innovation and entrepreneurship experts. The selected applicants may also be supported in terms of access to defence testing facilities and experts for their product/technology development.

Conclusion

While these initiatives are a step in the right direction, one surely hopes that Strategic Partnership (SP) will see the light of the day and the procurements under this category will be expedited. The due diligence process involved in the SP model is similar to MAKE-I and RUR and Government needs to implement the lessons learnt and not re-start from scratch. The need of the hour is on-the-ground action in terms of actual procurement and not just policies. A positive step towards this is the notification of products to be purchased by the DPSUs under purchase preference order dated 15th June 2017 of the Government. However, this list needs to be expanded exponentially. India's status as a Trusted STA-1 Trade Partner opens up a plethora of opportunities with the US companies, esp. in the SP model being promulgated by the Government. All that is needed is a tangible opportunity for the industry to design, develop and deliver.

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