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EYE ON INDIA

A Cyril Amarchand Mangaldas Thought Leadership Publication

5th EDITION

(Volume II)

II

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CONTENTS

01 CORPORATE FRAUD AND WHITE-COLLAR CRIMES 08
KEY ISSUES AND DEVELOPMENTS WITH A FOCUS ON INSIDER TRADING

02 ENABLING AN EMERGING DIGITAL INDIA
REGULATIONS FOR AI AND WEB 3.0 16

03 RECENT DEVELOPMENT IN THE INDIAN DISPUTE RESOLUTION SPACE 24

04 DATA PROTECTION AND PRIVACY IN INDIA 30

05 CRYPTO-ASSETS IN INDIA 36

06 DIVESTMENTS IN INDIA
M&A OPPORTUNITIES FOR GLOBAL INVESTORS (DIVESTMENT, PRIVATISATION AND ASSET MONETISATION) 44

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07 OVERVIEW OF IFSC, GIFT CITY
THE DEVELOPMENT, EVOLUTION, AND
THE GRADUAL AWAKENING 50

08 INSOLVENCY AND BANKRUPTCY CODE 2016
BEYOND THE CODE 58

09 DECRIMINALISATION AND TRANSPARENCY
IN TAX FILINGS 66

10 ENERGY TRANSITION IN INDIA
RENEWABLES AND MORE 74

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01

CORPORATE FRAUD AND WHITE-COLLAR CRIMES

KEY ISSUES AND DEVELOPMENTS WITH A FOCUS ON INSIDER TRADING

This article seeks to analyse key issues and recent developments that have arisen in relation to corporate fraud and White-Collar Crimes in India, especially as regards coercive steps taken during investigations such as issuance of Lookout Circulars and freezing of assets. The article further seeks to identify the recent developments on the treatment of insider trading under the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015.

Actions taken by Investigative Agencies during Investigations

As per the National Crime Records Bureau, Ministry of Home Affairs, Government of India, registered cases under the economic offences category jumped 19.4% to 1,74,013 in 2021 from 1,45,754 cases[1] in 2020.

1. https://ncrb.gov.in/sites/default/files/CII-2021/CII_2021Volume%201.pdf

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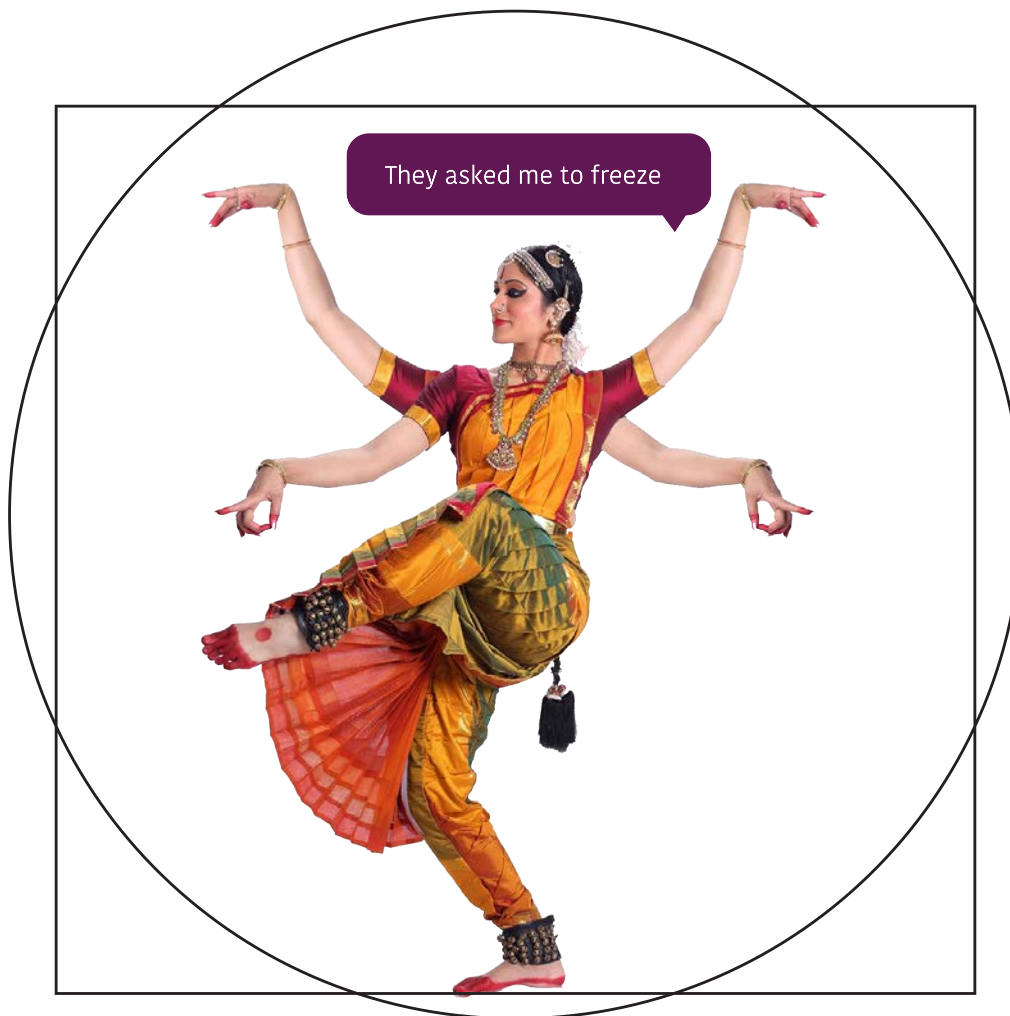
During any criminal investigation, law enforcement agencies may take various actions including coercive measures against the accused. These involve arrest, attachment of property, search and seizure, requisition of information, etc. They can even exercise their power to (i) freeze assets and (ii) issue a Lookout Circular (**LOC**). However, such actions can blur the lines between lawful investigative measures and possible violation of personal liberties, making it difficult to discern the boundaries.

FREEZING OF MOVABLE ASSETS

A common tool during investigations into White-Collar Crimes or Corporate Frauds is freezing of movable property. Such movable property may include bank accounts, shares, mutual funds, etc. Freezing of bank accounts is the most pervasive/common action since the proceeds are sought to be made from an offence. The rationale is to prevent recipients of moneys from alienating funds that are suspected to be involved in the commission of a crime.

Investigative authorities are empowered under Section 102 of the Code of Criminal Procedure, 1973 (**CrPC**) to seize certain property. In this regard, Section 102(1) allows a police officer to seize any property that is alleged or suspected to have been stolen or found under circumstances, which create suspicion of the commission of an offence. The Supreme Court opined that a bank account constitutes 'property' within the meaning of Section 102(1) CrPC.[2]

Further, as per Section 102(3) of the CrPC, the investigative authority is required to report the freezing to the concerned Magistrate forthwith and where the continued freezing is not necessary, the Magistrate may de-freeze the account on executing a bond of the said sum.[3] The non-reporting of the freezing to the concerned Magistrate has been considered to be fatal for such action.[4]



2. State of Maharashtra v. Tapas D Neogy, (1999) 7 SCC 685 at para 12.
3. R Chandrasekar v. Inspector of Police, 2002 (5) CTC 598.
4. Manish Khandelwal v. State of Maharashtra, 2019 SCC OnLine Bom 1412 at paras 26, 27.

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REMEDIES AGAINST FREEZING OF BANK ACCOUNTS

The act of freezing bank accounts can lead to serious consequences for the account holder and deprive individuals, and juristic persons, from accessing funds for day-to-day operations, resulting in commercial losses. It is, therefore, crucial to discuss remedies available to an account holder against such freezing. In such a scenario, the holder may approach the competent Magistrate if the investigative authority has reported the freezing to the Magistrate under Section 457 of the CrPC. However, if the Magistrate has not been informed of the freezing (as is required), a Writ Petition can be filed before the High Court directly[5] to challenge the act of freezing,

Crucially, Courts have also held that the Police possess the authority to seize not only the assets of an accused but also of his relatives or any other persons who could be linked to the property in question. The sole requirement for the investigative agencies is to show that the frozen accounts raise reasonable suspicion about the commission of an offence.[6]

RECENT TRENDS

A recent trend has emerged wherein investigating agencies are employing Section 91 of the CrPC to issue notices to freeze bank accounts. The said Section pertains to the power to issue '*summons to produce document or other thing*' necessary for investigation, inquiry, trial, or other proceedings, but does not authorise a police officer to seize property and freeze bank accounts.

Nonetheless, police officers are increasingly issuing freezing orders under Section 91 of the CrPC, which avoids the rigours of Section 102(3) of the CrPC that mandate reporting such freezing to a Magistrate. Despite being subversive of the scheme under the CrPC, such actions essentially coerce account holders into submitting to the investigation, while compelling banks to restrict access to such accounts.

Recently, Section 91 of the CrPC has come under the scrutiny of various Courts (such as the High Courts of Uttarakhand[7], Delhi[8], and Guwahati[9]), which not only clarified that the said Section cannot be employed to freeze bank accounts but also ordered the release of such frozen bank accounts. It has been clarified that, "*[...] from a reading of Section 91, it is evident that while a police officer certainly has the power to direct*

5. Madhu K v. Sub-Inspector of Police, 2020 SCC OnLine Ker 3589; South Indian Chamber of Commerce v. MC Alex, 2020 SCC OnLine Ker 16814; Nevada Properties v. State of Maharashtra, (2019) 20 SCC 119 at para 25.
6. Adarsh Co-operative Housing Society v. Union of India, 2011 SCC OnLine 974 at para 24.
7. Mohd. Rizwan Ansari v. State of Uttarakhand, Writ Petition (M/S) No. 699 of 2021.
8. V Plus Technology (P) Ltd v. State (NCT of Delhi, 2022 SCC OnLine Del 1223 at para 10.
9. Rahul HI Rise v. State of Assam, 2018 SCC OnLine Gau 2204 at para 28.

production of any document or other thing necessary or desirable for the purpose of any investigation or enquiry, this provision cannot be invoked for seizure of bank account as no such power has been conferred on a police officer under the said Section."[10]

This development is principled and consistent with the statutory scheme and authorities are necessarily required to report the seizure to Magistrates under Section 102(3) of the CrPC. This clarification is especially significant in the context of White-Collar Crimes as account holders will also be able to file applications before the Magistrate seeking to furnish a bond of the sum equivalent to the amount in the offence, and thereby access the funds in the bank account.

Issuance of LOCs in White Collar Crimes

In addition to the above, investigating agencies have also increasingly been issuing LOCs during investigations to prevent accused persons from travelling out of India. The issuance of such LOCs is nuanced, and several such issues arise in this regard that merit this analysis.

BACKGROUND TO LOCs

LOCs have no specific legal definition, though the statutory sanction for their issuance can be traced to Section 10A and 10B of the Passports Act, 1967.[11] The guidelines pertaining to issuance of LOCs are set out in the Office Memorandum issued by the Ministry of Home Affairs, Government of India on October 27, 2010, as amended from time to time. The latest office memorandum that is presently operative was issued on February 22, 2021 (**Memorandum**).

At the outset, the requests for issuance of an LOC must be made only in cases of cognisable offences, to the Deputy Director, Bureau of Immigration, accompanied with the approval of an investigating officer not below a specified rank, as stipulated therein, or pursuant to the directions of a court.

10. Id.
11. Harshavardhana Rao K v. Union of India, Writ Petition No. 12185 of 2022.
12. Karti P. Chidambaram v. Bureau of Immigration, 2018 SCC OnLine Mad 2229 at para 74.
13. Sumer Singh Salkan v. Asstt. Director, ILR (2010) VI Delhi 706 at para 11.
14. Rana Ayyub v. Union of India, 2022 SCC OnLine Del 961 at para 12; see also, Sumer Singh Salkan v. Asstt. Director, ILR (2010) VI Delhi 706 at para 11.

SETTING ASIDE OF LOCs BY COURTS AND PERMISSION TO TRAVEL ABROAD

As LOCs are not part of a penal statute/criminal law, individuals can only challenge their issuance under Section 482 of the CrPC or by moving the concerned High Court under Article 226 of the Constitution. . The Madras High Court has unequivocally held that an LOC as a coercive measure violates personal freedom of movement and liberty. Accordingly, in exercise of the power of judicial review, a writ Court can review and intervene in the issuance of an LOC.[12] Further, the person can also approach the officer that ordered the issuance of LOC and prove it was wrongly issued.[13]

Courts have also set aside LOCs in cases when it has been observed that the necessary precondition for the same have not been followed. For instance, in *Rana Ayyub*[14], the Petitioner was prevented from travelling abroad to London to attend an event. The said LOC was issued in respect of the allegations that the Petitioner misappropriated funds collected in the name of relief work. However, the Delhi High Court, while setting aside the LOC, held that it has to be issued in cases '*where the accused is deliberately evading summons/ arrest or where such person fails to appear in a Court despite a non-bailable warrant*'. Further, the Court ruled that the Petitioner had appeared before the investigative agency on each and every date when summoned and, therefore, no case was made out for issuing the LOC.

COPY OF LOCs AND NOTICE

A hotly contested issue is whether the subject of the LOC should a be given notice prior to its issuance or be granted a post-decisional hearing of the same. Subjects of LOCs are often made aware of such an issuance only at the time of egress resulting in grave personal hardships. In this regard, in a recent case, the High Court of Punjab and Haryana had held that a copy of the LOC has to be served along with the reasons for issuing it to the person as soon as possible and also provide a post decisional opportunity to the individual. Further, the Court read these guidelines into the Memorandum.[15]

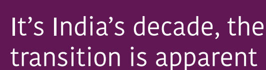
However, this direction of providing a copy of the LOC and a post decisional hearing was stayed by the Supreme Court and the matter is presently *sub-judice*.[16] The decision of the Supreme Court on the same would determine the course going forward on the manner in which LOCs may be used by such investigative agencies.

Insider Trading

UNDERSTANDING INSIDER TRADING

Insider trading or insider dealing is an unlawful malpractice that involves the usage of non-public or confidential information by an insider of a company to trade in the securities and shares of the company resulting in substantial loss to the general public traders whilst the insider benefits considerably owing to the exploitation of the non-public information.

In India, Insider trading is prohibited by the Securities and Exchange Board of India Act, 1992 (**SEBI Act**) and the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 and its subsequent amendments (**SEBI PIT Regulations**), and these laws do not provide explicit definition of the term. Nonetheless, the scope of the provisions dealing with insider and price sensitive information, has been widened over time. The SEBI Act and the SEBI



15. Noor Paul v. Union of India, CWP – 5492 – 2022 (O&M) at para 78.
16. Bank of India v. Noor Paul, Petition for Special Leave to Appeal No. 7733 of 2022, order dated May 5, 2022

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PIT Regulations have also been silent on the element of *mens rea*, necessary for convicting an insider for the crime of insider trading.

The maxim, '*Actus non facit reum nisi mens sit rea*', serves as a fundamental tenet of criminal law and states that to impose criminal liability upon the wrongdoer, the criminal or the wrongful act must be coupled with the guilty mind or guilty intention to commit the alleged offence. The application of this maxim relating to insider trading has been nebulous and courts have taken varying stances over time.

A hotly contested issue is whether the subject of the LOC should a be given notice prior to its issuance or be granted a post-decisional hearing of the same.

EVOLUTION OF THE MENS REA REQUIREMENT IN INSIDER TRADING OFFENCES

A bare reading of the SEBI Act indicates that it does not necessitate *mens rea* as a crucial element in establishing liability for insider trading and a person may be held liable even in the absence of knowledge. Similarly, the SEBI PIT Regulations does not mandate any knowledge, motive, or intention for the crime of insider trading.

Let's evaluate a couple of the initial landmark cases of insider trading before the Securities Appellate Tribunal (**SAT**), In the case of *Hindustan Lever Limited v. SEBI*,[17] the company had purchased 800,000 shares of Brooke Bond Lipton India Limited from Unit Trust of India before announcing its merger with Brooke Bond. It contended that a mere possession of knowledge is not a prohibition on acting upon the information and the action of insider trading serving to accrue some benefit, advantage or profit or avoid a loss must be shown, but the SAT rejected this contention and held that there was a misuse of fiduciary capacity. It held that under Regulation 3(1) of the SEBI PIT Regulations, there was no need for any requirement to gain any profit or avoid any loss.

In *DSQ Holdings Limited v. SEBI*, [18] the regulator rejected the corporate entity's contention that it had not traded on the basis of inside information but that the unpublished price sensitive information (**UPSI**) was used for corporate benefit, which did not amount to the breach of the SEBI PIT Regulations. SEBI rejected this contention and held that a corporate insider must abstain from dealing in securities in which he has insider information. It held that dealing in securities is the mere act of buying/ selling or agreeing to buy/ sell or deal in any security by any person as principal/ agent on the basis of UPSI is covered and is made an offence under Regulation 3 and profit motive is not a mandatory ingredient.

In *Cabot International Capital Corp*,[19] the Bombay High Court explained that the liability under the SEBI Act and SEBI PIT Regulations pertains to breach or default of statutory obligations. It held that *mens rea* is essential for establishing criminal liability; but since civil obligations are also present, the element of *mens rea* is not critical. The penalty under Section 15G of the SEBI Act and the SEBI PIT Regulations is not criminal or even quasi criminal in nature as the scheme and the provisions of the SEBI PIT Regulations and this Section do not contemplate any criminal offence or criminal proceedings. The Court, however, remarked that each case must be decided upon the exercise of judicial discretion but proceeding on the ground that *mens rea is a sine qua non* for every case under the SEBI Act is invalid and erroneous.

The Supreme Court of India, in *Shriram Mutual Fund*,[20] specifically stated that the criminal offence and punishments are covered under Section 24 of the SEBI Act and not under Chapter VI-A where provisions 15A to 15HB are contained. Therefore, liability is established as soon as there is a contravention of the provisions laid down in the SEBI Act and the SEBI PIT Regulations. It held that there is no requirement to prove the presence or absence of *mens rea* whenever there is a violation of the provisions of a civil act.

In *Rakesh Agarwal v. SEBI*,[21] the SAT took a differing view, contending that although *mens rea* was not explicitly enumerated as an ingredient of insider trading, it does not mean disregarding the motives altogether. It held that if the regulation is read in light of the act's objective, it becomes evident that that

17. Hindustan Lever Limited v. SEBI 1998 (18) SCL 311 (AA)
18. Order passed against DSQ Holdings Ltd Under Regulation 11 Of SEBI (Insider Trading) Regulations, 1992 read with Section 11 of the Securities and Exchange Board of India Act, 1992, dated Feb 28, 2003, SEBI.
19. SEBI v. Cabot International Capital Corpn., 2004 SCC OnLine Bom 180.
20. Chairman, SEBI v. Shriram Mutual Fund, (2006) 5 SCC 361.
21. Rakesh Agarwal v. SEBI, (2004) 49 SCL 351 (SAT).

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motive is built in, and renders insider trading non-punishable/non-culpable without first establishing the motive. Therefore, the charge of insider trading warranting penalty cannot be sustained against a person who had indulged in insider trading with no intention of gaining any unfair advantage.

CURRENT LEGAL POSITION

Amid a shift in the understanding of *mens rea* in adjudicating insider trading allegations, as seen in the *Rakesh Agarwal case*, the Supreme Court of India and the SAT have issued two recent judgments that firmly established a clear legal position concerning the role of *mens rea* in relation to insider trading.

SEBI V. ABHIJIT RAJAN [22]

In this case, the Respondent, was the Chairman and Managing Director of Gammon Infrastructure Projects Limited (**GIPL**). GIPL entered into two shareholder agreements with Simplex Infrastructure Limited (**SIL**), whereby they mutually invested in each other's projects. Subsequently, the Board of Directors of GIPL passed a resolution for authorising the termination of both the agreements. Soon after this, the respondent sold roughly 144 lakh shares held by him in GIPL, for an estimated value of INR 10.28 crore. The case reached the Supreme Court on appeal and the questions before it were:

a. whether the information of termination by the Board of Directors of GIPL can be characterised as 'price sensitive information'

b. whether the sale by the respondent amounted to 'insider trading'.

The SC noted that there had been a considerable expansion of the word '*unpublished*' and the '*price sensitive information*' to include substantial changes in the policy, plans and operations of the company concerned. The Court noted the scope of Explanation (vii) under Regulation 2(ha) of SEBI PIT Regulations and held that a person seeking to benefit out of this price sensitive information would not have made a sale when the prices increased or bought shares when the prices dropped. It held that the lower court had erred in holding that the respondent's directorial position in the company automatically qualified him an insider and consequently, his action of selling was deemed to constitute insider trading. For insider trading, the element of profit motive must be present. Actual gain or loss is irrelevant, but the driving force should be an intention to attain profit. To establish insider trading, it was necessary that an evident advantage must have accrued based on the sensitive price. After the disclosure, it transpired that the share prices of the company had risen subsequent to the sale of shares by the respondent. Thus, his action of selling the shares beforehand served him no purpose, and proved to be disadvantageous to his interests. Therefore, although the information was price sensitive as its publication did directly and materially affect the price of the securities, the offense of insider trading requires benefitting from the price sensitive information.

QUANTUM SECURITIES PVT LTD V. SEBI

In Quantum Securities Pvt Ltd v. SEBI,[23] the Appellant Sanjay Dutt was advisor to the NDTV group and responsible for the corporate finance and strategic planning function of the broadcasting entity during the relevant period. Thus, he had reasonable access to the UPSI of NDTV. On receipt of complaints from NDTV of *insider trading*, SEBI discovered that Sanjay Dutt's brother, wife, and wife's sister, who were also appellants, had made a gain of INR 2.2 crore. The SEBI ordered all the appellants to disgorge the amount as it believed that Sanjay Dutt had communicated UPSI to the other appellants and all of them were held for dealing in NDTV shares.

Here, the question to be adjudicated upon was whether there was any insider trading or not? The SAT concluded that SEBI's decision was based on the assumption that Sanjay Dutt, being an NDTV advisor, had divulged UPSI and engaged in insider trading. Whilst referring to the ratio in *Abhijit Rajan* case, the SAT, while deciding on the present case, reiterated the requirement to show that the trades conducted were motivated by UPSI. It is essential to demonstrate the specific and personal benefits accrued by undertaking trades on basis of UPSI. It held that the SEBI had failed to take into account the submissions showing that the trades were independent and uninfluenced by the UPSI, and the trading pattern only further bolstered this finding.

Thus, the evolving jurisprudence of *mens rea* in insider trading cases indicates a shift from absolute liability to consideration of factors such as the alleged insider's trading pattern, the direction of the person's trade vis-à-vis the nature of the UPSI and motive to make unlawful gains or avoid losses.

23. SEBI v. Abhijit Rajan, 2022 SCC OnLine SC 1241.
24. Quantum Securities Pvt Ltd v. SEBI, Appeal no. 49 of 2021.

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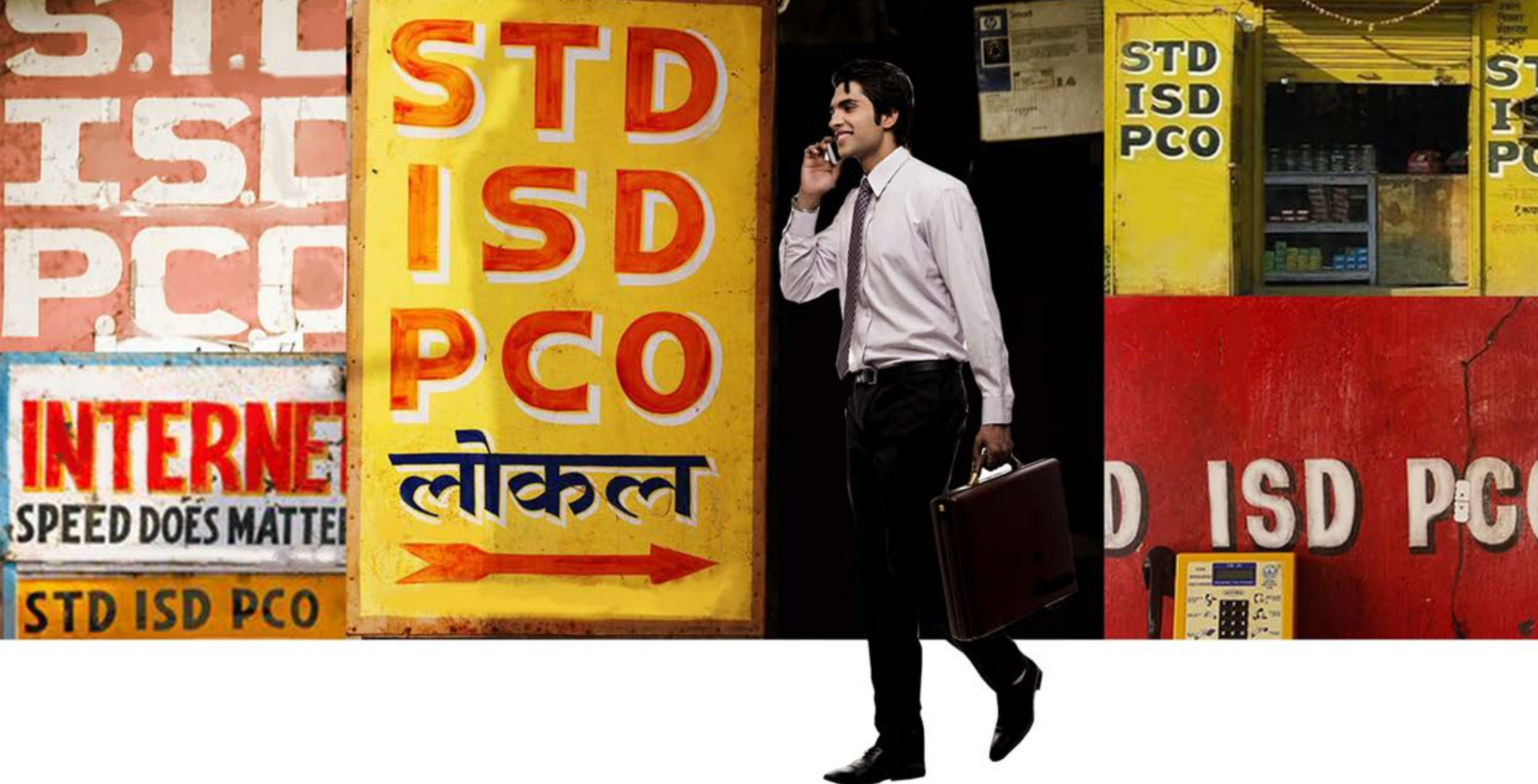
02

ENABLING AN EMERGING **DIGITAL INDIA**

REGULATIONS FOR AI AND WEB 3.0



Introduction

It is becoming increasingly apparent that India represents a bright spot in the global context economically, through its role as an alternative center for innovation, manufacturing, and global supply chains. Its unique "demographic dividend"[1], a novel set of widely accessible and adopted 'Digital Public Goods'[2], as well as innovation ecosystem, which extends from incubation to public exit, means that India's 'Techade'[3] is not only possible, but imminent.

Of essence to enabling this is the implementation of an effective and predictable set of regulation for key emerging technology such as artificial intelligence (**AI**) and WEB 3.0. In this Article, we will examine the state of current and proposed regulations and policy in this space, as well as some likely trends.

1. United Nations Population Fund, *Reaping India's demographic dividend*, January 13, 2022, available at https://india.unfpa.org/en/news/reaping-indias-demographic-dividend.
2. The Hindu, *India showing the way for the world with its dominance in digital public goods*: Nadella, January 5, 2023, available at https://www.thehindu.com/business/india-showing-way-for-the-world-with-its-dominance-in-digital-public-goods-nadella/article66342811.ece.
3. The Hindu, *India's dream of 'techade' will be fulfilled by innovators, their patents*: PM Modi, January 29, 2023, available at https://www.thehindu.com/news/national/indias-dream-of-techade-will-be-fulfilled-by-innovators-their-patents-pm-modi/article66446156.ece.

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The State of Affairs and a New Rule Book

Any examination of the regulatory framework surrounding technology in India must be cognizant of the current state of legislation, its dynamic regulatory environment, and some of the proposed radical changes.

Most of India's core legal framework regulating technology dates back decades[4] if not centuries[5], and has been typified by labyrinthine, voluminous rule making. Regulation and the enforcement environment have also been characterised by long periods of inactivity and lack of clarity, punctuated by bouts of ad hoc action, and long-standing regulatory disputes[6].

The sheer socio-economic and strategic importance of technology[7], as well as the winds of geopolitical conflict , have exposed the inadequacy of this framework and necessitated action, which has taken place on three fronts:

A. **Muscular Enforcement**: The immediate response was enforcement action, with an aggressive, "act first, deal with questions later" approach,[9] often stretching the reading of black letter law, and focusing on substance rather than form. Wide ranging investigations and enforcement action, anchored by a range of agencies across the Ministries of Home Affairs, Finance, Electronics and Information Technology and Information and Broadcasting, have become the norm.[10] While these actions have had widespread impact, several of them stand challenged before courts of law, which are typically loathe to interfere with regulatory actions, particularly when taken to support national security and public order goals. That said, it has become increasingly apparent that current frameworks, given the tenuous bases, are finding it difficult to support these types of actions, and consequently, two other sets of developments are taking place in parallel.

B. **Delegated Legislation**: The need for stronger bases for regulatory action has been supported, in the first instance, with a set of increasingly detailed rules made applicable to key parts of the information technology ecosystem in India. First of these were wide ranging expansion on the obligations of intermediaries. Intermediaries, still defined as entities which receive, store or transmit data on behalf of another person,[11] have long enjoyed minimal regulation and a safe harbor backed by an 'actual knowledge' standard, have found this increasingly eroded. Today, rules for regulation of intermediaries govern an increasingly diverse set of entities with varying significance and function, ranging from social media platforms, news and content publishers, and most recently operators of real money gaming platforms, each of whom are subject to an increasingly complex, granular and demanding due diligence, disclosure and takedown obligations. On the cybersecurity front as well, the Indian Computer Emergency Response Team (**CERT-In**), which was largely focused on critical and strategic systems and thought leadership, has found its role significantly expanded, with a detailed breach reporting framework requiring reporting of breaches in as little as 6 (six) hours and broad-based enforcement powers. Further, diverse entities ranging from data centres, virtual private server providers, cloud service providers, and virtual private network service providers to virtual asset service providers, virtual asset exchange provider and custodian wallet providers are being required to carry out KYC, and maintain extensive financial and other records for a period of 5 (five) years or longer, under the aegis of CERT-In.

These regulations evince the dynamism of India's legislative response to emerging technology trends, coupled with an aggressive set of enforcement actions, in the form of persistent

4. For example, the Information Technology Act, 2000.
5. For example, the Indian Telegraph Act, 1885.
6. The Economic Times, *Fears of regulatory overreach emerge as tech rules overlap*, April 11, 2023, available at https://economictimes.indiatimes.com/tech/technology/regulating-competition-issues-of-it-companies-experts-point-overlaps-in-laws/articleshow/99385169.cms.
7. Community by NASSCOM, *Information Technology and its Roles in India's Economic Development*, October 7, 2022, available at https://community.nasscom.in/communities/it-services/information-technology-and-its-role-indias-economic-development#:~:text=Information%20Technology%20not%20only%20contributed,%2C%20health%20services%2C%20etc.).
8. Harsh Pant & Aarshi Tirkey, *The 5G Question and India's Conundrum*, September 25, 2020, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7515818/; The Economic Times, *Technology is at the centre of national security policy of countries like China. What is India doing?*, February 2, 2023, available at https://economictimes.indiatimes.com/prime/economy-and-policy/technology-is-at-the-centre-of-national-security-policy-of-countries-like-china-what-is-india-doing/primearticleshow/97534508.cms.
9. Live Mint, *MeitY revokes ban orders on some digital lending apps*, February 10, 2023, available at https://www.livemint.com/news/india/meity-revokes-ban-orders-on-some-digital-lending-apps-11676019050662.html.
10. The Economic Times, *Three GACs to be led by MEITY, MIB and MHA*, March 1, 2023, available at https://economictimes.indiatimes.com/tech/technology/three-gacs-to-be-led-by-meity-mib-and-mha/articleshow/98316067.cms?from=mdr.
11. The Information Technology Act, 2000, Section 2(1)(w).

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banning of potentially harmful applications,[12] regulation on grey spaces such as online gaming,[13] and a hands-on approach towards prevalent issues across the internet such as fake news.[14]

C. **A New Rulebook**: It is well recognised that the above regulatory edifice is built on old bones, such as the intermediary safe harbour. With a view to enabling principles based regulation for an exploding digital economy, India is looking to a brand new stack of technology regulation, in three parts, the Digital Personal Data Protection Bill, 2022 (**DPDP Bill**), to regulate data privacy;[15] the proposed Digital India Act (**DIA**) to regulate intermediaries,[16] online harms and cybercrime; and the draft Indian Telecommunications Bill, 2022 (**Telecom Bill**), to regulate a broadly defined set of 'telecommunications services'.[17]

Nowhere is this convergence of technological trends and legislative and regulatory intervention clearer than in the areas of artificial intelligence and Web 3.0.

Artificial Intelligence

The emergence, and widespread public adoption of conversational, generational AI systems such as GPT 4.0 has led to unprecedented regulatory and business focus on artificial intelligence.

With large-scale adoption across all spheres, AI and its applications have created various legal and ethical concerns, including sensitive data protection/ security, privacy, transparency, equality, reliability, and accountability of these systems. NITI Aayog in its Discussion Paper on the National Strategy for Artificial Intelligence[18] has attempted to address these issues while acknowledging the transformative impact of AI across a wide spectrum of industries. The paper identifies points of intersection requiring affirmative action by the government, paving the way for India's AI adoption and tackling the forthcoming paradigm shift. Following are the recommendations:

Research and Application

Academic initiatives across all levels of educational institutions, setting up research centers via a public-private partnership, and a common cloud platform for Big Data analytics and assimilation with a large AI Computing infrastructure, connected across all institutions and research centers. Recommendations for setting up a separate IP regime for AI technology and supra-national collaboration were also made.

Reskilling and Training

Enabling the workforce from a student to professional level to be better equipped to handle and use AI, by introducing courses and training programmes. Incentives for private organisations can be introduced by creation of service sector jobs of the future such as data annotation through tax holidays, or inclusion in CSR activities and investment in training of employees through tax breaks and grants for employers.

12. CNBC TV 18, *Lazypay, KIssht, other prominent digital lenders face app & website ban in India in fresh crackdown*, February 8, 2023, available at: https://www.cnbctv18.com/technology/lazypay-digital-lending-apps-blocked-china-ties-security-concerns-meity-meeting-15869481.htm.
13. Times of India, *Government announces new rules for online gaming: What's banned and other details*, April 6, 2023, available at https://timesofindia.indiatimes.com/gadgets-news/government-announces-new-rules-for-online-gaming-whats-banned-and-other-details/articleshow/99302174.cms?from=mdr; Ministry of Electronics & Information Technology, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (updated 06.04.2023), available here.
14. The Economic Times, *MeitY notifies IT amendment rules: Govt-appointed fact-checker to identify fake news*, April 7, 2023, available at: https://economictimes.indiatimes.com/tech/technology/meity-notifies-it-amendment-rules-govt-appointed-fact-checker-to-identify-fake-news/articleshow/99305725.cms.
15. The draft Digital Personal Data Protection Bill, 2022 (**DPDP Bill**), available here.
16. The Hindu, *Explained | Highlights of the proposed Digital India Act, 2023*, March 18, 2023, available at: https://www.thehindu.com/news/national/explained-highlights-of-the-proposed-digital-india-act-2023/article66613508.ece.
17. The draft Indian Telecommunications Bill, 2022, available here.
18. NITI Aayog, *National Strategy for Artificial Intelligence, June 2018*, available at https://niti.gov.in/sites/default/files/2019-01/NationalStrategy-for-AI-Discussion-Paper.pdf

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Accelerating Adoption of AI

The adoption plan involves a multifaceted approach, including:

a. a data sharing platform for making datasets in the area of social sector, available for open public use in a machine readable form;
b. creating and making India specific annotated datasets public, annotation via crowdsourcing;
c. establishment of a data marketplace, data annotation marketplace and deployable model marketplace to increase collaboration and introducing multiple solutions deployment;
d. setting up an AI Database portal for easy dissemination of information on projects being implemented via collaboration among government-academia-industry-researchers-startups to enable resource matching; and
e. introducing awareness programmes, startup support, strategic partnerships and government/ PSU adoption programmes.

Responsible AI Development

Addressing ethics, privacy, security and various other issues by setting up ethics councils, implementing an appropriate data protection and privacy framework, and introducing sectoral regulations.

Simultaneously, the Securities and Exchange Board of India (**SEBI**) and the Reserve Bank of India (**RBI**) have paved the way for AI adoption by institutional regulators. SEBI has indicated its intent to deploy an AI system to scan stock market shows and build a database of recommendations made to monitor the securities market for offences[20]. Further, the RBI intends to use advanced analytics, AI and machine learning to improve regulatory supervision over regulated entities[21].

PROPOSED DIGITAL INDIA ACT

The proposed DIA, set to overhaul the existing Information Technology Act, is also heralded as a legislation that will regulate emerging technologies, including AI and machine learning[22]. With the aim of realising the trillion-dollar digital economy milestone through global innovation and indigenous entrepreneurship, India is set to be a key player in the global market for digital solutions. In line with this broader objective, the DIA is stated to be arriving at a future proof legislation to enable the growth of innovation and technology ecosystems, through focus on regulating an exponentially expanding class of

19. NITI Aayog, *Approach Document for India, Part-1 Principles for Responsible AI*, February 2021, https://www.niti.gov.in/sites/default/files/2021-02/Responsible-AI-22022021.pdf
20. The Economic Times, *SEBI to use AI to scan stock tips on TV shows*, December 1, 2022, available at: https://economictimes.indiatimes.com/markets/stocks/news/sebi-to-use-ai-to-scan-stock-tips-on-tv-shows/articleshow/95898820.cms?from=mdr.
21. The Economic Times, *RBI plans to extensively use artificial intelligence, machine learning to improve regulatory supervision*, October 5, 2022, available at https://economictimes.indiatimes.com/industry/banking/finance/banking/rbi-plans-to-extensively-use-artificial-intelligence-machine-learning-to-improve-regulatory-supervision/articleshow/94659490.cms.
22. Financial Express, *Digital India Act to ensure openness of emerging AI technologies: Rajeev Chandrasekhar*, available at https://www.financialexpress.com/life/technology-digital-india-act-to-ensure-openness-of-emerging-ai-technologies-rajeev-chandrasekhar-3030019/..

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'intermediaries', protecting user rights and addressing emerging technologies and risks.[23] The regulation of new technologies is proposed to be undertaken through a 'principles and rules-based approach'; safeguarding innovation therein; and regulating hi-risk systems through quality testing frameworks and ensuring algorithmic accountability, among others.[24]

The DIA may draw inspiration from global approaches to AI, which have sought to address and determine[25]:

i. A list of high-risk applications of AI systems;
ii. Address risks unique to applications of AI;
iii. Stringent regulation and requirements for AI systems with high-risk applications, along with specific obligations for users and providers thereof;
iv. Conformity assessment before implementation of AI systems, and clear means of enforcement after; and
v. Clear national governance structures.

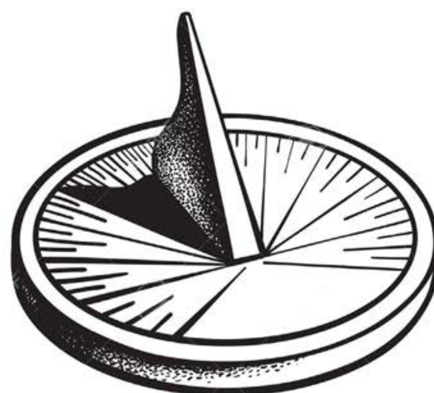
The risk-based approach towards classification of AI systems with graded obligations, based on the amount of risk associated, may also enable indigenous risk allocation; with such risk associated with various AI systems being labelled based on unique concerns of the Indian demographic.

EXPLAIN-ABILITY AND TRANSPARENT DESIGN

Globally, the adoption of AI has been accompanied by a push towards the explain-ability of AI systems, and to curb the opaque, 'black box' nature of AI. Explainable AI is intended to establish trust in autonomous systems and develop algorithms that demonstrably meet regulatory standards. Enforcement regimes such as the European General Data Protection Regulation (**GDPR**) have incorporated an obligation to provide individuals with "*meaningful information about the logic involved*" in automated decision making.[26] The current draft of the DPDP Bill excludes from its ambit non-automated processing of personal data.[27] The Bill also seeks to delete Section 43A as inserted by the Information Technology (Amendment) Act, 2008, which sought to provide fair compensation to data principals in the event of negligent

I'm sorry. I was looking at memes. What did you say?

We've come a long way haven't we?



23. Ministry of Electronics & Information Technology, *Presentation made during the Digital India Dialogues on the proposed Digital India Act on 9th March in Bengaluru, Karnataka*, (**MEITY Presentation**) available at https://www.meity.gov.in/writereaddata/files/DIA_Presentation%2009.03.2023%20Final.pdf.
24. MEITY Presentation, slides 16, 19.
26. European Commission, Regulatory framework proposal on artificial intelligence, available at: https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-aiArticles 15, 22, General Data Protection Regulation, available here.
27. Clause 4(3)(a), DPDP Bill.

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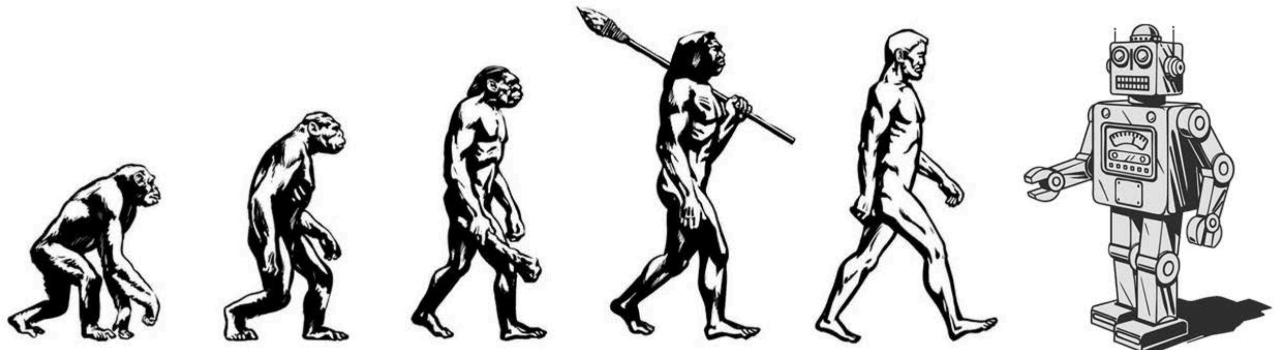
I can handle this boys.
You can turn back now.



implementation and maintenance of reasonable security practices and procedures.[28] The existing delta created by the absence of any right to object to unfair or unethical automated processing may be solved through the inclusion of similar transparent design principles and information rights being built into the Bill or the proposed DIA.

Web 3.0

Innovation in Web 3.0 has accelerated swiftly while remaining unfettered by restrictive legislation aimed at cracking down on bad actors in the ecosystem. 2022 witnessed the introduction of a 30% income tax on cryptocurrency transactions while introducing a 1% tax deductible at source, on income above certain thresholds[29]. The Finance Act, 2022, introduced a broad-based definition of "virtual digital assets" (**VDAs**), as any "information or code or number or token" that is not currency and is generated through "cryptographic means or otherwise". The definition further specifies that VDAs offer a digital representation of value exchanged, inherent value, or serve as a store of value or a unit of account that can be transferred, stored or traded electronically, and includes notified non-fungible tokens (**NFTs**) or other digital assets[30]. The definition of NFTs was clarified to include all tokens that qualify as a VDA, excluding those which enable the transfer of ownership in underlying tangible assets in a legally enforceable manner[31]. The fact that subsequent clarifications have had to be issued to exclude items like subscriptions, gift cards and reward points reinforces the broad scope of this definition.

Further, the CERT-In Directions, dated April 28, 2022 (**CERT-In Directions**), require virtual asset service providers, virtual asset exchange providers and custodian wallet providers to retain transaction and KYC records for a period of 5 (five) years.

In a positive support to the Web 3.0 ecosystem, the RBI published a concept paper on October 07, 2022[32], launching the Central Bank Digital Currency (**CBDC**) for specific use cases. CBDC aims to act as a sovereign currency, sans a bank account, operating as a medium of exchange and a store of value. In view of the Unified Payment Interface (**UPI**) cross-border payments[33], CBDCs present a unique opportunity to fast-track this application, along with various other opportunities of decentralised technology.

Web 3.0 is witnessing increased focus on practical utility via on-chain ramps, tokenisation of real-world assets, renewed focus on Bitcoin with the Ordinals

28. Clause 30, DPDP Bill.
29. Finance Act, 2022.
30. Finance Act, 2022, Section 2 (c) (47-A).
31. Ministry of Finance, Central Board of Direct Taxes, Notification, S.O. 2959(E). (June 30, 2022).
32. Reserve Bank of India, *Concept Note on Central Bank Digital Currency*, October 7, 2022, available at https://rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=1218.
33. The Economic Times, *PhonePe launches support for cross-border UPI payments*, February 11, 2023, available at https://economictimes.indiatimes.com/nri/invest/phonepe-launches-support-for-cross-border-upi-payments/articleshow/97821018.cms

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protocol, Web3 APIs and metaverse experiences, including gaming and virtual events. From a consumer/ investor protection aspect, the Advertising Standards Council of India (**ASCI**) has framed guidelines for advertising and promotional activities of VDAs[34], which intersected with multiple scams and fraudulent activities surfacing, such as the FTX fraud[35], collapse of UST[36], and crackdown on NFT rug pulls[37].

These regulations, although fragmented and siloed, can be construed as a sub-silentio nod to the Web 3.0 ecosystem, and may act as necessary stepping-stones towards a regulatory framework geared to tackle mainstream adoption.

Conclusion

Innovation, globally, is guided by fundamental principles of data processing – purpose limitation, accuracy, storage limitation, integrity, confidentiality and accountability.[38] Through the draft and proposed stack of regulation, current legislative intent seems to indicate an incorporation of these principles into the Indian legal framework, to the extent beneficial and applicable to the Indian technology sector and polity. Consequentially, innovation in AI, Web 3.0, big tech and data will require comprehensive evaluation of various regulatory frameworks, with data collection, storage and processing in light of the DPDP Bill; technology, design principles, algorithmic accountability and safety in light of the proposed DIA; any additional 'telecommunications services' and related convergence involved, in light of the Telecommunications Bill; and sectoral legislation, as applicable. This stack of light-touch, business friendly, accessible, and predictable approach to regulation, if backed by clear guidelines and demonstrable governmental intent towards enforcement, form an incredible opportunity for corporate India to innovate in the spaces of artificial intelligence, big data, and technology.

34. The Advertising Standards Council of India, *Guidelines for advertising of Virtual Digital Assets and linked services, Advertising Standards Council of India*, available at https://ascionline.in/images/pdf/vda-guidelines-23.02.22.pdf.
35. The Wall Street Journal, *FTX and Sam Bankman-Fried: Your Guide to the Crypto Crash*, January 19, 2023, available at https://www.wsj.com/articles/ftx-and-sam-bankman-fried-your-guide-to-the-crypto-crash-11669375609.
36. The Wall Street Journal, *Fugitive Stablecoin Founder Do Kwon Accused of Securities Fraud in U.S.*, February 16, 2023, available at https://www.wsj.com/articles/fugitive-stablecoin-founder-do-kwon-accused-of-securities-fraud-in-u-s-6da8f781.
37. Bloomberg, *Frosties NFT Creators Charged With 'Rug Pull' Investor Fraud*, March 25, 2022, available at https://www.bloomberg.com/news/articles/2022-03-24/nft-creators-charged-with-defrauding-investors-in-rug-pull.
38. The Centre for Internet and Society, *GDPR and India*, available at https://cis-india.org/internet-governance/files/gdpr-and-india.

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03

RECENT DEVELOPMENT IN THE **INDIAN DISPUTE RESOLUTION SPACE**

Introduction

The dispute resolution space in India has witnessed key developments in the recent past. The importance of institutional arbitration as a reliable means of enforcing commercial contracts has gained further traction, which is evident from the number of arbitration institutions mushrooming across India. Indian parties have become more sensitised to the advantages of institutional arbitration. The Mumbai Centre for International Arbitration (**MCIA**), in its Annual Report, 2022, reported a 20% increase in caseload over the previous year.[1] Other institutional arbitration centres have also reported significant increase in their workload.

In a bid to make India an attractive destination for international arbitration, the New Delhi International Arbitration Centre (**NDIAC**) was established, pursuant to the New Delhi International Arbitration Centre Act, that was enacted on July 26, 2019. The NDIAC was set up to create an independent and autonomous regime for institutionalised arbitration in India. However, given that the NDIAC gives an impression of being city centric, and considering the aspiration to promote India as an institutional arbitration hub, the Indian Parliament passed a law, changing the name from NDIAC to 'India International Arbitration Centre' (**IIAC**), and designated it as a centre of national importance. The Government of India notified the India International Arbitration Centre

1. https://mcia.org.in/news-and-events/

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(Criteria for admission to the panel of arbitrators) Regulations, 2023, to regulate the empanelment of arbitrators with the IIAC. After several decades of deliberation, the Bar Council of India made a notable decision to permit foreign law firms to practice within India on non-litigious matters, subject to certain restrictions. This is likely to be a game changer and lead to modernisation in the legal sector. These developments signify the Centre's intent of creating an enabling environment and jurisprudence such that the global business community chooses India as a seat of arbitration. With India emerging as an economic powerhouse, these developments will help boost investor confidence.

The Mediation Bill, 2021, provides for compulsory mediation in civil and commercial disputes, before approaching any court or tribunal. If this is enacted as a law, it will significantly impact future disputes. Given that mediation may help parties resolve disputes amicably, it is likely that the burden on courts/ tribunals will reduce.

Motivated by the success of 'Vivaad se Vishwas Scheme' that was introduced in 2020 for resolving tax disputes, the Government of India, in February 2023, announced a new 'Vivaad se Vishwas - 2 Scheme', providing *inter-alia* for disputes between private contractors and government entities that are at the stage of challenging an arbitral award, to be settled by signing a standard form contract. This scheme enables parties to amicably resolve disputes involving government entities, rather than going through a lengthy and cumbersome litigious process. Interestingly, a quicker exit from litigations involving government entities, who contribute to most disputes in the country. Interestingly, most disputes in the country involve government entities.

In a revolutionary move, the Supreme Court of India (**Supreme Court**) for the first time in its history, enabled live streaming of its Constitution Bench proceedings. Various High Courts across the country have also begun live streaming their proceedings, enabling the public to have access to the process of decision making by courts. This has brought in more transparency and accountability. The Supreme Court has embraced change and the need for greater use of technology in dispensing justice – which led to the experimental introduction of live transcription of its proceedings to truly become a 'court of record' for times to come. The 'E-Courts' project – a collaboration between the Supreme Court and the Government of India – is set to enter Phase III. The digital initiatives in the offing show potential, which may change the way litigation proceedings are conducted. This promising phase contemplates digital and paperless courts, and the use of emerging technologies like artificial intelligence and its subsets like Optical Character Recognition (**OCR**) and others for analysis of case pendency and forecasting future litigation.

The Group of Companies Doctrine in India - A Mistaken Concept?

The Supreme Court in *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors.*[2] (**Chloro Controls**) had paved the way for the application of the *group of companies* doctrine, which allows a non-signatory to an arbitration agreement to be included as a party to the arbitration agreement, as the non-signatory may form part of the same group of companies as one of the signatories to the arbitration agreement. In *Chloro Controls*, the application of the *group of companies* doctrine was subjected to the fulfilment of the '*mutual intentions*' test, which requires the existence of (a) a direct relationship between a non-signatory and a signatory, (b) the subject matter of the arbitration being common for the non-signatory and the signatory, and (c) the composite nature of the transaction from which disputes have arisen, involving both the signatory and the non-signatory. Following *Chloro Controls*, Indian Courts referred non-signatories to arbitration on the fulfilment of the mutual intentions test, indicating implied arbitral consent of the non-signatory.

Subsequently, in the *MTNL v. Canara Bank*[3] case, the concept of *single economic unit* was discussed to underscore that when there is a tight group structure with strong organisational and financial links, such that they constitute a single economic unit, or a single economic reality between the signatory and non-signatory companies, they can be bound together under an arbitration agreement. Further, the court ruled that this doctrine will apply particularly in cases where the funds of one company are used to financially support or re-structure other members of the group.

2. 2013 (1) SCC 641.

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The *group of companies* doctrine was deemed to require a relook by the Supreme *Court in Cox & Kings Ltd. v. SAP India*,[4] when it expressed concern that the aforesaid tests diluted: (i) the principle of party autonomy – as the application of this doctrine resulted in non-signatories that did not expressly consent to being bound by the arbitration agreement being referred to arbitration proceedings involving the signatories; and (ii) the principle of separate legal entity recognising independent corporate existence of subsidiaries and group companies – as the commercial reality underlying the group structure would be obliterated. The majority judgment considered several decisions of foreign courts, which viewed the applicability of the doctrine in the context of arbitration with scepticism on account of, *inter alia*, the *group of companies* doctrine, defeating the purpose of creating separate legal entities in a corporate structure, and non-recognition of this doctrine under local laws. The Supreme Court noted that as against the restricted application of this doctrine internationally, Indian jurisprudence has travelled a long way. Following these observations, the question of validity of the *group of companies* doctrine in India (especially, the correctness of the decision in *Chloro Controls*) has been referred to a larger bench. The decision of the larger bench will give much-needed clarity on this critical issue.

Scope of Inquiry by Courts while appointing Arbitrator - more clarity needed

The ability of Indian courts to venture into questions of arbitrability of disputes *i.e.*, whether a dispute is covered under the arbitration agreement between parties, while dealing with applications seeking reference of disputes to arbitration or appointment of arbitrators, has always been a contentious issue. In *Vidya Drolia v. Durga Trading Corporation and others*,[5] the Supreme Court emphasised that the scope of intervention at the stage of reference to arbitration is limited to *demonstrably non-arbitrable* cases, and that the courts, when faced with *plainly arguable* contentions about arbitrability, should leave such questions for the arbitral tribunal to decide. In *DLF Home Developers Ltd. v. Rajapura Homes Pvt. Ltd. and Anr.*,[6] the Supreme Court emphasised on the test of correlation in the context of determining questions of arbitrability at the stage of reference to arbitration, to see whether the disputes at hand correlate to the arbitration agreement between the parties.

In *IOCL v. NCCL*[7] (**IOCL**), a larger role for the courts at the pre-reference stage was implicitly endorsed by the Supreme Court, especially to interpret and give effect to clauses on *excepted matters i.e.*, the matters that are expressly excluded from the ambit of the arbitration agreement. The Supreme Court disagreed with the finding of the Delhi High Court about

3. 2020 (12) SCC 767.
4. (2022) 8 SCC 1
5. (2021) 2 SCC 1
6. (2021) 12 SCR 1
7. (2023) 2 SCC 539

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relegating contentious or arguable issues regarding '*excepted matters*' to the arbitral tribunal. By emphasising on party autonomy, the Supreme Court gave effect to the clear and unambiguous clause in the agreement between the parties that excluded certain claims from the purview of the arbitration agreement. Indian Courts retain the ability to address contentious issues pertaining to '*excepted matters*' under arbitration agreements – at the stage of reference to arbitration.

Close on the heels of *IOCL*, the Supreme Court in *Emaar India Ltd. v. Tarun Aggarwal Projects LLP and Others*,[8] emphasised on the requirement of *holding a preliminary inquiry/ review on whether the dispute is arbitrable or not* at the stage of reference to arbitration.

Fee under the Arbitration Act

The model fee for arbitrators is contained in Schedule IV of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**), which would apply in cases where the fee structure has not been specified in the agreement between the parties. A periodic revision of Schedule IV of the Arbitration Act, every (3) three years, has been mandated by the Supreme Court[9] so that the model fee reflects the changing needs of the arbitration ecosystem in India.

Notable Pro-arbitration Rulings in the Recent Past

In a landmark judgment passed by the Supreme Court in *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.*,[10] right of two Indian parties to choose a foreign seat of arbitration to resolve disputes was recognised. The judgment of the Supreme Court in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*,[11] declaring that an interim award passed by an emergency arbitrator is enforceable under the Arbitration Act, gave much-needed clarity on this issue.

The Existence of Debt and default are not the only factors for admitting a Financial Creditor's application for initiating Corporate Insolvency Resolution Process of the Corporate Debtor

In *Vidarbha Industries Power Limited v. Axis Bank Limited*[12] (**Vidarbha Industries**), the Supreme Court altered the scope of adjudication by the National Company Law Tribunal (**NCLT**) when entertaining an application in respect of Financial Debt[13] under Section 7(5) (a) of the Insolvency and Bankruptcy Code, 2016 (**IBC**). By examining the legislative intent behind the use of the word '*may*' in Section 7(5)(a) as opposed to the word '*shall*' in Section 9(5)(a) of the IBC, it was observed that the Adjudicating Authority has the discretion to reject the application of a Financial Creditor seeking to initiate Corporate Insolvency Resolution Process (**CIRP**) against a Corporate Debtor, by taking into account surrounding factors such as the ability of the latter to repay its debts. The Supreme Court highlighted that the IBC is not intended to penalise solvent companies, which have committed a temporary default of Financial Debt. However, it was clarified that the NCLT does not possess similar discretion when entertaining applications of Operational Creditors in respect of an Operational Debt[14] under Section 9(5)(a) of the IBC.

Vidarbha Industries has set the cat among the pigeons – and has been widely cited as a standard defence for a Corporate Debtor[15] to avoid CIRP[16] even in cases where Financial Debt is not disputed. The Government of India has proposed to amend the IBC to clarify that the NCLT '*must*' admit a petition on being satisfied that there exists a 'default' as defined under the IBC, and not provide any discretion to the NCLT as held in *Vidarbha Industries*. It remains to be seen if the Supreme Court will reconsider *Vidarbha Industries*.

8. AIR 2022 SC 4678
9. *Oil and Natural Gas Corporation v Afcons Gunanusa*, 2022 SCC OnLine SC 112
10. (2021) 7 SCC 1
11. (2022) 1 SCC 209
12. 2022 SCC Online SC 1339
13. "Financial Debt" is defined under the IBC to mean a debt along with interest, which is disbursed against the consideration for time value of money.
14. "Operational Debt" is defined under the IBC to mean a claim in respect of the provision of goods or services including employment or a debt in respect of dues arising under any applicable law.
15. "Corporate Debtor" is defined under the IBC to mean a corporate entity (company), which owes a debt to any person.
16. CIRP is the corporate insolvency resolution process of a Corporate Debtor in the manner provided under the IBC.

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Challenge to the Constitutional validity of the personal Guarantor Regime under the IBC

The Supreme Court is hearing a batch of cases[17] in which the validity of provisions bringing Personal Guarantors[18] under the purview of the IBC is being challenged. The grounds of challenge include (i) violation of the principles of natural justice, due to lack of opportunity to a Personal Guarantor – before the admission of a petition in respect of a Personal Guarantor. The proceedings against the petitioners who approached the Supreme Court have been temporarily stayed. The judgement will have a significant impact on banks and financial institutions and their ability to recover dues from Personal Guarantors.

Supreme Court upholds provisions of the Prevention of Money Laundering Act, 2022

A landmark Supreme Court judgment in *Vijay Madanlal Choudhary and others v. Union of India and others*[19] (**Vijay Madanlal**) upheld the constitutional validity of several provisions of the Prevention of Money Laundering Act, 2002 (**PMLA**), strengthening the powers of the Enforcement Directorate (**ED**) – the body tasked with investigating offences of money laundering. The Supreme Court rejected challenges to the constitutionality of provisions dealing with the procedure of investigation, conditions for grant of bail, reversal of burden of proof, and other substantive provisions of the PMLA.

Resultantly, there has been an increase in cases registered by the ED under the PMLA. There has been a lot of clamour about the correctness of *Vijay Madanlal*. Few weeks after the judgment, the Supreme Court issued notice in a review petition[20], seeking review of *Vijay Madanlal*. However, such review would be limited to two of the issues dealt with in *Vijay Madanlal*, namely (a) providing the accused with a copy of the Enforcement Case Information Report (the report on the basis of which the ED commences an investigation under the PMLA), and (b) reversal of

Various High Courts across the country have also begun live streaming their proceedings, enabling the public to have access to the process of decision making by courts.

the burden of proof and presumption of guilt under the PMLA (unlike the contrary presumption that is applicable in most criminal statutes). It will be interesting to see the outcome of the review petition, as it will have widespread ramifications.

Conclusion

The recent developments in commercial dispute resolution, regulatory litigation, and disputes relating to money laundering and white-collar crimes point to the fervent attempts of Indian Courts to crystallise applicable principles of law and resolve complex questions as they arise. A significant number of issues have been placed before larger benches of the Supreme Court, and many important judgements are expected in the near future that could settle the dust on long pending questions such as the requirement of payment of stamp duty on arbitration agreements and the correctness of the use of the *group of companies* doctrine in India. Further, efforts towards promoting the use of institutional arbitration and widespread adoption of alternative modes of dispute resolution, particularly for the resolution of civil and commercial disputes, is likely to see phenomenal rise. The emphasis on increase in the use of technology will pave the way for more innovation in resolving disputes.

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04

Data **Protection and Privacy** in India

As India enters its Amrit Kaal, there is a marked focus on enhancing its digital infrastructure and evolving an Indian version of principles-based legal framework for technology. One of the biggest lessons from the pandemic was the importance of '*digitised means*' of access for both public goods and private industry. While India has always had a thriving private technology services sector, the focus in the last decade has shifted inward, towards creating world leading product and service suite in India for Indians. Perhaps even more importantly, the Government's emphasis on treating technology infrastructure at par with physical infrastructure has led to innovative approaches that have spurred private sector participation in building allied/complementary technology solutions.

Success stories like the Unified Payment Interface and the Aadhaar stack, which are being emulated globally, represent important milestones in implementing population scale interventions. Interestingly, newer projects like the National Digital Health Mission, ONDC, DigiYatra along with initiatives centered around Artificial Intelligence hold even greater potential to bring about a transformative impact that will likely redefine the way technology touches the lives of every Indian in the decades to come.

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This rapid progression in technology demands an innovative legal regime that can keep up. Outdated legislation that fails to effectively regulate existing requirements can either become an impediment to innovation or allow for widespread systemic abuse, potentially leading to its own set of concerns. Furthermore, the absence of clear guiding principles in a sector often leads to regulatory arbitrage and an opportunity for bad actors to disrupt nascent ecosystems.

Recognising this need of safeguarding digital data, the Government of India has recently introduced/submitted draft proposals of the Digital Data Protection Bill, 2022 and the Indian Telecommunications Bill, 2022 for public consultations. Plans for a Digital India Act is also underway to replace the existing Information Technology Act, 2000. The center of this emerging framework is the Digital Personal Data Protection Bill, 2022 (the **Bill**).

As the practice of using personal data of individuals as a 'fee' for accessing goods and services continues to lose favour globally, the harnessing and extrapolation of such data to provide customised outcomes and enriched services has often resulted in noteworthy improvements in quality of life. Widely publicised data breaches, along with shallow bundled consents, and the lack of clear linkage to the purpose of availing services have brought this sector under the spotlight.

The situation was exacerbated due to two reasons: (i) the Indian jurisprudence did not recognise the right to privacy as a fundamental right, and; (ii) the archaic Information Technology (Sensitive Personal Data and Rules and Reasonable Security Standards and Procedures) Rules, 2011, did not provide the citizens with adequate power to demand better control over their personal data or seek redressal for their grievances. While over the years, sector regulators such as the Reserve Bank of India, the Insurance Development Authority of India and Securities Exchange Board of India have established rules of the road for entities regulated by it, large sections of the ecosystem remained outside the ambit and, therefore, there remained a requirement for a base general data protection statute in India.

However, a change in narrative came about in the year 2017 when a nine-judge bench of the Supreme Court of India[1] recognised right to privacy as a part of the fundamental right to life under the Constitution of India (the **Privacy Judgment**). The Privacy Judgment paved the way for India to conceptualise and implement a new personal data protection regime in India, which was started with the formation of a committee of experts under the chairpersonship of retired Justice B.N Srikrishna.

A robust data privacy legislation will provide even more strength to the push for greater digital inclusion and proliferation of digital goods and services.

While the process was initiated in 2017, the drafting and consultative process has been chequered and iterative. Being a diverse country with multiple aspirations meant that the expectations from the data privacy regime was also varied and often divergent. While there was a need to protect India's national interests, there were valid apprehensions that overprotective localisation measures may result in India losing its competitive advantage as a global hub for multinational companies. Similarly, the formulation of individual rights must be balanced against economic growth and distinctive requirements of a large heterogenous country like India. The impetus for having a strong and individual focused data privacy regime, similar to the General Data Protection Regulations in Europe, while attractive, would also mean heavy compliance burden on small entities who may not be able to meet compliance obligations.

The earliest draft of the Bill, the Personal Data Protection Bill, 2018, was modified by the Government and presented before Parliament in December 2019 and referred to a joint parliamentary committee. While the joint parliamentary committee held extensive deliberations and also consulted the industry, the latter opposed most of the amendments and changes proposed, which included regulation of intermediaries and non-personal data, to avoid unintended business disruption impact on both traditional and new-age technology focused businesses.

1. Justice KS Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1

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The Government, receptive of the concerns, withdrew the Data Protection Bill, 2019 and in November 2022, proposed a new draft of the Bill for public consultations. The Bill, as currently proposed, is radically different in approach from the earlier iterations in two fundamental aspects.

Firstly, the Bill is crafted as a principles-based legislation and not prescriptive in nature, to allow nimbler rulemaking.

Secondly, and perhaps more importantly, the Bill is drafted with a deliberate focus on achieving simplicity and balance between safeguarding individual rights on

one hand and promoting national security imperatives as well as business friendliness on the other hand.

Taking from the learnings of EU, where compliance challenges have impacted innovation and growth apart from inducing fatigue, the Bill proposes to 'Indianise' many concepts.

The Bill was proposed to be introduced during the Budget session of Parliament and is now likely to be presented for enactment during the monsoon session of Parliament. While the Bill may yet undergo changes, certain principles set out therein are discussed below, which in many ways will shape behavior of both individuals and businesses.

Extent and Applicability

The Bill broadens the scope of jurisdiction for collection of all 'digital' personal data and extends to cover the processing of such personal data for profiling or offering goods or services beyond India's borders. While there are representations on qualifying the applicability only for goods or services that are systemically offered, the underlying principle is in line with global standards where data protection regimes apply to offshore processing of the country's resident[2].

Flat Structure

While the Bill does propose different classes of data fiduciaries, and differential compliance for them, it adopts a uniform approach to regulating all personal data, without seeking to provide differential protection for 'sensitive' classes of personal data[3].

Moreover, 'significant' Data Fiduciaries have enhanced obligations such as appointment of a data protection officer based in India, conducting audits and undertaking potentially data impact assessment as well[4].

While an argument exists that the differential levels of protection may be beneficial for 'rightsizing' compliance burdens, the counterargument here is that these distinctions between types of data may become irrelevant as technology advances.

Similarly, the Bill does not propose bright line standards, or clear carve outs, for either anonymised or de-identified data.

While this has the benefit of simplicity, establishing clear standards for the latter (perhaps through rules) may significantly benefit small & medium enterprises and entrepreneurs, who may rely on low impact data sets to drive innovation.

A Consent Focus

The consent framework has been simplified extensively, where data fiduciaries are required to provide a detailed, itemized (as opposed to granular) notice in clear language describing the nature of personal data proposed to be collected[5].

Further, in the spirit of digital inclusion, at the discretion of the data principal, notice must be provided in all languages specified in the Eighth Schedule of the Constitution of India[6]. However, a significant challenge, upon enactment, will be to provide fresh notice for continued processing of data collected under previous regimes[7].

While the Bill has retained the concept of a consent manager, who will act on behalf of the data principal, it is yet to prescribe detailed guidelines pertaining to eligible entities and their operations[8].

A More Business Friendly Framework

The Bill incorporates the concept of 'deemed consent', which finds its roots in Singapore's Personal Data Protection Act, 2012[9].

These exceptions extend across wide ranging grounds and include instances where it is reasonably expected of a data principal to furnish data[10], fulfilment of legal obligations[11], health and safety[12], employment[13], other fair and reasonable purposes that may be defined. While the dual filter of reasonable purpose along with public interest[14] may not be compatible with certain objectives specified such as credit scoring, the overall framework is much more permissible than previous iterations.

The Bill also now allows for retention of data for longer periods as long it is needed 'business purpose'[15]. These modifications, along with the narrowing of rights like correction, erasure and portability represent a potentially more business friendly framework which may prove easier to transition to when the Bill is enacted.

Cross Border Transfers

Unlike the previous iterations, the current Bill does not require localization of specific data sets. However,

2. Section 4 of the Bill
3. Section 2(13) of the Bill
4. Section 11(2) of the Bill
5. Section 6(1) of the Bill
6. Section 6(2) of the Bill
7. Section 6(3) of the Bill
8. Section 7(7) and7(8) of the Bill
9. Section 8 of the Bill and Section 15 of the Singapore Personal Data Protection Act, 2012
10. Section 8(1) of the Bill
11. Section 8(2) of the Bill
12. Section 8(4) of the Bill
13. Section 8(7) of the Bill
14. Section 8(9) of the Bill
15. Section 9(6)(b) of the Bill

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it stipulates that all personal data may be stored and processed outside India if it is sent to only those jurisdictions that have been notified by the Government and in the manner to be prescribed[16]. While the details will be part of the rule-making process, the construct in the Bill attempts to strike a balance between data sovereignty and positioning India as an attractive global technology hub.

This is in line with other initiatives of the Government around 'trusted geographies' and restricting investment from and movement of data to certain specified geographies.

Children Data

The Government has consistently implemented various rules and enactments to mitigate harm to children in the digital world. In the same spirit, the age of consent has not been changed from 18 years[17] and requires obtaining permission of the guardian/parent through verifiable means. Further the Bill restricts tracking and behavioral monitoring of children or targeted advertising towards children[18].

Given that there are several services, especially in education sector, that are geared towards children, the implementation of the restrictions may prove challenging, especially in certain cases where behavioral monitoring may be in the best interest of the child.

Enforcement and Penalties

In a significant departure from the previous versions, the data protection authority has been replaced with a data protection board, with powers which are primarily adjudicatory[19].

In line with recent legislations, the Government has eliminated criminal penalties for non-compliance with business legislations. However, it has imposed fairly steep ceiling for fines, which may go upto INR 500 crore[20] in certain instances. While the guiding principles for determination of fines have been set out, the ability to impose high penalties without reference to turnover or size may disproportionately impact smaller businesses that may require additional time and resources to regularise compliance process.

While many of the powers and functions will be detailed in subordinate rule making, a dedicated adjudicatory body focused on data incidents, with the power to impose significant fines, portends a sharper focus around data protection and privacy in the days to come.

Reference to Other Legislations

While the Bill is a horizontal legislation, it recognises the possibility of sectoral regulators mandating specific requirements based on the distinct needs/ demands of a certain sector. Unlike the previous iterations that prescribed codes of conduct in consultation with sector regulators, the Bill will prevail over sectoral obligations which cannot be harmoniously construed with it[21].

A meticulous implementation through rule-making to circumvent any potential direct contradictions will, therefore, become important. It may necessitate intra-departmental and intra-regulatory discussions for a seamless implementation of the legislation.

Conclusion

Data privacy is the horizontal basis for a digital interaction and a robust data privacy legislation will provide even more strength to the push for greater digital inclusion and proliferation of digital goods and services.

The Bill along with the proposed Digital India Act, will likely provide a strong and enabling legislative framework for a robust digital ecosystem. While many operative aspects of the Bill will be determined through rulemaking, the principles in it portend toward a reimagination of data privacy regime in India. In essence, this legislation will hopefully serve as a strong template for many other jurisdictions to follow as it provides a balanced approach to protecting data privacy rights of individuals and legitimate business interests.

16. Section 17 of the Bill
17. Section 2(3) of the Bill
18. Section 10 of the Bill
19. Section 19 of the Bill
20. Section 25 read with Schedule 1 of the Bill
21. Section 29 of the Bill

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05

CRYPTO-**ASSETS** IN INDIA

Introduction

Since the historic highs of November 2021, the crypto-assets market has been roiling. Investor sentiment nosedived post the successive collapses of the widely adopted stablecoin, a previously leading crypto-asset exchange, crypto-asset investment funds, and a major decentralised finance (**DeFi**) platform. By some estimates, the market volatility and these collapses may have eroded investor wealth by around USD1.8 trillion, with retail investors likely incurring bigger losses than institutional or sophisticated investors.[1]

Key legal issues in several jurisdictions have consequently arisen, spanning areas across corporate governance, investor protection, and prudential regulation, with the spotlight falling once again on the long-standing regulatory dilemma: *how do we regulate crypto-assets and its use-cases, particularly in DeFi?*

1. Giulio Cornelli, Sebastian Doerr, Jon Frost and Leonardo Gambacorta, Crypto shocks and retail losses, BIS Bulletin No. 69 (February 20, 2023), available at: https://www.bis.org/publ/bisbull69.pdf.

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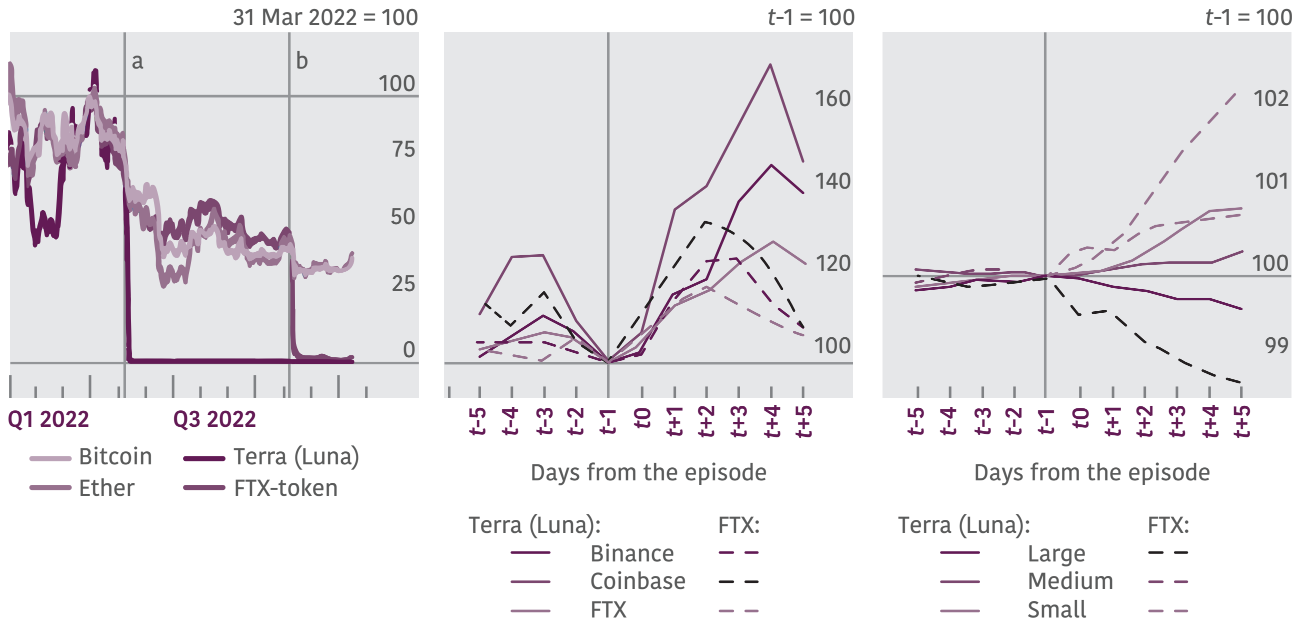
Picture 1: A snapshot of volatility in the crypto-assets markets and trends in retail trading

In stromy seas, "the whales eat the krill"



[a] Terra USD and Luna collapse, 8 May 2022. [b] FTX collapse, 7 November 2022.

[1] Based on daily active users of cryptoexchange apps. [2] Based on the number of BTC held in addresses with balance less than 1 BTC (small), 1–1000 BTC (medium), and more than 1000 BTC (large).

Sources: CoinGecko; IntoTheBlock; Sensor Tower; authors' calculations.

Source: Giulio Cornelli, Sebastian Doerr, Jon Frost and Leonardo Gambacorta, Crypto shocks and retail losses, BIS Bulletin No. 69 (February 20, 2023), available here.

Regulatory Developments Globally and in India

Several jurisdictions have been actively directing their efforts towards legal and regulatory frameworks to achieve their policy objectives: over the past year, the European Union has published its Market in Crypto-Assets (**MiCA**), the Monetary Authority of Singapore (**MAS**) has published consultation papers on proposed approaches towards regulation of crypto-assets[2] and stablecoins,[3] the Hong Kong Monetary Authority (**HKMA**) concluded its consultation on a discussion paper on crypto-assets and stablecoins,[4] and His Majesty's Treasury of the United Kingdom government has published a consultation paper on the regulatory regime for crypto-assets.[5] Parallelly, international standard-setting bodies have been cognisant of the possible risks associated with crypto-assets and have worked on various aspects of regulation of crypto-assets and stablecoins, including the Financial Action Task Force,[6] the International Monetary

2. Monetary Authority of Singapore (MAS), Consultation Paper on Proposed Regulatory Measures for Digital Payment Tokens (October 2022), available at: https://www.mas.gov.sg/publications/consultations/2022/consultation-paper-on-proposed-regulatory-measures-for-digital-payment-token-services.
3. Monetary Authority of Singapore (MAS), Consultation Paper on Proposed Regulatory Approach for Stablecoin-Related Activities (October 2022), available at: https://www.mas.gov.sg/publications/consultations/2022/consultation-paper-on-proposed-regulatory-approach-for-stablecoin-related-activities.
4. Conclusion of Discussion Paper on Crypto-assets and Stablecoins, Hong Kong Monetary Authority (January 2023), available at: https://www.hkma.gov.hk/media/eng/doc/key-information/press-release/2023/20230131e9a1.pdf.
5. Future financial services regulatory regime for cryptoassets – Consultation and call for evidence, HM Treasury (February 2023), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1133404/TR_Privacy_edits_Future_financial_services_regulatory_regime_for_cryptoassets_vP.pdf.
6. See, for example: FATF Report, Virtual Currencies: Key Definitions and Potential AML/ CFT Risks (June 2014), available at: https://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf; FATF Updated Guidance for a Risk-based Approach, Virtual Assets and Virtual Asset Service Providers (October 2021), available at: https://www.fatf-gafi.org/media/fatf/documents/recommendations/Updated-Guidance-VA-VASP.pdf.

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Fund,[7] the Bank for International Settlements,[8] and the International Organization of Securities Commissions.[9] The Financial Stability Board has also issued consultative reports, outlining their approaches towards regulation and supervision of crypto-assets[10] and stablecoins,[11] which Indian lawmakers had previously indicated would play an important role in their assessment of regulatory options.[12]

The Indian approach towards the legal and regulatory treatment of crypto-assets, on the other hand, has seen various ups and downs. The Inter-Ministerial Committee on Virtual Currencies published its report in February 2019, recommending a ban on crypto-assets, *vide* the draft 'Banning of Cryptocurrency & Regulation of Official Digital Currency Bill, 2019'.[13] However, while this Bill was never legislatively passed, the Government of India's position on banning crypto-assets appeared to remain unchanged when the draft 'Cryptocurrency and Regulation of Official Digital Currency Bill, 2021', was listed for introduction in the Lok Sabha in November 2021.[14] While the Reserve Bank of India (**RBI**) circular dated April 6, 2018, which directed entities regulated by the RBI not to deal in 'virtual currencies' nor to provide services facilitating any person or entity dealing with or settling virtual currencies, was struck down in the landmark judgment rendered in *Internet and Mobile Association of India v. Reserve Bank of India* in 2020,[15] its outlook towards crypto-assets continues to remain hawkish.

7. See, for example, work by IMF Staff: IMF Fintech Notes, Regulating the Crypto Ecosystem: The Case of Unbacked Crypto Assets (September 2022), available at: https://www.imf.org/-/media/Files/Publications/FTN063/2022/English/FTNEA2022007.ashx.
8. Basel Committee on Banking Supervision (Bank for International Settlements), Prudential treatment of cryptoasset exposures (June 2021), available at: https://www.bis.org/bcbs/publ/d519.pdf.
9. OICV-IOSCO, IOSCO Crypto-Asset Roadmap for 2022-23 (July 7, 2022), available at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD705.pdf.
10. Financial Stability Board, Regulation, Supervision and Oversight of Crypto-Asset Activities and Markets: Consultative report (October 2022), available at: https://www.fsb.org/2022/10/regulation-supervision-and-oversight-of-crypto-asset-activities-and-markets-consultative-report/.
11. Financial Stability Report, Review of the FSB High-level Recommendations of the Regulation, Supervision and Oversight of "Global Stablecoin" Arrangements: Consultative report (October 2022), available at: https://www.fsb.org/wp-content/uploads/P111022-4.pdf.
12. Outlook India, India's crypto guidelines to be in place next month, Govt to decide if wallet trading is legal (September 20, 2022), available at: https://www.outlookindia.com/business/cryptocurrency-ban-in-india-govt-call-on-banning-cryptos-to-be-based-on-financial-stability-board-s-october-report-news-224384
13. Inter-Ministerial Committee, Report of the Committee to propose specific actions to be taken in relation to Virtual Currencies (February 28, 2019), available at: https://dea.gov.in/sites/default/files/Approved%20and%20Signed%20Report%20and%20Bill%20of%20IMC%20on%20VCs%2028%20Feb%202019.pdf.
14. According to the Lok Sabha bulletin dated November 23, 2021, the draft Bill was meant to: 'create a facilitative framework for creation of the official digital currency to be issued by the Reserve Bank of India. The Bill also seeks to prohibit all private cryptocurrencies in India, however, it allows for certain exceptions to promote the underlying technology of cryptocurrency and its uses'. The bulletin is available at: https://loksabhadocs.nic.in/bull2mk/2021/23.11.21.pdf.
15. AIR 2021 SC 2720.

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This contrasts in some ways with the outlook of the Ministry of Finance, which looks at the G20 as a multilateral platform for reaching a policy consensus on the regulatory treatment of crypto-assets.

However, the crypto-assets industry in India has shown encouraging signs of expansion and diversification in 2022. To bolster non-trading fees and commission income, leading crypto-assets firms appear to be diversifying into traditional financial services such as stockbroking and investment advisory segments. This resultant diversification should be backed by supervision and oversight from financial sector regulators, including the Securities and Exchange Board of India (**SEBI**), which will help boost investor sentiment about such entities. At the same time, smaller players performing the roles of intermediaries that are regulated under the Indian securities law – such as mutual funds for crypto-assets, investment advisers for crypto-assets investments, and structures that closely resemble collective investment schemes – have also been mushrooming and may give rise to new risks if no regulatory oversight is extended.

In India, while the understanding of lawmakers and regulators about crypto-assets has deepened significantly as intermediaries in the crypto-assets ecosystem have matured and grown, crypto-assets and key intermediaries in the ecosystem operate in a policy vacuum. While no overarching policy decisions have been taken on matters such as prohibiting or regulating crypto-assets, how they should be classified, and what the regulatory objectives behind regulation should be, laws have been enacted and enforced on various aspects of crypto-assets. The following are some examples:

i. The imposition of 1% TDS has had a chilling effect on transaction volumes on Indian crypto exchanges and aggregator platforms. A ~70% reduction in transactional volumes on Indian crypto exchanges and aggregator platforms was been cited widely in the media in July 2022, following the TDS coming into effect on July 1, 2022.[16] While some of this may on account of general bearish investor outlook in the crypto markets, it represents an underlying trend: regulatory arbitrage and consequent migration of Indian investors to foreign exchanges.

Table 1: Centralised VDA Exchange Volumes[17]

VARIABLE	PERIOD	INDIAN EXCHANGES	FOREIGN EXCHANGES	INDIAN EXCHANGES AS PERCENT OF FOERIGN EXCHANGES
Exchange volume, USD Million	Jan, 2022	4736.7	834,603.1	0.57
Exchange volume, USD million	Oct, 2022	137.6	531,553.4	0.03
Exchange volume loss, percent	Jan-Oct 2022	97.1	36.3	

Source: Dr. Vikash Gautam. Virtual Digital Asset Tax Architecture in India: A Critical Examination. Special Issue No. 208, January 2023, Esya Centre

There are two consequences that arise from the migration of Indian investors to foreign exchanges:

(a) The enforcement mechanisms that will compel foreign exchanges to follow KYC directions may not be sufficient. In effect, this makes *on-ramps* (conversion of fiat currency or INR into crypto-assets) and *off-ramps* (conversion of crypto-assets into fiat currency or INR) difficult to track, which are two key areas that can be regulated

16. Source: https://www.livemint.com/news/india/tds-on-crypto-trading-volumes-take-a-hit-11656936362529.html.
17. Dr. Vikash Gautam. Virtual Digital Asset Tax Architecture in India: A Critical Examination. Special Issue No. 208, January 2023, Esya Centre, available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwig0u_gycf9AhUzxTgGHckGCtMQFnoECAoQAQ&url=https%3A%2F%2Fwww.esya-centre.org%2Fdocuments%2F2022%2F12%2F12%2Fvirtual-digital-asset-tax-architecture-in-india-a-critical-examination&usg=AOvVaw2_rgt5lRR_5eDttTwHQyv7.

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because they take place through centralised entities. The exposure of Indian investors to foreign exchanges is difficult to quantify, but the collapse of FTX, one of the largest crypto-asset exchanges, was reported as having impacted nearly five lakh Indian investors.

(b) At the same time, tax compliance by foreign exchanges remains difficult to enforce. This may lead to loss of revenue for the Government. The rate of TDS applicable on transactions related to virtual digital assets has also been felt to be onerous.

India has one of the highest number of crypto-asset users globally. Thus, all stakeholders must work with their G20 counterparts to frame appropriate legal and regulatory responses.

Table 2: Shift in Trade Volume from Indian to foreign centralised VDA exchanges[18]

PERIOD	FEB-MAR 2022	APR-JUN 2022	JUL-OCT 2022
Exchange volume, USD Million	9126.0	5991.0	1220.6
Indian online traffic to foreign centralised VDA exchanges, million	1.05	1.3	2.6
Indian online traffic to foreign centralised VDA exchanges, million	1.1	2.6	3.8
Substitution effect: Cumulative trade volume flight from Indian to foreign centralised VDA exchanges, USD million	543.9	1792.2	568.0
Growth effect: cumulative trade volume flight from Indian to foreign centralised VDA exchanges, USD million	253.3	414.2	280.5
Total: Shift in cumulative trade volume from Indian to foreign centralised VDA exchanges, USD million	**797.2**	**2206.4**	**848.6**
Trade volume going to foreign exchanges, as a percent of total trade volume	**8.7**	**36.8**	**69.5**

Source: Dr. Vikash Gautam. Virtual Digital Asset Tax Architecture in India: A Critical Examination. Special Issue No. 208, January 2023, Esya Centre

18. Dr. Vikash Gautam. Virtual Digital Asset Tax Architecture in India: A Critical Examination. Special Issue No. 208, January 2023, Esya Centre, available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwig0u_gycf9AhUzxTgGHckGCtMQFnoECAoQAQ&url=https%3A%2F%2Fwww.esyacentre.org%2Fdocuments%2F2022%2F12%2F12%2Fvirtual-digital-asset-tax-architecture-in-india-a-critical-examination&usg=AOvVaw2_rgt5lRR_5eDttTwHQyv7

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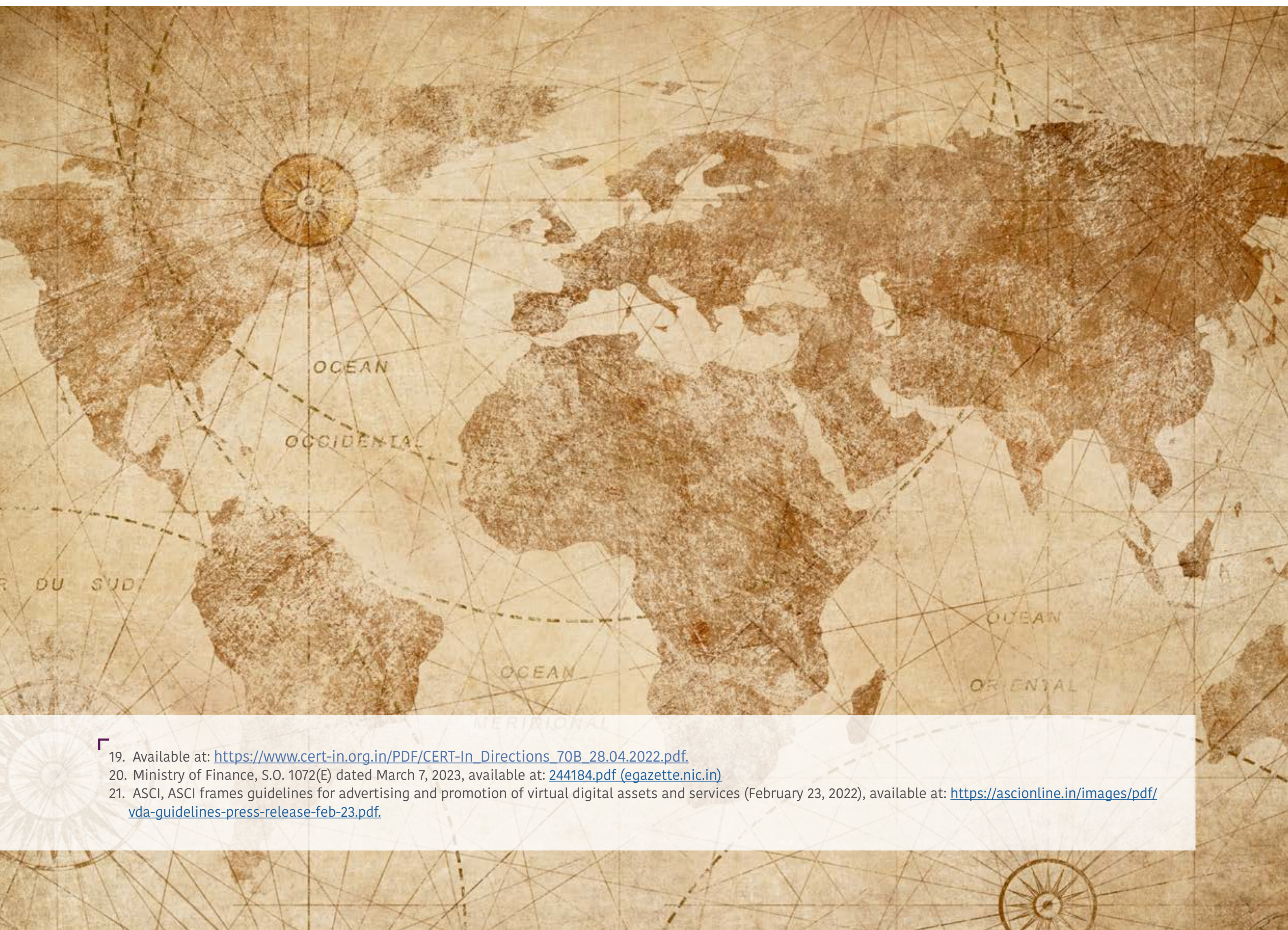
ii. The CERT-In circular dated April 28, 2022,[19] was issued pursuant to Section 70B(6) of the Information Technology Act, 2000, mandating that virtual assets service providers comply with Know Your Customer (**KYC**) norms evolved by the RBI, SEBI, or the Department of Telecommunication (**Ministry of Communication**). Virtual assets service providers have also been mandated to maintain all information obtained pursuant to KYC and records of financial transactions for a period of five years.

iii. In line with the global trend requiring virtual digital-asset platforms to comply with local anti-money laundering standards applicable to other regulated entities, the Finance Ministry on March 7, 2023, issued a gazette notification classifying an entity dealing in virtual digital assets (VDAs) as a 'reporting entity', within the meaning of Section 2(wa) of the Prevention of Money Laundering Act, 2002 (**PMLA**).[20] Pursuant to this notification, crypto-asset exchanges and intermediaries dealing in VDAs are mandated to conduct client/ user KYC verification and report any suspicious transactions to the Financial Intelligence Unit of India (**FIU-IND**). As a result, crypto exchanges are now obligated to maintain a record of all transactions, including the identity of the parties involved, for up to five years after the transaction has been completed, and to present such information to the government as and when required. The industry has pointed out that such amendment to the PMLA would also enable Central Board of Direct Taxes (**CBDT**), National Intelligence Grid (**NATGRID**), and other law enforcement agencies to gain access to detailed information on crypto asset transactions. The notification further states that the administration or safekeeping of VDAs as well as instruments enabling control over VDAs will be covered under the PMLA. Notably, crypto-asset exchanges and aggregators have been subjected to actions by enforcement agencies prior to the March, 2023, notification under the PMLA and the Foreign Exchange Management Act, 1999.

iv. There are also a few restrictions on advertising of crypto-assets by way of guidelines issued by the Advertising Standards Council of India (**ASCI**).[21]



19. Available at: https://www.cert-in.org.in/PDF/CERT-In_Directions_70B_28.04.2022.pdf.
20. Ministry of Finance, S.O. 1072(E) dated March 7, 2023, available at: 244184.pdf (egazette.nic.in)
21. ASCI, ASCI frames guidelines for advertising and promotion of virtual digital assets and services (February 23, 2022), available at: https://ascionline.in/images/pdf/vda-guidelines-press-release-feb-23.pdf.

Looking at Key Areas of Regulation in Relation to Crypto-assets in 2023

Notwithstanding the aforementioned piecemeal regulatory developments, India lacks a comprehensive legislative framework in relation to regulation of crypto-assets and stablecoins. Parent legislations in India that govern the powers and duties of financial service regulators may not provide a sufficient regulatory and supervisory toolkit for statutory regulators to regulate crypto-assets. As an example, while the RBI is governed by the Reserve Bank of India Act, 1934, the Banking Regulation Act, 1949, the Deposit Insurance and Credit Guarantee Corporation Act, 1961, the Foreign Exchange Management Act, 1999, the Credit Information Companies (Regulation) Act, 2005, the Government Securities Act, 2006, and the Payment and Settlement Systems Act, 2007, these legislations to do not directly or expressly provide powers in relation to crypto-assets or DeFi.

In effect, comprehensive legislative changes may be required for consumer protection, micro-prudential regulation, resolution, capital controls, systemic risks, market developments, and monetary policy may be needed to address the risks and guide the opportunities arising from crypto-assets and DeFi.[22]

Conclusion: Need to Leverage the G20 Platform

Recent statements by the Hon'ble Finance Minister Smt. Nirmala Sitharaman have underscored the importance of the G20 platform in ensuring effective regulation, supervision and enforcement in the crypto-assets ecosystem, along with various jurisdictions coordinating their efforts and reaching consensus at an international level.[23] India has one of the highest numbers of crypto-asset users globally.[24]

Consequently, it is important for all stakeholders – the Government, financial sector regulators, industry leaders and trade bodies, to work together with their counterparts in other G20 countries and with international standard-setting bodies to frame appropriate legal and regulatory responses to common harms.

The G20 platform may help establish an international platform for regulatory coordination on crypto-assets and stablecoins. At present, there is a wide variance in domestic policy approaches towards crypto-assets among G20 members. G20 members are also at different stages of finalising their policy approach towards crypto-assets. The potential of the G20 in harmonising regulatory approaches must be further explored, and specific priority areas must be identified.

This can be successfully achieved by closer cooperation between domestic authorities and different standard-setting bodies that are leading the discourse on specific areas of crypto-asset regulation. A working group may be proposed in the G20 with a permanent secretariat for harmonising regulatory approaches. There may also be a need for identification of a nodal enforcement agency at a national level in each member country for coordinating enforcement actions and for offering mutual legal assistance.

22. It is useful to refer to the Financial Sector Legislative Reforms Commission, Volume I (March 2013), available at: https://dea.gov.in/sites/default/files/fslrc_report_vol1_1.pdf.
23. Business Standard, FM Sitharaman lists climate finance, crypto regulation as key G-20 agenda (November 1, 2022), available at: https://www.business-standard.com/article/economy-policy/india-will-push-for-the-voice-of-developing-and-low-income-nations-fm-122110101436_1.html.
24. Mint, India has highest number of crypto owners in the world at 10.07 crore: Report (October 13, 2021), available at: https://www.livemint.com/market/cryptocurrency/india-has-highest-number-of-crypto-owners-in-the-world-at-10-07-crore-report-11634110396397.html.

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06

DIVESTMENTS IN INDIA

M&A OPPORTUNITIES FOR GLOBAL INVESTORS (DIVESTMENT, PRIVATISATION AND ASSET MONETISATION)

Introduction

The world has seen considerable turmoil in the past couple of years. Barely had the pandemic receded when the Russian invasion of Ukraine began. This has had the world reeling from the largest energy crisis since the 1970s and an overall economic slowdown, with decelerating global demand and monetary policy tightening.

At a time when policymakers are expected to take bold policy actions (monetary, fiscal, and structural) to confront these challenging times, the Indian government has made significant headway to demonstrate its support for an inclusive and supportive business environment, with stable administrative and policy reforms. Keeping hope in the Indian economy alive, currently, the world's fifth largest (measured in dollar terms)[1], the country is set to become the second-fastest growing economy in the G20 in financial year 2022-23.[2] An overall boost to investor confidence and optimism is also evident from an increase in foreign direct investment inflow from INR 6756 billion in financial year 2021 to INR 6888 billion in financial year 2022.[3]

1. Economic Survey 2022 -2023 issued by Ministry of Finance, Department of Economic Affairs, Government of India.
2. See https://issuu.com/oecd.publishing/docs/india-oecd-economic-outlook-projection-note-novemb.
3. Doing Business in India, KPMG Report 2022.

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A cornerstone for India's growing economy has been the Indian government's efforts to drive India into the next phase as evidenced from the growth-oriented policy initiatives. One such unwritten policy that has been emerging is the government's acknowledgement that it "*has no business to be in business*", which has resulted in India's disinvestment and asset monetisation programmes gaining momentum over the past few years, and "disinvestment", "privatisation" and "asset monetisation" becoming the buzzwords of India's economic policy. The government has been setting ambitious targets for its divestment programme in recent years, with budgets for the financial years 2021-22, 2022-23 and 2023-24 setting targets of INR 1,750 billion, INR 650 billion and INR 610 billion, respectively.

So, a question that is bound to arise is whether these policy measures are just one amongst many or are these, in fact, presenting the biggest opportunity for investment in India since liberalisation. Well, at this stage though the answer might not be crystal clear, there is enough evidence to tilt the scale towards the latter.

Disinvestment and Privatisation

Simply put, disinvestment, refers to the sale of government's stake in public sector undertakings (**PSUs**), and may be implemented by the government via various means such as strategic disinvestment/ privatisation, which implies transfer of majority ownership and management control of these entities to private players or by minority stake sale, where the government continues to hold majority stake in the PSU. To put it in context, the disinvestment of Air India Limited, the national airline of India, was a strategic disinvestment, where the entire share capital and control was transferred by the government to Tata Group and the initial public offering of Life Insurance Corporation, India's largest life insurance provider, was a minority stake sale, with the government continuing to remain the majority shareholder.

Disinvestment processes are typically run by the Department of Investment and Public Asset Management, Ministry of Finance. It has received a new impetus with the New Public Sector Enterprises

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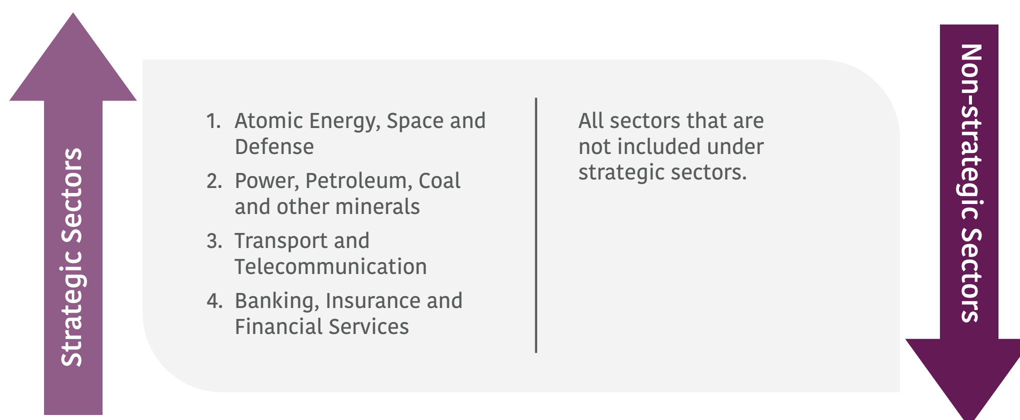
Policy (***NPSE Policy***). The NPSE Policy is essentially the government's decision to discontinue its businesses and classify public sector into strategic and non-strategic sectors, with the aim to (i) maintain only a bare minimum governmental presence in the strategic sectors; and (ii) completely disinvest/ close all ventures in non-strategic sectors. Strategic and non-strategic sectors have been identified as follows:



To successfully implement the NPSE Policy, the government is continually revising its policy to make the bargain attractive for buyers. For instance, to incentivise bidders during the disinvestment of Air India, the government assured continued slots and bilateral rights for Air India for at least six months and extended grandfather rights to the ground handling subsidiary of Air India on existing airports for 84 months. To attract suitable buyers for the proposed disinvestment of IDBI Bank, the 2023 Finance Bill, now proposes to allow carrying forward of accumulated losses and unabsorbed depreciation in the case of amalgamation of one or more banking company with a company post a strategic disinvestment, if such amalgamation takes place within five years of the strategic disinvestment.

Another innovative aspect of the government's disinvestment programme has been the separation of real estate assets from the core business of the PSU. This approach has been adopted by the government in the disinvestment of Air India, where to incentivise the bidder, the government had exempted the transactions between Air India Limited and a special vehicle of the government from capital gains tax, to efficiently carve out non-core/ real estate assets and reduce Air India's debt, without any impact on the potential acquirer of Air India.

Asset Monetisation

Asset monetisation is globally referred to as asset or capital recycling and in India it entails a limited period transfer of performing assets, as an overall strategy for bringing about a paradigm shift in infrastructure operations, augmentation, and maintenance.[4]

With the infrastructure vision of the country being cemented under the National Infrastructure Pipeline (**NIP**), the government plans to tap institutional investment and long-term capital into stable mature assets to generate financial resources. The government announced the National Monetisation Pipeline (**NMP**) for infrastructure investment of INR 6000 billion over three years. The NMP aims to create a cycle of "*develop, commission, monetise and invest*", with the objective of "*infrastructure creation through monetisation*" with public-private sector collaboration. The NMP framework has three key imperatives, namely (i) monetisation of 'rights' not 'ownership' (assets handed back at the end of transaction life); (ii) brownfield de-risked assets (with stable revenue streams); and (iii) structured partnerships under defined frameworks with strict performance indicators and standards. The NMP estimates aggregate pipeline value from the key sectors, as follows:

4. National Monetisation Pipeline, Volume 1: Monetisation Book. Available at https://www.niti.gov.in/sites/default/files/202108/Vol_I_NATIONAL_MONETISATION_PIPELINE_23_Aug_2021.pdf

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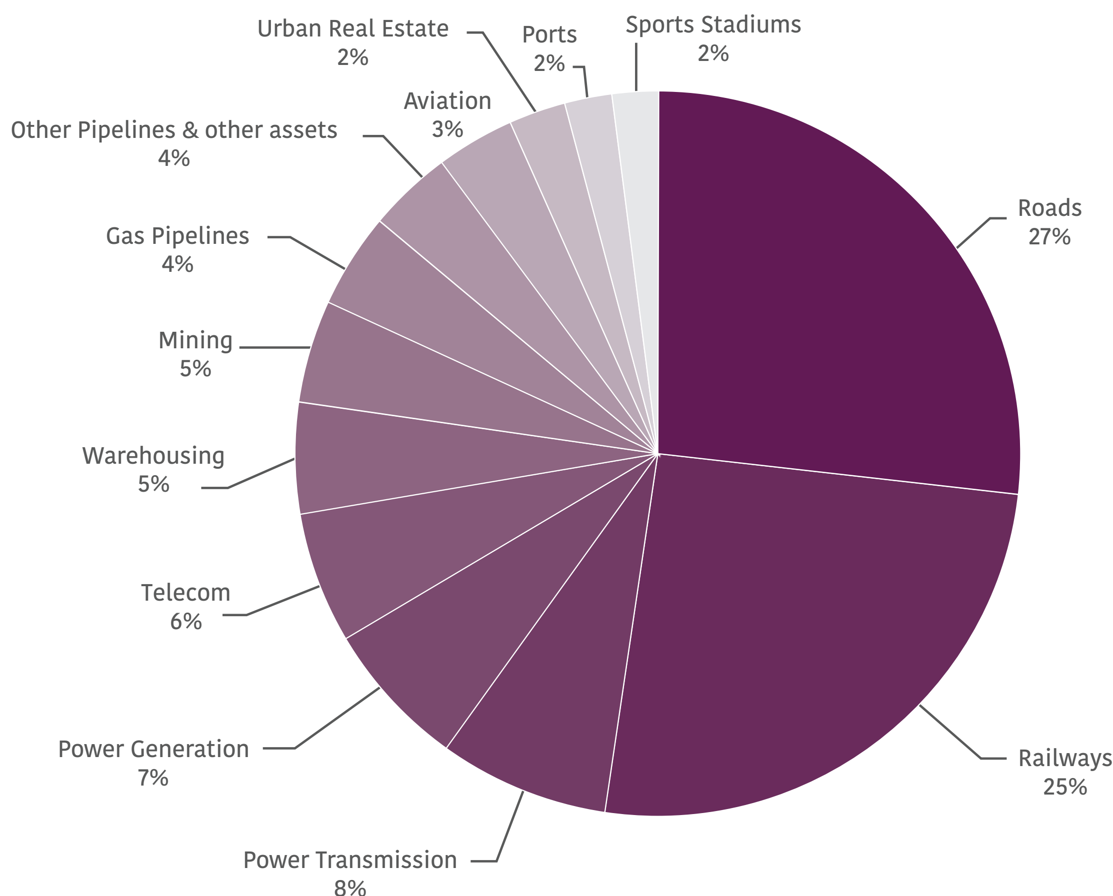

Source: National Monetisation Pipeline, Volume 2

To ensure speedy execution of the NMP/ NIP, the government has also announced Guidelines on the Scheme for Special Assistance to States for Capital Investment, for which INR 1000 billion has been allocated for providing interest free loans to the states, intended towards strengthening the disinvestment and monetisation plan of the government.

There are broadly two structures that are envisaged for monetisation, *namely*, direct contractual models with brownfield public private partnerships (such as toll operate transfer and operate maintain and develop) and structured finance vehicles (such as InvITs, REITs and structured bonds). Some recent asset monetisation examples are the NHAI InvIT, which is currently in its third round of private investment, targeting to mobilise upwards of INR 100 billion, and PowerGrid InvIT, which successfully listed with an offer size of upwards of INR 77 billion.

Potential Opportunities – Disinvestment/ Privatisation & Asset Monetisation

When examined closely, India's disinvestment and asset monetisation programmes present a unique opportunity for investors (domestic and global) to participate in India's growth story, while taking advantage of the growth potential in the Indian market. Although there are many reasons why not investing in the government programme may be a missed opportunity, a few of them are listed below:

a) *Gateway to Indian markets*: The disinvestment and asset monetisation programmes have been launched to attract investors, aiming to strengthen the economy by positioning private investors as co-partners in India's next growth phase. The tall targets and expectations set

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by the government for its disinvestment and asset monetisation programmes, has driven it to streamline processes surrounding the programmes and take a more commercial approach on matters. This new and reformed approach lays the perfect foundation for any new investor to enter the Indian market by way of well-regulated and transparent programmes.

b) *Premium assets at attractive valuations*: Even after liberalisation, PSUs/ government have continued to own and control some of the most exceptional and largest assets in India, which till date have not been capitalised to their maximum potential. This presents a unique opportunity for investors to acquire these assets/ PSUs at a significantly discounted price, compared to similarly placed private sector assets. Moreover, the assets offered under the asset monetisation programme are mature, low risk and have the potential to provide stable returns over a long period of time. This in turn eliminates the risk of starting projects in India from scratch, thus providing an unrivalled channel to global institutional investors like insurance funds, sovereign wealth funds and pension funds to build their presence in India.

c) *Growth Potential*: India is one of the fastest-growing economies in the world, with the Indian government actively pursuing economic reforms to attract foreign investment. Investing in the government's disinvestment and asset monetisation programmes provides investors with an opportunity to diversify their portfolio across sectors.

d) *Corporate Governance*: Government policies are now aimed at providing a robust corporate governance framework for PSUs, with the government proposing to undertake steps to ensure that PSUs are run professionally and transparently, leading to better decision-making and improved performance.

e) *India Growth Trajectory*: The strategic launch of these programmes comes at a time when the economic projection of India is positive, there is demographic presence of a large middle-class in the consumer base, responsible for the increase in domestic demand and availability of educated and skilled manpower. The synergy between such programmes and the modern socio-economic landscape has the potential to be a game changer in the restructuring of the Indian economy.

the assets offered under the asset monetisation programme are mature, low risk and have the potential to provide stable returns over a long period of time. ”

The disinvestment and asset monetisation programmes, though an excellent opportunity for investors, will entail its own set of challenges, which will require investors to learn and be adaptive of the regulatory regime and processes in India.

Conclusion

The government's disinvestment and asset monetisation programmes though currently aspirational, are evidence of the government's approach towards consistency, certainty, predictability and initiative, while unambiguously announcing the government's resolve that it "*has no business to be in business*". The last calendar year has proved that the government is motivated and driven to make its disinvestment and asset monetisation programmes a success, with the successful disinvestment of Air India and the Life Insurance Corporation, re-igniting the government's privatisation drive, with new learnings for the government.

With the shift in the global economic outlook towards China and global investors predicting India's emergence as an alternative due to market opportunities, India is expected to lead the world stage in terms of an easy, cost-effective and approachable destination for potential investors. Participation in disinvestment and asset monetisation programmes is a viable option for investors to enter and establish their presence in the Indian market, by acquiring exceptional assets at competitive prices, while diversifying their portfolio and capitalising on the growth potential of the Indian market.

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07

OVERVIEW OF IFSC, GIFT CITY

THE DEVELOPMENT, EVOLUTION, AND THE GRADUAL AWAKENING

Introduction

India's first and maiden International Financial Services Centre (**IFSC**), located in Gujarat International Finance Tec-City (**GIFT City**), a notified Special Economic Zone (**SEZ**), was set up in 2015, with a vision to become one of the leading global financial centres (**IFC**), providing a business friendly regulatory regime at par with other IFCs.

With India assuming the G-20 presidency, IFSC is the perfect platform to exhibit the country's strength in the global financial market, the commercial links it can prospectively share with global economies and showcase its true potential.

The IFSC Story: An Overview of the regulatory regime

Whilst being territorially located in India, IFSC has been envisaged as India's gateway to offshore global financial services and products and a platform for the Indian market to undertake their offshore transactions within the territory itself, i.e, "*onshore the offshore*".

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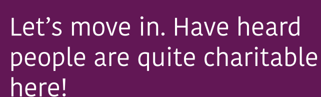
Entities in the IFSC are regulated by the IFSC Authority (**IFSCA**), which has been established as an unified regulator for all financial services and products in the IFSC, with a mandate to regulate and develop financial services, financial products, and financial institutions in the IFSC. The IFSCA, as a super regulator, is empowered to perform the functions of multiple Indian financial sector regulators, such as the SEBI, RBI, IRDAI and PFRDA in the IFSC jurisdiction.

Entities set up in the IFSC, for the purposes of foreign exchange, will be treated as non-residents[1]. Further, any transaction between an IFSC based entity and a foreign entity (i.e., an entity located outside India and/ or in IFSC) will be considered as a transaction between two non-residents. Also, an IFSC entity is required to undertake its business only in freely convertible foreign currency (other than Indian Rupees), but is allowed to defray its administrative expenses in Indian Rupees. There are also specific relaxations provided under the Companies Act, 2013, such as relaxed timelines for filing of various forms and returns, etc.

The establishment of IFSCA, in 2020, greatly helped in turning the wheels and witnessed the advent of global businesses, such as Bank of America, Morgan Stanley, JPMorgan, MUFG, Deustche Bank, Barclays Bank, as well as consolidation plans of offshore businesses of various Indian businesses, such as Punjab National Bank, EXIM Bank, NIFTY, to this unique jurisdiction. As on date, more than 250 entities spread across banking, capital markets, fintech, insurance, and fund sector have been registered with the IFSCA and many more are in the pipeline.

India's IFSC has always been a pioneer project for the country and as we move into 'Amrit Kaal', this regulatory island can become a key to accelerate India's goal of becoming 'Atma Nirbhar'.

Considered as a light touch regulator, the IFSCA has evolved as a principle-based legislator for the IFSC jurisdiction, while setting up the highest standards of compliance with AML/ CFT and FATF requirements and striving to provide a holistic business and commercial environment to various industry players under one umbrella.



1. Regulation 3, Foreign Exchange Management (International Financial Services Centre) Regulations, 2015

Gifts from the Government

India's IFSC has always been a pioneer project for the country and as we move into 'Amrit Kaal', this regulatory island can become a key to accelerate India's goal of becoming 'Atma Nirbhar'. The legislative changes to the overseas investment regime, along with IFSC specific announcements in the Union Budget 2022 and 2023 gave the IFSC jurisdiction a much-needed impetus.

The overseas investment norms in India recently underwent a regulatory overhaul. The Ministry of Finance (Department of Economic Affairs) released the Foreign Exchange Management (Overseas Investment) Rules, 2022, and the regulations and directions issued thereunder (collectively referred to as **New OI Regime**), which superseded the erstwhile regime. The New OI Regime provides *inter alia* special benefits for investments from India to IFSC, treatment of investments into funds as "overseas portfolio investment" and promises time bound permissions from the concerned financial services regulator in India for the said purpose.

The Union Budget of 2022 (**Budget 2022**) had two key exciting announcements *vis-à-vis* IFSC: (a) foreign universities will be allowed to set up in the IFSC jurisdiction, free from the purview of domestic regulations to facilitate availability of high skilled talent pool in the IFSC; and (b) setting up of international arbitration centre for ease in settlement of disputes within the IFSC.

Additionally, the Union Budget of 2023 (**Budget 2023**) greatly emphasised on increased ease of doing business by announcing the launch of a single window clearance system for granting various permissions and compliance related submissions in the IFSC and authorising the removal of dual legislation there, thereby proposing to consolidate the Special Economic Zone Act, 2005, related provisions with the IFSCA. It further announced the setting up of data embassies in the IFSC jurisdiction and the establishment of Export Import Bank of India's subsidiary, with an objective to provide trade refinancing to global players.

The steadfast and constant backing and the confidence displayed by the Government of India has resulted in the expansion of financial activities undertaken in and from the IFSC. This has resulted in renewed enthusiasm from both private and public players.

Activities in the IFSC

Over the past few months, the IFSCA has taken great strides in making the IFSC a preferred destination for undertaking financial services and offering financial products, for both domestic and foreign players.

BANKING AND FINANCING SECTOR

Currently playing a major role as trendsetters in the IFSC, the banking sector not only provides a boutique of plain vanilla banking products and services, but also structured products and services catering to the industry requirement.

The IFSC Banking Units (**IBUs**) can only be set up as a branch of their parent entity. IFSCA's banking regime permits not only traditional banking activities, but also new age products, including bullion banking, investment banking, acquisition financing, aircraft and ship leasing, distribution of global products, structured deposits, including green deposits, global administration office, etc.

Interestingly, Budget 2023 also paved the way for issuance of offshore derivative instruments (**ODI**) from the IFSC and such ODI would be recognised under the Securities Contract (Regulation) Act, 1956. Historically, SEBI has always viewed ODIs suspiciously, but domiciling the same in IFSC will not only help curb issues pertaining to greater transparency and supervision, but also provide India's domestic market with access to offshore entities. To cement this move, the government has removed double taxation, by proposing exemption to any income distributed on offshore derivative instruments entered with an IBU.

The recent global liquidity crunch and banking sector turmoil had an unexpected but positive ripple effect on the IFSC ecosystem. With the startup and the PE/ VC ecosystem looking for an effective alternative, the IBUs had a ready, time bound solution to help diversify funds and risks. Reportedly, around USD 200 million of the USD1 billion funds held by Indian startups in Silicon Valley Bank were transferred to the IFSC. This put the focus back on the IFSC's ability, capability and the offerings that it can provide.

Adequately supporting the banking regime, the IFSCA has also issued the IFSCA (Finance Company) Regulations, 2021 (**Finance Company Regulations**), setting out a framework for governance and operations of finance companies (other than banks). Such non-banking finance companies have been permitted to undertake core activities (such as lending, factoring, global/ corporate treasury, etc.) and non-core activities (merchant banking, operating lease for aircraft/ ship, etc.).

FUNDS

IFSCA (Fund Management) Regulations, 2022 (**FM Regulations**), is the primary legislation governing and facilitating a world class regulatory regime for funds in IFSC. The FM Regulations provide for a regulatory regime governing fund management entities (**FME**), which is based on types of FMEs, i.e, authorised FME, registered FME (non-retail and retail). The FM Regulations permit an FME to float venture capital scheme, restricted scheme, retail scheme/ mutual fund scheme, special situation fund scheme, exchange traded funds, angel funds, family investment funds, etc.

The key objective of the FM Regulations was to emulate the competitive environment prevailing in preferred funds jurisdictions such as Singapore, Mauritius, etc. In fact, to help global funds set up in the IFSC, the Budget announced that tax benefits, i.e.., the exemption on capital tax on account of relocation of fund from offshore location (broadly, transfer of capital asset, transfer by a shareholder/unitholder available, and income arising or received by a non-resident investor or a specified fund, on account of transfer of shares) to IFSC would be extended from March 31, 2023, to March 31, 2025. A combination of many of these factors has resulted in many funds setting up shop in the IFSC, and helped it gain recognition as a preferred global destination for funds and investment.

The FM Regulations also allowed setting up of family offices in the IFSC to tap into market and industry sentiment. It also specifically permits the creation of a family investment fund and allows pooling money from a 'single family'.

The IFSC ecosystem also hosts financial service providers providing wealth management, tax, and structuring advisory as well as portfolio management. The holistic regulatory regime, coupled with a favourable taxation environment will play a very key role in attracting global HNIs and NRIs with high net worth to set up office in IFSC.

Additionally, the IFSCA is also planning to adapt a variable capital company structure (**VCC**) in the IFSC and had set up an expert committee to examine the

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adoption of VCC in IFSC. VCC structure, though novel to India, is omnipresent in many popular global financial hubs such as Singapore. Generally, VCCs are structured like protected cell companies, multi-share class vehicles or variable capital companies.

CAPITAL MARKET SECTOR

The capital market sector is still at a nascent stage in IFSC. However, the IFSC regime provides a comprehensive regulatory market regime for industry players in the space, allowing even structured products such as index derivatives, commodities future, equity and debt listing, depository receipts, REITs and InVITs, NDFs, etc. The IFSCA has also permitted setting up of market infrastructure institutions such as stock exchanges, clearing corporations, depositories,[2] along with various capital market intermediaries such as brokers, custodians, registrar/ share transfer agents, merchant bankers, wealth managers, portfolio managers, investment advisors, etc.[3]

The current sandboxes provided by the IFSCA also offer niche products like unsponsored depository receipts, fractionalised ownership in bonds, bullion depository receipts, tokenisation, etc. The IFSC jurisdiction is still awaiting the introduction of the right product to help bring the necessary liquidity. With Nifty expected to move from the Singapore Stock Exchange to NSE IFSC by mid-2023, the issue of lack of liquidity in the IFSC jurisdiction may be greatly resolved.

The IFSC has also been pictured as a global bullion trading and vaulting hub. Following the same, India International Bullion Exchange (**IIBX**) was set up in IFSC. The idea was to provide a support system within the IFSC itself. Hence, the IFSCA also allowed bullion vaults and bullion refinery to be set up. With the establishment of IIBX, India has joined the league of select few nations providing the facility of bullion exchange. It is expected to put the country on the map as a global leader in bullion related transactions.

INSURANCE SECTOR

The insurance regime in the IFSC has undergone a major rejig with redrafting of the applicable erstwhile regulations. These regulations provide for operationalisation and setting up of insurance business by insurers and re-insurers and also for other aspects such as permissible investments, product pricing, etc. The objective is to develop the IFSC into a longevity and re-insurance global hub.

During the Covid-19 pandemic, both personal and commercial insurance garnered increased industry and regulatory attention. It is important to note that with niche areas such as aircraft leasing and ship leasing gaining moment, IFSC is suitably placed to fulfill the industry's insurance and reinsurance needs.

SUNRISE SECTORS

FINTECH AND TECHFIN

The IFSCA ardently promotes financial innovation through technological development. Hence, it is one of the few regulators that provides licence to fintech and techfin players while allowing them to experiment with financial products and services in a regulatory and fintech sandbox. To further promote the fintech ecosystem, the IFSCA has also tied up with well-known international jurisdictions such as Singapore, Qatar, Luxemburg, etc., to provide a fintech bridge, allowing global players a one-of-a-kind opportunity to launch fintech and techfin products requiring approvals from regulators in multiple jurisdictions. Fintechs and techfins present in the IFSC are currently providing an array of solutions for digital signature, KYC, tokenisation, derivative products, trade finance platforms, dollar payment and settlement system through digital coins, etc., thereby truly supporting the financial institutions present in the IFSC.

Additionally, a fintech hub is proposed to be set up in the domestic tariff area of GIFT City, adjacent to the IFSC region, which will help play a complimentary role to the ecosystem here.

AIRCRAFT LEASING AND SHIP LEASING

The Finance Company Regulations, read with the Framework for Aircraft Leasing[4] and Ship Leasing[5] has paved the way for undertaking operational and financial leasing of aircraft and ships, respectively, in and from the IFSC jurisdiction. It is time that the country taps into the large Indian diaspora and the ensuing business opportunities within the global financial hub. Further, to provide a platform that is on par with the ones offered by other established jurisdictions, the Indian government has offered huge

2. IFSCA (Market Infrastructure Institutions) Regulations, 2021
3. IFSCA (Capital Market Intermediaries) Regulations, 2021
4. IFSCA Framework for Aircraft Lease dated May 18, 2022.
5. IFSCA Framework for Ship Leasing dated August 16, 2022.

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tax breaks and an enabling regulatory regime in the IFSC.

INTERNATIONAL TRADE FINANCING SERVICES (ITFS) PLATFORM

With trade and supply chain finance becoming global, the IFSCA has permitted the setting up of an ITFS platform in the IFSC. This is an important milestone as it will open global avenues for medium and small enterprises in India as well as globally while digitally transforming and disrupting the landscape of factoring and bill discounting.

SUSTAINABLE FINANCE

India has announced its ambition to achieve net zero emissions by 2070. The IFSC is a perfect gateway for achieving this target. As a jurisdiction, it can play a major role for sustainable and sustainability linked finance and transitional sustainability finance. In fact, the IFSC jurisdiction has already witnessed a multitude of financial products and services, catering to such needs, such as but not limited to listing of green bonds on the exchanges, an international sustainability exchange platform, green deposits, etc.

FOREIGN UNIVERSITIES

Hon'ble Finance Minister, Ms. Nirmala Sitharaman in Union Budget 2022 announced that "*World-class foreign universities and institutions will be allowed in the GIFT City to offer courses in Financial Management, FinTech, Science, Technology, Engineering and Mathematics, free from domestic regulations, except those by IFSCA to facilitate availability of high-end human resources for financial services and technology*". Basis this, the Central Government *vide* notification[6] dated May 23, 2022, notified courses offered in above mentioned subjects by foreign universities or foreign institutions in the IFSC as 'financial services'. Subsequently, the IFSCA notified the IFSCA (International Branch Campuses and Offshore Education Centres) Regulations, 2022, on October 11, 2022, for the operation of foreign universities and institutions in the IFSC on a standalone basis while providing the same course and recognition as in its home jurisdiction. The primary aim was to nurture and develop the talent and skillset required in an IFSC based workforce. Deakin University became the first foreign university in India, to be approved to set up its campus in IFSC on a standalone basis.

ANCILLARY SERVICES

In order to provide a truly global financial hub under a single regime, the IFSCA has also permitted ancillary service providers such as accountants, tax consultants, legal firms, audit firms, trusteeship entities, ship broking, etc., to set up in IFSC.[7]

Fiscal Benefits

Taxation is often one of the key considerations while selecting a particular jurisdiction. The Government of India has been quite proactive in ensuring that the IFSC provides a competitive tax regime in comparison to other established international financial centres.

The key taxation benefits enjoyed by an IFSC unit include (a) 100% tax holiday for 10 consecutive years out of 15 years, with the IFSC Unit having the flexibility to select any 10 years out of a 15 years' block; (b) Minimum Alternate Tax rate at 9%; (c) Withholding tax @4% on interest on overseas borrowings (long term bonds/ rupee denominated bonds only listed on IFSC); (d) No securities transaction tax, commodities transaction tax or stamp duty on transactions carried out in IFSC exchanges or aircraft leasing transactions; (e) Interest payment to a non-resident by a unit in IFSC is exempted; (f) Capital gains tax on transfer of equity shares of a company or units of an equity oriented fund or business trust (without payment of STT) is taxed as: (i) Short term @15% and (ii) Long term @10%; and (g) GST is not payable on goods and services received by the IFSC unit. Additionally, IFSC units also enjoy specific exemptions from stamp duty, GST exemptions, as well as other SEZ related tax benefits and sector specific direct and indirect tax breaks.

Apart from the above, Budget 2022 also provided specific tax exemption on OTC derivatives issued by an IBU and income from royalty and interest on account of ship leasing, subject to specified conditions.

6. Ministry of Finance (Dept. of Economic Affairs) Notification S.O. 2374(E) dated May 23, 2022.
7. IFSCA Framework for enabling Ancillary Services at IFSC dated February 10, 2021.

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Additionally, special exemptions and subsidies in the form of stamp duty, etc., are also provided by the State of Gujarat. Further, Gujarat government issued IT/ ITES Policy (2022-27) also provides many capex and opex related benefits, which can be availed by an IFSC unit, subject to such conditions prescribed in the IT/ ITES Policy.

Road Ahead

While people who are a part of the IFSC jurisdiction and present on ground paint a picture of unprecedented growth that this jurisdiction is witnessing, others may have a more watch and wait guarded approach. However, IFSC's growth trajectory, though slow, is moving upward in the right direction, with unbound, untapped potential for positioning itself as the financial capital of the world.

The road ahead is not without hurdles. Few regulatory aspects such as providing parity to IFSC with offshore jurisdictions when it comes to investments and expenses under the liberalised remittance scheme by resident Indians, setting up an autonomous court system and an international arbitration centre for effective dispute resolution and providing (monetary) liquidity in the form of finance from the Central Government and/ or its undertakings, as skin in the game, will help the IFSC adequately compete with other IFCs.

IFSC is a perfect example of economic development, backed by technological advancement. It has the potential to revolutionise the way India interacts globally, while becoming truly 'Atma Nirbhar'.

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08

INSOLVENCY AND **BANKRUPTCY** CODE 2016

BEYOND THE CODE

Evolution of IBC Resolution: The Tipping Point

In 2016, India embarked on a stressed assets resolution journey through a *rescue-based creditor-in-control regime*, with the introduction of the Insolvency and Bankruptcy Code, 2016 (**IBC**). The IBC enactment was not only unprecedented, it was also revolutionary – it opened up investment channels (both domestic and foreign), in and resolution of, distressed assets. A dynamic law, the IBC has also kept pace with socio-economic developments, such that since its introduction, it has been amended six times and the underlying regulations (18 in total), issued by the Insolvency and Bankruptcy Board of India (**IBBI**), have been amended approximately 85 times. A total of 6,199 corporate insolvency resolution process (**CIRP**) had commenced by the end of December 2022, of which 4199 have been closed. Of the CIRPs closed, 894 have been closed on appeal or review or settled; 793 have been withdrawn; and 611 have ended with resolution plan approvals; while 1,901 have ended in liquidation orders.[1]

1. The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India, Vol. 25, (October-December 2022).

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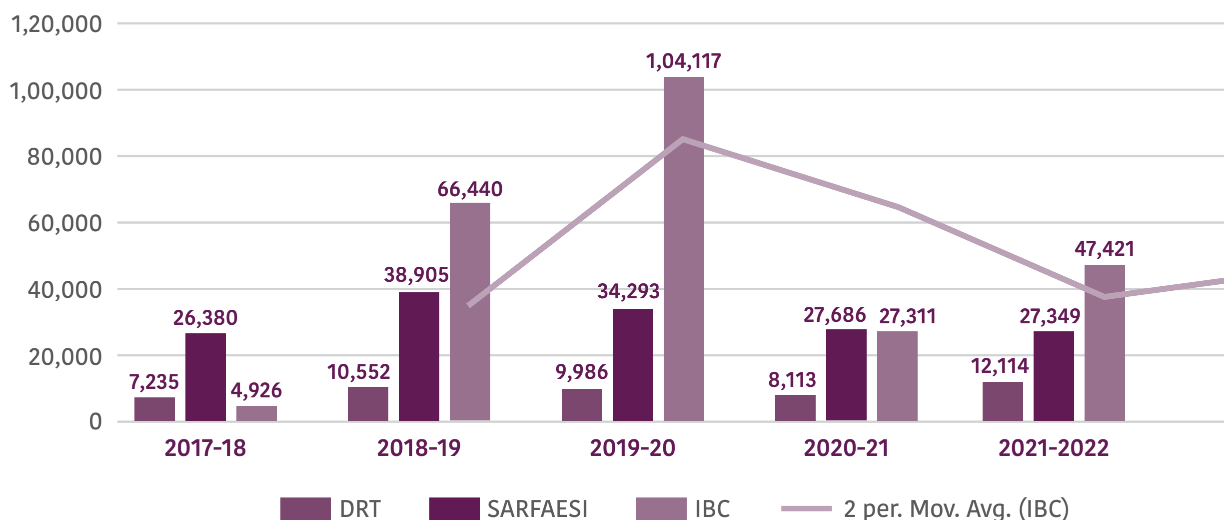
The success of IBC is demonstrated by the fact that even as the global economy emerges from a pandemic-induced economic slowdown and faces geopolitical headwinds, India has managed to clean-up the balance sheets of banks and financial institutions. The gross non-performing assets ratio (**GNPA**) of scheduled commercial banks (**SCBs**) has decreased from 8.2 per cent in March 2020 to a seven-year low of 5.0 per cent in September 2022, whereas the net non-performing assets ratio has dropped to a ten-year low of 1.3 per cent of total assets, paving the way for a well-capitalised banking sector.[2] The GNPA for non-banking finance companies (**NBFC**) has also declined from 7.2 per cent in June 2021 to 5.9 per cent in September 2022.[3] Further, a comparative analysis for the last five financial years (as set out below) reflects that the total amount recovered by SCBs under the IBC has been the highest compared to other tools for recovery, such as under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**) and Debt Recovery Tribunals (**DRTs**) under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.[4]

Amount recovered by scheduled commercial banks through various channels (amount in INR Crore)



Out of the CIRPs that ended in resolution plan approval, the creditors have realised INR 2.53 lakh crore, being 175.91% of the liquidation value and 84.08% of the fair value of the corporate entities. While the quantum of recovery is commendable, the success has come with its own set of infrastructural challenges. The quasi-judicial adjudicating authorities (i.e., National Company Law Tribunal (**NCLT**)) are one of the important institutional infrastructures in the IBC framework. There are currently 40 judges (19 judicial and 21 technical members) across 16 benches of the NCLTs (comprising 28 courtrooms with bench strength of two judges each). As of August 2022, approximately 7,175 applications were pending at admission before different benches of the NCLT.[5] Further, the average time taken for closure of CIRP is approximately 587 days.[6] The shortage of judges, high case load, coupled with excessive delays and judicial backlog are areas of concern, which lead to increase in cost and deterioration of value of assets of the corporate entity. Another critical infrastructural issue is related to complete operationalisation and utilisation of data available with information utilities, which are entrusted to act as repository of data pertaining to debt and default to aid the NCLTs in admission of CIRP applications.

In addition to the infrastructural issues, concerns have been raised on conflicting judicial precedents that disturb some of the foundation of the IBC. For

2. The Economic Survey Report (2022-23), Government of India, Ministry of Finance, Department of Economic Affairs Economic Division.
3. *supra* note 2.
4. RBI Report on Trend and Progress of Banking in India 2021-22.
5. <available at: https://nclt.gov.in/section-7-9-and-10> <last visited on March 7, 2023>
6. The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India, Vol. 25, (October-December 2022)

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instance, in *Vidarbha Industries Private Limited v. Axis Bank Limited*[7] (***Vidarbha Judgment***), the Supreme Court has departed from its earlier ruling in *Innoventive Industries*[8] and held that as far as insolvency filings by financial creditors are concerned, the NCLT is not obligated to admit such applications. It has instead been conferred with discretionary powers to either admit or reject such an application if the circumstances so warrant. In this regard, the Supreme Court has observed that unlike an application by an operational creditor wherein the NCLT "*shall*" admit the insolvency application if the pre-requisite conditions are met, Section 7(5) of the IBC that deals with an application by a financial creditor contemplates that if the NCLT is satisfied that a default has been committed by the corporate debtor, it "*may*" admit the insolvency application. Even though the court came to its finding in the context of certain specific circumstances, which were unique to the corporate debtor in question, the ruling in *Vidarbha Industries* is contrary to the legislative intent of the IBC as well as the earlier rulings of the Supreme Court. The review petition filed against the decision in *Vidarbha Industries* was also dismissed by the Supreme Court[9]. However, a larger bench comprising three judges (Dr. D.Y. Chandrachud C.J., P.S. Narasimha J. and J.B Pardiwala J.) has taken cognisance of the conflicting position taken in *Vidarbha Judgment* from the previous judgements (including *Innoventive Industries*), and notice has been issued to the respondents to this effect. The matter is now pending consideration before the Supreme Court. Unless overturned by the larger bench of the Supreme Court or subsequent legislative amendments, this ruling is likely to cause delays in the admission of insolvency proceedings, resulting in further value deterioration, which was expressly sought to be curtailed by the early admission of insolvency proceedings.

Further, in *State Tax Officer v. Rainbow Papers Limited*[10](***Rainbow Papers Judgment***), the Supreme Court of India dealt with the question of whether the provisions of the IBC and, in particular, Section 53 of the IBC, which lays down distribution waterfall, overrides Section 48 of the Gujarat Value Added Tax Act, 2003 (**GVAT Act**), which creates a first charge in favour of the GVAT authority. The Supreme Court was examining this issue while dealing with the challenges posed for determining the minimum amount payable to tax authorities under the GVAT Act as 'operational creditor' during the resolution process of a corporate debtor. The Supreme Court held that the debts owed to State under the GVAT Act would be considered as secured debt and are to rank equally with other specified debts (including debt owed to secured financial creditors). While the judgment is specific to the GVAT Act, it has far reaching implications for State dues, to the extent security is created in favour of the relevant Government and statutory authority by virtue of operation of law as payment to such authorities is being re-examined in the ongoing and closed cases. Further, this judgment impacts the objectives of the IBC, which as stipulated in the preamble of the IBC as well as the Statement of Objects and Reasons includes "*…alteration in the order of priority of payment of Government dues*". Notably, the report of the Bankruptcy Law Reforms Committee (which formed the basis of present text of IBC) had specifically recommended to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below unsecured creditors[11] to promote credit availability, reduce cost of capital and promote entrepreneurship, which is expected to benefit the Government in the longer run.

The Government of India and the IBBI have moved swiftly to address these issues. Recently, the Ministry of Corporate Affairs (**MCA**) has by way of consultation paper dated January 18, 2023 (**Consultation Paper**), invited comments from the public on IBC changes being considered.[12] Among others, in order to address the concerns raised pursuant to the *Vidarbha Judgment*, it is proposed to amend Section 7 of the IBC to limit the criteria for admission of CIRP application to "existence of debt" and "default" in line with the principles laid down by the Supreme Court in *Innoventive Industries* and thus the term "*may*" appearing in Section 7 ought to be replaced by "*shall*". Further, to address the concerns raised pursuant to the *Rainbow Papers Judgment*, it is proposed that all debts owed to the Central and State Government, irrespective of whether they are secured creditors, pursuant to a security interest created by a mere operation of statute, shall be treated equally with other unsecured creditors. The said amendments are under consideration by the Government of India.

The evolution of IBC thus stands at a tipping point, aiming to create new opportunities as an investor-friendly destination.

7. Vidarbha Industries Private Limited v. Axis Bank Limited (2022) 8 SCC 352
8. *Innoventive Industries Ltd. v. ICICI Bank and Anr.* (2018) 1 SCC 407
9. Review Petition (Civil) No. 1043 of 2022 decided on September 22, 2022
10. (2022) SCC OnLine SC 1162.
11. The Report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design (November 2015)
12. Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016 (January 18, 2023), Ministry of Corporate Affairs, Government of India, File No. 30/38/2021-Insolvency

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New Opportunities

With the evolution of IBC, there is an evident behavioral shift that has fostered credit discipline and also prompted entrepreneurs to take active measures to detect and mitigate stress early. This in turn has created a market for distressed asset investment, even outside the IBC, which to some extent will help boost investor sentiment and help create a matured and sophisticated space for stressed assets. To accomplish the same, the regulators in India, including the Reserve Bank of India (**RBI**) and the Securities and Exchange Board of India (**SEBI**), have also played an important role by facilitating new opportunities, some of which are detailed below:

ENHANCING THE ROLE OF ARCS IN RESOLUTION OF STRESSED ASSETS

One of the crucial avenues for investing in stressed assets is through asset reconstruction companies (**ARC**). Although, sales to ARCs have gradually decreased over the years, and in 2021-22, only 3.2 per cent of the previous year's GNPAs were sold to ARCs[13], the assets under management of ARCs are expected to grow 10% this fiscal year.[14] The recent amendments will also aid the ARCs to capitalise on the available opportunities, some of which are set out below:

a. The provisions of the SARFAESI Act lay down business activities that may be undertaken by ARCs, which include securitisation or asset reconstruction. For other activities, prior RBI approval was envisaged. In view of the same, participation of ARCs as resolution applicants was subject to challenges. In October 2022, pursuant to the RBI Circular on Review of Regulatory Framework for Asset Reconstruction Companies (**ARC Regulatory Framework**)[15], the RBI specifically permitted ARCs to participate as resolution applicants under the IBC, subject to them meeting the minimum net owned fund requirement of INR 1,000 crore and ensuring compliance and other disclosure requirements. In addition, the RBI has stipulated that for a specific CIRP, the ARCs shall not retain any significant influence or control over the corporate debtor after 5 (five) years from the date of approval of the resolution plan by the NCLT, failing which, the said ARCs shall not be allowed to submit any fresh resolution plans under IBC either as a resolution applicant or a resolution co-applicant.

b. The ARC Regulatory Framework has further stipulated investment in security receipts (SRs) by ARCs at a minimum of either 15% of the transferors' investment in the SRs or 2.5% of the total SRs issued, whichever is higher, of each class of SRs issued by them under each scheme on an ongoing basis till the redemption of all SRs issued under such scheme. Prior to this, ARCs had to invest at least 15% of the SRs issued in each class under each scheme even if there were other investors (in addition to the selling lenders). The amendment would free up funds for ARCs and further improve savings. Market reports also suggest that for cash transactions, savings could be as high as 80-85%, which in turn has enhanced the competitiveness of ARCs.[16]

13. RBI Report on Trend and Progress of Banking in India 2021-22
14. ASSOCHAM, CRISIL Report on Asset Reconstruction Companies, Realigning business models as opportunities evolve (February 2023)
15. RBI Circular on *Review of Regulatory Framework for Asset Reconstruction Companies (ARCs)* dated October 11, 2022, bearing reference number RBI/2022-23/128 DoR.SIG.FIN.REC.75/26.03.001/2022-23 (ARC Regulatory Framework)
16. *supra* note 14.

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c. Subject to certain conditions, stressed loans that are in default in the books of the transferors are permitted to be transferred to ARCs in terms of the RBI Transfer Directions (*as defined below*).[17] This was earlier limited to only NPAs. This would entail early stage participation to allow for optimal recovery by ARCs.

   The RBI has also recently issued a Discussion Paper on Securitisation of Stressed Assets Framework[18], which *inter alia* contemplates proposed framework on securitisation of stressed assets, which includes roles of special purpose entities and resolution managers in line with the international experience.

d. In 2016, sponsors were permitted to hold 100% (in departure from earlier limit of 50% limit) in an ARCs, subject to meeting a 'fit and proper' test.[19]

Although the amendment stated above comes with certain stipulations, these are likely to promote increased participation from ARCs (as well as SR holders and sponsors), yielding successful resolution of stressed assets.

RESTRUCTURING UNDER THE STRESSED ASSET DIRECTIONS

The RBI had issued Prudential Framework for Resolution of Stressed Assets, dated June 7, 2019 (as amended from time to time) (**Stressed Asset Directions**)[20]. As per the Stressed Asset Directions, in the event of a default[21] in an account of any lender (being the entities to whom the directions apply), all lenders are required to, within a period of 30 days of such default, undertake a *prima facie* review of the account and decide on a resolution strategy.[22] This framework also contemplates execution of inter creditor agreements (**ICA**), setting out broad decision making contours, which will be binding on all lenders. Foreign creditors can also become a party to the ICA and participate in the resolution process.

Unlike its predecessor regimes (such as the Corporate Debt Restructuring Scheme and Strategic Debt Restructuring Scheme), resolution under Stressed Asset Directions has gained traction with successful resolutions, some of which may also be attributed to IBC induced behavioral changes, as indicated above. In the recent past, restructuring of Altico Capital India Limited (a non-deposit taking systematically important non-banking financial company with aggregate debt of INR 4,000 crore approximately), Jain Irrigation Systems Limited (aggregate debt of INR 4,000 crore approximately), Imagicaaworld Entertainment Limited (aggregate debt of INR 1,500 crore approximately) and Hindustan Construction Company Limited (aggregate debt of INR 10,000 crore approximately) are a few of the success stories in respect of restructuring under Stressed Asset Directions.

RBI TRANSFER DIRECTIONS

In September 2021, the RBI revamped the regime for sale/ assignment of loans and loan participation by Indian lenders by issuance of the Master Directions-Reserve Bank of India (Transfer of Loan Exposures)

17. Paragraph 14 of the ARC Regulatory Framework.
18. Discussion Paper on Securitisation of Stressed Assets Framework dated January 25, 2023.
19. Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016
20. Prudential Framework for Resolution of Stressed Assets, Reserve Bank of India, June 7, 2019 <available at https://www.rbi.org.in/Scripts/NotificationUser.aspx-?Id=11580#F16.
21. The term 'default' has been defined to mean non-payment of debt (as defined under the IBC) when whole or any part or instalment of the debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be.
22. Paragraph 9 of the Stressed Asset Directions.

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Directions, 2021 (**RBI Transfer Directions**). The RBI Transfer Directions contain guidelines that are *inter alia* applicable to SCBs and NBFCs, permitting them to transfer: (i) loans that are not in default; (ii) "stressed assets", which are defined under the Master Direction as loan exposures that are classified as non-performing assets or as "special mention accounts"[23]. Stressed assets can only be transferred to permitted transferees and ARCs. Transfer of stressed assets as part of a resolution plan (approved by lenders – 75% by value and 60% by number) under the Stressed Asset Directions, resulting in an exit of all lenders, has been permitted across class of entities, including a corporate entity, which is statutorily permitted to acquire stressed assets.

The implementation of the RBI Transfer Directions, with increased participation from corporate entities, will enhance business opportunities in the distressed assets space.

NEW OPPORTUNITIES FOR SPECIAL SITUATION FUNDS

In January 2022, the SEBI introduced a new sub-category of the Category I Alternative Investment Funds (**AIF**), referred to as the Special Situations Fund (**SSFs**), by way of amendment to the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 (**AIF Regulations**). The SSFs (subject to them meeting the minimum corpus and capital requirements) are permitted to (a) invest only in *special situations assets*; and (b) act as a resolution applicant under the IBC.[24]

The term *special situation assets* covers a wide gamut of stressed assets, i.e., (a) stressed loans available for acquisition in terms of paragraph 58 of the RBI Transfer Directions[25], or as part of a resolution plan approved under the IBC or in terms of any other policy of the RBI or the Government of India issued in this regard (**Eligible Stressed Loans**); (b) SRs issued by an ARC registered with the RBI; (c) securities of specified investee companies[26], subject to certain requirements; (d) any other asset as may be specified by SEBI from time to time.[27]

The AIF Regulations stipulate diversification norms for Category I AIFs that restrict them from investing not more than 25% of their investable funds in one investee company, which however is not applicable to SSFs. Hence, SSFs should be able to invest up to 100% of their investable funds in a single special situations asset and may set up specific schemes targeting specific special situations asset, thereby providing much needed funding to corporate entities in distress and enable successful turnaround for the benefit of all stakeholders. A favourable regulatory regime for SSFs is expected to provide a platform for sophisticated investor participation, thereby creating a more robust market for stressed asset resolution.

PRE-PACK INSOLVENCY RESOLUTION PROCESS

In the aftermath of the financial concerns posed by the Covid-19 pandemic, India had taken various fiscal and regulatory measures to respond to and mitigate the economic distress caused by the pandemic. One such significant development was

23. "Special Mention Accounts" are classified in three categories (i.e. SMA-0, SMA-1 and SMA-2) depending on the period for which that account has been in default, as contemplated the Stressed Asset Directions.
24. Regulation 19M of Chapter IIIB (*Special Situation Funds*) of the AIF Regulations.
25. Paragraph 58 of the RBI Transfer Directions contemplates transfer of stressed loans under the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 resulting in an exit of all lenders from the stressed loan exposure, to the permitted transferees specified in Annex to the RBI Transfer Directions. The Annex is yet to be updated to include SSFs.
26. As per Regulation 19I(2)(c) of the AIF Regulations, SSFs can invest in securities of such investee company (i) whose stressed loans are available for acquisition as Eligible Stressed Loans; (ii) against whose borrowings, SRs have been issued by an ARC; (iii) whose borrowings are subject to CIRP under the IBC; (iv) who have disclosed all the defaults relating to the payment of interest/ repayment of principal amount on loans from banks / financial institutions/ systemically important non-deposit taking NBFCs/ Deposit taking NBFCs and/or listed or unlisted debt securities in terms of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, and such payment default is continuing for a period of at least 90 (ninety) days, after the occurrence of such default. In respect of (iii) and (iv) the credit rating of the financial instruments or credit instruments or borrowings of the company should have been downgraded to "D" or equivalent.
27. Regulation 19I(2) of Chapter IIIB (*Special Situation Funds*) of the AIF Regulations.

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the IBC amendment (effective from April 4, 2021), which introduced pre-packaged insolvency resolution process framework (**Pre-pack**) for micro, small and medium enterprises (**MSME**). Pre-pack is a *debtor-in-possession* as opposed to the *creditor-in-control* model for corporate rescue under the IBC. The framework is a hybrid model based on the learnings from the various jurisdictions. However, in contrast to the framework applicable in the United States of America and the United Kingdom, the process is much more court-oriented. The process contemplates filing, post approval (with specified majority) from the shareholders and unrelated financial creditors. While seeking approval from financial creditors, the MSME is required to provide such creditors with a declaration of the filing being bona fide and special resolution of the shareholders (as mentioned above) and a base resolution plan for the MSME, which conforms to the IBC (Base Resolution Plan). A Pre-pack also has moratorium protection similar to CIRP, rather more as it would be applicable from the date of filing till the conclusion of the process. Unlike normal CIRP, the role of insolvency professional is diluted (other than in exceptional circumstances), with directors running the process. The Base Resolution Plan is evaluated by the committee of creditors, comprising unrelated financial creditors, and may be approved by or be further subjected to a swiss challenge process. The resolution plan must be approved by a majority of 66% by voting share.

The outer timeline for completion of the Pre-Pack is 120 days from the date of the admission order. However, the insolvency professional is required to submit the approved resolution plan within 90 days from the date of the admission order, failing which the process would be terminated. Accordingly, unlike in other jurisdictions, rather than exiting a formal insolvency process immediately or shortly after a filing, debtors could remain in Pre-pack for up to 90 days, or potentially longer in case of litigation.[28]

While the shortcomings on account of potential delays (including litigation and process related) cannot be ruled out, the framework attempts to balance the interest of all stakeholders in a time-bound manner. Further, court sanctioned approval of a resolution plan, which has a binding effect, allows the MSME to have a clean state start, which may be the key to survival for many small businesses.

The Government is also considering widening the scope of applicability of Pre-pack framework to cover other specified entities, in addition to MSMEs.[29] Once introduced, such amendment would definitely help in early and time-bound resolution, albeit with the blessings of the creditors and the NCLT.

FAST TRACK INSOLVENCY RESOLUTION PROCESS

Chapter II of Part II of the IBC prescribes fast-track corporate insolvency resolution process (**FIRP**), which is applicable to small companies (as defined under the Companies Act, 2013), specified start-ups (other than a partnership firm) and unlisted companies with total asset size of less than INR 1 crore.[30] The process is designed to be completed within a shorter time frame than the regular CIRP, with a maximum of 90 days (extendable by a further 45 days) allowed for the resolution process.

The MCA in its Consultation Paper has recommended to widen the scope of applicability of the FIRP provisions to corporate entities, with larger asset size (as may be notified by the Central Government). Further, it is proposed to remodel the existing provisions such that the FIRP can be driven by unrelated financial creditors through an informal out-of-court process, with ultimate sanction of the resolution plan by the NCLT and other appropriate checks and balances. The proposed amendments are expected to aid time-bound value maximisation for corporate entities, coupled with court-sanctioned resolution plan, which would give requisite protection to potential investors.

Conclusion

India's stressed asset market and corresponding investment opportunities have significantly evolved in the last six years, in the aftermath of the introduction of IBC. The trend is now moving beyond IBC to more sophisticated and beneficial restructuring tools, which if leveraged as envisaged, would create numerous investment opportunities in India's distressed asset market.

28. Special Report: India's pre-pack insolvency resolution process - a pre-pack but not as we know it, Ashley Bell, Debtwire (March, 2021).
29. *Supra* note 12.
30. Section 55 of the IBC read with the MCA Notifications dated June 14, 2017 and August 30, 2022.

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09

DECRIMINALISATION AND TRANSPARENCY IN **TAX FILINGS**

Introduction

Attracting increased domestic and foreign investments, which is a critical marker of a healthy economy, is predicated in part on international trade and commerce in today's globalised world. To instill confidence among domestic and foreign businesses about the country's governance, a transparent and efficient tax system is imperative to facilitate ease of doing business, which can act as a catalyst in attracting investments.

The last decade witnessed increased international attention towards ensuring tax transparency, simplification of taxation norms and reducing penal consequences for non-compliance, to promote global trade without impinging upon the taxing rights of a nation. For instance, the Organisation for Economic Co-operation and Development's base erosion and profit shifting project stresses on introducing tax policy changes which, *inter alia*, (a) combat harmful tax practices through a transparent framework, (b) provide for mandatory disclosure rules, which require taxpayers to report aggressive tax planning strategies, and (c) require multinational enterprises to prepare country by country reporting on the global allocation of income, profit, taxes paid and economic activity among tax jurisdictions in which it operates. This is being followed by several nations reforming their tax regime, to align their fiscal policies with these principles.

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The Indian government, in the past few years, has tried to create a healthy environment for businesses by incorporating a sound and efficient tax system. This has been done by rationalising various tax provisions, streamlining the process of assessments and appeals, decriminalising various legislations while at the same time introducing new provisions to enhance compliance and monitoring requirements to create a transparent tax system. This article discusses a few such recent measures.

Substantial efforts are being made to bolster reliance on renewables through development of clean energy storage, and to make it an attractive investment proposition.

Moving Towards a System of Trust-Based Governance

The government has shown an inclination to move away from 'tax terrorism' to 'tax transparency'. Hence, it has introduced various measures to bridge the trust deficit between taxpayers and tax authorities while also easing taxation rules and procedures. Instrumentally, the tax governance policy in India has seen a shift towards technological usage and automation of processes instead of excessive dependence on manually performed functions. This is expected to encourage more taxpayers to appropriately disclose their taxable income and enhance taxpayer as well as tax collector accountability. It is further expected to streamline the tax collection process and remove the creeping-in of human biases within the recovery process.

For instance, in August 2020, the government unveiled a landmark reform in India's taxation regime with the launch of 'Transparent Taxation, Honouring the Honest' platform (**Transparency Platform**), to honour honest taxpayers who diligently pay their tax dues. The Transparency Platform introduced three major reforms, i.e., Faceless Assessments, Faceless Appeals and Taxpayer's Charter. It signalled a transformation

1. Notified as the 'Faceless E-assessment Scheme, 2019' on September 12, 2019 vide Notification No. S.O. 3264(E) dated September 12, 2019, https://incometaxindia.gov.in/communications/notification/Notification_61_2019.pdf and subsequently rebranded as the 'Faceless assessment Scheme, 2020' under the Transparency Platform vide Notification No. S.O. 2754(E) dated August 13, 2020, https://incometaxindia.gov.in/communications/notification/notification_62_2020.pdf.
2. It may be noted that certain specified cases (such as those involving international tax charges, cases not having a permanent account number, etc.) have been excluded from the purview of FAS.

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in the income-tax collection and recovery process towards establishing a trust-based governance system, which is clean, corruption-free and policy driven. The key components of the Transparency Platform are:

1. **Faceless Assessments and Appeals**: The 'Faceless Assessment Scheme' (**FAS**)[1] was notified under the (Indian) Income-tax Act, 1961 (**IT Act**), with a view to establish a transparent, efficient and accountable way of carrying out and concluding income-tax assessment proceedings. The FAS signified a complete overhaul in the way income-tax proceedings were being conducted. Now, assessment proceedings[2] are conducted through virtual means via digital technology. The identity of the taxpayer is concealed from the Assessing Officer (**AO**) and vice versa. The scheme is implemented by the Central Board of Direct Taxes (**CBDT**), through a central nodal agency, i.e., the National Faceless Assessment Centre (**NFAC**). The NFAC acts as the single point of contact between the taxpayer and the Income-tax department (**ITD**). It employs an automatic allocation algorithm, which makes the use of data analytics and artificial intelligence to randomly assign cases to the respective assessment unit. Further, the modified procedure employs 'dynamic jurisdiction', i.e., cases are assigned irrespective of the territorial jurisdiction of the assessment unit.

   The assessment process now also involves team-based reviews by various units such as assessment units, verification units, technical units, and review units, which is a novel concept. The communication between and by the units is done through the NFAC, in electronic mode. The Transparency Platform also introduced the Faceless Appeal Scheme, which similarly removes human interface under the appellate process.[3]

   Thus, taxpayers are no longer required to physically visit the ITD office or interact with tax officers in person. This has also led to speedy disposal of proceedings, reduced corruption, and increased transparency in the system.

   Separately, post the adoption of the Transparency Platform, the government has introduced a faceless penalty scheme under the IT Act and a similar faceless assessment scheme under the Customs Act, 1962.

2. **Taxpayers' Charter**: The CBDT has also adopted a Taxpayers' Charter, containing fourteen commitments from the ITD and six expectations from taxpayers.[4] Taxpayers can approach the Taxpayers' Charter Cell under the Principal Chief Commissioner of Income-tax in each zone to ensure compliance with the charter. Some of the noteworthy features of the charter are (a) presumption of honesty vis-à-vis taxpayers, (b) ensuring confidentiality and privacy, and (c) building mechanisms for open communication and accountability. Taxpayers are also expected to honestly disclose full information and fulfil their compliance obligations. Thus, by adopting this charter, the government has signalled rewarding of voluntary compliance and making honest and transparent disclosures in tax filings. There is also an effort to make tax enforcement more taxpayer-friendly rather than coercive and secretive. Similar commitments have also been adopted globally by major jurisdictions such as the US,[5] Canada,[6] and Australia.[7]

3. Notification No. S.O. 5429(E) dated December 28, 2021, https://incometaxindia.gov.in/Communications/Notification/Notification_No_139_2021.pdf.
4. Income Tax Department, 'Taxpayers' Charter', https://incometaxindia.gov.in/Documents/taxpayer-charter.pdf.
5. Internal Revenue Service, 'Taxpayer Bill of Rights', https://www.irs.gov/taxpayer-bill-of-rights.
6. Government of Canada, 'Taxpayer Bill of Rights Guide: Understanding your rights as a taxpayer', https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc17/taxpayer-bill-rights-guide-understanding-your-rights-a-taxpayer.html.
7. Australian Taxation Office, 'Taxpayers' Charter', https://www.ato.gov.au/about-ato/commitments-and-reporting/taxpayers--charter/#:~:text=The%20Taxpayers%27%20Charter%20(the%20Charter,all%20our%20dealings%20with%20you.

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Ensuring Transparency in Reporting of Income

In addition to transforming the Indian tax administration, the government has also made concerted efforts towards ensuring income does not escape assessment by requiring taxpayers to be more transparent while reporting their income. This has resulted in the revamp of various compliance provisions, as well as introduction of new provisions, which, *inter alia*, mandate disclosures of specified transactions and require tax to be withheld at the time of entering into a transaction. Such changes have also been brought about to ensure that income (and/ or expenditure) is reported on an on-going basis and effectively tracked by the system. Some of these are:

1. **Mandatory Reporting of Specified Transactions in Income-tax Returns (ITRs)**: In an attempt to increase reporting and accountability on the part of taxpayers, the IT Act was amended to require persons entering into certain specified transactions to mandatorily furnish their ITR (irrespective of whether their taxable income exceeded the basic exemption limit). This includes instances such as (i) where total sales, turnover or gross receipts of the business of the taxpayer exceeds INR 6 million, (ii) where total gross receipts in profession of the taxpayer exceeds INR 1 million, (iii) where aggregate tax deducted at source (**TDS**) and tax collected at source (**TCS**) is equal to INR 25,000[8] or more, or (iv) where deposit in one or more savings bank account of the person, in aggregate is INR 5 million or more, during the relevant financial year. This is expected to bring more citizens entering into high value transactions under tax surveillance and ensuring increased transparency in the system.

2. **Extended Scope of Reporting Financial Transactions**: The IT Act requires specified entities (including entities such as stock exchanges, banks, and financial institutions) to disclose certain specified financial transactions (**SFTs**) in prescribed forms (**Statement**). The scope of SFTs was recently widened[9] to, *inter alia*, include transactions such as (i) capital gains on transfer of listed securities or units of mutual funds, (ii) dividend income, and (iii) interest income. The information disclosed in the Statement is pre-filled in the ITRs of taxpayers. Further, details of SFTs are now also available in Form 26AS (i.e., a form which provides taxpayers with consolidated tax information regarding TDS/ TCS withheld, advance/ self-assessment tax paid, etc.). An Annual Information Statement (**AIS**) has also been introduced, which provides a comprehensive view of the information available under Form 26AS. The AIS can be accessed online and also provides taxpayers with an option to give feedback regarding the information presented in the AIS, i.e., whether such information is accurate, complete, etc. These changes have been brought to encourage transparency in tax filings, so that taxpayers desist from concealing their financial transactions and ensure effective exchange of information between taxpayers and the ITD.

3. **New Disclosure Provisions**: With the aim of achieving greater transparency in the Indian taxation system and to better track the income of taxpayers, the government has introduced a slew of amendments to the IT Act, introducing various TDS/ TCS provisions in the last few years. Few of these are:

   (i) TDS/ TCS on sale or purchase of goods: In order to create a trail of high-value transactions for better accountability and monitoring purposes, the government has introduced sections 206C(1H) and 194Q to the IT Act, which require TDS/ TCS to be deducted/ collected on purchase or sale of high-value goods (i.e., goods whose value exceeds INR 5 million), including securities.

   (ii) TCS on foreign remittances: Section 206C(1G) was similarly introduced to the IT Act, to mandate collection of TCS, *inter alia*, on high-value remittances made under the Liberalised Remittance Scheme (**LRS**). The Finance Bill, 2023 (**Finance Bill**), has now proposed to increase the TCS rate under this provision from 5% to 20% (subject to certain exceptions). With this change, more taxpayers are expected to file their ITRs to claim adjustments against such a high rate of TCS already deposited with the tax authorities. This will also help government agencies in exercising higher supervision over international transactions and keeping track of money that leaves the country.

8. This limit is increased to INR 50,000 in case of an individual resident in India who is of the age sixty years or more.
9. Notification No. GSR 175(E) dated March 12, 2021, https://incometaxindia.gov.in/communications/notification/notification_16_2021.pdf.

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(iii) TDS on certain benefits or perquisites: As per Section 28 (iv) of the IT Act, certain benefits or perquisites, arising from business or exercise of profession are taxed under the head 'business income'. However, it was noticed that often such benefits or perquisites were not reported by the recipient in their ITR. This caused such income to escape assessment, while the benefit/ perquisite provider could claim it as a deductible expense. To address this issue, the government introduced Section 194R in the IT Act. Now, the person providing such benefits and perquisites to a resident is required to deduct TDS on the value of such benefit/ perquisite, upon satisfaction of prescribed conditions.

(iv) TDS on virtual digital assets: With the advent of internet and the digitisation era, virtual digital assets (such as cryptocurrencies and non-fungible tokens) started gaining popularity and were being widely used across the globe. It was important to tax such virtual digital assets since such assets were easily transferable and such transactions were difficult to track. Thus, in order widen the tax base and to ensure that the transactions involving virtual digital assets do not go unreported, the government introduced Section 194S to the IT Act, which requires TDS to be deducted on making payment for transfer of virtual digital assets to a resident.

4. **Mandatory e-filing of certain forms**: In July 2022,[10] CBDT made e-filing mandatory for certain tax forms, returns and statements.[11] This initiative was in consonance with the increasing nationwide effort towards promotion of digitisation and e-governance by government authorities in order to achieve the dual objective of convenience and efficiency. With this new move of paperless filings, taxpayers can now avoid the hassle of filing the forms physically. It would also enable the ITD to effectively track compliances and ensure that the transactions covered under such forms are reported in a transparent manner.

5. **Indirect Tax**: Various steps have been taken to introduce transparency under the indirect tax regime as well. This includes (i) requiring specified suppliers to issue e-invoice and, (ii) providing for auto population of forms by the Goods and Services Tax Network (**GSTN**) portal. This has assisted in curbing tax evasion and fraud and easing the compliance process for taxpayers. Such transparency has also promoted availment of input tax credit. Further, the

10. CBDT Notification No. 03/2022 dated July 16, 2022, https://incometaxindia.gov.in/communications/notification/notification-no-3-2022-systems.pdf.
11. Form 3CEF, Form 10F, Form 10IA, Form 3BB, Form 3BC, Form 10BC, Form 10FC, Form 28A, form 27C, Form 58D, Form 58C and Form 68.

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GSTN Portal provides information on whether a taxpayer has filed tax returns for the past period, thus promoting the selection of a compliant vendor. The government has also introduced the concept of Document Identification Number for indirect tax communications to enable taxpayers to verify the authenticity of departmental communications.

Decriminalisation of Laws and Reducing Compliance Burden

As is evident from the above discussion, the government has made several changes to move towards a trust-based system, ensure effective and on-going compliance, and make it obligatory for taxpayers to transparently disclose their income, investments and expenditure. Towards this, the government has also been decriminalising various tax and financial laws, which seek to penalise minor offences (such as non-compliance), which may not necessarily be fraudulent or an outcome of any *mala fide* intent on the part of the offender. Inclusion of criminal penalties for such offences under various legislations has acted as a major impediment in attracting domestic as well as foreign investments.

Criminal proceedings are time-consuming, onerous and pose a great risk to both businesses and their key personnel in terms of the uncertainty involved in their outcomes. The government has thus been making concerted efforts to restore trust in doing business in India, revitalise a positive business sentiment and unclog the court processes. This was considered even more pertinent in the wake of the Covid-19 pandemic, in order to help revive economic growth and improve the justice system.[12] The government has been revamping various corporate, financial and tax laws to change the nature of certain criminal offences into civil wrongs and omit certain other redundant offences altogether. In fact, as recently reported by the Hon'ble Finance Minister in her Budget speech, the government has reduced more than 39,000 compliances and decriminalised more than 3,400 legal provisions in the last few years. Such a trust-based approach towards compliance is expected to build faith of entrepreneurs in corporate institutions and motivate them to adopt fairer and more transparent business practices, to be better compliant with the prevailing laws, thereby promoting better corporate management practices in their operations.

These steps reflect the government's pro-active approach towards promoting its policy of ease of doing business as new businesses would now not face harsh penalties due to minor and unintentional offences. For instance, after introduction of the Goods and Services Tax (**GST**), taxpayers were initially facing undue harassment, harsh penalties and imprisonment for minor breaches and contraventions. Their consignments were detained on route for minor procedural lapses, such as not carrying of particular documents or inadvertent declaration of details. Such draconian provisions made investors wary of investing in India. Thus, it was necessary to decriminalise minor offences and safeguard the interests of genuine taxpayers. It was essential to bifurcate between minor violations and deliberate evasion of tax and/ or willful offenders. Accordingly, the government introduced various amendments to the GST laws to rationalise such onerous provisions.

Some other recent measures taken in this respect include:

(i) The government has decriminalised various minor economic offences under the Companies Act, 2013 (**Companies Act**).[13] As a result, *inter alia*, numerous non-serious, procedural, or technical defaults have been relegated to the civil law sphere. It has been recently reported that such decriminalisation has led to over 400,000 companies willingly rectifying their past defaults.[14]

(ii) Similar to the Companies Act, the government has also introduced amendments to the Limited Liability Partnership (**LLP**) Act, 2008[15], to, *inter alia*, decriminalise minor offences and provide impetus to small businesses and start-ups who prefer opting for such structures.

(iii) The government has also introduced the Jan Vishwas (Amendment of Provisions) Bill, 2022, to similarly amend over 180 offences across 42 Central legislations, such as the Information Technology Act, 2000, the Agricultural Produce (Grading and Marking) Act, 1937, etc.

12. See Ministry of Finance, 'Statement of Reason: Decriminalisation of Minor Offences For Improving Business Sentiment and Unclogging Court Processes' dated June 8, 2020, https://financialservices.gov.in/sites/default/files/Decriminalization%20-%20Public%20Comments.pdf.
13. Vide the Companies (Amendment) Act, 2019, and the Companies (Amendment) Act, 2020.
14. S.N. Thyagarajan, 'Decriminalisation of minor offences prompts 4 lakh companies to rectify defaults: Eco Survey', January 31, 2023, https://www.moneycontrol.com/news/business/economy/decriminalisation-of-minor-offences-prompts-4-lakh-companies-to-rectify-defaults-eco-survey-9972021.html.
15. Vide the Limited Liability Partnership (Amendment) Act, 2021.

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Alongside the decriminalisation process, the government has also been focusing on simplifying the compliance burden on businesses. For instance, recognising the hardships and confusion faced by entrepreneurs in navigating the Indian regulatory system, the government had launched the 'National Single Window System' in September 2021. This is a digital platform, aiding businesses in identifying and applying for approvals according to their business requirements. The system was envisioned to, *inter alia*, reduce duplicity of information submission to different ministries, reduce compliance burden, and promote ease of starting and doing business. In less than three months of the launch platform, it was reported that the platform had facilitated over 44,000 since its launch.[16]

Building on the measures introduced over the last few years, various proposals have also been made under Budget 2023 to decriminalise tax provisions and reduce compliance burden on taxpayers. Some of these are:

1. **Common ITR**: Introducing a next-generation common ITR form and strengthening of the grievance redressal mechanism. This welcome change comes on the back of CBDT's proposal from last year[17] to introduce a common ITR form, which would make the filing process quicker and less cumbersome. It is expected that the new common ITR form would be in consonance with international best practices and hence enhance efficiency and transparency in India's tax system.
2. **Permanent Account Number (PAN) as a common identifier**: The Hon'ble Finance Minister has also proposed to use PAN as a common business identifier for all digital systems of specified government agencies. This change is expected to ease the Know Your Customer processes required at various steps and ease the compliance processes for clearances, registrations and permits. It would further simplify the tedious process of acquiring different identifiers under various laws (such as Goods and Service Tax Identification Number, Taxpayer Identification Number, Tax Deduction Account Number, Corporate Identification Number, etc.) and make the Indian ecosystem business-friendly, ultimately attracting new foreign and domestic businesses. This would also ensure inter-department sharing of key taxpayer information using PAN, thereby ensuring transparency in reporting of income and transactions.
3. **Decriminalisation under IT Act**: The Finance Bill has proposed to decriminalise section 276A of the IT Act, which makes a liquidator liable for rigorous imprisonment under certain specified instances. With the Insolvency and Bankruptcy
4. **Decriminalisation under Indirect Tax Laws**: The Finance Bill has also proposed to decriminalise offences under the indirect tax laws, such as those committed by any person (i) obstructing or preventing any officer in the discharge of his duties; (ii) tampering with or destroying any material evidence or documents; and (iii) failing to supply any information, which he is required to supply or supplying false information.

   Further, the Finance Bill proposes to increase the minimum threshold of tax amount for launching prosecution from INR 10 million to INR 20 million, except for the offence of issuance of invoices without supply of goods and/ or services. The Finance Bill also proposes to reduce the compounding amount. The government has thus taken a proactive step to differentiate between willful evasion of tax and minor offences.

Conclusion

With the numerous changes made through various amendments in the past few years, the direction in which the government is trying to push our taxation system is very clear. The government is trying to find the right balance between ease of doing business and a transparent and accountable tax system, by rationalising various tedious provisions, and transforming our complex taxation system into a user-friendly one, which is in line with internationally accepted taxation principles. Recent revamps in the tax governance system and the reliance on technology for monitoring, has increased transparency and accountability in the taxation system. Through these efforts, the government is trying to create an equitable framework wherein the taxpayers are rewarded with transparency and ease of operations, in return for their honesty. Commendable work has been done in the past few years to make our taxation system transparent and to make India an attractive destination for foreign investments.

16. https://pib.gov.in/PressReleasePage.aspx?PRID=1880251#:~:text=NSWS%20was%20soft%20launched%20to,and%20Textiles%2C%20Shri%20Piyush%20Goyal.
17. Notification F No. 370133/16/2022-TPL dated November 1, 2022, https://incometaxindia.gov.in/news/common-itr.pdf.

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10

ENERGY **TRANSITION** IN INDIA

RENEWABLES AND MORE

Introduction

With a significant decline in the Covid-19 rates globally, 2022 took off to new beginnings. In India, government and private players were able to re-focus on pre-pandemic goals, particularly energy transition. Climate change is a real and present danger, and governments across the world are taking strong steps to arrest environmental degradation and soaring temperatures. Climate change is specifically relevant in the context of India given that its geographic and socio-economic factors are said to make it climate-vulnerable[1].

India has consistently taken steps to transition to 'clean energy' and 'decarbonisation' and the task for 2022 was set at the COP - 26 conference held in November 2021. It was the platform from where had announced its commitment to achieve net zero by 2070. Other short-term targets include sourcing 50% of energy requirements from renewable energy and reducing carbon emissions and carbon intensity by 45% and 50%, all by 2030. In order to achieve its net-zero commitment, India will be required to install a total capacity of 500 GW from non-fossil fuel sources. Renewable energy, therefore, continues to be a focal point for the government and the private sector.

1. *Climate-risk Country Profile: India* published by World Bank in 2021.

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Multiple large-scale platforms are operating in India and working with corporates to reduce dependency on distribution licensees for power supply and also achieve green and net zero targets. ”

Renewable Energy – Year in Review

Renewable energy today is largely seen as a well-oiled machine, due to the developments of the last decade. The government initially created a supply push (through incentives like accelerated depreciation to set up renewable plants) and a demand push (through imposition of renewable purchase obligations and power bundling through offtakers like Solar Energy Corporation of India (**SECI**) and NTPC Vidyut Vyapar Nigam Limited), which has led to tremendous growth of renewable energy in the country. India's installed renewable energy capacity has increased by 396% in the last eight-and-a-half years and stands at more than 174.5 GW

The government is now focusing on addressing some of the operational challenges for renewable energy (such as grid access, grid intermittency and grid penetration). Legislative developments include the enactment of the Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022 (the **Open Access Rules**), which came into force in June 2022, and applies to all projects generating electrical energy from wind and solar sources. A Green Open Access Registry has been introduced as a single portal to route applications for open access of green energy. The Open Access Rules require that the relevant nodal agency respond within 15 days from the date on which the application is made, failing which the applications are deemed to have been approved. Simultaneous to the enactment of the Open Access Rules, the Central Electricity Regulatory Commission (**CERC**) has also issued the CERC (Connectivity to General Network Access to the Inter-state Transmission System) Regulations, 2022. The aim is to facilitate non-discriminatory open access for use of the Inter-state Transmission System through grant of a general network access. Significant changes brought about by these regulations is that consumers/ generators can now be issued general open access for a block period of upto 11 months, which will replace the earlier 'short term open access approvals' (and which created significant uncertainty on renewal and availability of continued open access). Similar to the Open Access Rules, all applications for obtaining network access will be routed through the 'National Open Access Registry', which will provide for a single-window clearance system. Information in the public domain suggests that of the 3174 applications made through the Green Open Access Registry, 3161 applications have been processed/ approved and only 13 applications are pending. Another regulatory incentive recently introduced by the CERC (Sharing of Inter-State Transmission Charges and Losses) (First Amendment) Regulations, 2023 is the waiver on inter-state transmission charges applicable to renewable energy projects (including hybrid projects), which are connected to the open access network and declare commercial operations before June 30, 2025, for a period ranging from 12 years to 25 years depending on the nature of the renewable energy project. These are significant steps forward and is indicative of shifting trends.

Intermittency of power has always been an area of concern for sustained use of renewable energy. Substantial efforts are now being made to bolster reliance on renewables through development of clean energy storage, and to make energy storage an attractive investment proposition. The Ministry of Power has waived payment of transmission charges for clean energy storage systems, which are charged by renewable energy. 'Clean energy storage' has also been notified as an infrastructure sub-sector in October, 2022, which will present opportunities for availing cheaper financing[2]. Domestic and foreign lenders have welcomed this move and have taken keen interest in financing India's renewable energy projects coupled with battery storage.

In order to incentivise the manufacture of batteries domestically, as part of the 'Make in India' initiative, the Union Cabinet has announced a 'Production Linked Scheme' (with an outlay of INR 18,500 crore) for domestic production of 'Advanced Chemistry Cell (**ACC**) batteries' to reduce reliance on import of these cells.

2. It has been defined as dense charging infrastructure and grid scale energy storage system with a minimum qualifying capacity of 200 MWh.

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A major enhancement to the government's efforts in promoting battery manufacturing domestically are the recently tapped lithium reserves discovered in Jammu and Kashmir, which is predicted to increase lithium cell production to 70-100 GWh by 2030. Not only do we expect to see rapid development in lithium based battery storage, but are also confident that this will be a game-changer for the automotive industry, considering the production of electric vehicles will now rely on domestically produced cells rather than resorting to high-cost imports.

The C&I (commercial & industrial) space in renewables has also grown significantly in recent times. Multiple large-scale platforms are operating in India and working with corporates to reduce dependency on distribution licensees for power supply and also achieve green and net zero targets. There is great potential for this sector to grow in the next few years, as the Indian electricity market shifts from state-run generation, supply and transmission to an open market. New products and structures are also anticipated, such as derivatives in electricity, vPPAs and environmental attributes. As the market matures, the traditional structures of long-term power purchase agreements with State-owned distribution licensees will shift.

The year has also seen significant involvement from private players (international and domestic), who have been quick in capitalising on any growing opportunities in the renewable energy space. India's first 'round-the-clock' project consisting of solar and wind components coupled with battery energy storage has been developed by ReNew Group[3]. Another first of its kind project being developed by the ReNew Group is the 'assured peak power supply' project, for which a 150 MW battery energy storage system will collect the energy generated by a hybrid system to enable supply during off-peak hours[4]. A strategic partnership has been entered into between the Greenko Group and ArcelorMittal for pioneering a round-the-clock renewable energy project of 975 MW, which will be supported by a hydro pumped storage project developed by Greenko Energies. The project is said to take care of over 20% of ArcelorMittal's energy requirements of its steel plant located in Hazira and will help reduce carbon emissions by approximately 1.5 million tonnes per year[5].

3. Reported in Project Finance International – Yearbook 2023 at Page No.
4. Reported by Mercom in article titled 'Greenko, ReNew Win SECI's Solar, Wind Auction with Storage for Peak Power Supply' published on January 31, 2020 (when the bid was awarded).
5. Reported by ArcelorMittal in article titled 'AcrelorMittal establishes strategic renewable energy partnership with Greenko Group in India' published on March 22, 2022.

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The renewable energy sector continues to see significant M&A and private equity activity, since it is largely driven by foreign and institutional investors. Key deals in 2022 include the investment of INR 6000 Crore by BlackRock and Mubadala for a stake in Tata Power's renewable energy subsidiary, Ontario Teacher's Pension Plan Board's investment in the Mahindra Group's renewable energy platform and London Stock Exchange listed ThomasLloyd Energy Impact Trust Plc.'s acquisition of a 100% stake in Solar Arise India Projects Private Limited.

Energy Transition

The year 2022 saw massive legislative and administrative push for energy transition. Focus shifted from directly promoting existing sources of renewable energy to developing alternative sources of clean energy and exploring 'de-carbonisation' in many forms. For instance, the Ministry of Power published the Green Hydrogen Policy in February 2022, which is the first step at codifying the National Green Hydrogen Mission. The policy provides benefits for the production of green hydrogen/ ammonia including the waiver of inter-state transmission charges for a period of 25 years for projects commissioned before June 30, 2025, availability of land provided by the Ports Authority for setting up of bunkers near ports (for storage of green ammonia) and production of green hydrogen counting towards a developer's renewable energy purchase obligations. Following the announcement of the Green Hydrogen Mission, large Indian corporates including Reliance Industries, Adani Enterprises and Larsen & Toubro have quickly taken to development of low-carbon technologies. Each of them has pledged to make investment in the production of low-cost green hydrogen for easy availability both in Indian and abroad. Another marquee development that took place in early 2022 is the joint venture between Greenko Energies and John Cockerill for development of green hydrogen for industrial purposes by setting up of alkaline electrolyser factories.

The Energy Conservation (Amendment) Act, 2022 was enacted in December 2022 to promote new and renewable energy and to facilitate India's COP 26 commitments. A key highlight is the introduction of a carbon credit trading scheme. The scheme proposes the introduction of a comprehensive system to combat greenhouse gases emissions by use of non-fossil fuel sources. 'Carbon credit certificates' will be issued to entities registered under the scheme, who will in turn be permitted to trade the credits issued to them. The Act also empowers the Central Government to specify the minimum share for consumption of non-fossil fuel sources that will differ on the basis of the requirements of each industry listed in Schedule 2 (including cement, iron and steel, textile, fertilisers, commercial buildings etc.). Another welcome development in decarbonisation is the focus laid on electrification of the public transport sector under the aegis of the National Electric Bus Program. Towards this Convergence Energy Service Limited (a wholly owned subsidiary Energy Efficiency Services Limited) has released two large scale tenders this year, which focusses on procurement, operation, and maintenance of over 5000 electric buses and allied infrastructure in various states.

Similar to clean energy systems, the Union Ministry has also notified 'data centres' under the realm of the infrastructure sub-sectors, which will enable energy storage systems to supply uninterrupted energy to power data centres. This would of course benefit the funding opportunities in data centre projects who will be entitled to receive low cost funding at attractive rates.

To facilitate a regulatory environment for transition finance and green finance, which will work on a combination of incentivising and mandating, both the Reserve Bank of India (**RBI**) and the Securities and Exchange Board of India (**SEBI**) have released discussion papers which focus on 'sustainable finance' and 'green finance' to facilitate low carbon transition and the evolution of corporates to incorporate sustainability into their businesses.

In Conclusion

India has, through a combination of demand and supply forces, skyrocketed renewable energy capacity in the country in the last decade. With 'net zero' being the need of the hour, this decade is expected to see a focus on renewable energy, coupled with a push to decarbonise all aspects of the economy. India's demographics and economic growth demand a balance between India's growth needs and sustained efforts towards arresting the devastating effects of climate change. The government's policies in the past year reflect this careful balance. Sustained government efforts together with private sector participation (driven by foreign investment) will guide India's energy transition journey for the next decade.

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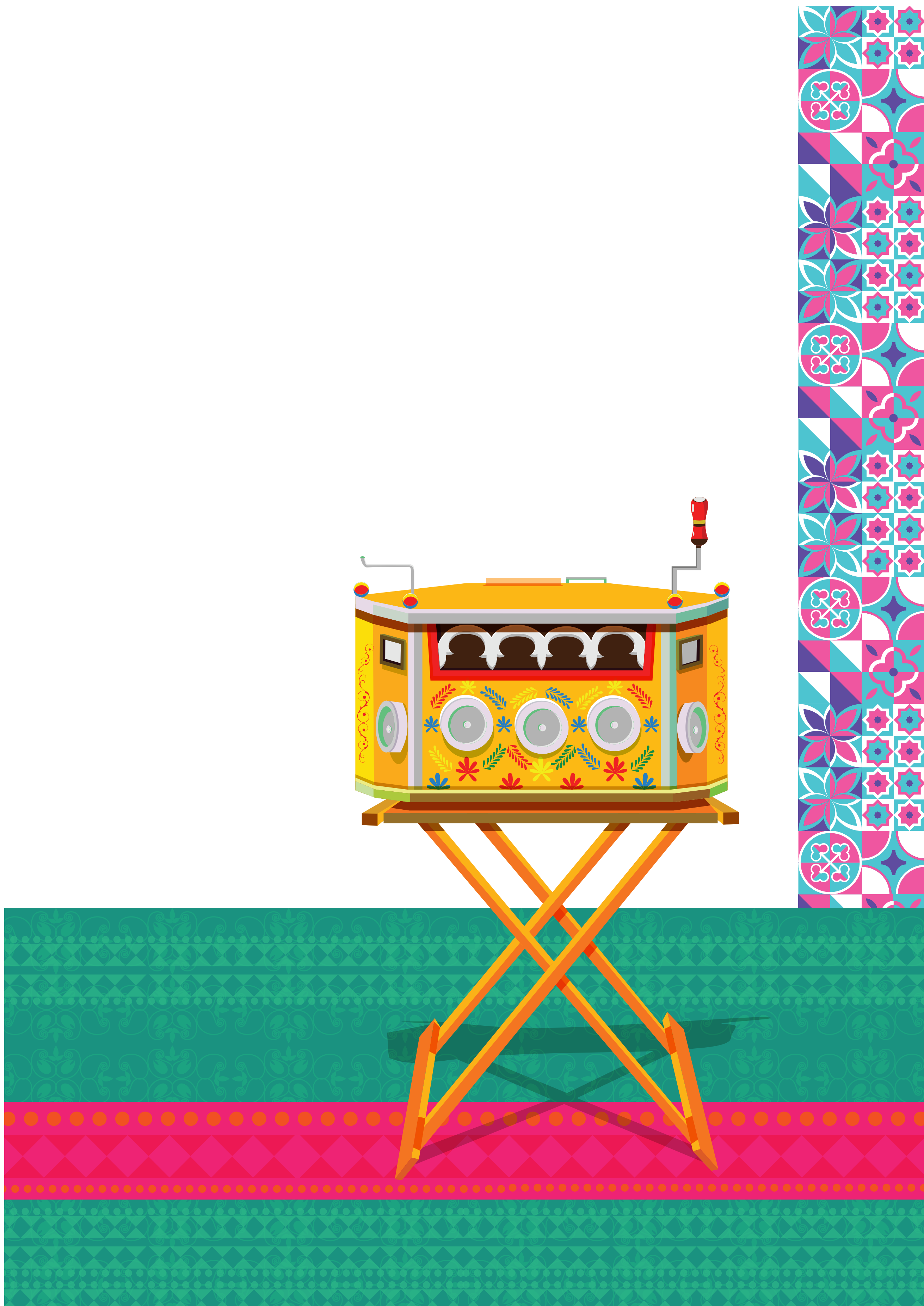

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