Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

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Startups and Venture Capital Investments

September 2018

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1. Introduction

The startup sector in India has, over the last few years, become a key indicator of the economic growth of the country. A startup is primarily an entrepreneurial venture which is in its initial years of operations and backed by its founders.

A startup is faced with a number of issues that have to be dealt with in order for it to grow into a successful organization. Apart from planning the most effective business strategy, a startup needs to look at the regulatory, legal and tax regimes of the country where the startup is proposed to be set up and carry on business.

In many instances, structuring the correct set up for a startup helps to prevent future complications, and mitigate regulatory and tax risks at a future stage when the startup is nearing maturity. At Nishith Desai Associates (NDA), we have advised companies at every stage of inception, growth and maturity. With this expertise in mind, we have outlined the various stages, right from the inception of an idea, which a startup typically goes through in the process of its development. We refer to this process of development of the startup as *"Start to Maturity"*.

Perhaps the first step a startup needs to take is to determine how it will be setup, from where the seed investment required to set up the startup entity needs to be brought in and what sort of entity it would like to function as (colloquially referred to as **"Structuring"**). This includes decisions in relation to whether the founders should register as a company or limited liability partnership and whether the founders should approach incubators/ angel investors for initial funding.

Once a startup is incorporated, it will need to set up its offices. This process gives rise to numerous issues that startups may not even be aware of. For instance, the startup will need to obtain registrations with various labour authorities and will need to establish human resources (HR) related policies in tune with the relevant labour laws in each state.

Once business commences, a startup will find itself positioned in various supply chains and will need to understand the myriad contracts it will enter into with suppliers, customers, partners, service providers and many others. The key is for startups to choose the right partners/ collaborators in its initial days and also enter into a mutually beneficial contractual relationship with such persons.

Most important of all, a startup looking to protect its intellectual property should enter into a non-disclosure agreement to ensure that the data it provides to various contractors, customers, vendors etc. are not improperly used and all contracts (including with employees) contain sufficient provisions for assignment of intellectual property in favour of the company.

Once the business is up and running, it is usual for the startup to look for investors. These investors come in at various stages in the growth of a startup. In order to get the startup off the ground, the startup is invariably capitalized by either the founders themselves or by an "angel investor" (usually someone with benevolent intentions).

Venture capital (also known as VC) is a type of private equity capital typically provided to startup companies with high-growth potential, in the interest of generating a return through an eventual liquidity event such as an IPO or trade sale of the company.

Venture capital investments are generally made as cash in exchange for shares in the invested company. Venture capital typically comes from institutional investors and high net worth individuals and is pooled together by dedicated investment firms.

Venture capital is most attractive for startups with limited operating history that are too small to raise capital in the public markets and are too immature to secure a bank loan or complete a debt offering. In exchange for the high risk that venture capitalists assume by investing in smaller and less mature companies, venture capitalists usually get certain protective rights in the company with respect to management decisions, in addition to a significant portion of the company's ownership (and consequently value). This is a particularly taxing time for the founders as it often requires them to give up a considerable quantum of stock in the start up and also collaborate with the right investor.

An institutional investor such as a venture capitalist typically conducts a financial and legal due diligence on the startup in order to uncover the risks pertaining to the startup. Issues that come up often relate to corporate, labour law and foreign exchange law compliances. In order to keep the startup's valuation high, it is essential for the startup to ensure that such issues do not arise, or to iron them out prior to a diligence process.

The due diligence process has become even more relevant in recent times as both investors, and financiers have grown cognizant of potential risks involved in investing in a startup – many investors having already suffered from issues in exiting their previous investments. The present circumstances are likely to breed distrust in India's institutional and internal mechanisms to administer corporate governance. It is therefore essential for any startup anticipating investment to be financially and legally sound and to have the cleanest track record possible in terms of corporate governance.

Once the startup has gone through the acid test of venture capital investment, it can usually aim to receive a Series A growth investment from a private equity fund followed by a few more rounds of investments (depending on the growth and capital requirements of the company) and possibly, a pre-IPO investment that will bulk up its valuation for the IPO process. Investors in startups typically look to exit either by way of an IPO or a buyout. Both options usually give them a high return on their investment.

Since most of the investments are expected from abroad, it is typically necessary to structure the investment from a legal, tax and regulatory point of view in order to comply with the necessary foreign exchange laws and regulations. Often, in the process, the tax incidence of the most convenient legal structure may be excessive. It is therefore essential to strike a balance and keep the tax incidence at a minimum.

The considerations covered below are an indication of the sort of legal, regulatory and tax considerations applicable to startups as they go from 'Start to Maturity'. It must be noted that the considerations outlined may not be strictly applicable in all instances, and the applicable rules will vary on a case to case basis depending on the industry, geography and type of activity sought to be pursued by a startup.

2. Startup India Action Plan and Policy

On India's Independence Day in August 2015, the Prime minister of India announced that the Government intended to launch an initiative titled "Startup India, Stand up India" to encourage entrepreneurship among the youth.

As the first step to this initiative, a full action plan for startups in India was launched by the Prime Minister on January 16, 2016 (**"Action Plan"**) in New Delhi. This Action Plan set the stage for wide ranging reforms which are expected to give an impetus to the fast burgeoning startup culture in India.

The Prime Minister, whilst announcing the Action Plan, once again reiterated the Government's intention of '*less government more governance*' where he attempted to reduce the regulatory hurdles for starting up a business in India.

The launch has garnered an overwhelming response from the startup community and the investors alike. While the Action Plan and subsequent changes brought by the Government under various legislations has laid down a road map for wide ranging reforms to give a boost to the startup culture in India, there are various additional steps which the Government will need to take to truly bring about a change in the startup culture in India.

As per the framework laid down by the Government, a "startup" is defined as follows: An entity (i.e. a private limited company / limited liability partnership or a registered partnership firm) incorporated/ registered in India shall be considered as a "startup" if:

1. It has been in existence for less than 7 years from the date of its incorporation/ registration (10 years in case of biotechnology),
2. Its turnover for any of the financial years has not exceeded Rs. 25,00,00,000 (Rupees Twenty Five Crores), and
3. development, deployment or commercialization of new products, processes or services driven by technology or intellectual property or it is a scalable business model with a high potential of employment generation or wealth creation.

However, any such entity formed by splitting up or reconstruction of a business already in existence will not be considered as a 'startup'. Further, the benefits available to an entity which was considered a startup would cease to apply once the turnover of the entity for any financial year exceeds Rs. 25,00,00,000 (Rupees Twenty Five Crores) or it has completed 7 (seven) years/10 (ten) years, as applicable, from the date of incorporation.

The Government has further clarified that a business would be covered under the definition of startup only if it aims to (a) develop and commercialize a new product or service; or (b) significantly improve an existing product, service or process that will create and add value for customers or the workflow. As such, the mere act of developing the following would not be covered under the definition of 'startup':

1. Products or services which do not have a potential for commercialization; or
2. Undifferentiated products or services or processes; or
3. Products or services or processes with no or limited incremental value for customers or workflow.

The Government has also laid down the process of recognition as a 'startup'. Accordingly, the recognitions shall be through a 'Startup India' portal and mobile app. However, in order to obtain tax and IPR related benefits, a startup shall be required to be certified as a business which involves innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property by the Inter-Ministerial Board of Certification which comprises of the Joint Secretary, Department of Industrial Policy and Promotion, representative of Department of Science and Technology, and representative of Department of Biotechnology.

For the purposes of making applications for being recognized as a startup, the proposed startup is required to comply with the following:

1. A startup shall make an online application over the mobile app or portal set up by the Department of Industrial Policy and Promotion.
2. The application shall be accompanied by—
   a. a copy of certificate of incorporation or registration, as the case may be, and
   b. a write-up about the nature of business highlighting how it is working towards innovation, development or improvement of products or processes or services, or its scalability in terms of employment generation or wealth creation.
3. The Department of Industrial Policy and Promotion may, after calling for such documents or information and making such enquires, as it may deem fit, —
   a. recognise the eligible entity as 'Startup'; or
   b. reject the application by providing reasons.

It is important at this stage to lay down the various incentives which have made available to startups in order to fully appreciate the benefits of recognition or registration as a startup. As of this date, the incentives can be divided into 3 (three) broad categories:

1. Incentives by the Reserve Bank of India (**"RBI"**)
2. Tax Incentives *(discussed in Chapter VI)*
3. Incentives for ease of doing Business.

I. Incentives by RBI

The RBI Governor in his statement on the sixth Bi-monthly Monetary Policy Statement, 2015-16 had laid out that in line with Government's Startup India initiative, the central bank will take steps to ease doing business and contribute to an ecosystem that is conducive for growth of startups. Accordingly, Foreign Venture Capital Investors are now able to invest in startups regardless of the sectors that they fall into.

Further, the RBI has now also permitted transfer of shares or ownership with deferred considerations and facilities for escrow or indemnity arrangements for a period of 18 (eighteen) months and upto 25% (twenty five percent) of the total consideration. Deferred payments, escrows and indemnities are typically used to structure different types of transactions. For example, deferred payments are often required when the payment of consideration is based on achieving certain milestones or completion of certain conditions subsequent.

In order to help startups, the RBI has already created a dedicated mailbox to provide assistance and guidance to the startup sector. Further, the RBI has also permitted electronic reporting of investment and subsequent transactions on e-Biz platform only, and has now moved to a single reporting format for all foreign investments.

In addition to these measures, the External Commercial Borrowing (**"ECB"**) framework has also been amended to permit eligible startups to obtain ECB (upto USD 3 million per financial year for any expenditure connected with the startup's business) under the automatic route for an average maturity period of 3 (three) years.

This is particularly important, considering the limited availability of venture debt in India. Further, streamlining of overseas investment operations will help the startups in setting up foreign subsidiaries and provide them with operational ease in terms of inflow and outflow of funds.

II. Incentives for Ease of Doing Business

A. Incorporation & Other Formalities

Realizing the inefficiencies in the existing systems causing inordinate delays in the incorporation of entities as well as the fact that startup founders at most times are simply unaware of the various formalities involved in starting a business, the Government, in order to ease the incorporation process, has set up a mobile application as well as a dedicated web portal whereby:

a. A simplified form can be filled for registration of startup with various governmental agencies. Importantly, this mobile application has been integrated with the Ministry of Corporate Affairs for seamless integration;

b. A checklist of various applicable laws and licenses and FAQs has been provided for founders to know of various compliances;

c. Filing for compliances and obtaining information on the status of various clearances and approvals has also been made possible on the app.

B. Self-Certification

In recognition of the fact that labour and environment law compliances are time consuming in nature and that startups are often caught unaware as to the issues pertaining to such laws, the Government has proposed a self-certification mechanism for certain compliances for 5 (five) years. Under this initiative, the Government has set up a mobile application as well as a dedicated web portal where startups can complete this self-certification process.

i. Labour Laws

After the self-certification process, it is proposed that there will be no inspection for a period of 3 (three) years, unless instances of specific violations are reported. Even in such a case, approval from a senior officer would be required prior for any inspection. The following labour laws have been covered under this initiative:

i. Building and Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996

ii. Inter – State Migrant Workmen (Regulation of Employment & Conditions of Service) Act, 1979

iii. Payment of Gratuity Act, 1972

iv. Contract Labour (Regulation and Abolition) Act, 1970

v. Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (**"EPF Act"**)

vi. Employees' State Insurance Act, 1948

Acting on the directions issued by the Labour Department, the Employees Provident Fund Organisation (**"EPFO"**) on January 21, 2016 notified a circular (**"EPFO Circular"**): (a) exempting the startup enterprises from compliance under the EPF Act in relation to inspection of establishments and (b) permitting submission of self-certified compliance returns.

Additionally, it has been clarified that from second year onwards (upto the fifth year), startups maybe taken up for inspection only when a credible and verifiable complaint of violation is filed in writing and approval has been obtained from atleast one level senior to the inspecting officer or from the Central Analysis and Intelligence Unit, as the case maybe.

ii. Environment Laws

Startups which fall under the 'white category' (as defined by Central Pollution Control Board) would be allowed to self-certify compliance and only random checks would be undertaken to ensure compliance.

C. Intellectual Property Rights

The Government had recently announced that about several patent applications and trademark registrations have been pending with the Government due to shortage of manpower. To address this backlog, at the Action Plan it was announced that the Government is recruiting various patent and trademark examiners to reduce the huge back log of pending applications. Further, Action Plan has proposed a 1 (one) year pilot program under which:

a. Patent applications filed by startups will be fast tracked for examination and disposal;

b. The Government will empanel facilitators who will be responsible for providing startups with (i) general advisory on intellectual property rights; (ii) filing and disposal of applications dealing with patents, trademark and design. The Government would pay fees to facilitators and startups would only be required to pay statutory filing fees;

c. Eligible startups would be given an 80% (eighty percent) rebate in filing of patents.

On April 13, 2017, the Government has also introduced a policy to promote awareness and adoption of intellectual property rights amongst startups including assisting startups in filing for necessary intellectual property protection. The fees charged by facilitators in provision of their services to start-ups is to be borne entirely by the Government and not the startup. This scheme was applicable for a period of 1 (one) year.

D. Ease of Winding Up

With the notification of the Insolvency and Bankruptcy Code, 2016 (**"IBC"**), the process of revival of a corporate debtor has become easier. Section 55 of the IBC provides for a fast track corporate insolvency resolution mechanism. Provisions in this regard are yet to be notified. The Action Plan also provided that startups with simple debt structures or with the criteria as may be set out by the Government, may be wound up in 90 (ninety) days from date of making an application on a fast track basis. In such a case, an insolvency professional shall be appointed who shall be responsible for liquidating its assets and paying its creditors within 6 (six) months.

3. Structuring Businesses

Startups primarily are set up by the founders based on the location in which they are based, without taking into account other considerations applicable in setting up the business. Following are the factors relevant to selecting a location for setting up of a startup:

I. Location of business

One of the more important considerations relies on where the startup expects to do its business. A startup geared towards local customers should ideally be close to the place where it intends to operate.

Conversely, where a startup intends to do business across the globe (for example, launching an application or service which they expect to be used not just in India but outside), then the startup will have to ensure that its setup is properly structured.

II. Presence of management team / founders

The other primary consideration is the presence of the management team. It may not be very cost effective for a startup incorporated in the US, to have a management team that effectively operates out of India, besides there being tax implications on the same as well.

III. Ease of doing business

Seeking licenses to do certain kinds of business, ease and efficiency of registering intellectual property and ability to procure the relevant licenses required to set up a business are also considerations that should be taken into account when choosing a location for a startup.

IV. Regulatory and tax considerations

One must also take into account and ensure that the startup is compliant with applicable regulatory requirements. Although, initially, tax may not act as a primary consideration for setting up a business, as it grows and generates income, it may want to restructure to more efficiently plan its affairs. It must be noted that if not initially thought through (on at least a preliminary level) re-structuring later may be expensive and fraught with potential risk of being subject to additional taxes.

The structure gives the startup a different identity as far as the laws and regulations are concerned, which will be instrumental in determining the taxation policies governing it as well as the regulatory environment. Accordingly, it is necessary to decide an appropriate structure for the startup and the jurisdiction where any intermediary holding company is to be situated. A startup needs to be structured in a manner that takes into consideration tax efficiency, corporate flexibility and adequate protection of its intellectual property so that it may attain the maximum level of success without getting into too many legal complexities or pay too much tax. There are various issues which need to be carefully examined by a startup while structuring its operations. The startup has to consider the nature of its operations, the attributes of the markets, and where it proposes to hold its intellectual property while determining the location which is most suitable for its business.

The choice of jurisdiction and region for setting up the business of a startup varies on a case to case basis; however, we have considered a few instances below where specific consideration may play a role in determining the choice of jurisdiction for setup.

A. Intellectual property lead global business

A business that relies heavily on specific intellectual property rights and which aspires to cater to a global audience should look to ensure that its intellectual property is adequately protected. Whilst the Indian government has also proposed several steps to ease the backlog of several pending intellectual property applications (as discussed in the previous chapter), it may still be easier to protect certain kind of intellectual property in certain developed offshore jurisdictions. Further, planning for potential tax implications in the future can also be achieved by housing the intellectual property in a friendly jurisdiction, such as Ireland or Netherlands, which provide tax incentives for intellectual property residing in such countries.

B. Flipping business to go global

As startups grow into maturity, they may look to externalize their management in order to more easily access global capital. One of the principal ways in which startups can procure easier access to global capital is by migrating the holding structure of the startup from India to a reputed offshore jurisdiction (such as Singapore or Mauritius). From a tax standpoint, flipping the ownership offshore may entail substantial tax leakage, and to that extent it is advisable if the flip is undertaken at early stages before value is built up in the Indian asset. However, the flip structure also entails considerations of Indian exchange control laws to ensure that such structures do not result in "round tripping".

C. Indian founders investing outside India

Indian foreign exchange control laws place certain restrictions on the ability of an Indian resident to remit monies outside India. Individuals looking to set up entities outside India typically do so under a scheme introduced in February 2004 by the RBI, "Liberalised Remittance Scheme" (**"LRS"**). Under the LRS, resident individuals can acquire and hold shares or debt instruments or any other assets including property outside India without requiring any specific approval of the RBI.

When setting up entities outside India, resident individuals utilize the LRS in order to make such remittances. However, certain restrictions have since been prescribed by the RBI including restricting resident individuals from making direct investment in entities involved in real estate business, banking business or financial services activity. Further, investment by individuals is only allowed in entities engaged in bonafide business activity. Further, the joint venture/wholly owned subsidiary set up by the Indian individuals cannot have further step down subsidiaries, which is key while structuring the startup in terms of its future expansion.

D. Potential tax implications arising from founders conducting business of an offshore company in India

Till very recently, offshore companies have been treated as "non-resident" in India unless wholly controlled and managed from India. The consequence of this is that the income of such offshore company is not taxable in India unless distributed to an Indian resident shareholder.

However, this has been changed to a more subjective test of "place of effective management" (**"POEM"**), and considers a foreign company resident in India if its POEM is in India. This has been discussed in detail in Chapter VI.

This means that startups set up outside India whose management team is deemed to have primarily sat in India may now face the risk of being classified as a tax resident of India for which all of its income may become taxable in India.

General business considerations for choice of jurisdiction would include an instance where if a startup proposes to have purely Indian operations and operate in the Indian market, the most likely jurisdiction for setting up the operations could be India, so that it does not have to face the various intricacies of a foreign entity operating in the Indian market. However, if a startup envisages global operations and a global market, then the location and the structure of the startup could be decided depending upon the nature of business and the market of the startup.

E. Exchange control considerations involved when non-resident Indian / foreign resident founders are setting up an Indian business

Where a founder or promoter who is not resident in India wants to carry on business in India, it can only be done through, (1) a company or subsidiary set up in India under the Indian Companies Act, 2013 (**"Companies Act"**), or (2) a branch office set up by the foreign entity already set up outside India, or (3) setting up a limited liability partnership (**"LLP"**) under the Limited Liability Partnership Act, 2008 (**"LLP Act"**) *(which has been discussed in detail in Chapter IV).*

Although foreign investment is freely permitted in most of the sectors, special care must be taken when foreign investment is sought to be made in any Indian company to ensure that it is permitted under Indian law, and if any conditions are prescribed, then that such conditions are satisfied.

India's exchange control regime is set out within the Foreign Exchange Management Act, 1999 (**"FEMA"**) and the rules and regulations thereunder. FEMA regulates all inbound and outbound foreign exchange related transactions, in effect regulating (or managing) the capital flows coming into and moving out of the country.

Section 3 of FEMA states that other than as provided (and specifically enunciated) in either FEMA (or its underlying rules and regulations) or unless special or general permission of the RBI has been obtained, no person shall (i) deal in or transfer any foreign exchange or foreign security to any person not being an authorized person; or (ii) make any payment to or for the credit of any person resident outside India in any manner; or (iii) receive otherwise than through an authorized person any payment by order or on behalf of any person resident outside India in any manner; or (iv) enter into any financial transaction in India as consideration for or in association with the acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

FEMA extends to the whole of India and also applies to all branches, offices and agencies outside India owned or controlled by a person who is a resident of India including any remittance or debit made by a person not resident in India into or out of India. Consequently, it also applies to any contravention committed outside India by any person to whom the FEMA applies when capital flows into or out of the country are affected.

Currently, under the FEMA and its underlying regulations, foreign companies or individuals are permitted to invest up to 100% (one hundred percent) in Indian companies in most sectors, without the prior approval of any governmental or regulatory authority. In certain other sectors such as non-banking financial services, e-commerce, etc., conditions have been prescribed for making foreign investment, whereas in sectors such as telecommunications and insurance, equity shareholding caps have been prescribed and any investment beyond such caps will require the prior approval.

i. General rules applicable to foreign investment in Indian companies

Foreign Direct Investments can be made either through the "automatic route" or the "approval route". Under the "automatic route", neither the foreign investor nor the Indian company, requires any approval from the relevant governmental authority. The startup in such case is only required to file certain forms and declarations with the RBI after the foreign investment is brought into the Indian company, whereas under the "approval route", prior approval of the relevant governmental authority will be required.

Foreign investment usually comes in either by way of subscription to, or purchase of, equity shares and/ or convertible preference shares/ debentures of the startup. The investment amount is normally remitted through normal banking channels or into a Non-Resident External Rupee (NRE)/Foreign Currency Non-resident (FCNR) account of the Indian company with a registered Authorized Dealer (a designated bank authorized by the RBI to participate in foreign exchange transactions).

The company is required to report the details of the amount of consideration received for issuing its securities to the regional office of the RBI in the forms prescribed under the regulations relating to Foreign Direct Investment together with copies of the Foreign Inward Remittance Certificate, arranged for by the Authorized Dealer (**"AD"**) bank evidencing the receipt of the remittance along with the "Know Your Customer" (e-KYC) report on the non-resident investor within 30 (thirty) days of the receipt of the foreign investment. With an objective of integrating the various reporting structures of foreign investments in India, a Single Master Form (**"SMF"**) has been introduced as an online reporting portal of the RBI effective from September 01, 2018. After the eKYC is completed, the SMF will be required to be filed, through the procedure set out for each of the specified forms which the SMF has replaced and a unique reference number will be generated for the filed SMF for the amount reported and against which the securities have been allotted. The AD Banks will then be required to verify the SMF filed by the relevant entity and if the details are in order, AD Banks will approve the form and send its acknowledgement to the concerned Indian entity. A certificate from a duly qualified merchant banker or a chartered accountant indicating the manner of calculating the price of the shares issued is also required. Pricing restrictions apply on any issuance of shares by Indian companies to non-residents which state that shares may be issued only at a price which is not less than the fair market value of shares calculated as per any internationally accepted pricing methodology.

While it is possible for a company to raise external debt, the same is governed by the ECB guidelines prescribed by the RBI which make all such borrowings subject to end use restrictions, limit on interest payable in relation to the borrowing – i.e. it would have to comply with an 'all-in-cost-ceiling' as well as restrictions on who can borrow (eligible borrower limitations) and who can lend (eligible lender restrictions). As mentioned above, the Government has made specific provisions to enable startups to obtain such ECB.

ii. Foreign Investment in Limited Liability Partnerships

An LLP is a form of business entity which permits individual partners to be shielded from the liabilities created by another partner's business decision or misconduct. In India, LLPs are governed by the LLP Act. LLP is a body corporate and exists as a legal person separate from its partners. Foreign investment in LLPs is permitted only in sectors where 100% (one hundred percent) foreign direct investment is allowed through the automatic route and there are no performance linked conditions. An LLP is utilized in certain instances by founders, but due to issues in procuring investment into an LLP under Indian exchange control laws, a company incorporated under the Companies Act is usually preferred.

4. Incorporating A Limited Liability Partnership in India

In 2008, the LLP Act introduced LLPs in India. An LLP is a beneficial business vehicle as it provides the benefits of limited liability to its partners and allows its members the flexibility of organizing their internal structure as a partnership based on an agreement. At the same time, an LLP has the basic features of a corporation including separate legal identity and limited liability.

An LLP consists of ordinary partners, and "designated partners" (**"DPs"**). DPs are responsible for the regulatory and legal compliance of an LLP in addition to liabilities ordinarily applicable to other partners of an LLP.

Incorporation can be done by going through the following steps:

Step 1: Assuming that the partners of the LLP have been identified, and at least 2 (two) DPs have been identified amongst the various partners (one of whom must be a resident in India), the DPs will have to apply for a designated partner identification number or director identification number by making an application in Form DIR-3 under the Companies (Appointment and Qualification of Directors) Rules, 2014 (**"DIN/DPIN"**).

Step 2: For making any filings with the Ministry of Corporate Affairs, the regulatory body in charge of overseeing LLPs, a digital signature is required. All filings made by or on behalf of LLPs are required to be filed using digital signatures by the person authorised to sign the documents.

Step 3: Once a DPIN and relevant digital signatures have been procured by the DPs, then the name of the LLP for which the application is sought to be made has to be registered with the registrar.

Step 4: If the name is approved by the registrar, then the relevant incorporation documents and subscriber's statement need to be filed with the registrar. If the registrar is satisfied, they will register the LLP.

Step 5: Immediately after incorporation, an LLP agreement is required to be filed with the authorities within 30 (thirty) days of incorporation. This can be consequently amended based on mutual agreement between the partners and DPs.

The LLP Act permits the conversion of a partnership firm, a private company and an unlisted public company into an LLP, in accordance with specified rules. As a consequence of the conversion, all assets, interests, rights, privileges, liabilities and obligations of the firm or the company may be transferred to the resulting LLP and would continue to vest in such LLP. Similarly, an LLP may be converted into a private limited company as per the provisions of Section 366 of the Companies Act and the Companies (Authorised to Register) Rules, 2014. However, an LLP is required to satisfy certain conditions for converting into a private limited company – for instance, an LLP must have at least 7 (seven) partners, approval from all the partners, no objection certificate from the registrar of companies (**"ROC"**) where the LLP is registered and advertisement in local and national newspapers.

Post incorporation steps are broadly similar for both LLPs and companies. They are covered in detail after the incorporation section for companies.

5. Incorporating A Company in India

Due to the restrictions placed on foreign direct investment in LLPs, startups prefer incorporating as a company in India. The company can be incorporated either as a private company or a public company or a one person company depending on the type of investment sought and nature and size of its operations. However, most startups prefer to initially start as a private entity since a private entity offers greater corporate and regulatory flexibility to the company. A private company is also easier to structure and is a relatively simpler vehicle for channeling foreign investments (through tax effective jurisdictions). A public company has to comply with stricter regulations and compliances. Further, a private company can be easily converted into a public company at a later stage. Further, as per the Companies Act, there is no requirement for minimum paid up capital which is a welcome move especially for startups.

After deciding the nature of the entity, the promoters would need to follow certain appropriate filing procedures with the ROC in connection with its incorporation as provided below.

I. Governing Act

Companies Act (which replaced the erstwhile Companies Act, 1956). The ROC in each state is the nodal authority for registration of companies.

II. Types of Companies

Under the Companies Act, different types of companies can be incorporated. Broadly, a company may either be a private company, a one person company or a public company. Such a company may be a limited company or an unlimited company. The Companies Act defines "limited company" to mean a company limited by shares or limited by guarantee. However, typically, companies in India are incorporated as private or public companies, limited by shares.

III. Private Company

A private company can be formed with a minimum of 2 (two) persons as shareholders and a minimum of 2 (two) directors, at least one of whom is a resident director who has stayed in India for not less than 182 (one hundred and eighty two) days in the previous calendar year. A private company has the following features:

a. The right to transfer shares is restricted in accordance with its articles of association.

b. The maximum number of its shareholders is limited to 200 (two hundred) (excluding past and present employees who are shareholders of the company).

c. No offer can be made to the public to subscribe to its shares, debentures and deposits.

IV. One Person Company

Under the Companies Act, a natural person who is an Indian citizen and resident in India can incorporate a one person company. However, it shall be required to convert itself into public or private company, in case its paid up share capital is increased beyond INR 5 million or its average annual turnover exceeds INR 20 million.

V. Public Company

Public companies can be formed with a minimum of 7 (seven) persons as shareholders and a minimum of 3 (three) directors, at least 1 (one) of whom is a resident director who has stayed in India for not less than 182 (one hundred and eighty two) days in the previous calendar year. There is no maximum limit on shareholders for public companies. The shares of a public company are freely transferable.

VI. Incorporation Process (as per Companies Act)

The process for incorporating a company in India is not exceptionally different from the processes in other Commonwealth nations. However, most founders prefer to go through the traditional incorporation process which is laid down below:

a. PAN – DSC – DIN

Permanent Account Number (**"PAN"**), Digital Signature (**"DSC"**) and DIN are mandatory for initiating the incorporation process along with the completion of KYC recently introduced for the directors. All forms are now required to be filed electronically.

No person can be appointed as a director without DIN and having duplicate DIN is an offence. DSC is required to be PAN encrypted as going forward, all filings relating to income tax have to be done by a director whose DSC is PAN encrypted.

b. Name Approval

   i. The ROC must be provided with 3 (three) preferred name options which should not be similar to the names of any existing companies. A no-objection certificate must be obtained in the event that the word is not an 'invented word'.

   ii. The proposed name must not violate the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950.

   iii. Ministry of Corporate Affairs has introduced a Central Registration Centre having territorial jurisdiction all over India to process and dispose of the name reservation applications.

c. Filing of charter documents of a company

   The following documents constitute the charter documents of a company and must be filed bearing in mind certain compliances associated with them.

   i. *Memorandum of Association*

   Memorandum of Association (**"Memorandum"**) is the charter of the company and contains the main objectives for which the company is incorporated. The Memorandum sets out the name of the company, state in which the registered office is to be situated, main objects to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of the main objects, liability of the members and authorized capital of the company.

   ii. *Articles of association*

   Articles of Association (**"Articles"**) of the company contain rules, regulations and bye-laws for the management of the company. The Articles should not contain any regulation which is contrary to provisions of the Memorandum or the Companies Act. The Articles are binding on the members and the company.

d. The ROC will need to be provided with certain information, such as the proposed first directors of the company and the address of its proposed registered office. The registered office is required to be finalized within 15 (fifteen) days and intimated within 30 (thirty) days of incorporation.

e. Affidavits and declarations are required to be provided by subscribers and requires notary and apostillisation at the respective home countries.

f. Companies that meet certain thresholds must have independent directors and women directors on the board of directors.

g. The Ministry of Corporate Affairs has introduced a major reform easing incorporation of an entity. Effective May 1, 2015, incorporation of a new company now requires only one e-form to be filed as against five e-forms. This process is known as Integrated Incorporation Procedure and is an additional procedure apart from regular procedure of incorporation.

h. Certificate of Incorporation

The certificate of incorporation provided by the ROC at the end of the incorporation process acts as proof of incorporation of the company.

i. The company should be capitalized and the corresponding share certificates be issued within a period of 60 (sixty) days of receiving the certificate of incorporation.

j. The process of incorporation, from initiating the name availability application to capitalization, should be completed within a window of 120 (one hundred and twenty) days.

VII. Post incorporation steps

i. Obtaining Permanent Account Number.

As per Section 139A of the Income Tax Act, 1961 (**"Income Tax Act"**), every company which is carrying on any business or profession and whose total sales, turnover or gross receipts are or is likely to exceed Rs. 5,00,000 (Rupees Five Lakhs) in any financial year needs to apply for a PAN. Though the section prescribes an eligibility limit for obtaining a PAN, any company intending to operate any bank account cannot do the same until it has obtained a PAN. Therefore it is necessary to obtain PAN in order to commence business. In addition to PAN, the company must have a Tax Deduction Account Number (TAN).

ii. Opening of Bank Account

Every company intending to carry on business will be required to open a current account with a Bank to manage its regular day to day business transactions and for handling various inward and outward remittances in foreign currency (if required).

iii. Board Meeting

A formal meeting of the board of directors of an organization must be held at definite intervals in accordance with the provisions of the Companies Act to consider policy issues and business developments. Presided over by a chairperson (chairman or chairwoman) of the organization or his or her appointee, it must meet the quorum requirements and its deliberations must be recorded in the minutes. Under the doctrine of collective responsibility, all directors (even if absent) are bound by its resolutions. The board has to meet once in every 3 (three) calendar months and at least 4 (four) such meetings are required to be held every year. A written notice has to be given to the directors regarding the meeting and quorum for the same is one-third of its total strength or 2 (two) directors, whichever is higher, which is necessary for every meeting.

iv. Annual General Meeting (**"AGM"**)

A meeting of the directors and shareholders of every incorporated entity is required by law to be held each calendar year. Generally, not more than 15 (fifteen) months are allowed to elapse between 2 (two) AGMs, and 21 (twenty one) days' prior written notice of its date is required to be given to the shareholders. The main purpose of an AGM is to comply with legal requirements, such as the presentation and approval of the audited accounts, election of directors, appointment of auditors for the new accounting term and other actions that require shareholder approval. Other items that may also be discussed include compensation of officers, confirmation of proposed dividend, and issues raised by the shareholders.

v. Appointment of Auditors

The Board must also appoint its first auditor within 30 (thirty) days from the date of its incorporation who shall hold office till the conclusion of its first annual general meeting. If in case, the board fails to appoint the auditor within 30 (thirty) days, shareholders can appoint the first auditor, within 90 (ninety) days of incorporation.

6. Taxation

I. Direct Taxation

Income tax in India is levied under the Income Tax Act. While residents are taxed on their worldwide income, non-residents are only taxed on income arising from sources in India.[1] A company is said to be resident in India if it is incorporated in India or its POEM is located in India. In this regard, the CBDT has released the final guidelines for determination of POEM.[2] India introduced the final test for POEM for determining the residential status of a company through Finance Act, 2016 with effect from financial year (FY) 2016-17. Further, the CBDT vide Circular No. 6 dated January 24, 2017 came out with guidelines for determination of POEM of a foreign company (**"Guidelines"**). As per the Guidelines, the POEM concept is one of substance over form. It may be noted that an entity may have more than one place of management, but it can have only one place of effective management at any point of time. Since "residence" is to be determined for each year, POEM will also be required to be determined on a year to year basis. As per the Guidelines, POEM of a foreign company is presumed to be outside India if it is considered to be carrying on active business outside India (**"ABOI"**) as per the ABOI test prescribed in the Guidelines. Foreign companies that do not meet the ABOI test are subject to a two step process to determine POEM. Step 1 involves identification or ascertaining the person or persons who actually make the key management and commercial decision for conduct of the company's business as a whole and Step 2 involves the determination of place where these decisions are in fact being made. Until the introduction of POEM, foreign companies were characterized as being tax resident of India only on the satisfaction of the 'control and management' test, which required that the foreign company's control and management be wholly situated in India.

Resident companies are taxed at the rate of 30% (thirty percent),[3] but if the turnover or gross receipts of the company does not exceed Rs. 2.5 billion then the tax rate will be 25% (twenty five percent),[4] while non-resident companies are taxed at the rate of 40% (forty percent).

A. Dividends

Dividends distributed by Indian companies are subject to a dividend distribution tax (**"DDT"**) at the rate of around 15% (fifteen percent) (calculated on a gross-up basis), payable by the company.[5] However, except as stated immediately below, no further Indian taxes are payable by the shareholders on such dividend income once DDT is paid.[6] Dividends received from a domestic company by a non-resident company should continue to be Indian tax exempt in the hands of the foreign company, provided that DDT has been paid by the distributing domestic company. Accordingly, there should be no withholding tax applicable on the payment of dividends to a non-resident.

1. The income taxes payable are subject to an additional surcharge as per the following ranges (i) domestic Company: 7% for income between INR 1 crore and INR 10 crores; 12% for income above INR 10 crores; (ii) Foreign Company: 2% for income between INR 1 crore and INR 10 crores; 5% for income above INR 10 crores. Additionally, 4 % Health and Educational cess is levied.

2. Circular No. 6 of 2017 dated 24 January, 2017

3. All tax rates mentioned in this chapter are applicable to Financial Year 2018-19 and are exclusive of applicable surcharge and cess.

4. For assessment year (**"AY"**) 2018-19, following are the two situations
(i) a domestic company is taxable at the rate of 25% if its total turnover or gross receipt in financial year 2015-16 does not exceed INR 50 crore. In other cases, the corporate tax rate is 30%; and
(ii) a domestic company is taxable at the rate of 25% of its total turnover or gross receipt in financial year 2016-17 is up to INR 250 crore. In other cases, the corporate tax rate is 30%.

5. Section 115- O, Income Tax Act, 1961

6. Section 10(34), Income Tax Act, 1961

B. Interest, Royalties and Fees for Technical Services

Interest payable to non-residents on loans taken/debt securities issued in foreign currency are taxable at a beneficial rate of TDS at 5% (five percent).[7] However, this benefit has a sunset clause stating that the benefits would only be available for loan agreements entered into/ bonds issued on or after July 1, 2012 and before July 1, 2020. The said beneficial 5% (five percent) rate of TDS is also available in relation to Rupee Denominated Bonds (**"RDB"**) issued until July 1, 2020. Similarly, interest payable to foreign institutional investors on investments made by them in RDBs and government securities is taxable at the rate of 5% (five percent). This benefit also has a sunset period and is applicable only in respect of interest payable until July 1, 2020.[8]

Further, as per the recently introduced Thin Capitalization Rules under the Income Tax Act (anti-avoidance provision)[9] interest payments made by an Indian company to its associated enterprises/related parties,[10] exceeding 30% (thirty percent) of the Earnings Before Interest, Taxes, Depreciation and Amortization of the payer of interest shall not be deductible as an expense.

The withholding tax on royalties and fees for technical services earned by a non-resident is 10% (ten percent).[11] These rates are subject to available relief under an applicable tax treaty. In this context, it is important to note that the definition of royalties and fees for technical services under Indian domestic law is much wider than the definition under most tax treaties signed by India.

C. Capital Gains

Gains earned by a resident company from the transfer of capital assets situated anywhere in the world are taxable in India. In the case of non-residents, only those gains arising out of the transfer of a capital asset in India should be taxable.[12] The tax treatment of capital gains depends mainly on whether the gains are short term or long term. Short term capital gains (**"STCG"**) arise upon the transfer of capital assets held by a taxpayer for a period of 36 (thirty six) months or less before the date of transfer (12 (twelve) months or less in the case of securities listed on a recognized stock exchange in India, and 24 (twenty four) months in the case of unlisted shares of an Indian company). Long term capital gains (**"LTCG"**) arise upon the transfer of a capital asset held for a period of more than 36 (thirty six) months (12 (twelve) months in the case of listed securities and 24 (twenty four) months in the case of unlisted shares of an Indian company).

Listed: STCGs arising from the transfer of listed equity shares upon payment of requisite securities transaction tax (**"STT"**) are taxable at the beneficial rate of 15% (fifteen percent).[13] LTCGs arising out sale of listed shares on the stock exchange are subject to a beneficial tax rate of 10% (ten percent) where such gains exceed Rs. 1,00,000 (Rupees One Lakh) provided that STT is paid both at the time of acquisition and sale of shares.[14] However, all gains up to January 31, 2018 will be grandfathered i.e. the capital gains will attract tax only upon transfer of the long-term capital asset on or after April 1, 2018.

7. Section 194LC, Income Tax Act, 1961
8. Section 194LD, Income Tax Act, 1961
9. Introduced through Finance Act, 2017, with effect from April 1, 2017.
10. Section 92A, Income Tax Act, 1961 defines 'associated enterprises'.
11. Sec 115A, Income Tax Act, 1961
12. Section 9 of the Income Tax Act, 1961. Further, India also introduced a rule to tax non- residents on the transfer of foreign securities the value of which are substantially (directly or indirectly) derived from assets situated in India (Indirect Transfer Tax).
13. Section 111A, Income Tax Act 1961.
14. Section 112A of the Income Tax Act, 1961

Unlisted: STCGs arising from transfer of unlisted securities are taxable at slab rates both in the hands of residents and non-residents. LTCGs arising out of unlisted securities are taxable at the rate of (i) 10% (ten percent) in the hands of non-resident companies; and (ii) 20% (twenty percent) in the hands of resident companies.[15]

D. Anti-Avoidance

A number of specific anti-avoidance rules are enforced in India. For example, Transfer Pricing Rules as per which cross-border transactions between related parties would be viewed for tax purposes on an arm's length basis.[16] Transfer pricing rules apply to certain domestic transactions as well. Further, Finance Act, 2013 introduced general anti avoidance rules (**"GAAR"**), which post several deferrals, became effective from April 1, 2017. GAAR seeks to tax or disregard certain 'impermissible avoidance arrangements' that are abusive or lack commercial substance. As per GAAR provisions, arrangements would be considered to be 'impermissible avoidance arrangements' if the main purpose is to obtain tax benefits and contains certain tainted elements as prescribed therein. GAAR is likely to impact some of the conventional tax optimization structures for India.

E. Tax Incentives for Startups

The Government has provided for various tax related incentives for startups which could be broadly summarized in the following heads:

i. Corporate Tax Reduction

As first announced in the Action Plan (*as discussed in Chapter II*), 'eligible startups'[17] have been exempted from paying income tax for a period of any 3 (three) consecutive assessment years out of 7 (seven) years beginning from the year in which the eligible startup is incorporated.

For obtaining the said benefit, eligible startups have to obtain a certificate of eligible business from the Inter-Ministerial Board of Certification, by submitting Form I (along with documents specified thereunder).[18]

However, since eligible startups have not been exempt from Minimum Alternative Tax, it would continue to remain liable to pay tax at the rate of 18.5% (eighteen point five percent) of its book profits in the years that it claims the exemption.

ii. Exemption from section 56(2)(vii)(b)

As per Section 56(2)(vii)(b) of the Income Tax Act, resident companies that issue shares at a premium are subject to tax under the head 'income from other sources' on the difference between consideration actually paid and the fair market value. However, 'eligible startups' are exempt from this provision provided they obtain requisite approval from the Inter-Ministerial Board of Certification. This exemption was brought about to allow ease of funding for startups with the ultimate objective of fostering a growing startup environment.

iii. Capital Gains Exemption

In line with the Action Plan, capital gains arising in the hands of eligible startups from sale of long term capital assets have been exempt if such gains are invested into the Government specified long-term asset which is expected to be a 'Fund of Fund', that invests in other funds.

Similarly, an exemption has been provided for an individual or an HUF that invests capital gains from the transfer of a residential property for subscription of equity shares of an eligible startup. Provided that the individual or HUF holds more than 50% (fifty percent) shares of the company and such company utilises the amount invested to purchase computers or computer software.

15. Section 112, Income Tax Act, 1961.

16. Section 92, Income Tax Act, 1961

17. As defined under Notification GSR 180 (E) issued by the DIPP on 17.02.2016.

18. As per DIPP Notification dated May 23, 2017.

Having said that, the Union Budgets since the launch of the Action Plan seem to have missed some announcements which were supposed to be notified in the budget as per the Action Plan including the extension of the Section 56 exemption to incubators. It will be interesting to see how this place unfolds and whether the Government eventually rolls out all the benefits that were contemplated for startups in the Action Plan.

II. Indirect Taxation

A. Good and Services Tax ("GST")

The GST regime is comprised of three major pillars: the Central Goods and Services Tax Act, 2017 (**"CGST Act"**) which provides for the taxing powers of the Central Government, individual State / Union Territory Goods and Services Tax Acts (**"SGST Act"** and **"UTGST Act"** respectively) which provide for the taxing powers of each State / Union Territory, and the Integrated Goods and Services Tax Act, 2017 (**"IGST Act"**), which grants exclusive rights to the Centre to tax inter-state commerce.

Under the GST regime, the "supply" of goods, or services, or both, is treated as a taxable event, with different taxes applying to inter-state supply and intra-state supply. Every inter-state supply of goods or services is liable to IGST under the IGST Act, while every intra-state supply of goods or services is liable to both CGST under the CGST Act, and SGST / UTGST under the applicable SGST Act / UTGST Act. Supply is treated as either inter-state, or intra-state, depending on the location of the supplier, and the "place of supply" determined in accordance with the provisions of the IGST Act.

GST is levied at rates that vary between nil – 28% (twenty eight percent) depending on the rate schedule applicable to the supply in question. To prevent cascading of taxes, a uniform input tax credit system is available in respect of input supplies of goods or services used or intended to be used in the provision of output supplies of goods or services or both. GST is a consumption tax and is typically passed on to the consumer of the good / service as part of the price.

As a general rule, the import of goods or services or both into India qualifies as a taxable inter-state supply chargeable to IGST, while the export of goods or services or both from India is treated as a zero-rated supply not chargeable to tax under the GST regime.

B. Value Added Tax ("VAT")

VAT is levied on the sale of goods within a particular state and rates may vary from 0% (zero percent), 1% (one percent), 4% (four percent) to 15% (fifteen percent) although there may be further variations depending on the state. VAT is a state specific levy and most states in India have introduced specific legislations for VAT. Under the VAT regime, a system of tax credits on input goods procured by the dealer is also available, to avoid the cascading effect of taxes that was prevalent under the erstwhile sales tax regime. With the introduction of GST in India, the power of the State Governments to levy VAT has been significantly curtailed. From July 1, 2017, VAT may be levied only on the sale within a state of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption.

C. Central Value Added Tax ("CENVAT")

CENVAT is a duty of excise which is levied by the Central Government on all goods that are produced or manufactured in India, marketable, movable and covered by the excise legislation. The peak duty rate was reduced from 16% (sixteen percent) to 14% (fourteen percent) and has further been reduced to 8% (eight percent) from 12.36% (twelve point three six percent), although there are other rates ranging upwards, or based on an ad valorem / quantity rate. The rate of CENVAT varies depending on the product description. In order to avoid the cascading effect of excise duty and double taxation, a manufacturer of excisable goods may avail of credit of duty paid on certain inputs and capital goods barring certain inputs used in the specified manufacture of certain products in accordance with the CENVAT Credit Rules. The credit can be utilized towards the duty payable on removal of the final product. The CENVAT scheme also takes into account, credits with respect to any service tax paid by the manufacturer on input services received. With the introduction of GST in India, the scope of CENVAT has been significantly limited. From July 1, 2017, CENVAT may be levied only on the production or manufacture of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption.

D. Customs Duty

Customs duty is a duty that is levied on goods that are imported into India and exported from India. Customs duty is levied by the Central Government. The Customs Act, 1962 provides for the levy and collection of duty on imports and exports, import / export procedures, prohibitions on importation and exportation of goods, penalties, offences, etc. The rates at which customs duty is levied are specified in the Customs Tariff Act, 1975. While export duties are levied occasionally to mop up excess profitability in international prices of goods in respect of which domestic prices may be low at the given time, levy of import duties is quite wide. Prior to the introduction of GST in India, import duties were generally categorized into basic customs duty, additional customs duties, countervailing duty, safeguard duty and anti-dumping duty. With the introduction of GST, the customs framework has been significantly revamped. Import of goods is now subject to IGST at the rate prescribed for inter-state supply of the goods concerned, in addition to basic customs duty, while most other duties have been abolished, or significantly curtailed. While the standard rate of customs duty for import of goods is 28.84% (twenty eight point eight four percent) (including IGST and education cess), the actual rate may vary according to the product description.

7. Basic Documentation

Once a startup has been incorporated, certain basic documentation should be formulated to ensure that business can be carried out.

I. Confidentiality Agreement

First, in order to carry out business or enter into arrangements concerning the business with third parties, a standard confidentiality and non-disclosure agreement template must be ready. This can be used by the startup to enter into preliminary discussions with third party vendors, consultants, contractors, etc. whilst ensuring that appropriate protection is provided to the startup and its ideas.

A non-disclosure agreement (**"NDA"**) is an agreement in which one party agrees to provide access to confidential information to a second party about its business or products and the second party agrees not to share this information with anyone else for a specified period of time. In certain cases, the sharing of confidential information may happen both ways. Some important clauses in NDAs include:

i. definition of 'confidential information' and exclusions thereof;

ii. term, if any, for keeping the information confidential;

iii. provisions regarding obligations on the use / disclosure of confidential information, which includes:

   a. use of information only for restricted purposes;

   b. disclosure of information only to persons on a 'need to know' basis;

   c. adherence to a standard of care relating to confidential information;

   d. ensuring that anyone to whom the information is disclosed further abides by the recipient's obligations;

   e. consequences/ remedies available to a party in case of breach by the other party.

II. Offer Letters/Employment Agreements

Second, certain documentation relating to the recruitment of employees has to be put in place including but not limited to template offer letters and employment agreements, NDAs and invention assignment agreements.

While there is no particular requirement under the central labour statutes to have written employment contracts, certain state specific shops and establishments legislations such as the Karnataka Shops & Commercial Establishments Act, 1961 require an employer to issue an 'employment order' to employees, within 30 (thirty) days from the date of appointment. Irrespective of any statutory obligation, it is recommended that the terms and conditions of employment, remuneration and benefits be clearly documented.

In India, it is a general practice that employers issue offer letters to employees at the time of appointment. The offer letter briefly outlines the terms and conditions of employment including probationary period, conditions of employment, remuneration and other documents required to be produced at the time of joining. While many employers stop at this stage, it is recommended that employers execute employment contracts with each of their employees in addition to the offer letters. While drafting the offer letter and employment agreements and determining the terms and conditions of employment, it is critical to ensure that all applicable employment laws are being complied with.

Although there is no prescribed format for an employment contract, some of the important clauses in such contracts include:

a. Term of employment and termination of employment (including as a result of misconduct);

b. Compensation structure – remuneration and bonuses;

c. Duties and responsibilities of the employee;

d. Conflict of interest;

e. Confidentiality and non-disclosure;

f. Intellectual property and assignment;

g. Non-compete and non-solicitation obligations; and

h. Dispute resolution.

An NDA is also executed with an employee by the employer to ensure that details learned by the employee during the course of employment is not otherwise used to the disadvantage of the employer / startup. Alternatively, this may be included as part of the employment agreement.

III. Non-competition/non-solicitation agreements

Employers may choose to enter into non-competition and non-solicitation agreements with their employees. Alternatively, these obligations may be included in the employment agreement. While non- compete clauses during the term of employment are generally enforceable in India,[19] a post-termination non-compete clause is not enforceable under Indian laws since they are viewed to be in 'restraint of trade or business' under Section 27 of the Indian Contract Act, 1872. Courts in India have time and again reiterated that a contract containing a clause restricting an employee's right to seek employment and/or to do business in the same field beyond the term of employment is unenforceable, void and against public policy.[20]

An employee cannot be confronted with a situation where he has to either work for the present employer or be forced to be unemployed (to the extent that he/she cannot take up employment with any other entity engaged in the same business). Though the stance of Indian courts on the question of restraint on trade is clear, such clauses are commonly included in the terms of employment for their deterrent effect. With respect to non-hire restrictions, courts have viewed the arrangement as an extension of a post-termination non-compete clause and therefore unenforceable.

The trend of incorporating restrictions on solicitation of employees, customers or clients during or after the term of employment has become common in recent times, especially with the increasing usage of social media and professional networking sites. A non-solicit clause is essentially a restriction on the employees from directly / indirectly soliciting or enticing an employee, customer or client to terminate his contract or relationship with the company or to accept any contract or other arrangement with any other person or organization. In determining the enforceability of a non-solicit clause, the courts have generally taken the view that such clauses shall be enforceable, unless it appears on the face of it to be unconscionable, excessively harsh or one-sided.[21]

Considering the stance of Indian courts on non-solicit and non-compete provisions, it is preferable to draft these clauses in a reasonable and less restrictive manner.

19. Wipro Limited v. Beckman Coulter International S.A; 2006(3) ARBLR118(Delhi)

20. Pepsi Foods Ltd. and Ors. v. Bharat Coca-Cola Holdings Pvt. Ltd. and Ors. 81 (1991) DLT 122; Wipro Ltd. v. Beckman Coulter International S.A 2006(3) ARBLR118 (Delhi)

21. Wipro Limited v. Beckman Coulter International S.A; 2006(3) ARBLR118(Delhi)

IV. Intellectual Property Assignment Agreement

In India, the Copyright Act, 1957 specifies that typically an employer becomes the owner of a copyright-able article created by an employee during the course of and within the scope of employment.

However, other forms of intellectual property rights still need to be specifically assigned. To this end, a "confidentiality and inventions assignment agreement" is typically entered into by an employee with the employer which, amongst other things covers the following:

a. Scope and extent of intellectual property sought to be covered;

b. Definition of the intellectual property included, including defining proprietary information being provided to the employee;

c. Covenant stating that all intellectual property developed by the employee during the course of the employment should be adequately disclosed to the employer;

d. Assignment of any intellectual property developed by the employee during the course of employment in favour of the employer perpetually;

e. Waiver of any right to claim rights – whether economic or moral over the intellectual property so developed; and

f. Cooperation related covenants that would allow the employer to utilize the intellectual property so assigned to the employer through the inventions assignment agreement.

V. HR Policy / Employee Handbook

It is recommended that all employers clearly set out the various policies and procedures applicable to employees and circulate such policies to employees periodically. Many subjects covered in a company's employee handbook are governed by laws which may be specific to the state in which the workplace is located. Hence, it is recommended that the employee handbook be drafted in accordance with all applicable national and state laws.

The general provisions incorporated in an employee handbook include (but are not limited to):

a. Employee benefits;

b. Leave policies including paid leave, casual leave, sick leave, maternity leave etc;

c. Compensation policies;

d. Code of conduct and behaviour policies;

e. Anti-discrimination and sexual harassment policies;

f. Immigration law policies;

g. Complaint procedures and resolution of internal disputes;

h. Internet, email and computer use policies;

i. Conflict of interest policy;

j. Anti-drugs, smoking and alcohol policy;

k. Accident and emergency policies;

l. Travel and expense policy;

m. Prohibition from insider trading.

VI. ESOP

Employee stock option plans (**"ESOPs"**) are designed to give an employee, an option to acquire stock in the employer company. They may be granted either after completion of certain years of employment or may vest immediately upon joining. In order to recruit and retain top performers, the company could use ESOPs as incentives to its potential employees by offering stock options to them. This is a popular strategy with companies that cannot afford to provide large pay packages in order to attract employees who fit the requirements of the company.

ESOPs are generally executed through an ESOP plan document that specifies the scope, extent and manner in which the options will be granted to employees. This is accompanied by a "grant letter" which is a quasi-agreement entered into with the relevant employee which more specifically outlines the terms of the grant, vesting and exercise.

An option under an ESOP is a right but not an obligation of an employee to apply for the shares in the company in future at a predetermined price (or at times for a nil exercise price). These options may be converted into shares upon fulfillment of certain conditions. These conditions could be performance-based or time-based. All schemes floated by public listed companies have to comply with the guidelines issued by the Securities and Exchange Board of India (**"SEBI"**) – namely the SEBI (Share Based Employee Benefits), Regulations, 2014.

Further, it is also possible to grant options in foreign companies to employees of the Indian subsidiaries of such foreign companies subject to compliance with certain guidelines as per the FEMA.

From a taxation perspective, for the employee, the difference between the fair market value of the shares and exercise price of the options will be taxed as salary income. Further, the employee is required to pay capital gains tax at the time of sale of shares acquired under an ESOP on the difference between the sale consideration and the fair market value on the date of vesting, thereby subjecting him to double taxation.

Further, employers may also grant and have, on a few occasions, granted benefits that have a few characteristics of an employee stock option but do not entitle the holder thereof to acquire shares of the employer. These may be in the form of phantom options or stock appreciation rights (**"SARs"**). In case of SARs, the employee will be entitled to the economic benefits of the shares granted to him/her. While the SEBI (Share Based Employee Benefits), Regulations, 2014 recognizes and contains certain conditions for grant of stock appreciation rights in a listed company, the Companies Act does not contain any conditions regarding grant of such options to employees and these kind of rights are mostly governed contractually in case of private companies.

VII. Other Agreements

The startup, in order to conduct its activities, will have to deal with various other players in the market, which fulfill the requirements as to raw material, advertisement or selling of the product. Accordingly, in order to deal with them as clients, suppliers or partners, the startup has to enter into certain agreements with them specifying the standard which has to be met by both the startup and the other parties in order to conduct the business.

As the startup conducts business, it requires drafting or review of various agreements which it enters into with other parties. These would often involve standard form agreements including those used by the startup and those used by third parties it deals with. It would also involve more aggressively negotiated agreements such as investment contracts and large supplier or customer contracts. These agreements are often structured differently. For instance, a startup may enter into numerous contracts with a customer for each assignment or may choose to have a master agreement setting out the essential terms and have assignments and their corresponding payments set out in statements-of- work under such a master agreement.

These would include agreements such as:

a. Software License Agreement

   Licenses to use software necessary in the conduct of business. These softwares can be as simple as operating systems.

b. Software Development/Services Agreement

   Entered into by software companies when providing services to their clients. These usually cover the scope of services and the payment of consideration.

c. Assignment Agreement (Work for Hire Agreement)

Contracts for work done, especially in relation to software. These are often tailored to ensure that the intellectual property created is retained by the hiring party rather than the creator of such intellectual property.

d. Equipment/ Technology Lease

Permits a party that leases equipment or technology to use the leased equipment or technology for a limited period of time.

e. Online Agreements

These protect a company from misuse of its web-based resources. They often take the form of click wrap agreements and disclaimers that are designed to minimize the company's liability for misuse.

f. Shrink Wrap/ Click Wrap Agreements

Shrink wrap agreements pertain to licenses that take force as soon as a purchaser commences using a product, "removes the shrink wrap" so to speak. Click wrap agreements purport to be enforceable as and when a user clicks a button accepting its terms.

g. Strategic Alliance Agreements

These agreements are mainly in the nature of technology transfer, co marketing, pre- development and co-development arrangements. The rights and obligations of each of the parties under these agreements must be clearly identified and set out.

h. Outsourcing Agreements

These are particularly relevant in the Indian context. These often involve one 'master services agreement' entered into with the client followed by 'statements of work' specifying the scope of work and the consideration for that task. However, a company needs to ensure that outsourcing activities in India do not create a permanent establishment in India for tax purposes.

i. Customer Contracts

These usually lay out the terms of supply by the company and the terms of payment by the customer. The company may choose to use standard form agreements for smaller customers while larger customers may have negotiated terms. Where the company is providing software services, adequate care must be taken to ensure that the terms regarding ownership of rights and interest in software, including any modification made to the software during the term of the agreement, is captured.

j. Distribution Agreements

Many products, especially in the FMCG sector, use large distribution networks to ensure their products reach the farthest possible corners of the country, or the world. It is important that a proper agreement sets out the terms of the company with its distributors and other middlemen to allay any potential for conflict.

k. Vendor/ Supplier Contracts

Companies usually have raw materials of various natures supplied to them in order for them to add value in whatever manner. The supply of such raw materials is essential to carrying on the intended business activity and the terms of such supply and payment by the company should be laid out as clearly as possible in an agreement.

l. Contractor Agreements

A company may use contractors to perform various ancillary functions. These may include construction and architecture, design, housekeeping, security and transport amongst others. It may also include more important functions such as human resource management, temporary staffing and public relations. These agreements need to be drafted carefully in order to ensure that the persons engaged by the contractors to carry out these activities are not deemed to be 'employees' of the principal employer (i.e. the company).

m. Leases

A startup would usually lease the property in which it houses its offices or factory. These property leases need careful drafting and negotiation in order to ensure the utmost clarity and legality of the same. Common issues that arise in leases relate to inadequate stamping and non-registration. Stamping and registration are essential in order to make the lease or any other agreement enforceable in Indian courts. Lease-purchase agreements with respect to vehicles and other movable assets like laptops, furniture, etc. are another common type of agreement that companies enter into.

n. Insurance Agreements

Most companies obtain numerous insurance policies, including group health insurance policies, fire insurance policies, key man insurance policies and many others. Certain of these, such as group health policies, may require negotiated terms for, amongst others, modes of payment (such as cashless transactions).

8. Applicable Employment Laws

Human resources related laws or employment laws in India do not stem from any single legislation and there are over 200 (two hundred) laws at the federal level and the state level, governing subjects ranging from conditions of employment to social security, health, safety, welfare, trade unions, industrial and labour disputes, etc. However, the Government appears to have started the process of amalgamating around 44 (forty four) central labour laws into 4 (four) codes to simplify them. The consolidation, if and when it happens, will streamline the otherwise cumbersome requirements of compliance with labour laws. Set out below is an overview of the key employment legislations in India at present:

Statute	Applicability
Factories Act, 1948 ("Factories Act")	Factories Act is one of the earliest welfare legislations, which embodies the law relating to regulation of labour in factories. The statute prescribes, inter alia, terms of health, safety, working hours, benefits, overtime and leave. The statute is enforced by state governments in accordance with the state specific rules framed under the Factories Act.
Shops and Commercial Establishments Acts ("S&E Acts")	S&E Acts are state specific statutes which regulate conditions of work and employment in shops, commercial establishments, residential hotels, restaurants, eating houses, theatres, places of public amusement / entertainment and other establishments located within the state. These statutes prescribe the minimum conditions of service and benefits for employees, including working hours, rest intervals, overtime, holidays, leave, termination of service, employment of children, young persons and women and other rights and obligations of an employer and employee.
Industrial Employment (Standing Orders) Act, 1946 ("Standing Orders Act")	This statute applies to factories, railways, mines, quarries and oil fields, tramway or motor, omnibus services, docks, wharves and jetties, inland steam vessels, plantations and workshops, where 100 (one hundred) or more persons are employed or were employed on any day of the preceding 12 (twelve) months. In certain states in India, such as Maharashtra, the applicability of the Standing Orders Act has been extended to shops and commercial establishments as well. The statute mandates every employer of an establishment to lay down clear and precise terms and conditions of service which is to be certified by the concerned labour department and thereafter enacted.
Contract Labour (regulation and Abolition) Act, 1970 ("CLRA Act")	CLRA Act applies to: i. All establishments employing 20 (twenty) or more persons (or that have employed 20 (twenty) or more persons on any day of the preceding 12 (twelve) months). ii. Contractors employing (or that have employed) 20 (twenty) or more workmen on any day of the preceding 12 (twelve) months. The statute does not govern establishments where work of a casual or intermittent nature is carried out. It regulates the conditions of employment of contract labour, the duties of a contractor and principal employer and provides for abolition of contract labour in certain circumstances. However, as provided in Chapter II, the Government has provided the option of self certification in respect of the provisions of this legislation to startups. In the states of Maharashtra and Haryana, the applicability threshold is 50 (fifty) workmen.

Maternity Benefit Act, 1961 ("Maternity Act")	Maternity Act is applicable to all shops and establishments in which 10 (ten) or more persons are employed; and factories, mines, plantations and circus. It prescribes conditions of employment for women employees, before and after childbirth and also provides for maternity benefits and other benefits. Pursuant to the Maternity Benefit (Amendment) Act, 2017, the period of maternity break has been increased from 12 (twelve) weeks to 26 (twenty six) weeks.
Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("Sexual Harassment Act")	Sexual Harassment Act, enacted in the year 2013, aims at providing women, protection against sexual harassment at workplace and prescribes detailed guidelines to be followed by employers and employees for the prevention and redressal of complaints of sexual harassment. The statute applies to the organized and unorganized sector - including government bodies, private and public sector organisations, non- governmental organisations, organisations carrying on commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational and sports institutions and stadiums used for training individuals. It also applies to all places visited by employees during the course of employment or for reasons arising out of employment.
Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ("BOCW Act")	BOCW Act applies to establishments employing 10 (ten) or more building workers in any building/ construction work and regulates the conditions of employment and service of the workers and imposes obligations on the employer, with respect to health, safety and welfare of the construction workers. However, as provided in Chapter II, the Government has provided the option of self certification in respect of the provisions of this legislation to startups.
Minimum Wages Act, 1948 ("Minimum Wages Act")	Minimum Wages Act provides for the fixing and revising of minimum wages by the respective state governments for certain scheduled employments. State governments periodically prescribe and revise the minimum wage rates for both the organized and unorganized sectors.
Payment of Wages Act, 1936 ("Payment of Wages Act")	Payment of Wages Act regulates conditions of payment of wages. The statute applies to all employees whose salary is up to Rs. 24,000 (Rupees Twenty Four Thousand) per month and who are engaged in factories, railways, tramways, motor transport services, docks, wharves, jetty, inland vessels, mines, quarries and oil fields, workshops, establishments involved in construction work and other establishments as notified by the appropriate state governments.
Equal Remuneration Act, 1976 ("Remuneration Act")	Remuneration Act applies to all factories, mines, plantations, ports, railways companies, shops and establishments in which 10 (ten) or more persons are employed. The statute provides for the payment of equal remuneration to men and women workers for the same work / work of a similar nature and prohibits discrimination on grounds of sex against women, in matters of employment.
Payment of Bonus Act,1965 ("Bonus Act")	Bonus Act applies to every factory and establishment in which 20 (twenty) or more persons are employed on any day during an accounting year. It further provides for the payment of bonuses under certain defined circumstances, thereby enabling the employees to share the profits earned by the establishment.
Payment of Gratuity Act, 1972 ("Gratuity Act")	The Gratuity Act is applicable to every factory, mine, oil field, plantation, port, railway company, shop and commercial establishment where 10 (ten) or more persons are employed or were employed on any day of the preceding 12 (twelve) months. Employees are entitled to receive gratuity upon cessation of employment, irrespective of the mode of cessation.

	An employee is eligible to receive gratuity only in cases where he has completed a 'continuous service' of at least 5 (five) years (interpreted to mean 4 years and 240 days) at the time of employment cessation. However, as provided in chapter II above, the Government has provided the option of self certification in respect of the provisions of this legislation to startups. Recently, the Government has doubled the maximum gratuity limit to Rs. 20,00,000 (Rupees Twenty Lakhs).
Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act")	EPF Act is one of India's most important social security legislations which provides for the institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other prescribed establishments. The statute envisages a contributory social security mechanism and applies to establishments having at least 20 (twenty) employees. An employee whose basic salary is less than Rs. 15,000 (Rupees Fifteen Thousand) per month, or who has an existing provident fund membership based on previous employment arrangement is eligible for benefits under the EPF Act. However, as provided in Chapter II, the Government has provided the option of self certification in respect of the provisions of this legislation to startups.
Employees' State Insurance Act, 1948 ("ESI ACT")	It applies to all factories, industrial and commercial establishments, hotels, restaurants, cinemas and shops. Only employees drawing wages below Rs. 21,000 (Rupees Twenty One Thousand) per month are eligible for benefits under this statute. The statute provides for benefits in cases of sickness, maternity and employment injury and certain other related matters. However, as provided in Chapter II, the Government has provided the option of self certification in respect of the provisions of this legislation to startups.
The Apprentices Act,1961 ("Apprentices Act")	Apprentices Act provides for the regulation and control of training of technically qualified persons under defined conditions.
Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 ("EECNV ACT")	EECNV Act is applicable to establishments in the public sector and establishments in the private sector, having a minimum of 25 (twenty five) employees. The statute mandates the compulsory notification of vacancies (other than vacancies in unskilled categories, vacancies of temporary duration and vacancies proposed to be filled by promotion); to employment exchanges in order to ensure equal opportunity for all employment seekers.
Child Labour (Prohibition and Regulation) Act, 1986 ("Child Labour Act")	Child Labour Act prohibits the engagement of children (below the age of 14 (fourteen)) in certain employments (the Schedule to the Child Labour Act lays down prohibited occupations) and regulates the conditions of work of children and adolescents (aged between 14-18 years) in certain other employments where they are not prohibited from working.
Industrial Disputes Act, 1947 ("ID Act")	ID Act, one of India's most important labour legislations, prescribes and governs the mechanism of collective bargaining and dispute resolution between employers and employees. The statute contains provisions with respect to, inter alia, unfair labour practices, strikes, lock-outs, lay-offs, retrenchment, transfer of undertaking and closure of business.
Trade Unions Act, 1926 ("Trade Unions' Act")	Trade Unions Act provides for the registration of trade unions and lays down the law relating to registered trade unions.
The Rights of Persons with Disabilities Act, 2016 ("Disabilities Act")	The Disabilities Act is applicable to all establishments (including private sector). It prohibits discrimination on grounds of disabilities and all establishments are required to frame and display an Equal Opportunities Policy.

* The list of employment laws is not exhaustive and does not reflect labour laws specific to certain industries and/or activities. The list also does not provide the details of compliances to be undertaken by the employer for each applicable labour law. Further, the applicability of each labour law (for the employer as well as its employees) needs to be determined based on various aspects including (i) the exact nature of activities/work performed, (ii) nature of establishment, (iii) number of employees, (iv) role and responsibilities of the employees, (v) salary / compensation, (vi) duration of employment, etc. For example, the ID Act applies only to individuals falling within the category of 'workmen' and specifically excludes persons who are employed in a managerial or administrative capacity, or a supervisor who draws a monthly salary exceeding Rs. 10,000 (Rupees Ten Thousand). There are also specific legislations governing the terms and conditions of employment of individuals working in factories (Factories Act), commercial establishments (S & E Acts), mines (Mines Act, 1952), plantation workers (Plantations Labour Act, 1951) etc. Finally, it must be noted that under certain circumstances, Indian states have the right to amend the labour laws enacted by the central (federal) government and accordingly, it is important to check for any state-specific amendments that may be relevant to a central (federal) labour law.

9. Seeking Investment & Investment Documentation

Typically, after incorporation, most startups look for angel investments from friends / family / benefactors. At times, after receiving angel investment, startups receive seed investments. These investments typically come from incubators and high networth individuals who look for making early stage investments in companies. Venture capital (**"VC"**) is often the first large investment a startup can expect to receive after receiving angel investment and seed investment. There are specific considerations that should be kept in mind by a startup when approaching any investor.

I. Information Memorandum / Business Plan

When approaching an investor, it is important to have a specific document setting out clearly the revenue model, proposed business idea, areas and solutions that the business intends to address and an analysis of the sector in which the business expects to operate.

II. Copy of charter documents and any existing founders' agreement

All charter documents relating to the startup, the share capital and any other agreement governing the relationship of the founders with the company should ideally be provided to the investors.

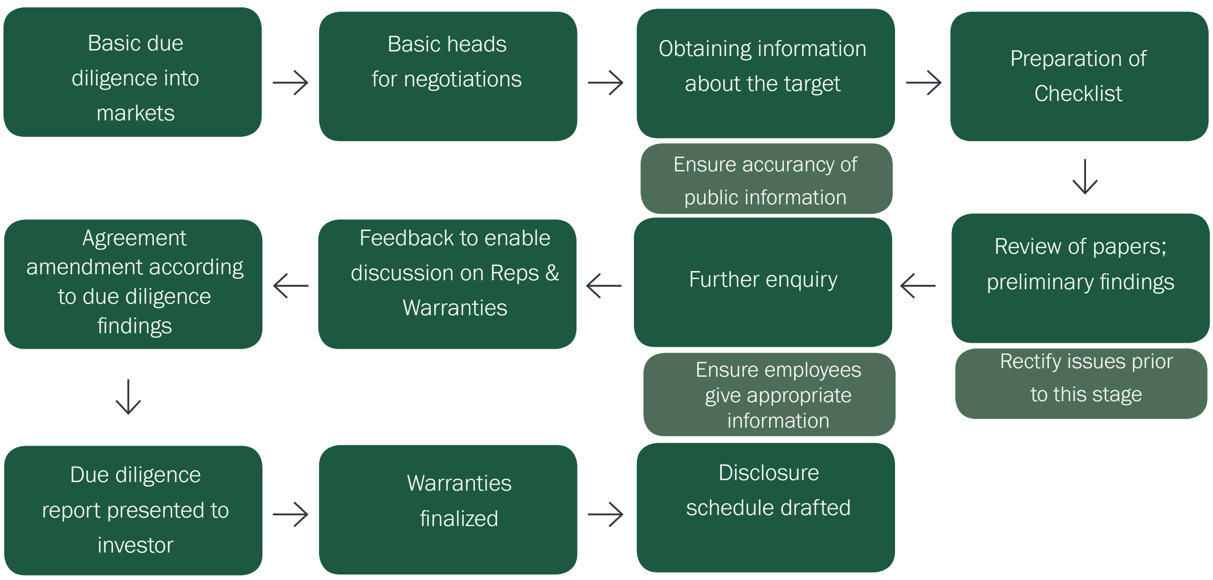
III. Draft term sheet

It is also important to have ready a brief and succinct term sheet that provides a clear outline of the investment sought, the stake offered and the investment rights that may be made available to the investors.

IV. Diligence Ready

The company must ensure that it complies with all regulations and laws with respect to its business and operations. Due diligences can be a daunting reality for startups hoping to receive investments. They may come across as intrusive, but are essential to any investor.

The process, from an investor's point of view, usually takes place as described in the following diagram.



Any issues / non-compliance discovered during diligence may affect the valuation of the company and may also increase the indemnification obligations of the company and the founders..

V. Investment from angel investors

If seeking investment from registered angel funds in India, certain rules and regulations may be applicable to the startup in which an angel fund may look to make investments. Under the SEBI (Alternative Investment Funds) Regulations, 2012, SEBI has made the following restrictions applicable to angel funds investing in an Indian company:

A. Investee companies

To be eligible to receive 'angel funding', an investee company has to comply with the criteria regarding the age of the venture capital undertaking/startup issued by the Department of Industrial Policy and Promotion under the Ministry of Commerce and Industry, Government of India vide notification no. G.S.R. 180(E) dated February 17, 2016 or such other policy made in this regard which may be in force, not listed on the floor of a stock exchange, and should have a turnover of less than Rs. 250 million and not be promoted by or related to an industrial group (with group turnover exceeding Rs. 3 billion).

B. Deal ticket size/holding period of investments

The deal ticket size is required to be between Rs. 2.5 million and Rs. 50 million. Separately, it is required that an investment be held for a period of at least 1 (one) year.

VI. Venture Capital funding

Venture capital investment is one of the preliminary formal rounds of funding received by a startup. Venture capital is most attractive for startups with limited operating history that are too small to raise capital in the public markets and are too immature to secure a bank loan or complete a debt offering. In exchange for the high risk that venture capitalists assume by investing in smaller and less mature companies, venture capitalists usually get certain protective rights in the company with respect to management decisions, in addition to a significant portion of the company's ownership (and consequently value).

VII. Investment Instruments

As noted in the previous sections, there are limitations on the kind of instruments that may be issued to non-resident investors. Usually, convertible instruments are the preferred option, as such instruments provide a preference to the instrument holder, with respect to dividend/ interest payout, payment at the time of liquidation, etc. Further, the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 (**"TISPRO Regulations"**), has permitted startup companies[22] to issue convertible notes to non-resident persons evidencing receipt of money initially as debt, which is repayable at the option of the holder or which is convertible into such number of equity shares of such startup company, within a period not exceeding 5 (five) years from the date of issue of the convertible note, upon occurrence of specified events as per the other terms and conditions agreed to and indicated in the instrument.

22. Notification No. G.S.R 180(E) dated February 17, 2016 issued by Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India

With respect to residents, there is relatively more flexibility in terms of the nature of instruments that may be issued. Certain companies issue instruments which are optionally convertible / redeemable. Some of the key terms of the instruments issued to investors in venture capital funding are as follows:

A. CCPS

Compulsorily convertible preference shares can be used as an effective instrument as they continue to carry a preferential right of dividend and a preferential right to recover investment in the eventuality of a winding up. Further, the Companies Act has permitted a private company to issue preference shares carrying voting rights on a fully diluted basis.

B. CCD

Compulsorily convertible debentures are another investment instrument that may be considered. A debenture is a debt security issued by a company, and typically represents a loan taken by the issuer company with an agreed rate of interest. Debentures may either be secured or unsecured. While compulsorily convertible debentures provide flexibility to companies with respect to interest payment on dividends, since debentures cannot carry voting rights, it may be a less favored instrument compared to preference shares.

The Ministry of Finance, Government of India, through its press release dated April 30, 2007, and a subsequent circular issued by the RBI on June 08 2007, directed that all preference shares and debentures, other than compulsorily convertible preference shares/ debentures, viz. non-convertible, partially convertible or optionally convertible preference shares/ debentures, issued to non-residents on or after May 01, 2007, would be regarded as debt and not share capital for the purposes of investment into India and therefore issuance of the same would be subject to the terms and conditions of the External Commercial Borrowings Guidelines (**"ECB Guidelines"**). The ECB Guidelines place various restrictions on debt and certain securities that are treated as debt. These restrictions include restrictions on who may be a recognized lender, who is eligible to borrow, and what such borrowings may be used for.

VIII. Documentation

Such investments involve essentially 3 (three) principal documents:

i. Term Sheet / Letter of Intent / Memorandum of understanding

   a. First step in a VC investment.

   b. Sets out the basic commercial understanding between the VC and the startup including valuation at which the investment will be made.

   c. Sets out the basic legal terms for the agreements to follow, as discussed below.

ii. Share Subscription Agreement

   a. Provides for the issuance of shares in the share capital of the startup to the investor in consideration of a subscription amount, which is determined as per the valuation of the startup. It also provides a broad outline of what the money will be used for.

   b. Provides for representations and warranties by the startup and the founders (in relation to the startup) which will allay any risk the investor may face due to legal, regulatory or tax related liabilities of the startup. The founders and startup may make certain exceptions to the warranties, in the form of a disclosure letter. Representations and warranties are usually protected by an indemnity provided by the startup and/ or the founders, if any losses occur as a result of any breach of representations and warranties. The founders and startup may place certain limitations on their indemnity obligations.

   c. Provides covenants which are designed to keep the startup's activities in check in terms of legal, regulatory and tax compliances. It also provides conditions precedent/ conditions subsequent, which aim to cure any issues that are identified during the due diligence process.

iii. Shareholders' Agreement

The primary purpose of a shareholders' agreement is to identify the terms regarding the management of the startup, share transfer restrictions and exit rights of the investors.

a. Provides for the appointment of the investor's directors on the board of the startup and provides the structure of the board.

b. Provides information and reporting rights which require the startup to keep the investor informed of developments and provides the investor with, *inter alia*, regular financial reports.

c. Provides the investor's exit route to cash out the investment at some future date. The following are exit routes commonly used by investors:

- Initial Public Offering : Exit by way of listing shares on a recognized stock exchange.
- Strategic sale: Exit by way of sale of shares or assets of the startup to a strategic player desirous of acquiring the startup.
- Buyback of Shares: Equity shares of a company, including equity shares issued pursuant to the conversion of preference shares / debentures may be bought back by the company. However, the Companies Act imposes several restrictions on buy-back of shares including, inter alia, the following: (a) buy-back must be authorized by a minimum of 75% (seventy five percent) of the shareholders; (b) buy-back cannot be more than 25% (twenty five percent) of a company's aggregate paid-up share capital and free reserves in any financial year; (c) no buy-back can be initiated within 1 (one) year from the date of closure of the preceding buy-back offer. Further, in the event of buy-back of shares, the amount distributed by the company shall be charged to tax and the company shall be liable to pay tax at the rate of 20% (twenty percent) on such amount distributed.
- Redemption Rights: This mode of exit may not be availed by foreign investors since Indian foreign exchange regulations do not permit issuance of redeemable shares/ debentures to foreign investors. However, it is still a useful exit option for Indian investors.
- Registration Rights: Permits the investor to piggyback on any registration on a foreign stock exchange by way of issuing American Depository Receipts (**"ADRs"**) or Global Depository Receipts (**"GDRs"**).

d. Provides various rights to the investor including:

- Pre emptive Right – where the company proposes a fresh issue of shares, the right to be offered such shares prior to any other party.
- Right of First Refusal or Right of First Offer – where the founders intends to sell their shares in the company, the right to be offered such shares before any third party. In case of companies with multiple shareholders, the investor may seek this right even in case of sale of shares by any other shareholder.
- Tag Along Rights – the right to sell to the founders' buyer on the same terms and conditions as the founders.
- Drag Along Rights – the right to have the founders and other shareholders sell to the investor's buyer on the same terms and conditions. This right usually gets triggered in case of any

material breach by the startup of the shareholders' agreement or where the startup/founders fail to provide an exit to the investor by the agreed period.

- Put Option and Call Option – The right to "put" the shares back in the company and the right to "call" on the shares of another shareholder coupled with the other shareholder's obligation to sell the shares respectively. Put options in favour of a non-resident requiring an Indian resident to purchase the shares held by the non-resident under the FDI regime are subject to the following conditions as per the TISPRO Regulations:
    - Shares/debentures with an optionality clause can be issued to foreign investors, provided that they do not contain an option/ right to exit at an assured price;
    - Such instruments shall be subject to a minimum lock-in period of 1 (one) year;
    - The exit price should be as follows:
        - In case of a listed company, at the market price determined on the floor of the recognized stock exchanges;
        - In case of unlisted equity shares, at a price not exceeding the fair market value determined as per any internationally accepted pricing methodology;
        - In case of preference shares or debentures, at a price determined by a chartered accountant or a SEBI registered merchant banker as per any internationally accepted methodology.
- Liquidation Preference: Liquidation preference ensures that the investor receives priority in the event of liquidation or winding up proceeding commencing. Such right to be given priority in terms of payouts is also reserved in terms of acquisitions and other liquidity events for the shareholders in the company.

e. Provides the investor with affirmative voting rights. These rights permit the investors to block certain resolutions at the board and shareholder level. These rights are primarily negative in nature, akin to veto rights.

f. Provides covenants which are designed to keep the startup's activities in check in terms of legal, regulatory and tax compliances.

g. Anti-dilution rights protect the value of the investor's shares. In the event that the company makes a fresh issue of shares at a lower price than the price at which the investor acquired its shares, the value of the investor's shares may be protected by either a full ratchet or a weighted- average ratchet. The ratchet may be effected by:

- Issuing further shares (usually when the investor owns equity shares in the company)
- Adjusting the conversion ratio of convertible instruments in accordance with the valuation of the company.

10. Maturity/ Exit

As the company grows, it reaches a stage where it has stable operations and revenue flow. This is considered the maturity stage in this module. At this stage, the company is most likely ready to make a public offering or merge with or acquire another company. The startup needs to comply with various regulatory requirements during the process of a merger, acquisition or an initial public offering.

I. IPO

An IPO is when a company issues equity shares to the public for the first time. It is a great way for smaller, younger companies seeking capital to expand. When a company lists its shares on a recognized stock exchange, it will almost invariably look to issue additional new shares in order to raise extra capital at the same time. The money paid by investors for the newly-issued shares goes directly to the company (in contrast to a later trade of shares on the exchange, where the money passes between investors). An IPO, therefore, allows a company to tap a wide pool of stock market investors to provide it with large volumes of capital for future growth. The existing shareholders will see their shareholdings diluted as a proportion of the company's shares. However, they hope that the capital investment will make their shareholdings more valuable in absolute terms. Indian stock exchanges are governed by SEBI.

Companies can also list abroad via an issue of ADRs or GDRs. Specifically for startups, SEBI has introduced the institutional trading platform which allows companies in high risk areas to list with fewer compliances. However, the concept of institutional trading platforms failed to achieve the purpose for which it was introduced – to provide certain relaxations to the startups and enabling them to access public money without complying with the stringent norms for listing set out by SEBI.

Some important legislations involved in an IPO in India include:

a. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

b. SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (which are proposed to be replaced by SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018)

c. Securities Contracts (Regulation) Rules,1957.

In most IPOs, the founders have certain obligations, for instance, meeting minimum contribution requirements. Further, the founders are generally subject to a 3 (three) year lock-in once the IPO is concluded. The basic steps involved in an IPO include various parties such as investment bankers, underwriters and lawyers. Each is essential to different parts of the process.

II. M&A

The phrase mergers and acquisitions (commonly abbreviated to **"M&A"**) refers to the aspect of corporate strategy, corporate finance and management dealing with the buying, selling and combining of different companies that can aid, finance, or help a growing company in a given industry grow rapidly without having to create another business entity. A merger is a tool used by companies for the purpose of expanding their operations often aiming at an increase of their long term profitability. Mergers usually occur in a consensual (occurring by mutual consent) setting where executives from the target company help those from the purchaser in a due diligence process to ensure that the deal is beneficial to both parties. Each of the companies proposing to merge with the other must make an application to the National Company Law Tribunal (the **"Tribunal"**) having jurisdiction over such company for calling meetings of its respective shareholders and/or creditors. The Tribunal may then order a meeting of the creditors/shareholders of the company. If the majority in number representing 3/4th of the creditors/ shareholders, present and voting at such meeting, agree to the merger, then the merger, if sanctioned by the Tribunal, is binding on all creditors/ shareholders of the company. The Tribunal, however, will not approve a merger or any other corporate restructuring, unless it is satisfied that all material facts have been disclosed by the company. A certified copy of the order of the Tribunal will have to be filed by the company with the ROC in order for it to take effect. It is also pertinent to note that provisions dealing with mergers under the Companies Act recognize and permit a merger/ reconstruction where a foreign company merges into an Indian company and vice-versa.

An acquisition, also known as a takeover, is the buying of one company by another. An acquisition may be friendly or hostile. In the former case, the companies cooperate in negotiations; in the latter case, the takeover target is unwilling to be bought or the target's board has no prior knowledge of the offer. The Companies Act does not make a reference to the term 'acquisition' per se. However, the various modes used for making an acquisition of a company involve compliance with certain key provisions of the Companies Act. The modes most commonly adopted are a share acquisition or an asset purchase.

A. Acquisition of shares

A share purchase may take place by an acquisition of all existing shares of the target by the acquirer, or by way of subscription to new shares in the target so as to acquire a controlling stake in the target. If a scheme or contract involving the transfer of shares or a class of shares in a company (the 'transferor company') to another company (the 'transferee company') is approved by the holders of at least 9/10ths in value of the shares whose transfer is involved, the transferee company may give notice to the dissenting shareholders that it desires to acquire such shares, and the transferee company is then, not only entitled, but also bound to acquire such shares. If the acquisition is by way of subscription of shares, then the provisions of the Companies Act and FEMA applicable to subscription will have to be followed. It is also necessary for the board of the company to pass a resolution approving the transfer / subscription of shares.

B. Asset purchase

An asset purchase involves the sale of the whole or part of the assets of the target to the acquirer. In case of a public company, the board of directors of a company cannot sell, lease or dispose all, substantially all, or any undertaking of the company without the approval of the shareholders in a shareholders meeting. Therefore, it would be necessary for at least 75% (seventy five percent) of the shareholders of the seller company to pass a resolution approving such a sale or disposal.

C. Takeover Code

The SEBI is the nodal authority regulating entities that are listed on stock exchanges in India. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the "Takeover Code") restricts and regulates the acquisition of shares / control in listed companies. Generally, if an acquirer acquires 25% (twenty five percent) or more of the shares or voting rights of a listed company, the acquirer would be required to make a public announcement of an open offer for acquiring shares of such target company in accordance with the regulations. However, this particular requirement will not be applicable to a transfer or acquisition of shares or voting rights pursuant to a scheme of arrangement or reconstruction, including amalgamation or merger or demerger, under any law or regulation, whether Indian or foreign. Therefore, if a merger is sanctioned by the Tribunal under the provisions of the Companies Act, the aforesaid requirement of the Takeover Code would not be applicable.

M&A is a great way for a founder to exit a successful business with a good profit.

11. Risk Management

I. For an e-commerce / internet based company

A website is a virtual front of the company on the internet. A host of information about the company, including the products and services offered by the company, is on the website. Since the website can be accessed by everyone around the world, it is important for the company to deal with the risks arising out of the internet. These deal with the management of the operations of the startup on the internet. It includes establishing a presence on the internet, acquiring domain names, and carrying on business on the internet. Another issue is the management of associated risks.

The minimization of the liability of the startup on the internet largely depends on the nature of representations made by the startup on its website, like terms of use, privacy policies, and the usage agreements. Each of these have to be customized for the website to effectively manage the liability of the company. These would necessarily carry certain disclaimers to at least help minimize the liability of the startup if not eliminate it. A startup should also regularly review its website to flag off potential areas of liability.

II. Information Technology Act, 2000 ("IT Act")

The IT Act provides legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies. The IT Act provides the law regarding the use of digital signature as well as their validity and the maintenance of the website. With the computerization of the Ministry of Company Affairs, digital signatures have gained significance as a convenient way for foreign companies to conduct their Indian operations.

Internet security has become even more relevant in the context of the Bazee.com case, wherein the CEO of the company was jailed for permitting (albeit unintentionally) inappropriate material to be sold through his company website. Further, the emergence of a sexual harassment regime in India has led to a necessity, even amongst non-IT companies to ensure that their employees do not engage in inappropriate internet use.

III. Content Regulation

For the e-commerce ventures that distribute content or act as a platform for distribution or exchange of third party information/ content, compliance with content regulations assumes paramount importance. There is no single legislation in India that would deal with regulation of content in India; rather a plethora of legislations would come into play coupled with judicial interpretations. It would be essential for any e-commerce business to be mindful of such laws primarily because an e-commerce website acts as a platform for several third party information/ content and it is important to examine if such content would be objectionable under any of the laws. Laws primarily applicable include the Indian Penal Code, 1860, the Indecent Representation of Women (Prohibition) Act, 1986 and the IT Act itself, amongst others. Further, the Personal Data Protection Bill, 2018 contains provisions regarding the protection of general, critical and sensitive personal data collected from individuals, including storage requirements for such information.

In such a scenario, intermediary liability becomes very relevant.

A. Who is an intermediary?

Intermediary is defined under the IT Act with respect to an electronic record as any person who, on behalf of another person, receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.[23]

B. Is an Intermediary liable for third party actions?

When an e-commerce website merely provides a platform and acts as an intermediary between different parties, the question that then arises is – what is the extent of liability of such e-commerce companies for acts of third parties? Is the intermediary to be held liable for the actions of third parties who may make use of the platform provided by the intermediary for their illegal activities?

Section 79 of the IT Act provides for exemptions to the liability of intermediaries if certain requirements have been fulfilled such as:

i. the intermediary merely provides access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

ii. the intermediary does not at its instance

  - initiate the transmission;
  - determine the receiver of the transmission,
  - choose or alter the information contained in the transmission; and

iii. the intermediary observes due diligence or any guidelines issued by the Central Government in this regard.[24]

In furtherance of the requirements to be fulfilled by intermediaries to qualify for the exemption, the Central Government in April 2011 also issued the Information Technology (Intermediaries Guidelines) Rules, 2011 (**"Intermediaries Rules"**). The Intermediaries Rules stipulate in detail the due diligence procedures which need to be observed by an intermediary and some of the important aspects are that the intermediary must publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource by any person. Such rules and regulations must inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share certain prescribed categories of prohibited information.

The Supreme Court has recently clarified that an intermediary must, only upon receipt of a court order / notification from a government agency requiring the intermediary to remove specific information, comply with the same. Further, the Supreme Court has also stated that any such court order or notification must necessarily fall within the ambit of the restrictions under Article 19(2).

Therefore an e-commerce company can ensure that any liability arising by virtue of providing a platform for third parties can be pre-empted by adhering to these guidelines. This is increasingly important with vigilance over a large volume of users of such e-commerce websites becoming nearly impossible.

23. Section 1(w) of the IT Act

24. Section 79 (2) of the IT Act.

12. Leveraging IP

With the advent of the knowledge and information technology era, intellectual capital has gained substantial importance. Consequently, Intellectual Property and rights attached thereto have become precious commodities and are being fiercely protected. In recent years, especially during the last decade, the world has witnessed an increasing number of cross-border transactions. Companies are carrying on business in several countries and selling their goods and services to entities in multiple locations across the world. Since intellectual property rights (**"IPRs"**) are country-specific, it is imperative, in a global economy, to ascertain and analyze the nature of protection afforded to IPRs in each jurisdiction. It becomes pertinent to mention here that India has complied with its obligations under the Agreement on Trade Related Intellectual Property Rights (**"TRIPS"**) by enacting the necessary statutes and amending the existing statues. There are broadly five types of IPRs that a startup needs to protect to leverage its intellectual property, which are: (a) Patents, (b) Copyrights, (c) Trademarks, (d) Designs, and (e) Trade Secrets.

I. Patents

It deals with protection of workable ideas or creations known as inventions. A patent is a statutory right to exclude others, from making, offering for sale, using, selling, and importing the patented product or process without the consent of the patentee, for a limited period of time. These rights are granted in exchange of full disclosure of the invention.

The term "invention" is defined under Section 2(1)(j) of the Patents Act, 1970 as *"a new product or process involving an inventive step and capable of industrial application."* Thus, if the invention fulfills the requirements of novelty, non-obviousness, and utility then it would be considered as patentable invention. However, if the invention was known or used by any other person, or used or sold by the applicant to any person in India and/or outside India, then the applicant would not be entitled to the grant of a patent.

India grants patent right on a first-to-apply basis. The application can be made by either (i) the inventor or (ii) the assignee or legal representative of the inventor. The inventor in order to obtain registration of a patent has to file an application with the authority in the prescribed forms along with the necessary documents as required. Once the application has been filed, it will be published in the patent journal and would also be examined by the patent office. After such examination and subject to any objections, the patent may be granted or refused by the patent office. Once the patent has been granted, it would be published in the patent journal. Usually the patent application contains the following documents:

(a) Application form in form 1 (b) Provisional or Complete Specification in form 2 (c) Declaration as to inventorship in form 5 (d) Request for examination in form 18 (e) Abstracts (f) Drawings, if any (g) Claims.

In the event someone uses the above patented invention without the permission or consent of the patent owner, then the same would amount to patent infringement and the owner of the patent can approach the court of law for obtaining remedies including but not limited to injunctions, damages, etc.

II. Copyright

The Copyright Act, 1957 (**"Copyright Act"**), along with the Copyright Rules, 2013, is the governing law for copyright protection in India. The Copyright Act provides that a copyright subsists throughout India in an:

a. original literary, dramatic, musical or artistic work,

b. cinematograph films, and

c. sound recordings.

A copyright grants protection to the creator and his representatives for the works and prevents such works from being copied or reproduced without his/ their consent. The term of copyright in India for a literary, dramatic, musical or artistic work is the lifetime of the author of the work plus 60 (sixty) years from the beginning of the calendar year following the year in which the author dies. The term of copyright in the case of a cinematograph film is 60 (sixty) years from the beginning of the calendar year following the year in which the film is published. The term of copyright in the case of a sound recording is 60 (sixty) years from the beginning of the calendar year following the year in which the sound recording is published.

Under Indian law, registration is not a prerequisite for acquiring a copyright in a work. A copyright in a work is created when the work is created and given a material form, provided it is original. However, unlike the U.S. law, the Indian law registration does not confer any special rights or privileges with respect to the registered copyrighted work. However, the registration of a copyright would serve as prima facie evidence admissible in a court pertaining to the ownership and particulars of the copyright. India is also a member to the Berne and Universal Copyright Convention, which protects copyrights beyond the territorial boundaries of a nation. Thus, any work first published in any country - which is a member of any of the above conventions - is granted the same treatment as if it was first published in India.

Copyright infringement and remediation: A copyright is infringed if a person without an appropriate license does anything that the owner of the copyright has an exclusive right to do. However, there are certain exceptions to the above rule (e.g., fair dealing). The Copyright Act provides for both civil and criminal remedies for copyright infringement. When an infringement is proved, the copyright owner is entitled to remedies by way of injunction, damages, and order for seizure and destruction of infringing articles.

The Copyright Act and the Trade Marks Act, 1999 have special provisions which run pari materia, and are over and above the provisions in the Code of Civil Procedure, 1908, that help a plaintiff in filing a suit for copyright or trademark infringement, so that they don't incur high costs in enforcing their rights. The Delhi High Court in 2014 held that carrying on a virtual business can be equated with a brick and mortar business for the purpose of 'carrying on business'- this would enable an aggrieved party to file a suit for infringement of copyright or trademark in the district court within whose jurisdiction the plaintiff actually and voluntarily resides or 'carries on business' or personally works for gain.

By way of certain amendments made to the Copyright Act in 2012, the right of the authors of any literary or musical work incorporated in a cinematograph film or sound recording to waive their right to receive royalties has been limited.

III. Trademarks

Trademarks are protected both under statutory law and common law. The Trade Marks Act, 1999 (**"TM Act"**) along with the Trade Mark Rules, 2002 governs the law of trademarks in India.

Under the TM Act the term 'mark' is defined to include 'a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or, combination of colors, or any combination thereof.' Thus, the list of instances of marks is inclusive and not exhaustive. Any mark capable of being 'graphically represented' and indicative of a trade connection with the proprietor is entitled to registration under the TM Act. This interpretation opens the scope of trademark protection to unconventional trademarks like sound marks. Also, India follows the NICE Classification of Goods and Services for the purpose of registration of trademarks.

Internet domain names: Indian courts have been proactive in granting orders against the use of infringing domain names. Some of the cases in which injunctions against the use of conflicting domain names have been granted are: **www.yahoo.com** v. **www.yahooindia.com**[21] and **www.rediff.com** v. **www.radiff.com**.[22] In the **www.yahoo.com** case it has been held that "the domain name serves the same function as a trademark, and is not a mere address or like finding number on the internet, and therefore, it is entitled to equal protection as a trademark".

Assignment of trademarks: A registered or unregistered trademark can be assigned or transmitted with or without the goodwill of the business concerned, and in respect of either or all of the goods or services in respect of which the trademark is registered. However, assignment of trademarks (registered or unregistered) without goodwill requires the fulfillment of certain statutory procedures including advertisement of the proposed assignment to be published in newspapers.

Recognition of Foreign Well-Known Marks & Trans-border Reputation: The courts in India have recognized the trans-border reputation of foreign trademarks and trade names and the importance of their protection. Thus, international trademarks, having no actual presence in India could, as a result, be enforced in India if a transborder reputation with respect to such trademarks can be shown to exist.

The marks, such as Whirlpool, Volvo, Caterpillar, and Ocuflox, have received protection through judicial decisions. Further, infringement actions for a registered trademark along with the claims for passing off for an unregistered mark are recognized by Indian courts. The courts not only grant injunctions but also award damages or an order for account of profits along with the delivery of the infringing marks, for destruction or erasure. In addition to the civil remedies, the TM Act contains stringent criminal provisions relating to offenses and penalties.

IV. Trade Secrets

It deals with rights on private knowledge that gives its owner a competitive business advantage.

Trade Secrets protection plan: Confidential information and trade secrets are protected under common law and there are no statutes that specifically govern the protection of the same. Accordingly, the remedies available for infringement of trade secrets is limited to civil and equitable remedies in the form of damages or injunction.

In order to protect trade secrets and confidential information, watertight agreements should be agreed upon, and they should be supported by sound policies and procedures.

V. Designs

Designs in India are protected under the Designs Act, 2000 (**"Designs Act")**, which replaced the Designs Act, 1911. The Designs Act incorporates the minimum standards for the protection of designs, in accordance with the TRIPS agreement. It also provides for the introduction of an international system of classification, as per the Locarno Classification.

As per the Designs Act, "design" means only the *features of shape, configuration, pattern, ornament or composition of lines or colors applied to any "article" whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye.*

The Designs Act provides for civil remedies in cases of infringement of copyright in a design, but does not provide for criminal actions. The civil remedies available in such cases are injunctions, damages, compensation, or delivery-up of the infringing articles.

Additionally, a company in India needs to ensure that it fully leverages the intellectual property developed by it as this may often be the keystone of its valuation. Further, it needs to establish systems to ensure that such intellectual property is adequately protected. It needs to conduct IPR audits to ensure that any intellectual property developed by the company is not going unnoticed or unprotected. The company also needs to ensure that its employees do not violate any third party's intellectual property rights knowingly or unknowingly. A company must ensure that its intellectual property is not only protected in India, but also in the country where it carries on business, where its products are exported, or where it anticipates competition from.

About NDA

At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium *Aligunjan*, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India's regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavors in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

As a firm of doyens, we pride ourselves in working with select clients within select verticals on complex matters. Our forte lies in providing innovative and strategic advice in futuristic areas of law such as those relating to Blockchain and virtual currencies, Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Ed-Tech, Med-Tech & Medical Devices and Nanotechnology with our key clientele comprising of marquee Fortune 500 corporations.

The firm has been consistently ranked as one of the Most Innovative Law Firms, across the globe. In fact, NDA has been the proud recipient of the Financial Times – RSG award 4 times in a row, (2014-2017) as the **Most Innovative Indian Law Firm**.

We are a trust based, non-hierarchical, democratic organization that leverages research and knowledge to deliver extraordinary value to our clients. Datum, our unique employer proposition has been developed into a global case study, aptly titled 'Management by Trust in a Democratic Enterprise,' published by John Wiley & Sons, USA.

A brief below chronicles our firm's global acclaim for its achievements and prowess through the years.

- **IDEX Legal Awards:** In 2015, NDA won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm". Nishith Desai was also recognized as the 'Managing Partner of the Year' in 2014.
- **Merger Market:** has recognized NDA as the fastest growing M&A law firm in India for the year 2015.
- **Legal 500** has ranked us in Tier 1 for Investment Funds, Tax and Technology-Media-Telecom (TMT) practices (2011, 2012, 2013, 2014, 2017, 2018). We have also been ranked in Tier 1 for Dispute Resolution, Labour & Employment and Investment Funds (2018)
- **International Financial Law Review (a Euromoney publication)** in its **IFLR1000,** has placed Nishith Desai Associates in Tier 1 for Private Equity (2014, 2017, 2018). For three consecutive years, **IFLR** recognized us as the Indian "Firm of the Year" (2010-2013) and has placed us in Tier 1 category in 2018 for our Technology - Media - Telecom (TMT) practice.

- **Chambers and Partners** has ranked us #1 for Tax and Technology-Media-Telecom (2013, 2014, 2015, 2017, 2018); #1 in Employment Law (2015, 2017, 2018); #1 in Private Equity (2013, 2017); #1 for Tax, TMT and Real Estate – FDI (2011); and #1 in Labour and Employment (2018)
- **India Business Law Journal (IBLJ)** has awarded Nishith Desai Associates for Private Equity, Structured Finance & Securitization, TMT, and Taxation in 2015 & 2014; for Employment Law in 2015
- **Legal Era** recognized Nishith Desai Associates as the Best Tax Law Firm of the Year (2013).

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Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our *"Hotlines"*. These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction.

We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our *ThinkTank* discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports.

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