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FORESIGHT2022

LEGAL CHANGES AND TRENDS TO LOOK FORWARD TO IN 2022

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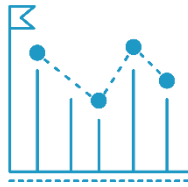
Preface

While the general mood of 2020 was one of uncertainty as to when the COVID pandemic would end, 2021 saw a marked shift in the mindset of corporate India. A global pandemic did not deter market activity. Corporate activity and government measures alike have ensured the economy has not just stayed afloat, but has crossed milestones which were hitherto unachievable – the Indian capital market has been booming, a record number of entities have reached “Unicorn” status and capital deployment by global players has been robust. The government too has played ball with a number of measures to facilitate the growth of the economy and general deal making. At Khaitan & Co, we have been involved on most marquee transactions in various sectors. We have pooled our experience, insights and market intelligence in this year’s Foresight to give you a flavour of what to expect in the new year. We wish you a pleasurable read and hope this helps you to plan your India journey in 2022 just as [Foresight 2021](https://www.khaitanco.com/sites/default/files/2021-01/Khaitan_&_Co_Foresight_2021.pdf)¹ did.

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¹ https://www.khaitanco.com/sites/default/files/2021-01/Khaitan_&_Co_Foresight_2021.pdf



Capital Markets

Markets likely to remain bullish courtesy robust measures

The last few years have seen a massive proliferation of initial public offerings (IPOs) in India. In a recent speech in September 2021, Mr. Ajay Tyagi, the Chairman of SEBI, remarked that the funds raised through IPOs had more than doubled between Fiscal 2020 (approximately USD 2.8 billion) and Fiscal 2021 (approximately USD 6.2 billion). As of October 31, 2021, a total of 76 issuances (including both, public and rights issues) were made in India in the ongoing financial year, raising a total of ~USD 7.3 billion. In comparison, in all of Fiscal 2021, a total of 78 issuances were made, raising a sum of ~USD 14.9 billion. In the coming year, we look forward to seeing how the capital markets progress with the pandemic still sustained.

Over this period, SEBI has attempted to ease capital markets processes, while simultaneously creating frameworks that promote accountability. Some of the key developments that we have seen, and anticipate in the coming future are set out below:

Special Purpose Acquisition Companies (SPACs)

In view of the burgeoning popularity of SPACs in stock markets overseas, SEBI has recently shown interest in examining the potential of SPACs in the Indian context. To this end, SEBI has formed a group of experts to examine the feasibility of introducing the same in India. Separately, the International Financial Services Centres Authority (IFSCA) has issued a consultation paper which, *inter alia*, sets out a potential framework for listing through SPCACs. It is expected that we'll see further steps in this direction in the coming few years.

SPACs are also garnering interest as a means of listing overseas, as seen in the listing of the UK-domiciled ReNew Energy Global PLC (the holding Company of India-based ReNew Power Private Limited) on the NASDAQ. While there are several restrictions under Indian law that currently make such transactions difficult, it'll be interesting to see whether more entities take this route to listing on foreign stock exchanges in the coming years.

Social Stock Exchanges

SEBI has, in September 2021, approved the creation of 'social stock exchanges (SSEs)', as dedicated exchanges where securities of 'social enterprises', or non-profit and for-profit entities with social impact as their primary goal, may be traded by the public. Based on the recommendations of SEBI's technical committee in this regard, we expect to see social entities being permitted to raise funds from investors through equity, zero coupon-zero principal bonds, mutual funds, social impact funds and development impact bonds on SSEs. Within the framework being considered by SEBI, such social enterprises shall be audited by reputed auditing firms with expertise in 'social auditing'. Social enterprises so listed shall also have to make initial and continuous disclosures on their financing and social impact activities.

Rise in American Depository Receipt (ADR) transactions

In November 2021, the shareholders of Coforge Limited have announced an offering of ADRs in the United States for an amount of USD 750 million. The company itself shall not be issuing any securities as part of the offering. As niche, technology-focussed companies are likely to get a better valuation in the United States, we it is likely that other companies in the space may also choose the Coforge route and consider issuing ADRs as an attractive option. While the Indian government has taken certain steps towards permitting the listing of Indian companies on overseas stock exchanges, until a framework in this regard is operationalised, it shall be interesting to see if more companies look to ADR as an alternative to listing their equity capital overseas.

Business Responsibility and Sustainability Reporting (BRSR) Framework

In consonance with the world-wide push towards greater responsibility and sustainability, SEBI has taken numerous steps towards enhancing 'Environment, Social and Governance (ESG)' measures by listed companies and is expected to make further changes in this direction. Since 2015, SEBI has prescribed a 'Business Responsibility Report' that listed companies are required to prepare as part of their reporting on ESG parameters. In May 2021, SEBI enhanced this regime by introducing the BRSR framework, pursuant to which, the top 1000 listed entities by market capitalisation must disclose their performance against the principles of the 'National Guidelines on Responsible Business Conduct' from Fiscal 2023. With the growing popularity of ESG investments, the BRSR framework is intended to give investors important non-financial parameters to

assess the credibility of a company and equip them with adequate information in order to make better informed ESG-based investment decisions.

We expect to see further regulatory action to promote ESG in the coming year. SEBI has currently not affixed liability for non-disclosure under the BRSR framework. In the event that a sizable number of entities default on making adequate disclosure, SEBI may consider a move towards a stricter penalty-driven approach. Further, given the increasing interest in ESG ratings and the launch of ESG mutual fund schemes, SEBI is contemplating measures to regulate and supervise providers of ESG ratings.

Innovators Growth Platform

In April 2019, SEBI launched the 'Innovators Growth Platform (IGP)' to provide an avenue for the listing of issuers that were leveraging technology, intellectual property and data analytics, among others, to provide substantial value additions. The platform operates as a carve-out within the mainboard of the stock exchanges and enables companies from India's start-up ecosystem to access a wide pool of investors. It also allows such entities to raise capital between INR 70 crore (~USD 9.4 million) and INR 200 crore (~USD 27 million), thereby increasing Indian capital availability significantly, while enabling easier exits for early-stage investors.

In May 2021, SEBI had relaxed several requirements in relation to the platform, in order to make it more accessible to India's start-up ecosystem. Among others, the amendment has: (a) reduced the time period for which pre-issue investors are required to hold shares of the Company, (b) allowed companies seeking to list on the IGP to issue shares with superior voting rights, (c) increased the trigger for a mandatory open offer in a company listed on the IGP, and (d) eased the conditions for migrating to the main board or de-listing from the IGP. It is expected that these amendments shall increase adoption of the platform, particularly in light of the number of mainboard initial public offerings by technology-enabled start-ups on the mainboard.



Competition Law

Green channels to continue while digital tech remains cautious

Much on the lines of 2021, 2022 remains full of cautious optimism in the competition law landscape. As anticipated, developments in the digital economy continued apace. Motivated by antitrust concerns associated with surveillance capitalism, the Competition Commission of India (CCI) launched an investigation into the privacy policies of a big-tech player. The CCI also took cue from its overseas peers and zeroed in on the practices of big-tech in the consumer IoT segment.

While the past two years enjoyed an uptick in DigiTech inquiries, we expect a downturn in the initiation of new investigations. Instead, 2022 will kickstart the rollout of the CCI's final findings in a multitude of ongoing cases, including in the e-commerce, fin-tech, and consumer IoT sectors. The CCI is likely to publish its much-awaited study on M&A in digital markets.

The "green channel" route for merger approvals remained a stakeholder favourite - with the number of applications for deemed approvals witnessing a 43% jump since 2020². The deemed approval route was availed by transacting parties' across sectors including financial services, pharmaceuticals, polyester, logistics, insurance, mutual funds, etc. Interestingly, the green channel route was introduced to facilitate the fast-track closing of transactions in cases where the transacting parties' activities did not exhibit any horizontal, vertical or complementary relationship.

In 2021, the CCI demonstrated its readiness towards adopting a flexible approach in its interpretation of the meaning of "horizontal, vertical or complementary" green channel standard. For instance, a financial institution (FI) secured deemed approval for its investment in a target, despite a vertical relationship between the FI's portfolio company and the target. While the reasons for the flexibility remain unknown, this flexibility in the CCI's

² As on 17 December 2021, 23 green channel filings were made in 2021 and 16 green channel filings were made in 2020.

interpretation is likely to substantially increase the number of green channel filings.

The Competition (Amendment) Bill 2020 (Bill), which was anticipated to be passed in 2021, took a seat on the legislative's back burner. However, stakeholders remain hopeful that the Bill will be deliberated upon in the 2022 budget session. Such cautious optimism is likely to animate 2022 on the competition and antitrust front!



Data Privacy

It's not just personal – new data protection regime finally on the anvil

In 2022, ground-breaking developments are anticipated in the data privacy and protection space in India. After years of deliberation and stakeholder consultations, it is expected that this year will usher in a new data protection regime in India. With the Joint Parliamentary Committee submitting its report on the Personal Data Protection Bill 2019 (PDP Bill) on 16 December 2021, this should be the fillip for passage of the PDP Bill in the Parliament. There is a likelihood that the PDP Bill will govern aspects of protection of both personal and non-personal data. The present version of the PDP Bill already covers compliance obligations in relation to cross border data flows, rights of information providers, grievance redressal mechanism and data breach reporting, some of which may be fine-tuned or bolstered further. The PDP Bill is expected to have a phased implementation and specific timelines will be prescribed for entities to ensure compliance with various provisions.

Another development to watch out for is the proposed Health Data Retention Policy (**HDR Policy**), for which stakeholder feedback had been requested by 24 December 2021 by virtue of a consultation paper. Pursuant to the Health Data Management Policy (**HDM Policy**) which was approved as a guidance document to protect and manage patient data available in National Digital Health ecosystem (**NDHE**), the National Health Authority is required to formulate a policy on health data retention to be adopted by entities involved in the NDHE. A draft of

the HDR Policy is expected to be released in 2022 which will shed more light on aspects such as specific applicability and relevant data retention requirements.

Considering the extensive focus placed on regulating technology, we are also witnessing major developments in spheres such as blockchain which is expected to continue this year. The National Strategy on Blockchain had been released in December 2021 which offers a broad view of the Indian government's blockchain ambitions.



Direct Tax – Dispute Resolution Mechanism

Transfer pricing, reassessment notices and faceless assessment regime face challenges

Some notable updates to look forward to this year in the realm of dispute resolution mechanisms in the Direct Tax arena are outlined below:

Transfer pricing issues plaguing advertising, marketing, and promotional expenses (AMP)

It is quite common in the current competitive environment to see MNCs incurring advertisement expenses to increase their visibility and consequently, sales. However, tax authorities are viewing this as a tool used by the taxpayer to benefit its foreign related party in promotion of its brand in India by incurring expenditures which such foreign related party should have incurred. It is also alleged that the Indian entity is providing marketing/ brand building services to its foreign related party which owns the brand. A question which arises is whether such AMP can be subject to tax under the Indian transfer pricing regulations, even if the Indian entity does not charge any amount from its foreign related party.

The issue is now up for examination before the Hon'ble Supreme Court of India. This issue is one of the hotly debated topics under transfer pricing law.

Challenge to reassessment notices issued under the old regime

There has been a paradigm shift in the rules for

reopening of completed tax assessments under Indian Income-tax law in as much as the number of years for which tax assessments can be reopened has been changed. Even though the new law became effective from 1 April 2021, the tax department continued to issue reassessment notices under the old law even after 31 March 2021 by placing reliance on an enactment which had sought to extend the applicability of the older law.

Consequently, such reassessment notices have been challenged before various High Courts in India. While some Courts have ruled on this aspect (by setting aside the reassessment notices, granting stay on the reassessment proceedings until final adjudication etc), developments in this regard at other Courts should also be closely followed.

Challenge to the Faceless Assessment Regime

Indian Income-tax law has undergone a significant change in the past few years wherein the tax adjudication has transformed to a faceless regime. What this means is that taxpayers do not have visibility as to which officer of the tax department will examine and assess their case.

One of the characteristics of the faceless assessment regime is that even though the taxpayer can make a request for personal hearing (via video conferencing), the same is subject to the approval of the prescribed authority. A writ petition has been filed before the High Court challenging the legal tenability of faceless assessment regime *inter alia* on the ground that personal hearing is a fundamental right of taxpayer and hence, making it subject to approval of the prescribed authority goes against this fundamental right.



Direct Tax – Legislation Changes

Equalisation Levy may be removed while crypto taxation is anticipated

Digital Economy taxation update

During 2021, as a part of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (IF), India has agreed to the Pillar One and Two Solution to address the tax challenges arising from the

digitalisation of the economy. Under Pillar One, market jurisdictions will be accorded the right to receive tax on profits of large multinational enterprises based on the market nexus. Specifically, for multinational enterprises (MNEs) with global turnover above 20 billion euros and profitability above 10% (i.e. profit before tax/revenue), 25% of residual profit (being the profit in excess of 10% of revenue) will be allocated to market jurisdictions with nexus using a revenue-based allocation key (the tax to be allocated is known as **Amount A**). The nexus for allocation of Amount A would be in the form of a minimum revenue threshold of 1 million euros (for jurisdictions with GSP lower than 40 billion euros, the nexus threshold will be 250,000 euros).

The implementation of Amount A of Pillar One would be achieved by a Multilateral Convention which is expected to be developed and opened for signature in 2022, with Amount A coming into effect in 2023. Notably, implementation of Pillar One requires countries to remove their unilateral digital services taxation measures. **In the Indian context, it is expected that the 2% equalisation levy (EL) which applies to 'e-commerce supply of goods or services' by non-residents, shall be removed in line with this commitment. One can expect an amendment to this effect in the upcoming 2022 Budget.** Interestingly, India has also agreed with USA to provide credit of EL collected from 1 April 2022 against the Amount A tax determined to be receivable by India as per Pillar One in the first year in which Pillar One applies to the concerned foreign entity (with a carry forward mechanism for unutilised credits). The terms of this agreement with USA will be finalized by 1 February 2022.

Cryptocurrency taxation measures

India has a fairly large number of cryptocurrency holders with the interest in this space only growing rapidly. However, this space remains unregulated. A cryptocurrency bill is proposed to be introduced in the parliament. It is expected to provide clarity and certainty on the government's view on the legality as well as several other aspects relating to cryptocurrency.

From an income-tax standpoint, one of the foremost questions pertaining to cryptocurrencies is with respect to their characterisation and determination of their situs (i.e location).

Characterisation: Characterisation of cryptocurrencies will lay down the foundation of the manner in which they fit into existing Indian taxation regime. Guidance is expected on whether cryptocurrencies will be characterised as mere

conventional assets (such as securities, commodities etc) or as 'foreign currency' (notably, EL Salvador has classified Bitcoin as its official legal tender). If classified as 'capital assets', the gains earned in the form appreciation in their value, can be taxable as capital gains (if held as investments) or business income (if one regularly trades in them).

Another important aspect on which guidance is awaited, is the 'situs' of a cryptocurrency. As cryptocurrencies are completely digital and do not have a physical form, it would be relevant to determine where it is situated. This becomes relevant in case of cryptocurrencies bought on offshore crypto exchanges or received / stored in online wallets (provided by offshore wallet service providers), as cryptocurrencies in such cases may well be called a foreign asset. Interestingly, in case of intangible assets (such as intellectual property, which also do not have any physical existence), the situs of the owner is an important factor for determining the situs of intangible asset - so this may apply to cryptocurrencies as well. Importantly, foreign assets need specific disclosure in Indian tax returns and therefore, clarity as to their situs is expected from the government.



Dispute Resolution

Judgments and legislations awaited, Indian parties opting for foreign seated arbitrations expected

While courts in India gradually resumed physical hearings in the latter half of the year, the Indian justice system largely remained functional through the year. We expect the following developments in the new year:

Question of stamp duty payment on arbitration agreements

A three-judge bench of the Supreme Court in *M/s N.N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Ltd. & Ors* expressed a differing view on the issue of invalidity and unenforceability of an arbitration agreement in an unstamped contract. It held that the arbitration agreement would not be rendered invalid

or unenforceable even if the underlying contract cannot be acted upon on account of non-payment of stamp duty. In view of the above, it expressly overruled the findings in *SMS Tea Estate* (which was also followed in *Garware Wall Ropes*). Since *Garware Wall Ropes* was previously affirmed by a three-judge bench in *Vidya Drolia v Durga Trading Corporation*, the Bench in *NN Mercantile* referred this specific question to a larger Constitution Bench of five judges. This is likely to be taken up sometime in 2022.

Indian parties and Choice of Seat

In one of the most landmark judgements of 2021, the Supreme Court in *PASL Wind Solutions v. GE Power Conversion India* clarified that two Indian parties to an arbitration agreement can choose a foreign seat. The judgement is significant for Indian subsidiaries of international groups since it allows them to align their Indian-related contracts with their standard arbitration clauses. Additionally, Indian companies with international businesses (who are no strangers to offshores arbitrations) are likely to welcome this increased flexibility. Given this, 2022 will definitely witness a sharp increase in Indian parties opting for foreign seated arbitrations.

Recognition of Emergency Arbitrator Awards

On 06 August 2021, the Supreme Court passed an order in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Others* holding that an award by an emergency arbitrator in an India-seated arbitration constitutes an order under the Arbitration and Conciliation Act, 1996 and will be enforceable in India. The above findings were despite the absence of any such provision recognising awards by emergency arbitrators under the Arbitration and Conciliation Act, 1996. Given the far-reaching ramifications of the above judgement on the "Ease of Doing Business" in India, it is likely that the Indian legislature will be pushed to move amendments which provide for the recognition of emergency awards under the Indian legal framework.

Constitutionality of the 2021 Arbitration Amendment

On 10 March 2021, the Arbitration and Conciliation (Amendment) Act, 2021 gained Parliamentary assent, thereby replacing the Arbitration and Conciliation (Amendment) Ordinance, 2020. The amendment introduces a proviso to Section 36 to ensure that in instances where the Court is *prima facie* satisfied that a case is made out that either (i) the arbitration agreement or contract which is the basis of the award; or (ii) the making of the award was induced or effected by fraud or corruption, it shall stay the award

unconditionally pending disposal of the challenge under Section 34. Given the broad language of the proviso, it is likely that this amendment may be challenged on grounds of constitutionality.

Draft Mediation Bill, 2021

On 5 November 2021, the Ministry of Law and Justice released a draft of the Mediation Bill, 2021 for public comment. Its many objectives include the promotion and facilitation of mediation, especially institutional mediation and more importantly, providing for the recognition and enforcement of domestic and international mediation settlement agreements. The Bill was introduced in the winter session of Parliament and has been sent to the Standing Committee for further deliberations. It is likely that it will be passed in the first half of 2022.



Employment and Labour

New labour code may see some enforcement, WFH, workforce inoculation and gig economy may see updates

The employment and labour law landscape has seen important developments in the course of 2021 that are being closely watched by the industry and other stakeholders and may continue to dominate the discourse in 2022. One of these developments is in the form of the draft rules released by several state governments (including Maharashtra, Delhi, and Karnataka) for public consultation under the upcoming labour codes on wages, social security, industrial relations, and working conditions, respectively. These draft rules envisage important procedural aspects of the labour codes (including filing and reporting requirements for employers). While the timeline for implementation of the labour codes (which will replace 29 extant Central labour laws) has not been determined with finality as yet, it is being speculated that year 2022 may see some semblance of enforcement of the new legal regime.

In addition to the above, year 2021 presented us with two important issues which hitherto have not seen detailed statutory framework governing them, and it is expected that the upcoming year may provide

some visibility to employers and employees on these fronts. One issue, that of workforce inoculation, emanates from the nationwide vaccination drive announced by the Government of India earlier this year and revolves around balancing of two critical interests i.e., duty of the employer to undertake reasonable measures to ensure safety of the workforce, and the individual interest of employees to freely determine whether they wish to get themselves vaccinated. This issue is being gradually brought to the notice of the judiciary, and it is hoped that 2022 may offer some perspective on the way forward. The second issue pertains to the need for a robust framework around work from home that may help revisit the traditional notions of work timings, provision of welfare facilities, display of notices, maintenance of records, etc.

Another significant issue that has already been taken cognizance of by the judiciary but may take some shape in 2022 is the determination of the status of gig workers in India as workers / employees vis-à-vis intermediaries such as cab aggregation service providers and food aggregators. As recently as 20 September 2021, the Indian Federation of App-Based Transport Workers filed a writ petition before the Supreme Court of India alleging that the gig workers and the platform workers are in an employment relationship with the aggregators and that, therefore, they are inter alia entitled to social security benefits (reference *Indian Federation of App-Based Transport Workers v Union of India and Others [Writ Petition (Civil) Number 001068 of 2021 (Supreme Court)]*). The Supreme Court has already sent a notice to the Government of India to respond to the petition. Interestingly, the upcoming labour codes, without expressly recognizing gig workers as employees, envisage creation of social security schemes that may entail contributions from the aggregators engaging such gig workers.



Foreign Investment Regulations

Continued reforms expected and possible clarifications on PN3

Policies in furtherance of ease of doing business and continued reforms has been a major enabler for

drawing foreign investments in the country. Considering this, we expect the following measures in the coming year:

Change in regulatory framework

The Government is expected to continue a slew of reforms to ease foreign investment in India and investments outside India. To this effect, the Centre has introduced draft rules and regulations regarding overseas investments with the intention of overhauling the process of overseas investments. It is expected that the Government will consider suggestions from stakeholders in areas such as, the restrictions on setting up of step-down subsidiaries by the overseas entities holding Indian investment from resident individuals. This will ease regulatory concerns for foreign investment in unicorns set up through overseas holding companies.

Press Note 3 clarifications

Further, there is an expectation of clarifications being issued in respect of Press Note 3 (2020 Series) to ease issues being faced by institutional investors having minimal exposure to neighbouring countries. These restrictions were placed in 2020 during the beginning of the pandemic to protect the Indian economy and avoid opportunistic takeovers/acquisitions.

Sectoral reforms

The Government may open up new sectors for FDI, increase existing FDI limits and relax sectoral conditionalities to diversify investing focus from sectors like the manufacturing sector and to project India as a global and low-cost manufacturing (by introducing tax breaks and financial inducements). Further, the Government is contemplating a proposal to permit foreign investors to be able to participate as a shareholder in the national insurance companies like the Life Insurance Corporation of India (LIC). Currently, the FDI rules of India permit up to 74% overseas shareholding, however, this is not applicable to LIC. The Government proposes to amend the LIC Act, 1956 to launch an initial public offer and raise funds and it would be interesting to see how this space develops.



Indirect Taxes and Foreign Trade Policy

More sectors possible under PLI, GST may pose some challenges and State Export Hubs expected

From the perspective of International Trade and Taxation laws, 2021 was a year in which firm steps were taken by the Indian government to improve market access, bolster domestic manufacturing, position India as a global manufacturing hub for strategic products and to reduce the country's reliance on imports from China. The policy shifts over 2020 and 2021 have started bearing fruit, as record foreign direct investment flowed into India. 2022 is expected to continue the momentum and consolidate the gains of 2020 and 2021, and keep the manufacturing sector firmly in focus, as the growth driver for the economy. Therefore, no major shifts are expected in trade policy and the indirect taxation regime.

Production Linked Incentive Schemes

The Production Linked Incentive (PLI) scheme for 13 sectors was announced in the Budget of 2021. At the time of publication of Foresight 2022, applications were closed for most of the manufacturing sectors including mobile, pharma, medical devices, ACC batteries, electronic products, food processing, solar PV modules and white goods while the scheme was still open for automobiles, textiles and specialty steel. A cash incentive of 4 to 6 percent on incremental sales has been announced under the scheme for greenfield and brownfield projects.

Considering the lucrative incentives, other sectors have been making representations for inclusion in the scheme. Depending on the success of the scheme in the coming months, the Government could include few more sectors within the ambit of PLI.

Cryptocurrency tax

The Government is ready with the much awaited and anticipated Cryptocurrency and Regulation of Official Digital Currency Bill 2021. If not introduced in the winter session, it is likely to be listed during the Budget session in February 2022. The bill will clarify

India's stand in terms of crypto assets as to whether these assets will be strictly regulated or completely banned. If not outrightly banned, the Bill will clarify if the Government wants to treat crypto assets as a token of exchange or a tradeable commodity though the likelihood of treating it as currency seems remote.

The Bill will have a major impact on the current crypto asset businesses already thriving in India along with international exchanges planning to make a foray into the fertile crypto sector of the country. The Bill will affect the considerable number of retail investors investing in crypto assets for the past few years.

Depending on the stand of the Bill, questions related to cross border transactions of crypto assets, tax impact, raising funds and penal provisions are likely to get resolved.

Goods and Services Tax (GST)

As the GST regime has been stable and tax collections have been growing steadily, no major changes are expected to be ushered in 2022. The focus is expected to firmly remain on rationalization of tax rates and removal of inverted duty structure issues to further optimize tax collections. The government has also been steadily undertaking technology improvements in an effort to increase compliance. Throughout 2021, the focus of the tax administration has been on enforcement issues and this is likely to continue. Due to technological aids and close monitoring, enforcement actions have yielded record recoveries for the state. Therefore, the duty of care in vendor selection and partners will remain ever so critical for large businesses.

Some challenges are likely to persist in pockets. State administrations are keen for the federal government to continue the compensation levy previously allowed, beyond June 2022. However, the federal government has expressed its reluctance and indicated states to be financially more responsible. This may result in friction which in turn could impact further reforms. The rationalization of tax rates is also not expected to find favour with the impacted industries and it is possible that the rationalization exercise may not be entirely successful.

Trade Developments

India has continued the pursuit of finding trade partners, and made significant advances, in its trade development conversations with the United Kingdom (UK) and Australia. Though both the UK and Australia are viewed as critical trade partners, the trade deal with Australia is expected to materialize earlier, through an early harvest deal in the first quarter of

2022 followed with a comprehensive agreement later in the year. India views Australia as a strategic ally, due to shared national security concerns, common geo-political interests and priorities, hence negotiations are likely to progress quicker. Australia, has also exhibited its sensitivity towards the agricultural sector in India and has expressed its willingness to work around the limitations which it may impose. India and UK are on schedule to start trade negotiations in 2022, but the negotiations are expected to be protracted considering that India already offers market access for British businesses, and therefore there may be a lack of urgency.

Updated Foreign Trade Policy

The updated Foreign Trade Policy 2021-2026 (**FTP**) is also expected to be announced within the first quarter of 2022 and is likely to be made effective from the 01 April 2022. The FTP will also bring into effect the Remission of Duties and Taxes on Exported Products (**RODTEP**) Scheme. The mounting concerns with the existing export incentive schemes have led to the formation of RODTEP, which is compliant with the WTO framework. The domestic industry expects the FTP to provide a more nuanced legal structure and to extend export benefits to sectors, which are presently not covered specifically such as specialty chemicals, specialty steel and iron products, etc. The domestic industry is also expecting clarity on the continuity of the existing schemes and the manner in which they might interplay with RODTEP.

The FTP is also expected to create State Export Hubs, being developed and mapped by the Directorate General of Foreign Trade along with other key stakeholders from industries and state governments. The creation of State Export Hubs is expected to aid the implementation of Indian government's aims and objectives under the 'Atmanirbhar Bharat' 'Make in India' and 'Vocal for Local' initiatives as it will provide an impetus to employment, investment, technological development, etc. across rural and semi-urban regions.



Information Technology Laws

Landmark judgments on IL and “Pegasus”

The year 2021 saw significant developments for shaping of intermediary liability in India with the notification of the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 (**IT Rules 2021**) in February 2021. In another significant development, the Supreme Court took cognizance of the Pegasus scandal later in the year and attempted to balance an individual's right of privacy with interests of national security and integrity. Landmark judgments touching upon these issues are expected in the coming year.

Constitutionality of the “IT Rules 2021”

- Considering the broad ambit of the IT Rules 2021, which govern both intermediaries and digital media, its validity has been challenged by various stakeholders including news publishers, law reporters, OTTs, opensource programmers, users of social media messengers, and social media platforms.
- *WhatsApp LLC V. Union Of India, W.P.(C) 7284/2021 (Delhi High Court)*- WhatsApp has challenged the requirement to trace the originator of messages pursuant to the IT Rules 2021. As per the social media platform, this requirement forces WhatsApp to break end-to-end encryption on its messaging service, and infringes upon the fundamental rights to privacy and free speech of its users.
- Several petitions are pending before the Supreme Court seeking regulation of content streamed on OTT platforms. Petitions have also been filed before various High Courts challenging the constitutional validity of the IT Rules 2021 in its application to digital media, which may be transferred to the Supreme Court and clubbed together. It is anticipated that the Supreme Court will rule on the constitutional validity of several aspects of the IT Rules 2021 in 2022.

Requirement of search engines to proactively filter and globally take down content - *Google LLC v. X and Ors., LPA 174/2021 (Delhi High Court)* - Google has

filed an appeal before the Delhi High Court against its judgment in *X v. Union of India, W.P. (C) 1082/ 2020*, whereby the Delhi High Court had issued template directions over and above the obligations of intermediaries outlined under the IT Rules 2021 to make certain objectionable content unsearchable by search engines. It is likely that this matter will be decided in 2022. This will have an impact on the role and liability of search engines with respect to the content circulated on websites by third parties.

Surveillance and its conflict with the right to privacy

- On 27 October 2021, the Supreme Court ordered the constitution of an Expert Committee headed by a retired judge of the Supreme Court to probe into the alleged use of the Israeli spyware, Pegasus to carry out surveillance in India. The judgment is of particular importance as it addresses the larger impact of use of surveillance technologies on the fundamental right to privacy, protection of data and freedom of the press, and the need to balance these rights against the security interests of the State. It is anticipated that in 2022, the Committee will render its findings on the investigation into the Pegasus spyware attack and will also submit recommendations on the enactment or amendment to existing law and procedures surrounding surveillance and for securing improved right to privacy. (*Manohar Lal Sharma v. Union of India and Ors., W.P.(CRL.) 314 of 2021*)
- *Internet Freedom Foundation v. Union of India, W.P.(C) No. 44 / 2019 (Supreme Court)* - A writ petition had been filed in 2019 by the Internet Freedom Foundation challenging Section 69 of the Information Technology Act, 2000 (**IT Act**), the Information Technology (Procedure for Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 (**2009 IT Rules**), and a Notification dated 20.12.2018, wherein ten (10) Security and Intelligence Agencies of the Central Government have been authorised to intercept, monitor, and decrypt information generated, transmitted, received, or stored in any computer resource in national interest. The Petitioner contends that the law does not provide sufficient safeguards against misuse of surveillance and impacts the right to privacy and exercise of freedom of speech and expression. It is likely that this matter will also be heard and decided by the Supreme Court in 2022.



Intellectual Property

Two legislations may see amendments, effects of IPAB abolishment to take more shape

The Parliamentary Standing Committee on IP had tabled its report last year which had suggested major changes to the IP framework in India. The recommendations include reassessment of National IPR Policy; setting up apex level institution for IPR Development, IPR Cells in State Police Departments and Central Co-ordination Body on IP Enforcement; generating awareness, better understanding and having specific law on IP financing, reestablishment of Intellectual Property Appellate Board (IPAB); easing the procedural aspects for patent applications; specific legislation for trade secrets; and dedicated IP Benches at High Courts.

In fact, revisions to the Copyright Act were expected last year (since comments were sought) but have been delayed, owing to the pandemic. Hopefully, this year we could expect amendments to be announced to cover the changes due to new technologies. On the new technologies front, the Parliamentary Standing Committee's report makes specific reference to Artificial Intelligence (AI) and OTT platforms and changes to be made in the Indian IP regime for these aspects.

If sources are to be believed and going by the recommendations in the Parliamentary Standing Committee report, the Trade Marks Act is also likely to be amended with changes in the provisions relating to well-known marks, easing procedural issues in criminal remedies, providing more flexibility to brand owners to file actions from jurisdictional perspective, and in provisions relating to Madrid Protocol.

Further, with the abolition of IPAB last year, Indian courts have implemented procedures to hear matters which were earlier heard by the IPAB and these procedures are likely to further evolve. However, it remains to be seen, if the Government is keen on making any drastic changes soon or whether it would wait till issues relating to pandemic are resolved.



Insolvency & Bankruptcy

Insolvency Law Poised for Infrastructure Tweaks, Several Opportunities for Private Credit

India's insolvency law: This year India's toddler insolvency law (the IBC) celebrated its 5th year. As a game changer reform, it has reduced insolvency timelines to 1.6 years from 4.3 years while also increasing recoveries for financial creditors from 25% to 36%. If you were to discard the zombie companies left over from previous failed insolvency laws, these figures look better still, with recoveries in 2020 at 71.6%. But, like all else, Covid-19, has had its impact here as well. In the June and Sept 2021 quarters, average timelines have increased to nearly 2 years and this will likely impact recoveries going forward. However, with 18 new judges and with a system of long term judicial appointments, the judicial infrastructure is stepping up.

Cross-border regime: India is also poised to adopt a cross-border regime along the lines of the UNCITRAL Model Law. This is a 3rd generation reform. The toddler is indeed growing up fast! This means there is scope for closer interactions amongst the IBC, its insolvency professionals and lawyers with their international counterparts.

Pre-packs: Last year India adopted a pre-pack regime for small defaulters. This is seen as a test case for a roll out at a larger scale. Before that, there are obvious hurdles which will need to be resolved – for example, India does not allow connected party sales and also maintains a very close scrutiny over its insolvency professionals – a measure which is opposite to the approach adopted in the successful pre-pack regime in the UK.

Future opportunities: While the Covid-19 quantitative and qualitative reliefs have helped ease some of its impact, sectors such as real estate, hospitality and ports continue to present opportunities. Bank balance sheets have emerged stronger though non-bank finance companies continue to face stress. As IL&FS continues to monetize assets, the Reserve Bank of India has also recently initiated insolvency proceedings against Reliance Capital. This is the holding company for the Anil Ambani financial empire

with significant holdings in insurance, pension, home finance and others. These are highly attractive buy-side opportunities as the administrator for Reliance Capital will look to monetize these holdings.

India has also set up a Bad Bank which will consolidate NPLs from banks. This should result in easier debt aggregation and a better price discovery market for distressed debt. The Bad Bank has the benefit of Government guarantee which incentivizes faster resolution.

A more reliable insolvency system, greater powers to creditors with better price discovery should augur well for private credit in India which has grown significantly in recent years.



Public M&A

Impetus in Control deals with a boost in listed space fundraising

The Public M&A bull run continues, and is expected to get stronger over the coming year. Attractive valuations coupled with robust initiatives by SEBI towards stronger and clearer regulations in the listed space have been key drivers in increasing deal activity. We expect an increase in control deals, take private transactions and general consolidation by promoters in listed companies – to support such deal activity, SEBI has already notified and approved certain regulatory changes; a brief analysis below:

Control Deal / Take Private

SEBI has recently revamped the exiting tender offer rules to provide flexibility to acquirers in combined control + take private deals. In brief, a control deal triggering a tender offer can now be structured in a manner where the acquirer specifies upfront the tender offer price and an indicative take private price. The indicative price should include a suitable premium and cannot be less than book value. If the response to the tender offer leads to satisfaction of the take private threshold (90%), the shareholders will be paid the indicative price (ie take private succeeds) and if it does not, then the shareholders will be paid tender offer price (ie take private fails). In the event, the take private threshold is not met, but the acquirer acquires

more than 75%, a period of 12 months would be granted to the acquirer to take another crack at the take private. If the take private fails again, the acquirer would be required to bring down its shareholding to 75% within a further period of 12 months. The revisions to the tender offer rules offer much needed flexibility and are expected to provide an impetus to transactions of this nature.

In addition, SEBI has introduced new rules for take private deals and the key changes include: (a) defining the role of independent directors (IDs) in the take private process by, amongst other things, requiring IDs to provide reasoned recommendations on the delisting proposal; (b) clarity on determination of book value which is pertinent for the take private counter offer process; and (c) streamlining timelines and reducing procedural inefficiencies in implementing such transactions.

Preferential Allotment

SEBI has approved certain changes to the framework governing preferential issue of securities; key changes include: (a) reduction of look back period for determining minimum preferential issue price (under the present regime, the minimum price is linked to the average of the weekly high and low of the volume weighted average price (VWAP) during the preceding 26 weeks / 2 weeks, and now SEBI has approved a reduced lookback of preceding 90 / 10 trading days or any stricter provisions in the charter documents; (b) any allotment resulting in change of control or allotment of more than 5% shares will require a valuation report from a registered independent valuer and in case of change in control, a committee of IDs is required to provide reasoned recommendations and comments on pricing and other aspects of the preferential issue; (c) reduction of the tenure of applicable lock-in requirements; (d) guidelines for pledging promoter securities issued pursuant to preferential allotment; and (e) permitting 'non-cash' preferential issue through share swaps supported by a valuation report. While the amendments are yet to be notified, such revisions are largely aligned with the commercial requirements of present day deal making and are expected to provide a boost to fund raising in the listed space.



Telecommunication, Media & Technology

Clarity on framework for establishment of satellite earth station expected while telecom sector will see more reforms

Framework for the establishment of Satellite Earth Station

In light of the advancement of satellite technologies and potential benefits of satellite-based communications, there is a growing demand for satellite bandwidth. At present, the telecom licensing framework mandates a licensee to establish its gateway for the provision of telecom satellite-based communications services. However, there is a possibility for existing licensees to use the gateway and satellite-based resources provided by satellite operators. In this regard, several questions, *inter alia*, with respect to the need for a framework for provision of satellite-based resources to service licensees, need to have a specific license for establishing satellite earth station gateway in India, allocation of spectrum for satellite earth station, etc need to be answered. It is anticipated that further clarity will emerge with respect to the framework for establishment of satellite earth station by 2022.

Review of scope of Infrastructure Providers Category-I (IP-I) Registration

Over the years IP-Is have been crucial in ensuring affordable telecom services and sharing of tower infrastructure has significantly bolstered the growth of mobile networks in India. Further to a Government notification on the National Digital Communications Policy 2018 which envisaged the enhancement in the scope of infrastructure providers, the review of scope of IP-I Registration with an aim to boost sharing of infrastructure and to facilitate telegraph infrastructure creation in the country is imminent. Expansion of the scope of IP-I Registration such that IP-Is should be allowed to *inter alia* 'own' certain active telecom infrastructure is possible. While a formal notification of this proposal is awaited, it is likely that this move will significantly unburden the telecom sector and incentivize the growth of IP-Is.

Further clarifications to the OSP guidelines

Notably, India is a front-runner in business process outsourcing services across the globe. In legal terms, entities providing voice-based business process outsourcing services to customers are known as 'Other Service Providers' (OSPs). In view of this, the government notified several relaxations made to the 'Other Service Providers guidelines' (OSP guidelines), in June 2021. These relaxations have been much appreciated by the industry as it eases doing of business in this sector and in turn strengthens the country's business process outsourcing market. However, further clarity is awaited from the Government on certain crucial aspects in the OSP guidelines. There are several ambiguities pertaining to the engagement of contact centre service providers (CCSPs) and hosted contact centre service providers (HCCSPs) by OSP centres. With the growth of CCSPs and HCCSPs on the rise, it is likely that the authorities will provide further regulatory clarity on aspects governing CCSPs and HCCSPs.

Crystallizing the regulatory framework for M2M communications

Over the past few years, India's legal and regulatory framework has been trying to catch up to modern technology – one such example being 'Internet of Things' (IoT) and 'Machine to Machine' (M2M) communications. To address the gaps in the existing regulatory framework, the Department of Telecommunications issued the 'Draft Guidelines for Registration Process of M2M Service Providers (M2MSP) & WPAN/WLAN Connectivity Provider for M2M Services' for stakeholder feedback and comments. Further to the vision of the National Telecom M2M Roadmap, these draft guidelines seek to *inter alia* create a registration process for M2M service providers and WPAN / WLAN connectivity providers for such services. LPWAN connectivity providers may also be regulated going forward. Interestingly, the draft guidelines also mention a new authorization under the Unified License regime, i.e., UL (M2M). While these frameworks are only in the pipeline, it is possible that some aspects may crystallize in 2022.

Unbundling the telecom license framework

With the ongoing deliberations on separation of infrastructure, network and service layers under the telecom licensing framework, a differential licensing regime is expected for unbundling of the telecom license framework. It seems that the regulatory authorities are considering a separate authorisation under the Unified License for 'Access Network Providers', i.e., the network layer. As the Government

has taken some concrete steps in 2021 towards the vision of the National Digital Communications Policy 2018, it is conceivable that 2022 may bring about more of these reforms including the differential licensing regime.



White Collar Crime

Robust compliance programmes, more power to authorities re cryptos and more one-time compliance windows expected

Overall Perspective

India is ranked 86th in the Corruption Perception Index for the year 2020 (6 places down from 2019) while the TRACE Bribery Risk Matrix for the year 2021 indicated that India ranked 82nd in a list of 194 countries – down from 77th in 2020. Both of these aspects tend to indicate that despite steps being taken in previous years to stem the rot of corruption in India, not a lot of change appears to be taken place, at least from a perception standpoint.

Given concerns of new lockdowns being imposed in India on account of the Omicron variant of the Covid-19 virus, there is a concern that organizations may indulge in overstatement of revenues or profitability to show increased growth to their stakeholders despite difficult business circumstances. As in 2020 and 2021, there is likely to be more pressure on business teams within organizations to try and push transactions through at the cost of ensuring compliance with anti-corruption laws. As a result of the lack of movement by the Union Government in framing compliance guidelines under the Prevention of Corruption Act, 1988, there continues to be uncertainty around the procedures needed to be put in place by companies to mitigate liability for their boards. In contrast, the recent strategy announced by the Biden administration promising strong enforcement against facilitation of foreign corruption is likely to have an impact on the actions of Indian subsidiaries of US Corporations and there is likely to be a stronger push to have robust compliance programmes and trainings implemented at the India level by such corporations.

New Trends

The ever-increasing valuation of cryptocurrencies over the past year and the recent uptick in crimes involving cryptocurrency has resulted in several regulatory and enforcement authorities around the world proposing and enacting regulations to tackle its misuse. The United States Department of Justice launched a National Cryptocurrency Enforcement Team to prevent and prosecute criminal misuse of cryptocurrency particularly by virtual currency exchanges and money laundering actors. In India, the Finance Ministry recently disclosed that 8 cases of cryptocurrency fraud were under investigation by the Enforcement Directorate. Regulation of private cryptocurrency exchanges by formally treating these exchanges akin to stock exchanges are on the anvil. We also expect more powers to be provided to enforcement and other regulatory authorities to prosecute cryptocurrency related crimes in several jurisdictions.

The Pandora Papers leaks published by the International Consortium of Investigative Journalists have brought a renewed focus on the aspects of tax avoidance and stashing of illicit money in tax havens by several prominent individuals and firms worldwide. Similar to the response surrounding the leaks in the Panama Papers and Paradise Papers, we can expect several jurisdictions to address loopholes in taxation laws as well as enforce stricter prosecutions against individuals and firms for taxation avoidance. While the Union Government recently indicated that it does not have any data on the quantum of black money it expects to be stashed away abroad in foreign accounts, it has stated that it has been successful in recovering unpaid taxes and that several prosecutions have been initiated previously under the Black Money (Undisclosed Foreign Income and Foreign Assets Act) (**Black Money Act**) after the Panama Papers and Paradise Papers leaks. When the Black Money Act first came into force, a one-time compliance window was floated for the collection of taxes and penalties per which an amount of INR 2,500 crores was collected. Instead of embarking on lengthy prosecutions and cost-intensive litigations, we can expect similar one-time compliance windows to be floated for the collection of the unpaid taxes.

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