

1. Introduction

India is one of the most diverse economies of the world with a population of 1.32 billion people has seen a decade of 7%+growth. The economy of India can be categorized by the presence of a number of major sectors including manufacturing industries, agriculture, textiles and handicrafts, and services. Today, India is rated as one of the top economies in the world in terms of the purchasing power parity (1.15 trillion) of the gross domestic product by leading financial entities of the world such as the International Monetary Fund, the World Bank, etc. There have been a number of changes that were adopted by the national government in recent times. This has led to improvement in business freedom, more economic freedom for individuals, reduced growth constraints and the overall improvement in business environment.

The World Bank's annual Doing Business 2017 report's release recognizes India's achievements in implementing reforms in four of its ten indicators – Trading Across Borders, Getting Electricity, Enforcing Contracts and Paying Taxes. This is the first time in its history that India has been recognized for improvement in four indicators. The Doing Business report ranks countries on the basis of Distance to Frontier, an absolute score that measures the gap between India and the global best practice. India's absolute score improved from 53.93 to 55.27 in the previous year. Additionally, India's Distance to Frontier score improved on 6 out of the 10 indicators, showing that India is increasingly progressing towards best practice.

Today, Indian manufacturing companies in several sectors are targeting global markets and are becoming formidable global competitors. Many are already amongst the most competitive in their sectors. Further, with the help of GOI initiatives for the Ease of doing Business in India many sectors are expected to grow exponentially. The projected growth in few of the sectors in the Indian economy are:

- Defence Sector: India is expected to spend US \$ 40 billion on defence purchases over the next four to five years.
- Textile Industries: The Indian textiles industry, currently estimated at around US \$ 108 billion, is expected to reach US \$ 141 billion by 2021.
- Chemicals Industries: The Indian chemical industry stands as the third largest producer in Asia and 12th in world, in terms of volume. This industry is expected to grow at 14% p.a. to reach a size of US \$ 350 billion by 2021.
- Food Processing: The Indian Food Industry stood around US \$ 39.03 billion in 2013 and is expected to grow at a rate of 11% to touch US \$ 64.31 billion in the year 2018.
- Electronics Sector: The Electronics market is one of the largest in the world

and is anticipated to reach US \$ 400 billion in 2022.

There are many more sectors with a great scope of investment facilitated by the various GOI initiatives in Ease of doing Business.

India – Ease of Doing Business Ranking

The Ease of Doing Business (EODB) index is a ranking system established by the World Bank Group. In the EODB index, 'higher rankings' (a lower numerical value) indicate better, usually simpler, regulations for businesses and stronger protections of property rights. A high EODB ranking means the regulatory environment is more conducive for starting and operating of businesses.

Among the chosen 189 countries for this index, India was ranked 134 in 2015 on the World Bank's Doing Business index. Since then there has been a remarkable improvement.

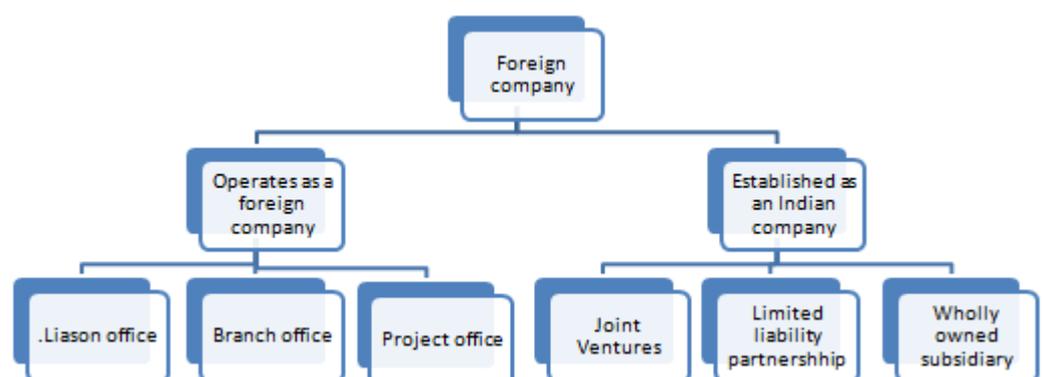
Since 2014, the Government of India launched an ambitious program of regulatory reform aimed at making it easier to do business in India. A table showing improvement in India's ranking among a total of 189 countries in the last three years is given below.

YEAR	2015	2016	2017
INDIA'S EODB RANKING	134	131	130

Note- Ranking for 2015 has been revised from 142 to 134 and 2016 has been revised from 130 to 131

2. Legal Entities For Doing Business In India

A foreign company could undertake business activities in India through various modes. It can be broadly explained in two ways.



2.1 Place of Business under Companies Act 2013

- **Branch Office-** A 'branch office' refers to an establishment, which carries out the same business under the head of main company. Such establishment helps the company in spreading its business on wide scale. It can only be opened with prior permission of RBI.
- **Liaison/ Representative Office-** 'Liaison Office' means a place of business to act as a channel of communication between the principal place of business or Head Office and entities in India but which does not undertake any commercial / trading/ industrial activity, directly or indirectly, and maintains itself out of inward remittances received from abroad through normal banking channel. Foreign companies can set up a liaison office in India. But its role is limited to collecting and disseminating information related to the company. It is a nexus between the parent company and Indian companies. Such Liaison office can be opened only with the prior approval of RBI.
- **Project Office-** 'Project Office' means a place of business in India to represent the interests of the foreign company in conducting and executing a project in India but excludes a Liaison Office. It can setup temporary project. The RBI has granted general permission to a foreign entity for setting up a project office in India, subject to the fulfillment of certain conditions.
- **Place of Business in electronic mode-** Companies Act, 2013 has also widened the definition of foreign companies to include those having a place of business in India via an agent or through electronic mode, which means online services provided by foreign companies without opening a physical office in India is also covered under the provisions of Companies Act, 2013. This would require foreign companies to comply with the maintenance of financial records and reporting requirements in India.

2.2 Company under the provisions of Companies Act, 2013

- **Wholly Owned Subsidiaries**

When a foreign company makes 100 per cent FDI (Foreign Direct Investment) in India through an automatic route, the Indian company becomes the Wholly Owned Subsidiary Company of that Foreign Company. This is possible where 100 per cent FDI is permitted and no prior approval of Reserve Bank of India is required. Under automatic route, FDI is allowed without the prior approval of Government and Reserve Bank of India.

- **Subsidiary**

A foreign company can open up a subsidiary company in India. This can be done either by acquiring the majority of shares (more than 50%) of the company or by controlling the composition of Board of Directors of the company. Both holding and subsidiary companies are separate legal entities and they are related to each other by virtue of subsidiary holding company relationship. The In-

vestment is subject to compliance of FDI Policy.

Both Wholly-Owned Subsidiary (WOS) and Subsidiary Company can be incorporated as a **Private Limited Company** in India

A WOS or a Subsidiary is treated as Indian Company under the Income Tax Act and is eligible for all exemptions, deductions benefits as applicable to any Indian Company.

- **Joint Venture**

A foreign company can form joint venture by forming an alliance with an Indian Partner. By mutual agreement they exercise control over the enterprise and consequently share revenues, assets, liabilities and expenses. It can be incorporated either as private limited company or public limited company which has to be registered under the Companies Act, 2013 and subject to exchange control regulations and Foreign Direct Policy of the Government of India. The Investments are subject to compliance of FDI Policy.

- **Limited Liability Partnership under Limited Liability Partnership Act, 2008**

LLP is a new development in the sphere of partnership firms. In this, liability is limited. The entity has to get registered under the Limited Liability Act, 2008. Earlier, no foreign investment could be made in LLP. However, Reserve Bank of India vide circular dated April 16, 2014 allowed foreign investment in LLP subject to approval by Foreign Investment Promotion Board.

3. Form For Incorporation Of Company

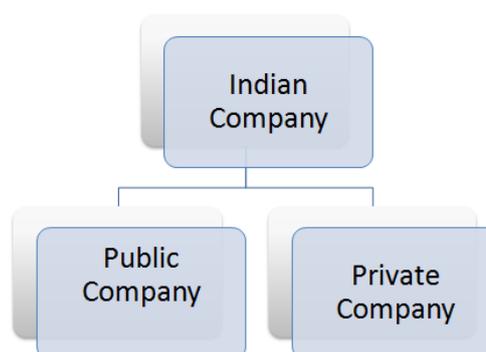
The SPICE stands for Simplified Performa for Incorporating Company Electronically. It is latest development by Ministry of Corporate Affairs. It is an integrated form. It helps to incorporate company in a day if requisite documents are already prepared in advance.

4. Procedure For Formation Of Legal Entity

Liaison office/Branch office/Project office:- Prior permission with RBI is required to form above mentioned office. Necessary application in the prescribed form is required to be filled with RBI along with requisite fees/annexure.

Indian Companies

Procedure followed for incorporation may vary company to company.



Apart from the above, an Indian company may also be incorporated as a 'company limited by guarantee', 'government company', 'non-profit company', 'one person company'.

Main Features

1. Private Limited Company:

Members– Minimum number of 2 members and a maximum number of 200 members are allowed to be member as per the provisions of the Companies act 2013.

Limited Liability– The liability of each member or shareholders is limited. It means that if a company faces loss under any circumstances then its shareholders are liable to sell their own assets for payment. The personal, individual assets of the shareholders are not at risk.

Number of Directors– Minimum number of director should be two.

Paid up Capital– Minimum paid-up capital has been done away by the amendment made in the Companies Act, 2013 by Company Law Amendment, 2015.

Prospectus– Prospectus is a detailed statement of the company affairs which is issued by a company for its public. However, in case of private limited company there is no such need to issue a prospectus because the public is not invited to subscribe for the shares of a private company.

Name– It is mandatory for all the private companies to use the word private limited after its name.

2. Public Limited Company:

Members– Minimum number of 7 members are required to be members as per the Companies Act, 2013.

Limited Liability– The liability of each member or shareholders is limited. It means that if a company faces loss under any circumstances then its shareholders are liable to sell their own assets for payment. The personal/ individual assets of the shareholders are not at risk.

Number of Directors– Minimum numbers of director should be three. In case of Listed Companies, at least One-Third as independent directors.

Paid up capital–Minimum paid-up capital of has been done away with by the Company Law Amendment, 2015.

Name– It is mandatory for all the public companies to use the word public limited after its name.

3. Other Types of Companies:

Company limited by Guarantee: A company may be 'company limited by shares' or a 'company limited by guarantee'. In company limited by shares, the liability of its members is limited to the unpaid value of the shares. In a company limited by guarantee, the liability of its members is limited to such amount as the member may undertake to contribute to the assets of the company in the event of its being wound up.

Government Company: A 'Government company' is defined under Section 2(45) of the Companies Act, 2013 as, "any company in which not less than 51% of the paid-up share capital is held by the Central Government, or by any State Government or Gov-

ernments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company."

Non Profit Company: Section 8 of the Companies Act, 2013 defines 'non profit company'. This is confined to companies which would not distribute their profits among its member. For incorporation, they have to follow the same provision like other companies follow.

One Person Company (OPC): Section 2(62) of the Companies Act, 2013 defines 'OPC' as a company which has only one person as a member. OPC can be registered only as a **private company** which means that all the provisions applicable to a private company will be applicable to an OPC, unless otherwise expressly excluded in the Act or rules made there under.

Small company: Section 2(85) of the Companies Act, 2013 defines a 'Small Company' as a company other than a Public Company that satisfies either of the following conditions:

- Paid-up share capital which does not exceed 50 lac rupees or such higher amount as may be prescribed which shall not be more than 5 crore rupees; or
- Turnover of which as per its last profit and loss account does not exceed 2 crore rupees or such higher amount as may be prescribed which shall not be more than 20 crore rupees.

Provided that nothing in this clause shall apply to—

- (A) A holding company or a subsidiary company;
- (B) A company registered under section 8; or
- (C) A company or body corporate governed by any special Act;

5. Documentary Requirements

Documents mandatory for **Indian nationals** for incorporation of company in India:

- **Pan Card:** Pan Card copy of the proposed director will be required.
- **Address Proof:** In addition to the Pan Card, the proposed director must submit address proof. **Any One** of the following documents are acceptable address proof for Indian National :-
 1. Passport
 2. Election card
 3. Ration card
 4. Driving license
 5. Electricity bill
 6. Telephone bill
 7. Aadhar bill
- **Residential Proof:** A Residential proof must be submitted during the incorporation of the company to validate the current address of the director. **Any One** of the following documents are acceptable residential proof :-

1. Bank statement
2. Electricity bill
3. Telephone bill
4. Mobile bill

Documents mandatory for Foreign nationals for incorporation of Company in India:

- **Passport:** In case of a foreign National, Passport is a mandatory requirement as a proof of identity. The Passport must also be Notarized or Apostilled in the country it was issued. In case the document is in a foreign language, it must be translated into English by an official translator and also be Notarized or Apostilled. Further, if the Passport does not contain date of birth of the holder, then an additional document indicating the date of birth of the Director must be provided, duly certified or attested or Notarized or Apostilled.
- **Address Proof:** In addition to the Notarized or Apostilled Passport copy, the proposed Director must submit an address proof which is also Notarized or Apostilled. The address proof submitted must have the name of the Director as mentioned in the Passport and the most current address of the Director. Further, the document must also not be older than 1 year for foreign nationals. **Any One** of the following documents are acceptable address proof for foreign nationals:-
 1. Driving national
 2. Bank statement
 3. Residence card
 4. Government issue form of identity containing address.

In case the document is in a foreign language, then it must be translated into English by an official translator and Notarized or Apostilled.

- **Residential Proof:** In addition to the address proof, a residential proof must be submitted during the incorporation of the Company to validate the current address of the Director. As applicable for address proof, the residential proof must also contain the name of the Director as mentioned in the Passport and must not be older than one year. It can be validated through **any one** of the following documents :-
 1. Bank statement
 2. Electricity bill
 3. Telephone bill
 4. Mobile bill.

In case the document is in a foreign language, then it must be translated into English by an official translator and Notarized or Apostilled.

- **Registered office proof**

The company shall furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation in such manner as may be prescribed. The verification of the registered office shall be filed in Form No. INC-22 along with the fee and there shall be attached to said Form, **any one** of the fol-

lowing documents, namely -

- (i) Registered document of the title of the premise of the registered office in the name of company; or
- (ii) Notarized copy of lease/rent agreement not older than 1 month.
- (iii) The authorization from the owner or authorized occupant of the premises along with proof of ownership or occupancy authorization, to use the premises by the company as its registered office; and
- (iv) He proof of evidence of any utility service like telephone, gas, electricity, etc. depicting the address of the premises in the name of the owner or document, as the case may be, which is not older than two months.

OTHER IMPORTANT & MATERIAL CHANGES UNDER COMPANIES ACT, 2013

The Companies Act, 2013 brings a lot of new features, compliances and disclosures for foreign companies operating in India, in any mode. Indian Ministry of Corporate Affairs (MCA) has notified 183 new sections of the Companies Act 2013. The newly notified sections came into effect on April 1, 2014. The notified section requires company to comply with the new Act.

Resident Directors:

Under the new Act, every company in India shall have at least one director who has resided in India for a total period of more than 182 days in the previous calendar year.

Disclosure of Company Information on Official Documents

Pursuant to section 12(3)(c) of the Act, every company in India shall have the following information printed on its business letterhead, billhead, and letter paper and on all notices and other official publications:

- Name of the company
- Registered office address
- Corporate Identity Number (CIN)
- Telephone number
- Fax number
- E-mail and website address, if any.

Board Meetings

The Act now allows meeting through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognizing the participation of the Directors. Also, the recordings of the proceedings of the meetings must be stored along with date and time.

Official Communication for Conducting Board Meetings

Under the Act, e-mail is now also regarded as an official way to communicate. A director is, therefore, liable for any information that he might have received during the

course of his board participation, including agenda, notice, etc. In order to make the final notice, agenda and board minutes an official communication, it is recommended that each company creates a separate group e-mail ID of its board of directors.

In addition, the Indian company must approve the policy of communicating to its board members through this official e-mail ID, which should only be an official communication for all purposes and for the knowledge of the board.

Board Meetings through Video Conferencing Facility (VCF)

The Act now allows meetings to be held through video conferencing. Directors attending meetings using VCF are now considered toward a quorum.

Other Issues in regard to Board Meetings

Every company in India shall hold a minimum of four board meetings every year in such a manner that not more than 120 days shall intervene between two consecutive board meetings. A board meeting needs to be called by giving not less than seven days' advance written notice to every director.

Woman Director

Every company listed as public in India with paid capital of Rs 100 Crores (approximately \$16.5 million) or more, or a public company with turnover of Rs 300 Crores (approximately \$49 million) or more shall have at least one woman director within 1 year from the commencement of second proviso to Section 149(1) of the Companies Act, 2013.

Disqualification of Director

All existing directors of an Indian company must have Director Identification Number (DIN) allotted by central government as per Section 26A to 26G of the Companies Act, 2006. As such, all the existing and intending Directors have to obtain DIN within the prescribed time-frame as notified by filing an application in eForm DIR-3.

Corporate Social Responsibilities (CSR)

The term CSR is referred as corporate initiative to assess and take responsibility for the company's effects on the environment and impact on social welfare. The term generally applies to companies efforts that go beyond what may be required by regulators or environmental protection groups. CSR is the process by which an organization thinks about and evolves

its relationships with stakeholders for the common good, and demonstrates its commitment in

this regard by adoption of appropriate business processes and strategies.

The Act mandates that all Indian companies that satisfy any one of the following criteria:

- (i) A turnover of 1000 Crores (approximately \$164 million),

- (ii) a net worth of 500 Crores (approximately \$82 million), or
 - (iii) a profit of 5 Crore (approximately \$800,000.00) and above
- Need to spend 2 percent of their profit made in the preceding consecutive 3 financial years on its corporate social responsibility policy.

Other Important points under notified act that require immediate attention are as follows:

- The Articles of Association may contain entrenchment provisions, regarding the alteration of specified provisions of articles, which means that they may be altered only if conditions restrictive than special resolution are met.
 - The Board may appoint alternate director, if authorized by its articles or by a resolution passed by company during the absence of a director, for a period of **not less than three months from India**.
 - Chief Executive Officer (CEO) and Chief Financial Officer (CFO) has been defined in the Act and covered in the category of Key Managerial Personnel (KMP) with wider responsibilities and liabilities.
 - The company can maintain its book of accounts in electronic mode.
 - A consolidated financial statement shall be produced at the Annual General Meeting, if the company has any subsidiary, associate company, joint venture in India or abroad along with the financial statement of the company and also attach with it a statement containing salient features of the financial statement of its subsidiary or subsidiaries.
 - An audit firm cannot be appointed for more than ten years and individual auditor has to be rotated after the expiry of the period of 5 years.
 - Class Action Suit under which a prescribed class of members or deposit holders will have the right to file a Class Action suit with the Tribunal.
 - **No declarations for commencement of business, etc:** The Companies (Amendment) Act, 2015 has removed the requirements of filing the following declarations with the Registrar of Companies prior to the commencement of the business and deleted Section 11 of Companies Act, 2013:
 - (i) declaration by a director that minimum paid-up share capital has been paid;
and
 - (ii) company has filed verification of registered office.
- This reduces the filings to be made by companies in India.

6. Income Tax Rates

Income Tax Rate for companies for the Assessment Year 2018-2019

Turnover (In Indian Rupees)	Base Tax Rate (Proposed in Budget 2017)	
	For Indian Company	For Foreign Company
Less than or equal to 50 crore rupees (in the previous year 2015-2016)	25%	40%
More than 50 crore rupees (in the previous year 2015-2016)	30%	40%

Surcharge on Companies for the Assessment Year 2018-2019

	For Indian Company	For Foreign Company
Less than or Equal to 1 crore	Nil	Nil
More than 1 crore but less than 10 crore	7%	2%
More than 10 crore	12%	5%

PLUS:

Education Cess: 2% - charged on the amount of income tax and surcharge being paid.

Secondary and Higher Education Cess: 1% on the amount of income tax and surcharge being paid.

Note: A Wholly Owned Subsidiary of a Foreign Company is treated as a Domestic Company and thus, the tax rate of an Indian Company will be applicable to it.

7. Goods and Service Tax Implementation In India w.e.f July 01, 2017

- The Goods and Services Tax (GST) replaced numerous different indirect taxes such as Central Excise Duty, Service Tax, Value Added Tax (VAT), Central Sales Tax (CST) etc.
- The GST Council finalized a four-tier GST tax structure of 5%, 12%, 18% and 28%, with lower rates for essential items and the highest for luxury. De-merit (A good which can have a negative impact on the consumer – but these damaging effects may be unknown or ignored by the consumer. It's consumption causes a harmful effect to the third party) goods attracts further additional cess.
- The recently implemented GST system has subsumed all other indirect taxes and now only one tax i.e. GST prevails. In the post GST system, there is a

strong correlation between inputs and corresponding outputs.

- **IMPROVED INDIA'S EASE OF DOING BUSINESS IN THE LONG RUN:**

The GST has benefited and opened up more doors for doing business in India than ever. The proper implementation and execution of GST has helped businesses and consumers.

It has enhanced the following aspects:

Reducing the Tax Burden

One salient feature of the GST is a transparent system of input and output of tax credits. Previously, there was no clear mechanism to handle taxes. It was based on tax on tax with multiple taxes, cess and surcharge. It created a cascading effect. However, with the implementation of GST, the tax burden for both sellers and buyers has reduced exponentially.

Easing the Flow of Goods and Services

Earlier, many foreign investors were often intimidated by the intricate frames of taxes. Furthermore, they had to pay double taxes if they had to move the goods across state borders. Such kind of practice hindered the free flow of goods and services and hence it lowered profit margins and the flexibility in doing business in India. But, with the introduction of GST, the flow of goods and service is a lot more easier in India now.

Easier Compliance

An other important essence of this tax reform is that it has reduced the excessive bureaucratic procedures and non-compliances prevalent in India. The GST has come out with much clear tax rule on goods and services with uniform structure across the nation. Moreover, online registration, returns and payments is serving as a single window system which has made compliances easier and has facilitated in reducing red tapism.

These reforms have reduced the transaction cost of selling goods and services in India, and thereby, improved the ease of doing business in the country.

Presently, Government of India has introduced many other policies in addition to this tax reform to ease business in India. Many procedures have been simplified to reduce time and increase effectiveness.

8. The Changes Brought By The GOI

8.1 INITIATIVES BY THE CENTRAL GOVERNMENT:

8.1.1 Starting a business:

- The requirement of Common company seal is eliminated.
- Introduction of form -29 by MCA. With this form three processes such as Name Availability, Director Identification Number and Incorporation of Company are clubbed into one. The company can be registered within 1-2 working days in India.
- The provision is in place for getting PAN and TAN in T+1 day using digital signature.
- ESIC and EPFO are completely online with no physical touch point for registration or document submission.

8.1.2. Dealing with construction permits:

- Municipal Corporations of Delhi as well as Municipal Corporation of Greater Mumbai have introduced fast track approval system for issuing building permits with features such as Common application form, provision of using digital signature and online scrutiny of building plans.
- Delhi has a uniform building bye laws, 2016 which allows for risk-based classification regimes for different building types. The uniform building bye laws have provision of deemed approval of sanctioning building plans within 30 days.

8.1.3. Trading Across Borders:

- The Central Board of Excise and Customs (CBEC) has implemented 'Indian Customs Single Window Project' to facilitate trade. Now importers and exporters can electronically lodge their customs clearance documents at a single point only with the customs.
- (i) The number of mandatory documents required by customs for import and export of goods have been reduced to three viz. Bill of Lading, Invoice cum Packing List and Import Declaration.

8.1.4. Enforcing Contracts:

- The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 has been enacted. The Commercial Courts and Appellate Divisions have already been established in Delhi and Bombay High Court.
- National Judicial Data Grid (NJDG), provides case data including case registration, cause list, case status and orders/ judgments of courts across the country and District-wise. NJDG was opened to general public on 19th September, 2015.

8.1.5 Getting Credit:

- SARFAESI (Central Registry) Rules, 2011 has been amended. The amendment modifies rule 4 to include additional types of charges, including: "security interest

in immovable property by mortgage other than deposit of title deeds"; "security interest in hypothecation of plant and machinery, stocks, debt including book debt or receivables"; "security interest in intangible assets, being know-how, patent, copyright, trademark or any other business or commercial right of similar nature"; and "security interest in any under construction residential or commercial building or a part thereof". This amendment allows (Central Registry of Securitization Asset Reconstruction and Security Interest) CERSAI to register these additional charges.

- This amendment will allow uploading of data pertaining to security interests created on all types of properties covered by the definition of property in Section 2 (1)(t) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) i.e. immovable as well as intangible.

8.1.6. Getting Electricity:

- In both Delhi and Mumbai, the distribution companies have stipulated that electricity connections will be provided in 15 days and the number of documents required to obtain an electricity connection have been reduced to only 2. Online application for connections above 100 KVA have been made mandatory in Delhi and Mumbai. This will reduce procedures, cost and time taken to obtain an electricity connection significantly.
- In Mumbai, Brihanmumbai Electric Supply and Transport (BEST) has improved its SAIDI by 3% in the period Jun 2015-Mar 2016, and SAIFI by 11% in the same period and Tata power has improved its SAIDI by 2.42 and it's SAIFI by 2.41.

8.1.7. Registering Property:

- In Delhi, all sub-registrar offices have been digitized and sub-registrars' records have been integrated with the Land Records Department and in Maharashtra all property tax records have been digitized. The digitization of property records will overcome the cumbersome and time consuming paper work for registering properties. It will ensure transparency and allow citizens to ascertain history of transactions in digital mode.

8.1.8. Paying Taxes:

- The ESIC has developed a fully online module for electronic return filing with online payment. This has greatly reduced the time to prepare and file returns.
- With introduction of e-Verification system, there remains no physical touch point for document submission to Income tax authorities.

Measures Underway

Integrate processes for obtaining PAN, TAN, ESIC & EPFO registration with incorporation of company.

- Increasing the coverage of Credit Registry and Credit Bureau to register at least

70% of the individuals and firms with information on their borrowing history from the last 5 years.

- Simplification in the forms for filing income tax return, VAT return, CST return, EPFO and ESIC return.
- Operationalizing Insolvency and Bankruptcy Code.

8.2. INITIATIVES BY THE STATE GOVERNMENT:

8.2.1. DPP launched an online portal in April 2016 to track implementation of reforms on a real-time basis. The online portal is aimed to provide the following:

- Real time ranking and tracking of the States and UTs based on implementation of the recommendations.
- Details of the good practices to learn and replicate.
- Provide information on current policies and practices across States and UTs

8.2.2. More than 7000 reforms have been uploaded by States on the portal, the validation exercise of which is underway. While the validation exercise is in the final stages, it can be seen from the website that around 10 States have implemented more than 90% of the reforms.

9. Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code, 2016 (IBC, further referred to as the Code) is the bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy. The Code seeks to repeal the Presidency Towns Insolvency Act, 1909 and Sick Industrial Companies (Special Provisions) Repeal Act, 2003, among others.

Key features of the Code are:

9.1. Insolvency Resolution :

The Code outlines separate insolvency resolution processes for individuals, companies and partnership firms. The process may be initiated by either the debtor or the creditors. A maximum time limit, for completion of the insolvency resolution process, has been set. For companies, the process will have to be completed in 180 days, which may be extended by 90 days, if a majority of the creditors agree. For start ups (other than partnership firms), small companies and other companies (with asset less than Rs. 1 crore), resolution process would be completed within 90 days of initiation of request, which may be extended by 45 days.

9.2. Insolvency regulator:

The Code establishes the Insolvency and Bankruptcy Board of India, to oversee the insolvency proceedings in the country and regulate the entities registered under it. The Board will have 10 members, including representatives from the Ministries of Finance and Law, and the Reserve Bank of India.

9.3. Insolvency professionals:

The insolvency process will be managed by licensed professionals. These professionals will also control the assets of the debtor during the insolvency process. The NCLT appoints an insolvency professional or 'Resolution Professional' to administer the Insolvency Resolution Process (IRP). The Resolution Professional's primary function is to take over the management of the corporate borrower and operate its business as a going concern under the broad directions of a committee of creditors.

Therefore, the thrust of the Code is to allow a shift of control from the defaulting debtor's management to its creditors, where the creditors drive the business of the debtor with the Resolution Professional acting as their

9.4. Bankruptcy and Insolvency Adjudicator:

The Code proposes two separate tribunals to oversee the process of insolvency resolution, for individuals and companies:

- (i) the National Company Law Tribunal for Companies and Limited Liability Partnership firms; and
- (ii) the Debt Recovery Tribunal for individuals and partnerships.

9.5. Information Utilities:

A notable feature of the Code is the creation of information utilities to collect, collate, authenticate and disseminate financial information of debtors in centralised electronic databases. The Code requires creditors to provide financial information of debtors to multiple utilities on an ongoing basis. Such information would be available to creditors, resolution professionals, liquidators and other stakeholders in insolvency and bankruptcy proceedings. The purpose of this is to remove information asymmetry and dependency on the debtor's management for critical information that is needed to swiftly resolve insolvency.

9.6. Corporate Debtors: Two-Stage Process

To initiate an insolvency process for corporate debtors, the default should be at least INR 100,000 (USD 1495) (which limit may be increased up to INR 10,000,000 (USD 149,500) by the Government). The Code proposes two independent stages:

- *Insolvency Resolution Process*, during which financial creditors assess whether the debtor's business is viable to continue and the options for its rescue and revival; and
- *Liquidation*, if the insolvency resolution process fails or financial creditors decide to wind down and distribute the assets of the debtor.

9.7. Insolvency Resolution Process for Individuals/Unlimited Partnerships

For individuals and unlimited partnerships, the Code applies in all cases where the minimum default amount is INR 1000 (USD 15) and above (the Government may

later revise the minimum amount of default to a higher threshold). The Code envisages two distinct processes in case of insolvencies: automatic fresh start and insolvency resolution.

- Under the *automatic fresh start process*, eligible debtors (basis gross income) can apply to the Debt Recovery Tribunal (DRT) for discharge from certain debts not exceeding a specified threshold, allowing them to start afresh.
- The *insolvency resolution process* consists of preparation of a repayment plan by the debtor, for approval of creditors. If approved, the DRT passes an order binding the debtor and creditors to the repayment plan. If the plan is rejected or fails, the debtor or creditors may apply for a bankruptcy order.

Winding Up Under The Insolvency And Bankruptcy Code, 2016

Section 255 of the Code has been notified with effect from November 15, 2016 and by virtue of it the Companies Act, 2013 stands amended in accordance with Schedule IX of the Code. The aforementioned schedule has introduced a new section 2(94) to the 2013 Act as "Winding up under this act or liquidation under the Insolvency and Bankruptcy Code, 2016. The Code has also brought about a new change in the 2013 Act including removal of the provisions of 'voluntary winding up' and winding up on the ground of 'inability to pay debts' from the 2013 Act as the proceedings relating to these now find place under the Code.

PROVISIONS FOR WINDING UP UNDER THE CODE:

- **Winding Up on inability to Pay Debts:**

It is dealt with in accordance with the provisions of Section 7 to 9 of the Code, being initiation of corporate insolvency resolution process by financial and operational creditors. 'Default' as defined under the Code means non-repayment of a debt, whether whole or in part, which has become due and payable by a corporate person. This implies that the Insolvency proceedings can be initiated even against a financially solvent company having made a default in payment of debts, since the same would fall within the purview of default. When the proceedings are initiated and the Tribunal accepts the application, an insolvency professional is appointed for conducting the corporate insolvency process. The process is required to be completed in 180 days from the date of admission of application by the Tribunal, on failure of which, the Tribunal may pass an order for liquidation of the corporate person in relation to whom the application was made.

- **Winding Up on Grounds other than Inability to Pay Debts:**

The circumstances under which a company can be wound up by Tribunal are as follows:

- (i) passing of special resolution to that effect;
- (ii) acting against the sovereignty and integrity of India, security of state,

- friendly relations with foreign states, public order, decency or morality;
- (iii) conducting affairs in a fraudulent manner;
 - (iv) default in filing of financial statements or annual returns with the Registrar for immediately preceding five financial years; and
 - (v) on just and equitable grounds in the opinion of the Tribunal.

- **Voluntary Winding Up:**

This falls within the purview of section 59 of the Code. It provides that a corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate a voluntary winding up proceeding provided it gives a declaration from majority of the directors of the company on verified affidavit that either the company has no debts or that it will be able to pay off its debts in full and that the company is not being wound up to defraud any person.

10. Feedback

Your feedback is appreciated by the Firm.

We are available for any Clarification/Information needed.

Dubey & Partners - Advocates

601, DLF Tower, Tower A, Plot No 10 –11

DDA Distt. Center, Jasola, New Delhi - 110044

Tel : +91-11-41072626

+91-11-41072630

Fax: +91-11-41072628

Email: newdelhi@dubeypartners.com

rkubey@dubeypartners.com

Website: www.dubeypartners.com