

KOREA NEWSLETTER

Quarter of October to December 2023



In this newsletter, **INDUSLAW** brings you key legal, regulatory and policy updates from India (both sector- specific and general) for the recently concluded quarter.

INDUSLAW is a top-tier Indian Law Firm, the 6th Largest in India, providing legal services to a wide range of International & Domestic clients across a variety of sectors. With over **400 lawyers** including **more than 60 Partners** spread across *Bengaluru, Chennai, Delhi & NCR, Hyderabad & Mumbai*, we have been fortunate to partner with and contribute significantly to many established businesses and new economy companies.

We have been fortunate to partner with and contribute significantly to both established businesses and new economy companies. Our clients typically include financial institutions, investment funds, foreign multinationals operating in India, domestic corporations, growing Indian companies, start-ups, social enterprises and not-for-profit entities.

We work with clients across various sectors including, energy (including renewable energy), electronics, food processing, financial services, healthcare and pharmaceuticals, infrastructure, manufacturing, textile and garment, technology and automobile.

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Welcome to our Korea-focused newsletter on sector-specific and regulatory updates in India. In the backdrop of last year's celebrations of the 50th (fiftieth) anniversary of diplomatic relations between India and the Republic of Korea, we reflect on a relationship that has blossomed into a multifaceted partnership characterized by mutual goodwill, high-level exchanges, and a significant convergence of interests. The economic collaboration between our nations has been particularly robust, with Korea emerging as India's 13th (thirteenth) largest FDI investor, channelling USD 5.71 (five point seven one) billion into industries like metallurgy, automobiles, health and electronics. This investment synergy aligns well with India's strategic priorities and Korea's New Southern Policy.¹ Bilateral trade has also seen remarkable growth, with a target to reach USD 50 (fifty) billion by 2030, symbolizing our deepening economic and strategic ties. As we mark this milestone year, we commit to further enhancing this special strategic partnership, focusing on sectors like renewable energy, semiconductors, electric vehicles, etc.

¹ <https://www.investindia.gov.in/country/korea-plus>

2023 년 10-12 월 주요 업데이트

파트 A: 섹터별 업데이트

1. 지정인에 대한 최소 재생 에너지 의무 소비량

인도 정부(Government of India, GoI)는 광업, 시멘트, 섬유 등 특정 산업의 지정인에 대해 2024-2025 년 간에 사용된 총 에너지의 29.91% (이십구 점 구십일 퍼센트)를 재생에너지로 사용하도록 최소 재생에너지 의무 소비량을 고시했으며, 해당 수치는 2029-2030 년까지 43.33% (사십삼 점 삼십삼 퍼센트)로 점차 확대될 예정입니다.

2. 그린 수소에 대한 연구 개발 (Research and development, R&D) 로드맵 발표

GoI 산하의 신재생에너지부는 (i) 민관 협력 활성화; (ii) R&D 기금 마련 구체화; (iii) 우수 센터 설립을 통해 신소재, 기술 및 인프라 개발에 중점을 둔 그린 수소 R&D 로드맵을 발표했습니다.

3. 2023 년 해상 풍력 에너지 임대 규정

GoI 는 해상 풍력 에너지 및 풍력 송전 프로젝트를 위한 해상 지역 임대 허가를 규제하기 위해 2023 년 해상 풍력 에너지 규정을 도입했습니다. 해당 규정은 해상 풍력 프로젝트의 부지 임대 절차를 간소화함으로써, 국내 풍력 에너지 발전을 촉진하기 위해 마련되었습니다.

4. 인도 의회, 2023 년 통신법 통과

인도 의회는 기존의 통신 규제 프레임워크를 대체할 2023 년 통신법을 통과시켰으며, 이는 통신 규제 프레임워크를 현대화하고 통합함으로써 인도 내 통신 부문의 성장을 촉진하는 것을 목표로 합니다.

파트 B: 외국인 투자자를 위한 일반 업데이트

1. 2023 년 인도 준비은행(비은행 금융회사 - 규모 기반 규제)의 지시 사항

인도 준비은행 (Reserve Bank of India, RBI)은 비은행 금융회사 (non-banking financial companies, NBFC) 대상으로 개정된 프레임워크를 도입했습니다. 새로운 프레임워크에서는 NBFC 를 시스템적으로 중요한 것과 그렇지 않은 것으로 분류하던 이전의 분류 체계에서 벗어나, NBFC 를 다음과 같은 4 개의 계층으로 나누는 계층 기반 분류를 제공합니다: (i) 기본 계층; (ii) 중간 계층; (iii) 상위 계층; (iv) 최상위 계층.

2. 국경 간 결제 대행 업체 대상 규제

RBI 는 국경 간 재화와 서비스의 수출입 거래를 촉진하는 결제 대행 업체들에 적용될 새로운 규제 프레임워크를 발표했습니다. 본 규정에서는 이러한 결제 대행 업체들에 적용되는 인가, 분류, 최소 자본금 요건 및 규정 준수 프레임워크를 간략하게 설명합니다.

3. 상장 인프라 투자 신탁(Infrastructure Investment Trusts, InvIT)의 최소 공개 주식 보유량 달성 방식 개정안

인도 증권거래위원회는 상장된 InvIT 에서 최소 유닛 보유 요건인 25% (이십오 퍼센트)를 달성하기 위해 일반 투자자에 대한 우선 배당이라는 추가적인 방법을 활용할 수 있도록 허용하는 안내문을 발표했습니다.

4. 중재 합의로 비서명자 구속 가능

인도 대법원은 '기업 집단' 주의를 지지하는 *Cox and Kings Ltd v SAP India Pvt. Ltd* 사건에서, 중재 합의가 비서명자도 구속할 수 있다고 판시했습니다.

5. 직인이 찍히지 않은 중재 합의도 집행 가능

인도 대법원은: *중재 및 조정법(1996)과 인도 인지조례(1899)에 따른 중재 합의 간의 상호작용에 관한 판결*에서, 이전 판결을 뒤엎고, 도장이 찍히지 않았거나 부적절하게 찍힌 중재 합의는 무효이거나 집행할 수 없다고 판시했습니다.

Key Updates from October to December 2023

Part A: Sector specific updates

1. Minimum renewable energy consumption obligations for designated persons

The Government of India (GoI) notified minimum renewable energy consumption obligations for designated persons (industries like mining, cement, textiles etc.) to utilize 29.91% (twenty-nine point nine one percent) of their total energy utilized in the year 2024-25 as renewable energy and this is set to gradually increase to 43.33% (forty-three point three three percent) by the year 2029-30.

2. Research and development (R&D) roadmap for green hydrogen released

The Ministry of New and Renewable Energy, GoI, released the R&D roadmap for green hydrogen focussing on development of new materials, technologies and infrastructure by (i) enabling public private partnerships; (ii) establishing specific R&D funds; and (iii) establishment of centres of excellence.

3. Offshore Wind Energy Lease Rules, 2023

The GoI introduced the Offshore Wind Energy Rules, 2023 to regulate the grant of lease of offshore areas for offshore wind energy and wind transmission projects. The regulations are designed to streamline the process of leasing offshore wind project sites, thereby catalyzing wind energy generation in the country.

4. Indian parliament passed Telecommunications Act, 2023

The Indian parliament passed the Telecommunications Act, 2023 which supersedes the existing telecom regulatory framework and aims to modernize and consolidate the regulatory framework on telecommunications and boost the sector's growth in India.

Part B: General updates for foreign investors

1. Reserve Bank of India (Non-Banking Financial Company – Scale Based Regulation) Directions, 2023

The Reserve Bank of India (RBI) introduced a revised framework for non-banking financial companies (NBFCs). The new framework deviates from the earlier system of classification wherein the NBFCs were classified into systematically important and systematically non-important and provides for a layer-based classification dividing the NBFCs into 4 (four) layers: (i) base layer; (ii) middle layer; (iii) upper layer; and (iv) top layer.

2. Regulation of cross border payment aggregators

The RBI issued a new regulatory framework governing payment aggregator aiming to facilitate cross border transactions of import/ export of goods and services. The regulations outline authorization, classification, minimum capital requirements and the compliance framework applicable for such payment aggregators.

3. Manner in revision of attaining minimum public shareholding by listed Infrastructure Investment Trusts (InvITs)

The Securities and Exchange Board of India released a circular permitting listed InvITs to utilise an additional method i.e., preferential allotment to public investors to achieve minimum public unit-holding requirement of 25% (twenty five percent).

4. Arbitration agreement can bind non-signatories

The Supreme Court of India, in the case of *Cox and Kings Ltd v. SAP India Pvt. Ltd*, endorsing the 'group of companies' doctrine held that arbitration agreement can bind non-signatories as well.

5. Unstamped arbitration agreements are enforceable

The Supreme Court of India, in the case of *In Re: Interplay between arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*, overruling its earlier judgement, held that unstamped or inadequately stamped arbitration agreements are not void or unenforceable.

Section A: Sector specific updates

Renewable Energy and Power

Overview

The Government of India (GoI) remains steadfast in its commitment to transition to sustainable sources of energy and with an installed capacity of 422 (four hundred twenty-two) gigawatt (GW) of renewable energy sources, India stands 4th (fourth) in terms of global renewable energy capacity.² This capacity is expected to grow to 817 (eight hundred and seventeen) GW by 2030.³ In the past years, the GoI has taken several steps to establish a regulatory framework for nascent industries such as green hydrogen by developing the National Green Hydrogen Mission and Green Hydrogen Standards for India. The GoI has introduced several demand side and supply side policy initiatives for the renewable energy sector including the Production Linked Incentive Scheme for High Efficiency Solar PV Modules which had a budgetary outlay of approximately USD 2.34 (two point three four) billion and aimed at achieving a higher manufacturing capacity in high efficiency solar PV modules and reduce import dependence in the renewable energy sector.⁴ In this edition of the newsletter, we have discussed several initiatives introduced by the GoI this quarter including renewable energy consumption obligations for designated consumers, research and development roadmap for green hydrogen, rules for offshore wind energy projects and the revised Battery Waste Management Rules, 2022.

Renewable energy consumption obligation notified by the GoI

In October 2023, the Ministry of Power, GoI notified minimum renewable energy consumption obligations for the period between 2024-2030 with the total renewable energy obligation consumption increasing from 29.91% (twenty-nine point nine one percent) in 2024-25 to 43.33% (forty-three point three three) in 2029-30.⁵ Such renewable energy consumption obligations are applicable on designated persons which include industries like mining, cement, textile, chemicals, transportation sector and specified categories of commercial buildings and requires such designated persons to utilize a greater portion of renewable energy as part of their total annual energy consumption.

This change is expected to increase demand-side pressures for renewable energy in India. This notification shall come into force on April 01, 2024.

Research and development (R&D) roadmap released under the National Green Hydrogen Mission

The Ministry of New and Renewable Energy, GoI has released a R&D roadmap under the National Green Hydrogen Mission to promote green hydrogen and its derivatives such as green methanol and

² Renewable Energy, Invest India, available at <https://www.investindia.gov.in/sector/renewable-energy>, last accessed November 12, 2023

³ TND India, India's Power Generation Capacity Estimated At 817 GW By FY30, dated March 25, 2021, available at <https://www.tndindia.com/indias-power-generation-capacity-estimated-at-817-gw-by-fy30/>, last accessed November 12, 2023

⁴ We had discussed the Production Linked Incentive Scheme for High Efficiency Solar PV in the previous edition of our newsletter available at <https://induslaw.com/publications/pdf/alerts-2022/Korea-Newsletter-July-September-2022.pdf>; Press Information Bureau, Cabinet approves Production Linked Incentive Scheme on 'National programme on High Efficiency Solar PV Modules' for achieving manufacturing capacity of Giga Watt (GW) scale in High Efficiency Solar PV Modules, dated September 21, 2022, available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1861127>, last accessed November 12, 2023.

⁵ Ministry of Power, Notification S.O. 4617(E) dated October 20, 2023, available at <https://egazette.gov.in/WriteReadData/2023/249637.pdf>, last accessed November 12, 2023

green ammonia.⁶ The roadmap focuses on developing new materials, technologies and infrastructure to improve the efficiency, reliability and cost-effectiveness of green hydrogen. Key proposal under the roadmap include (i) enabling public private partnerships; (ii) establishing a specific R&D fund; and (iii) establishment of centres of excellence.

Earlier, the GoI had notified the Green Hydrogen Standard for India which outlined the emission threshold that must be met for hydrogen to be classified as 'green'. The National Green Hydrogen Mission and Green Hydrogen Standard for India were covered in the previous editions of our newsletter which is available at <https://induslaw.com/publications/pdf/alerts-2023/Korea-Newsletter-Jan-Mar.pdf> and <https://induslaw.com/publications/pdf/alerts-2023/Korea-Newsletter-Jul-Sep2023.pdf> respectively.

Amendment to Battery Waste Management Rules, 2022 notified

The Ministry of Environment, Forest and Climate Change, GoI notified the Battery Waste Management (Amendment) Rules, 2023⁷ (Battery Waste Amendment Rules) that amended the Battery Waste Management Rules, 2022⁸ (Battery Waste Rules). The Battery Waste Rules are formulated under the Environment Protection Act, 1986 and introduced the concept of extended producer responsibility for battery producers to ensure environmentally sound management of waste batteries.

The Battery Waste Amendment Rules now expands such obligation towards batteries produced for self-use as well. Earlier, the producers were responsible for environmentally sound management including recycling and refurbishing of batteries introduced by them in the market. Producers are required to ensure environmentally sound management of pre-consumer waste batteries generated for manufacturing, assembling or import of batteries or battery packs. Further, the producers are also obligated to file annual returns outlining pre-consumer battery waste generated in the previous year.

We have analyzed the Battery Waste Rules in our Infolex publication, which is available at https://induslaw.com/publications/pdf/alerts-2022/Induslaw_Battery_Waste_Article_2022.pdf

Introduction of Offshore Wind Energy Lease Rules 2023 for governing offshore wind projects in India⁹

In December 2023, the GoI notified certain rules for the leasing of offshore wind projects. These rules have been issued under an existing law that regulates India's territorial waters, continental shelf, exclusive economic zones and other maritime zones.

Under these rules, prospective lessees for offshore wind projects will be selected through an open, international competitive bidding process in accordance with the prevailing national policy on offshore

⁶Ministry of New and Renewable Energy, R&D Roadmap for Green Hydrogen Ecosystem in India dated October 13, 2023, available at <https://mnre.gov.in/notice/rd-roadmap-released-by-mnre-on-the-eve-of-world-hydrogen-day/>, last accessed November 12, 2023.

⁷ Ministry of Environment, Forest and Climate Change, Battery Waste Management (Amendment) Rules, 2023, dated October 25, 2023, available at <http://www.indiaenvironmentportal.org.in/files/file/battery%20waste%20management%20rules%202023.pdf>, last accessed November 12, 2023

⁸ Ministry of Environment, Forest and Climate Change, Battery Waste Management Rules, 2022, dated August 22, 2022, available at <https://cpcb.nic.in/uploads/hwmd/Battery-WasteManagementRules-2022.pdf>, last accessed November 12, 2023

⁹ Ministry of External Affairs, Offshore Wind Lease Rules, 2023, dated December 19, 2023, available at <https://cdnbbsr.s3waas.gov.in/s3716e1b8c6cd17b771da77391355749f3/uploads/2023/12/202312208216880.pdf>, last accessed January 04, 2024.

wind energy.¹⁰ Leases will be granted for an area ranging from 25 (twenty-five) square kilometres to 500 (five hundred) square kilometres for a period of 35 (thirty-five) years (extendable, subject to the project's functional viability).

These rules are considered a part of a larger effort by the Indian government to catalyze wind energy generation. For example, in August last year, the government sought proposals for surveys along the country's southern and western coastlines, in relation to three government-formulated models for developing wind energy.¹¹ Similarly, in February 2024, auctions are expected for allocating offshore wind sites in the southern state of Tamil Nadu.¹²

Electronics

Establishing non-processing areas in information technology (IT)/ information technology enabled services (ITES) special economic zones (SEZs)¹³

In December 2023, the Ministry of Commerce amended the Special Economic Zone Rules, 2006 permitting non SEZ IT/ITES businesses to operate in the non-processing built up area of the SEZ, subject to certain conditions. The revised rules allow the board of approval (BOA) of an IT/ITES SEZ, on request of the developer, to demarcate non-processing areas within the IT/ITES SEZ which may be used for setting up and operating businesses engaged in IT/ITES. Such businesses will operate as per the stipulations set by the BOA. The rules also specify implementation of certain access control measures and repayment of tax benefits linked to the demarcated non-processing area by the developer.

Non-processing area of a SEZ is the area which separated from and is intended to support the activities in the processing area.¹⁴ The processing area is utilised for setting up units for manufacturing of goods or rendering of services or areas used exclusively for trading or warehousing purposes.¹⁵

While businesses setting up in such non processing areas can utilize the common infrastructure and facilities available in the SEZ, no tax benefits are available for such units on operation and maintenance of such infrastructure. Additionally, such units are not permitted to avail any rights or facilities available to the SEZ units.

¹⁰ Ministry of New and Renewable Energy, National Offshore Wind Energy Policy, dated October 06, 2015, available at <https://policy.asiapacificenergy.org/sites/default/files/Notification%20G.%20S.%20R.%20765%28E%29%20regarding%20National%20Offshore%20Wind%20Energy%20Policy.pdf>, last accessed January 04, 2024.

¹¹ Mercom India, MNRE Outlines Strategy for Developing Offshore Wind Projects, dated August 22, 2023, available at <https://www.mercomindia.com/mnre-strategy-developing-offshore-wind-projects>, last accessed January 05, 2024; National Institute of Wind Energy, Strategy for Establishment of Offshore Wind Energy Projects, available at <https://cdnbbsr.s3waas.gov.in/s3716e1b8c6cd17b771da77391355749f3/uploads/2023/09/202309271030958532.pdf>, last accessed January 05, 2024.

¹² Mercom India, Government to Auction First Offshore Wind Site in February 2024, dated September 28, 2023, available at <https://www.mercomindia.com/auction-first-offshore-wind-site-february-2024>, last accessed January 05, 2024

¹³ Ministry of Commerce and Industry, Special Economic Zones (Fifth Amendment) Rules, 2023, dated December 6, 2023, <https://www.a2ztaxcorp.com/wp-content/uploads/2023/12/SEZ-Fifth-Amendment-Rules-2023-06.12.2023.pdf>, last accessed January 04, 2024.

¹⁴ Madras Export Processing Zone, FAQ relating to special Economic Zones, available at <https://www.mepz.gov.in/PDFs/FAQRelatingtoSEZ.pdf>, last accessed January 05, 2024

¹⁵ Noida Special Economic Zone, FAQs on SEZ, available at <https://nsez.gov.in/Resources/SEZ%20FAQs.pdf>, last accessed January 05, 2024.

Telecommunications

Indian parliament passes Telecommunications Act, 2023

The Indian parliament passed the Telecommunications Act, 2023¹⁶ (Telecom Act), thereby providing a consolidated framework governing the development, expansion and operation of telecommunication services and telecommunication networks; possession of radio equipment and assignment of spectrum. The Telecom Act will replace and repeal the existing regulatory framework i.e., the Indian Telegraph Act, 1885 (Telegraph Act), and the Indian Wireless Telegraphy Act, 1933, Telegraph Wires (Unlawful Possession) Act, 1950. Key provisions introduced by the Telecom Act include:

- (i) **Broader definitions:** The Telecom Act contains broader definitions for “telecommunication”, “telecommunication service” and “telecommunication equipment”, which could potentially have implications for businesses or products and services that may have previously been considered as falling outside the scope of telecom regulations.
- (ii) **Spectrum:** Auctions will continue to be the primary process for assigning spectrum. However, for certain spectrum categories – such as GMPS and other satellite-based services, space research, in-flight and maritime connectivity and others that the government may notify – an administrative/non-auction process will be followed. Provisions for harmonizing, re-farming, re-assignment, sharing, trading, leasing, surrender and termination of spectrum have been introduced.
- (iii) **Right of way:** The Telecom Act consolidates and revises the existing framework for obtaining “right of way” (RoW) for telecom networks infrastructure. The revised framework has distinct provisions for public and private properties and clarifies that telecom infrastructure will be distinct from the property on which it is installed and contains provisions for, amongst others, compensation to owners of private properties and resolution of right of way-related disputes.
- (iv) **Enforcement:** The Telecom Act provides for graded civil penalties based on severity of the breach and imposes stricter penalties and punishment in case of offences (which are all cognizable and non-bailable). Civil contraventions are to be adjudicated through a three-tier system, involving an adjudicating officer and a designated appeals committee, each of which is intended to function as a digital office, followed ultimately by an appellate tribunal or court. The Telecom Act also introduces a mechanism for civil penalties to be determined and imposed based on voluntary undertakings by authorized entities.
- (v) **M&A:** The Telecom Act eases restructuring norms for telecom entities by allowing authorised entities to undertake restructuring (merger or acquisition) in accordance with the applicable laws, without explicit permission from the GoI.
- (vi) **Other highlights:**
 - *Extra-territorial application* – the Telecom Act applies to offences or contraventions outside of India as well.
 - The government can prescribe *standards and conformity measures* regarding telecom services, networks and equipment, including on matters relating to cybersecurity, encryption and data processing.

¹⁶ The Telecommunications Act, 2023, dated December 24, 2023, available at https://dot.gov.in/sites/default/files/Telecommunications%20Act%202023_1.pdf?download=1, last accessed January 04, 2024

- The government can notify certain categories of telecom services, for which the service providers would have to *verify* users through *biometric tools*.
- The Telecom Act enhances the government's powers regarding interception of telecommunication messages and also allows the government to prescribe certain measures in situations involving national security, diplomatic relations or wars, including restricting access or taking over telecom services or networks.
- The government can prescribe standards, security practices and upgradation requirements for certain telecom networks that are considered 'critical' from the perspectives of national security, economic, or public health/ safety.
- The government can create *regulatory sandboxes*, to allow testing of innovative products and services on a temporary basis through relaxations from certain regulatory requirements.
- Enhanced regulatory framework for controlling marketing messages sent to users.

Section B: General updates

In this section, we explore the latest regulatory developments, which show cases India's commitment to creating a more transparent, secure, and investor-friendly business environment.

For instance, Securities and Exchange Board of India's (SEBI) amendment to the Guidelines on Anti-Money Laundering Standards and Combating the Financing of Terrorism is a clear signal of India's resolve to align with global standards in financial integrity and security. Similarly, the Reserve Bank of India's (RBI) new directives for non-banking financial companies reflect a nuanced approach to regulation, catering to the diverse landscape of India's financial sector.

These examples, among others, highlight India's ongoing efforts to refine its regulatory framework, making it an increasingly attractive destination for global investors and businesses seeking a dynamic and secure market.

SEBI

Amendment to the Guidelines on Anti-Money Laundering (AML) Standards and Combating the Financing of Terrorism (CFT)

SEBI amended the AML/ CFT rules for securities market intermediaries in India in October, 2023.¹⁷ The key changes are:

- (i) financial groups must take additional steps to manage money laundering/ financing terrorism risks, in situations where the host country does not allow proper implementation of AML/ CFT measures in line with India's requirements; and
- (ii) additional guidelines were introduced to help securities market intermediaries determine the beneficial ownership and control of their clients.

Earlier, SEBI had notified amendments to the Guidelines on AML Standards and CFT/Obligations of Securities Market Intermediaries pursuant to the Prevention of Money Laundering (Maintenance of Records) Amendment Rules 2023. We had discussed such amendments in the previous edition of the newsletter which is available at <https://induslaw.com/publications/pdf/alerts-2023/korea-newsletter-apr-jun-twenty-twenty-three.pdf>.

Revised framework for fund raising by issuance of debt securities by large corporates

SEBI issued a revised framework for fund raising by issuance of debt securities by large corporates (LCs).¹⁸ Under the SEBI regulations, LCs are required to raise 25% (twenty-five percent) of their 'qualified borrowings' i.e., incremental borrowings, by issuance of debt securities. LCs under the

¹⁷ Securities and Exchange Board of India, Amendment to the Guidelines on Anti-Money Laundering (AML) Standards and Combating the Financing of Terrorism (CFT) /Obligations of Securities Market Intermediaries under the Prevention of Money-laundering Act, 2002 and Rules framed there under, dated October 13, 2023, available at <https://www.sebi.gov.in/legal/circulars/oct-2023/amendment-to-the-guidelines-on-anti-money-laundering-aml-standards-and-combating-the-financing-of-terrorism-cft-obligations-of-securities-market-intermediaries-under-the-prevention-of-money-laund-77975.html>, last accessed November 12, 2023.

¹⁸ Securities and Exchange Board of India, Ease of doing business and development of corporate bond markets - revision in the framework for fund raising by issuance of debt securities by large corporates (LCs), dated October 19, 2023, available at, <https://www.sebi.gov.in/legal/circulars/oct-2023/ease-of-doing-business-and-development-of-corporate-bond-markets-revision-in-the-framework-for-fund-raising-by-issuance-of-debt-securities-by-large-corporates-lcs-78237.html>, last accessed November 12, 2023.

present framework include listed entities (excluding banks) that have long-term borrowing of more than approximately USD 12 (twelve) million.

The revised guidelines have raised this qualifying threshold to USD 120 (one hundred and twenty) million. Further the following categories of borrowings will be excluded from calculation of long-term borrowings:

- (i) external commercial borrowings;
- (ii) inter-corporate borrowings involving a holding company and/or subsidiary or associate companies;
- (iii) grants, deposits or other funds received as per guidelines of the GoI;
- (iv) borrowings arising on account of interest capitalization; and
- (v) borrowings for scheme of arrangements.

The framework will be applicable with effect from January 01, 2024, or April 01, 2024, depending on whether the LC follows the calendar year or the financial year in their accounting practices.

Revision in manner of achieving minimum public unitholding requirement for Infrastructure Investment Trusts (InvITs)

In October, 2023, SEBI released a circular permitting listed InvITs to utilize an additional method i.e., issuance of units through preferential allotment to public investors, to achieve public unitholding requirements.¹⁹ As per the SEBI regulations, all listed InvITs are mandated to ensure that their public unit-holding is at least 25% (twenty five percent) within a period of 3 (three) years from the date of listing, pursuant to the initial offer.²⁰ In June 2023, SEBI had notified certain suggested methods which could be adopted by the InvITs to achieve the minimum threshold including issuance of units to public (or offer for sale of units to the public) through offer documents, rights issue to public unit holders, bonus issue to public unit holders, offer for-sale where the sponsor, manager, or related parties can offer their units to the public etc.²¹

We had discussed the original notification by SEBI prescribing methods to fulfil public unitholding requirements for InvITs in the previous edition of our newsletter available at <https://induslaw.com/publications/pdf/alerts-2023/korea-newsletter-apr-jun-twenty-twenty-three.pdf>.

Framework for dealing with unclaimed amounts lying with Real Estate Investment Trusts (REITs), InvITs, and listed entities having non-convertible securities and manner of claiming amounts by investors

SEBI issued a detailed procedure on November 08, 2023, for dealing with unclaimed amounts and subsequent transfer of the same to the investor by REITs, InvITs, and listed entities (Entity/ies) with

¹⁹ Securities and Exchange Board of India, Revision in manner of achieving minimum public unitholding requirement – Infrastructure Investment Trusts (InvITs), dated October 31, 2023, available at <https://www.sebi.gov.in/legal/circulars/oct-2023/revision-in-manner-of-achieving-minimum-public-unitholding-requirement-infrastructure-investment-trusts-invits-78561.html>, last accessed November 12, 2023

²⁰ Securities and Exchange Board of India, SEBI (Infrastructure Investment Trusts) Regulations, 2014 [Last amended on March 6, 2017], dated April 18, 2017, available at <https://www.sebi.gov.in/legal/regulations/apr-2017/sebi-infrastructure-investment-trusts-regulations-2014-last-amended-on-march-6-2017-34691.html>, last accessed November 12, 2023

²¹ Securities and Exchange Board of India, Manner of achieving minimum public unitholding – InvITs, dated June 27, 2023, available at <https://www.sebi.gov.in/legal/circulars/jun-2023/manner-of-achieving-minimum-public-unitholding-invits-73149.html>, last accessed November 12, 2023

non-convertible securities.²² The framework which shall become effective from March 01, 2024 lays down the procedural framework for dealing with unclaimed amounts which includes appointment of a nodal officer by the Entities, steps for transfer of unclaimed amounts to an escrow account and subsequently to the investor protection and education fund. It also outlines other obligations of the managers and Entities, interest applicable in case of default by such entities, and other compliances applicable to the entities such as publication of details of transferred unclaimed amounts on the website of the Entity and formulation of policy by Entities specifying the process to be followed by unitholders for claiming their unclaimed amounts.

RBI

Master Direction – RBI (Non-Banking Financial Company – Scale Based Regulation) Directions, 2023

The RBI introduced a revised framework for non-banking financial companies (NBFCs) through the scale based regulation framework (SBR Framework) on October 19, 2023.²³ The major change that has been brought by this introduction is with regard to the categorization of NBFCs. Earlier, NBFCs were divided into systemically important and non-systemically important. However, the RBI has introduced a layer-based classification creating base, middle, upper, and top layers. This categorization was earlier introduced by the RBI in October 2022, however no harmonization of such division was undertaken with the pre-existing NBFC framework. To simplify this, the RBI issued the SBR Framework aiming to consolidate regulations for NBFCs, bringing clarity to compliance requirements and ensuring a consistent and transparent framework for NBFCs of different scales. Even though the SBR Framework is majorly aligned with previously prescribed regulations, it has reportedly brought in much awaited clarity by clarifying the regulatory regime applicable to NBFCs on the basis of asset size and activity. The categorization will work as follows:

- (i) **Base Layer:** This includes non-deposit-taking NBFCs with assets below approximately USD 120 (one hundred and twenty) million engaged in specific activities, including NBFC-peer peer lending platforms, NBFC-account aggregators, non-operative financial holding companies, and NBFCs without public funds and no customer interface.
- (ii) **Middle Layer:** Encompasses deposit-taking NBFCs, non-deposit-taking NBFCs with assets of approximately USD 120 (one hundred and twenty) million and above, and certain other categories.

²² SEBI, Circular no. SEBI/HO/DDHS/DDHS-RAC-1/P/CIR/2023/176, Procedural framework for dealing with unclaimed amounts lying with entities having listed non-convertible securities and manner of claiming such amounts lying with REITs and manner of claiming such amounts by unitholders dated November 08, 2023, available at https://www.sebi.gov.in/legal/circulars/nov-2023/procedural-framework-for-dealing-with-unclaimed-amounts-lying-with-real-estate-investment-trusts-reits-and-manner-of-claiming-such-amounts-by-unitholders_78992.html; SEBI, Circular no. SEBI/HO/DDHS/DDHS-RAC-1/P/CIR/2023/177, Procedural framework for dealing with unclaimed amounts lying with REITs and manner of claiming such amounts by unitholders dated November 08, 2023, available at https://www.sebi.gov.in/legal/circulars/nov-2023/procedural-framework-for-dealing-with-unclaimed-amounts-lying-with-infrastructure-investment-trusts-invt-and-manner-of-claiming-such-amounts-by-unitholders_78990.html; SEBI, Circular no. SEBI/HO/DDHS/DDHS-RAC-1/P/CIR/2023/176, Procedural framework for dealing with unclaimed amounts lying with entities having listed non-convertible securities and manner of claiming such amounts by investors dated November 08, 2023, available at https://www.sebi.gov.in/legal/circulars/nov-2023/procedural-framework-for-dealing-with-unclaimed-amounts-lying-with-entities-having-listed-non-convertible-securities-and-manner-of-claiming-such-amounts-by-investors_78988.html, last accessed on December 8, 2023.

²³ Reserve Bank of India, Master Direction – Reserve Bank of India (Non-Banking Financial Company – Scale Based Regulation) Directions, 2023, dated October 19, 2023, available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/106MDNBFCs1910202343073E3EF57A4916AA5042911CD8D562.PDF>, last accessed November 12, 2023.

- (iii) Upper Layer: Identified based on specific parameters and scoring methodology, housing the top ten eligible NBFCs in terms of asset size.
- (iv) Top Layer: Ideally vacant, this layer may be populated if certain NBFCs in the upper layer pose substantial systemic risks.

Private sector banks and wholly owned subsidiaries of foreign banks to have 2 (two) whole time directors on its board.

Following directions issued by the RBI in October 2023,²⁴ all private sector banks and wholly-owned subsidiaries of foreign banks (excluding payments banks and local area banks) in India need to have at least 2 (two) whole-time directors (including the managing director and chief executive officer) on their boards. According to the RBI, these measures are necessary to have effective senior management to help navigate the growing complexities of the banking sector and facilitate succession planning. Banks that currently do not meet the minimum requirement as above are advised to submit their proposals for the appointment of whole-time directors by February 2024. Banks that do have enabling provisions regarding appointment of whole-time directors in their articles are required to apply for necessary approvals under the Banking Regulation Act, 1949 for making such changes in their articles.

Regulation of cross border payment aggregators

In October 2023, the RBI issued a new regulatory framework for payment aggregators of Cross Border transactions (PA-CBs)²⁵ which shall govern all payment system providers and participants including Authorized Dealer Category-I Banks (AD Banks) engaged in processing cross border transactions of import/ export of good and services. In March 2020, the RBI issued guidelines on regulation of domestic payment aggregators (Domestic PA framework),²⁶ however, this domestic regulation framework did not apply to cross-border payments for import-export transactions.

Key changes in the regulatory framework governing PA-CBs include:

- (i) Authorization- While AD Banks do not require separate approval for undertaking PA-CB activity, non-banks providing PA-CB services are required to obtain authorization from the RBI for facilitating such transactions by April 30, 2024. A single authorization is required by non-banks to undertake activities of payment aggregator and PA-CB. As a pre-requisite to seeking authorization, all non-bank PA-CBs which exist as of October 2023 are required to register themselves with the financial intelligence unit-India.
- (ii) Classification: Authorization for PA-CB activity can be sought under the categories of (i) export only PA-CB; (ii) import only PA-CB; or (iii) export and import PA-CB. However, a PA-CB can change its authorized category by informing the RBI and department of payment and settlements systems, prior to commencement of new business.
- (iii) Minimum capital: Operational PA-CBs are required to maintain a minimum net-worth of approximately USD 1.8 (one point eight) million at the time of filing the application and are expected to increase such net-worth to approximately USD 3 (three) million by March 31, 2026. Similarly new PA-CBs are required to maintain a net-worth of USD 1.8 (one point eight) million at

²⁴ Reserve Bank of India, Appointment of Whole-Time Director(s), dated October 25, 2023, available at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12551&Mode=0>, last accessed November 12, 2023.

²⁵ Reserve Bank of India, Regulation of Payment Aggregator – Cross Border (PA-Cross Border), dated October 31, 2023, available at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12561&Mode=0>, last accessed November 12, 2023

²⁶ Reserve Bank of India, Guidelines on Regulation of Payment Aggregators and Payment Gateways (Updated as on November 17, 2020), dated March 17, 2020, available at <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11822&Mode=0>, last accessed November 12, 2023

the time of filing the application and are expected to increase such net-worth to approximately USD 3 (three) million by the end of the third year of grant of authorization.

- (iv) **Transaction protocols and compliance framework:** PA-CBs are required to ensure compliance with guidelines on governance, merchant on-boarding, customer grievance redressal and dispute management framework, baselines technology recommendations, security, fraud prevention and risk management framework as outlined in the Domestic PA framework. Further, the regulations specify that the maximum value per unit of goods/ services sold/ purchased can be approximately USD 30,000 (thirty thousand).
- (v) **Trade accounts:** Import only PA-CB and export-only PA-CB are required to maintain separate import collection account and export collection account with an AD bank respectively. An export and import PA-CB is required to maintain both such accounts.
- (vi) **Compliance:** Compliance requirements include thorough customer due diligence, adherence to KYC procedures, and strict adherence to foreign trade policies. Entities engaged in both domestic Payment Aggregator (PA) and cross-border PA-CB activities must adhere to regulatory stipulations by maintaining distinct import collection and export collection accounts, ensuring separation from the escrow account designated for domestic PA activities.

Inclusion of sovereign green bonds under the fully accessible route (FAR) for investment by NRIs

The RBI has allowed investments by non-residents in sovereign green bonds (green bonds that are fixed-interest bearing financial instruments issued by RBI, the proceeds of which are invested in environmental projects like wind, solar, hydropower etc.) issued by the GoI under FAR.²⁷ Non-residents will now be able to invest in sovereign green bonds without any restrictions that are typically applicable to non-residents, such as a limit on investments.

RBI notifies the Master Direction on Information Technology Governance, Risk, Controls and Assurance Practices

RBI recently finalised the “Master Direction on Information Technology Governance, Risk, Controls and Assurance Practices” to incorporate, consolidate, and update the guidelines, instructions, and circulars on information technology (IT) governance, risk, controls, assurance practices, and business continuity and disaster recovery management.²⁸ Regulated entities, including banks, NBFCs, financial institutions and credit information companies (except local area banks and core investment company NBFCs), have to institute robust frameworks for both: (i) IT governance; and (ii) IT service management, with effect from April 1, 2024. The IT governance framework must specify the governance structure and processes that are necessary to meet the entity's business and strategic objectives and include roles and responsibilities of the board of directors and senior management. The IT service management framework is to be used for managing IT operations while ensuring effective division of duties between concerned personnel for ensuring operational resilience.

²⁷ Reserve Bank of India, ‘Fully Accessible Route’ for Investment by Non-residents in Government Securities, dated November 8, 2023, available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOT818EC8E91B0A0844F49136B67D7D99A58E.PDF>, last accessed on December 8, 2023.

²⁸ Reserve Bank of India, Master Direction on Information Technology Governance, Risk, Controls and Assurance Practices, dated November 7, 2023, available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/107MDITGOVERNANCE3303572008604C67AC25B84292D85567.PDF>, last accessed on December 8, 2023.

RBI regulates investments in alternative investment funds (AIFs) for lenders²⁹

With effect from December 2023, banks, non-banking financial companies and other regulated financial institutions are not permitted to invest in any AIF that has a direct or indirect downstream investment in a company that has borrowed funds from them.

This change has been introduced by the RBI reportedly to curb a specific technique of 'evergreening', where the financial institution manages to have its loans repaid by investing in an AIF that provides the funds to the borrower company to repay the original loan.

Arbitration

Arbitration agreement can bind non-signatories

A constitution bench of the Supreme Court of India in *Cox and Kings Ltd v. SAP India Pvt. Ltd.*³⁰ has clarified that an arbitration agreement can bind non-signatories, endorsing the 'group of companies' doctrine. The judgment, delivered by a 5 (five) judge bench, emphasized the importance of the doctrine in interpreting the parties' intentions, particularly in intricate transactions involving multiple entities and agreements. The court ruled that an arbitration agreement is not restricted to signatories alone, and accordingly, even the non-signatories to the arbitration agreement can be parties to the arbitration agreement. The 'group of companies' doctrine was acknowledged as a valuable tool for understanding the common intention of parties in complex transactions and to identify the real parties to the dispute. The court also emphasized that at the referral stage, it must be left to the arbitral tribunal to decide whether non-signatories are bound by the arbitration agreement.

Unstamped Arbitration Agreements are enforceable³¹

In a landmark judgement, a 7 (seven) judge bench of the Supreme Court of India (Supreme Court) held that arbitration agreements that are unstamped or insufficiently stamped are not rendered void or void ab initio or unenforceable. This issue was previously adjudicated upon by the Bombay High Court in 2020 and a 3 (three) judge bench of the Supreme Court in 2021 where it was referred to a 5 (five) judge bench of the Supreme Court.

Overruling the judgement of the 5 (five) judge bench in the case of *M/s N.N. Global Mercantile Private Limited v. M/s Indo Unique Flame Ltd*, the Supreme Court in the case also held that objections relating to stamping do not fall for the determination of courts at the stage of reference under the Arbitration and Conciliation Act, 1996 (Arbitration Act) and must be left to the determination of the arbitral tribunal. The court further clarified that courts are not required to deal with the issue of stamping while deciding an application for interim reliefs under the Arbitration Act.

This judgment seeks to harmonize the provisions of the Indian Stamp Act, 1899 and the Arbitration Act, categorically placing stamping issues within the purview of arbitral tribunals rather than the courts. The decision aligned with the overarching principles of minimal judicial intervention, kompetenz-kompetenz (arbitrators' authority to rule on their jurisdiction), and the doctrine of separability, emphasizing the autonomy and efficiency of the arbitral process.

²⁹ Reserve Bank of India, Investments in Alternate Investment Funds (AIFs), dated December 19, 2023, available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT9051F8256D79234D5FA6D4E4CBD029E16D.PDF>, last accessed on January 02, 2024.

³⁰ *Cox and Kings v SAP India Private Limited & Anr.*, Arbitration Petition (Civil) No. 38 of 2020, Judgment dated December 6, 2023

³¹ *In Re, Interplay Between Arbitration Agreements Under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*, Curative Petition (C) No. 44 of 2023

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