



Fintech landscape and initiatives

General innovation climate

What is the general state of fintech innovation in your jurisdiction?

India has been the hub of fintech innovation over the past few years and reports suggest there are over 2,000 fintech start-ups at present in the country.

India is the world's second most populous country but a large percentage of the population has yet to take the benefit of true financial inclusiveness. Fintech companies have a unique opportunity to collaborate finance and technology to offer more effective financial solutions than traditional institutions.

Fintech innovation is taking place across various industry verticals, which include banking, payments, insurance, asset management, brokerage, etc. Fintech companies also focus on machine learning that analyses customer expectations and matches them with appropriate services.

With the advent of Aadhaar, a biometric-based identification project, the government can directly transfer subsidy-based payments to the bank accounts of holders without any third-party intervention. Aadhaar is also being used to meet know-your-customer (KYC) requirements in a cost-effective manner. However, a recent Supreme Court ruling over fears of privacy breaches of data with Aadhaar has derailed many fintech companies relying on the Aadhaar database for their businesses, and the law is in the process of being amended to resolve this issue.

Government and regulatory support

Do government bodies or regulators provide any support specific to financial innovation? If so, what are the key benefits of such support?

The Reserve Bank of India (RBI) set up an inter-regulatory working group to look into the granular aspects of fintech and its implications so as to review the regulatory framework and to respond to the dynamics of the rapidly evolving scenario of the market concerned. The working group recommended the introduction of an appropriate framework for a regulatory sandbox and to provide an environment for developing fintech innovations and testing applications and application programming interfaces (APIs) developed by banks and fintech companies. The draft regulatory sandbox regulations were released for public comments in April 2019. Although introducing a regulatory sandbox is in the right direction, the eligibility criteria are quite strict and may not entertain too much enthusiasm from entities in this area.

The government has over the past few years opened no-frills bank accounts for the majority of people without access to formal banking. This has given direct access to millions of Indians to formal banking solutions.

Financial regulation

Regulatory bodies

Which bodies regulate the provision of fintech products and services?

There is no universal regulatory body for fintech entities in India. Depending on the product or service offered by the entity, the regulatory body governing such vertical would regulate those specific entities. By and large fintech products and services can be considered to fall under the purview of the following regulators:

- the RBI;
- the Securities Exchange Board of India (SEBI);
- the Ministry of Electronics and Information Technology (MEITY);
- the Ministry of Corporate Affairs; and
- the Insurance Regulatory and Development Authority of India (IRDAI).

However, the RBI currently regulates the majority of fintech companies dealing with account aggregation, peer-to-peer (P2P) lending, cryptocurrencies, payments, etc.

Regulated activities

Which activities trigger a licensing requirement in your jurisdiction?

Indian law regulates various types of financial services. Advisory work relating to investments in Indian securities requires a licence as an investment adviser. Certain types of investment banking, such as assisting private companies in obtaining funding, are considered to be outside the scope of the licence. There are also licensed merchant bankers - for example, making a public issue on the stock exchanges or a public offer under the Takeover Code would need the support of a registered merchant banker. There are different categories of merchant bankers and the functions of each level of category vary. There are other categories of agencies that require a licence, such as custodians, stock brokers, underwriters, portfolio managers, credit rating agencies, foreign institutional investors, venture capital funds, depositories and stock exchanges.

There are various categories of institutions that can engage in lending. These are banks that include scheduled commercial banks and non-scheduled commercial banks, cooperative society banks, small finance banks, non-banking financial companies (NBFCs) and money lenders. As regards deposits, there are various categories of institutions that can receive deposits. These are banks that include scheduled commercial banks and non-scheduled commercial banks, cooperative society banks, small finance banks, NBFCs that are authorised to receive deposits and payment banks. There is also the concept of a chit fund, which receives contributions from members and periodically conducts a lottery to pay the winner. Post offices can also receive deposits. There is a provident fund that is a pension scheme operated by the government. Mutual funds are also regulated.

Factoring can be undertaken by banks, NBFCs registered as factors with the RBI and certain other government entities.

Invoice discounting can be undertaken by banks, NBFCs and corporates.

Bonds and debentures can be listed on stock exchanges as public offerings. Syndications of loans are generally not regulated unless they are converted into securitised instruments.

Payment services are also regulated and are particularly relevant to fintech (see question 12).

Entities in India can deal in foreign exchange trading only with permitted stock exchanges and banks in India. Other entities such as fully fledged money changers are also permitted to deal with foreign exchange. Note that Indian residents are not permitted to trade in foreign exchange through overseas trading platforms.

Consumer lending

Is consumer lending regulated in your jurisdiction?

Yes, consumer lending is regulated. There are various types of institutions that are entitled to engage in consumer lending. These are banks that include scheduled commercial banks and non-scheduled commercial banks, NBFCs, cooperative society banks, small finance banks, microfinance institutions and moneylenders. Regulations require lending agencies to maintain standards relating to capital adequacy, prudential norms, cash reserve ratio, statutory liquidity ratio, credit ceiling, KYC guidelines, etc, although each of these norms would apply to each category of lending agency in a different manner. Each agency plays a different role in terms of the type of lending and the kind of borrower. For example, infrastructure NBFCs can extend credit facilities to entities in the transport, energy, water and sanitation, and communication sectors. Loans and advances of up to 2.5 million rupees are required to constitute at least 50 per cent of the loan portfolio of small finance banks.

Secondary market loan trading

Are there restrictions on trading loans in the secondary market in your jurisdiction?

Issuance and listing of debt securities and public offer and listing of securitised debt instruments are regulated in India. Trading of debt securities and securitised debt instruments in the secondary market is permitted after the debt securities or securitised debt instruments are listed on a recognised stock exchange.

Asset reconstruction companies or securitisation companies are permitted to securitise the acquired debt and sell the securitised debt only to qualified institutional buyers, which include banks, insurance companies and foreign institutional investors.

Risk participation, either funded or unfunded, is unregulated in India, and banks and NBFCs rarely enter into domestic risk participation transactions.

Collective investment schemes

Describe the regulatory regime for collective investment schemes and whether fintech companies providing alternative finance products or services would fall within its scope.

There are several categories of collective investment schemes. These are broadly mutual funds, alternative investment funds (AIFs) and collective investment schemes, all of which are required to be registered with SEBI. Mutual funds are primarily focused on listed equity and debt instruments and anyone can participate in a mutual fund. AIFs are primarily focused on unlisted instruments and primarily institutional investors invest in AIFs due to a significant minimum investment by an investor. The regulations on collective investment schemes cover all other forms of collective investment schemes. The regulations are extremely stringent on collective investment management companies; for example, there are requirements for rating, insurance, appraisal, schemes to be closed-ended, no guaranteed returns and restrictions on advertising material. Units subscribed to collective investment schemes are freely transferable. A fintech company would need to be registered as a collective investment management company to deal with collective investment schemes. However, alternative finance services such as P2P or marketplace lenders would not fall under the ambit of collective investment schemes. There are separate regulations governing these services, which a fintech company would have to comply with, as further explained in questions 9 and 10.

Alternative investment funds

Are managers of alternative investment funds regulated?

Yes, managers of AIFs are regulated. There are requirements as to their qualifications and minimum years of experience. The manager or sponsor of an AIF is also required to have a minimum investment in the fund of not less than 2.5 per cent or 50 million rupees, whichever is lower. There are requirements relating to disclosure of their investments.

Peer-to-peer and marketplace lending

Describe any specific regulation of peer-to-peer or marketplace lending in your jurisdiction.

The RBI is the authority that regulates P2P lending in India. All P2P lending platforms are required to be registered with the RBI as an NBFC. The eligibility requirements for a company to register as a P2P lending platform include, among other things:

- a minimum capital of 20 million rupees;
- that the company applying for registration is incorporated in India;
- a robust and secure information technology system must be in place;
- there must be a viable business plan; and
- promoters and directors must fulfil the fit and proper criteria laid down by the RBI.

While many analysts have cheered the step taken by the RBI to regulate the P2P industry, the regulations themselves are extremely stringent with respect to the scope of activities that can be undertaken by these entities. For example:

- P2P lending can only be done on an unsecured basis;
- loan maturity is capped at 36 months;
- there is a limit of 50,000 rupees regarding exposure between the same lender and borrower;

- there is a limit of 1 million rupees regarding exposure of a lender or borrower across all P2P lending platforms; and
- there must be quarterly reporting to the RBI.

Crowdfunding

Describe any specific regulation of crowdfunding in your jurisdiction.

To the extent that crowdfunding involves investments in equity or debt instruments, these would be regulated by company or securities law. A private company cannot access capital from the public and cannot have more than 200 shareholders. It also cannot accept deposits from the public. A public company would need to follow primary market processes for equity or debt funding. There are no regulations that deal directly with crowdfunding. For other types of funding, that is, those that are not debt or equity based, the law is not settled at the moment as all kinds of crowdfunding could be considered ‘deposits’. We believe that crowdfunding that can be justified as an advance against purchase of a product would be permitted in India. For P2P lending to the extent that it is a type of crowdfunding, see question 9.

Invoice trading

Describe any specific regulation of invoice trading in your jurisdiction.

To enhance the ease of financing micro, small and medium-sized enterprises in India, the RBI has provided its approval to three companies to set up invoice discounting platforms. The Trade Receivables Discounting System (TReDS) is a fintech platform where financiers discount invoices due by corporates, government entities, etc. TReDS would need to have a minimum paid-up capital of 250 million rupees and entities, other than the promoters, are not permitted to maintain shareholding in excess of 10 per cent in TReDS.

Payment services

Are payment services regulated in your jurisdiction?

Yes, payment services are regulated under the Payment and Settlement Systems Act 2007. A payment system is defined as ‘a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement service or all of them, but does not include a stock exchange’. These include credit cards, debit cards, smart cards and money transfers. Any entity interested in commencing a payment system is required to obtain authorisation from the RBI.

The categories of payment providers are prepaid payment instruments, financial market infrastructure (clearing houses), retail payment organisations, card payment networks (Visa, MasterCard, etc), cross-border money transfers, ATM networks, white-label ATM operators, instant money transfer and prepaid payment instruments. There are three types of prepaid payment instruments:

- open payment instruments, which are payment instruments that can be used to make a payment to any merchant;
- semi-closed, which are payment instruments that can be used to make payment to a defined set of merchants; and
- closed, which are payment instruments of a merchant for payment only to that merchant.

Open payment instruments can be issued only by banks. Cash withdrawal is permitted only in the case of open payment instruments. Only closed payment instruments do not require registration under the regulations.

After the overnight demonetisation of the 500 rupee and 1,000 rupee notes in circulation on 8 November 2016, digital payments have seen huge traction in the country. At the forefront of this traction are e-wallets, where it is believed that e-wallet transactions have increased 40 times in the past five years. E-wallets are frequently used for online purchase of goods and services. E-wallets have also gained popularity because of the requirement of a second authentication (such as Visa Verify or MasterCard Secure Code) for ‘card not present’ credit card and debit card transactions. This is difficult for services such as Uber. Accordingly, customers use payment wallets that allow for automatic debit without the need for a second authentication.

Open banking

Are there any laws or regulations introduced to promote competition that require financial institutions to make customer or product data available to third parties?

The laws regarding disclosure of customer data to third parties are not very well established in India. Banks are required to adhere to the guidelines on information security, electronic banking, technology risk management and cyber fraud issued by the RBI to ensure data protection of customers. Under normal circumstances, disclosure of customer data requires prior written approval from the customer. This is usually obtained in the account opening forms or provided for in the terms and conditions. As per the current legal framework, financial institutions are only obligated to share this information where the disclosure is required by a court of law or where the disclosure is necessary for government agencies mandated under law to procure such information.

Insurance products

Do fintech companies that sell or market insurance products in your jurisdiction need to be regulated?

Selling and marketing of insurance products is regulated in India. The statutory authority regulating insurance products in India is IRDAI. An insurer is required to justify the premium amount and terms and conditions of the insurance policy to be offered to customers to IRDAI. A fintech company cannot offer any insurance product for sale unless the fintech company is duly certified by IRDAI.

IRDAI has also issued guidelines on advertisement, promotion and publicity of insurance companies and insurance intermediaries. Fintech companies would need to comply with these guidelines with respect to marketing insurance products.

Credit references

Are there any restrictions on providing credit references or credit information services in your jurisdiction?

Companies carrying on the business of credit information services are regulated under the Credit Information Companies (Regulation) Act 2005. As per the provisions of the Act, every such company must obtain a certificate of registration from the RBI. Credit information companies are required to have a minimum issued capital of 200 million rupees. The RBI has set up a Central Repository of Information Large Credits to collect, store and disseminate credit data to lenders. Under the Insolvency and Bankruptcy Code 2016, information utilities have been set up where all credit information is required to be reported by lenders and borrowers.

Cross-border regulation

Passporting

Can regulated activities be passported into your jurisdiction?

No, India does not allow passporting of regulated activities; that is, a financial service provider registered in one country is not entitled to engage in regulated financial services in India purely based on registration in a foreign jurisdiction and would need to obtain registration separately in India.

Requirement for a local presence

Can fintech companies obtain a licence to provide financial services in your jurisdiction without establishing a local presence?

By and large, this would be difficult as obtaining a licence for a regulated financial service is available only to agencies incorporated in India, or in the case of banks, having a presence in India. It is possible for a fintech company outside India to provide services outside India to Indian nationals, especially for investments outside India. However, the scope for this is limited because exchange control restrictions may come in the way of making payments outside India for services rendered.

Sales and marketing

Restrictions

What restrictions apply to the sales and marketing of financial services and products in your jurisdiction?

Rules on marketing materials for financial services are fairly limited. Information in prospectus and letters of offer for public and public offers respectively are regulated. The RBI also requires financial companies to use only registered telemarketers for telemarketing activity. See question 14 for regulations regarding sale and marketing of insurance products.

Change of control

Notification and consent

Describe any rules relating to notification or consent requirements if a regulated business changes control.

Most regulated entities require prior notification or consent for change in control. For NBFCs, including P2P entities and account aggregators, prior RBI approval is required for a change beyond 26 per cent shareholding. For banks, RBI approval is required for foreign investment beyond 49 per cent shareholding. Foreign investment in banks is capped at 74 per cent. For insurance companies, prior RBI approval is required when the transferee's shareholding is likely to exceed 5 per cent shareholding of the insurance company, and if a transferor intends to transfer more than 1 per cent of its shareholding of the insurance company. For prepaid payment instrument entities, any takeover, acquisition or change in management should be communicated to the RBI within 15 days.

Financial crime

Anti-bribery and anti-money laundering procedures

Are fintech companies required by law or regulation to have procedures to combat bribery or money laundering?

India has a law on the prevention of corruption that penalises corrupt practices. There are no requirements on framing policies or conducting training.

The Prevention of Money Laundering Act 2002 prescribes strict criminal penalties on entities indulging in money laundering. It covers involvement with or concealment, possession, acquisition or use of proceeds of a claim or projecting or claiming such proceeds as untainted property.

The RBI has also prescribed stringent KYC norms, anti-money laundering standards and guidelines on combating the financing of terrorism to be adhered to by all banks, NBFCs, payment system operators, e-wallet companies, etc.

Companies or exchanges dealing with digital currencies are not regulated in India, other than as described in question 28.

Guidance

Is there regulatory or industry anti-financial crime guidance for fintech companies?

India has fairly detailed laws with regard to the prevention of money laundering, KYC requirements, insider trading and combating financing of terrorism. Depending on the services provided by the fintech companies, they may be governed by some or all of these regulations. There is also a heightened awareness of identity fraud and most financial institutions require a much higher level of identity proof from customers than is the case in many developing countries. Given the slow court process and inefficiencies of the investigative agencies, financial institutions also resort to a high level of protection compared with developed countries, such as through higher security cover, undated cheques, bank guarantees, personal guarantees and the appointment of nominee directors. Fintech companies would need to consider the optimal mix of these options to balance obtaining sufficient protection with ensuring business efficiency.

Peer-to-peer and marketplace lending

Execution and enforceability of loan agreements

What are the requirements for executing loan agreements or security agreements? Is there a risk that loan agreements or security agreements entered into on a peer-to-peer or marketplace lending platform will not be enforceable?

Loan agreements and security agreements are required to be executed in accordance with the constitutional documents of the entity and the corporate authorisations executed by the entity. Under Indian laws, a mortgage deed, that is, relating to immovable property, is executed by the mortgagor, attested by two witnesses and registered with the relevant land registry. Most security arrangements involving immovable property relate to mortgage by deposit of title deeds. A mortgage by deposit of title deeds or an equitable mortgage would encompass a declaration provided by the mortgagor and a memorandum of entry in the records of the mortgagee that records the deposit of title deeds. There are other various formalities to ensure perfection of the security documents. This includes filing a form with the company registry and registration of the charge with a central registry for security interest.

As long as the P2P lending contracts are properly executed, they would be enforceable. While Indian law broadly allows electronic contracts, a key issue relates to stamp duty. Indian state governments are yet to introduce digital stamping of documents. There is therefore likely to be a need for physical contracts to be printed and stamped to comply with laws on stamp duty and in order for such contracts to be enforceable.

Assignment of loans

What steps are required to perfect an assignment of loans originated on a peer-to-peer or marketplace lending platform? What are the implications for the purchaser if the assignment is not perfected? Is it possible to assign these loans without informing the borrower?

While there are some distinctions between assignment of rights versus obligations under a contract, it is preferable to state expressly in the contract whether the rights and obligations under the contract can be assigned, with or without the consent of the other party. A notice on the assignment to the counterparty is required in certain instances and is generally considered to be good practice.

There are certain contracts under which assignment is prohibited. Contracts where personal skill or qualifications are involved cannot be assigned. This primarily stems from common law.

It should also be noted that the assignor and the assignee may have to bear significant stamp duty on the assignment. If a document is not duly stamped, the document will not be admissible as evidence in court.

P2P lending platforms will be required to adhere to the same method of assignment as described above.

Under Indian law, for assignment of actionable claims, the assignment is required to be executed by an instrument in writing by the assignor in favour of the assignee. A notice of the assignment to the borrower is necessary to make the assignment binding against the borrower. For example: A owes money to B, who transfers the right to receive the dues to C; B then demands the debt from A, who, not having received notice of the transfer, pays B; the payment is valid, and C cannot sue A for the debt.

Securitisation risk retention requirements

Are securitisation transactions subject to risk retention requirements?

The transferor transfers the risk of the underlying asset to the transferee. It is not necessary for the transferor to retain the risk from the underlying asset. This is usually negotiated and specifically agreed to during the transfer.

Securitisation confidentiality and data protection requirements

Is a special purpose company used to purchase and securitise peer-to-peer or marketplace loans subject to a duty of confidentiality or data protection laws regarding information relating to the borrowers?

Under Indian banking laws, there is a central register maintained by the regulator relating to security being provided by borrowers. This register is accessible by any person upon payment of the prescribed fees.

Outside this law, general laws on data protection and privacy would apply and a duty of confidentiality would apply. The law provides for payment of compensation on failure to exercise reasonable security practices and procedures to protect sensitive personal data or information (which includes financial information) that results in wrongful loss or gain, and a criminal penalty for disclosure of personal information in breach of contract or without consent of the data subject where such breach is done with the intention of or knowing that it is likely to result in wrongful loss or wrongful gain.

Artificial intelligence, distributed ledger technology and crypto-assets

Artificial intelligence

Are there rules or regulations governing the use of artificial intelligence, including in relation to robo-advice?

SEBI, which regulates all public listed securities, has recently directed all fund houses and asset management companies to report with SEBI all artificial intelligence and machine learning applications and systems offered and used by mutual funds. SEBI intends to conduct a survey and create an inventory of the robo-advice landscape in the Indian financial markets to gain an in-depth understanding of the adoption of such technologies in the markets and to ensure preparedness for any robo-advice policies that may arise in the future. SEBI also wants to ensure that any advertised financial benefit owing to these technologies in investor facing financial products should not constitute to misrepresentation.

Distributed ledger technology

Are there rules or regulations governing the use of distributed ledger technology or blockchains?

There are no legal or regulatory rules currently in place in relation to the use of distributed ledger technology in India. The RBI has recently formally acknowledged blockchain technology and is exploring ways to further use this technology in financial transactions.

In 2015, the RBI released a Financial Stability Report detailing the possible impact of blockchain technology. The report recognises the need for the regulators and authorities to keep pace with developments, as many of the world's largest banks are said to be supporting a joint effort to set up a 'private blockchain' and build an industry-wide platform for standardising the use of the technology. The importance of blockchain and distributed ledger technologies also finds specific mention in the report published by the working group set up by the RBI on fintech and digital banking. The working group recognises the importance of adopting these technologies in the financial sector. On numerous occasions, the government has also made public statements in support of vast adoption of these technologies in various government sectors. A prime example of where the technology could be extremely useful in India is for maintaining land records, which the government recognises and hopes to implement in the near future.

Certain Indian banks have successfully used blockchain technology in trade finance transactions with foreign banks. There are also reports on Indian banks looking to use blockchain technology to share KYC information through a private blockchain.

Crypto-assets

Are there rules or regulations governing the use of cryptoassets, including digital currencies, digital wallets and e-money?

On 6 April 2018, the RBI issued a circular that prohibits any entity regulated by the RBI (including banks, financial institutions, payment gateways and digital wallets) from dealing with digital currencies or providing services that facilitate any person or entity in dealing with or settling digital currencies. The prohibition on services includes maintaining accounts, registering, trading, settling, clearing, giving loans against virtual tokens, accepting them as collateral, opening accounts of exchanges dealing with them and transfer or receipt of money in accounts relating to purchase or sale of digital currencies. Regulated entities have been given until 6 July 2018 to discontinue providing such services. This circular has essentially crippled the digital currency market in India. Users would only be able to trade in digital currencies and not exchange or redeem them for Indian rupees, as the mode of payment of Indian rupees is usually through banking channels. The regulatory framework on digital wallets is explained in question 12.

Digital currency exchanges

Are there rules or regulations governing the operation of digital currency exchanges or brokerages?

There are no rules or guidelines relating to the operation of digital currency exchanges or brokerages in India, other than the prohibition described in question 28. Specific advice should be sought for the nature of the exchange.

Initial coin offerings

Are there rules or regulations governing initial coin offerings (ICOs) or token generation events?

ICOs are not regulated in India.

Data protection and cybersecurity

Data protection

What rules and regulations govern the processing and transfer (domestic and cross-border) of data relating to fintech products and services?

India does not have a specific law on data protection. Certain provisions of the Information Technology Act 2000 (IT Act) deal with data protection.

There are two provisions, civil and criminal, on the use of personal data. A body corporate that has access to sensitive personal data or information (SPDI) will be liable to compensation if it is negligent in using reasonable security practices and procedures (RSPP) in protecting such SPDI and it results in wrongful loss or wrongful gain. SPDI includes:

- passwords;

- financial information such as bank account, credit or debit card or other payment instrument details;
- physical, physiological and mental health condition;
- sexual orientation;
- medical records and history; and
- biometric information.

RSPP refers to procedures determined by any law in force (there is none) or as agreed between the parties and in the absence of the same, the rules of the central government. Accordingly, it is open to an organisation to agree privacy policies and security standards with its customers, service providers, employees, etc. The central government rules are more in the nature of cursory privacy rules on collection, storage, transfer, etc, of SPDI. They prescribe no specific security standard.

Indian law also imposes criminal penalties on an organisation providing a service that is in possession of personal information if it discloses such information in breach of contract or without the consent of the data subject and does so with the intention of or knowing that it is likely to result in wrongful gain or wrongful loss.

There are some general data protection and security requirements applicable to the financial sector. For example, credit information companies are governed by certain norms concerning protection and disclosure of personal information. The card-issuing entity should not reveal any information relating to customers obtained at the time of opening the account or issuing the credit card to any other person or organisation without obtaining their specific consent. The purpose for which the information would be used and the organisations with which the information would be shared is also required to be disclosed. The RBI has frowned upon credit companies obtaining the consent of the customer for sharing their information furnished while applying for the credit card with other agencies, as part of the terms and conditions. The credit companies are required to provide the customer with the option to decide whether he or she is in agreement with the credit company sharing the information with other agencies. The credit companies are also required to explicitly state and explain clearly to the customer the full meaning and implications of the disclosure clause.

Separately, the regulations governing account aggregators prescribe a consent architecture to be followed by aggregators while collecting personal and sensitive personal information from the data subject. They also impose restrictions on sharing of financial information without the consent of the data subject and a use limitation, and require the conducting of periodical information security audits.

The RBI recently issued a notification requiring all payment systems operators to store the entirety of data relating to payment systems including the full end-to-end transaction details, information collected, carried or processed as part of the message or payment instruction on servers located in India.

A new data protection law is in the works and is scheduled to be placed before Parliament shortly.

Cybersecurity

What cybersecurity regulations or standards apply to fintech businesses?

The law currently does not contemplate any specific cybersecurity regulation or security standards to be complied with by fintech businesses in India. The rules framed by the government under the IT Act for regulating SPDI do recommend a security standard (ie, IS/ISO/IEC 27001 information security standards) to be complied with while processing SPDI (financial information is SPDI). As mentioned in question 31, it is not mandatory to comply with the aforesaid rules and parties can agree on RSPP and exclude the application of these rules.

Outsourcing and cloud computing

Outsourcing

Are there legal requirements or regulatory guidance with respect to the outsourcing by a financial services company of a material aspect of its business?

Outsourcing of core management functions including internal audit, compliance function and decision-making functions such as determining compliance with KYC norms for opening deposit accounts, according sanction for loans (including retail loans) and management of investment portfolio are not permitted. Outsourcing of

other functions is permitted. The banking laws prescribe certain principles on the basis of which a bank can outsource its functions, where this results in data being processed, stored or accessed overseas. This is permitted provided that the following conditions are met:

- the offshore regulator does not obstruct the arrangement or prevent inspections by the RBI or auditors;
- the availability of records to the management and the RBI is not affected by the liquidation of the offshore provider or the bank in India;
- the offshore regulator does not have access to the data simply because the data is being processed overseas; and
- the jurisdiction of the courts in the offshore location does not extend to the operations of the bank in India.

The outsourcing regulations also require customer data to be isolated and clearly identified, and prohibit any merging of data.

Cloud computing

Are there legal requirements or regulatory guidance with respect to the use of cloud computing in the financial services industry?

At present there are no legal requirements or statutory guidance for use of cloud computing.

The Institute for Development and Research in Banking Technology, established by the RBI, has a centre for cloud computing. The centre focuses on providing suitable cloud platforms to banks for testing, undertaking studies on security, scalability, building secure cloud storage, among other things.

A working committee formed by the RBI published a report on the use of cloud computing by urban cooperative banks in 2012. The report tried to lay down the existing issues and the way forward for urban cooperative banks to establish a robust IT network that includes cloud computing.

There are various private players in the market offering their cloud computing services to banks and NBFCs. Banks and NBFCs in India are slowly accepting and moving towards such services.

Intellectual property rights

IP protection for software

Which intellectual property rights are available to protect software, and how do you obtain those rights?

Software can be protected under copyright law. The patent laws of India provide fairly limited protection for software, as they cannot protect software per se: it requires something in addition to the mere software for it to be patentable (eg, an operating system is patentable).

IP developed by employees and contractors

Who owns new intellectual property developed by an employee during the course of employment? Do the same rules apply to new intellectual property developed by contractors or consultants?

In the case of copyright law, this would be the employer. In the case of patent law, it would be the inventor, who could be the employee. Copyrights and patents can be assigned to the employer. In the case of patents, the application for a patent must be accompanied by the assignment deed executed by the employee.

Joint ownership

Are there any restrictions on a joint owner of intellectual property's right to use, license, charge or assign its right in intellectual property?

In the case of patents, the Patents Act 1970 provides that the share in the patent held by a co-owner cannot be licensed or assigned without the consent of the other owners. The same applies with all other intellectual property rights. The licensing, charge and right to use would be as per the agreement entered into, or will be equal among the joint owners. The Trademarks Act does not impose any such specific condition. However, it envisages that jointly owned trademarks cannot be used in rivalry or in competition against each other and there can only be one joint source as to the trademarks. Therefore, in case of subsequent rivalry, if any, between the co-owners, there cannot be two different owners of the trademarks.

Trade secrets

How are trade secrets protected? Are trade secrets kept confidential during court proceedings?

India does not have a specific law dealing with trade secrets. Trade secrets are protected under the common law remedy of breach of confidentiality. Confidentiality may be protected under contract or implied depending on the nature of the service.

Trade secrets are to be kept secret unless it is an inherent part of the court proceedings; in that case, disclosure for the purpose of providing evidence is required. This has sometimes acted as a deterrent to many from enforcing their trade secrets through the judicial process.

Branding

What intellectual property rights are available to protect branding and how do you obtain those rights? How can fintech businesses ensure they do not infringe existing brands?

Branding is largely protected under trademark law, whereby one would need to register a trademark. One can file an action for infringement in the case of a registered trademark or a passing-off action in the case of unregistered marks. Indian law also recognises the concept of transnational reputation of international trademarks. Trademark owners can also register their brands with customs authorities that could enable authorities to intercept goods they believe are counterfeits. The trademark owner can also claim prior use and strike down a registered owner's right, by seeking cancellation of the mark. The trademark owner can also keep watch and seek to oppose any new marks that are the same or similar to the one owned by it. One can also obtain a copyright registration over the copyright in a mark. However, registration is not mandatory for ownership of copyright.

A new business can undertake a trademark search to determine whether a similar trademark has been registered. The trademark registry is online and one can search via the trademark registry website. One can also undertake market studies or test marketing to see if similar unregistered marks are in use. A new business can also search domain name registries to determine if websites with similar domain names have been registered.

Remedies for infringement of IP

What remedies are available to individuals or companies whose intellectual property rights have been infringed?

If a trademark, copyright or patent has been infringed, one would file a suit for infringement. In the case of trademark, one can also file a passing off action. In the case of copyright and trademark, one can also pursue criminal remedies in the case of infringement. The Copyright Act deals with offences of infringement of copyright or other rights conferred under this Act. It provides for imprisonment that ranges from six months to three years and a fine that ranges from 50,000 to 200,000 rupees. The Trademarks Act 1999 also deals with criminal remedies against infringement and passing off action. Search and seizure procedures can also be invoked to deal with infringement.

One can also engage in opposition proceedings in respect of trademarks and patents that are sought to be registered. There is a procedure for cancellation of marks. In addition, one can file actions with the company authorities in respect of companies registered with names that are similar to trademarks or other company names, though a trade name registration in no way confers trademark protection.

A unique aspect of Indian law is that one can file a case of copyright or trademark infringement not just where the cause of action arose or where the defendant resides or does business, but also where the plaintiff resides and does business. One can obtain an Anton Piller order for appointment of a court commissioner to conduct an inspection, and it is possible to obtain injunctions.

Competition

Sector-specific issues

Are there any specific competition issues that exist with respect to fintech companies in your jurisdiction?

There are none. Indian competition law in general relates to anticompetitive practices, monopolistic practices and merger control requirements.

Tax

Incentives

Are there any tax incentives available for fintech companies and investors to encourage innovation and investment in the fintech sector in your jurisdiction?

There are no tax incentives specifically aimed at fintech companies. However, the fintech companies that qualify as start-ups may avail themselves of various benefits under the Startup India initiative launched by the Indian government. Tax benefits are also extended to units in a special economic zone.

Increased tax burden

Are there any new or proposed tax laws or guidance that could significantly increase tax or administrative costs for fintech companies in your jurisdiction?

There are no specific additional taxes or exemptions for fintech companies. However, under the Start-up India initiative, certain companies falling under the ambit of the start-up definition (incorporated for less than 10 years, turnover not exceeding 1 billion rupees, working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation and is provided with a start-up certificate) are provided with tax breaks to encourage innovation.

Immigration

Sector-specific schemes

What immigration schemes are available for fintech businesses to recruit skilled staff from abroad? Are there any special regimes specific to the technology or financial sectors?

There are no specific limits applicable for immigrants seeking employment in India. There are certain criteria that the applicant needs to meet, for example, a minimum salary of US\$25,000 per year, subject to certain exemptions given only to individuals with skills that are unavailable in India (such as highly qualified technical experts, senior executives in a managerial position, etc). Labour and employment law in India dealing with immigration is complex and specific advice should be sought.

Update and trends

Current developments

Are there any other current developments or emerging trends to note?

Current developments⁴⁵ Are there any other current developments or emerging trends to note?

There has been a large amount of activity in the fintech regulatory space during the past year. The government has formally recognised the importance of this niche industry by setting up committees to study the development and future of the industry. It has also passed regulations on P2P lending platforms and account aggregators directly in relation to fintech entities.

Although the government has not made virtual currencies illegal, the RBI has placed restrictions on all entities regulated by it to deal with any funds in relation to the trading, settling, clearing and so on of virtual currencies. This has essentially crippled the virtual currency market in India as holders of virtual currencies cannot exchange them for fiat currency through standard banking channels. On 22 July 2019 the Inter-Ministerial Committee on Virtual Currencies submitted a report recommending a complete ban on cryptocurrencies and the development of an official digital currency to be issued by the government.

On 6 April 2018, the RBI issued directives to all payment system providers to store the entire data relating to payment systems operated by them only in India no later than 15 October 2018. The data include the full end-to-end transaction details - information collected, carried and processed as part of the message or payment instruction. For the foreign leg of the transaction, if any, the data can also be stored in the foreign country, if required. This has given rise to India-US tensions, with the US government threatening retaliatory measures affecting Indian businesses. The RBI has also issued clarifications that the data localisation requirements also extend to all third-party entities involved in the payment ecosystem, including payment gateways.

In August 2017, the Supreme Court of India delivered a landmark judgment recognising the right to privacy as a fundamental right. Accordingly, on 27 July 2018 MEITY released the much-awaited draft Personal Data Protection Bill 2018 (the Bill) for public comments. The Bill is India's first attempt towards a specific data protection and privacy statute in India. A large portion of the Bill seems to have been adopted from the recent global data protection regulations of the EU and it includes concepts such as the right to be forgotten, privacy by design, consent-based approach, data localisation requirements, data protection office and data protection authority, etc. The public consultation process has been completed and MEITY has finalised the Bill. The Bill is scheduled to be placed before Parliament shortly.

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