

Newsletter

# Sharp View

September 2023

**SHARP &  
TANNAN**

Assurance | Consulting | GRC | Taxation

Ahmedabad | Bengaluru | Chennai | Coimbatore | Goa | **Mumbai** | New Delhi | Pune | Vadodara

# SEPTEMBER 2023

September month in India is usually associated with the fading away of the rainy season and a slow rise in temperatures, with cloudy weather throughout the month. It marks the beginning of many significant festivals in various Indian states demonstrating a rich cultural history.

Nationwide, we celebrate the 'Teacher's Day' on 5th September to commemorate the birthday of India's first Vice President and second President, Dr. Sarvapalli Radhakrishnan, who was a teacher and a distinguished philosopher of the 20th century. He earned prestigious awards including the 'Bharat Ratna' and 'Knighthood.'

On Teachers' Day, schools across the country organise programmes to honour the teachers' work. Higher grade students teach the lower grade students as a mark of respect to the teachers. The hard work and dedication of the teachers is recognised by various sections of the society. There is a lot of encouragement and motivation to them from the Government too in the form of theme celebrations, recognising their efforts, addressing and wishing them on various media platforms.





# ASSURANCE

## Default loss guarantee guidelines

**In June 2023 the Reserve Bank of India notified the default loss guarantee guidelines. These guidelines govern the arrangements between a regulated entity and the lending service provider known as default loss guarantee agreements. Ms. Sathya Ramesh and Mr. Arjun MK (Bengaluru office) present you a quick snapshot of the guidelines.**

# Assurance

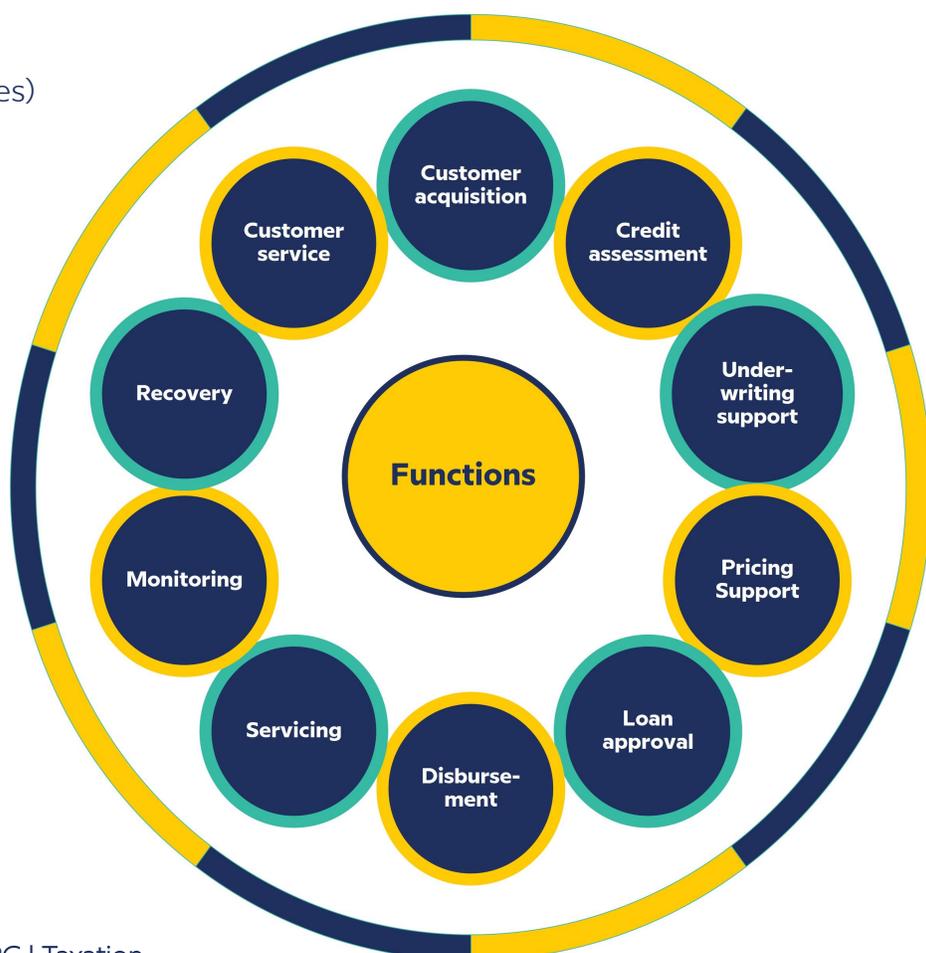
## Default loss guarantee guidelines

In June 2023, the Reserve Bank of India ('RBI') issued guidelines in respect of default loss guarantee arrangements between the RBI regulated entities ('RE's) and the lending service providers ('LSP's). These guidelines are based on the recommendations of the 'working group' on digital lending. The primary objective was to regulate the growth in the financial sector, preserving the financial stability and protection of the depositors' and customers' interest while encouraging innovations in the financial systems, products and credit delivery methods. Notifying the guidelines also ensure a proper reporting framework by the players in the financial system while being regulated by the RBI. Let us take a snapshot of these digital lending guidelines.

### Regulated Entities refer to



Lending Service Providers ('LSP') refer to agents of RE (incorporated as companies) who carry out the following functions of specific loan/loan portfolio.

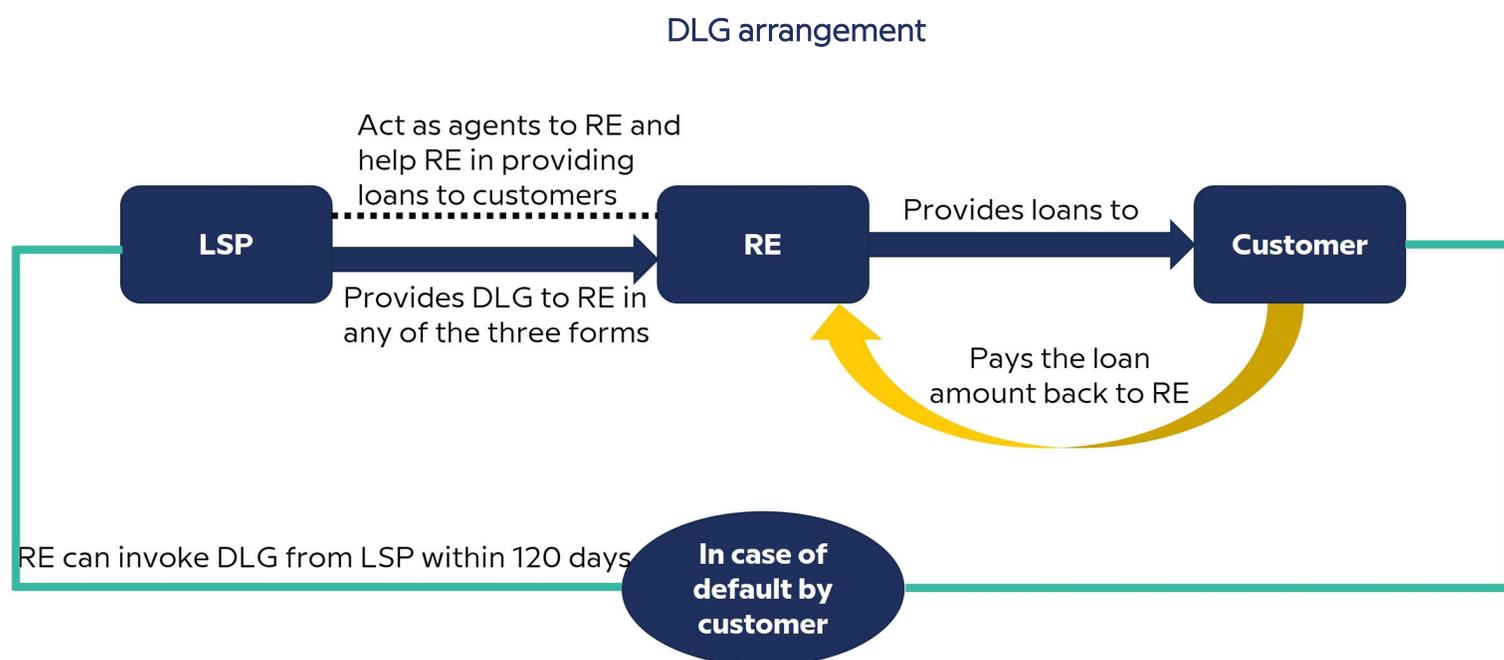


# Assurance

## Default loss guarantee guidelines

Have you noticed the advertisements which say 'you will be granted loans instantly?' Who does that? Do banks themselves offer you the facility to get a loan from the comfort of your home? May not. This is being facilitated by some companies that act as an intermediary between the Bank and the customer. This process of remote and automated lending by use of digital technology is called Digital Lending. The mobile and web-based applications of the Banks/REs, as well as those operated by LSPs that facilitate digital lending, are termed Digital Lending Apps/Platforms (DLAs). The companies that make possible lending through these apps are called FinTech companies. These companies use technology to deliver financial services. They aim to make financial services more accessible to the general public.

All the above developments in the credit sector have enabled the public to meet their credit requirements through smartphones. Before going further into the DLG agreements, let's see what happens when the borrower fails to repay the money borrowed. REs will be forced to bear the loss. Despite the fact that the FinTech companies were the ones who chose whom to grant loans to. This can prove to be unhealthy for the REs in the long run through these tie-ups, if the entire loss is to be borne by them in case of default and in the event of a loan asset turning into a non-performing asset.



Therefore, in order to lessen the burden of the REs and at the same time, to make the FinTech companies responsible for the customers they choose, the idea of DLG came into existence wherein an agreement is entered into between the RE and the FinTech companies whenever a lending deal is entered into, wherein the FinTech companies will compensate a part of the loan, which is usually a percentage of the same, specified upfront, in case the borrower defaults. The agreement is, in effect, a guarantee provided by the LSPs to the REs that, in case of default by a customer, a portion of the loan portfolio will be compensated by them.

# Assurance

## Default loss guarantee guidelines

The RBI issued guidelines on digital lending (lending through means of technology) in September 2022, but it did not provide clarity on some of the aspects of the DLG arrangements. This created difficulties as REs were not able to reach customers far and wide without FinTech companies and FinTech companies were not able to actively involve in lending.

In the new guidelines issued by the RBI in June 2023, RBI has even brought all kinds of implicit guarantees under the definition of DLG, covering any agreement called by whatever name.

**Structure of a DLG agreement:** The DLG arrangements must be essentially backed by an explicit legally enforceable contract between the RE and the DLG provider and specify the following details:

- a. Extent of DLG cover
- b. Form in which DLG cover is to be maintained with the RE
- c. Timeline for DLG invocation
- d. Disclosure requirements

**Extent:** The new guideline states that the Fintech companies shall compensate for up to 5% of the loan portfolio to the REs in case the borrower defaults. This gave a legal existence to DLG agreements and has eliminated all the confusion regarding the nature of the DLG.

**Form:** RE shall accept DLG as a cash deposit with RE, a fixed deposit maintained with a scheduled commercial bank with a lien marked in favour of the RE, or as a bank guarantee in favour of RE.

### Timeline

**What happens when the borrower doesn't repay the loan within the time prescribed? Will the FinTech companies have to pay right away?**

No, RBI has specified a maximum overdue period of 120 days within which action has to be taken by the FinTech companies. In situations where the guarantee is invoked by the regulated lender, the DLG can be invoked within a maximum overdue period of 120 days from the date of default for such action, unless made good by the borrower before 120 days. The amount of DLG invoked shall not be set off against the underlying individual loans.

**How long will the DLG agreement remain in force?**

The period of agreement shall not be less than the longest tenor of the loan in the underlying loan portfolio.

**Disclosure:** The LSPs are required to publish the total number of portfolios and the respective amount of each portfolio on which the guarantee arrangement has been offered, on their website. This means, the FinTech companies have to show the loans guaranteed by them along with the amount for which each one is guaranteed, on their website.

# Assurance

## Default loss guarantee guidelines

**Because FinTech companies bring in customers, do you think they have to take care of everything related to the loan in the RE and at the customer's end?** - No, the activities which FinTech companies have to carry out are clearly defined by RBI. The services of these companies are limited to activities wherein mostly interaction with the customers is needed. RBI has specified that all the other requirements regarding income recognition, asset classification and provisioning is the responsibility of the RE. Classification of NPA assets and consequent provisioning shall be carried out by the RE irrespective of any DLG cover available at the portfolio level. The amount of DLG invoked shall not be set off against the underlying individual loans.

**What are the requirements to be fulfilled by RE before entering into a DLG arrangement with LSP?** - REs shall put in place a Board-approved policy. It shall include eligibility for the DLG provider, nature and extent of DLG cover, the process of monitoring and reviewing the DLG arrangement, and details of the fees, if any, payable to the DLG provider. Every time an RE enters into or renews a DLG arrangement, it shall obtain adequate information to satisfy itself that the entity extending DLG would be able to honour it. It shall, at a minimum include a declaration from the DLG provider, certified by the statutory auditor on the aggregate DLG amount outstanding, the number of REs, and the respective number of portfolios against which DLG has been provided. It shall also contain the past default rates on similar portfolios.

## Concluding notes

All the above-mentioned details make it obvious that RBI is trying to streamline the process of DLG arrangements. This way, REs will be able to reach far more people than now and FinTech companies will get the kind of acceptance they seek from, the public. This is no different from the RBI's objective of financial inclusion. Also, FinTech companies, proven for their high-growth potential in the financial services sector, get an opportunity to showcase their ability for risk-taking. This can lead to better service for customers, and ultimately, increased trust and loyalty to the REs. In short, REs can improve their services by adopting the customer-centric approach of Fintechs.

This has been considered a great step forward by the digital lending industry. The popularity of DLG rose among fintech as it allowed them to onboard more banks and non-bank lenders and enabled them to cater to the under-banked segment. The arrangement offered security to these regulated entities in instances where loans go bad, helps in reaching more customers and providing financial services in a more customer-oriented manner. Because of DLG, REs can now expand their area of operation without having to be present physically. Fintech companies have become more reliable due to its increased role in the digital lending space.

Companies that are considering entering into DLG arrangements should carefully review the guidelines to ensure that they are in compliance. The guidelines should also be considered when developing and implementing risk management policies and procedures for digital lending. Here are some pointers for the consideration of CEO, CFO and the Board of directors:

- The DLG arrangement must be approved by the board of directors of the RE.
- RE must conduct due diligence on the DLG provider to ensure that it is financially sound and has the capacity to honour the guarantee.
- RE must monitor the performance of the DLG provider on an ongoing basis to ensure that it is meeting its obligations under the guarantee.



# CONSULTING

## Alternative Dispute Resolution

Alternative dispute resolution ('ADR') refers to the various techniques to resolve disputes outside the court system. Being less formal and more flexible mechanisms they are preferred by the disputing parties in certain scenarios. Ms. Priya Tolani (Vadodara office) explains various ADR techniques like arbitration, mediation, negotiation and conciliation with a brief on practical challenges in implementing such techniques.

# Consulting

## Alternative Dispute Resolution

### What is Alternative Dispute Mechanism ('ADR')?

Alternative Dispute Resolution ('ADR') refers to a set of processes and techniques used to resolve disputes and conflicts outside of the traditional court system. It provides parties with alternative means to resolve their differences, typically with the assistance of a neutral third party. ADR methods are generally considered less formal, less adversarial, and more flexible compared to litigation.

### Need for ADR

There are several reasons why ADR is considered necessary and beneficial in many situations:

- **Efficiency:** ADR methods are generally faster and more efficient than going through the court system. Litigation can be a lengthy and time-consuming process, often taking years to resolve. ADR processes, such as mediation or arbitration, can provide quicker results, allowing parties to resolve their disputes in a timelier manner.
- **Cost-effectiveness:** ADR can be more cost-effective compared to litigation. Engaging in a court case involves substantial legal fees, including attorney fees, court costs, and expenses related to the discovery process. ADR processes often have lower costs, making them more accessible to individuals and businesses with limited financial resources.
- **Confidentiality:** ADR offers greater confidentiality and privacy compared to public court proceedings. Confidentiality is particularly important in sensitive matters, such as family disputes, intellectual property conflicts, or commercial negotiations. Parties can have more control over the confidentiality of their information and proceedings in ADR.
- **Flexibility and informality:** ADR allows for greater flexibility and informality in the resolution process. Parties have more control over the selection of a neutral third party to facilitate the process, the location, and the scheduling of meetings or hearings. This flexibility can help create a more collaborative and less adversarial atmosphere, potentially leading to better outcomes and preserving relationships between the parties.
- **Preserving relationships:** ADR methods emphasize finding mutually agreeable solutions and promoting collaboration and compromise. Unlike litigation, where parties are often pitted against each other in an adversarial manner, ADR processes aim to preserve relationships and promote a win-win outcome. This can be particularly valuable in situations where ongoing relationships, such as business partnerships or family dynamics, need to be maintained.
- **Overburdened court systems:** Courts are often burdened with a significant backlog of cases, leading to delays in obtaining justice. By encouraging the use of ADR, some cases can be diverted from the court system, relieving the burden on the judiciary and allowing courts to focus on more complex or high-priority matters.



# Consulting

## Alternative Dispute Resolution

### Types of ADR mechanisms

#### Arbitration

Arbitration is a widely recognized ADR mechanism used to settle conflicts outside of the traditional court systems. It offers parties involved in disputes a private and often quicker, more cost-effective method for resolving their differences. In arbitration, the parties agree to submit their dispute to one or more impartial individuals, known as arbitrators, who then render a binding decision, known as an arbitral award.

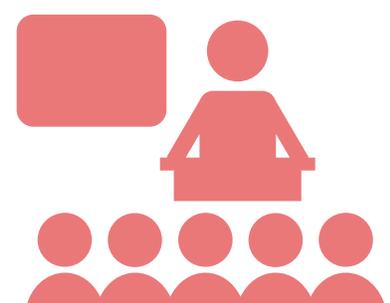
Key features of arbitration include its flexibility and confidentiality. Parties can choose the rules and procedures that govern the arbitration, tailoring the process to suit the complexity and nature of their dispute. This adaptability makes arbitration particularly suitable for disputes involving technical or specialized subject matters. Additionally, the proceedings and outcome of arbitration are typically kept confidential, which can be advantageous for parties seeking to protect sensitive business information or maintain their privacy.

Arbitration's enforceability is a significant advantage. The resulting arbitral award can be recognized and enforced in many countries through international conventions, such as the New York Convention, enhancing the cross-border enforceability of these awards.

Arbitration can be institutional or ad hoc. Institutional arbitration is conducted under the auspices of an arbitration institution (e.g., the International Chamber of Commerce or the American Arbitration Association) which provides rules, administrative support, and a pool of qualified arbitrators. Ad hoc arbitration, on the other hand, is organized and managed by the parties themselves, often guided by relevant arbitration laws and rules.

While arbitration offers numerous benefits, it is essential to recognize that it might not be suitable for every situation. Certain disputes, such as those requiring injunctive relief or establishing legal precedents, may be better addressed through traditional litigation. Additionally, arbitration's finality means that the arbitral award is generally not subject to the same level of appeal as court judgments.

In summary, it serves as a valuable ADR mechanism by offering parties a more efficient and customizable process for resolving disputes. Its widespread acceptance, enforceability, and potential for maintaining confidentiality make it an attractive choice for parties seeking to avoid lengthy and costly court proceedings.



# Consulting

## Alternative Dispute Resolution

### Mediation

Mediation is a constructive and voluntary ADR mechanism designed to help parties resolve conflicts by facilitating open communication and negotiation. Unlike arbitration or litigation, where a third party makes decisions or judgments, mediation empowers the parties themselves to reach a mutually satisfactory resolution with the assistance of a neutral mediator.

In a mediation process, the mediator acts as a skilled facilitator, guiding the conversation and encouraging each party to express their concerns, interests, and perspectives. The mediator does not impose a decision but helps the parties explore potential solutions and find common ground. This approach encourages collaboration and can often lead to more creative and customized resolutions that suit the unique needs of the parties involved.

Confidentiality is a cornerstone of mediation. All discussions, documents, and outcomes are typically kept private, fostering an environment where parties can openly share their thoughts without fear of their words being used against them later in court.

Mediation is particularly beneficial for preserving relationships, as it encourages open dialogue and cooperation. It is often used in family disputes, workplace conflicts, contractual disagreements, and various other scenarios where maintaining ongoing interactions is important.

The success of mediation depends on the willingness of the parties to engage in good-faith negotiations and work towards a solution. While mediation doesn't always guarantee a resolution, it provides a platform for parties to explore possibilities and make informed decisions about the best course of action.

In brief, mediation serves as a non-adversarial and empowering ADR method that promotes effective communication and collaboration among disputing parties. Its emphasis on finding common ground and preserving relationships makes it an invaluable tool for resolving disputes in a manner that is more amicable and tailored to the parties' specific needs.



# Consulting

## Alternative Dispute Resolution

### Negotiation

Negotiation is a fundamental and pervasive form of dispute resolution that involves direct communication and bargaining between parties to reach a mutually agreeable outcome. It is an informal process in which individuals, organizations, or governments engage in discussions to find common ground and resolve their differences.

In negotiation, the parties involved have the autonomy to shape the terms of the agreement, making it a highly flexible and adaptable method of conflict resolution. Unlike arbitration or mediation, negotiation doesn't require the involvement of a third party or a neutral intermediary. Instead, the parties directly engage with each other, presenting their interests, concerns, and proposed solutions.

Negotiation can be categorized into two main types: distributive and integrative. Distributive negotiation involves dividing a fixed amount of resources among the parties, often leading to a 'win-lose' scenario where one party's gain is another's loss. Integrative negotiation, on the other hand, focuses on expanding the pie of resources and creating 'win-win' solutions that benefit all parties.

The success of negotiation relies on effective communication, persuasive skills, and a willingness to compromise. It is important for parties to be clear about their objectives and be open to exploring different options to find common ground.

Negotiation is used in various scenarios, from business transactions and labour disputes to international diplomacy. It provides a means for parties to exercise control over the outcome and actively participate in shaping the resolution of their disagreements.

In summary, negotiation is a dynamic and direct method of dispute resolution that empowers parties to communicate, collaborate, and craft solutions that address their interests. Its adaptability and broad applicability make it an essential tool for resolving conflicts across diverse situations and relationships.

### Conciliation

Conciliation is an ADR mechanism that focuses on resolving conflicts with the assistance of a neutral third party, known as a conciliator. Similar to mediation, conciliation aims to help parties reach a mutually acceptable solution, but it often involves a more proactive role for the conciliator in suggesting possible resolutions.

In the conciliation process, the conciliator works to facilitate communication between the disputing parties, helping them identify common interests and explore potential avenues for agreement. The conciliator may provide expert advice, propose compromises, and encourage creative solutions to bridge the gap between the parties' positions.

One of the distinctive features of conciliation is its emphasis on maintaining a positive and constructive atmosphere. The conciliator aims to foster a cooperative environment where parties can express their concerns and work together to find resolutions.

# Consulting

## Alternative Dispute Resolution

Confidentiality is often maintained during the process, which can encourage parties to be more open and candid about their needs and interests.

Conciliation is commonly used in labour disputes, contractual disagreements, family matters, and commercial conflicts. Its effectiveness lies in the conciliator's ability to guide parties toward a settlement that aligns with their interests and avoids the adversarial nature of litigation.

It is important to note that while conciliation shares similarities with mediation, the conciliator may take a more proactive role in proposing solutions and facilitating discussions. This approach can be particularly useful when parties are unable to generate potential solutions on their own.

In conclusion, conciliation offers a structured and guided approach to resolve the disputes by leveraging the expertise of a neutral third party. Through active facilitation and suggestion of potential solutions, conciliation seeks to assist parties in finding common ground and achieving agreements that meet their needs and objectives.

### Challenges with ADR in India

While ADR has gained recognition and acceptance in India, there are still several challenges associated with its implementation and effectiveness. Here are some of the key challenges:

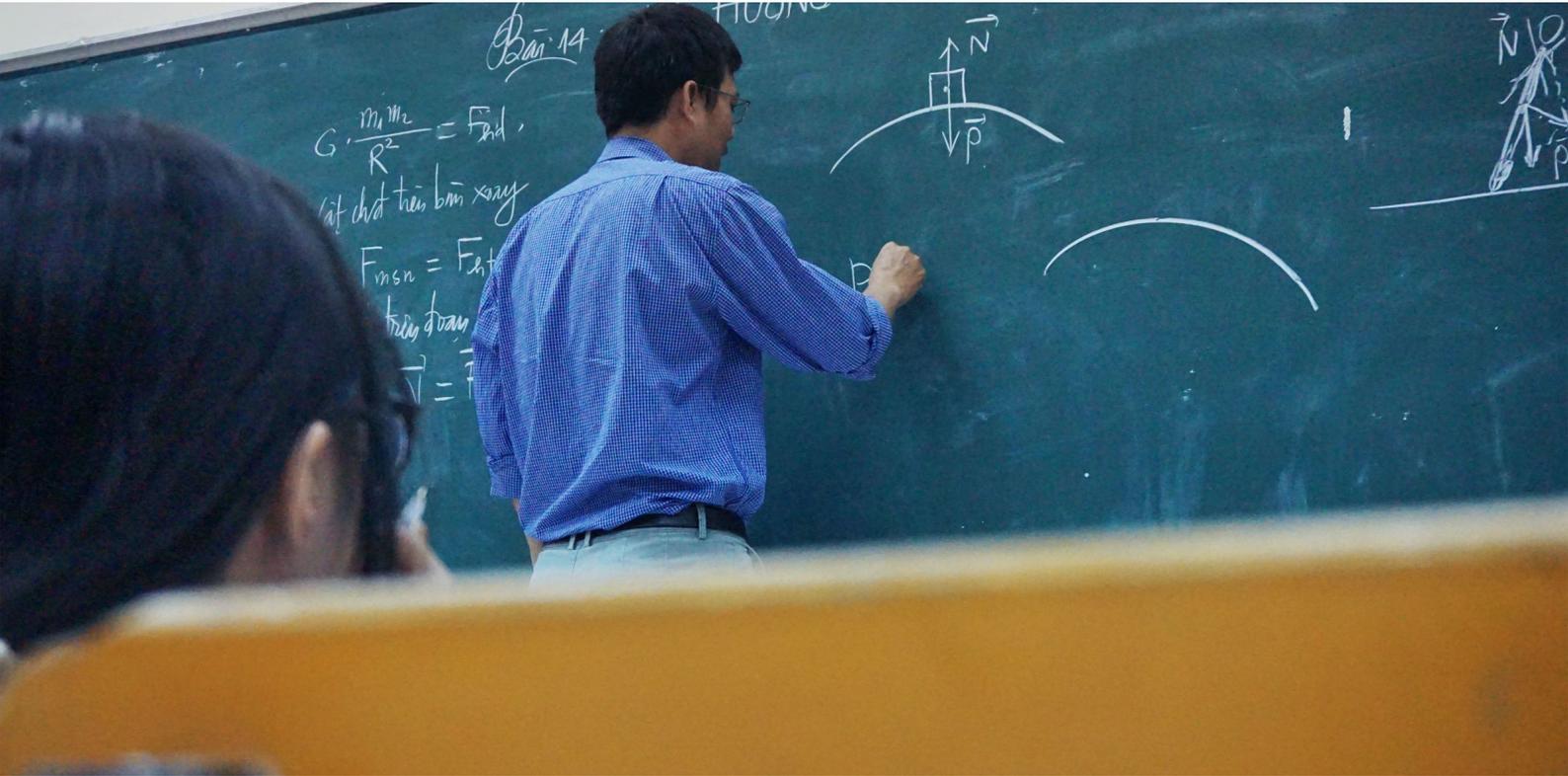
- **Lack of awareness:** One of the primary challenges is the lack of awareness and understanding of ADR methods among the general public. Many individuals and businesses are unaware of the benefits and processes involved in ADR. This results in a tendency to rely solely on traditional litigation, even in cases where ADR could be a more suitable and efficient option.
- **Enforcement of ADR decisions:** While arbitration awards are generally enforceable in India, challenges can arise in practice. The enforcement of ADR decisions, particularly in the case of domestic arbitration, can be time-consuming and cumbersome. The judicial system's approach to enforcing arbitral awards is sometimes perceived as slow and inconsistent, which can undermine confidence in ADR processes.
- **Overburdened judicial System:** The Indian judicial system faces a significant backlog of cases, leading to delays in the resolution of disputes. While ADR offers an alternative means of resolving disputes, the overburdened court system sometimes struggles to effectively promote and manage ADR processes. The lack of coordination and integration between the court system and ADR mechanisms can hinder the smooth functioning and uptake of ADR.
- **Limited statutory support:** While the Arbitration and Conciliation Act, 1996 provides a framework for arbitration and other ADR methods, some stakeholders believe that certain provisions require further clarity and improvements. The need for legislative reforms and amendments to enhance the efficacy of ADR has been recognized. The introduction of the Arbitration and Conciliation (Amendment) Act, 2019 was a step in this direction, but there may still be areas that need attention.
- **Public trust and perception:** Building public trust in ADR processes is crucial for their wider acceptance and usage. Some individuals may perceive ADR as biased or lacking in transparency. Addressing these concerns and ensuring the integrity and fairness of ADR mechanisms is essential for their effective implementation.

# Consulting

## Alternative Dispute Resolution

### Conclusion

- ADR has emerged as a transformative force within India's legal landscape, offering a pragmatic and efficient approach to resolving disputes. As the nation seeks to ease the burden on its courts, expedite the resolution process, and enhance access to justice, ADR methods have gained prominence for their flexibility, cost-effectiveness, and potential for fostering amicable solutions.
- India's journey towards ADR advancement is marked by positive strides, including the establishment of specialized ADR institutions, legislative reforms, and a growing awareness of the benefits ADR offers. However, there is a room for further growth and refinement. Encouraging widespread adoption of ADR clauses, harnessing technology to create accessible online platforms, and nurturing a skilled pool of ADR practitioners are avenues that can propel ADR's impact to greater heights.
- As the nation celebrates its rich cultural diversity, it is imperative that ADR practices are adapted to resonate with the cultural nuances of different regions and communities. By fostering a sense of ownership and trust among the population, ADR mechanisms can solidify their place as a preferred method for resolving disputes.
- Ultimately, the evolution of ADR in India underscores a commitment to foster collaboration, understanding, and timely resolution. By embracing these principles, India has the potential to not only transform its justice system but also contribute to a society where disputes are not just settled but there are opportunities for growth, learning, and harmonious coexistence.





# GRC

## **Digital Personal Data Protection Act, 2023**

In August 2023, the Ministry of Law and Justice passed the Digital Personal Data Protection Act, 2023. The Act governs the protection and lawful processing of digital personal data. Ms. Aarti Joshi (Vadodara office) summarises the provisions of this newly notified law.

## Digital Personal Data Protection Act, 2023

### Introduction

Digitalisation is the backbone of any economy and every country has undergone digitalization over the last 2 decades. Digitalisation has changed the way businesses are done and has defined new ways of doing them. Today, every business/economic activity begins with the collection, storage and processing of digital data, be it government departments, banks, financial institutions, schools/educational institutions, health organisations, telecommunication companies, insurance companies, shopping and other applications (apps), and so on. These organisations collect a huge amount of personal data of individuals (as subscribers or service recipients) and may require processing/transmitting this data for business purposes. Certain artificial intelligence ('AI') tools also require such personal data for processing. Thus, a huge amount of digital personal data is created and available with such business organisations (Data Fiduciaries- Person who alone or in conjunction with other persons determines the purpose and means of processing of personal data) which ideally must be used only for legitimate business purposes. The ownership of the data lies with the data principals, (i.e., individuals to whom the personal data relate) and must be kept safe by the data fiduciaries. Till present, there was no independent regulation in India to govern the protection and lawful processing of personal digital data. The Digital Personal Data Protection Act, 2023 ('the Act'), governs the protection and lawful use of such personal digital data.

On 11 August 2023, the Ministry of Law and Justice passed the Digital Personal Data Protection Act, 2023. The 'Act' applies to the processing of digital personal data within the territory of India where the personal data is collected:

- (i) in digital form; or
- (ii) in non-digital form and digitised subsequently

It also applies to the processing of digital personal data outside the territory of India, if such processing is in connection with any activity related to the offering of goods or services to 'Data Principals' within the territory of India.

Various new terms like 'Personal Data', 'Data Principal', 'Data Fiduciary', and 'Person' etc. are defined.

- Personal data: any data about an individual who is identifiable by or in relation to such data.
- Data principal: the individual to whom the personal data relates and where such individual is-
  - a child, includes the parents or lawful guardian of such a child
  - a person with disability, includes her lawful guardian, acting on her behalf
- Data fiduciary: any person who alone or in conjunction with other persons determines the purpose and means of processing of personal data. The term 'Person' has been defined to widen the scope under 2(s) to include
  - i. an individual;
  - ii. a Hindu undivided family;
  - iii. a company;
  - iv. a firm;
  - v. an association of persons or a body of individuals, whether incorporated or not;
  - vi. the State; and
  - vii. every artificial juristic person.

## Digital Personal Data Protection Act, 2023

### Non-applicability

The Act does not apply to the data processed by an 'individual' for domestic/personal purposes and in circumstances where the data principal publicly makes available her data. It also excludes the data that is made/required to be made publicly available by any other person under any law for the time being in force in India.

### Salient features of the Act

**Consent** : The data fiduciary('DF'), while/before collecting personal data of the data principal ('DP') need to ensure that it informs the DP about:

- a. The specific personal data needed to be collected and processed
- b. The right of the DP to withdraw her consent for the use of data with the same ease as was used in making the data available
- c. The prescribed manner in which the DP can make a complaint to the Data Protection Board of India ('Board')

The law also requires the DF to abide by the above provisions, within a reasonable time, where the consent is given by the DP before this Act came into force, which makes it retrospective by nature. Thus, it applies to the past consents also.

- The consent by the DP has to be free, informed and unconditional and must be used only for the specific personal data required to be processed and
- For the specified purpose only.

There are further justifications for processing personal data without an agreement, including 'legitimate uses' such as adhering to legal requirements and court orders, responding to medical crises & epidemics, and public safety concerns. Additionally, the Act allows the processing of personal data for certain employment-related objectives or to shield an employer from responsibility as legitimate uses for which consent is not necessary.

### Data processing - certain legitimate uses under the Act

- a. Any specific purpose agreed between the DF and the DP
- b. Providing any benefit, subsidy, certificate, license/permit by any 'State' or its 'instrumentalities' (or for fulfilling an obligation to disclose the information to the State/its instrumentalities) within the approved legal framework of the Central Government for the governance of personal data.
- c. Performing any function by the State under any law prevalent in India/in the interest of India's integrity & sovereignty/for the State's security.
- d. In compliance with any decree of a court/order in India
- e. In compliance of an order of a contractual/civil nature outside India
- f. Responding to a medical emergency involving a threat to the life/health of the DP or any other person
- g. Taking measures for providing medical/health services to any individual during an epidemic, outbreak of disease, disaster, etc.

## Digital Personal Data Protection Act, 2023

h. Purposes such as safeguarding an employer from corporate espionage, maintenance of confidentiality of trade secrets, intellectual property, classified information or provision of any service/benefit sought by a DP who is an employee.

**Obligations of the DF:** The term fiduciary indicates that the DF holds the data of a DP in trust and must ensure the privacy, legitimate use and protection of the data as would be done in his own case.

- a. Thus, the Act primarily makes the DF responsible for protecting and processing the personal data of the DP. For this (and where required), a DF can, only under a valid contract, appoint a data processor to process the DP's data used in relation to the provision of goods/services by DF to DP.
- b. The primary function of protecting the data by the data processor/DF rests on the DF.
- c. The DP must erase the DP's personal data either on the withdrawal of the DP's consent or immediately after the purpose for which the data was required to be processed has ceased to exist. Also, the DF shall cause the data processor to erase the data once the above conditions are met.
- d. The only exception for such erasure is where the data needs to be preserved in compliance with any law for the time being in force.
- e. A data fiduciary is required to inform the data principals of the personal data that will be processed. The opportunity to withdraw consent and the grievance resolution process made accessible by the data fiduciary must also be disclosed to data principals. This notification must be available in all 22 of the languages listed in the Constitution's Eighth Schedule, in addition to English.

### Other obligations of a DF

- i. The DF shall be responsible for establishing an effective mechanism to redress the grievances of DPs.
- ii. Obligations with respect to the data of children/persons with disability:
  - a. For processing the data of children/persons with disability, the DF must obtain the consent of the parent or lawful guardian, as the case may be.
  - b. A DF is not allowed to track/monitor a child's behavioural aspects, and neither the DP is allowed to make any type of targeted advertising directed at the children.
  - c. Exemption from applicability of a. and b. above can be provided by the Central Government ('CG') on being satisfied that the personal data of the children is processed in a verifiably safe manner.

**Additional obligations of a Significant Data Fiduciary ('SDF'):** Based on certain parameters like risk, volume and sensitivity of the data processed, potential impact on the sovereignty of India/State, etc., the CG may appoint 'SDF' who shall be responsible for the appointment of 'Data protection officer' to be based in India. The data protection officer be an individual who is responsible to the Board of directors/other governing body of the SDF and acts as a 'point of contact' for the grievance redressal mechanism under the Act.

The SDF shall also appoint an independent data auditor to evaluate its compliances and for the carrying out periodic audits and the data protection impact assessment under the Act.

## Digital Personal Data Protection Act, 2023

**Special provisions:** The CG may restrict the transfer of personal data for data processing by a DF to any country/territory outside India. However, any more stringent law/restriction for a higher degree of data protection prevailing in India on the transfer of such personal data by the DF outside India will prevail over the provisions of this Act.

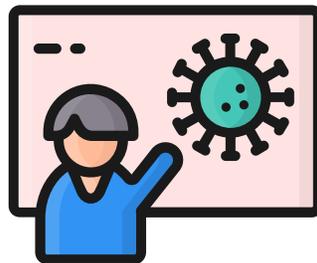
**Oversight:** The CG will establish 'Data Protection Board' for the carrying out of the purposes of the Act and for its effective governance. The chairperson and other members will be appointed by the CG possessing special knowledge and experience in the fields of data governance, administration or implementation of laws related to social or consumer protection, dispute resolution, information and communication technology, digital economy, law, regulation or techno-regulation, or in any other appropriate field. A person aggrieved by the Board's order shall approach the Appellate Tribunal. Both the Board and the Appellate Tribunal shall function digitally.

**Exemptions:** The Act gives the Government the authority to exempt itself and its agencies from the Act's requirements on specific grounds such as the sovereignty and integrity of India, or the security of the State, which are taken from the Indian Constitution and are cited by the Supreme Court of India as justifications for limiting privacy rights. Certain provisions of the Act are exempted like section 8 (1) and (5) relating to the obligations of a DF, Chapter III (relating to rights and duties of a DP) and section 16 (restriction on the transfer of data outside India) where the data processing is:

- a. necessary to enforce any legal right/claim
- b. required by tribunal/judicial/quasi-judicial body/for a regulatory or a supervisory function
- c. done for prevention/detection or for prosecution under any offence
- d. in pursuance of a scheme of amalgamation/merger/demerger/transfer of an undertaking approved by the court.
- e. for ascertaining the financial information, assets and liabilities of a person defaulting in repayment of a loan from a financial institution.

The CG may notify certain data fiduciaries including start-ups who may be exempt from the applicability of certain provisions under the Act.

**Enforcement powers of the CG:** The CG, through the Board's reference about imposing a penalty on the DF for 2 or more instances and if felt necessary in the public interest, block/caused to be blocked the access to the information by public available on the DF's platform.



## Digital Personal Data Protection Act, 2023

### Reference to other Acts

- a. Section 14 of the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act'): The Appellate Tribunal established under the Digital Personal Data Protection Act, 2023 shall be empowered under the TRAI Act to exercise its jurisdiction, powers and authority as well.
- b. Information Technology Act, 2000 ('IT Act'): Certain sections of the IT Act have become redundant as they are now covered under this 'Act'. Hence sections 43A, section 87(2)(ob) have been dropped from the IT Act. Also, section 81 of the IT Act provides that IT Act shall override any other Act except the Patents Act and the Copyrights Act. The exception will now include the Digital Personal Data Protection Act.
- c. Right to Information Act, 2005 ('RTI Act'): Section 8(1)(j) of the RTI Act provides exemption to the government to disclose personal information to any citizen, if certain conditions are met. With the Digital Personal Data Protection Act coming into force, such exemption is freely available to the government (i.e. without satisfaction of other conditions of clause j).

### Conclusion

Digitalisation has changed the way businesses are done and information is held, transmitted and processed. Essentially, data is an asset which binds the owner (data principal) and the processor (data fiduciary) in a manner where protection and confidentiality of the data assume utmost importance.

The Act achieves:

- Protection of personal digital data with minimum disruption while ensuring necessary change in the way DFs process the individual data.
- Enhancing the 'ease of living' and the 'ease of doing business'.
- Supporting India's digital economy and its innovation ecosystem.
- Protecting and safeguarding the personal data (including cross-border data transmission), rights, obligations of the DFs & DPs and redressal mechanisms in a digital and hassle-free manner.



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