

Edition N°3 | August 2023 | India

REVIEWS LEGAL INDUSTRY



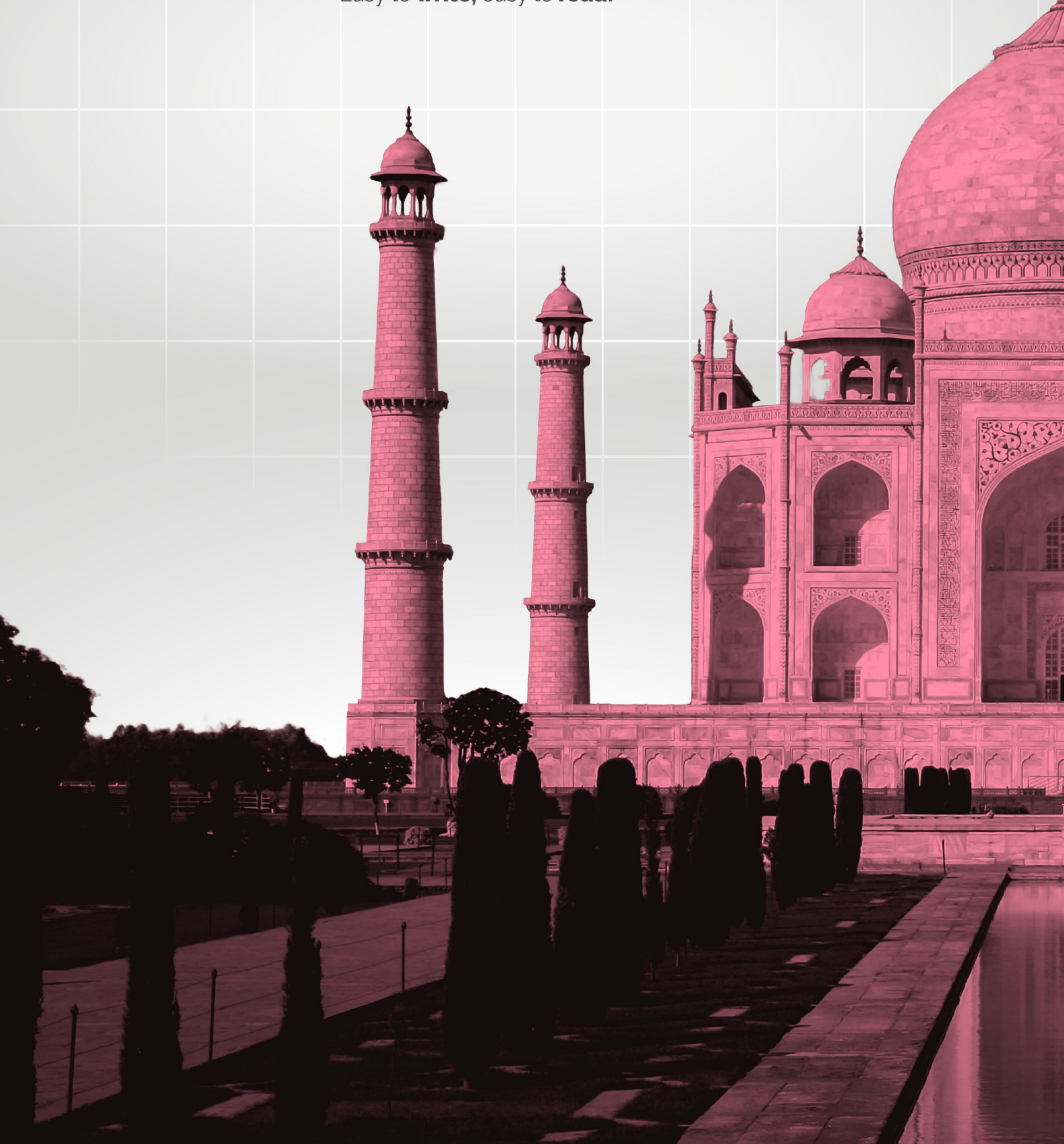
In this issue, ten of **India's leading law firms** share their insights on applied law.

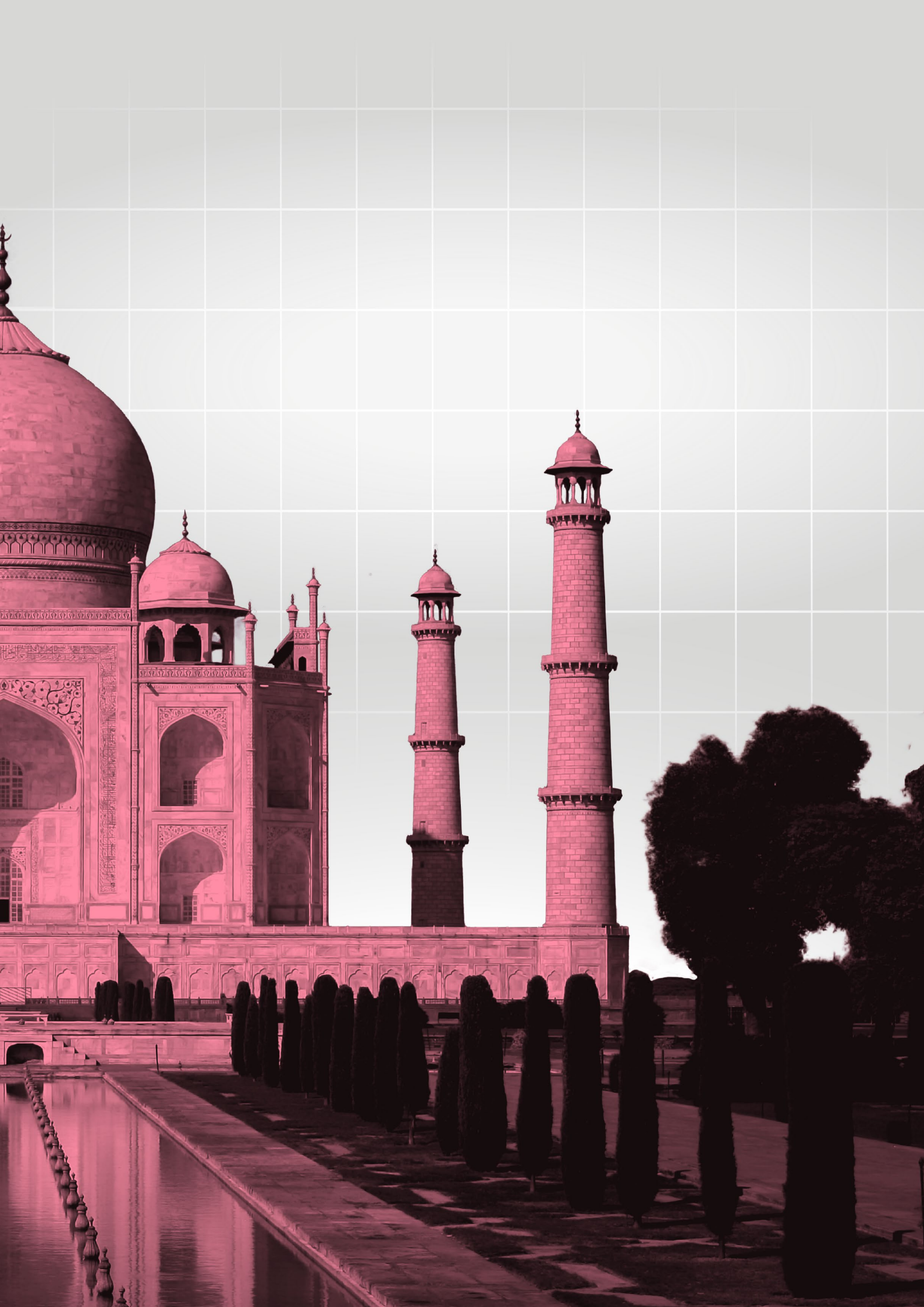
In addition, two of Latin America's leading firms make guest appearances in our **International Desks** section: **Peru** and **Chile**.



APPLIED LAW

Easy to **write**, easy to **read**.





Arbitration

Stamping of Arbitral Agreements

In April 2023, a five-judge bench of the Indian Supreme Court pronounced a landmark judgment in the case of ***N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd*** (“**NN Global 2**”). This judgment held that the non/insufficient stamping of agreements (containing an arbitral clause) would render such agreements and the arbitration clause therein unenforceable under the law. The court found that non/insufficient stamping is not a “*curable defect*”, and that rights of parties would remain frozen until the agreement (otherwise exigible to stamp duty) has been stamped.

By this judgment, the five-judge bench overturned the decision by the three-judge bench in the same matter (“**NN Global 1**”). *NN Global 1* had applied the doctrine of separability to find that an arbitration agreement could still be acted upon even if the contract containing such arbitration agreement was unstamped. Accordingly, *NN Global 1* held that prior decisions of ***SMS Tea Estates v. Chandmari Tea Co.*** and ***Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engg Ltd*** were bad in law.

In *SMS Tea Estates*, a division bench of the Indian Supreme Court had held that an arbitration clause contained in an unstamped or insufficiently stamped contract cannot be acted upon under Section 35 of the Indian Stamp Act, 1899 (“**Stamp Act**”). After this judgment, in 2015, Section 11(6A) to the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) was introduced. This section sets out that while appointing an arbitrator, courts should merely look at the “*existence*” of an arbitration agreement. In *Garware*, the Supreme Court held that an arbitration agreement would not “*exist*” when the contract containing it is not enforceable under the law for being unstamped. Accordingly, *Garware* ensured that the findings of *SMS Tea Estates* remained untouched by the introduction of Section 11(6A) to the Arbitration Act.

While overturning *SMS Tea Estates* and *Garware*, *NN Global 1* also raised doubts about the findings made another three-judge bench in ***Vidya Drolia v. Durga Trading Corporation***, which upheld *Garware*. Due to this conflict between the two three-judge benches, this matter was referred to a larger five-judge bench to settle the matter.



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By overturning *NN Global 1*, the five-judge bench in *NN Global 2* upheld the prior decisions in *Garware* and *SMS Tea Estates*. *NN Global 2* upheld the findings of *Vidya Drolia* that under Section 11(6A) of the Arbitration Act, a court has to decide whether an agreement exists in law and not just in fact. An agreement which cannot be enforced under the law cannot be a valid contract, and thus cannot “*exist*” for the purpose of Section 11(6A). An unstamped agreement (otherwise exigible to stamp duty) cannot be enforced under the law, and thus cannot be said to have any “*existence*”. Lastly, *NN Global 2* held that an arbitration agreement is also exigible to stamp duty under the Stamp Act. Accordingly, it held that the doctrine of separability would not preserve the enforceability of an arbitration agreement if the main contract (containing such agreement) is unstamped.





Practice Area News

Magic Eye Developers (P) Ltd. v. Green Edge Infrastructure (P) Ltd., 2023 SCC OnLine SC, May 28 2023. The **Supreme Court** held that when a dispute regarding the existence or validity of an arbitration agreement is raised at the pre-referral stage, it is the duty of the referral court to finally and conclusively decide the issue first to protect parties from being forced to arbitrate under a non-existent or invalid arbitration agreement.

Sunflag Iron & Steel Co. Ltd. v. J. Poonamchand, 2023 SCC OnLine Bom 1214, June 5 2023. The **Bombay High Court** held that mere filing of an application to initiate insolvency proceedings under the Insolvency and Bankruptcy Code, 2016 does not render Section 11(6) of the Arbitration Act inapplicable, and would not affect the appointment of an arbitrator under it.

Arbaza Alimentos Ltda vs MAC Impex and others, 2021 SCC OnLine Bom 5482, June 5 2023. The **Bombay High Court** reiterated that a general reference to a standard form contract is sufficient to incorporate an arbitration clause. The court also held that the arbitrator may decide challenges to its jurisdiction even if there is no specific clause for this purpose in the Grain and Feed Trade Association (GAFTA) Arbitration Rules.

Tomorrow Sales Agency Pvt. Ltd. v SBS Holdings Inc, 2023 SCC OnLine Del 3191, May 29 2023. The **Delhi High Court** held that interim relief cannot be sought against a third-party funder, who was neither a signatory to the arbitration agreement nor a party to the arbitration proceedings.

In the Firm

• Benchmark Litigation Asia Pacific 2023

NDA was recognized as "Tier 1" Law Firm for International Arbitration in the Benchmark Litigation Asia Pacific 2023 rankings [Read more [HERE](#)].

Other recognitions given to NDA lawyers can be accessed [HERE](#).

• Startup20 Engagement Group

NDA and TiE Mumbai, under the Indian presidency of the G-20 2023, organized an exclusive think tank conference on 29 April 2023. NDA also contributed to the G20's Startup20 Engagement Group's Think Tank Recommendations on Corporate Governance for Indian Start-Ups [Read more [HERE](#)].

Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

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